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Land Law Federalism

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ABSTRACT

Land exhibits a unique duality. Each parcel is at once absolutely fixed in location and inextricably linked to a complex array of interconnected systems, natural and man-made. Ecosystems spanning vast geographic areas sustain human life; interstate highways, railways, and airports physically connect remote areas; networks of buildings, homes, offices, and factories create communities and provide the physical context in which most human interaction takes place. Despite this duality, the dominant descriptive and normative account of land-use law is premised upon local control. In a world where capital and information pass freely across increasingly porous jurisdictional boundaries, few regulatory matters can be cabined within the borders of a single state, let alone a single locality. Thus, despite the mantra of localism, modern land-use law has evolved to incorporate a significant, though undertheorized, national dimension.

This Article develops a coherent national account of land-use law. First, this Article establishes a doctrinal basis and normative justification for federal land-use law, both of which derive from the cumulative effects of local land-use decisions on interstate commerce and the national welfare. Second, this Article develops a theoretical framework through which to analyze the substantial body of existing federal land law. Finally, the Article applies principles of federalism theory to outline a "local-official-as-federal-agent" model of land-use law that harnesses the relative regulatory capacities of each level of government.

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INTRODUCTION

It is hardly unique to describe land as unique.[1] In one sense, land is unique because it is immobile; it is, by definition, local.[2] Its value is specific to its owner and locational context—its geography, topography, current use, and relationship to surrounding uses and users. Yet the uniqueness of land derives not only from its "localness" but also from its "nationalness"—from the role that it plays in national networks. Each parcel is at once absolutely fixed in location and inextricably linked to a complex array of interconnected systems, natural and man-made. Ecosystems spanning vast geographic areas sustain human life; interstate highways, railways, and airports physically connect remote areas; telecommunications towers dotting the landscape facilitate increasingly sophisticated forms of communication; energy infrastructure crosses state and local boundaries to power the nation; and networks of buildings, homes, offices, and factories create communities and provide the physical context in which most human interaction takes place.[3]

Despite the expansion of the federal government over the past century, local governments have retained primary authority to regulate the use of land.[4]

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[1] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1981) ("A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money.").

[2] Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 297 (2011).

[3] *See* JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 17 (1987) ("[P]lace is indispensable; all human activity must occur somewhere."); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993) ("Because human beings are fated to live mostly on the surface of the earth, the pattern of entitlements to use land is a central issue in social organization."); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 829 (2009) (describing land "as an essential component in any human activity that requires physical space").

[4] *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) ("Land use control is the most important local regulatory power."); Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 236 (2008) ("[T]he prevailing descriptive and normative view of land use involves, first and foremost, local control."); Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 449–50 (2000) (finding that local land-use laws continue to enjoy "a near absolute status as untouchable local government prerogatives"); John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 366 (2002) (noting a "national understanding that the power to control the private use of land is a state prerogative, one that has been delegated, in most states, to local governments"); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 839 (1983) ("Land use control in America has always been an intensely local area of the law."); Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 616 (2011) ("[L]ocal government has retained almost full authority over land use . . . ."); A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 653 (2007) ("The United States has . . . enshrined the idea that land should be controlled at the lowest level of government, if at all."); Katherine A. Trisolini, *All Hands on Deck: Local Governments*

Scholars and policy makers often reject the notion of an expanded federal role,[5] even as they recognize that local zoning boards lack the capacity and the incentive to address complex problems,[6] such as urban sprawl and affordable housing that are created by the cumulative impact of local land-use decisions.[7] In a world where capital and information flow freely across national and subnational boundaries, few regulatory matters can be cabined within the jurisdictional lines of a single state, let alone a single locality.[8]

In response, modern land-use law has evolved to incorporate a variety of national concerns.[9] Federal laws that directly regulate or seek to influence land

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and the Potential for Bidirectional Climate Change Regulation, 62 STAN. L. REV. 669, 740 (2010) ("[Z]oning and land use remain largely the province of local governments."); William A. Fischel, The Evolution of Zoning Since the 1980s: The Persistence of Localism § 3, at 4–5 (Sept. 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1686009 (noting that the most remarkable aspect of local zoning is that it has remained local).

[5] *See, e.g.*, Bronin, *supra* note 4, at 262 ("No serious scholar supports an expanded role for the national government in traditional land use regulation . . . ."); Eric T. Freyfogle, *The Particulars of Owning*, 25 ECOLOGY L.Q. 574, 580 (1999) (noting that "[l]and use regulation at the state level is bad enough" and that "[d]irect federal regulation, for many citizens, is simply taking things too far"); Kayden, *supra* note 4, at 451–53 (suggesting that the size of the United States, its private-property tradition, and citizen preference for local control cut against national involvement); Catherine J. LaCroix, *Land Use and Climate Change: Is It Time for a National Land Use Policy?*, 35 ECOLOGY L. CURRENTS 124, 124 (2008), http://elq.typepad.com/currents/pdf/currents35-16-lacroix-2008-1124.pdf ("It will never be time for an articulated federal land use policy; the tradition of local control of land use is simply too strong."); Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 ECOLOGY L.Q. 745, 751 (1997) (explaining why property owners and local governments resist centralization of land-use regulatory authority); Trisolini, *supra* note 4, at 740 (arguing that efforts to centralize regulation of land "would likely provoke fierce political opposition, as many consider this a core local function, central to local governments' ability to maintain autonomy").

[6] Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 511 (2005); Alexandra B. Klass & Elizabeth Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. (forthcoming 2012) (manuscript at 42–47), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012075 (articulating the desirability of federal regulation but noting that federal intervention is politically unfeasible absent a national crisis); Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENVTL. L.J. 241, 291 (2011) (noting the merits of federal regulation but concluding that reallocation of authority in land-use law is politically unfeasible); Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 389 (2002) (declaring that "[t]here is no doubt that a need exists for more comprehensive federal legislation on land use" but maintaining that the authority will and should remain local).

[7] *See* sources cited *infra* note 36.

[8] Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 120 (2007) ("In contemporary society, the dichotomy of 'truly local' and 'truly national' has no substance."); *see also* Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 17 (2007); Griffith, *supra* note 6, at 510–11.

[9] John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 45 (2006) (describing the evolution of land-use law to incorporate state and federal influences); *see also* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 1:1, at 6

use include federal permitting schemes under the Endangered Species Act[10] (ESA) and the Clean Water Act[11] (CWA), federal siting regimes under the Telecommunications Act[12] (TCA) and the Religious Land Use and Institutionalized Persons Act[13] (RLUIPA), and land-use planning requirements imposed in connection with federal housing and transportation funding. In addition, many other federal laws impact land use incidentally, as a byproduct of their main goals, including, for example, land-use decisions that must be made to achieve federally mandated emissions standards under the Clean Air Act and the CWA's Stormwater Phase II Rule.[14]

Thus, despite the mantra of localism, a significant body of federal land-use law, defined broadly to include federal policies that influence the development of privately owned land, already exists. In the absence of a national land-use policy, however, observers have typically studied each federal policy in isolation, describing an uncoordinated federal statutory "patchwork,"[15] enacted "piecemeal"[16] and resulting in inconsistent and sometimes self-defeating regulatory policies.[17] In contrast to other substantive areas of law,[18] including, for example, environmental law,[19] the legal literature has yet to develop a

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(2007); Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69 (1998); ROBERT I. MCMURRY, A.L.I.–A.B.A. LAND USE INST., USING FEDERAL LAWS AND REGULATIONS TO CONTROL LOCAL LAND USE 357 (2001).

[10] Endangered Species Act of 1973 § 10(a), 16 U.S.C. § 1539(a)(1)(A)–(B) (2006).

[11] Clean Water Act of 1972 § 404, 33 U.S.C. § 1344.

[12] Telecommunications Act of 1996 § 704(a), 47 U.S.C. § 332(c)(7)(B)(ii)–(iii).

[13] Religious Land Use and Institutionalized Persons Act of 2000 § 2(a)(1), 42 U.S.C. § 2000cc(a)(1).

[14] 40 C.F.R. § 122.21–.29 (2011); *see also infra* Part II.

[15] Kayden, *supra* note 4, at 446.

[16] U.S. GEN. ACCOUNTING OFFICE, B-280699, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON "URBAN SPRAWL" IS UNCLEAR 9 (1999); Randolph R. Lowell, *Coastal Smart Growth*, 22 PACE ENVTL. L. REV. 231, 237 (2005); Todd A. Wildermuth, *National Land Use Planning in America, Briefly*, 26 J. LAND RESOURCES & ENVTL. L. 73, 73 (2005).

[17] Green, *supra* note 9, at 119; *see also* Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159, 1173 (2010) ("Congress has almost always steered clear of establishing anything that remotely resembles a federal land use regulatory program . . . .").

[18] *See, e.g.*, Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125 (2006); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625 (2004); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377 (2006).

[19] *See, e.g.*, William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108 (2005); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996). Other scholars have applied federalism theory to biodiversity conservation. *See* Bradley C. Karkkainen, *Biodiversity and Land*, 83

robust theory of federalism to tie together the disparate strands of federal land-use law.[20]

This Article considers the body of federal land-use law as a whole and assesses its component parts through the lens of federalism. Part I introduces the cumulative effects doctrine that underlies federal regulation of "trivial" intrastate activity that would, in the aggregate, have a nontrivial effect on interstate commerce.[21] Part I then applies the cumulative effects doctrine to the "Not in My Backyard"[22] (NIMBY) phenomenon using two examples—the affordable-housing crisis and the challenge of achieving energy security—to illustrate the national implications of cumulative land-use decisions. Indeed, both of these shortages have been attributed, at least in part, to restrictive zoning policies that make it difficult to site crucial national facilities.[23]

Part II argues that, despite its "patchwork" or "piecemeal" appearance, the body of federal land law is bound by a common objective—to counterbalance the harm that would result from unfettered local control over land use. Federal law can be used to subsidize development that would be suboptimally permitted by local governments, including nationally significant but locally undesirable land uses, such as cell phone towers, energy infrastructure, and affordable housing. Federal law can also be used to preserve resources that would otherwise be overexploited, as in the case of wetlands, endangered species habitats, and coastal zones. Both types of laws can be implemented directly by a federal administrative agency or indirectly using fiscal and

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CORNELL L. REV. 1 (1997); J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555 (1995); A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315 (1995).

[20] An exception is Patty Salkin, who has argued that federal policies promoting sustainable development constitute a de facto national land-use policy. Salkin, *supra* note 6, at 382; *see also* Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253 (2012) (providing a comprehensive summary of federal statutes that impact land use).

[21] *See* Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (holding that Congress's power under the Commerce Clause extends to regulating wheat grown solely for home consumption because of the aggregate impact on the national market); *see also* Gonzales v. Raich, 545 U.S. 1, 16–17 (2005) (upholding the federal regulation of homegrown medicinal marijuana based upon *Wickard*'s cumulative-impact rationale).

[22] For an overview of NIMBY, see WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 9–11, 262 (2001); Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288 (1992); and Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994).

[23] This Article uses the term "restrictive zoning" to include local zoning policies that have the effect of excluding affordable housing as well as other locally undesirable uses. *See infra* notes 78–80 and accompanying text.

regulatory incentives to persuade local officials to participate in administering the federal program.[24]

Such distinctions are admittedly simplistic. Many federal land laws have multiple objectives and utilize a mix of preemptive and cooperative techniques. Nonetheless, the basic taxonomy, (a) pro-development or anti-development and (b) direct or indirect, provides a useful starting point for theorizing federal land-use law.

Building upon the theoretical framework developed in Part II, Part III takes up a basic question of federalism: How should authority be allocated between the national government and its subnational units?[25] In particular, this Part assesses the relative regulatory capacities of each level of government—federal, state, and local—to design and implement land-use policies that account for the cumulative impact of land-use decisions on the nation as a whole. The persistence of localism in land-use law presents a unique forum for federalism. Traditional theories of federalism focus on the federal–state relationship or on the state–local relationship.[26] The relative absence of the state in land-use law invites federalism theorists to explore the boundaries of a federal–local relationship.[27]

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[24] *See* New York v. United States, 505 U.S. 144, 166–69 (1992); *see also* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 859–60, 866 (1998) (describing the use of conditional grants and conditional preemption to induce state cooperation).

[25] *See* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 10 (2008) ("[U]ltimately the issue of federalism is about what allocation of power provides the best governance with the least chances of abuse."); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010) (asserting that what makes federalism and localism distinctive is that they provide "a broad-gauged, democratic account of how . . . nested governmental structures ought to interact"); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 254 (2005) ("Federalism involves the allocation of authority to a national government and to subnational units. A theory of federalism should guide this allocation.").

[26] Nestor M. Davidson, *Cooperative Localism: Federal–Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 960 n.1 (2007); Daniel J. Elazar, *Cooperative Federalism*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65, 66 (Daphne A. Kenyon & John Kincaid eds., 1991); Gerken, *supra* note 25, at 25–26.

[27] *See, e.g.*, Davidson, *supra* note 26; Gerken, *supra* note 25; Hills, *supra* note 24; *see also* Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 573 (2007) (arguing for increased cooperation between the federal and state governments to address "interjurisdictional" regulatory problems that arise due to an overlap between a federally regulated interest and a local land-use policy).

Part III accepts this invitation, outlining a hybrid federal–local regulatory model that relies upon *local* officials to implement *national* land-use policies.[28] This "local-official-as-federal-agent" model harnesses (a) the capacity of the federal government, with its distance from local politics and economic pressures, to coordinate land use on a national scale and (b) the capacity of local officials, who have detailed knowledge of the land and are politically accountable to the local community, to implement land-use policies at the local level. Local implementation of a federal land-use policy is likely to produce individual decisions that are consistent with national priorities but sensitive to the local context.

I. LOCAL LAND AS A NATIONAL RESOURCE

In modern society, capital, information, and resources pass seamlessly across increasingly porous jurisdictional boundaries. Land does not. Perhaps because of its immobility, the dominant descriptive and normative account of land-use law is premised upon local control. State-level zoning, once identified as "the quiet revolution" in land-use law,[29] failed to alter the fundamentally local nature of land-use law.[30] Periodic calls for an increased federal role in land-use planning have similarly gone unanswered.[31] The federal judiciary has

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[28] This conception is consistent with an emerging trend in environmental law scholarship pointing to the utility of federal–local cooperation in addressing interjurisdictional problems, such as climate change and environmental pollution. *See, e.g.*, Katrina Fischer Kuh, *Capturing Individual Harms*, 35 HARV. ENVTL. L. REV. 155 (2011) (arguing for federal–local cooperation to reduce environmental pollution caused by individual behaviors); Nolon, *supra* note 4, at 372–77 (discussing federal–local cooperation in ecosystem management); Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1052–55 (2009) (proposing federal regulation of local zoning boards to facilitate national wind siting); Salkin, *supra* note 6, at 392 (discussing 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) (discussing federal–local cooperation in biodiversity protection).

[29] FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

[30] *See infra* note 234.

[31] *See, e.g.*, Kayden, *supra* note 4 (discussing the federal government's limited role in land-use planning); Salkin, *supra* note 6 (describing previous efforts at national land-use reform); Wildermuth, *supra* note 16 (describing two failed attempts to bring order to land-use law through national land-use planning); *cf.* William F. Pedersen, *Using Federal Environmental Regulations to Bargain for Private Land Use Control*, 21 YALE J. ON REG. 1, 21–23 (2004) (identifying political opposition to federal attempts to shape local land use through the CWA and ESA).

consistently refused to hear zoning cases, reinforcing the notion that land-use law is *local* law.[32]

In a recent article, Professor William Fischel assessed the evolution of zoning and concluded that "[t]he most striking quality about zoning is that it is still local."[33] Professor Fischel observed that, in contrast to zoning, "many formerly local activities such as road building, public health, care for the poor, school finance, prosecution of corruption, and water quality regulation (even drinking water regulation), have been largely pre-empted by the state and federal government."[34] Most commentators concur, emphasizing a national understanding that land use is primarily a prerogative of local governments.[35]

This Part establishes a doctrinal basis and normative justification for federal land-use law, both of which derive from the cumulative effects of local land-use decisions on interstate commerce and the national welfare. Section A provides a context for federal land law by describing the unsuccessful attempt to nationalize land-use law along with environmental law during the 1970s. Section B introduces the cumulative effects doctrine that underlies federal regulation of purely intrastate activity that would, in the aggregate, have a nontrivial effect on interstate commerce. Section C applies the cumulative effects doctrine to the NIMBY phenomenon, using affordable housing and energy infrastructure to illustrate the potentially significant social and economic costs of cumulative land-use decisions.[36]

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[32] *See* 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 6:16 (2011) (noting the reluctance of federal courts to hear zoning cases); Fischel, *supra* note 4, § 5, at 10 (describing "procedural barriers to access to the federal courts"); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 92–94 (1994) (arguing that federal courts rely upon the ripeness doctrine to dismiss land-use cases because "they simply do not like to hear them").

[33] Fischel, *supra* note 4, § 3, at 4.

[34] *Id.*

[35] *See supra* note 4.

[36] WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 19 (1985) ("The notion that zoning is just a matter of local concern is incorrect when the cumulative effect of these regulations is considered."). Professor William Buzbee makes a similar point in the context of urban sprawl, noting: "Even seemingly local activity such as home building patterns can generate much larger harms. Viewed in the aggregate, sprawling patterns of development are expensive for local governments that must invest in infrastructure, schools, and other services as agriculture and green spaces are converted to residential use." William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 10 (2003); *accord* Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 828–29 (2008) (arguing that local governments, in the aggregate, can utilize land-use controls to substantially reduce greenhouse emissions); Kevin M. Stack & Michael P. Vandenbergh, *The One Percent Problem*, 111 COLUM. L. REV. 1385 (2011) (arguing that federal

A. The Nonfederalization of Land-Use Law

Less than fifty years ago, environmental regulation, like land-use regulation, occurred mainly at the local level[37]: "A few federal laws addressed unique national concerns such as maintaining the navigability of interstate waters, but beyond that, federal support for environmental protection was primarily limited to sponsoring scientific research."[38] During the late 1960s and early 1970s, Congress turned the traditional allocation of authority on its head, enacting comprehensive federal environmental statutes, including the National Environmental Policy Act of 1969;[39] the Clean Air Amendments of 1970;[40] the Federal Water Pollution Control Act Amendments of 1972,[41] later amended by the Clean Water Act of 1977;[42] and the Endangered Species Act of 1973.[43] Given the inextricable connection between environmental quality and land use, a national land-use policy seemed imminent. It was not to be.

In 1970, Senator Henry Jackson introduced the National Land Use Policy Act (NLUPA) into the U.S. Senate.[44] The proposed law sought to engage public authorities at the national, state, and local levels in cooperative land-use

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regulation should account for all of the "one percent" producers of greenhouse gasses that, in the aggregate, are a substantial source of carbon emissions).

[37] *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 95–96 (2002) (describing local efforts to control pollution that preceded federal regulation); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 381 (2005) [hereinafter Adler, *Judicial Federalism*] ("Prior to the late 1960s, most environmental concerns were addressed at the state and local level, if they were addressed at all."); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1147–60 (1995) (discussing the history of environmental protection prior to 1970).

[38] Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENVTL. L.J. 397, 400 (2008).

[39] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370h (2006)).

[40] Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q).

[41] Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387).

[42] Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251–1387).

[43] Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544). Additional environmental statutes enacted during this period include the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. §§ 136–136y); the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992k); the Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f–300j-26); and the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601–2697).

[44] *See* NOREEN LYDAY, THE LAW OF THE LAND: DEBATING NATIONAL LAND USE LEGISLATION 1970–75, at 5–7 (1976); Kayden, *supra* note 4, at 448 (discussing Senator Henry Jackson's failed attempt to pass NLUPA).

planning.[45] NLUPA would have provided funding for the formulation of state land-use plans, established a national data system to aid in land-use planning, and created a single federal agency to monitor federal compliance with state plans.[46] NLUPA faced political opposition and was ultimately defeated in the House of Representatives.[47]

A second attempt to coordinate land-use planning on a national scale under the Clean Air Act paradoxically served to *reinforce* local land-use authority. Under the Clean Air Act, states must design state implementation plans (SIPs) to meet national air-quality and emissions standards.[48] In its first iteration, the Clean Air Act Amendments required states to include "land-use and transportation controls" in their SIPs if such controls were necessary to achieve federal air-quality standards.[49] Though states that refused or were unable to comply with this directive risked having their state plans preempted by a federal implementation plan[50] (FIP), both the states and the EPA recognized that the threat was largely illusory. The EPA lacked the administrative resources and localized knowledge necessary to directly implement this program.[51]

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[45] Kayden, *supra* note 4, at 448; John R. Nolon, *The National Land Use Policy Act*, 13 PACE ENVTL. L. REV. 519, 522 (1996) (noting that, through NLUPA, Senator Jackson intended to create "a system that would have infused comprehensiveness, coordination and cooperation into a system that increasingly exhibits conflict and confusion"). According to the legislative history, the proposed act would have established

> a national 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 through the development and implementation of comprehensive "Statewide Environmental, Recreational and Industrial Land Use Plans" . . . and management programs designed to achieve an ecologically and environmentally sound use of the Nation's land resources.

S. 3354, 91st Cong. § 402(a) (1970).

[46] Salkin, *supra* note 6, at 384.

[47] LYDAY, *supra* note 44, at 45–47; Bronin, *supra* note 4, at 262; Nolon, *supra* note 4, at 367 (noting that the NLUPA was defeated, "in part[,] because it was regarded as an assault on the independent authority of the states to control land use"); Salkin, *supra* note 6, at 384.

[48] Clean Air Act § 110(a), 42 U.S.C. § 7410(a) (2006). EPA's procedure for SIP approval is contained in 40 C.F.R. § 51.101–.105 (2011).

[49] Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 4(a), § 110(a)(2)(B), 84 Stat. 1676, 1680 (amended 1977).

[50] Clean Air Act § 110(c)(1), 42 U.S.C. § 7410(c)(1).

[51] *See* Dwyer, *supra* note 19, at 1201 ("EPA sensed both its own political and technical limitations and the mammoth technical task that the states faced.").

In 1977, Congress backtracked, repealing the "land-use" portion of "land-use and transportation controls."[52] In the 1990 amendments, Congress cautiously imposed new transportation-control requirements in certain nonattainment areas but did not reinstate the land-use controls. Instead, the 1990 amendments retreated further from land-use regulation, declaring that the Clean Air Act does not infringe "on the existing authority of counties and cities to plan or control land use."[53]

Not surprisingly, much environmental damage today is caused by nonpoint-source pollution resulting from land-use decisions that are within the jurisdictional purview of local governments.[54] As the chairman of the Council on Environmental Quality observed when lobbying on behalf of NLUPA, land use is "the single most important element affecting the quality of our environment which remains substantially unaddressed as a matter of national policy."[55]

B. The Cumulative Effects Doctrine

Although there has never been a national land-use policy, federal law has long been used to account for the cumulative impact of local land-use decisions. In 1938, Congress passed the Agricultural Adjustment Act.[56] The Act was designed to drive up the price of wheat by strictly limiting the number of acres of land that could be used for the production of wheat.[57] Roscoe Filburn grew wheat on nearly double the number of acres he was allotted under

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[52] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 108(a)(2), 91 Stat. 685, 693.

[53] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 805, § 131, 104 Stat. 2399, 2689 (codified at 42 U.S.C. § 7431).

[54] Nolon, *supra* note 4, at 365. Nonpoint-source water pollution includes "the runoff from impervious surfaces such as roofs, driveways, parking lots, and roads; erosion and sedimentation caused by development activities, including the removal of vegetation and site disturbance; and the movement into water bodies of fertilizer, pesticides, and herbicides from lawns, golf courses, and farms." *Id.* at 369; *accord* Doremus & Hanemann, *supra* note 36, at 828–29 (arguing that local governments, in the aggregate, can utilize land-use controls to substantially reduce greenhouse emissions); Nolon, *supra* note 4, at 371 ("Nonpoint source pollution is the cause of nearly half of the remaining water quality problems in the United States and is intimately related to land use." (footnote omitted)); A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, 20 PACE ENVTL. L. REV. 149, 152 (2002) (describing local control over land uses that generate nonpoint-source pollution and impact biodiversity).

[55] Nolon, *supra* note 4, at 372 (quoting Henry L. Diamond, *Land Use: Environmental Orphan*, ENVTL. F., Jan./Feb. 1993, at 31, 32) (internal quotation marks omitted).

[56] Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.).

[57] Wickard v. Filburn, 317 U.S. 111, 115 (1942).

the Act.[58] Filburn argued that the Act could not apply to the excess wheat he produced on his land because the wheat was intended for his private use and would never enter into the stream of commerce.[59]

In *Wickard v. Filburn*, the Court unanimously upheld Congress's power under the Commerce Clause to impose federal limits on local land use.[60] Although the Court agreed that Filburn's excess wheat would have a negligible impact on interstate commerce, the Court declined to evaluate this activity in isolation. Instead, the Court considered Filburn's activity as part of a larger economic enterprise and concluded that, in the aggregate, "his contribution, taken together with that of many others similarly situated," would have a substantial impact on interstate commerce.[61]

The cumulative effects doctrine, also known as the aggregate effects doctrine or the cumulative impacts doctrine,[62] recognizes that "a single activity that itself has no discernible effect on interstate commerce may still be regulated [federally] if the aggregate effect of that class of activity has a substantial impact on interstate commerce."[63] So, for example, Congress may regulate isolated, intrastate acts of discrimination,[64] entirely intrastate credit transactions,[65] surface mining on privately owned land,[66] and the consumption of homegrown medicinal marijuana,[67] if it determines that the cumulative impact of the regulated economic activity substantially interferes with a national market.[68]

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[58] *Id.* at 114–15.

[59] *Id.* at 119.

[60] *Id.* at 128–29.

[61] *Id.* at 127–29.

[62] J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 93 n.138 (2010).

[63] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 850 (7th Cir. 1999), *rev'd on other grounds*, 531 U.S. 159 (2001); *accord* United States v. Darby, 312 U.S. 100, 119–20 (1941) (noting that Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); Ruhl & Salzman, *supra* note 62, at 93 n.138 (describing the use of the cumulative effects doctrine in federal law).

[64] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); *id.* at 276 (Black, J., concurring) (considering the aggregate effect of local discriminatory acts on the interstate market); Ruhl & Salzman, *supra* note 62, at 93 (noting that employment discrimination cases often consider the cumulative effects of employment practices and employer statements).

[65] Perez v. United States, 402 U.S. 146, 154 (1971).

[66] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281 (1981).

[67] Gonzales v. Raich, 545 U.S. 1, 22 (2005).

[68] During the Rehnquist Court's "federalism revival," the Court struck down several federal statutes based upon its determination that the regulated activity, possession of guns near schools in *United States v. Lopez*, 514 U.S. 549, 561 (1995), and gender-motivated crimes in *United States v. Morrison*, 529 U.S. 598,

In addition, federal regulation in fields as varied as banking law, securities law, disability law, discrimination law, and environmental law require administrative agencies to consider the cumulative effect of individual actions on federal policy goals.[69] For example, in issuing federal permits under section 404 of the CWA, the Army Corps of Engineers does not simply consider the impact of filling an individual wetland but rather the cumulative impact of wetlands development.[70] Under the ESA, the U.S. Fish and Wildlife Service is required to determine whether a proposed action, "taken together with cumulative effects, is likely to jeopardize the continued existence of listed species."[71] Similarly, in administering the National Environmental Policy Act, the Council on Environmental Quality is charged with assessing the cumulative impacts of proposed actions.[72]

In contrast to environmental law, traditional land-use law has not been nationalized. Indeed, "environmental policy and land-use policy in the United States remain . . . separate and distinct fields, created and implemented by different levels of governments and studied by different sets of academics and professionals."[73] The next section addresses some of the implications of this distinction.

C. The Cumulative Effects of NIMBY: Beyond the Backyard

The local land-use regulatory process is, by design, quite limited in scope. Land-use plans traditionally account for land located within municipal

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617–19 (2000), was not an "economic activity." Both cases, nonetheless, affirmed the general authority of Congress to regulate economic activity that "substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 558–59; *accord Morrison*, 529 U.S. at 609.

[69] Ruhl & Salzman, *supra* note 62, at 93; *see also* Joseph H. Guth, *Cumulative Impacts: Death-Knell for Cost–Benefit Analysis in Environmental Decisions*, 11 BARRY L. REV. 23, 49–52 (2008) (discussing cumulative impacts in federal environmental legislation, including the Clean Air Act National Ambient Air Quality Standards, CWA water-quality standards, ESA, and federal cap-and-trade systems).

[70] *See* Ruhl & Salzman, *supra* note 62, at 95 (citing 33 U.S.C. § 1344(e)(1) (2006)).

[71] 50 C.F.R. § 402.14(g)(4) (2011); *see also* Ruhl & Salzman, *supra* note 62, at 95 n.152 ("The agency defines cumulative effects as 'those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area.'" (quoting 50 C.F.R. § 402.02)).

[72] 40 C.F.R. § 1508.25.

[73] Kayden, *supra* note 4, at 460–62; *see also* William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 98 (1999) (noting that, despite decades of federal environmental regulation, "land use decisions and processes have remained quintessentially within the province of local governments"); Keith H. Hirokawa, *Sustaining Ecosystem Services Through Local Environmental Law*, 28 PACE ENVTL. L. REV. 760, 773–77 (2011) (describing the rise of local environmental law and contrasting it with traditional federal environmental law); Tarlock, *supra* note 4, at 652 (highlighting the regulatory disparity between national environmental objectives and local land-use authority).

boundaries;[74] land-use decisions promote the welfare of the local community, often at the expense of broader national policies or goals.[75] In the late 1960s, the term "exclusionary zoning"[76] was coined to describe the way in which traditional land-use regulations systematically exclude low-income persons from many residential communities.[77]

In addition to the poor, localities routinely use their zoning powers to exclude an extensive array of locally undesirable land uses, including group homes for the disabled,[78] cell phone towers,[79] and distributed-renewable-energy facilities, such as backyard wind turbines and rooftop solar panels.[80] This Article, therefore, uses the term "restrictive zoning" to encompass the use

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[74] *See* Kayden, *supra* note 4, at 449–50; Ostrow, *supra* note 2, at 294.

[75] *See* Griffith, *supra* note 6, at 526 (noting that traditional municipal law does not require localities to consider the extralocal impact of their decisions); Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 659 (1997) (noting that "[l]and use decisions are generally made solely by local officials elected by and responsible only to citizens within the local municipality" but nonetheless "impose burdens on citizens outside the local municipality").

[76] Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 767 (1969); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 561 (2007) ("While there is no universally agreed-upon definition of 'exclusionary zoning,' the term generally refers to zoning ordinances and planning codes 'that have the intent or effect of excluding disadvantaged groups, particularly low- and moderate-income people and racial minorities, from a locality.'" (quoting Ken Zimmerman & Arielle Cohen, *Exclusionary Zoning: Constitutional and Federal Statutory Responses*, *in* THE LEGAL GUIDE TO AFFORDABLE HOUSING 39, 41 (Tim Iglesias & Rochelle E. Lento eds., 2005))).

[77] *See* MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* 143 (2008) (noting that municipalities are given substantial discretion to use zoning to exclude low-income individuals); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 365–74, 382–84 (1990); William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 326–31 (2004) (describing the growth of single-family residences and local zoning as a means for excluding low-income individuals).

[78] *See* Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 418 (1986) (noting local opposition to a wide variety of group homes, including homes for "the elderly, halfway houses for prisoners, residential treatment facilities for alcoholics and drug addicts, . . .[homeless] shelters . . . , [and] group homes for the developmentally disabled").

[79] *See* Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 455–57 (2005) (describing NIMBY opposition to telecommunications towers); Salkin & Ostrow, *supra* note 28, at 1088–91 (same).

[80] *See* WOLF, *supra* note 77, at 147–48; Sara C. Bronin, *Curbing Energy Sprawl with Microgrids*, 43 CONN. L. REV. 547, 571–72 (2010) (describing local opposition to renewable- and alternative-energy projects, including wind and solar installations); Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 UTAH L. REV. 1223, 1238–42 (discussing local opposition to distributed renewables); Salkin & Ostrow, *supra* note 28, at 1067–76 (assessing local opposition to wind turbines).

of the local zoning authority to exclude undesirable facilities, as well as affordable housing.

That local zoning produces restrictive land-use patterns is hardly surprising. In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court expressly rejected the notion that a locality should take regional needs into consideration in devising its zoning ordinances.[81] Instead, the Court maintained that "the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions."[82] The Court's decision condoned an intentionally parochial system that relies upon local political boundaries, rather than natural geographic boundaries, to determine the scope of land-use regulatory authority.[83]

Where the local land-use process is dominated by NIMBY sentiment (as is the case in many elite suburban communities),[84] local residents have the economic incentive and legal authority to exclude undesirable developments, without regard for the impact on regional or national land-use priorities.[85] Even diverse localities, ones that do not fall within the affluent suburban model, may have a proclivity toward restrictive zoning. In a recent study of zoning decisions in New York City, Professors Hills and Schleicher concluded that the *seriatim* method that cities use to make land-use decisions systematically overprotects incumbent land users against new entrants, particularly in high-value housing areas.[86] As Professors Hills and Schleicher observe:

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[81] 272 U.S. 365, 389 (1926).

[82] *Id.*

[83] WOLF, *supra* note 77, at 137.

[84] According to Professor William Fischel, small local governments are often responsive to their largest and most motivated constituency—homeowners. *See* FISCHEL, *supra* note 22, at 5–6; *accord* Roderick M. Hills, Jr. & David Schleicher, *Balancing the "Zoning Budget,"* 61 CASE W. RES. L. REV. (forthcoming 2012) (manuscript at 11–12), *available at* http://ssrn.com/abstract=1816368 (describing homeowner opposition to new development) (footnotes omitted)).

[85] Incumbent property owners tend reflexively to resist all new development, even development that would *increase* local property values. Ostrow, *supra* note 2, at 298–300; Peñalver, *supra* note 3, at 831–32; Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1655–56 (2006) (arguing that NIMBYs are motivated both by a desire to protect property values and by a desire to preserve community character); *see also* Ashira Pelman Ostrow, *Minority Interests, Majority Politics: A Comment on Richard Collins' "Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity,"* 86 DENV. U. L. REV. 1459, 1467–68 (2009) (illustrating the impact of NIMBYism in preventing arguably beneficial facilities from being constructed outside of Telluride).

[86] Hills & Schleicher, *supra* note 84 (manuscript at 9).

> The essence of the problem is that the neighbors who are physically close to parcels proposed for additional housing generally have strong incentives and organizational capacity to oppose changes in the zoning status quo. . . . By contrast, the persons benefited by [these] proposals . . . are dispersed and disorganized.[87]

As a result of this asymmetry, the problems of locating development inside a city frequently parallel those caused by suburban exclusionary zoning.[88]

While entirely rational from the perspective of an individual homeowner and of the community,[89] restrictive zoning across multiple jurisdictions results in the systematic exclusion of certain land uses, and users, from large parts of a region with significant extralocal social and economic consequences. To illustrate, consider two contexts in which the cumulative impact of restrictive local zoning policies generates land-use patterns that conflict with national policy goals: (1) the development of affordable housing and (2) the development of multijurisdictional physical infrastructure, including energy infrastructure and telecommunications facilities.

1. Confronting the National Housing Crisis

As the 2007–2008 subprime-mortgage crisis and ensuing economic recession strikingly revealed, the modern real-estate-finance market is national in scope.[90] When mortgages are securitized, a default in one jurisdiction affects investors throughout the country, with an obvious impact on interstate commerce.[91] The national foreclosure crisis has "drained household wealth,

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[87] *Id.* (manuscript at 5–6).

[88] For an overview of the interplay between NIMBY and affordable housing, see Iglesias, *supra* note 76, at 566; and Peter W. Salsich, Jr., *Toward a Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation in Housing*, 42 WAKE FOREST L. REV. 459, 497–98 (2007).

[89] *See* Fischel, *supra* note 4, § 2, at 3 (arguing that NIMBY is a rational homeowner response).

[90] *See* Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 MO. L. REV. 1031, 1033–34 (2007) (describing the rise of a national and global market for American mortgages); Prentiss Cox, *Foreclosure Reform amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 743 (2008) (noting proposals to increase uniformity in foreclosure procedures "to accompany the increasing national or even global character of real estate finance markets"); Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve from Abusive Foreclosure Practices*, 94 MINN. L. REV. 1269, 1290 & n.165 (2010) (citing sources that demonstrate that real estate finance has become national and argue for national regulation).

[91] *See generally* Michael H. Schill, *The Impact of the Capital Markets on Real Estate Law and Practice*, 32 J. MARSHALL L. REV. 269 (1999) (providing an overview of the way in which real estate markets have been transformed by securitization of mortgages). On the connection between the securitization of sub-prime mortgages and the financial crisis, see Shelby D. Green, *Disquiet on the Home Front: Disturbing Crises in the*

ruined the credit standing of many borrowers and devastated [a disproportionate number of minority] communities."[92] It has also thrust the challenge of developing affordable housing back onto the national agenda.

In the wake of the foreclosure crisis, the federal government has enacted a variety of programs designed to subsidize the development of affordable housing.[93] This flurry of programs is but a continuation of a decades-old national housing policy aimed at increasing the supply of affordable housing.[94] The United States Housing Act of 1937 declared its intent "to promote the general welfare of the Nation by employing its funds and credit . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income."[95] Since that time, the federal government has spent tens of billions of dollars every year on a baffling array of housing programs and subsidies.[96]

Nation's Markets and Institutions, 30 PACE L. REV. 7, 10 (2009) ("High leveraging by poor credit risks in real estate markets . . . promoted instability in both the housing and financial markets."); Claire A. Hill, *Why Didn't Subprime Investors Demand a (Much Larger) Lemons Premium?*, LAW & CONTEMP. PROBS., Spring 2011, at 47, 47–48 (discussing the subprime-mortgage crisis as the cause of the current financial and foreclosure crisis); Katherine L. Lewis, Note, *Rebuilding a House of Cards: Envisioning Sustainable Federal Housing Policy*, 35 WASH. U. J.L. & POL'Y 473, 497–98 (2011) (noting that falling home prices and defaults on bad loans damaged the national subprime-mortgage market, and helped cause a financial crisis).

[92] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2011, at 4 (2011), *available at* http://www.995hope.org/wp-content/uploads/2011/07/SON_2011.pdf; *accord* Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL'Y 243, 269 (2010) ("The foreclosure crisis and its effect on tenants does not just impact the local community, but has also had a national impact."); Marshall, *supra* note 90, at 1289–90 (discussing how foreclosures have damaged the national economy); Diana A. Silva, Note, *Land Banking as a Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 627–28 (2011) (discussing the foreclosure crisis as a problem that has spread beyond economically depressed urban cities).

[93] *See* Nicholas J. Brunick & Patrick O'B. Maier, *Renewing the Land of Opportunity*, 19 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 161, 184–85 (2010) (listing Obama Administration proposals to facilitate affordable housing); Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 193, 206 (2011) (describing efforts to overcome challenges to the Low Income Housing Tax Credit); Murray S. Levin, *Digest of Selected Articles*, 39 REAL EST. L.J. 542, 544–45 (2011) (describing the National Housing Trust Fund, which was created under the Housing and Economic Recovery Act of 2008 but is currently unfunded); Lewis, *supra* note 91, at 499–503 (listing government responses to housing-market problems, including a commitment to affordable housing).

[94] *See, e.g.*, Levin, *supra* note 93, at 542 ("Since the Great depression, U.S. federal policy has promoted affordable housing for the poor."); Lewis, *supra* note 91, at 483–89 (describing federal efforts to increase affordable rental housing and home ownership for those with low incomes). *See generally* Edson, *supra* note 93 (discussing the history of public housing in the United States).

[95] Pub. L. No. 75-412, § 1, 50 Stat. 888, 888 (codified as amended at 42 U.S.C. § 1437(a)(1)(A) (2006)).

[96] David J. Reiss, *First Principles for an Effective Federal Housing Policy*, 35 BROOK. J. INT'L L. 795, 795 (2010). *See generally* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES (2d ed. 2010) (surveying policies and programs designed to provide affordable housing to Americans); *Center Mission & Goals*, NAT'L HOUSING CONF., http://www.nhc.org/about/Center-Mission-Goals.html (last visited Aug. 22, 2012) ("[T]he Center

Despite this expenditure, the gap between supply and demand of affordable housing continues to grow.[97] Even where federal funds are available, exclusionary zoning policies make it extremely difficult to site affordable-housing developments.[98] Euclidean zoning is premised on the notion that certain high-value land uses should be insulated from other, less desirable land uses. In *Village of Euclid v. Ambler Realty Co.*, the Court famously described multifamily housing as "a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the [single-family] district."[99] Exclusionary zoning ordinances and planning codes typically exclude multifamily dwellings, impose minimum building- and lot-size requirements, and restrict the number of permitted bedrooms.[100]

The exclusionary pattern of development gained national attention with the *Mount Laurel* litigation,[101] in which the Supreme Court of New Jersey required every municipality to provide affordable housing for its "fair share" of the regional demand.[102] In contrast to the *Euclid* Court, the *Mount Laurel* court required municipalities to exercise their land-use regulatory authority to promote the welfare of the *state* as a whole, rather than exclusively to benefit their own residents.[103] The ensuing decades have proven that *Mount Laurel*'s

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helps to develop effective policy solutions at the national, state and local levels that increase the availability of affordable homes.").

97 JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 92, at 27 ("In 1999, 8.5 million extremely low-income renter households . . . competed for 3.6 million [affordable and available] units . . . . By 2009, the mismatch had grown to 10.4 million extremely low-income renter households and just 3.7 million affordable and available units." (citation omitted)).

98 *See* Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 78, 79 (2002); Iglesias, *supra* note 76, at 566 ("Attempts to site affordable housing in 'established neighborhoods' provokes stereotypes of 'those people' who, it is feared, will bring chaos to an otherwise stable and wholesome social order in the neighborhood.").

99 272 U.S. 365, 394 (1926).

100 Iglesias, *supra* note 76, at 561; *see also* Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 452 (2006) (stating that antidiscrimination laws force communities wishing to exclude to use proxies, such as single-family homes on large lots in the suburbs).

101 *See* Hills Dev. Co. v. Township of Bernards (*Mount Laurel III*), 510 A.2d 621 (N.J. 1986); S. Burlington Cnty. NAACP v. Township of Mount Laurel (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983); S. Burlington Cnty. NAACP v. Township of Mount Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975); *see also* Salsich, *supra* note 88, at 473 ("The *Mount Laurel* litigation and similar efforts in other states became the focal point for advocates of affordable housing . . . because the Supreme Court had ruled a few years earlier that there was no federal constitutional right to housing.").

102 *Mount Laurel I*, 336 A.2d at 724–25.

103 *See id.* at 726 ("[W]hen regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.").

fair-share approach is the exception, rather than the rule. The regional approach to affordable housing has been difficult to implement in New Jersey itself[104] and has been ignored by the vast majority of states.[105]

2. *The Infrastructure Challenge*

a. *Energy Security as a National Policy Goal*

On August 14, 2003, cascading power failures swept across the northeastern United States and parts of Canada, raising serious concerns over the security and reliability of the nation's energy infrastructure.[106] Energy security has been a national policy goal for more than thirty-five years.[107] Every President from Richard Nixon to Barack Obama has made transitioning to a clean-energy economy a national priority.[108] Congress has supported the development of renewable energy through legislation such as the Public Utility Regulatory Policies Act of 1978 (PURPA), which required utilities to purchase electricity generated from qualifying facilities, including alternative

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[104] *See* David N. Kinsey, *The Growth Share Approach to* Mount Laurel *Housing Obligations: Origins, Hijacking, and Future*, 63 RUTGERS L. REV. 867 (2011) (discussing the battle over the formula for determining affordable-housing needs in New Jersey); Alan Mallach, *The* Mount Laurel *Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 851–59 (2011) (detailing many challenges to the implementation of the New Jersey Fair Housing Act since 2002); Matthew Shiers Sternman, Note, *Integrating the Suburbs: Harnessing the Benefits of Mixed-Income Housing in Westchester County and Other Low-Poverty Areas*, 44 COLUM. J.L. & SOC. PROBS. 1, 13–18 (2010) (noting factors that have thwarted the New Jersey Fair Housing Act's effectiveness).

[105] *See* John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Do Land Use Regulations that Preclude Reasonable Housing Opportunity Based upon Income Violate the Individual Liberties Protected by State Constitutions?*, 33 U. BALT. L. REV. 153, 170–76 (2004) (discussing efforts to curtail affordable housing in several states); Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning*, 22 HARV. C.R.–C.L. L. REV. 623, 623–25 (1987) (noting that a strong local preference for the ability to exclude renders state courts and state legislatures reluctant to address exclusionary zoning); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 72 (2001) (describing the New Jersey courts' success as "marginal" and noting that no other state court has gone as far as the Supreme Court of New Jersey in encouraging affordable housing).

[106] *See* Joshua P. Fershee, *Misguided Energy: Why Recent Legislative, Regulatory, and Market Initiatives Are Insufficient to Improve the U.S. Energy Infrastructure*, 44 HARV. J. ON LEGIS. 327, 328 (2007); *see also* U.S.–CAN. POWER SYS. OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS 17–19 (2004), *available at* https://reports.energy.gov/BlackoutFinal-Web.pdf (describing causes of the cascading blackout).

[107] E. Donald Elliott, *Why the U.S. Does Not Have a Renewable Energy Policy* 2 (John M. Olin Ctr. for Studies in Law, Econ., and Pub. Policy, Research Paper No. 433, 2011), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1878616.

[108] *Id.*; *see also State of the Union 2011*, WHITE HOUSE, http://www.whitehouse.gov/state-of-the-union-2011 (last visited Aug. 22, 2012).

generators,[109] and the Production Tax Credit (PTC), which subsidized the development of wind energy.[110] Moreover, renewable energy consistently receives overwhelming bipartisan support in national polls.[111]

In recent years, significant increases in installed wind capacity[112] and domestic production of oil and gas have reduced reliance on foreign imports and inched the United States closer to achieving its energy goals.[113] Yet, restrictive zoning and NIMBYism continue to hinder the development of nationwide energy infrastructure.[114] Siting is particularly important to the development of renewable energy. In contrast to traditional generating facilities, which could be built close to demand centers, renewable-energy generators must be built near renewable resources. Often these resources are located in remote areas, far from existing transmission lines.[115] Thus, in addition to siting wind turbines and solar panels, a key challenge for renewable

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[109] Pub. L. No. 95-617, § 210(a), 92 Stat. 3117, 3144 (codified as amended at 16 U.S.C. § 824a-3 (2006)); *see also* Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 909–11 (2011) (describing federal policies that subsidize development of renewables); Jim Rossi, *The Limits of a National Renewable Portfolio Standard*, 42 CONN. L. REV. 1425, 1427 (2010).

[110] Energy Policy Act of 1992 § 1914(a), 26 U.S.C. § 45(a); *see also* Jeffry S. Hinman, *The Green Economic Recovery: Wind Energy Tax Policy After Financial Crisis and the American Recovery and Reinvestment Tax Act of 2009*, 24 J. ENVTL. L. & LITIG. 35, 60 (2009) (crediting the PTC for encouraging growth of installed wind capacity).

[111] *See Energy*, POLLINGREPORT.COM, http://www.pollingreport.com/energy.htm (last visited Aug. 22, 2012) (collecting data from a CNN/Opinion Research Corporation poll indicating that 83% of people favor greater reliance on wind power, a Pew Research Center study indicating that 74% of people favor increased federal funding of wind power, a Pew Research/National Journal Congressional Connection poll indicating that 78% of people favor adoption of federal RPS, and an ABC News/Washington Post poll indicating that 87% of people favor developing more solar and wind power).

[112] U.S. Dep't of Energy, *U.S. Installed Wind Capacity*, WIND POWERING AM., http://www.windpoweringamerica.gov/wind_installed_capacity.asp#current (last updated Apr. 2, 2012) (stating that, between 1999 and 2011, installed wind capacity in the United States increased from approximately 2500 MW to nearly 47,000 MW).

[113] Clifford Krauss & Eric Lipton, *U.S. Inches Toward Goal of Energy Independence*, N.Y. TIMES, Mar. 23, 2012, at A1; *see also* INT'L ENERGY AGENCY, CLEAN ENERGY PROGRESS REPORT: IEA INPUT TO THE CLEAN ENERGY MINISTERIAL 44–58 (2011).

[114] *See* Steven J. Eagle, *Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation?*, 73 TENN. L. REV. 1 (2005) (assessing transmission-siting challenges and remedies provided by the Energy Policy Act of 2005); Outka, *supra* note 6, at 288 ("[E]ntrenched 'devolved federalism' in the land use context contributes to the persistent disconnection between land use and the larger energy policy discourse."); Chi-Jen Yang, *Electrical Transmission: Barriers and Policy Solutions* 16–18 (CCPP Tech. Policy Brief Series, Paper No. 09-06, 2009), *available at* http://www.nicholas.duke.edu/ccpp/ccpp_pdfs/transmission.pdf.

[115] *See* Salkin & Ostrow, *supra* note 28, at 1062.

energy is siting new interstate transmission lines linking electric generators to population centers.[116]

In the Energy Act of 2005[117] (EPAct), Congress granted FERC the authority to preempt state siting authority for certain transmission lines and for liquefied-natural-gas (LNG) terminals.[118] Thus far, FERC has not had much success siting transmission lines[119] or liquefied-natural-gas-terminals.[120] Navigating the decentralized siting process continues to hinder the development of a modern, secure smart grid.

b. Process Preemption in Telecommunications Siting

A decade earlier a similar tension between local land-use authority and national land-use priorities prompted Congress to include a National Wireless Telecommunications Siting Policy as part of the Telecommunications Act of 1996.[121] The Telecommunications Siting Policy bridges the national–local

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[116] *See* Eagle, *supra* note 114, at 2–3; Klass & Wilson, *supra* note 6 (manuscript at 41–42); Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1016 (2009) (noting that existing transmission grids cannot accommodate additional renewable-energy resources); Salkin & Ostrow, *supra* note 28, at 1062–63 (describing obstacles to wind energy, including NIMBY, inadequate transmission, and the intermittent nature of wind as an energy source).

[117] Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 16, 22, 26, and 42 U.S.C.).

[118] *See* Energy Policy Act of 2005 sec. 1221(a), § 216(b), 16 U.S.C. § 824p(b) (2006) (providing FERC with power to preempt state siting authority in "national interest electric transmission corridor[s]"); *see also* Jacob Dweck et al., *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473, 474 (2006); R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPAct*, 108 COLUM. L. REV. 404, 408 n.29 (2008) ("Concerns about the deleterious effects of local holdup, or a . . . NIMBY[] mentality, appear throughout the legislative history of EPAct." (citing H.R. REP. No. 108-65, pt. 1, at 170 (2003); and 151 CONG. REC. S7267 (daily ed. June 23, 2005) (statement of Sen. Craig L. Thomas))).

[119] Klass & Wilson, *supra* note 6 (manuscript at 12); Rossi, *supra* note 116, at 1033–35.

[120] *See* Joan M. Darby et al., *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005—Consultation, Preemption and Cooperative Federalism*, 6 TEX. J. OIL GAS & ENERGY L. 335, 339, 384 (2010–2011) (concluding that the changes enacted pursuant to EPAct have not made the LNG approval process quicker or more organized); Sheila Slocum Hollis, *Liquefied Natural Gas: "The Big Picture" for Future Development in North America*, 2 ENVTL. & ENERGY L. & POL'Y J. 5, 18, 22 (2007) (explaining that local opposition to LNG terminal construction is common); James C. Erdle, Jr., Note, *Controlling LNG:* AES Sparrows Point LNG, LLC v. Smith, *527 F.3d 120 (4th Cir. 2008)*, 29 ENERGY L.J. 695, 702 (2008) (concluding that deference to states' coastal-zone-management plans enables states to block construction of LNG terminals); *Public Concerns*, FED. ENERGY REG. COMMISSION, http://ferc.gov/industries/gas/indus-act/lng/public.asp (last updated June 28, 2010) (describing reasons for controversy surrounding proposed LNG terminals).

[121] *See* Ostrow, *supra* note 2, at 292–93 (citing H.R. REP. No. 104-204, pt. 1, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61).

divide using what I have previously described as "process preemption" to streamline the telecommunications-siting and permitting process.[122] In a process-preemption regime, Congress imposes baseline *federal* requirements on the *local* siting process.[123] Within the federal framework, local officials retain substantial discretion to shape and customize the broad federal policy guidelines in response to community preferences.[124]

Prior to the passage of the Telecommunications Siting Policy, inconsistent local permitting processes and strong local opposition significantly delayed and often prevented cell-phone-tower siting.[125] Recognizing the importance of developing a nationwide telecommunications network, the House of Representatives first considered granting the Federal Communications Commission (FCC) exclusive siting authority over telecommunications towers. The House Facilities Siting Policies called for the FCC to establish a negotiated rule-making committee to develop substantive policies related to wireless-facilities siting that would consider both the national interest in enhancing coverage and the legitimate interests of state and local governments in regulating the use of land within their own borders.[126] Like the EPAct, this proposal would have entirely preempted the local land-use process, replacing local zoning officials with federal administrative agents. In contrast, the corresponding Senate bill would have left siting authority exclusively under the control of local authorities.[127]

The House–Senate conference committee adopted a compromise, enacting a Telecommunications Siting Policy that imposes federal constraints on the siting process but leaves primary siting authority in the hands of local regulators.[128] The Siting Policy, thus, allows local regulators to tailor the policy to local conditions and to experiment with siting standards and

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122 Ostrow, *supra* note 2.

123 *Id.* at 289.

124 According to the conference committee report, "The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." H.R. REP. NO. 104-458, at 207–08 (1996) (Conf. Rep.).

125 *See* Ostrow, *supra* note 2, at 317.

126 *See* H.R. REP. NO. 104-204, pt. 1, at 25.

127 *See* S. 652, 104th Cong. (1996) (making no mention of telecommunications siting). *See generally* Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 697–98 (4th Cir. 2000) (per curiam) (noting the difference between the House version, which would have empowered the FCC to directly regulate the siting of towers, and the Senate version, which would have allowed local zoning officials to retain that authority).

128 Ostrow, *supra* note 2, at 318.

strategies.[129] Procedurally, the Telecommunications Siting Policy requires that local governments respond to any siting application "within a reasonable period of time"[130] and that a local government decision to deny a permit "be in writing and supported by substantial evidence contained in a written record."[131]

Under the Telecommunications Siting Policy, state and local governments retain almost complete authority over the substance of local zoning codes. The Siting Policy imposes three substantive constraints on local decision making, preempting local siting decisions that "unreasonably discriminate among providers of functionally equivalent services,"[132] "prohibit[] the provision of personal wireless services,"[133] or vary from FCC regulations governing radio-frequency emissions.[134] Though siting decisions must be supported by "substantial evidence contained in a written record," the decision itself is made in accordance with substantive state and local law.[135] In essence, the Telecommunications Siting Policy sets out the degree of evidence needed to support the zoning decision but does not dictate what type of evidence must be considered.[136]

As an empirical matter, the TCA's process-preemption regime has been a success; since 1996, the number of cell phone towers sited across the country has increased exponentially.[137] The sophisticated national telecommunications network stands in stark contrast to the antiquated and inadequate energy-transmission grid. Yet many questions remain unanswered. Indeed, the questions have yet to be asked: How does the siting policy work? Why does it work? What are the costs and benefits of this regulatory framework as

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[129] *See id.* at 305, 319 (describing how states can experiment with cell-tower siting within the confines of the Telecommunications Siting Policy).

[130] Telecommunications Act of 1996 § 704(a), 47 U.S.C. § 332(c)(7)(B)(ii) (2006).

[131] *Id.* § 332(c)(7)(B)(iii).

[132] *Id.* § 332(c)(7)(B)(i)(I)–(II).

[133] *Id.* § 332(c)(7)(B)(i)(II).

[134] *Id.* § 332(c)(7)(B)(iv).

[135] *See* Eagle, *supra* note 79, at 477 ("[F]ederal law specifies the degree or quantum of evidence needed to legitimize, under federal law, the exercise of legislative powers devolved upon local boards, under state law, to enforce substantive rights established by state law."); *see also* Susan Lorde Martin, *Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation*, 20 FORDHAM ENVTL. L. REV. 427, 433–34 (2010) (citing cases holding that substantial evidence must be based on existing state and local law).

[136] *See* USCOC of Greater Mo. v. City of Ferguson, 583 F.3d 1035, 1042 (8th Cir. 2009); T-Mobile Cent., LLC v. Unified Gov't, 546 F.3d 1299, 1307 (10th Cir. 2008); U.S. Cellular Tel., L.L.C. v. City of Broken Arrow, 340 F.3d 1122, 1133 (10th Cir. 2003); New Par v. City of Saginaw, 301 F.3d 390, 398 (6th Cir. 2002); Town of Amherst v. Omnipoint Commc'ns Enters., 173 F.3d 9, 14–16 (1st Cir. 1999).

[137] Ostrow, *supra* note 2, at 293.

compared with alternative strategies? The next Part considers these foundational questions to develop a theory of land law federalism.

II. FEDERAL LAND LAW: OF MONEY AND POWER

Notwithstanding the rhetoric of local control, modern land-use law involves a significant, though poorly understood, national dimension. Given the variation in form and substance, it might appear, as others have observed, that the federal patchwork lacks internal coherence or underlying logic.[138] This Part argues that the disparate strands of federal land law are, in fact, bound together by a common objective—to account for the cumulative impact of local land-use decisions. In this way, federal land laws counterbalance the development that would result from unfettered local control.

To differentiate between various modes of federal regulation, this Part categorizes federal land laws along substantive and procedural axes. Substantively, federal laws can be classified as (1) pro-development, subsidizing land use that would be overly restricted by local governments, or (2) anti-development, restricting land use that would be excessively permitted by local governments. Procedurally, federal land laws are implemented either (1) directly, by a federal administrative agency, or (2) indirectly, by local officials serving as federal agents.

The notion that nonfederal regulators can, and do, implement federal law is not new.[139] Under the Supreme Court's commandeering doctrine, as developed in *New York v. United States*[140] and *Printz v. United States*,[141] "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[142]

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138 *See supra* notes 15–17.

139 *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 565–66 (2011) (using legislation theory to analyze the varying roles that state actors play in implementing federal statutes); Hills, *supra* note 24, at 815 (analyzing the utility to the federal government of enlisting state actors to accomplish federal objectives); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 64–65 (2011) (describing state and local implementation of federal policy).

140 505 U.S. 144 (1992).

141 521 U.S. 898 (1997).

142 *Id.* at 935. To be sure, the boundaries of the commandeering doctrine are murky. In *Reno v. Condon*, 528 U.S. 141 (2000), the Court held that a federal statute that prohibited state motor vehicle departments from selling drivers' personal information did *not* commandeer state officials. As other scholars have noted, it is not

Congress, however, may offer incentives—financial and regulatory—to persuade states to legislate in accordance with federal interests.[143] Traditionally, these mechanisms have been called "cooperative," although commentators have long noted the noncooperative, or coercive, elements of these regimes.[144] As Professor Roderick Hills first observed:

> There are two mechanisms by which non-federal governments become the agencies of the Congress: first, the Congress can hire state and local officials with federal grants-in-aid, and, second, the federal government can allow state or local law to displace federal regulation that would otherwise preempt such non-federal law if the non-federal law meets the standards established by Congress.[145]

To avoid commandeering concerns, federal policies that are implemented directly by local officials rely upon conditional spending (money) and/or conditional preemption (power) to encourage local land-use regulators to implement federal law.[146] Moreover, federal land laws utilize two distinct forms of conditional preemption. The first, which I label the "federal-regulation model," encourages local implementation by threatening to replace

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clear why "[s]tate authority implicated in performing a background check on state citizens is protected, but state authority implicated in gathering and reporting information about state citizens (e.g., missing children to the federal government, or drivers' information to willing buyers) is not." Ryan, *supra* note 27, at 548; *accord* Erwin Chemerinsky, *Empowering States: A Rebuttal to Dr. Greve*, 33 PEPP. L. REV. 91, 93–94 (2005).

[143] *See New York*, 505 U.S. at 166–69; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1204 n.12 (1999) (describing cooperative federalism as "intergovernmental cooperation . . . under which nonfederal officials implement federal policy").

[144] *See* Adler, *Judicial Federalism*, *supra* note 37, at 385; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1284–91 (2009) (exploring the potential benefits of uncooperative state regimes).

[145] Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 184 (1998). Professor Hills also notes that "Congress may allow non-federal governments to enforce its regulations only if they meet federal standards, and Congress may encourage non-federal governments to submit implementation plans by subsidizing the cost of implementation with federal grants." *Id.*

[146] *New York*, 505 U.S. at 176. In *New York*, New York State challenged a provision of the Low Level Radioactive Waste Policy Act that required states to either (1) regulate low-level radioactive waste according to federal standards or (2) take title to and assume liability for waste produced within the state's borders. *Id.* at 174–75. The Court determined that Congress lacked the power to enact either of these options as mandatory, independent legislation and therefore could not force the states to choose between the two, noting that a "choice between two unconstitutionally coercive regulatory techniques is no choice at all." *Id.* at 176. The Court, therefore, struck down the take-title provision for "commandeer[ing]" the state regulatory apparatus in violation of the Tenth Amendment. *Id.* at 175–77.

state law with federal law.[147] The second form, which I call the "market-alternative model," encourages local implementation by threatening to leave the area unregulated, subject only to the free market.[148]

There are a variety of reasons why Congress chooses to regulate through the states, rather than regulating directly.[149] Perhaps the most basic is as Professor Erin Ryan explains: "Congress creates programs of cooperative federalism in commerce-related realms it could manage from top to bottom—but chooses not to, because the federal government lacks the local expertise, regulatory authority, boots on the ground, or perceived legitimacy—in short, the *capacity*—that state government can provide."[150]

At the outset of this undertaking, a disclaimer is in order. This Part develops a theoretical framework for federal land law. I do not propose a single model or advocate the adoption of a comprehensive national land-use policy along the lines of the failed NLUPA.[151] The first is impossible for practical reasons—by its very nature, land resists generalization.[152] The second is unlikely for political reasons. As Congress's failure to pass climate change legislation reveals, there is little political support for centralization through federal legislation.[153] Instead, this Part is my initial foray into the theory of land law federalism.

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147 *See, e.g.*, Clean Water Act § 402, 33 U.S.C. § 1342 (2006 & Supp. II 2008) (allowing states to submit national pollutant discharge elimination system (NPDES) regulatory plans for federal approval but preempting states with federal enforcement of NPDES regulations in the event of state refusal to submit a plan); Clean Air Act § 107, 42 U.S.C. §§ 7407, 7409 (2006) (inviting states to enforce national ambient-air-quality standards through state implementation plans but providing for federal implementation plans).

148 *See* Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 703–04 (4th Cir. 2000) (per curiam) (characterizing the Telecommunications Act as presenting the states with a choice between regulating cell-phone-tower siting in accordance with federal standards or ceasing all regulation of cell-phone-tower siting); *see also* FERC v. Mississippi, 456 U.S. 742, 766 (1982) (upholding the use of conditional preemption even where Congress "fail[s] to *provide an alternative regulatory mechanism to police the area in the event of state default*" (emphasis added)).

149 *See* Gluck, *supra* note 139, at 565 (summarizing strategic and functional reasons for federal reliance on state implementation of federal programs).

150 Ryan, *supra* note 139, at 90.

151 *See supra* notes 44–47.

152 *See infra* Part III.C.

153 *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (passing the House with a vote of 219 to 212 but failing to reach a vote in the Senate); Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421, 437 (2011) (criticizing the EPA for only regulating carbon emissions from sources deemed "politically acceptable"); Vivian E. Thomson & Vicki Arroyo, *Upside-Down Cooperative Federalism: Climate Change Policymaking and the States*, 29 VA. ENVTL. L.J. 1, 54–59 (2011) (analyzing state and federal resistance to centralization through comprehensive climate change and energy legislation).

A. Federal Implementation

1. Federal Permitting Schemes

Federal permitting requirements restrict the development of privately owned property, including wetlands and endangered species habitats. For example, section 404 of the CWA requires landowners to obtain federal permits from the U.S. Army Corps of Engineers to discharge dredge and fill materials into "waters of the United States."[154] The regulations state that "[m]ost wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."[155]

Section 9 of the ESA similarly prohibits activities affecting protected species and their habitats, even if privately owned, unless authorized by a permit from the Fish and Wildlife Service or the National Oceanic and Atmospheric Administration.[156] To obtain a permit under the ESA, landowners and developers must prepare habitat-conservation plans that fully describe proposed land-development activities and demonstrate measures that will mitigate their adverse impact on endangered or threatened species.[157]

Federal permitting schemes are generally effective at preventing undesired development;[158] however, critics argue that single-purpose federal agencies are overly zealous in administering the schemes, restricting even socially beneficial development,[159] and that direct federal regulation intrudes upon

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[154] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 404, 86 Stat. 816, 884 (codified as amended at 33 U.S.C. § 1344 (2006)); *see also* 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States"); 33 C.F.R. § 320.4(a) (2011).

[155] 33 C.F.R. § 320.4(b)(1).

[156] Pub. L. No. 93-205, § 9, 87 Stat. 884, 893 (codified as amended at 16 U.S.C. § 1538); *see also* Adler, *Judicial Federalism*, *supra* note 37, at 383.

[157] 16 U.S.C. § 1539(a)(2)(A).

[158] *See* OFFICE OF WATER, ENVTL. PROT. AGENCY, NATIONAL WATER PROGRAM: BEST PRACTICES AND END OF YEAR PERFORMANCE REPORT, FISCAL YEAR 2011, at 85 (2012) (finding that the EPA met its goals for 2011, achieving no net loss of wetlands, and that the EPA had exceeded its commitment on number of acres restored in every year since 2004); Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BIOSCIENCE 360 (2005) (analyzing the effectiveness of the ESA and finding positive correlation between protection under the ESA and increasing population of endangered species).

[159] *See* Zygmunt J.B. Plater, *Endangered Species Act Lessons over 30 Years, and the Legacy of the Snail Darter, a Small Fish in a Pork Barrel*, 34 ENVTL. L. 289, 302–03 (2004) (noting that opponents of the ESA have claimed that it harms "human economic welfare" by restraining development); J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1137–39 (1995) (describing objections of property

local autonomy.[160] Unlike locally elected officials, federal administrators are not politically accountable to the local community and therefore have less incentive to take local preferences into consideration. Thus, even where federal programs enable federal regulators to modify uniform rules through case-by-case permitting schemes, as under the CWA and the ESA, "vast geographical and metaphorical distances separate Washington bureaucrats from the local contexts in which land-use decisions are typically made, and where their consequences, at least on the cost side, are most keenly felt."[161]

2. *Federal Siting Regimes*

In contrast to federal permitting schemes, which intentionally restrict development, federal siting regimes *promote* growth by subsidizing the development of specific land uses. Several federal siting regimes preempt the local zoning process and vest siting authority exclusively in a federal administrative agency. For example, the EPAct grants FERC exclusive authority to site LNG terminals.[162] Despite this authority, commentators observe that state and local actors continue to resist LNG siting, using litigation and drawn-out permitting processes to delay or prevent the development of these facilities.[163]

The Nuclear Waste Policy Act of 1982[164] (NWPA), perhaps the poster child for a failed federal land-use policy, similarly preempts the local zoning process. The NWPA, as amended, charged the Nuclear Regulatory Commission with licensing a single national repository for high-level

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rights advocates to the ESA and the CWA); David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 79–80 (2002) (discussing changes to the federal wetland-permitting process and projecting higher costs for private developers that could make some projects economically infeasible).

[160] *See* Pedersen, *supra* note 31, at 21–23 (identifying political opposition to federal attempts to shape local land use through the CWA and the ESA).

[161] Karkkainen, *supra* note 19, at 80; *accord* Dwyer, *supra* note 19, at 1218 (noting intense conflict over land use at local levels because burdens of use are felt most directly by those living near the land); Hills & Schleicher, *supra* note 84 (manuscript at 10) ("[L]and use disputes involve geographically concentrated harms and widely geographically dispersed benefits . . . ."); Ostrow, *supra* note 2, at 297; Rose, *supra* note 4, at 911 (suggesting that land-use decisions are made at the local level, in part, because these decisions are felt most deeply within the neighborhood).

[162] Energy Policy Act of 2005 § 311(c)(2), 15 U.S.C. 717b(e)(1).

[163] *See supra* note 117–20.

[164] Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101–10270).

radioactive waste at Yucca Mountain, Nevada.[165] From the outset, the Yucca Mountain project faced intense state and local opposition.[166] In 2009, nearly two decades after the site was selected and billions had been spent studying it, the Department of Energy terminated its plans for the Yucca Mountain project.[167]

Because the sample size is so small, and the targeted land use so unavoidably risky, it is difficult to generalize from the federal experience siting LNG terminals and hazardous-waste facilities to other land-use facilities. It is quite possible that federal administrative agencies have the capacity to site less hazardous facilities more effectively. Nonetheless, in comparison to the alternative local-official-as-federal-agent approach, federal implementation is likely to be more costly and to produce less optimal results. Section B turns to the local-official-as-federal-agent alternative.

B. Local Implementation

1. Conditional Funding

When Congress seeks to encourage a state to legislate in accordance with national interests, it may, under its spending power, condition federal funding upon cooperation with the national program.[168] Although there is a point at which conditional funding becomes coercive, in *South Dakota v. Dole*, the Supreme Court embraced an expansive understanding of Congress's spending power, noting that the Spending Clause empowers Congress to impose conditions on the use of federal funds "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[169]

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[165] Nuclear Waste Policy Act of 1982 § 113(a), 42 U.S.C. § 10133(a); Richard C. Kearney, *Low-Level Radioactive Waste Management: Environmental Policy, Federalism, and* New York, PUBLIUS, Summer 1993, at 57, 59–60.

[166] *See* Marta Adams, *Yucca Mountain—Nevada's Perspective*, 46 IDAHO L. REV. 423, 438–42 (2010) (describing the controversy in Nevada and the delays caused by scientific and environmental studies, and judicial and administrative challenges); Kearney, *supra* note 165, at 60 (describing the contentious siting process at Yucca Mountain).

[167] Ostrow, *supra* note 2, at 310–12.

[168] New York v. United States, 505 U.S. 144, 166–68 (1992); Hills, *supra* note 145, at 184.

[169] 483 U.S. 203, 206 (1987) (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (plurality opinion)) (internal quotation marks omitted). Some scholars have urged the Court to impose stricter limits on congressional power under the Spending Clause. *See, e.g.*, Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 483–85 (2003).

Conditional funding does not commandeer state officials because states can opt out of the funding program and refuse to follow federal directives. Professor Buzbee explains that, "[w]hen a variety of targeted grants or subsidies are available or vulnerable to loss, states and local governments can seek the particular array of programmatic supports that best meet a jurisdiction's interests."[170] Importantly, while conditional spending seeks to guide state and local decision making, the decision-making authority itself remains in the hands of local regulators. Thus, conditional spending schemes leave state and local governments with significantly more discretion than would be the case if the federal government regulated land directly.

Federal grants and spending programs have been used to promote local development in accordance with national environmental, economic, and welfare policy goals. For example, federal transportation policies require state and local officials to engage in land-use planning as a condition to receipt of federal highway funds.[171] The Clean Air Act similarly conditions federal highway funds upon states' adoption of air-pollution-control plans that meet federal requirements.[172] The CWA provides states with federal funds to encourage local land-use planning to prevent nonpoint-source pollution,[173] while the Coastal Barrier Resources Act denies aid for developments in sensitive coastal areas.[174]

In addition, several federal programs bypass the states and channel funds directly to local political units. The federal Transportation Equity Act for the 21st Century provides regional transportation-planning agencies with the authority to fund projects that reduce traffic congestion, to acquire scenic easements, and to create bicycle trails.[175] Federal housing programs provide substantial subsidies to special local government agencies, called housing

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[170] Buzbee, *supra* note 73, at 108.

[171] *See* 23 U.S.C. § 134(i)(4)(A) (2006) (requiring metropolitan-planning organizations to consult with state and local land-use agencies to develop long-range transportation plans). As Professor John Nolon has observed, "The enigma embodied in this requirement is easily described: it requires regional transportation agencies to achieve consistency with land use plans that are predominantly local in nature and not consistent with one another at the regional level." Nolon, *supra* note 4, at 368 n.14.

[172] Clean Air Act Amendments of 1977 sec. 129(b), § 176(c)(1), 42 U.S.C. § 7506(c)(1); *see also* Adler, *Judicial Federalism*, *supra* note 37, at 436–37 (noting that the tenuous connection between highway funds and the Clean Air Act makes this provision vulnerable to federalism challenges under the Spending Clause).

[173] Clean Water Act § 317(c), 33 U.S.C. § 1281(g)(1).

[174] Coastal Barrier Resources Act § 2(b), 16 U.S.C. § 3501(b).

[175] Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified as amended in scattered sections of 23 U.S.C.).

authorities, to enable these authorities to develop and manage housing projects with below-market rent.[176]

Although the early federal housing projects had mixed results,[177] subsequent federal policies aimed at developing mixed-income communities[178] and included funding for the development of regional and local land-use plans.[179] Federal funding for regional land-use planning declined in the 1980s[180] but was revived in 2009 with the formation of the Partnership for Sustainable Communities, an interagency partnership between the U.S. Department of Housing and Urban Development (HUD), the U.S. Department of Transportation (DOT), and the EPA.[181] The Partnership coordinates a host of discretionary grant programs,[182] including the Sustainable Communities Initiative, which supports "regional planning efforts that integrate housing and transportation decisions, and increase the capacity of communities to modernize land use and zoning plans."[183]

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[176] *See, e.g.*, United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437–1437f); *see also* Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 989–90 (2010); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 894–99 (1990).

[177] *See* Ellickson, *supra* note 176, at 989–95; Green, *supra* note 9, at 91–92.

[178] For example, the section 8 voucher program was designed to allow low-income families to obtain housing on the open market. United States Housing Act of 1937 § 8, 42 U.S.C. § 1437f. HOPE VI aimed at inducing local housing authorities to replace failed public-housing projects with mixed-income developments, *see* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993, Pub. L. No. 102-389, tit. II, 106 Stat. 1571, 1579 (1992), and recent legislation required local housing authorities to rent more public-housing units to households whose incomes were not extremely low, *see* Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 513(a), 112 Stat. 2461, 2544–45 (codified at 42 U.S.C. § 1437n(a)(3)).

[179] *See* MARK SOLOF, N. JERSEY TRANSP. PLANNING AUTH., INC., HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS 17 (1998), *available at* http://www.njtpa.org/Pub/Report/hist_mpo/documents/MPO history1998.pdf (summarizing federal legislation that conditioned federal funding on regional planning).

[180] *Id.* at 26.

[181] The Partnership defines "sustainable communities" as "places that have a variety of housing and transportation choices, with destinations close to home." *Sustainable Communities*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, http://www.sustainablecommunities.gov/ (last visited Aug. 22, 2012).

[182] *See Partnership Grants, Assistance & Programs*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, http://www.sustainablecommunities.gov/grants.html (last visited Aug. 22, 2012) (listing federal grants and programs for sustainable communities offered by the Partnership as well as individually by HUD, the DOT, and the EPA).

[183] *See* DEP'T OF HOUS. & URBAN DEV., NOTICE OF FUNDING AVAILABILITY (NOFA) FOR HUD'S FISCAL YEAR 2011: SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM 1 (2011), *available at* http://archives.hud.gov/funding/2011/scrpgprenofa.pdf.

Another interesting example of conditional funding is in the Coastal Zone Management Act of 1972 (CZMA).[184] Unlike other environmental laws that threaten noncompliant states with federal preemption, the CZMA is entirely voluntary.[185] The CZMA provides states with two sets of incentives to encourage them to develop comprehensive coastal-management programs that meet federal approval standards: (a) federal funding and (b) regulatory authority over their coastal zones, including the authority to ensure that federal projects are consistent with the states' plans.[186] The CZMA recognizes the traditional role that local officials play in administering land-use regulations and requires states to create a regulatory framework that assures "the full participation of those local governments and agencies" in implementing the Act.[187] Moreover, the federal standards are broadly drawn, leaving states with substantial discretion to tailor the particular coastal-protection measures they adopt.[188] Although weaknesses in the evaluation process have made it difficult to assess the CZMA's effectiveness,[189] nearly every coastal state has adopted a plan in compliance with federal standards.[190]

2. *Conditional Preemption*

In addition to the carrot of federal funding, federal land laws often include the stick of conditional preemption.[191] Conditional preemption requires the

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184 Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. § 1451–1466 (2006)).

185 *See* Buzbee, *supra* note 73, at 110 (citing 16 U.S.C. § 1455(d)(1)).

186 Ryan, *supra* note 139, at 59–60; *see also* 136 CONG. REC. 26,030, 26,030–67 (1990) (statement of Rep. Walter B. Jones); Buzbee, *supra* note 73, at 111 (noting that the CZMA provides regulatory and financial "incentives to direct development in ways avoiding environmental harms, yet without requiring any federal displacement of local choices").

187 16 U.S.C. § 1455(d)(3)(B).

188 *Id. See generally* NAT'L OCEAN SERV., U.S. DEP'T OF COMMERCE, CZMA SECTION 312 EVALUATION SUMMARY REPORT—2006 (2007), *available at* http://coastalmanagement.noaa.gov/success/media/312summaryreport2006.pdf (identifying challenges for state coastal-management programs and encouraging information exchange).

189 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1045, COASTAL ZONE MANAGEMENT: MEASURING PROGRAM'S EFFECTIVENESS CONTINUES TO BE A CHALLENGE 7 (2008), *available at* http://www.gao.gov/assets/290/280782.pdf.

190 *See* Ryan, *supra* note 139, at 59 ("Thirty-four of thirty-five eligible states have approved coastal-management plans, and Illinois, the remaining state, is presently composing a plan."); *see also* OFFICE OF OCEAN & COASTAL RES. MGMT., U.S. DEP'T OF COMMERCE, UPDATE ON COASTAL ZONE MANAGEMENT ACT PERFORMANCE MEASUREMENT SYSTEM, at ii (2006), *available at* http://coastalmanagement.noaa.gov/resources/docs/npmsupdate.pdf.

191 *See* Hills, *supra* note 145, at 184; Hills, *supra* note 24, at 867 ("[P]rograms for conditional preemption resemble programs for project grants; rather than presenting every state with the same package of conditions and benefits, Congress establishes a set of criteria that each state might be able to meet in a different manner by individually applying to a Federal agency for approval of its implementation plan."); Philip J. Weiser,

states to cooperate in implementing the federal program or be preempted by the federal government.[192] In *New York v. United States*, the Supreme Court held that the Tenth Amendment prohibits Congress from imposing some affirmative duties on nonfederal officials.[193] At the same time, however, the Court maintained that, so long as Congress is authorized under the Commerce Clause to preempt state regulation entirely, it may require states to choose between regulating in accordance with federal standards and having their nonconforming regulations preempted by federal law.[194]

The consequences of refusing to implement the cooperative program, however, vary depending on the form of conditional preemption Congress uses. This section identifies two forms of conditional preemption that appear in federal land law: the federal-regulation model and the market-alternative model. The federal-regulation model of conditional preemption presents states with the following choice: regulate in accordance with federal standards or the federal government will regulate directly.[195] In contrast, the market-alternative model tells states: regulate in accordance with federal standards or do not regulate at all. Congress does not threaten to replace local officials with federal agents. Instead, Congress threatens to leave the field unregulated.[196]

The federal-regulation model appears in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*.[197] In *Hodel*, the Court upheld a provision of the Surface Mining Control and Reclamation Act of 1977[198] (SMCRA) that required mine operators to restore certain land to its pre-mining condition.[199] In essence, the

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Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. REV. 663, 668 (2001) (noting that, through conditional preemption, "Congress either allows states to regulate in compliance with federal standards or preempts state law with federal regulation").

192 Davis, *supra* note 118, at 405; Weiser, *supra* note 191, at 668. *See generally* New York v. United States, 505 U.S. 144, 167–68 (1992) (providing examples of conditional preemption, including the CWA, the Occupational Safety and Health Act of 1970, the Resource Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act).

193 *See New York*, 505 U.S. at 174–75; *see also supra* note 142.

194 *See id.* at 173–74.

195 Davis, *supra* note 118, at 405.

196 *See id.* at 405–06 & n.12 (identifying proposals for eliminating conditional-preemption schemes that do not provide an alternative federal regulatory scheme); *see also* Hills, *supra* note 24, at 926 (criticizing the Court's acceptance of PURPA, which failed to provide a federal regulatory alternative for states that refused to comply); Jared O'Connor, Note, National League of Cities *Rising: How the Telecommunications Act of 1996 Could Expand Tenth Amendment Jurisprudence*, 30 B.C. ENVTL. AFF. L. REV. 315, 346–47 (2003) (describing the use of conditional preemption in the Telecommunications Act).

197 452 U.S. 264 (1981).

198 Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201–1328 (2006)).

199 *See Hodel*, 452 U.S. at 268.

SMCRA told the states: regulate pursuant to our requirements or we will regulate surface mining ourselves.[200] Despite the tradition of localism in land-use law, the Court upheld this use of conditional preemption to invalidate inconsistent state policies.[201]

In *FERC v. Mississippi*, decided one year after *Hodel*, the Court upheld the market-alternative model.[202] PURPA, which was at issue in *FERC*, required states to consider federal standards for regulating utilities. In contrast to the SMCRA, however, the federal government did not provide alternative federal regulations for states that chose not to comply. The Court acknowledged the dilemma created by this form of conditional preemption, stating:

> We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one. And that is particularly true when Congress, as is the case here, *has failed to provide an alternative regulatory mechanism to police the area in the event of state default*.[203]

Nevertheless, the Court determined that Congress may require states to choose between regulating in accordance with federal standards or leaving the field unregulated, subject only to the free market.[204]

a. The Federal-Regulation Model

A number of environmental laws utilize the federal-regulation model of conditional preemption to persuade local officials to administer a federal regulatory program. In general, environmental laws restrict or regulate the use of land so as to protect natural resources or reduce pollution. Because the purpose of these statutes is to restrict development, Congress first offers states the opportunity to comply with federal restrictions and then provides alternative federal regulations should states refuse to cooperate. Regardless of which option a state chooses, the federal purpose is accomplished—

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200 *See id.* at 270–72; *see also* Adler, *Judicial Federalism*, *supra* note 37, at 431 (describing the SMCRA as offering states the alternative of federal regulation if they do not wish to regulate in accordance with the federal scheme).

201 *See* FERC v. Mississippi, 456 U.S. 742, 767 n.30 (1982) (noting that *Hodel* upheld SMCRA's land-use regulations although "regulation of land use is perhaps the quintessential state activity").

202 *Id.* at 766.

203 Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 715 (4th Cir. 2000) (per curiam) (quoting *FERC*, 456 U.S. at 766).

204 *See FERC*, 456 U.S. at 766.

development will be restricted either by states complying with federal requirements or by the federal regulatory alternative.

The Clean Air Act, for example, incentivizes state implementation of federally imposed standards by threatening to replace state plans and local discretion with federal plans.[205] The Act affords state and local regulators substantial discretion to allocate criteria pollutants, thus enabling local officials to tailor patterns of development, building codes, public transportation, farming practices, and wetland drainage to meet federal pollution-emission standards.[206] Yet, if a state fails to complete a plan that complies with all requirements of the Act, the federal government may step in and implement a federal plan.[207] Under either scenario, air pollution will be regulated.

The CWA's Stormwater Phase II Rule, which regulates the storm-water discharges of small municipalities, provides another example of this form of conditional preemption.[208] Under the Phase II Rule, municipalities must develop individually tailored storm-water-management programs that meet six minimum federal criteria or submit to a more complex federal permitting process.[209] The Ninth Circuit sustained the Phase II Rule against a Tenth Amendment challenge because the Phase II Rule gave municipal operators a choice: implement the regulatory program required by the Phase II Rule or become subject to a federal permitting scheme.[210] Here, too, the national objective is achieved—water pollution is regulated regardless of an individual municipality's choice.

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205 *See supra* notes 48–51.

206 *See* Doremus & Hanemann, *supra* note 36, at 828.

207 Clean Air Act § 110(c), 42 U.S.C § 7410(c) (2006).

208 40 C.F.R. § 122.34 (2011). *See generally* John H. Minan, *Municipal Separate Storm Sewer System (MS4) Regulation Under the Federal Clean Water Act: The Role of Water Quality Standards?*, 42 SAN DIEGO L. REV. 1215 (2005) (providing an overview of the CWA's municipal-storm-water regulations); Ryan, *supra* note 139, at 56 (noting that the regulation of municipal storm water sits "vexingly at the crossroad between land uses regulated locally and water pollution regulated federally").

209 40 C.F.R. § 122.34. Specifically, the municipal program must contain the following elements: (1) public education and outreach on storm-water impacts, (2) public involvement/participation, (3) illicit-discharge detection and elimination, (4) construction site storm-water-runoff control, (5) post-construction storm-water management in new development and redevelopment, and (6) pollution prevention/good housekeeping for municipal operations. *Id.*

210 *See* Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 847 (9th Cir. 2003) ("With the Phase II Rule, EPA gave the operators of small MS4s a choice: either implement the regulatory program spelled out by the Minimum Measures described at 40 C.F.R. § 122.34(b), or pursue the Alternative Permit option and seek a permit under the Phase I Rule as described at 40 C.F.R. § 122.26(d).").

b. The Market-Alternative Model

In contrast, under the market-alternative model of conditional preemption, local officials must regulate in accordance with federal standards or leave the substantive area unregulated and subject only to the free market. In essence, Congress permits states to regulate the protected land use so long as states comply with the federal standards. If states refuse to comply, Congress is content to leave the area unregulated, assuming that the free market will produce at least as much, and likely more, of the desired land use.

Several federal siting regimes utilize the market-alternative model. Federal siting regimes are designed to promote land use, albeit a particular type of land use. For example, the Telecommunications Siting Policy is expressly designed to streamline the local land-use-permitting process so as to facilitate the rapid deployment of a national telecommunications network.[211] To that end, the Telecommunications Siting Policy establishes threshold federal requirements for cell-phone-tower siting.[212] State and local land-use regulators must comply with these federal requirements or refrain from regulating the siting of cell phone towers entirely.[213] As the Fourth Circuit explained in considering a Tenth Amendment challenge to the Telecommunications Siting Policy, "Because Congress could validly prohibit states from regulating the siting of telecommunications towers, it may constitutionally offer states a choice between (1) being subject to such a prohibition or (2) processing permit applications for communications towers in accordance with [federal standards]."[214]

RLUIPA presents localities with a similar option in regulating religious land uses. RLUIPA is intended to protect religious land use in the zoning process.[215] RLUIPA, thus, prohibits local governments from "implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates that [the regulation] . . . (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental

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211 *See supra* Part I.C.2.b.

212 *See* Telecommunications Act of 1996 § 704(a), 47 U.S.C. § 332(c)(7)(B)(i)–(iii).

213 *See id.* § 332(c)(7)(B)(v) (giving the right to sue to persons adversely affected by an action of a state government that is inconsistent with the statute's limitations).

214 Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 715 (4th Cir. 2000) (per curiam).

215 *See* Religious Land Use and Institutionalized Persons Act of 2000 § 2, 42 U.S.C. § 2000cc.

interest."[216] Zoning boards must comply with the federal requirements or leave religious land use unregulated.

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Of course, the choice presented to local governments—regulate in accordance with federal standards or abandon zoning—is largely illusory. No local government would choose to entirely relinquish its land-use regulatory authority, even over a limited category of land uses, such as cell phone towers, group homes for the disabled, or churches. Indeed, Judge Niemeyer, the only judge to have determined that the Telecommunications Siting Policy "commandeer[ed]" local officials in violation of the Tenth Amendment, emphasized the coerciveness of this "choice" in light of the importance of land-use regulation to local governments.[217] According to Judge Niemeyer:

> To suggest that a local governmental body withdraw from land-use regulation and leave the construction of structures in the community to the whims of the market is nothing short of suggesting that it end its existence in one of its most vital aspects.
>
> . . . If a state, county, or town abandoned its local land-use power to regulate the siting of communications facilities, any number of telecommunications towers and other communications facilities could be erected in the midst of residential neighborhoods, next to schools, or in bucolic natural settings such as in the woods or on top of mountains—areas held in high value by most communities. Abandoning land use power in this way would put at risk the property value of every home in the jurisdiction and create the possibility that aesthetic quality of every area in the jurisdiction would be destroyed.[218]

In contrast to Judge Niemeyer, most courts have concluded that requiring land-use authorities to regulate in accordance with federal standards does not commandeer state officials.[219] Moreover, this Article maintains that, in some

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[216] *Id.* § 2000cc(a)(1).

[217] *Petersburg Cellular P'ship*, 205 F.3d at 699–705 (quoting New York v. United States, 505 U.S. 144, 175 (1992)) (internal quotation marks omitted). Judge Niemeyer concluded that the Telecommunications Siting Policy violates the Tenth Amendment because "[t]he abandonment of land use control for towers is not a viable option for state and local governments." *Id.* at 703; *accord* Clive B. Jacques & Jack M. Beermann, *Section 1983's "and Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. REV. 735, 779 (2001) (arguing that the Telecommunications Act's cellular-tower-siting provisions commandeer state agents in violation of the Tenth Amendment).

[218] *Petersburg Cellular P'ship*, 205 F.3d at 703.

[219] *See, e.g.*, Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000) (holding that 47 U.S.C. § 332(c)(7)(B)(iv) complies with the Tenth Amendment both facially and as applied); New Cingular Wireless

instances, local governments *should* be "coerced" into considering the broader implications of their local land-use decisions.[220] To that end, the next Part introduces a local-official-as-federal-agent model that permits the federal government to establish standards that promote the national welfare without sacrificing the many benefits of decentralized governance.[221]

III. LOCAL OFFICIALS AS FEDERAL AGENTS

Having established a normative and doctrinal justification for the use of federal law to address cumulative land-use problems in Part I and investigated the mechanics of federal land law in Part II, this Part considers the most basic question of federalism; namely, how should land-use regulatory authority be allocated between the national government and its subnational units?[222]

To answer this question, this Part assesses the comparative regulatory capacity at each level of government—federal, state, and local—to address

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PCS, LLC v. City of Cambridge, No. 10-11541-NMG, 2011 WL 6755835 (D. Mass. Dec. 22, 2011) (holding that the substantial-evidence requirement passes muster under the Tenth Amendment); United States v. Maui County, 298 F. Supp. 2d 1010, 1015–16 (D. Haw. 2003) (finding similarity between RLUIPA and the TCA in that both are valid despite the fact that they intrude on some local land-use decisions); USOC of Greater Iowa, Inc. v. City of Bellevue, 279 F. Supp. 2d 1080, 1087 (D. Neb. 2003) (rejecting a Tenth Amendment challenge to the "in writing" and "substantial evidence" requirements of the TCA); SBA Commc'ns, Inc. v. Zoning Comm'n, 164 F. Supp. 2d 280, 289 (D. Conn. 2001) (holding that the substantial-evidence standard does not violate the Tenth Amendment); Am. Tower, L.P. v. City of Huntsville, No. CV-99-B-2933-NE, 2000 WL 34017802, at *34 (N.D. Ala. Sept. 29, 2000) (holding that the TCA does not violate the Tenth Amendment). The fact that the Telecommunications Siting Policy blends substantive and procedural constraints does not impact this analysis. As the Supreme Court held in *FERC*, "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks." FERC v. Mississippi, 456 U.S. 742, 771 (1982).

220 *Accord* Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 608 (2008) (arguing that ceiling preemption is a proper response to NIMBYism); Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 166, 176 (Richard A. Epstein & Michael S. Greve eds., 2007) ("NIMBY laws present a classic example of the prisoners' dilemma: everyone has an incentive to export the costs of an activity [such as a locally undesirable land use], but if everyone pursues this strategy, the benefits associated with the activity are lost to all."); Ostrow, *supra* note 2, at 324 (noting that, absent a federal policy compelling local decision makers to consider the broader implications of their decisions, they are often unwilling to do so).

221 *See* Ostrow, *supra* note 2, at 324–25.

222 *See supra* note 25.

cumulative land-use problems.[223] Local zoning is far too narrow in scope, and local governments lack the legal authority and political and economic incentives to consider the cumulative impact of local decisions and respond accordingly. At the same time, centralized federal agencies lack the detailed knowledge necessary to make context-specific land-use decisions.[224] The very distance that enables the national government to establish general policies in furtherance of national goals prevents the federal government from efficiently and effectively implementing these polices at the local level, where the costs are concentrated.[225]

This Part argues that a local-official-as-federal-agent model of land use law is likely to generate land-use decisions that are consistent with national policy goals but sensitive to the local context. Section A describes the passive role that states have traditionally played in land-use law. Section B illustrates the relative institutional capacity of the federal government to respond to cumulative, multijurisdictional land-use problems. Section C emphasizes the importance of preserving a primary role for local officials in implementing land-use law. Local officials who are part of the community and politically accountable to it are in the best position to make the types of detailed, context-specific decisions that arise in regulating the use of land.[226]

Though localities are, at least initially, created by the state, they are ultimately more than mere agents of the state.[227] Particularly in the context of

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[223] "Regulatory capacity is the power to make things happen—by whatever resources or institutional feature enables either side to accomplish an objective that the other cannot do as well." Ryan, *supra* note 139, at 90.

[224] *See* Hills, *supra* note 143, at 1206 ("Congress is simply not as well-suited as the states for creating institutions that deliver local public goods to the residents of a state in a politically accountable and cost-effective way."); Selmi, *supra* note 4, at 616 ("Largely by highlighting its responsiveness to local conditions, local government has retained almost full authority over land use . . . .").

[225] *See supra* note 161.

[226] *See* Dwyer, *supra* note 19, at 1218 ("Precisely because they are local, and locally accountable, state and local officials bring that knowledge and orientation to implementation and enforcement."); Freyfogle, *supra* note 5, at 580 ("Sensible land use decisions require knowledge of the land itself, in its many variations. . . . Local people typically know the land better than outsiders."); Keith H. Hirokawa, *Property Pieces in Compensation Statutes: Law's Eulogy for Oregon's Measure 37*, 38 ENVTL. L. 1111, 1142 (2008) (arguing that zoning enables local governments to address issues of local concern and to "create intentional and organized communities"); Ostrow, *supra* note 2, at 296 ("[L]ocal primacy in this area of law stems from a practical recognition that local governments are institutionally better suited to this task than are higher levels of government.").

[227] *See* Briffault, *supra* note 4, at 91 (describing local governments as agents of the state and of the local community); Davidson, *supra* note 26, at 979–80 (describing competing accounts of local governments as agents of the state and as democratically accountable popular governments).

land use, local governments represent local communities. The Supreme Court set the tone in *Village of Euclid v. Ambler Realty Co.* when it emphasized the municipality's autonomous political identity separate from the state and from the larger region.[228] When local officials implement federal land-use policies, they act as double agents, serving both the federal government and local community.[229] As federal agents, local officials further national policy goals, but as agents of the community, local officials actively tailor broad national land-use policies to accommodate local geographic and economic conditions and community preferences.

A. The Silent States

Although zoning has traditionally been considered a local endeavor, the legal authority to regulate land derives, in the first instance, from the states' police power. The states, then, are certainly the most obvious choice for engaging in centralized land-use planning. Yet, there are two reasons to be wary of relying primarily on the states to account for cumulative land-use problems. First, states have always retained broad discretion to modify or reduce local land-use authority but have generally refused to do so.[230] In the 1920s, most state legislatures expressly delegated their land-use regulatory authority to localities through the adoption of zoning enabling acts.[231] In 1971, Fred Bosselman and David Callies declared the start of a "quiet revolution,"[232] in which state governments would reclaim their land-use regulatory authority from localities so as to address extralocal problems that exceeded the capacity of individual local governments.[233] More than forty years later, the anticipated revolution has yet to materialize, and there is little reason to think that the

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228 272 U.S. 365, 389 (1926).

229 *See* Gerken, *supra* note 25, at 39–40 (analogizing sub-local officials, such as zoning board members, with servants and arguing that the power of the servant derives in part from serving two masters).

230 *See* Bronin, *supra* note 4, at 268 ("With the power to pass laws, which affect each locality, states have the power to reform the land use regulation system in a significant way to effect change on the wide scale, which the evidence suggests is necessary. Yet no state has demonstrated a willingness to change local land use laws to respond to the mounting evidence against conventional construction.").

231 Griffith, *supra* note 6, at 523; Ostrow, *supra* note 2, at 728.

232 BOSSELMAN & CALLIES, *supra* note 29, at 1.

233 *See id.* at 3 ("[S]tates . . . are the only existing political entities capable of devising innovative techniques and governmental structures to solve problems . . . beyond the capacity of local governments acting alone.").

states are poised to supplant local governments as the primary land-use regulators.[234]

Second, over the next few decades, the vast amount of growth in the United States is predicted to be concentrated within ten megaregions, many of which cross state boundaries.[235] Thus, as the next section explains, it is not clear that individual states will have the regulatory capacity to effectively coordinate land use, even if they were inclined to do so.

B. A National Perspective

Where the cumulative impact of local land-use policies generates substantial extralocal social and economic costs, only the federal government has the legal authority and the financial resources to respond at the appropriate scale.[236] The federal government's capacity to compel states to internalize the costs of their activities has historically been a key justification for federal environmental law.[237] Indeed, as the challenge of siting nationwide infrastructure demonstrates, it is difficult to address interstate and interlocal spillovers within a decentralized regulatory system.[238] In the words of Steven G. Calabresi, "Sometimes variety is not the spice of life; as to some items it may be a downright nuisance and an expensive one at that. National

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[234] *See* Bronin, *supra* note 4, at 232; David L. Callies, *The Quiet Revolution Redux: How Selected Local Governments Have Fared*, 20 PACE ENVTL. L. REV. 277, 296–97 (2002) ("Local land use controls have not withered away . . . . [N]ot only have traditional land use controls such as zoning and more flexible 'growth management' plans and regulations been used, but there is a growing trend toward environmental protection at the local level as well." (footnotes omitted)); Fischel, *supra* note 4, § 3, at 5 ("[W]ithin a few years even its enthusiasts had conceded that the revolution had gotten so quiet as to be inaudible." (citation omitted)); Amnon Lehavi, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 935–37 (2006) (describing changes in zoning and concluding that "states still leave the overwhelming majority of land use regulation to general-purpose local governments"); Saxer, *supra* note 75, at 678 ("Th[e] shift in responsibility from local to state control has not yet occurred as predicted, though some scholars continue to see a trend in growth management programs toward greater state intervention in the local planning and implementation process.").

[235] *See* ROBERT E. LANG & DAWN DHAVALE, CENSUS REPORT NO. 05:01, BEYOND MEGALOPOLIS: EXPLORING AMERICA'S NEW "MEGAPOLITAN" GEOGRAPHY 12–13 (2005), *available at* http://america2050.org/pdf/beyondmegalopolislang.pdf (identifying ten "megapolitan" areas).

[236] *See* Ostrow, *supra* note 2, at 305–06.

[237] *See id.*; Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 (1997) (presenting the classic "race-to-the-bottom" justification for federal environmental law).

[238] *See* Christina C. Caplan, *The Failure of Current Legal and Regulatory Mechanisms to Control Interstate Ozone Transport: The Need for New National Legislation*, 28 ECOLOGY L.Q. 169, 201–02 (2001) (arguing that interstate spillovers cannot be remedied within a decentralized system); Esty, *supra* note 19, at 624 ("[W]hen problems are transboundary in scope . . . decentralized enforcement breaks down entirely."); Ostrow, *supra* note 2, at 305–06.

government eliminates these potential deadweight social costs with general gains in social utility as a result."[239]

The relative institutional capacity of the federal government to account for interstate spillovers will likely increase as the scale of metropolitan governance expands to encompass "megapolitan" regions.[240] Professor Nestor Davidson has argued that the growth of these interstate megaregions may trigger an increased federal role in urban governance as these new regions turn toward the federal government to address complex multijurisdictional regulatory problems, such as climate change, urban sprawl, and the bursting of the subprime-mortgage bubble.[241]

In addition, in the siting context, variations in local permitting processes inhibit the growth of nationwide infrastructure. Increased regulatory uniformity encourages the development of capital-intensive infrastructure by reducing compliance costs and creating a more predictable regulatory environment.[242] For regional or national developers, centralized review of permitting applications is often preferable to local jurisdiction. As one energy consultant explained, "State permitting is advantageous to power plant developers because state proceedings are removed from local electoral politics. State permit reviews are never simple and are always costly. . . . Still, a state proceeding offers a degree of time certainty and an atmosphere of fairness often absent at the local level."[243]

Moreover, the federal government, which is physically and metaphorically removed from local politics and economic constraints, has a far greater

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[239] Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 780 (1995).

[240] *See* LANG & DHAVALE, *supra* note 235, at 12–13; *see also, e.g.*, ROBERT E. LANG ET AL., METRO. POLICY PROGRAM AT BROOKINGS, MOUNTAIN MEGAS: AMERICAS'S NEWEST METROPOLITAN PLACES AND A FEDERAL PARTNERSHIP TO HELP THEM PROSPER 11, 15 (2008), *available at* http://www.brookings.edu/~/media/research/files/reports/2008/7/20%20mountainmegas%20sarzynski/imw_full_report.pdf (discussing emerging megapolitan regions in the Intermountain West).

[241] *See* Nestor M. Davidson, *Leaps and Bounds*, 108 MICH. L. REV. 957, 969 n.46 (2010) (reviewing GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008)); *see also* Klass & Wilson, *supra* note 6 (manuscript at 22) (identifying regulatory mismatch between interstate transmission siting subject to intrastate regulation); Ruhl & Salzman, *supra* note 62, at 64–65 (identifying climate change, urban sprawl, and the bursting of the subprime-mortgage bubble as "massive problems with dimensions far beyond the capacity of any single agency to manage effectively").

[242] *See* Esty, *supra* note 19, at 619; Ostrow, *supra* note 2, at 307; *see also* Sovacool, *supra* note 38, at 421–22.

[243] Robert D. Kahn, *Siting Struggles: The Unique Challenge of Permitting Renewable Energy Power Plants*, ELECTRICITY J., Mar. 2000, at 21, 24.

capacity to enact policies that have substantial redistributive effects. Paul Peterson argues that the lessening of restrictions on the flow of capital and credit at the national level allows for redistributive policies that are not politically viable at the local level.[244] Sheryll Cashin similarly argues that "the national legislature possesses several institutional advantages over state legislatures, including a captured tax base and its facility for logrolling arrangements that tend to equalize power between representatives of affluent and poor districts."[245]

In contrast, for economic and political reasons, local officials rarely compel their constituents to accept unpopular land-use decisions.[246] Local services—schools, police, fire protection, and sanitation, among others—are financed through local taxes, primarily the property tax.[247] As a result, state and local officials are exquisitely sensitive to local property values, aiming to attract land uses (and users) that contribute more to the local tax base than they consume in services.[248] As Richard Briffault observes, "Contemporary cities, as a rule, do not engage in innovative redistributive programs, not because they lack the legal authority, but rather because they fear that initiating such programs would cause residential and commercial taxpayers to depart."[249]

C. Local Tailoring

Given the enormous variability of land, it would be difficult, if not impossible, for the federal government to enact uniform, substantive land-use

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[244] PAUL E. PETERSON, CITY LIMITS 183 (1981).

[245] Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 594 (1999).

[246] *See* PETERSON, *supra* note 244, at 69–70 (stating that central governments are more likely to enact redistributive policies than are local governments). *See generally* MARK SCHNEIDER, THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA (1989) (exploring political and economic incentives of suburban governments, focusing on the effect of competition among local governments).

[247] *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1115, 1129 (1996) ("Local boundaries are central to the raising and spending of local revenue. . . . The principal source of locally-raised revenue for municipalities is the property tax."); Lehavi, *supra* note 234, at 948 & n.84 (explaining that local governments finance their expenditures mainly through revenue that is generated by taxes); Serkin, *supra* note 85, at 1646–47 (arguing that local governments are responsive to homeowners who "pay for local government services through property taxes and receive the benefit of those services in increased property values").

[248] *See* Briffault, *supra* note 77, at 408; Hills, *supra* note 143, at 1217–18.

[249] Briffault, *supra* note 77, at 408; *see also* Cashin, *supra* note 245, at 594–95 (observing that the national government has historically "been far more interventionist than have state governments on behalf of both the poor and racial minorities").

policies.[250] The United States spans a continent and is home to deserts, mountains, plains, and coastal regions.[251] In some areas, land has been intensively developed; in others, land has been preserved in its natural state.[252] Even adjacent parcels of land "can vary dramatically in their topography and soil characteristics, their hydrology and ecology."[253] As Justice Story explained in requiring specific performance of land contracts:

> The locality, character, vicinage, peculiar soil, or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser; and it cannot be replaced by other land of the same precise value, or having the same precise local conveniences or accommodations; and therefore a compensation in damages would not be adequate relief.[254]

Generally, a landowner will have deliberately accumulated the parcel in its present form—"it can be cropped in line with the family's resources, it can be divided for inheritance, or it makes aesthetic or economic sense."[255] Through its use, land obtains a subjective value that cannot be measured solely in monetary terms.[256]

Thus, the substantive content of "good" land-use law can only be determined in the context of its location.[257] Many land-use questions cannot be

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[250] *See* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 136 (2005) ("The failure to take into account local environmental conditions—let alone local tastes, preferences, and economic conditions—leads to 'one size fits all' policies that fit few areas well, if at all."); Karol Ceplo & Bruce Yandle, *Western States and Environmental Federalism: An Examination of Institutional Viability*, *in* ENVIRONMENTAL FEDERALISM 225, 225–26 (Terry L. Anderson & Peter J. Hill eds., 1997) ("There is recognition that homogeneous solutions applied to heterogeneous problems often yield high costs and weak results."); Karkkainen, *supra* note 19, at 80 (noting concerns regarding "rigidities and inefficiencies of sweeping, uniform federal controls on land use"); Trisolini, *supra* note 4, at 740 ("The variation of urban form renders land use inevitably local to a large degree.").

[251] *See* Dwyer, *supra* note 19, at 1218; Peñalver, *supra* note 3, at 828.

[252] Fischel, *supra* note 4, § 8, at 15 (noting the use of satellite imagery to provide evidence regarding the ratio of urbanized land to agricultural land).

[253] Peñalver, *supra* note 3, at 828.

[254] 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 746, at 51 (Boston, Hilliard, Gray, & Co. 1836) (footnote omitted). As sociologists John Logan and Harvey Molotch put it, "Every parcel of land is unique in the idiosyncratic access it provides to other parcels and uses, and this quality underscores the specialness of property as a commodity." LOGAN & MOLOTCH, *supra* note 3, at 23.

[255] Jeffry A. Frieden, *Towards a Political Economy of Takings*, 3 WASH. U. J.L. & POL'Y 137, 141 (2000).

[256] *See* Serkin, *supra* note 85, at 1655–56 (arguing that an account of land that focuses purely on market value misses the subjective value that owners place on the use of the land); *see also* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 663–99 (1988).

[257] *See* RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 419 (rev. ed. 2004) (noting that the substance of "good" land-use practices is "informed by the geographical

answered in the abstract.[258] Whether a parcel of land should be developed for residential use or preserved for open space, or whether a church should be sited in a commercial district depends upon the desired city form and socioeconomic makeup of the area. To borrow from Justice Sutherland's analysis in *Euclid*:

> [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.[259]

In contrast to federal bureaucrats, local officials are literally on the ground.[260] Local officials, who are a part of the local community and are politically accountable to it, have the nuanced knowledge and local sensibilities necessary to regulate land.[261] Indeed, John Dwyer similarly concluded in the context of the Clean Air Act:

> The practical need to tailor implementation and enforcement to local conditions requires decision-makers who have, in addition to an adequate knowledge of these conditions, a sympathetic orientation toward local conditions. . . . Precisely because they are local, and locally accountable, state and local officials bring that knowledge and orientation to implementation and enforcement.[262]

Moreover, local implementation preserves traditional federalism values—avoiding the undue concentration of regulatory authority in one level of government; fostering democratic accountability and responsiveness; and leaving ample room for local variation, innovation, and competition.[263] Local

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context of the physical and socioeconomic systems in which land use operates" (emphasis omitted)); Frieden, *supra* note 255, at 141 ("Although some land is undifferentiated and standardized, the value of most land is highly specific to its location, owner, and its current use."); Hirokawa, *supra* note 226, at 1142 ("[T]he propriety of particular land uses is governed by their locational context . . . .").

258 *See* Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 9–10 (1992) (noting the difficulty of identifying transcendent zoning values that apply to all land-use decisions).

259 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

260 *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 695 (1991); *see also supra* note 161.

261 *See supra* notes 227–29 and accompanying text

262 Dwyer, *supra* note 19, at 1218.

263 In the familiar words of the Court, federalism

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

zoning boards are easily accessible and exquisitely responsive to the preferences of local residents.[264] Local units, especially those charged with land-use control, exhibit the traits most closely identified with political participation: they are small, yet powerful.[265] Local zoning proceedings often feature high rates of local participation and provide a robust forum for participatory democracy,[266] allowing democratic communities to develop their character and pursue common goals.[267]

Citizen participation in policy making, in turn, promotes local tailoring and experimentation. Local implementation enables local regulators to experiment with novel implementation techniques with the expectation that optimal regulatory strategies will vary by locale.[268] Local governments learn from each other and from the national government. The national government is able to build upon the best practices of its constituent units but avoid locking in a suboptimal regulatory standard.[269] In this way, the local-official-as-federal-

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Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); *accord* Gerken, *supra* note 25, at 6 ("[F]ederalism promotes choice, competition, participation, experimentation, and the diffusion of power."); David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1161–63 (2012) (considering values of federalism in administrative agencies); Ryan, *supra* note 27, at 601 (identifying values underlying a federal system of government); Ryan, *supra* note 139, at 10 (listing traditional federalism values).

264 *See* Serkin, *supra* note 85, at 1649–50 (noting that "actual participation in local decisionmaking is relatively easy" and that property owners have both the incentive and political power to influence zoning decisions).

265 *See* Briffault, *supra* note 247, at 1123–24 ("[S]maller political units enhance the benefits of participation by increasing the likelihood that a citizen's 'action will make a significant difference in the outcome . . . .'" (quoting ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY 41 (1973))); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1069–70 (1980) (noting first that "limited size appears to be a prerequisite to individual participation in political life" and second that "[n]o one is likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference in his life").

266 Gerken, *supra* note 25, at 22.

267 *See* Ostrow, *supra* note 2, at 297; *see also* Hirokawa, *supra* note 73, at 773 ("Through zoning and planning, local governments have engaged in a self-identification process and implemented community visions in the process of designing communities.").

268 *See* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1702 (2001); *cf.* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 545 (2003) (describing, as a possible objection to agency rulemaking, that "[i]t requires agencies to set achievable levels of compliance based on speculation when they more fruitfully might experiment with proposed levels"); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 157 & n.42 (2007) (using experimentalist scholarship to analyze the risk of aggressive preemption).

269 Schapiro, *supra* note 25, at 293; *see also* Buzbee, *supra* note 19, at 108 (noting that there are benefits of regulatory overlap and cooperative-federalism structures); Engel, *supra* note 19, at 187 (arguing that the static allocation of regulatory authority to either the state or federal government obstructs good environmental management and that broadly overlapping state and federal regulatory jurisdiction is needed).

agent model effectively balances national land-use priorities and local land-use concerns.

CONCLUSION

Though land is local, land *use* is not. In the aggregate, local land use generates harms that far exceed the remedial capacity of local governments. While other formerly local areas have since been subsumed by the states or the federal government, land-use law has retained much of its local character. Nonetheless, modern land-use law involves a significant, though undertheorized, national dimension. In the absence of a national land-use policy, scholars have studied individual federal laws that impact the development of privately owned land in isolation, describing an uncoordinated federal statutory patchwork.

This Article brings order to the federal patchwork, developing a coherent national account of land-use law. This account supplements the traditional localist account by (a) demonstrating that federal law can (and sometimes should) be used to account for the cumulative effects of local land-use decisions on interstate commerce, (b) constructing a theoretical framework through which to analyze the existing body of federal land law, and (c) using insights of federalism theory to identify the benefits of a local-official-as-federal-agent model of land-use law. In allocating authority to both national and local regulators, this model quite consciously accounts for the unique duality of land.