

# Empowering Local Autonomy and Encouraging Experimentation in Climate Change Governance: The Case for a Layered Regime

by Michael Burger

Michael Burger is an Acting Assistant Professor at New York University School of Law. Portions of this Article are adapted from *"It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. (forthcoming, 2010).

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## Editors' Summary

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In the decades-long absence of federal action, local governments—along with the states—have positioned themselves at the forefront of climate change and sustainability planning. These efforts, however, confront preemption problems imposed by federal “ceilings,” or uniform national standards, under both existing environmental law and pending climate change legislation. In order to preserve the local autonomy values that underlie local action, and to capture the benefits of regulatory experimentation that result from it, federal climate change law should grant an agency, such as the U.S. Environmental Protection Agency, the discretion to approve local climate action plans that include measures that surpass federal ceilings.

Almost 20 years ago, world leaders gathered in Rio de Janeiro to declare a shared commitment to reducing emissions of carbon dioxide (CO<sub>2</sub>) and other greenhouse gases (GHGs).<sup>1</sup> Then, in 1997, 160 nations signed the Kyoto Protocol, which established legally binding limits for industrialized countries on GHG emissions.<sup>2</sup> And in January 2005, the European Union European Trading System (EU ETS) became the world's first operating international GHG emissions exchange. But the United States infamously refused to ratify the Kyoto Protocol, the EU ETS has been derided as a failure that has profited industry and led to little in the way of actual GHG emissions reductions,<sup>3</sup> and the international community is now preparing for another meeting—December's UNFCCC Conference of the Parties in Copenhagen—that will almost certainly see its final session pass without a new agreement. Meanwhile, average CO<sub>2</sub> saturation levels continue to rise.<sup>4</sup>

While coordinated action on the national and international scale has faltered, U.S. cities and states engaged in a kind of multistrategy “race to the top” have taken the lead in planning and implementing climate change mitigation and adaptation initiatives. These initiatives have ranged broadly from establishing regional GHG emissions trading regimes, to “greening” government operations and purchase practices, to revising commercial and residential building codes, to adopting long-term Climate Action Plans (CAPs) that incorporate these and other measures. Yet, as the American Clean Energy and Security Act (ACESA) of 2009 and the Clean Energy Jobs and American Power Act (the Boxer-Kerry Bill) wind their way through the U.S. Congress<sup>5</sup> and the U.S. Environmental Protection Agency (EPA) contemplates several regulatory options,<sup>6</sup> the fate of these local initiatives has

1. United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, 31 I.L.M. 849. The main GHGs are CO<sub>2</sub>, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2007: SYNTHESIS REPORT 5 n.5 (2007) (referring to gases covered under the UNFCCC).
2. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.
3. See, e.g., Adam Vaughan, *James Lovelock Labels Europe's Carbon Trading Scheme a "Scam"*, GUARDIAN.CO.UK, Mar. 10, 2009, <http://www.guardian.co.uk/environment/2009/mar/10/lovelock-meacher-slam-carbon-trading> (last visited Oct. 30, 2009).
4. Carbonify.com, Current/Historic Carbon Dioxide Levels, <http://www.carbonify.com/carbon-dioxide-levels.htm> (last visited Nov. 20, 2009).
5. H.R. 2454, 111th Cong. (2009) [hereinafter ACESA]; S. 1733, 111th Cong. (2009) [hereinafter Boxer-Kerry]. See also John M. Broder, *House Backs Bill, 219-212, to Curb Global Warming*, N.Y. TIMES, June 27, 2009, at A1; Darren Samuelsohn, *Senate Climate Bill Faces Narrow Window for Action in 2010*, N.Y. TIMES, Nov. 16, 2009. Because Boxer-Kerry was reported out of committee in early November and remains a far way from passing the U.S. Senate, this Article will focus on the provisions of ACESA. For a good summary of preemption under Boxer-Kerry, see William Buzbee, *Boxer-Kerry: Measures to Address Error and Illegality*, CPRBlog, Oct. 5, 2009.
6. See EPA, Mandatory Reporting of Greenhouse Gases, Final Rule, 74 Fed. Reg. 56259 (Oct. 30, 2009); EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55292 (proposed Oct.

become uncertain. Indeed, the imposition of preemptive federal “ceilings” threatens to stifle the very competition and experimentation that have paved the way for the now seemingly inevitable federal action.<sup>7</sup>

Broadly speaking, federal environmental law has largely concerned itself with the setting of “floors,” and many have argued that floors are the appropriate regulatory choice for addressing climate change. ACESA, though, at least in its current form, offers a combination of ceilings and floors that will, without question, result in challenges to local initiatives. For example, Title III of ACESA (Reducing Global Warming Pollution) includes a nationwide cap-and-trade system,<sup>8</sup> which, by design, imposes a ceiling of a sort.<sup>9</sup> Title I (Clean Energy) offers a mix of floors and silence whose full meaning is far from clear. Title II (Energy Efficiency) maintains the ceilings imposed by current energy efficiency and vehicle emissions standards established under the Energy Policy and Conservation Act (EPCA) and the Clean Air Act (CAA).<sup>10</sup> Localities seeking to create green building codes and to increase the number of hybrid vehicles serving as public transportation have already found themselves preempted by these same standards.

However, there is an opportunity, here; we can have it both ways, with floors that demand minimum GHG reductions in some areas and ceilings that, while maintaining a degree of national uniformity, also allow for local innovations and diversity. In this Article, I propose that Title II of ACESA—or whatever form the final federal law takes—incorporate a layered regulatory regime, modeled on the Coastal Zone Management Act (CZMA), that would allow for both the imposition of federal energy efficiency and vehicle emissions ceilings and the authorization of state and

local climate initiatives that surpass them. Rather than leave it to courts to apply an unfortunately inflexible preemption doctrine, this proposal would grant federal agencies the discretion to empower local autonomy and encourage regulatory experimentation.

## I. Subnational Climate Change Initiatives

Years of inaction under the George W. Bush Administration left a void in climate change policy that prompted a scramble among state and local governments to create and implement their own programs. Taken together, the resulting state and local initiatives could significantly mitigate domestic GHG emissions: According to one study, all the state and local programs in place as of September 2007, fully realized, would effectively stabilize U.S. emissions at 2010 levels by 2020.<sup>11</sup>

The most prominent action, and at the largest scale, has been the creation of three regional cap-and-trade programs: the Regional Greenhouse Gas Initiative (RGGI), the Western Climate Action Initiative (WCI), and the Midwestern Greenhouse Gas Reduction Accord (Midwestern Accord).<sup>12</sup> The RGGI, an agreement between 10 northeastern and Mid-Atlantic states, established the first CO<sub>2</sub> emissions trading program in the nation, setting a goal of reducing CO<sub>2</sub> emissions from electricity-generating power plants to 10% below 2009 levels by 2018.<sup>13</sup> Auctions for CO<sub>2</sub> allowances went live in 2008, and the program is being phased in. The WCI, an agreement among seven western states and four Canadian provinces, has not set a final cap, and the design is a work in progress; by the time it is fully online in 2015, the program will cover emissions of all six primary GHGs from electricity generation (including imported electricity), industrial and commercial fossil-fuel combustion, industrial process emissions, transportation, and residential fuel use.<sup>14</sup> The Midwestern Accord, with six states and one Canadian province fully

27, 2009); EPA, Proposed Rulemaking: Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49453 (proposed Sept. 28, 2009); EPA, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (proposed Apr. 24, 2009); EPA, Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 16448 (proposed Apr. 10, 2009); EPA, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (proposed July 30, 2008).

7. Ceiling preemption exists where federal law sets a maximum, or uniform, standard above, and below, which states and localities cannot go. See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1554 (2007); 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, 583 (2008).
8. See ACESA §311 (2009) (amending the Clean Air Act (CAA) to include a cap-and-trade program for GHGs).
9. ACESA expressly preempts regional and state cap-and-trade systems for a five-year period. ACESA §335 (providing that “no State or political subdivision thereof shall implement or enforce a cap and trade program that covers any capped emissions emitted during the years 2012 through 2017”). What happens after that is unknown, though it is difficult to see revived regional markets surviving preemption challenges after that time. See, e.g., *Clean Air Markets Group v. Pataki*, 338 F.3d 82, 33 ELR 20247 (2d Cir. 2003) (holding restrictive covenants on SO<sub>2</sub> allowances imposed by New York State regulation preempted by acid rain cap-and-trade regime); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 914-20 (2008) (discussing preemption problems likely to arise under federal cap and trade); Glicksman & Levy, *supra* note 7, at 642-47 (explaining how state regulation could undermine efficiency goals of the “trade” component of a cap-and-trade regime).
10. ACESA §201, 211-13, 221.

11. Nicholas Lutsey & Daniel Sperling, *America's Bottom-Up Climate Change Mitigation Policy*, 36 ENERGY POL'Y 673, 674 (2008). Of course, as the authors of the study concede, this nonetheless falls short of what is needed to effectively combat climate change. *Id.* at 683. See also J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1538 (2007) (“Existing state-level measures are currently minimal and uncertain, but even if they were more developed, their potential effectiveness in the absence of a federal regime remains speculative at best.”).
12. See Regional Greenhouse Gas Initiative, <http://rggi.org/>; Western Climate Initiative, <http://www.westernclimateinitiative.org/>; Midwest Greenhouse Gas Reduction Accord, <http://www.midwesternaccord.org/index.html>. For a discussion of how cap-and-trade programs offer insufficient incentives for innovation, see 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 (2008) (arguing that establishment of federal floors and mandate analogous to state implementation plans under the CAA more likely to drive innovation); David M. Driesen, *Sustainable Development and Market Liberalism's Shotgun Wedding: Emissions Trading Under the Kyoto Protocol*, 83 IND. L.J. 21 (2008); David Driesen, *The Economic Dynamics of Environmental Law: Cost-Benefit Analysis, Emissions Trading, and Priority-Setting*, 31 B.C. ENVTL. AFF. L. REV. 501, 518-20 (2004); Margaret R. Taylor et al., *Regulation as the Mother of Invention: The Case of SO<sub>2</sub> Control*, 27 L. & POL'Y 348, 370 (2005) (concluding that trading under the acid rain trading program encouraged less innovation than earlier command-and-control regime).
13. RGGI, RGGI Fact Sheet, at 1, available at [http://www.rggi.org/docs/RGGI\\_Executive%20Summary\\_4.22.09.pdf](http://www.rggi.org/docs/RGGI_Executive%20Summary_4.22.09.pdf).
14. WCI, The WCI Cap & Trade Program, <http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program> (last visited Oct. 30, 2009).

on board, has also yet to set final targets or establish a final design; in July 2009, an Advisory Group issued a draft of its final recommendations, calling for a 20% reduction below 2005 levels by 2020 and an 80% reduction below 2005 levels by 2050.<sup>15</sup> Like the WCI, the Midwestern Accord will cover electricity generation, industrial combustion, industrial process, transportation, and building fuel use.<sup>16</sup>

There have also been developments on a state-by-state level<sup>17</sup>: As of September 2009, 21 states had set specific targets for GHG emissions reductions.<sup>18</sup> Of these, seven—California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, and Washington—have enacted laws mandating the specified reductions.<sup>19</sup> Separately, a number of states have implemented performance standards for CO<sub>2</sub> emissions from power plants.<sup>20</sup> The majority of states has also adopted or is in the process of adopting state CAPs.<sup>21</sup> In addition, the majority of states has established renewable and/or alternative energy portfolio standards, which require utilities to achieve a certain percentage of contribution to power plant capacity or generation from renewable or alternative energy sources, such as wind, solar, and geothermal.<sup>22</sup>

On the local level, more than 965 mayors have signed on to the U.S. Conference of Mayors Climate Action Protection Agreement, which sets a target of 7% reductions below 1990 levels by 2012.<sup>23</sup> Whether to help achieve that target or for other reasons, hundreds of cities and counties have adopted local CAPs, which, like their state counterparts, serve as

planning tools for policymakers and lawmakers.<sup>24</sup> The range of measures recommended in these plans is diverse, but tend to focus on certain areas: replacing streetlights and traffic signals with LED or high-pressure sodium technologies, replacing lighting fixtures in public buildings with more efficient bulbs, converting government-owned vehicle fleets to hybrid or biodiesel, and reducing total vehicle-miles-traveled (VMTs) by taking steps to encourage bicycling and car-sharing.<sup>25</sup> Some cities have drawn connections between energy efficiency and other forms of consumption, as well; for instance, Berkeley, California, and Albany, New York, have adopted local food-purchasing policies that aim to decrease energy use and GHG emissions.<sup>26</sup>

What is more, some local governments have taken the additional step of regulating the private sector, particularly in regard to green building requirements.<sup>27</sup> Cities such as Albuquerque and San Francisco have set green building requirements for new residential and commercial construction.<sup>28</sup> Similarly, the town of Babylon, on Long Island, passed a law in 2006 requiring applicants for commercial, industrial, and large residential projects to demonstrate that they are Leadership in Energy and Environmental Design (LEED)-certifiable prior to issuance of a building permit.<sup>29</sup> New York City now requires that not only city projects but also any private development receiving more than 50% city funding or more than \$10 million in city money satisfy the requirements for LEED Silver certification.<sup>30</sup> There have been non-building code-related regulatory efforts, too: New York City has twice tried to hybridize its famous fleet of yellow cabs, as has Boston with its somewhat less uniform taxi fleets. And both San Francisco and Boulder, Colorado, have established a carbon

15. MIDWESTERN GREENHOUSE GAS REDUCTION ACCORD: DRAFT FINAL RECOMMENDATIONS OF THE ADVISORY GROUP §1.0, *available at* [http://www.midwesternaccord.org/Accord\\_Draft\\_Final\\_7-16-09.pdf](http://www.midwesternaccord.org/Accord_Draft_Final_7-16-09.pdf).

16. *Id.* §2.0.

17. Both EPA and the Pew Center on Global Climate Change maintain excellent websites that organize and track state-level developments, from which the following summary is derived. *See generally* EPA, Climate Change—State and Local Governments: State Climate Action, <http://epa.gov/climatechange/wycd/stateandlocalgov/state.html> (last visited Sept. 8, 2009); Pew Center on Global Climate Change, U.S. States & Regions, <http://www.pewclimate.org/states-regions> (last visited Oct. 30, 2009).

18. *See* Pew Center on Global Climate Change, Greenhouse Gas Emissions Targets, [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/emission-targets\\_map.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/emission-targets_map.cfm) (last visited Sept. 9, 2009).

19. California Global Warming Solutions Act of 2006 (AB 32), CAL. HEALTH & SAFETY CODE §§38500-38599 (West 2008); HAW. REV. STAT. ANN. §342B-71 (LexisNexis 2009); MINN. STAT. §216H.02 (2008); N.J. STAT. ANN. §26:2C-38 (West 2009); WASH. REV. CODE § 70.235.020 (2009); H.B. 5600, Gen. Assem., 2008 Leg., Reg. Sess. (Conn. 2008). *See also* National Conference of State Legislatures, Enacted Climate Change Legislation Requiring Mandatory Greenhouse Gas Reductions, <http://www.ncsl.org/?TabId=13240> (last visited Oct. 30, 2009).

20. *See* Edward S. Rubin, *A Performance Standards Approach to Reducing CO<sub>2</sub> Emissions From Electric Power Plants*, at 9 (Pew Center on Climate Change, Coal Initiatives Reports: White Paper Series, 2009), *available at* <http://www.pewclimate.org/docUploads/Coal-Initiative-Series-Rubin.pdf>.

21. *See* EPA, Climate Change—State and Local Governments: State Climate Action Plans, [http://epa.gov/climatechange/wycd/stateandlocalgov/state\\_action.html](http://epa.gov/climatechange/wycd/stateandlocalgov/state_action.html) (last visited Sept. 8, 2009); Pew Center on Global Climate Change, Climate Action Plans, [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/action\\_plan\\_map.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/action_plan_map.cfm) (last visited Sept. 9, 2009).

22. *See* Pew Center on Global Climate Change, Renewable and Alternative Energy Portfolio Standards, [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/rps.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm) (last visited Sept. 18, 2009); U.S. Dep't of Energy, States With Renewable Portfolio Standards, [http://apps1.eere.energy.gov/states/maps/renewable\\_portfolio\\_states.cfm](http://apps1.eere.energy.gov/states/maps/renewable_portfolio_states.cfm) (last visited June 16, 2009).

23. *See* Mayors Climate Protection Center, Map of Participating Mayors, <http://www.usmayors.org/climateprotection/Map.asp> (last visited Oct. 29, 2009).

24. For a sample of local action plans, see EPA, Climate Change—What You Can Do: Local Climate Action Plan Recommendations Matrix, <http://yosemite.epa.gov/gw/StatePolicyActions.nsf/matrices/local> (last visited Nov. 2, 2009).

25. *See, e.g.*, U.S. GREEN BLDG. COUNCIL, LEED INITIATIVES IN GOVERNMENTS AND SCHOOLS (2009), *available at* <https://www.usgbc.org/ShowFile.aspx?DocumentID=691> (noting that as of September 1, 2009, 194 localities had enacted green building laws). For a robust account of the need and means to address VMTs, see U.S. Mayors Climate Protection Agreement, at C.2-3 (2005) [hereinafter Climate Protection Agreement], *available at* <http://usmayors.org/climateprotection/documents/mcpAgreement.pdf> (advocating that cities “adopt and enforce land-use policies that reduce sprawl, preserve open space, and create compact, walkable urban communities” and “promote transportation options such as bicycle trails, commute trip reduction programs, incentives for car pooling and public transit”); Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253 (2009).

26. Berkeley, Cal., Environmentally Preferable Purchase Policy (Aug. 16, 2004), *available at* [http://www.besafenet.com/ppc/docs/purchasing/PU\\_BP.pdf](http://www.besafenet.com/ppc/docs/purchasing/PU_BP.pdf); Albany County, N.Y., Resolution 496 (Dec. 8, 2008), *available at* <http://www.albanycounty.com/departments/legislature/resolutions/2008/20081208/08-496.pdf>.

27. *See* Patricia E. Salkin, *New York Climate Change Report Card: Improvement Needed for More Effective Leadership and Overall Coordination With Local Government*, 80 COL. L. REV. (forthcoming 2009), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1371950](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371950); Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1, 8-19 (2008).

28. SAN FRANCISCO, CAL., BUILDING INSPECTION COMMISSION CODE ch. 13C (2008) (containing San Francisco's Green Building Requirements).

29. BABYLON, N.Y., CITY CODE §89-86(a) (2006).

30. New York, N.Y., Local Law No. 86 (Oct. 4, 2005), *available at* [http://www.nyc.gov/html/dob/downloads/pdf/ll\\_86of2005.pdf](http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf).

tax, with San Francisco's targeting businesses that generate CO<sub>2</sub> emissions and Boulder's targeting residences.<sup>31</sup>

Importantly, district courts have struck down a number of these measures: Albuquerque's building code, and both New York and Boston's hybrid taxi rules were found to be preempted by federal law. As discussed further below, under ACESA, the result in those cases would have been the same. This result is unnecessarily discouraging. Federal climate change law should allow local governments to continue experimenting and innovating on the climate change frontlines.

## II. Inter-Local Competition and the Race to the Top

### A. An Explanation for Local Action

The existence of local climate initiatives raises a basic question: Why is this happening? As others have explained elsewhere, climate change poses a classic collective action problem.<sup>32</sup> Neither an individual state nor any collection of states, far less a city or county, has a classical, rational-actor, economic incentive to deter GHG emissions. Acting alone, one cannot meaningfully address the problem, and whatever environmental benefit does result from the effort will be shared with the entire world. What is more, the costs of GHG emissions reductions may well be high, and absorbed by the local actor, rather than externalized to or even shared with residents or businesses inhabiting another jurisdiction.

Yet, local governments have nonetheless been at the vanguard of climate change action in America. Scholars offer a number of theoretical and pragmatic explanations for this behavior.<sup>33</sup> For instance, it has been said that the initiatives cater to a strong demand among voters for action.<sup>34</sup> The demand among voters can itself be attributed both to such intangible politico-personal values as those that inhere in symbolic statements, the "warm glow" of altruistic behavior

and the desire to influence other jurisdictions to take action; and to more economic calculations, such as a misperception by voters of the possible costs and benefits of action, or the desire to see the creation of new jobs.<sup>35</sup> In addition, politicians and bureaucrats may have their own reasons, beyond seeking reelection or reappointment, for pushing climate change initiatives, including administrative and political entrepreneurship, anticipation of a future market for GHG emissions credits, and attracting new "green energy" businesses.<sup>36</sup> Indeed, these politicians, and the interests they represent, may well be trying to create agglomeration economies around climate change mitigation.<sup>37</sup>

I suggest that, taken together, these rationales support a more general program: the attempt by places to brand themselves "green" in order to increase their competitiveness in the inter-local market for residents, businesses, and capital. Neither ACESA nor existing environmental ceilings properly account for either the autonomous expressive function or the experimentalist benefits of this kind of inter-local competition.

In *A Pure Theory of Local Expenditures*, Charles Tiebout articulated a number of potential advantages to be gained through more robust inter-local competition.<sup>38</sup> Tiebout proposed that a decentralized system with many local governments can act as a market for mobile residents, who will sort themselves into jurisdictions offering the mix of taxes and public goods that they prefer.<sup>39</sup> Tiebout's central thesis, that competition will result in an optimal or efficient provision of public goods,<sup>40</sup> has been frequently criticized.<sup>41</sup> The descriptive element of his study, though, has long been widely accepted.<sup>42</sup> There is little doubt that cities do, in fact, compete for residents, businesses, and capital, offering businesses a variety of financial and regulatory incentives, while offering residents a choice among packages of public services and taxes. Under this system, then, mobile citizens—both cor-

31. See Samantha Young, *California Weighs Nation's First Statewide Carbon Tax on Polluting Industries*, HUFFINGTON POST, June 25, 2009, [http://www.huffingtonpost.com/2009/06/25/california-weighs-nations\\_n\\_220798.html](http://www.huffingtonpost.com/2009/06/25/california-weighs-nations_n_220798.html) (discussing delays to California's statewide carbon tax and noting existence of local taxes).

32. See, e.g., Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 *ECOLOGY L.Q.* 183 (2005) (arguing for half-glass-full view of state and local initiatives that reflect global collective action failure); Glicksman & Levy, *supra* note 7.

33. See, e.g., Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 *WAKE FOREST L. REV.* 719, 779-80 (2006) (arguing that "cooperative federalism programs" have allowed the states to close the "institutional competence" gap with federal regulators; that "inflexibility on the part of federal regulators provided further opportunities for states"; that local politicians are motivated by "ideological commitments" and responsiveness to "constituents' demands for greater environmental protection"; that local needs driving state initiatives are of little concern to federal officials; and that state and local entities might adopt environmental standards to forestall "the imposition of more rigorous federal controls").

34. William W. Buzbee, *Contextual Environmental Federalism*, 14 *N.Y.U. ENVTL. L.J.* 108, 115-16 (2005) (arguing that decreased federal environmental action provides an opportunity for states to respond to the preferences of the median voter at the "relevant level of government"); DeShazo & Freeman, *supra* note 11, at 1519 (finding appeal to electorate "most plausible" among alternative explanations).

35. See Kirsten H. Engel & Barak Y. Orbach, *Micro-Motives and State and Local Climate Change Initiatives*, 2 *HARV. L. & POL'Y REV.* 119, 127-33 (2008).

36. *Id.* at 133-35. See also Barry G. Rabe et al., *State Competition as a Source Driving Climate Change Mitigation*, 14 *N.Y.U. ENVTL. L.J.* 1, 3-4 (2005) (claiming that much subnational regulation amounts to state positioning in anticipation of federal or international regulation, and arguing that state regulation can be explained in terms of an interjurisdictional competition among states for economic development).

37. See, e.g., GLOBAL CITY-REGIONS: TRENDS, THEORY, POLICY 14-18 (Allen J. Scott ed., 2001) (discussing benefits of agglomeration economies in regard to developing city-regions, including concentration of knowledge, materials and networks).

38. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956).

39. *Id.* at 418.

40. *Id.* at 420-21.

41. See, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *COLUM. L. REV.* 473, 515-17 and accompanying notes (1991) (summarizing criticisms of Tiebout's "unrealistic assumptions" about consumer voters and communities, and his prediction of equilibrium resulting from competition).

42. See Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 *VA. L. REV.* 1091, 1096 (2008) ("The dominant economic accounts of cities presume that cities are open economies, governed not so much by law as by the force of mobile capital, which dictates what cities can and cannot do as a matter of policy"). See also Eric J. Heikkilä, *Are Municipalities Tieboutian Clubs?*, 26 *REGIONAL SCI. & URB. ECON.* 203, 204 (1996) (analysis of Los Angeles County community sorting demonstrates "strong evidence" to support existence of Tieboutian clubs).

porate and individual—become consumers of localities, and localities become goods marketed to their mobile consumers.

Although Tiebout's thesis posits an economic efficiency that some have argued theoretically negates traditional concerns about a "race to the bottom" among jurisdictions trying to attract industry, the emergence of local climate change initiatives provides evidence that inter-local competition may also produce an actual "race to the top," in which cities strive to outdo one another, environmentally speaking, in an effort to attract "desirable" residents, such as the service-sector industry and its affluent employees, who will contribute to the tax base without demanding public services.<sup>43</sup> This new form of "urban entrepreneurialism" differs from the appeal to traditional quality of life concerns like clean air and access to parks and open space. Contemporary citizen-consumers are not only buying into the environmental amenities, business incentives, and bundles of taxes and services offered by this or that place; they are also buying into the laws and regulations that define it and its relation to the global environmental crisis posed by climate change.

## B. Branding Places Green

The American idealization of this thing called "place" will be familiar to readers of American environmental literature, where it is often used to communicate a deeply valued association between an individual or community and a specific geographical location.<sup>44</sup> Yet, place is also of consequence to both the purposes and the structures of environmental law.<sup>45</sup> The values of place are perhaps more intuitively and thus more frequently associated with rural regions, with the wilderness areas and public lands of the American West, or with sites sacred to Native Americans, but they inhere in built and urban environments too.<sup>46</sup> Indeed, urban planners have been

talking about how to create and preserve a sense of place for almost half-a-century.<sup>47</sup>

Today, the notion of a place expands beyond the boundaries of its physical space to incorporate a broader set of ideas and relationships.<sup>48</sup> As individuals and communities, we do not identify only with the natural and built environments we inhabit; we also identify with the regulatory environments that circumscribe those spaces and, on an individual and collective level, govern our interactions with other individuals and communities, as well as the natural and built environments themselves. Indeed, individuals knowingly participate in domestic politics and international relations, not only through the choice of what material goods we purchase,<sup>49</sup> but also through the choice of where we live.<sup>50</sup> Thus, local governments' ability to brand themselves "green" and advertise themselves to citizen-consumers becomes an increasingly important element of local autonomy, expressing the values of local residents and empowering economic development.<sup>51</sup>

The expressive and economic development functions of local climate change initiatives are interrelated, and it is worth tracing each in a little more detail.

*Regulation as Expression:* Local governments represent their residents on multiple levels, both literally and symbolically. On a literal level, they represent their residents through local regulation and policymaking, as well as through lobbying and organizing at the state, national, and international levels, whether independently or as part of an association like the U.S. Conference of Mayors or ICLEI-Local Governments for Sustainability (formerly the International Council of Local Environmental Initiatives).<sup>52</sup> On a symbolic level, the local initiatives, as well as the government's participation in these networks, represent residents' values and identity. There is an emotional attachment to local decisionmaking in certain "core areas of personal autonomy."<sup>53</sup> Decisionmak-

43. See MATTHEW E. KAHN, *GREEN CITIES, URBAN GROWTH, AND THE ENVIRONMENT* (2006); KENT E. PORTNEY, *TAKING SUSTAINABLE CITIES SERIOUSLY: ECONOMIC DEVELOPMENT, THE ENVIRONMENT, AND QUALITY OF LIFE IN AMERICAN CITIES* (2003).

44. See, e.g., EDWARD ABBEY, *DESERT SOLITAIRE* (1968) (the red rock desert in Utah); ANNIE DILLARD, *A PILGRIM AT TINKER CREEK* (1974) (the Blue Ridge Mountains of Virginia); GRETLE EHRLICH, *THE SOLACE OF OPEN SPACES* (1985) (the "planet of Wyoming"); ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1949) (Sauk County, Wisconsin); NORMAN MACLEAN, *A RIVER RUNS THROUGH IT* (1976) (fly fishing in Montana); TERRY TEMPEST WILLIAMS, *REFUGE: AN UNNATURAL HISTORY OF FAMILY AND PLACE* (1992) (a landscape in Utah).

45. See, e.g., CHRISTINE A. KLEIN ET AL., *NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES* 24-34 (2005); Mark Sagoff, *Settling America or the Concept of Place in Environmental Ethics*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 349, 389 (1992) (place "combines the meaning we associate with nature and the utility we associate with the environment"); Nancy Perkins Spyke, *The Land Use-Environmental Law Distinction; A Geo-Feminist Critique*, 13 DUKE ENVTL. L. & POL'Y F. 55, 90-91 (2002) (arguing that much of environmental law ignores the significance of place).

46. See, e.g., Sheila R. Foster, *From Harlem to Havana: Sustainable Urban Development*, 16 TUL. ENVTL. L.J. 783, 801 (2003) (commitments to urban sustainable development "must be rooted in particular societies, communities, cultures, and 'places' which then must perpetuate them and project them into the future"); John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1 (1996-1997) (noting the peculiar environmental interests of buildings and structures).

47. See MIKE GREENBERG, *THE POETICS OF CITIES: DESIGNING NEIGHBORHOODS THAT WORK* (1995); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); KEVIN LYNCH, *THE IMAGE OF THE CITY* (1960); RICHARD SENNETT, *THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES* (1990).

48. See, e.g., Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008).

49. See Douglas A. Kysar & Michael P. Vandenbergh, *Introduction: Climate Change and Consumption*, 38 ELR 10825 (Dec. 2008).

50. See, e.g., Osofsky & Levit, *supra* note 48, at 433-34 (describing "bottom-up networking" approach to transnational movement for climate change mitigation and adaptation).

51. See Margaret Scammell, *Political Brands and Consumer Citizens: The Rebranding of Tony Blair*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 176 (2007) (arguing that increasing importance of political "brands" indicates move toward consumer model of political communication); Peter Van Ham, *Place Branding: The State of the Art*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 127 (2008) (defining place brand as "the totality of the thoughts, feelings, associations and expectations that come to mind when a prospect or consumer is exposed to an entity's name, logo, products, services, events, or any design or symbol representing them" and, more generally, examining relevance of place branding as a political phenomenon in international politics).

52. See Climate Protection Agreement, *supra* note 25, at A, B (committing members to urge state and federal governments to reduce GHG emissions to the levels set forth in the Kyoto Protocol and to pass federal legislation on climate change); ICLEI Homepage, <http://iclei.org/> (portal for international coalition of local governments and associations dedicated to information-sharing, capacity-building, and campaigning for sustainable development).

53. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 452 (1990).

ing with even remote implications for climate change and sustainability—at least for some people who are obviously drawn to certain places—constitutes just such a core area.

*Regulation as Economic Development/Fiscal Management:* The literal and symbolic significations discussed just above imbue a place with a brand, and that brand becomes a product in the market for places to live and work. The hope, for at least some actors, is that this product will spur economic development.<sup>54</sup> At the same time, cities stand to absorb tremendous costs for climate change adaptation, including potential damage to and/or retrofitting or reconstructing critical infrastructure, indirect effects related to water supply and agriculture, and public health effects. As corporate entities with a proprietary interest in sewers, sidewalks, land, hospitals, and the public fisc, it seems within their scope to take mitigating measures against those future costs.

### III. Preemption, the Floor/Ceiling Divide, and the Terms of ACESA

#### A. Preemption Doctrine and Environmental Policy

Preemption doctrine derives from the principle that federal law is the “supreme Law of the Land.”<sup>55</sup> Preemption can be either express or implied.<sup>56</sup> Its existence is described in the explicit language of a statute,<sup>57</sup> generally in a separate preemption clause.<sup>58</sup> Because questions regarding the scope of preemption turn on the language of the statute, courts employ traditional tools of statutory construction to delimit the reach of its preemptive effect.<sup>59</sup> Thus, the purposes of the statute—as well as the specific purposes of the preemption

clause—are a factor in deciding whether a state or local law should be preempted.

Implied preemption falls into two categories: field preemption and conflict preemption.<sup>60</sup> Field preemption occurs where Congress “completely occupies the field”<sup>61</sup>; its effect is to displace any state or local law in the area.<sup>62</sup> A court may infer field preemption where the pervasiveness of the federal regulation precludes supplementation, where the federal interest in the field is sufficiently dominant, or where “the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.”<sup>63</sup> Conflict preemption arises where either it is impossible to comply with both federal and state or local law or else the state or local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>64</sup> As with express preemption, the question of implied preemption turns ultimately on the purposes of the federal law.

Traditional federalism concerns are at the heart of preemption doctrine, and for that reason, there is often said to be a “presumption against preemption.”<sup>65</sup> Indeed, when preemption is invoked to prevent a state or municipality from wielding its traditional police powers, congressional intent to displace that authority must be “clear and manifest.”<sup>66</sup> The setting of the terms and conditions governing state and municipal contracts constitutes one such traditional police power<sup>67</sup>; the protection of public health and the environment is another.<sup>68</sup>

54. Rosemary J. Coombe et al., *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 U.C. DAVIS L. REV. 891, 902 (2007). See also David Gertner, Editorial, *Place Branding: Dilemma or Reconciliation Between Political Ideology and Economic Pragmatism?*, 3 PLACE BRANDING & PUB. DIPL. 3, 4 (2007), available at <http://www.palgrave-journals.com/pb/journal/v3/n1/pdf/6000053a.pdf> (“Positive brand images have helped many economies boost their exports and attract investments, businesses, factories, visitors, residents and talented people.”).

55. U.S. CONST. art VI, cl. 2. Preemption of municipal ordinances is governed under the same standards as state law. See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 21 ELR 21127 (1991).

56. See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 22 ELR 21073 (1992); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04, 13 ELR 20519 (1983). See also FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007); PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009).

57. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (“The purpose of Congress is the ultimate touchstone in every preemption case.”); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 n.27 (1992) (an understanding of the scope of a preemption provision turns on “a fair understanding of congressional purpose”).

58. Similarly, state regulatory flexibility may be encoded in a separate “savings clause.” See, e.g., 7 U.S.C. §136v(a) (2007) (preserving state authority to adopt more stringent regulations of federally registered pesticides); 15 U.S.C. §2617(a)(1) (2007) (chemical substances); 16 U.S.C. §1535(f) (2007) (takings of endangered species); 33 U.S.C. §1370 (2007) (water pollution); 42 U.S.C. §6929 (2007) (solid waste disposal); 42 U.S.C. §7416 (2007) (ambient air quality standards).

59. See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (express preemption analysis begins with text of the provision and proceeds to the structure and purpose of the act in which it occurs).

60. The distinction between these categories is not necessarily “rigid.” *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000).

61. *Pac. Gas & Elec.*, 461 U.S. at 212-13. See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

62. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727 (2008).

63. *Rice*, 331 U.S. at 230.

64. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

65. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (“we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”) (internal quotes and citations omitted); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 21 ELR 21127 (1991) (applying presumption to local law). A series of Chief Justice William H. Rehnquist court preemption decisions have inspired an ongoing debate regarding the seriousness with which courts treat the presumption. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (preempting California law requiring insurance companies doing business in the state to disclose Holocaust-era insurance policies); *Crosby*, 530 U.S. 363 (invalidating Massachusetts law restricting ability of state to purchase goods and services from companies that did business with Burma under foreign dormant Commerce Clause); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (preempting state products liability common-law claims under obstacle preemption theory despite Express Preemption and Savings Clauses). See also Erwin Chemerinsky, *Empowering States When It Matters*, 69 BROOK. L. REV. 1313 (2004) (arguing Court masks policy choices behind rhetoric of preemption and states rights); Calvin Massey, *“Joltin’ Joe Has Left and Gone Away”: The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759 (2003); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002).

66. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice*, 331 U.S. at 230).

67. *Atkin v. Kansas*, 191 U.S. 207 (1903).

68. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) (“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”).

In environmental law, preemption falls within the broader policy debate between federalization and devolution, that is, the debate between whether, when, and how decisionmaking should be either centralized in the federal government or left to states and their subdivisions.

A number of well-rehearsed theories support traditional arguments in favor of federalization or centralization:

- 1) The problem of interstate externalities requires a federal response.<sup>69</sup>
- 2) Federalization counteracts the problem of the “race to the bottom,” in which subnational jurisdictions lower environmental standards to potentially harmful levels in order to attract industry.<sup>70</sup>
- 3) Uniform federal standards for products manufactured for and distributed on a national scale provide necessary economic efficiencies to regulated entities.<sup>71</sup>
- 4) The pooling of resources at a larger scale improves information-gathering, research, rulemaking, and enforcement processes.
- 5) A greater diversity of interest groups participate in non-local decisionmaking.
- 6) Federal power can override NIMBYism (the not in my backyard phenomenon).
- 7) Organization at a national level caters to the national moral demand for environmental protection.

Similarly, several theories are often referenced to justify arguments in favor of devolution or decentralization:

- 1) Decentralization allows for regulatory and policy innovation that can then trickle up to the national level. This is the lesson often cited in Justice Louis Brandeis’ famous remark: “It is one of the happy incidents of the federal system that a single courageous State may, if

its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>72</sup>

- 2) Local decisionmaking is more responsive to local preferences.
- 3) Local decisionmaking can be tailored more narrowly to variable local environmental conditions.
- 4) Decentralization can enable adaptive management or other “New Governance” regimes.<sup>73</sup>
- 5) Interjurisdictional competition can lead to economically efficient regulation.

For many years, arguments on both sides focused on the theoretical and instrumentalist justifications for federal floors, such as those found in the CAA’s national ambient air quality standards and the Clean Water Act’s water quality standards.<sup>74</sup> In the last few years, however, the federalism debate has turned to the question of federal ceilings, particularly in relation to climate change. This shift has corresponded to the appearance or threat of ceiling preemption in an increasing number of areas, such as liquefied natural gas terminal siting and state common law, and to the understanding that federal climate change law will almost certainly impose ceilings.<sup>75</sup>

In considering the desirability of ceiling preemption, commentators have extracted a number of theories from the federalization/devolution debate. On the one hand, there are the economic efficiencies of uniform product standards and the need to counter NIMBYism; on the other, the core federalism values of local autonomy—subnational governments serving as “laboratories of experimentation” and responding directly to local preferences.<sup>76</sup> Questions regarding the purpose, form, and scope of federal climate change preemp-

69. In economics, externalities are spillover costs or adverse consequences imposed on non-parties to a transaction.

70. The validity of this theory has been the subject of a long-running debate. See, e.g., Jonathan Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 139 (2005); Kirsten Engel, *State Environmental Standard-Setting: Is There a Race and Is It “to the Bottom”?*, 48 HASTINGS L.J. 271 (1997); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211 (1992); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 555-57 (2001); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67 (1996).

71. See Revesz, *A Response to Critics*, *supra* note 70, at 544 (“Uniformity can be desirable for products with important economies of scale in production.”); Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 6-10 (2000) (discussing “inefficiencies” associated with disparate state standards). But see Engel, *supra* note 70, at 369 (noting that uniform standards benefit industry by stifling competition and freeing it from having to satisfy diversity of requirements); Glicksman & Levy, *supra* note 7, at 599 n.95 (noting that uniform standards are “more concerned with reducing regulatory burdens than improving the effectiveness of environmental regulation”); James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—and Why It Matters*, 54 MD. L. REV. 1226 (1995) (arguing that uniform standards under the CAA and the Clean Water Act (CWA) had proven “foolish”).

72. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also David L. Markell, *States as Innovators: It’s Time for a New Look to Our “Laboratories of Democracy” in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347 (1994).

73. See, e.g., Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 943-45 (2003); Charles Sabel et al., *Beyond Backyard Environmentalism*, in *BEYOND BACKYARD ENVIRONMENTALISM* 3 (Joshua Cohen & Joel Rogers eds., 2000). But cf. Douglas Nejaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323 (2009).

74. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618; 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

75. Buzbee, *supra* note 7, at 1568-76 (describing “unitary federal choice ceilings” in GHG regulation, liquid natural gas terminal siting, state common law and Department of Homeland Security proposal to preempt regulation of chemical facilities); Jeremy Remy Nash, *The Illusion of Devolution in Environmental Law*, 38 URB. LAW. 1003 (2006) (using state superlien statutes from the 1980s, the Acid Rain trading program and the controversy surrounding California’s attempt to regulate GHG gases from automobiles as examples of federal ceilings in operation); Revesz, *Federalism and Environmental Regulation*, *supra* note 70, at 633 (noting Food Quality Protection Act sets ceiling over local tolerances for pesticide residue); *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227-28 (2007) (noting attempts to preempt by preamble standards for mattress bedding and SUV roofs).

76. See, e.g., *Discussion Paper #1: Preserving the Right of States and Localities to Set More Stringent Greenhouse Gas Reduction Requirements Than the Federal Program*, in NAT’L ASS’N OF CLEAN AIR AGENCIES, CONFERENCE ON DEFINING THE ROLE OF STATES AND LOCALITIES IN FEDERAL GLOBAL WARMING LEGISLATION 9, 9-14 (2008), available at <http://www.4cleanair.org/documents/GWConferenceMaterials.pdf> (outlining justifications and benefits of state flexibility).

tion—whether examined from the angle of legislators crafting a statute or courts interpreting it—ultimately turn on a resolution of these competing theories. Accordingly, I next unpack the proposed preemption scheme of ACESA.

## B. Preemption Under ACESA

The bargain struck in ACESA plainly seeks to balance interests in national uniformity with interests in diversity and local individuation. Under the law, federal climate change ceilings appear in preemption clauses in some areas, while savings clauses carve out room for states to surpass federal minimums in others. There is also the likelihood that courts will be asked by industry to imply a broad preemptive effect as a matter of field preemption or as a matter of obstacle preemption. Though the ultimate reach of preemption is unclear, however, the portage of existing preemption problems is already manifest.

The most far-reaching change to the regulatory landscape executed by ACESA is Title III's creation of a national GHG emissions cap-and-trade program.<sup>77</sup> Here, preemption is express, as the program halts the operation of subnational cap-and-trade regimes for the five years between 2012-2017.<sup>78</sup> Beyond that time, the law is silent; as both a practical and a legal matter, the consequences of this silence for the regional trading programs are unclear. Would the national market continue to function in the absence of a reauthorization of the preemption clause? If so, would a court find that the national market has occupied the field of GHG emissions reductions and preempt local actions?<sup>79</sup> Would a court find that the national market remains the law of the land, implying that local actions that conflict with or disrupt the market are preempted? If the market dissolves, would the regional programs be able to successfully reconstitute themselves? And what will be the preemptive effect of the federal regime's relation to foreign policy in a post-Kyoto world?<sup>80</sup>

As with the cap-and-trade regime, other preemption provisions in ACESA send mixed signals that do not provide a firm answer to the question of how federalization and devolution values are to be balanced. In regard to energy supply, Title I (Clean Energy) would establish a national renewable portfolio standard that explicitly preserves the right of states to surpass it.<sup>81</sup> Title I would also establish performance standards for coal-burning power plants, though here, the bill makes no mention of whether existing state standards would be preempted.<sup>82</sup> In addition, Title I would establish a planning process of siting and building a "green" transmission grid that on the one hand encourages a collaborative effort among all levels of government<sup>83</sup>; at the same time, the provi-

sions grant the federal government the ability, under certain conditions, to issue a certificate of public convenience and necessity to a transmission facility located in any of the states served by the Western Interconnection.<sup>84</sup>

As for energy efficiency, Title II of ACESA directs the U.S. Department of Energy (DOE) to create a national building code, again preserving the right of states to surpass its mandates.<sup>85</sup> However, Title II also establishes new energy efficiency standards for a number of appliances, and expressly preempts state building codes that require appliances that satisfy more stringent efficiency standards.<sup>86</sup> Similarly, in setting new emissions standards for vehicles, Title II preserves the existing preemption compromise, including California's special status under the CAA.<sup>87</sup>

ACESA, then, sets up a largely coordinated national climate change response; in so doing, however, it reiterates, or at least fails to resolve, some of the existing preemption problems facing both states and localities, particularly with regard to vehicle emissions and energy efficiency standards.

Five years ago, in *Engine Manufacturers Association v. South Coast Air Quality Management District*,<sup>88</sup> the U.S. Supreme Court created a new hurdle for local governments seeking to improve air quality by regulating emissions from categories of local vehicles. In that case, the Court determined that "Fleet Rules" promulgated by a California state agency were preempted by §209(a) of the CAA, which prohibits states or their subdivisions from adopting or attempting to enforce any state or local "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."<sup>89</sup> The Fleet Rules required certain public and private fleet operators to purchase or lease alternative fuel vehicles or vehicles that met emissions standards specified by the California Air Resources Board (CARB) when replacing older vehicles.<sup>90</sup> The Court held that the purchase requirements were tantamount to emissions standards under the CAA, and therefore preempted.<sup>91</sup>

The effects of the Court's holding have become evident over the last two years. Boston and New York City have both attempted to hybridize their taxi fleets, but have been preempted under both §209(a) of the CAA and the Corporate Average Fuel Economy (CAFE) standards promulgated under EPCA.<sup>92</sup> Importantly, in both instances, the hybrid-

84. *Id.* (new §216b).

85. *Id.* §201 (savings clause at amended §304(b)).

86. *Id.* §§211-213. The new law arguably makes it easier for states and localities to obtain a waiver to set more stringent standards. *Id.* §213(g).

87. *Id.* §§221, 221(4). See also John M. Broder, *Obama to Toughen Rules on Emissions and Mileage*, N.Y. TIMES, May 19, 2009, at A1.

88. 541 U.S. 246, 34 ELR 20028 (2004).

89. 42 U.S.C. §7543(a) (2007).

90. The fleets included street sweepers; passenger cars, light-duty trucks, and medium-duty vehicles; public transit vehicles and urban buses; solid waste collection vehicles; airport passenger transportation vehicles, including shuttles and taxicabs picking up airline passengers; and heavy-duty on-road vehicles. *South Coast*, 541 U.S. at 249.

91. *Id.* at 255.

92. See *Ophir v. City of Boston*, No. 09-10467-WGY (D. Mass. Aug. 14, 2009) (memorandum and order); *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 39 ELR 20140 (S.D.N.Y. 2009) (*Metro. Taxi II*); *Metro. Taxicab Bd. of Trade v. City of New York*, 2008 U.S. Dist. LEXIS 94021 (S.D.N.Y. Oct. 31, 2008) (*Metro. Taxi I*). It bears noting here that, as part of

77. ACESA §334.

78. *Id.* §335.

79. Glicksman & Levy, *supra* note 7, at 583 (noting that field preemption acts as both a floor and a ceiling).

80. See Farber, *supra* note 9, 904-10 (discussing foreign affairs preemption and applying it to climate change).

81. ACESA §101 (savings clause at amended §610(i)).

82. *Id.* §116.

83. *Id.* §151 (amending §216 of the Federal Power Act, 16 U.S.C. §824p, to include new §216a).

ization attempts were part of coordinated local plans to address climate change. Indeed, although Boston disclaimed any policy motive beyond modernizing the appearance of taxis in the city, the conversion of taxis to hybrids is a part of the city's local CAP.<sup>93</sup> Similarly, New York City's hybrid taxi rules represented an attempt to implement PlaNYC, a long-term sustainable development plan whose goal is to reduce the city's GHG emissions by 30% by 2030.<sup>94</sup> PlaNYC was made enforceable by the New York City Council's passage of the Climate Change Protection Act, which sets a different GHG reduction target, but adopts PlaNYC programs as the mechanism for achieving it.<sup>95</sup>

Cities' taxis and other almost-public vehicle fleets constitute a small fraction of our collective GHG contributions. Emissions from buildings and building appliances, however, make up a far larger share. Indeed, DOE estimates that buildings and their appliances make up 40% of the country's CO<sub>2</sub> emissions.<sup>96</sup> Increasing the energy efficiency of buildings and appliances, then, could quickly and drastically reduce the nation's carbon footprint. Thus, a district court's decision last year that critical parts of Albuquerque's green building code were likely preempted under EPCA takes on greater literal significance than the rulings in the hybrid taxi cases.<sup>97</sup> The court's finding that the building code was preempted as it "effectively require[d]" the installation of appliances that exceed federal efficiency standards,<sup>98</sup> could chill local experimentation across the country. What is more, the *New York Times* recently reported on potential insufficiencies in the LEED certification program, leading to less efficiency improvements through that program than originally thought.<sup>99</sup> With the ultimate efficacy of the LEED program in question, the ability to link green building to actual energy appliance efficiency takes on an even greater importance.

These three instances—Boston and New York's taxi cases, and Albuquerque's green building code case—are emblematic of the problem posed to local climate change initiatives by existing preemption doctrine, and carried forward in the provisions of ACESA. In each case, the courts essentially disregarded the planning efforts behind the rules, their integration into more comprehensive local climate change programs, and the devolutionary values they represent (local autonomy and experimentation); nor did courts consider the actual impact the rules would have on the federal scheme of vehicle emissions or appliance efficiency regulation. They

certainly did not consider whether inter-local competition for green-savvy citizens was a net positive for national policy. Rather, the courts concluded that, as a matter of doctrine, *no* local deviation from federal uniform standards was permissible. It is this black-and-white picture of regulation in gray areas that the proposal below seeks to improve.

#### IV. Proposal for a Layered Regime

How, then, can federal climate change law account for the race to the top? How can the law capture the values that favor devolution yet respect those that favor centralization?

Reinvention of doctrinal interpretation provides one approach. For example, I argue elsewhere that an expansion of the market participant exception to federal preemption provides an interpretive means to balance national concerns about equity, efficiency, and uniformity with the devolutionary values and market forces driving local climate change and sustainability initiatives.<sup>100</sup> Others argue that the actual impact of a local law on a uniform market or standard should be part of the preemption analysis itself. Prof. Tom Merrill, for one, describes "anti-Balkanization" and "anti-NIMBY" "default rules" for preemption that would transform the theoretical justifications for ceilings into subjects for scrutiny, rather than matters of presumption.<sup>101</sup> Similarly, Prof. Alexandra Klass argues that the preemption test could be modified to account for innovative state actions.<sup>102</sup> Preemption analyses could also directly apply the *Pike* balancing test used in dormant Commerce Clause cases to explicitly weigh burdens on the federal scheme against local benefits.<sup>103</sup>

But ACESA has not been finalized, and even if it were, there would still be cause to contemplate regulatory structures that could improve on it. Along these lines, a spate of scholarly literature over the last few years has offered variations on the theme of federal-state cooperation.<sup>104</sup> Here, I

the Boxer-Kerry Bill, legislation has been introduced that would overturn these decisions. See H.R. 3711, S. 1741, 111th Cong. (2009) (the Green Taxis Act of 2009).

93. See CITY OF BOSTON, CLIMATE: CHANGE—THE CITY OF BOSTON'S CLIMATE ACTION PLAN 17 (2007), available at <http://www.cityofboston.gov/climate/pdfs/CAPJan08.pdf>.

94. City of N.Y., PlaNYC: A Greener, Greater New York (2007) (hereinafter PlaNYC).

95. City of New York, Local Law No. 55 (Dec. 5, 2007).

96. Clifford Krauss, *Tightened Codes Bring a New Enforcer, the Energy Inspector*, N.Y. TIMES, July 18, 2009, at A1.

97. *AHRI v. City of Albuquerque*, 2008 U.S. Dist. LEXIS 106706 (D.N.M. Oct. 3, 2008).

98. *Id.* at \*30.

99. Mireya Navarro, *Some Buildings Not Living Up to Green Label*, N.Y. TIMES, Aug. 31, 2009, at A8.

100. Michael Burger, "It's Not Easy Being Green": *Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. (forthcoming 2010).

101. Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS*, *supra* note 56, at 166.

102. Alexandra B. Klass, *State Innovation and Preemption: Lessons From State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1704-16 (2008).

103. See *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254, 37 ELR 20228 (3d Cir. 2007) (a state law that affects rail carriage survives preemption under Interstate Commerce Commission Termination Act if it does not discriminate against or unreasonably burden rail carriage). See also Michael Wells & Walter Hellerstein, *The Governmental Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1126 (1980) (arguing that government-proprietary distinction can be jettisoned altogether in favor of *Pike* balancing test).

104. William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108-09 (2005) (noting the benefits of regulatory overlap and cooperative federalism structures); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 8-14 (2003) (examining how the "regulatory commons problem" can generate regulatory gaps for interjurisdictional problems like urban sprawl and global warming); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (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); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248-49 (2005) (proposing the concept of

join this chorus by proposing a specific regulatory structure that resonates with the principles of contextual/collaborative/dynamic/polyphonic federalism: Federal climate change law could substantiate state and local CAPs in a manner analogous to the CZMA's incorporation of state Coastal Management Plans (CMPs) and their local off-shoots.<sup>105</sup>

### A. *The Origins and Purposes of the CZMA*

The CZMA was enacted in 1972 to respond to another pollution-of-the-commons problem: the threat posed to the nation's coastal areas and resources by uncoordinated land and water use. The coastal zone, of course, is a critical natural resource. Despite accounting for only 14% of the national land mass, the coastal zone is home to more than one-half the nation's population. In addition, there is enormous biological productivity within the coastal ocean (the area stretching 200 nautical miles from the shoreline to the far edge of the Exclusive Economic Zone). It also is a source of fossil fuels, mineral wealth, and significant recreational opportunities, both onshore and off. Finally, the coastal zone affords numerous opportunities for renewable-resource energy development, including tapping wind, wave, current, tidal, or ocean thermal sources.<sup>106</sup>

By the late 1960s, it was clear that the population's movement toward coastal cities was creating a new level of stress on coastal resources, the result of "burgeoning populations congregating in ever larger urban systems, creating growing demands for commercial, residential, recreational, and other development, often at the expense of natural values that include some of the most productive areas found anywhere on earth."<sup>107</sup> For at least three reasons, the regulatory structure was ill-equipped to deal with the new stresses: First, there was a lack of federal oversight. Second, local failures were widespread. Third, there was no coordination among competing federal, state, local, commercial, and public interests.

There are obvious differences between the CZMA and climate change contexts. For instance, in creating the CZMA, Congress recognized that management of the coastal zone was fundamentally an exercise in local land use planning, and "did not wish to preempt what traditionally has been a matter of state authority."<sup>108</sup> Indeed, Congress recognized that the complexity of the problem was such that it could not easily create and apply uniform national standards, and that "the key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in

the coastal zone."<sup>109</sup> ACESA, by contrast, seeks to create a new unified national market in GHG emissions credits and to carry forward existing federal ceilings. Its primary solution is federalization; the authority and expertise of states and localities operate as secondary measures.

Despite these differences, the federal response to climate change could adopt some of the principles and structures from the CZMA to achieve a more desirable balance between the values of centralization and devolution.

### B. *The Structure of the CZMA and the Advantages of Layered Approach*

Under the CZMA, the federal government provides funding to coastal states that opt into the program and prepare CMPs, which must meet a number of criteria in order to obtain approval from the National Oceanic and Atmospheric Administration (NOAA).<sup>110</sup> Once the CMP has been approved, all local, state, and federal decisions that affect the coastal zone must be certified for consistency with it.<sup>111</sup> Although the emphasis in this regime shifts much power to states, the federal government retains approval authority: For instance, the Secretary of Commerce cannot approve any state management plan unless the views of federal agencies principally affected by the plan have been adequately considered,<sup>112</sup> the plan provides for adequate consideration of national interests involved in siting of energy facilities that are of greater than local significance,<sup>113</sup> and lands that are held in trust by or subject solely to the discretion of the federal government are excluded from the definition of "coastal zone."<sup>114</sup> The federal government may also condition funding,<sup>115</sup> or else withdraw approval.<sup>116</sup>

Local governments also play an important part in management and implementation of the state CMPs. Some local governments develop local implementation mechanisms, such as local coastal programs, land use plans, comprehensive programs, ordinances, local permits, and special area management plans (SAMPs); or else they may take on a more limited role that requires only that their actions be consistent with the state CMP. Several states—including New York,

109. 16 U.S.C. §1451(i).

110. *Id.* §§1455-1456. For example, a CMP must include "identification of the means by which the State proposes to exert control over the land uses and water uses" and "areas of particular concern." *Id.* §1455(d)(2)(D), (E). A state's CMP development must be conducted "with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private . . ." and must provide "an effective mechanism for continuing consultation and coordination" among them. *Id.* §1455(d)(3)(B). The CMP also must demonstrate that land and water uses can be controlled and coordinated through either state establishment of standards for local implementation, direct state regulation, state review of all state, local, and private development proposals for consistency with the CMP, or a combination of those three general approaches. *Id.* §1455(d)(11).

111. *Id.* §1456.

112. *Id.* §1456(a).

113. *Id.* §1455(d)(8).

114. *Id.* §1453(1).

115. *Id.* §1458(c).

116. *Id.* §1458(d).

polyphonic federalism, where the focus is placed upon the interaction between state and federal authority, rather than upon where the two spheres diverge).

105. Pub. L. No. 89-454, 80 Stat. 203 (codified as amended at 16 U.S.C. §§1451-1466 (2007), ELR STAT. CZMA §§302-319). This law was most recently amended by the Coastal Zone Protection Act of 1996, Pub. L. No. 108-415, 118 Stat. 2337.

106. See The Coastal State Renewable Energy Promotion Act, H.R. 1690, 111th Cong. (2009).

107. S. REP. NO. 92-753 (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4777.

108. *New York v. DeLyser*, 759 F. Supp. 982, 988, 21 ELR 20989 (W.D.N.Y. 1991).

Oregon, and Washington—formally incorporate local government plans into their statewide CMPs.<sup>117</sup>

An analogous system for climate change, though necessarily distinct, could adopt much from this system, with more of an emphasis on local autonomy and innovation. In rough terms, the program could look like this:

- A) 1. Under a new subtitle located in either Title I or Title II of ACESA (or their analogs in future legislation), the federal government would support the development of state CAPs through the provision of funding and technical expertise. Where states opt not to develop CAPs, localities would be able to seek federal funding independently.
2. State and local CAPs could incorporate provisions related to any of the areas covered under ACESA—including, among other things, renewable portfolio standards, carbon capture and sequestration projects, clean transportation, green grid and transmission planning, building codes, energy efficiency, public and quasi-public vehicle emissions standards, and climate change adaptation—with the exception that state and local CAPs could not establish independent GHG emissions trading markets.
3. GHG emissions reductions achieved through state or local CAPs would be ineligible to qualify as offsets under Title III's cap-and-trade program. ACESA presently preserves the principle of offset additionality, requiring that proposed offset projects will only qualify if "they are not required by or undertaken to comply with any law, including any regulation or

consent order."<sup>118</sup> This principle would apply to state and local CAPs, as well.

- B) All CAPs would require federal approval, which would be contingent on satisfying requirements for public participation and intergovernmental coordination. CAPs would be approvable if they do not substantially interfere with federal uniform standards or ceilings. In addition, CAPs would not be approvable if they seek to impose standards or requirements that do not satisfy federal minimums.
- C) States that do create CAPs would further devolve authority to localities to develop local CAPs. These local CAPs could be more narrowly tailored to local conditions, and could utilize local expertise in such as areas as land use, building codes, and municipal operations to capitalize on both large-scale and micro-scale opportunities for achieving GHG emissions reductions.<sup>119</sup> Where a local government proposes to take measures that surpass federal ceilings or uniform standards in a way that substantially differs from the approved state CAP, federal approval would be required.
- D) Federal projects—except in specified areas of national concern where NIMBYism problems need to be overridden—must be consistent with state and local CAPs.
- E) State and local actions must also be consistent with approved CAPs.

This proposed regime, though rough in detail, represents a means to empower both state and local governments to express the preferences of their residents, to compete for mobile residents and capital, and to experiment with diverse forms of climate change mitigation. At the same time, by preserving the federal government's authority to approve or deny CAPs, the proposal ensures that states and localities do not take on programs that substantially interfere with national policy. Such a layered regulatory structure would serve as a vital supplement to the cap-and-trade program: Federal law establishes clear targets for national GHG reductions, and the emissions trading market as the mechanism for achieving that minimum; the CAP provisions provide states and localities with a way to go even further.

Obviously, such a regime would require extensive intergovernmental coordination and cooperation. This is, of course, one of the driving forces behind the CZMA: Among the CZMA's policies are "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone;" "to encourage coordination and cooperation with and among the appropriate Federal, State, and local agencies, and international organizations where appropriate, in collection, analysis, synthesis, and dissemination of coastal management information, research results, and technical assistance;"

117. Oregon requires local governments to develop comprehensive plans consistent with the state's 19 Statewide Planning Goals. OR. REV. STAT. 197.015(5), (8). Several of the Statewide Planning Goals relate to coastal zone management, and comprehensive plans are incorporated into the Oregon Coastal Management Program. See OREGON DEPARTMENT OF LAND CONSERVATION DEVELOPMENT, A CITIZEN'S GUIDE TO THE OREGON COASTAL ZONE MANAGEMENT PROGRAM (2001), available at <http://www.oregon.gov/LCD/docs/publications/citngnd.pdf> (last visited Nov. 18, 2009). Similarly, Washington's Shoreline Management Act (SMA) is administered cooperatively through a partnership between local governments and the Washington Department of Ecology. Shoreline Management Act of 1971, RCW 90.58. Under the SMA, cities and counties develop shoreline master programs to regulate development and land use along the shore, while the Department of Ecology provides technical and financial assistance and reviews local programs and permit decisions. Washington State Dept. of Ecology, Shoreline Management Home, available at <http://www.ecy.wa.gov/programs/sea/sma/>. In New York, the Waterfront Revitalization and Coastal Resources Act (WRCRA), N.Y. EXEC. LAW §§910-920, as amended at Act of July 21, 1986, ch. 366, 1986 N.Y. Laws §762, is administered by the Department of State's Division of Coastal Resources, which covers 250 coastal municipalities along 3,200 miles of the state's coastline. To ensure consistency and coordination among multiple jurisdictions and layers of government, the Division of Coastal Resources has established 44 coastal policies. N.Y. DEPT. OF STATE, COASTAL MANAGEMENT PROGRAM, STATE COASTAL POLICIES 1 (Apr. 2002), available at [http://nyswaterfronts.com/downloads/pdfs/State\\_Coastal\\_Policies.pdf](http://nyswaterfronts.com/downloads/pdfs/State_Coastal_Policies.pdf). These policies, in turn, guide local governments in the development of authorized Local Waterfront Revitalization Programs (LWRPs). See NYSDOS, Division of Coastal Resources, "Local Waterfront Revitalization Program," available at [http://nyswaterfronts.com/aboutus\\_LWRP.asp](http://nyswaterfronts.com/aboutus_LWRP.asp) (last visited Nov. 18, 2009). Once adopted, LWRPs "in effect, become the policies and standards of the local government, the State of New York, and the federal government." *Stutchin v. Town of Huntington*, 71 F. Supp. 2d 76, 89 (E.D.N.Y. 1999).

118. ACESA §311 (§734(a)(1)(A)).

119. Local CAPs could be required to be consistent with state CAPs, or else could be independently approved by the federal government. In either event, when a state has opted not to develop a CAP, a locality within that jurisdiction would have access to federal approval.

and “to respond to changing circumstances affecting the coastal environment and coastal resource management.”<sup>120</sup> This integration among the various scales of governance is precisely the response climate change demands.

I freely admit that the need for creative integration among local, state, and federal levels of government is, as noted above, nothing new.<sup>121</sup> What’s more, one might argue that both the CAA and EPCA already provide avenues for states to surpass federal ceilings: The CAA provides California with the ability to set more stringent vehicle emissions standards, and other states with the ability to opt-in to California’s regime, provided EPA grants California a waiver.<sup>122</sup> The EPCA also includes waiver provisions that allow states to set more stringent energy efficiency standards for appliances.<sup>123</sup> However, neither of these regimes fully accounts for the values of local experimentation and autonomy. For one thing, cities cannot opt-in to California’s vehicle emissions standards; nor do California’s standards necessarily go far enough for any given city’s purposes. Similarly, cities cannot obtain a waiver under EPCA. Only states may request a waiver, and such a request must be based on “unusual and compelling State or local energy or water interests” that are “substantially different in nature or magnitude than those prevailing in the United States generally.”<sup>124</sup> DOE has, thus far, never granted such a waiver; only California has ever bothered to apply.<sup>125</sup> Indeed, DOE’s waiver program is rife with inefficiencies and slack.<sup>126</sup> Although ACESA arguably makes it easier for states and localities to obtain a waiver to set more stringent standards,<sup>127</sup> there is no clear indication that waivers will be forthcoming.

The proposed layered approach improves upon the waiver system by broadening the range of jurisdictions to include local governments. The approach also, for the first time, fully credits the value of comprehensive climate change and sustainability planning. A good amount of public resources have been poured into these planning activities, creating and accumulating institutional knowledge at the state and local level on which the nation as a whole can capitalize. Rather than dismiss these efforts, or leave them subject to judicial review, federal climate change law should encourage them, and thereby encourage a diversity of regulatory approaches and experimentation.

120. 16 U.S.C. §1452(2), (5), (6).

121. See *supra* notes 102-03. See also John R. Nolan, *Champions for Change: Re-inventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 18 (2006) (calling for integrated approach to federal use land law) (“Law reform taking place at the grassroots level must be integrated into a federal system of laws, organized within a framework that accounts for and marshals the resources of all levels of government.”); Thomas D. Peterson et al., *Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors*, 39 ELR 10711 (Aug. 2009) (proposing that existing SIP provisions under the CAA provide workable approach to integrating climate change governance); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 567 (2007) (highlighting water and air pollution, counterterrorism efforts, and the Hurricane Katrina response as examples of interjurisdictional regulatory problems).

122. 42 U.S.C. §7543(b).

123. 42 U.S.C. §6297(d)(1).

124. *Id.* §6297(d)(1)(c)(i), (ii).

125. See U.S. Department of Energy, Energy Efficiency Program for Consumer Products: California Energy Commission Petition for Exemption From Federal Preemption of California’s Water Conservation Standards for Residential Clothes Washers, 71 Fed. Reg. 78157 (Dec. 28, 2006).

126. See Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards* (draft article, on file with author).

127. ACESA §213(g).