

# Unblocking Cooperative Energy Governance<sup>∅</sup>

Garrick B. Pursley<sup>∅</sup>

## 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.<sup>1</sup> Revamping energy systems to accommodate renewable energy sources, as well as new extraction, production, transmission and delivery techniques requires rapid technological innovation,<sup>2</sup> 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.<sup>3</sup> These two issues are

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<sup>∅</sup> Assistant Professor, The University of Toledo College of Law.

<sup>1</sup> See, e.g., Barack Obama, *Remarks by the President in State of the Union Address at the United States Capitol*, The White House, Office of the Press Secretary, Jan. 24, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address> (“This country needs an all-out, all-of-the-above strategy that develops every available source of American energy.”); Barak Obama, *Remarks by the President on America’s Energy Security*, THE WHITE HOUSE (Mar. 30, 2011), available at <http://www.whitehouse.gov/sites/default/the-press-office/2011/03/30/remarks-president-americas-energy-security>; *The White House, Blueprint for a Secure Energy Future* (2011), available at [http://www.whitehouse.gov/sites/default/files/blueprint\\_secure\\_energy\\_future.pdf](http://www.whitehouse.gov/sites/default/files/blueprint_secure_energy_future.pdf); Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 878–94 (2011) (canvassing the literature on renewable energy, highlighting the need for greater development). The Intergovernmental Panel on Climate Change (IPCC) was established by the United Nations Environmental Program and the World Meteorological Organization “to provide the world with a clear scientific view on the current state of climate change,” *Organization, IPCC*, at <http://www.ipcc.ch/organization/organization.htm> (last visited Feb. 17, 2011), and it published its first report warning of warming in 1990. See IPCC, CLIMATE CHANGE: THE IPCC 1990 AND 1992 ASSESSMENTS 47 (1992), available at [http://www.ipcc.ch/ipccreports/far/IPCC\\_1990\\_and\\_1992\\_Assessments/English/ipcc-90-92-assessments-full-report.pdf](http://www.ipcc.ch/ipccreports/far/IPCC_1990_and_1992_Assessments/English/ipcc-90-92-assessments-full-report.pdf). Its most recent report concludes: “Warming of the climate system is unequivocal . . . .” INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (Abdelkader Allali et al. eds. 2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf).

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

<sup>3</sup> See generally J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems: Applications to Climate Change Adaptation Law*, 89 N.C.L. REV. 1373, 1387–1400 (2011); Michael Burger, *Empowering Local Autonomy and Encouraging Experimentation in Climate Change Governance: The Case for a Layered Regime*, 39 ENVTL. L. REP.: NEWS & ANALYSIS 11,161 (2009); Timothy A. Slatling & Jay P. Kesan, *Making Regulatory Innovation Keep Pace with Technological Innovation*, 2011 WIS. L. REV. 1109, 1117–18 (2011) (arguing that “when technological innovations result in the creation of social value, regulatory innovation is often called for to mitigate regulatory burdens in order to fully capture this value”). Commentators note significant regulatory reform necessary to facilitate major transition to renewable energy sources. See, e.g., Sara C. Bronin, *Modern Lights*, 80 U. COLO. L. REV. 881 (2009) (solar); Ronald H. Rosenberg, *Diversifying America’s Energy Future: The Future of Renewable Wind Power*, 26 VA. ENVTL. L.J. 505, 532 (2008) (wind).

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 rethinking judicial 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.<sup>4</sup> Commentators and policymakers initially pushed for centralized national action, exemplified by the first wave significant modern antipollution regulation.<sup>5</sup> 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.<sup>6</sup> It provides coordinated responses to interstate problems—like pollution crossing state borders—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.<sup>7</sup> And, centralized action may

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<sup>4</sup> 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).

<sup>5</sup> See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210–11 (1977) (making the seminal economic case for centralized environmental regulation and noting the problem of potential “races to the bottom” inherent in leaving environmental regulation to sub-national governments); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977) (similar).

<sup>6</sup> 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.”).

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> Centralizing authority in a small group of agencies with broad policy portfolios encompassing both industry and public interest goals<sup>10</sup> may increase the risk of capture by conventional energy

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with the breeze), the states lack the proper incentives to legislate.”); Stewart, *supra* note 5, at 1211–16 (“Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry . . . for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards. If each locality reasons in the same way, all will adopt lower standards of environmental quality than they would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards, thus eliminating the threatened loss of industry or development.” (footnote omitted)).

<sup>8</sup> 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, *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, *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, *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](http://switchboard.nrdc.org/blogs/cangelides/state_of_the_union_clean_energ.html) (last visited Feb. 24, 2012).

<sup>9</sup> See Richard Briffault, *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, *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, *The Economic Conditions of Interstate Federalism*, in INDIVIDUALISM AND ECONOMIC ORDER 255, 268–69 (1948)); Richard Revesz, *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).

<sup>10</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 50 (2010) (citing *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, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 7 (2009) (“[A]gents 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;<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> Devolving

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<sup>11</sup> See Rachel E. Barkow, *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, *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, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264–65 (2001); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99–100 (1992); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

<sup>12</sup> See Obama, *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”).

<sup>13</sup> Thus President Obama’s repeated calls for national action on alternative energy. See sources cited *supra*, note 1.

<sup>14</sup> See, e.g., Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL’Y 369 (2006); Donald A. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States*, 5 DICK. J. ENVTL. L. & POL’Y 175 (1996); Ann E. Carlson, *Implementing Greenhouse Gas Emissions Caps: A Case Study of the Los Angeles Department of Water and Power*, 55 UCLA L. REV. 1479 (2008); Engel, *supra* note XX; Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253 (2009); Hari M. Osofsky, *Is Climate Change “International”? Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585 (2009); Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local, and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN. ST. ENVTL. L. REV. 15 (2004); Rodriguez, *supra* note XX; Richard B. Stewart, *States and Cities as Actors in Global Climate Change Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681 (2008).

<sup>15</sup> See Pursley & Wiseman, *supra* note 1, at 911–13. Over 30 states have adopted Renewable Portfolio Standards. See, e.g., ARIZ. ADMIN. CODE § R14-2-1804(A)–(B) (2007); COLO. REV. STAT. § 40-2-

regulatory authority can spur technological innovation by confronting designers and manufacturers with a variety of regulatory requirements to which they must adapt their devices.<sup>16</sup> 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.”<sup>17</sup> 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 respond<sup>18</sup>—“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.”<sup>19</sup> 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.<sup>20</sup> This disparity in political power, from the

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124(1)(c)(1)(2010); N.M. STAT. ANN. § 62-16-4(A)(1) (LexisNexis 2010) (requiring that twenty percent of retail electricity sales come from renewables by January 1, 2020). States have also adopted financial incentives for the installation of certain renewable devices. *See, e.g.*, The California State Initiative—CSI, Go Solar Cal., at <http://www.gosolarcalifornia.ca.gov/csi/index.html> (last visited Feb. 23, 2012); PV Incentives, Power Naturally, at <http://www.powernaturally.org/programs/solar/incentives.asp> (last visited Feb. 23, 2012) (New York incentives); Solar and Wind Energy Rebate Program, Ill. Dep’t of Commerce & Econ. Opportunity, at [http://www.commerce.state.il.us/deco/Bureaus/Energy\\_Recycling/Energy/Clean+Energy/01-RERP.htm](http://www.commerce.state.il.us/deco/Bureaus/Energy_Recycling/Energy/Clean+Energy/01-RERP.htm) (last visited Feb. 23, 2012) (Illinois incentives).

<sup>16</sup> *See* Pursley & Wiseman, *supra* note 1, at XX.

<sup>17</sup> David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 851 (2008).

<sup>18</sup> *See* Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 20–21 (2002).

<sup>19</sup> 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”).

<sup>20</sup> *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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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;<sup>26</sup> there are also reasons to think that state governments may prove particularly responsive to entrenched

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("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.

<sup>21</sup> 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 ENVTL. L. & POL'Y F. 225, 285–86 (1997).

<sup>22</sup> 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).

<sup>23</sup> 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.").

<sup>24</sup> See Revesz, *supra* note 21, at 560–61.

<sup>25</sup> See *supra*, note 15 and accompanying text.

<sup>26</sup> 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).

conventional energy interests.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> Thus, while decentralization remains an important component of modern theory on optimizing environmental and energy regulation<sup>32</sup>, the current consensus for *cooperative* federalism arrangements in

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<sup>27</sup> See Pursley & Wiseman, *supra* note 1, at 926–27.

<sup>28</sup> See *supra*, note 15 and accompanying text.

<sup>29</sup> See Tiebout, *supra* note 31; sources cited *supra*, note 31; Cross, *supra* note 37, at 22 (discussing “Tiebout and his theory of interjurisdictional competition”).

<sup>30</sup> 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)).

<sup>31</sup> Charles Tiebout’s critique of the race-to-the-bottom argument is famous but controversial—the idea is that state citizens’ power of exit disciplines state governments against enacting overly lax environmental regulation at the request of industry. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1213–20 (1992). People seem likely to move if environmental conditions deteriorate significantly, but perhaps not willing enough, given transaction costs, to fully offset industry pressures. In any event, recent scholarship suggests that race-to-the-bottom risks remain real. 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, 74–76 (1998).

<sup>32</sup> See HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 17 (1996) (arguing against the significance of these phenomena and advocating decentralization); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1104 (2009) (summarizing the “race to the bottom” argument); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) (noting, but critiquing, the economic assumptions supporting the environmental race-to-the-bottom scenario); Stewart, *supra* note 5, at 1211–16 (providing the canonical formulation of economic-theory-based concerns about autonomous state environmental policy making); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 99–100 (1996) (reviewing these arguments).

which the federal government plays a coordinating or floor-setting role.<sup>33</sup> 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.<sup>34</sup> Indeed, federal cooperation with state governments is an important part of the implementation strategy built into the Clean Air and Clean Water acts.<sup>35</sup>

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.<sup>36</sup> 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"<sup>37</sup>—is that there are reasons to think that state governments will "be less amenable to decentralized localism with all of its benefits."<sup>38</sup> 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.<sup>39</sup> Thus, theory suggests that states on net are less likely to delegate discretionary authority to local governments even where

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<sup>33</sup> See sources cited *supra*, note 14.

<sup>34</sup> See Ruhl, *supra* note 3, at 1387–1400; William W. Buzbee, *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, *supra* note 1, at 930–31.

<sup>35</sup> Clean Water Act, 33 U.S.C. § 1342 (2006 & Supp. II 2008); Clean Air Act, 42 U.S.C. §§ 7409–7410 (2006); Carlson, *supra* note 32, at 1106–07.

<sup>36</sup> See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

<sup>37</sup> Frank Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 18 (2002).

<sup>38</sup> Cross, *supra* note 19, at 33.

<sup>39</sup> See Cross, *supra* note 19, at 39–40 (citing G. Ross Stephens, *State Centralization and the Erosion of Local Autonomy*, 36 J. POL. 44 (1974)).

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.”<sup>40</sup> 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.”<sup>41</sup> 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,<sup>42</sup> some small-scale cooperative federal-local energy programs have been initiated,<sup>43</sup> and scholars increasingly recognize the potential for environmental and energy cooperation involving local governments.<sup>44</sup> Once again, federal floor-setting

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<sup>40</sup> *Id.* at 39.

<sup>41</sup> Cross, *supra* note 37, at 2.

<sup>42</sup> See generally Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1021 (2006); PEW CTR. ON GLOBAL CLIMATE CHANGE & PEW CTR. ON THE STATES, CLIMATE CHANGE 101: STATE ACTION (2006), available at [http://www.pewclimate.org/docUploads/101\\_States.pdf](http://www.pewclimate.org/docUploads/101_States.pdf); JOHN BAILEY, INST. FOR LOCAL SELF-RELIANCE, LESSONS FROM THE PIONEERS: TACKLING GLOBAL WARMING AT THE LOCAL LEVEL (2007), available at <http://www.newrules.org/sites/newrules.org/files/images/pioneers.pdf>; Carlson, *supra* note 32, at 1098–99 (discussing examples from California and other states); Pursley & Wiseman, *supra* note 1, at 914–16 (canvassing examples); *id.* at 959–65 (presenting, in tabular form, a thorough listing of local renewable energy initiatives).

<sup>43</sup> See, e.g., SOLAR AM. COMMUNITIES, U.S. DEP’T OF ENERGY, SOLAR POWERING YOUR COMMUNITY: A GUIDE FOR LOCAL GOVERNMENTS 1–2 (2d ed. 2011), available at <http://solaramericacommunities.energy.gov/pdfs/Solar-Powering-Your-Community-Guide-For-Local-Governments.pdf>; Hannah Muller, U.S. Dep’t of Energy, *Accelerating Solar Energy at the Local Level* (June 11, 2009), available at [http://www.epa.gov/statelocalclimate/documents/pdf/6\\_solar\\_america\\_hannah\\_muller.pdf](http://www.epa.gov/statelocalclimate/documents/pdf/6_solar_america_hannah_muller.pdf); see also SOLAR AM. COMMUNITIES, *supra* note, at 60, 64.

<sup>44</sup> See, e.g., Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 41 ENVTL. L. (forthcoming 2011) (manuscript at 6–10), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1667533](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1667533) (analyzing several models for intergovernmental collaboration in regulatory efforts to foster adaptation to climate change); David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 840 (2008) (arguing for both a federal and state role in regulating to reduce greenhouse gas emissions); Buzbee, *supra* note XX, at 108 (emphasizing “the benefits of regulatory overlap, cooperative federalism structures, and redundant enforcement mechanisms” in environmental regulation); Carlson, *supra* note XX, at 1106–08 (noting “cooperative federalism” regimes operate in a number of substantive environmental areas and a turn in the literature toward more “contextual” or “dynamic” conceptions of intergovernmental relations); John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 372–77, 410–13 (2002) (canvassing local environmental initiatives, arguing for collaboration among federal, state, and local environmental policymakers); Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 392 (2002) (noting federal–local cooperation in brownfield redevelopment); A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 581–82 (1993) [hereinafter Tarlock,

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.<sup>45</sup> 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.<sup>46</sup> 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”)

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*Biodiversity*] (federal–local collaboration in management of sensitive wetlands); A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, 20 PACE ENVTL. L. REV. 149, 149 (2002) (similar); *see also* Timothy F. Malloy, *The Social Construction of Regulation: Lessons from the War Against Command and Control*, 58 BUFF. L. REV. 267, 269 (2010) (arguing that even academic commentary on the proper allocation of regulatory authority among the levels of government is insufficiently attentive to context-dependent considerations).

<sup>45</sup> *See* Pursley & Wiseman, *supra* note 1, at 936–40; Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253, 284–85 (2009) (arguing that local governments’ familiarity with local physical, social, and legal structures can enhance energy governance); William Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 83 (1999) (similar). Cf. Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 ECOLOGY L.Q. 745, 750–51 (similar point in the broader ecosystem management context).

<sup>46</sup> Homevoters rather than oil and gas lobbyists *See* Pursley & Wiseman, *supra* note 1, at 928 (arguing that “local governments, compared to the state and federal governments, appear less likely to be targeted by the influential utility and carbon fuel lobbies that might vehemently resist a push for more renewable energy”). Oil lobby influence in federal and state politics is well documented. *See, e.g.*, Benjamin K. Sovacool & Kelly E. Sovacool, *Preventing National Electricity-Water Crisis Areas in the United States*, 34 COLUM. J. ENVTL. L. 333, 385–86 & nn.294–95 (2009) (“During important elections . . . [Greenpeace estimated that] oil and gas companies contributed about \$255 million to political campaigns and electric utilities an additional \$20 million for the 2004 election cycle. From 2003 to 2006, fossil fuel lobbyists contributed about \$58 million to state-level campaigns alone. Over the same period, renewable energy lobbyists spent just over \$500,000.”). While these groups may be sufficiently organized to resist renewables initiatives in every local forum, it seems unlikely; thus we argue that local government programs are less likely than state or federal initiatives to draw hostile counter-pressure. *See* Sara C. Bronin, *Curbing Energy Sprawl with Microgrids*, 43 CONN. L. REV. 547 (2010) (arguing for small-scale generation and suggesting that while utilities constitute a major source of political opposition to alternative energy programs at the state government level, the primary source of such opposition in local government settings is “neighbors”); Robert R.M. Verchick, *Why the Global Environment Needs Local Government: Lessons from the Johannesburg Summit*, 35 URB. LAW. 471, 476 n.24 (2003) (“[O]ne imagines that even those forces [that are powerful at the local level] can be unseated more easily by concentrated local opposition than is possible with, say, the aerospace or petroleum lobbies at the national level.”).

crates the potential for state interference with local regulatory initiatives.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> In the environmental context, states frequently create statewide policies that preempt more protective local requirements.<sup>50</sup> Examples include the Massachusetts Pesticide Control Act's preemption of stricter local pesticide restrictions;<sup>51</sup> 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;<sup>52</sup> and multiple states' preemption of local hazardous waste rules that were more restrictive than statewide standards.<sup>53</sup>

## 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.

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<sup>47</sup> 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”).

<sup>48</sup> 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).

<sup>49</sup> 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)).

<sup>50</sup> See *id.* at 488–96 (discussing examples).

<sup>51</sup> See *Town of Wendell v. Attorney Gen.*, 476 N.E.2d 585, 592 (Mass. 1985).

<sup>52</sup> 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).

<sup>53</sup> See *Envirosafe Servs. of Idaho, Inc. v. Cnty. of Owyhee*, 735 P.2d 998 (Idaho 1987); *Twp. of Cascade v. Cascade Res. Recovery, Inc.*, 325 N.W.2d 500 (Mich. Ct. App. 1982); *Stablex Corp. v. Town of Hooksett*, 456 A.2d 94 (N.H. 1982); *Rollins Envtl. Servs., Inc. v. Twp. of Logan*, 508 A.2d 271 (N.J. Super. Ct. App. Div. 1986).

Federalism is an ineliminable feature of the American constitutional structure.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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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<sup>54</sup> See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 167–69 (6th ed. 2009) (describing federalism as a clear structural presupposition of the Constitution); *New York v. United States*, 505 U.S. 144, 157 (1992) (explaining that federalism is part of “the framework set forth in the Constitution.”); *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (Kennedy, J., concurring) (noting that the Constitution established for Americans “two political capacities, one state and one federal”).

<sup>55</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[T]he historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress”). See Stephen A. Gardbaum, *The Nature of Preemption*, 79 *CORNELL L. REV.* 767 (1994) (discussing the presumption).

<sup>56</sup> See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593 (1992).

<sup>57</sup> 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).

<sup>58</sup> Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 *VA. L. REV.* 1 (2004) (highlighting the role of non-constitutional considerations in the formulation of constitutional doctrine).

they apply.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup>

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<sup>59</sup> 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.

<sup>60</sup> 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).

<sup>61</sup> 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).

<sup>62</sup> *Printz*, 521 U.S. at 930.

<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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,”<sup>66</sup> requires courts to avoid construing federal statutes to preempt state law absent a clear indication of congressional intent to preempt.<sup>67</sup> 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<sup>68</sup>—a presumption aimed at the same sort of intrusions into state sovereignty (or autonomy, depending on one’s perspective<sup>69</sup>) that are the direct objects of the *National League of Cities* and anticommandering doctrines.<sup>70</sup> In *Penhurst State School and Hospital v. Halderman*,<sup>71</sup> the Court established a rule against interpreting federal statutes to impose conditions on federal funding to states without an unambiguous statement from Congress.<sup>72</sup> 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.<sup>73</sup> Other federalism-influenced statutory interpretation rules require clear statements from Congress before federal statutes will be read to abrogate state sovereign immunity,<sup>74</sup> to apply criminal liability to state or local

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<sup>64</sup> 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).

<sup>65</sup> See, e.g., Manning, *supra* note XX, at 2013–20 (setting out the basics of strict textualist interpretive theory).

<sup>66</sup> See, e.g., *United States v. Locke*, 529 U.S. 89, 108 (2000); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (both failing, without explanation, to apply the presumption against preemption in standard preemption cases); cf. Davis, *supra* note 57, at 1219 (noting these and other omissions for no clear reason).

<sup>67</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>68</sup> *Gregory v. Ashcroft*, 501 U.S. 452 (1991); Eskridge & Frickey, *supra* note 56, at 623–24.

<sup>69</sup> 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).

<sup>70</sup> See *supra*, notes **Error! Bookmark not defined.**–63 and accompanying text.

<sup>71</sup> 451 U.S. 1 (1981).

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

<sup>73</sup> *Penhurst*, 451 U.S. at 24–25.

<sup>74</sup> 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,<sup>75</sup> or to press the outer limits of Congress commerce power to the potential derogation of reserves state regulatory authority.<sup>76</sup>

The problem with the role of federalism in these indirect cases is that it *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.<sup>77</sup> 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.<sup>78</sup> 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. *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

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<sup>75</sup> *McNally v. United States*, 483 U.S. 350 (1987); *McCormick v. United States*, 111 S. Ct. 1807 (1991); Eskridge & Frickey; *supra* note 56, at 626–27.

<sup>76</sup> *Jones v. United States*, 529 U.S. 848, 859 (2000); *Solid Waste Agency v. U.S. Army Corps. of Engineers*, 531 U.S. 159, 174 (2001). See Young, *supra* note XX, at 37–38 (discussing these rules).

<sup>77</sup> See, e.g., Young, *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, *supra* note 56, at 629–44 (canvassing federalism-related interpretive canons and noting conceptual problems briefly before mounting normative critique).

<sup>78</sup> See generally sources cited *supra*, note 93 (defending a variety of compatibilist theories of federalism). But see Ernest A. Young & Stuart M. Benjamin, *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.<sup>79</sup> 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.”<sup>80</sup> They are now often performed by ordinary statutes, regulations, executive orders, and so forth.<sup>81</sup> For example, certain “super statutes” that perform constitutive functions like structuring government agencies or protecting rights are treated as superordinate against ordinary law.<sup>82</sup> 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 Act<sup>83</sup> 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.<sup>84</sup> The third thesis is that legal

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<sup>79</sup> See generally WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) [hereinafter ESKRIDGE & FERREJOHN, *REPUBLIC*]; Gillian E. Metzger, *Ordinary Administrative Law As Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007); William N. Eskridge, Jr., *America's Statutory "constitution"*, 41 U.C. DAVIS L. REV. 1 (2007).

<sup>80</sup> Young, *supra* note 79, at 412.

<sup>81</sup> See, *e.g.*, William N. Eskridge, Jr. & John Ferrejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001); Young, *supra* note 79, at 412–13 (discussing the Federal Communications Act).

<sup>82</sup> See generally Eskridge & Ferrejohn, *supra* note 81, at 1216 (explaining the concept).

<sup>83</sup> 15 U.S.C. § 1 (2006).

<sup>84</sup> Eskridge & Ferrejohn, *Super Statutes*, *supra* note 79, at 1227. See *id.* at 1216 (“A *super-statute* is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy, and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem . . . . The law must also provide a robust solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture.” (emphasis added)). Super statutes need not even perform constitutive functions; the Sherman Act, for example, is non-constitutive but nevertheless is a super statute because its principle has been entrenched into public culture. See Eskridge & Ferrejohn, *Super Statutes*, *supra* note 79, at 1216–19. 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.<sup>85</sup> 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.<sup>86</sup> 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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<sup>85</sup> These are conventional criteria for selecting among competing theories. See Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1239–40 (2009) (citing W.V.O. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* (2d ed. 1978); Paul Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76 (1978)).

<sup>86</sup> 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.<sup>87</sup> 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,<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> Think here of preemption and conditional spending cases involving significant federal regulatory, foreign relations or national security interests, and so forth.<sup>91</sup> 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

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<sup>87</sup> See *supra*, notes **Error! Bookmark not defined.**–63 and accompanying text.

<sup>88</sup> See generally Pursley, *supra* note 93 (canvassing compatibilists' normative claims).

<sup>89</sup> 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”).

<sup>90</sup> See Pursley, *supra* note 93, at 1370–75.

<sup>91</sup> See, e.g., *Wyeth v. Levine*, 555 U.S. 555 (2009) (applying presumption against preemption in case about preemption under the federal Food, Drug & Cosmetic Act); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (omitting presumption in foreign relations preemption case).

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.<sup>92</sup>

## 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.<sup>93</sup> 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.<sup>94</sup> 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’

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<sup>92</sup> 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.

<sup>93</sup> Garrick B. Pursley, *Federalism Compatibilists*, 89 TEXAS L. REV. 1365, 1367–69 & nn. 11–15, 20–23 (2011) (reviewing ROBERT SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009)) (canvassing compatibilist literature). See, e.g., SCHAPIRO, *supra* (describing and defending a system of “polyphonic” federalism involving federal-state cooperation); Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (arguing that states wield “the power of the servant” rather than autonomy-based checks on federal power); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008) (arguing for a “constitutional realism” accommodating modern arrangements); ERWIN CHERMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008) (defending a system of “empowerment federalism”).

<sup>94</sup> 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.