The Cost of Federalism: Ecology, Community, and the Pragmatism of Land Use

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If there is a victim of federalism, it is undoubtedly the community. Self-governance demands that the persons affected by a governance decision have priority of control in decision-making over persons not so affected. As indicated throughout this book, the notion of decentralized governance serves laudable and efficient purposes for democratic self-governance. In Democracy in America, Alexis de Tocqueville detailed several ways in which a decentralized authority encourages individuals to participate in enforcing the law to ameliorate lawlessness and injustice. Other authors tend to prefer consequentialist justifications for decentralization as a mechanism to improve managerial and social economy.

From a perspective that prioritizes community, citizens engage in the process of self-governance by utilizing the land and its associated ecosystems and resources to support the community’s desired objectives. For example, some communities may seek to promote effective spaces for family and citizen engagement or spaces to interact with and learn

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from ecology, while other communities may focus on spaces to improve mental and physical health or develop an economic advantage.4

Through the exercise of federal regulatory authority over local environmental conditions, citizens lose their ability to self-governance and thus to create communities. While we recognize that a uniform regulatory system may benefit the environment by, among other things, reducing collective action problems and may reduce costs associated with economic activities, a federal top-down regulatory scheme also imposes unwanted – and sometimes unwarranted – uniformity upon the diverse local prerogatives and priorities that are individually expressed among thousands of local jurisdictions. Of course, federalism is not intended to tear from communities the power to self-regulate and self-identify. Federalism is intended only to tear part of the power to self-regulate from communities by targeting the problems of parochialism and externalities. In the context of federal environmental regulations, however, the impact is the same – local communities are stripped of critical opportunities to self-identify and build a community around their natural environs.

From the principles that community is a worthwhile expression of values and that there are benefits in fostering local diversity, this chapter examines the exercise of federal control over environmental issues and its potential assault on the merits of community. This chapter explores whether imposed homogeneity or sameness at the federal level defeats the benefits of self-identifying communities through land use controls and, if so, whether that is a trade-off we are willing to accept given the benefits of federal environmental regulatory action. Our objective is to help clarify the impact of federal regulation on local land use control and to more completely articulate how federal regulation detaches a community from its local ecosystem.

The framework proposed herein is premised in the ecological economics of ecosystem services, which is defined as the “wide range of conditions and processes through which natural ecosystems, and the species that are part of them, help sustain and fulfill human life.”5 An ecosystem services analysis identifies the value of the otherwise invisible services that functioning ecosystems provide, such as mitigation of storm energy in wetlands, carbon sequestration and crop pollination. These

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4 For purposes of this chapter, we refer to “land use control” as broadly referencing the management and regulation of ecosystems within a geographic area. This definition is intended to include zoning, agricultural regulation, water, forest and wetland management, and many others.  
services occur as natural processes in functioning ecosystems, and it is indisputable that they provide substantial benefits to humans and human well-being. The relevance of ecosystem services to the question of environmental federalism is how ecosystem services invoke the question of governance: once the local pond can no long sustain aquatic life, the neighborhood youngsters can no longer swim and fish; once riparian wetlands can no longer absorb storm surges, affected neighborhoods should fear flooding; once the local soils are depleted or have been washed away, communities will need to look elsewhere for employment and food. Localities, in contrast to the federal government, have a very real stake in the quality of ecosystem functionality, because localities rely on ecosystem services as the beneficiaries of those services. Hence, if there is a victim of federalism, it is undoubtedly the community.

I. THE LOSS OF COMMUNITY IN FEDERAL ENVIRONMENTAL LAW

American jurisprudence makes it clear that a local community is secondary to state and/or federal body politics and local laws are subordinate to state and/or federal laws. Establishing a community’s authority to act in the US federalist system is predominantly decided by the actions of individuals and entities outside the community or local government. While a community may be empowered to take particular actions, it is rare that the community has exclusive control over a particular area. Rather, its authority is subject to federal and/or state government action that may preempt or withdraw the local power.6

While state and federal governments had the authority to regulate local environmental and land use issues, they did so only half-heartedly until the 1970s. Prior to the modern federal environmental regulatory scheme, environmental quality was largely dictated at the state and local levels. Historically, the litigation of claims concerning the environment was

considered, if at all, within the scope of state-based property protections or tort-based duties (such as nuisance, trespass and negligence) governing interactions among individuals and the public. Neither Congress nor common law supplied legal grounds to support a claim against environmental degradation, at least as that term is understood today. Litigation based in the environment often involved direct, physical, locally-based impacts between and among neighbors, such as contamination of drinking water from pig farms or the spread of disease through burning contaminated clothing.

In contrast, state and local governments were active, albeit unsuccessful, in identifying regulatory roles in governing private actions affecting the environment. Through zoning and other police power-based initiatives, local governments herded pollution sources to chosen locations (such as in industrial districts) to minimize exposure and protect the public, while still allowing activities to occur within local boundaries. Local governments used their planning powers to establish parks and natural settings, plant trees and protect waterfronts. Some municipalities adopted air pollution regulations. Notwithstanding local efforts it became clear by the 1970s that many local communities simply lacked the resources necessary to protect the environment and the health of citizens.

As discussed in the next two subsections, the federal regulatory regime that sought to replace state and local regulation dramatically affected communities by discouraging them from exceeding federal standards in a “race-to-the-top” by failing to account for and maximize local communities’ attachment to the environment. The attachment between local communities and their environment is critical in helping individuals create and define their communities. Environmental federalism strains that connection and treats broad categories of individual action, across diverse environments, in similar fashions, without regard for local environment and community values.

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8 Haag v Bd. of Comm’rs, 60 Ind. 511, 512–15 (1878).
10 Ibid. at 579.
11 We recognize that there are clearly situations where a local community would prefer to overexploit a resource to the community’s gain at great losses to individuals in other jurisdictions. This is obviously where federal environmental
A. Preeminence of Boundaries: How Federal Law Preempts Local Governance

When confronted with a question whether a local government has the legal authority to regulate in a particular area, judicial inquiry often hinges on whether local authority has been preempted by federal law. Two determining factors in a federal preemption analysis are: (i) what actions the federal government has taken, and (ii) whether the local government is regulating beyond its borders. These two factors focus the inquiry on individuals and impacts outside the local community’s control, regardless of the local connection to, history with, and knowledge of the environment, ecosystems or relevant services.

The starting point to analyze whether a local community is subordinate to federal legal authority concerning a local environmental issue is the US Constitution. Although the US Constitution does not formally recognize local governments, the US federalist structure and US Supreme Court decisions concerning the Constitution help frame local communities’ authority relative to federal law. The US Supreme Court has made it clear that local governments are subjects of their corresponding states. As a matter of US constitutional law, local governments are “political subdivisions of the state, created as convenient agencies” by the state for undertaking state purposes. As creatures of state law, local governments may have only that authority states did not transfer to the federal government. Thus, authority lies either with the federal government or with the state government – local governments do not have an independent source of authority. If the federal government has the authority to act, states and local government are without the power to take action and vice versa. While this form of dual sovereignty between the federal and state governments helps to define their respective

regulation excels. We are most concerned with the day-to-day decisions relevant to resources in which communities are built around, such as potable water and forests.

13 Hunter, 207 U.S. at 178.
14 But see Robinson Twp., 83 A.3d at 901.
authority, it also makes it clear that local governments are not autonomous and local authority is not implicit.\textsuperscript{16}

Determining whether local governments have been granted authority requires a review of the relevant provisions in the US Constitution, federal statutes, state constitutions and state statutes. In interpreting these legal sources, courts focus heavily on whether the federal or state governments have preempted local government actions. A reoccurring theme in the preemption analysis is that the scope of preemption is predominantly dictated by the federal and state governments and not by local governments. For example, assume a local government wanted to ensure that its citizens had the relevant health or environmental information pertaining to pesticides and/or the local government wanted to ban pesticide use on public or private lands. The federal government, however, regulates pesticide labeling and 43 states regulate the use, sale and transportation of pesticides.\textsuperscript{17} The local community’s desires here to protect its citizens from pesticide use would likely be prohibited as preempted by federal and state law. This determination is made predominantly based on actions of individuals outside of the local community (that is, the state or federal legislative bodies), presumably not based on all of the information relevant to that particular local community, such as a desire for clean water and enhanced wildlife.

The Supremacy Clause makes it clear that the US Constitution and federal statutes regulating the environment “shall be the supreme law of the land” and may preempt state – and therefore, local – action.\textsuperscript{18} By

\textsuperscript{16} See Daily, \textit{supra}, n. 5.

\textsuperscript{17} See Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2014) (stating that the federal government has exclusive authority over pesticide labeling); Cal. Food & Agric. § 11501.1 (West 2014) (stating local governments are prohibited from “attempt[ing] to regulate any matter relating to the registration, sale, transportation, or use of pesticides, and any of these [local] ordinances, laws, or regulations are void and of no force or effect.”); see also Porter, Matthew, \textit{Beyond Pesticides, State Preemption Law: The Battle for Local Control of Democracy}, accessed 18 July 2015 at www.beyondpesticides.org/lawn/activist/documents/StatePreemption.pdf (“Currently, 43 states have some form of state law that preempts local governments’ ability to regulate the use of pesticides. In fact, state environmental preemption law often applies more broadly to local restrictions on genetically engineered crops and the use of synthetic fertilizers.”).

doing so, when federal law conflicts with local community desires, it may limit local governments and communities by narrowing the issues they may address and the solutions they may propose. In Metro. Taxicab Bd. of Trade v City of N.Y., the Second Circuit illustrated this point by striking down New York City’s attempt to reduce its carbon footprint by, among other things, motivating taxi companies to consider fuel efficiency when purchasing vehicles. The court ruled that New York City’s effort was preempted by federal law. In this case, a local government sought to address a critical ecological challenge – clean air and climate change – but was not permitted to do so because it was preempted by federal law.

Pursuant to this case and others, communities are prohibited from addressing environmental challenges because of actions at other levels of government, even though the local community’s action would have a positive impact on the environment and would presumably be consistent with the prime objectives of the relevant federal law.

In exercising its authority Congress has taken a number of steps to control environmental quality, including in the enactment of 1969 National Environmental Policy Act (NEPA), the 1970 Clean Air Amendments, the 1972 Federal Water Pollution Control Act Amendments (as amended by the 1977 Clean Water Act), 1973 Endangered Species Act, and the Resource Conservation and Recovery Act (RCRA) passed in 1976 and intended to create a system for the traditional state regulation ... we have worked on the ‘assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

19 Metro. Taxicab Bd. of Trade v City of N.Y., 615 F.3d 152, 155 (2d Cir. 2010).
20 See generally Cruz v United States, 387 F. Supp. 2d 1057, 1073-75 (N.D. Cal. 2005) (striking down California law as it conflicts with US/Mexican agreements.). But see Hillsborough Cnty. v Automated Med. Labs., Inc., 471 U.S. 707, 714 (1985) (holding that local law regulating blood plasma collection was not preempted by federal law because federal regulation was clear that it was not “usur[p]ing] local power”).
disposal and reduction of solid waste. Unless specifically stated otherwise in the acts, these statutes have the potential to preempt a broad spectrum of local actions relevant to the environment and local land use control. For example, although Congress has not passed a comprehensive land use statute, it has passed a number of statutes directly affecting local land use decisions, including the 1996 Telecommunications Act (limiting local action over telecommunications facility siting). The US Constitution also has a number of provisions affecting local land use decisions, including the First Amendment, Equal Protection Clause and the Takings Clause of the Fifth Amendment. Because the federal constitution and statutes establish minimum standards for treatment of individuals, local governments and communities are prohibited from infringing upon those standards and must comply regardless of local sentiment, knowledge and history.

In addition to focusing on actions occurring outside of the community (that is, federal and state actions), preemption jurisprudence restricts a community from acting extraterritorially – beyond its jurisdictional boundary. This part of the preemption inquiry focuses intently on boundaries. It questions whether a local government is attempting to exercise authority, or will have an impact, outside its jurisdiction, regardless of whether the federal or state governments have acted or sought to expressly preempt local actions. Thus, where boundaries are drawn and who draws them becomes the focal point for identifying authority over environmental and land use issues.

At the federal level, it is clear that communities do not have the power to determine local government boundaries. The Supreme Court has held that individuals and communities have no protected constitutional right to localized self-government because states have almost complete authority to reshape local government boundaries as they see fit. Individuals may not form a local government around communal beliefs without state authorization, and the US Constitution provides only limited protections from a state’s intrusion into a community’s attempt to draw a localized self-governance boundary.

Not only do states have almost complete authority over local boundaries, but federal and state law highlight the critical importance of those boundaries, further separating a community from its environment. The

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26 See e.g. *Seigles, Inc. v City of St. Charles*, 849 N.E.2d 456, 458 (Ill. App. Ct. 2006) (stating that it is “axiomatic” that a local government may not act outside its borders).

US Supreme Court highlighted the importance of being inside a boundary versus outside in *Holt Civic Club v City of Tuscaloosa*, holding that citizens who are serviced by a local government (including policing and sanitation services) have no US Constitution-protected right to representation in the administration of those services unless they are physically located in the local jurisdiction. Thus, at its discretion, a state may place some people in and others out of a local government boundary, and those outside the boundary have no right to vote in how the local government is administered, even if they are receiving generalized services from the local government. Thus, not only do communities not have a right to be in one local government over the other, they do not have a right to vote in elections when drawn out of a local government. The *Holt* decision and others similar to it make it clear that the US Constitution does not recognize individuals’ interest in a smaller form of government and their desire to be regulated one way or another based on a jurisdictional boundary that responds to their connection to their surroundings.

The Ohio Supreme Court’s decision in *Bakies v City of Perrysburg* provides a typical example of state jurisprudence focusing on local boundaries, as opposed to the environment, communities, and the connection between them. The plaintiffs in *Bakies*, landowners in unincorporated areas, challenged a local government’s requirement that they execute an annexation agreement prior to receiving water and sewer services extraterritorially. The Court held that the local government may barter with extraterritorial customers desiring to use their services. While the local government may not barter with those inside the jurisdiction, it may with those outside. The Court ruled that “[m]unicipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent contractual obligation.” Further, they can change the terms of existing services once the contract has expired.

This decision, similar to the decision in *Holt*, hinged on where the local government boundary was drawn and whether the individuals were inside or outside the jurisdiction. If an individual or community is in the jurisdiction, then they are entitled to services.

An additional line of US Supreme Court cases further divides communities from their local services, the ecosystems in which they derive and democratic principles in the delivery of those services. In *Ball v*

29 *Bakies v City of Perrysburg*, 108 Ohio St. 3d 361 (2006).
30 Ibid. at 365.
James, the US Supreme Court ruled that individuals within a local government jurisdiction do not have a protected constitutional right to equal representation in the local government when those services are provided by a special purpose district.\textsuperscript{31} For purposes of the constitutional analysis, a local government is considered a special purpose district when its actions are limited in nature (sufficiently specialized) and when the services have a disproportionately greater impact on a particular group. The majority in \textit{Ball} held that if the local government is a special purpose district, the individual citizens serviced by the district do not have a constitutional right in stating how the service is to be run. The Court ruled that “districts remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners.”\textsuperscript{32} The Court views the constitutional analysis as one analogous to a market transaction. It does not value the connection the community may have to the water and supporting ecosystems, and whether their form of government should be designed around it. Rather, it focuses its inquiry on legal constructs developed at the state or federal level.

The importance of boundaries often plays out in disputes between state and local laws as well. Because local governments derive their power from the state, it is not surprising that state law may preempt local actions. The predominant interpretation of state preemption laws weighs heavily in favor of state supremacy and restricting local governments from regulating beyond their borders. In analyzing whether a state has preempted local action, courts will look at state constitutional or statutory provisions to establish the boundaries of permissible local action.

There are four potential legal origins of local power: (i) Dillon’s Rule, in which a local government may act only if the action was expressly authorized by the state, was incidental to an expressly stated authorization, or was “indispensable” to performing the local government’s tasks;\textsuperscript{33} (ii) legislative home rule;\textsuperscript{34} (iii) imperio home rule;\textsuperscript{35} and (iv) hybrid legislative/imperio home rule.\textsuperscript{36} Whether a local government is authorized to take a particular action in a home rule state (ii–iv above) is a two-part inquiry: (1) has the local government been empowered to act? and (2) if empowered to act, has the local action nonetheless been

\textsuperscript{32} Ibid. at 367.
\textsuperscript{34} See e.g. Ark. Const. Art. 10, § 11.
\textsuperscript{35} See e.g. Cal Const. Art. 11, § 5(a).
\textsuperscript{36} See e.g. IOWA CONST. Art. III, § 38A.
preempted? Zoning, for example, is an area that states have traditionally
empowered local governments to act, as opposed to international trade
regulation, banking controls and immigration restrictions, which are not.
If empowered to act, the court will then question whether the local action
has been preempted by: (i) conflict preemption, where there is a direct
conflict between the local ordinance and state law; (ii) express preemp-
tion, where the state specifically notes that it is preempting the subject
matter; and (iii) implied preemption, where the state preempts a subject
matter indirectly through prior actions, such as existing state legislation.37

Similar to federal preemption jurisprudence, judicial interpretation of
state preemption38 acknowledges the importance of jurisdictional bound-
aries, often at the expense of ecosystems and the ability of a community
to connect to its environment. Preemption of a local action has often been
decided based on whether the local action has an extraterritorial impact.
While state courts differ on the precise meaning and terminology in
describing local government extraterritorial impacts,39 “many [courts] use
a finding of extraterritoriality as the basis for the conclusion that the
home rule ordinance … has exceeded the [locality’s] … powers, or has
been preempted by the state legislature.”40 If a local action encourages
other local jurisdictions to adopt conflicting local legislations, results in

37 See Talbot Cnty. v Skipper, 620 A.2d 880, 882–83 (Md. 1993); see
generally Briffault, Richard and Reynolds, Laurie, State and Local Government

38 Similar to the theoretical justifications for federal preemption, state
preemption is partially justified on the need to avoid a race to the bottom
phenomenon stemming from local government competition. However, it is often
state legal parameters that actually encourage local governments to unsustainably
manage natural resources. “Local governments are often prohibited from having
extraterritorial impacts and are limited to regulating solely within their borders.
The combination of multi-jurisdictional natural capital resources and limited
local government authority to regulate those resources creates inefficiencies that
discourage local governments from seeking innovative solutions to commons
challenges.” Hudson, Blake and Jonathan Rosenbloom, “Uncommon Approaches
to Commons Problems: Nested Governance Commons and Climate Change”
(2013) 64 Hastings L.J. 1273, 1307–08.

39 Reynolds, Laurie, “Home Rule, Extraterritorial Impact, and the Region”
that a local government may not act outside its borders) and comparing Goodell
v Humboldt County, 575 N.W.2d 486, 492 (Iowa 1998) (treating the two legal
questions separately), with City of Northglenn v Ibarra, 62 P.3d 151, 155 (Colo.
2003) (blending the two steps together)).

40 Reynolds, supra, n. 39, at 1275.
“permeation, seepage, or cross border movement,” or impacts “the marketplace generally,” it may be preempted by state law.41 Judicial interpretation of “extraterritorial impacts casts a wide net over the type of local actions that are preempted by state law . . . . It has been used to strike down local ordinances addressing noise pollution, wastewater, service contracts, telephone line installation, automated automobile photograph systems, sex offender controls, and others.”42

The theoretical importance of addressing some environmental and land use issues at the federal or state level is clear. If it can overcome a number of internal obstacles including gridlock, Congress could be helpful in avoiding a tragedy of the commons among local governments. National legislation may reduce competition among local governments and may regulate their activity in a way that sustainably manages resources. This theory, of course, relies heavily on the assumption that local governments will set low environmental standards to incentivize local development. By unifying the law, Congress, it is assumed, may avoid this competition and more efficiently use resources at the local level. In doing so, however, Congress has consumed an area of environmental regulation, and left little space for local governments to flourish. The Supreme Court and state supreme courts have made it clear that local governments are vulnerable to federal and state preemption challenges. Among preemption jurisprudence there is very little acknowledgment that local governments could promote the goals of many federal acts and do so in a way that is more closely aligned with local conditions. Rather, preemption jurisprudence makes it clear that where federal or state governments have acted and, at times, when they have not acted local governments are prohibited from acting.

The combination of these two preemption themes – higher level action and boundaries – marginalizes local governments and their ability to address critical environmental challenges and build a community around the environment. The preemption analysis is deeply rooted in the federalist structure – a human-made, static institutional governance arrangement – to determine whether local governments have authority to regulate systems, such as the ecosystem, that do not respond to the government structures or their boundaries. The analysis does not consider the needs of the community trying to regulate and build a community identity. Further, it undermines and devalues the relationship between

41 Ibid. at 1279–82.
42 Rosenbloom, “New Day at the Pool,” supra, n. 6, at 453.
ecology and community by focusing on institutional structures to determine the fate of communities and their connection to natural resources.

B. Specific Controversies over Local Decision-making

In large part, land use decision-making has continued to occur at the local level. Yet the question of preemption in land use and local environmental decision-making is perpetually debated. It is noteworthy that in 1970 Congress considered adopting a federal policy “to encourage and assist the several States to more effectively exercise their constitutional responsibilities for the planning, management, and administration of the Nation’s land resources.” The National Land Use Policy Act (NLUPA) was intended to coordinate land use governance under a federal agency that would facilitate an inventory of land use assets and plans across jurisdictional boundaries. Although the bill was unsuccessful, the proposed NLUPA illustrates the importance of coordinating decision making over local environmental resources, as well as the political difficulties that the federal government faces in this arena.

Without a comprehensive federal statute on the subject, local governments typically confront federal restrictions on land use topics in a patchwork system of constitutional and statutory controls. Often the relevant laws are incidental to the concerns that dominate the land use process; for instance, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) protects religious freedoms from discrimination in the land use regulatory process and yet greatly influences local land use decisions. In other cases, federal preemption arises in statutory mandates that are limited to specific issues; for instance, the 1996 Telecommunications Act imposes federal standards on the local regulation of telecommunications facility siting, with the purposes of facilitating development of a nationwide system of telecommunications access.

Air Conditioning, Heating and Refrigeration Institute v City of Albuquerque provides a good example of the difficulties local governments face in trying to decipher a piecemeal federal preemption scheme.

43 S. 3354, 91st Cong. § 402(a) (1970).
In this case, industry advocates successfully argued that the City of Albuquerque’s attempt to require the construction of efficient buildings through a “green building code” was preempted by federal law that regulated the energy efficiency of appliances. Albuquerque adopted minimum energy efficiency standards that applied to the construction of new buildings and remodels. The Albuquerque code allowed applicants to consider several methods of building construction and design to meet the code’s energy efficiency requirements. Most commercial construction was required to meet with one of two “performance” options, but the code also included a “prescriptive” option applicable to small commercial buildings. The code established minimum energy efficiency standards for building systems that were intended to exceed the EPCA “Energy Star” minimum ratings. Similarly, residential construction was subject to four “performance” options and a “prescriptive” option that considered installation of building components that exceeded minimum EPCA “Energy Star” product ratings.

Notably, appliance efficiency is a topic that has been preempted by a federal statutory scheme that governs the energy efficiency of appliances, but not of buildings. In *Air Conditioning, Heating and Refrigeration Inst.*, industry advocates insisted that Albuquerque’s ordinances required builders to use particular appliances to meet the energy-efficiency demands. The court agreed that the City’s building efficiency standards would require builders to choose particular appliances to meet the building performance levels. The court reasoned that even “if products at the federal efficiency standard are used, a building owner must make other modifications to the home to increase its energy efficiency in order to comply with the code,”48 which the court found to serve as “a penalty imposed for selecting products that meet, but do not exceed, federal energy standards”.49 The court ruled that the code’s effect of requiring the installation of certain appliances was clearly preempted by federal law.

48 Ibid. at *9.
49 Ibid. at *9.
In contrast, in Building Industry Association of Washington v Washington State Building Code Council, a similar preemption challenge was rejected by the federal district court in Washington. Similar to the challenged provisions in the Albuquerque case, the challenged provisions of the Washington State Energy Code applied to new residential construction and were based on the following findings:

Energy efficiency is the cheapest, quickest, and cleanest way to meet rising energy needs, confront climate change, and boost Washington’s economy. More than thirty percent of Washington’s greenhouse gas emissions come from energy use in buildings. Making homes, businesses, and public institutions more energy efficient will save money, create good local jobs, enhance energy security, reduce pollution that causes global warming, and speed economic recovery while reducing the need to invest in costly new generation. Washington can spur its economy and assert its regional and national clean energy leadership by putting efficiency first. Washington can accomplish this by: Promoting super efficient, low-energy use building codes; requiring disclosure of buildings’ energy use to prospective buyers; making public buildings models of energy efficiency; financing energy saving upgrades to existing buildings; and reducing utility bills for low-income households.

As in the Albuquerque case, the plaintiff argued that the code’s energy consumption mandates could be reached only by choosing particular appliances. However, the Washington Court recognized that the code did not mandate specific appliances, either directly or indirectly. Rather, the code allowed applicants to reach the energy efficiency levels through alternative “pathways.” The Court found that the availability of options saved the energy code from impinging on the preempted subject matter.

Litigation has dulled the threat of federal preemption on some matters. However, it is clear that the federal government can unilaterally and completely obstruct local governments from governing matters of environmental importance. The question that remains unanswered is: at what cost do we achieve national uniformity among local governments in environmental matters?

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II. COMMUNITY IDENTITY AND LOCAL ENVIRONMENTS

This chapter now turns to what might be thought of as the invisible costs of federal control over natural resources. Specifically, we explore the effects of severing the legal authority to govern the environment from local communities. Our exploration suggests that community—an essential local concept—has no counterpart in the federalist vocabulary or the structure of federal environmental law. As noted above, the combination of federal and state preemption severely limits the ability of local governments to engage in the management of their local ecosystems as regulatory agencies. Because many ecosystems reach beyond the geographical borders of their local governmental entity, state and federal restrictions that limit local government’s jurisdiction over natural resource management discourage and even prohibit local governments from considering externalities implicating ecosystems. In light of these restrictions, local government regulations may be limited to goals and legal standards that do not reflect functionality or value in ecosystems, including forests, wetlands and agricultural resources. Yet, ecosystem functionality is an important concept to local governments because functioning ecosystems are relied upon and help define communities.

The point is an important one: the Millennium Ecosystem Assessment reports that 60 per cent of the ecosystems studied had been degraded beyond their capacity to regenerate or recover their previous level or type functionality. The observation about ecosystem functionality becomes more significant when it is framed in terms of natural capital: ecosystems that fail to function can provide neither the basis for formulating a community nor even the basic services on which human health and life rely, such as clear water and air, wildlife and biodiversity, climate and chemical regulation, nutrient cycling, and so on. Of course, ecosystems are damaged in a number of different ways, and not all damage to the environment is due exclusively to lack of perception about ecosystem value or lack of access to information on the need for continuing ecosystem services. Nonetheless, efforts to value ecosystem functionality likely grow where ecosystem health coincides or converges with some

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type of beneficiary interest, and in many ways recent ecology and economics make it clearer that communities are the primary beneficiaries of ecosystem processes. When framed in this way, the argument in favor of local power to regulate the environment becomes more persuasive.

A. What Federalism Is Not: Community as an Important Environmental Concept

As noted above, local governments have historically addressed environmental issues within the scope of home rule, police power regulation. That is, local governments have created communities, and in the process have encountered, valued and managed local environmental resources in furtherance of baseline objectives for public health and the environment. To accomplish this task, local governments have identified and regulated the use of critical and locally important environments. As John Nolon describes:

Communities have long used large-lot zoning as a crude way of protecting open space and its associated natural resources. Upzoning occurred in some suburban areas, aimed principally at lowering development densities to control population growth, maintain residential property values, and contain the cost of servicing development while, incidentally, limiting water use, preventing aquifer contamination, and containing nonpoint source pollution. As the environmental movement evolved and matured in the 1970s and 1980s, the sensitivity of local lawmakers was raised and early signs of the adoption of local environmental law became apparent. These signs emerged from a variety of sources, including the National Flood Insurance Program, which required local governments to adopt and enforce floodplain management programs as a prerequisite to local eligibility for national flood disaster assistance payments. Catastrophes influenced the movement towards increased regulation at the local level, leading to storm water management measures and stringent setback requirements along the coasts of barrier islands that are particularly vulnerable to hurricane damage. The 1990s saw the advent of local laws clearly designed to protect environmental functions and these, in the aggregate, now constitute a significant body of law.

56 In Ohio, for instance, municipal incorporation proceedings are driving by the necessity of findings that the area is compact and can be served by municipal services, and that “the general good of the community, including both the proposed municipal corporation and the surrounding area, will be served if the incorporation petition is granted.” Ohio Rev. Code. § 707.07(D).

Nolon’s historical detail illustrates the local concern for human welfare and its story as a powerful incentive for environmental regulation. Further, it highlights the ability of local governments to reflect community connectivity to environments and their ability to consider the value of local environmental resources.

When local governments interact with their local environments a very special type of governance happens. There is no counterpart in federal or state governance that could replicate local connectivity. Local governments, through their governed communities, interact as a means of expressing community identity. In the process of regulating use and abuse of the environment, local governments engage the democratic process as they envision and protect community assets. The traditional zoning and other police power tools enabled local governments to understand the relationship between the local environment and community goals.

In a report entitled *Community Culture and the Environment: A Guide to Understanding a Sense of Place*, the EPA noted how important surroundings are to a determined policy of environmental protection:

> We live among, and are deeply connected to, the many streams, rivers, lakes, meadows, forests, wetlands, and mountains that compose our natural environment and make it the beautiful and livable place so many of us value. More and more often, human communities realize that the health and vibrancy of the natural environment affects the health and vibrancy of the community and vice versa. We value the land, air, and water available to us for material goods, beauty, solace, retreat, recreation, and habitat for all creatures. Throughout the nation, communities are engaging in efforts to protect these treasured natural resources and the quality of life they provide.

The EPA’s report builds on Nolon’s observations and makes an important ecological point: what happens in local governments and the communities that they govern is very important to ecological identity and, conversely, what happens in ecosystems and the local environments they govern is very important to community identity.

The importance of this point is paramount: in contrast to federal environmental governance, local governments regulate the environment because communities are situated in the environment. Local governments

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59 Ibid. at 2.
and communities need, and define themselves around, functioning ecosystems, whereas the same cannot (necessarily) be said for other governmental entities. The EPA’s report also notes:

‘Community-based environmental protection recognizes that values held both individually and as a group contribute to the quality of community life. Expression of values through social and cultural practices can create a “sense of community.” Many of these values relate directly to the “place” in which people live, thus creating a strong “sense of place.”’

One way of articulating this distinction is that “local environment” is synonymous with “governance” in very important ways. Many of the individual services that local governments provide to their residents – and the costs of providing those services – are substitutes for benefits that can be delivered (at least in part) by functioning ecosystems. Local governments are accountable in ways not felt at other levels of government. Recognizing such costs and the benefits of ecosystem investments is a local accountability issue. Dealing with ecosystem health is “governance” at the local level.

There’s more. Because local governments are ecologically situated, the quality and character of the environment is essential to the identity and well-being of communities: the continuing receipt of ecosystem services (for example watershed services, such as water provision, water filtration, flood and climate control, wildlife habitat, and so on) is relied upon at the community level. However, we use land, and land use involves transformation of the landscape, and as such the types of changes that occur in land use development imply losses (in every instance) of some ecosystem attribute that affects expectations in social, economic and environmental ways. Local governments, with their experience in designing communities and protecting public health and safety, are constantly faced with accounting for ecosystem trade-offs and the losses that result. When local governments secure these ecological benefits through land use regulation, they are engaged in prioritization of local environmental functions and maximizing the interaction between community and nature.

B. Digging In: Examples of Local Governments Regulating Within the Federal Scheme

The Millennium Ecosystem Assessment noted that, because of the special relationship that communities have with local ecosystems, community

\[^{60}\text{Ibid. at 4.}\]
well-being in many cases drives priorities toward protecting ecosystem functionality. Evidence of this relationship is illustrated in the community priorities and preferences expressed in land-use regulations and comprehensive land-use planning. This makes sense: as beneficiaries of ecosystem processes, local governments have meaningful insights into the manner in which functioning ecosystems serve human needs.

When local governments regulate ecosystem characteristics, they confront a broad range of activities on the land that threaten to change how the ecosystem functions and how the community engages with the ecosystem. Local governments may regulate for the variety of lost values from land conversion, such as the wetlands ordinance in Branford, Connecticut that is triggered by activities that diminish inland wetland or watercourse capacities to support fisheries and wildlife, supply water, prevent flooding, process waste, facilitate drainage or provide open recreational space.61 Local governments may protect open space, soil structure and function, critical habitats and other ecosystem features through the direct regulation of aquifer recharge,62 subdivision regulations63 and site design review processes,64 and storm water and erosion

61 See e.g. Queach Corp. v Inland Wetlands Comm’n of the Town of Branford, 779 A.2d 134, 140 & n.12, 150 (Conn. 2001).
62 Hernando County’s groundwater protection ordinance is focused on the fact that the Floridan Aquifer underlying the county is unconfined and vulnerable to contamination. Hernando Cnty., Fla. Groundwater Protection and Siting Ordinance 94-8, § 2 (27 June 1994), accessed 18 July 2015 at www.co.hernando.fl.us/utils/PDF/ordinances/Ordinance%2094-08.pdf (“It is the intent and purpose of this Ordinance to protect and maintain the quality of groundwater in Hernando County by providing criteria for land uses and the siting of facilities which use, handle, produce, store or dispose of Regulated Substances; and by providing protection to vulnerable features which discharge directly to the Floridan aquifer. This Ordinance, through its provisions, shall protect the quality of water obtained from existing and future community public supply wells described in this ordinance, in addition to the County-wide groundwater resources.”).
63 State Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 10–13 (Wash. 2002) (finding that statutory exemptions from the groundwater permitting system for domestic wells was not applicable to applications to subdivide, recognizing that the exemption was not intended to exempt a water use of so many users).
64 Dartmouth, Mass., Zoning Bylaws § 20.701(d) (2008) (“Site design shall incorporate natural drainage patterns and vegetation in order to maintain predevelopment stormwater patterns and water quality to the greatest extent feasible.”).
control programs.⁶⁵ Through their land use control programs⁶⁶ local
governments are capable of committing to local ecosystem protection.

In an important respect, local governments engage politically with the
environment because of the direct and often immediate impact on local
economics. For instance, local governments are the primary economic
beneficiaries of functional local forest resources. Of course, urban
community forests are typically not valued as timber and other commod-
ity resources. Instead, trees in urban areas contribute to community
well-being by grounding an aesthetic and psychological identity, facilitat-
ing individual and community sense of place, mitigating the challenges
of urban life.⁶⁷ Evidence of the value of urban forests is illustrated in
increased property values, but also in the other non-commodity benefits.
Hence, Roanoke, Virginia prepared an Urban Ecosystem Analysis to
study the services provided to city residents by trees.⁶⁸ The Analysis
measured property value and tourism, as well as ecosystem function
features, such as storm water retention, shade, erosion control and
pollution mitigation. The study identified a positive correlation between
urban trees and property value, substantial value in storm water control
services retention capacity at $128 million, and pollution sequestration
potential at an annual value of $2.3 million. The urban forest in Roanoke
saved the city from having to construct expensive water treatment
facilities, saved residents in electricity bills from lower climate control
needs, and provided a valuable sense of place. The conclusion of the
report: increase the reach (and effectiveness) of the urban forest, because
saving more trees means saving more dollars.

Local governments are also seriously concerned with actions that
would impair the capacity of local aquifers to provide safe drinking water

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⁶⁵ The New Jersey Administrative Code section 7:8-2.2 (2011), explicitly
includes erosion control, as well as prevention of pollution and assurance of
groundwater recharge as goals of stormwater management regulation and permitting
process.

⁶⁶ See Blackwell, Robert J., “Overylay Zoning, Performance Standards, and
Environmental Protection After Nollan” (1989) 16 B.C. Envtl. Aff. L. Rev. 615,
629, 632–34 and n.152.

⁶⁷ In addition, urban forests provide ecosystem services as they “aid in
stabilizing the environment’s ecological balance by contributing to the processes
of air purification, oxygen regeneration, groundwater recharge, and stormwater
runoff retardation, as well as aiding in noise, glare, and heat abatement.” Jackson

⁶⁸ American Forests & City of Roanoke Town Council, Urban Ecosystem
Analysis, Roanoke, Virginia: Calculating the Value of Nature (2002), accessed 18
as well as sufficient flows for commercial and industrial purposes and for maintaining surface water flows. Local governments regulate the manner in which land uses impact groundwater to ensure sufficient water supplies for domestic uses and economic development. In addition, groundwater protections are designed to protect drinking water sources through regulation of contaminant discharges and prevention of pollution, such as the ordinance in Weston, Wisconsin which has as its purpose:

The Village depends exclusively on ground water for a safe drinking water supply. Certain land use practices and activities can seriously threaten or degrade ground water quality. The purpose of this Section is to institute land use regulations and restrictions to protect the Village’s municipal water supply and well fields, and to promote the public health, safety, and general welfare of the residents, employees, and visitors of the Village. The restrictions imposed in this Section are in addition to those of the underlying standard zoning district or any other provisions of this Chapter.

What distinguishes local environmental regulation of ecosystem functionality is in the role and relevance of local priorities: local demands on the ecosystem goods, local advantages from geological conditions, local economies, local pressures on drinking water supplies, and the types of land use that are competing with the continued receipt of ecosystem benefits.

Notably, when local governments govern to capture the benefits of ecosystem services, they are not confined to thinking about only those

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70 Federal and state laws protecting specific resources have largely left local governments responsible for implementing land use regulation. Arnold, Craig Anthony (Tony), “Clean-Water Land Use: Connecting Scale and Function” (2006) 23 Pace Envtl. L. Rev. 291, 302–03. Cities have a variety of land use controls that are capable of connecting conversion of ecosystems to public service needs, such as water supply. Tarlock, A. Dan, “How California Local Governments Became Both Water Suppliers and Planners” (2010) 4 Golden Gate U. Envtl. L.J. 7, 20.

ecosystem processes that occur within jurisdictional boundaries. Hence, New York City and Santa Fe, New Mexico have acknowledged the direct relationship between ecosystem protection and securing reliable clean drinking water supplies, and have recognized that the relationship is defined by watershed boundaries rather than political ones. In Santa Fe, for example, the federally-owned forested watershed supplies water for more than 30,000 homes and businesses.\textsuperscript{72} Santa Fe’s water supply is not risk-free: the basin is constantly monitored for the threats of forest degradation and fire catastrophe.\textsuperscript{73} The solution was not obvious, but it illustrates the relevance of local involvement in environmental protection. Santa Fe balanced the cost of a substantial forest fire in the watershed (including the expenses of removing increased sedimentation, treating and filtering water supplies, and securing replacement water supplies\textsuperscript{74}) against the costs of managing the watershed to reduce the likelihood of forest fire: “The cost to retain the restored forest condition is estimated at $4.3 million, an average of $200,000 per year. In contrast, the avoided cost that would result from a 7,000 acre fire in the watershed is estimated at $22 million.”\textsuperscript{75} To capitalize on the natural services provided to Santa Fe from the forested watershed, the city is pursuing its interests into federal lands with a plan to manage the federal forests to reduce the risk.\textsuperscript{76}

CONCLUSION

At times, federalist jurisprudence seems to work reasonably well at accomplishing the stated goals of uniformity and standards setting among

\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid. at 11.
\textsuperscript{75} Ibid. at 1.
\textsuperscript{76} The city is planning for ways to fund their proposal, including a payment for ecosystem services (PES) program. Under PES programs, some landowners are being paid to protect ecosystem services capacity, such as by enhancing flood storage, assisting in the management of critical habitats and aquifer recharge, and leaving wetlands intact. Majanen, Terhi et al., Ecoagriculture Partners, “Innovations in Market-Based Watershed Conservation in the United States: Payments for Watershed Services for Agricultural and Forest Landscapes” (2011), 6, 9, accessed 18 July 2015 at http://ecoagriculture.org/publication_details.php?publicationID=362.
potentially competitive states and local governments. However, through its design, the legal structure for a federal environmental program, including the resulting legal structure of local governments, may go too far in impinging upon individuals’ collective desire to create community.77 As Gerald Frug noted, “if we focus on cities as they are presently organized and managed, we will not see the argument for city power.”78 The argument in favor of local authority to regulate natural resources is not reflected in the federalist legal structure. The failure of many local governments to exceed federal regulations cannot be described simply as a failure of local governments to act or to care about their local environments. Rather, it is a failure of environmental federalism to account for local communities’ connection to the environment and to incorporate that connection into the law, in particular land use controls.

Local governments face legal hurdles that are not only outside their ability to control, but also are crafted in a way that do not respond to a community’s engagement with its surroundings. State and federal review of local authority essential boil down to questions concerning external actions and boundary lines. Even assuming some divergence for the purposes and merits of decentralization as varied by discipline,79 the inquiry into authority over the environment nonetheless marginalizes local governments’ ability to know the importance of a given ecosystem, its historical and culture value, and the potential for it to impact local governments beyond their borders. It also fails to meet several classical notions of decentralization of power relative to community empowerment and involvement and give “better incentives, more opportunities to exercise their facilities, and fewer reasons to oppress each other.”80 Perhaps most importantly, the notion of centralized authority over natural resources avoids valuing the relationship between communities and

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77 We do note that many of the more pervasive threats to ecosystem health, such as land conversion, impervious surfaces, and other “nonpoint source” pollution problems, have been left to local governments in the federal scheme of environmental law. In some cases, the federal scheme appears to rely on the benign nature of such problems, while in others, Congress appears to cave to partisan politics and/or the object of regulation may simply be too miniscule or remote to justify uniform standards, such as small-scale soils displacement.


governance that only occurs in local governments and, in turn, in local self-governance.

Tocqueville believed that the individual, induced by the “spirit of ownership or any ideas of improvement,” would act in his own self-interest and demand more gains or less waste from government.81 The geographical proximity of the central authority to the individual ensures that it will be more accountable and hasten to repair inevitable mistakes.82 Yet Tocqueville’s argument also relies on observations of human nature. He believed that centralization of human affairs was a natural eventuality which helped form the first towns.83 Tocqueville was not advocating sameness; some differences are essential yet expose the society to greater risk of external exploitation.84

Of course, the mere fact that local governments do engage in the protection of local ecosystem functionality is not a sufficient argument in favor of local control. Yet the inescapable observation in these local efforts is that they cannot be reproduced at the federal level: where local governments have regulated land uses to prevent degradation of local important ecosystems, they regulate from a purpose that non-local governments simply do not have.

81 Tocqueville, supra, n. 2, at 116.
82 Ibid. at 113, 119, 304.
83 Ibid. at 74.
84 Ibid. at 75.