INTRASTATE PREEMPTION
IN THE SHIFTING ENERGY SECTOR

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The United States energy sector is in a state of transition, at once moving toward cleaner energy resources, but also expanding the use of fossil fuels with new access to oil and gas plays. Although federalism concerns have dominated the literature, I argue here that the state-local relationship and intrastate preemption are shaping energy policy in important and under-examined ways. The energy transition to date has been marked by growth centered on hydraulic fracturing (fracking) and commercial wind development, both of which are mostly regulated at the state level. Local governments have exerted authority over both forms of energy production, although state-local tensions in the fracking context have been especially pronounced. Hundreds of localities have opposed or sought to contain the effects of fracking through official action, including bans and moratoria.

This striking trend, considered alongside local responses to wind development, provides a fresh lens through which to assess the role of intrastate preemption in the shifting energy sector. By approaching fracking and wind together, this Article represents a departure from the largely resource-segregated literature in favor of greater scholarly coherence on energy transition. As this Article explains, the doctrine of intrastate preemption, though it hews closely to its federal analogue, is uniquely nuanced by the variability of state-local power structures. I develop the claim that the unpredictable legal environment resulting from this

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INTRODUCTION

The United States energy sector is in a state of transition,
at once moving toward cleaner energy resources, but also
expanding the use of fossil fuels with new access to oil and gas
plays. Dramatic growth in natural gas and commercial wind
development is a hallmark of this shift. Observers have called
the spike in natural gas a “game-changer” resulting from the
expanded use of horizontal drilling with hydraulic fracturing
 fracking. 1 Electricity generation from renewable resources

1. See, e.g., Interview by Kimberly Strassel with T. Boone Pickens,
Chairman, BP Capital Mgmt., and Edward G. Rendell, Partner, Ballard Spahr, in
SB100014240527023046364044577296682719190576, archived at http://perma.cc/
WBE5-Y5HU. In keeping with the focus here on the shifting energy sector for
has increased four-fold since 1990, and most of that trend represents recent growth in wind power.\(^2\)

Wind projects have often been contentious for host communities, and fracking has proven even more controversial. States are the primary regulators over both forms of energy production, and local governments have exerted authority in both contexts. Tensions over local regulation of fracking have been especially pronounced—hundreds of localities have opposed or sought to contain the effects of fracking through official action, including bans and moratoria.

This striking trend, considered alongside local responses to wind development, provides a fresh lens through which to assess the role of intrastate preemption in the shifting energy sector. Although federalism concerns have dominated the literature,\(^3\) I argue that the state-local relationship—contextualized as it is by intrastate preemption principles—is shaping energy policy in important and under-examined ways. This Article explains how, in contrast to federal preemption, the doctrine of intrastate preemption is uniquely nuanced by the variability of state-local power structures. I develop the claim that the unpredictable legal environment resulting from this variability works to enhance the prospects for local governments, and even more localized property interests, to inform national energy discourse.

By approaching fracking and wind together, this Article represents a departure from the largely resource-segregated literature in favor of greater scholarly coherence on energy transition.\(^4\) Most of the literature on renewable energy reflects electricity generation, the discussion of fracking in this Article (and most of the legal literature on fracking) is focused on natural gas, though the extraction technique is also used for oil.


4. Of the handful of recent articles that address fracking and renewables
a common ideal: a federalism model that will more effectively promote rapid policy and infrastructure development. The fracking literature reflects less normative consensus, with debate continuing over the appropriate extent, form, and balance of regulation by states and the federal government. The integrated approach I take here reveals that a shift in focus from federalism to intrastate dynamics and their implications is overdue. Although federalism has long structured energy’s regulatory environment, the federal government is notably disengaged from direct regulation of the production of natural gas and wind, the fastest growing energy resources. With their rapid and geographically dispersed proliferation, unconventional gas wells have inevitably touched many localities. Local regulation more commonly raises state rather than federal preemption issues, and in states with local fracking bans and moratoria, intrastate preemption questions have become dominant energy policy themes. All of this is taking place against a backdrop of risk that remains, for many, unsatisfactorily quantified. The risk of fracking to groundwater, for example, remains the subject of heated
together to some extent, none have done so for purposes of reconciling state-local dynamics and intrastate preemption across contexts. See, e.g., Joseph P. Tomain, Shale Gas and Clean Energy Policy, 63 CASE W. RES. L. REV. 1187 (2013) (cautioning against relying on natural gas to the detriment of renewable energy development); Hannah J. Wiseman, Urban Energy, 40 FORDHAM URB. L.J. 1793 (2013) (observing that gas drilling and distributed renewable energy are both encroaching on populated areas previously distanced from energy production modes).


7. See generally infra Part II.
debate, and the water consumption required for fracking presents risks in western states where water resources have long been strained, and in areas plagued with recurring droughts.\textsuperscript{8} Toxic air emissions at the wellhead present local health hazards, while the greenhouse gas emissions profile of natural gas, both in isolation and relative to other fossil fuels, raises important policy questions that are national in scope about the role of natural gas in a clean energy transition.\textsuperscript{9} Although the federal government is poised to exert increased authority over environmental impacts of natural gas production, this will not materially alter the basic state regulatory structures.\textsuperscript{10}

Renewable energy projects and the challenges associated with finding suitable development sites have also highlighted persistent intrastate preemption questions. As the Article details, the siting process for electric power facilities on private land is typically either locally controlled or addressed by state power plant siting statutes that articulate a strong local role.\textsuperscript{11} Intrastate preemption questions can be expected to remain relevant here as well, with no sign of a turn toward federal preemption of energy land use authority at the local level.\textsuperscript{12} In both contexts, it is clear that empowered local governments have the potential to enhance protections for locally important natural resources, as well as to facilitate or destabilize energy development plans.

With its emphasis on the state-local relationship, this Article makes several contributions to the literature on energy transition. First, it articulates the doctrinal importance of intrastate preemption to United States energy policy. In turning attention to intrastate dynamics, it highlights a governance nexus often overlooked but highly relevant to fast


\textsuperscript{9} See infra Part I.


\textsuperscript{11} See infra Part IV.A.

\textsuperscript{12} I have discussed the bases for this expectation at greater length elsewhere. See Outka, Footprint, supra note 5, at 286–92.
growing segments of the energy sector. Importantly, this sheds new light on local governments’ role in energy transition beyond the purely local setting—a role in which they can assist in bridging persistent structural divisions between energy and environmental concerns.

Second, it brings a new depth of analysis to the scholarship on evolving natural gas law by evaluating the form and variability of local government action, state legislative responses, and the role of the courts. Local governments have been uniquely assertive in their resistance to the fracking boom—a resistance which, in its scope and consistency, suggests an important milestone in the historical arc of local environmental regulation. Others have addressed the trend summarily,13 or addressed case law in one or more states,14 but the richer implications of these state-local dynamics have yet to be explored.

Third, this Article makes the first attempt to reconcile the trend with similar tensions in the renewable energy context. This integrated approach probes the extent to which resource-divergent policy preferences may be justified. Is there a reasoned basis, for example, for a “fracking bans good/wind bans bad” position in the shifting energy sector? Can points of difference in local governments’ response to each resource


inform governance quandries across contexts?

In what follows, Part I provides a brief overview of natural gas production and wind development and their importance within the shifting United States energy sector. Part II situates the intrastate preemption doctrine as both defined by and defining state-local power structures. In doing so, it clarifies how these influences analytically differentiate intrastate preemption from federal preemption, its doctrinal counterpart, with implications for national policy anchored to state law.

Part III surveys the scale and scope of local government action related to fracking, drawing from a Food and Water Watch compendium of over 400 localities, and situates the trend in local fracking governance as part of a continuum of local environmental regulation. This research shows a variety of discrete forms of local resistance coalescing around fairly consistent political, if not theoretical, themes. It then turns to state legislative responses and recent high-profile litigation for their lessons about the function of intrastate preemption in this evolving field.

Part IV turns to commercial wind development, which has shown the highest growth among renewable resources to date. In 2012 alone, 143 wind farms were newly constructed or added capacity; there are now over 800 wind farms nationwide, with the capacity to power roughly 15 million homes.15 Wind projects—like natural gas wells—are very often sited on private land pursuant to lease agreements between developers and private landowners.16 Private land transactions involve


localities in both forms of energy development due to the threshold importance of land use law to siting.\textsuperscript{17} Because wind bans and moratoria present preemption questions similar to those facing fracking states, they afford a fruitful contrast for analysis.

Part V considers differential treatment of local authority across contexts—by courts applying the intrastate preemption doctrine, or by state legislatures making a policy judgment to preempt local government action. Differences between fracking and wind power create divergent policy considerations bearing on whether and how broadly states exert legislative preemption in each context. Yet as 2013’s landmark Robinson Township case reiterated with considerable force, even express preemption must yield to intrastate power structures.\textsuperscript{18} It is becoming clear that intrastate preemption’s heterogeneity across the states creates a legal environment in the shifting energy sector that has increased attention to the impacts of energy development. Buoyed by the legal, political, and institutional posture of local governments, as distinct from community and environmental groups, this attention is spurring substantative responses to these impacts at both state and federal levels. In this way, intrastate preemption as a legal doctrine, in resisting a single definition that can be applied one state to the next, has enhanced local governments’ collective contribution to national discourse on energy transition. The benefits of this productive dialogue in the shifting energy sector caution states to avoid broad preemption in favor of engaging local governments in resolving the concerns they raise.

I. NATURAL GAS AND WIND IN THE SHIFTING ENERGY SECTOR

Production of natural gas and wind energy has been steadily increasing, and projections show this trend is likely to continue.\textsuperscript{19} Hydraulic fracturing, combined with improved

\textsuperscript{17} See infra Part III.


\textsuperscript{19} See U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2013 WITH PROJECTIONS TO 2040 75–76 (2013), available at http://www.eia.gov/forecasts/
horizontal drilling technology, has been central to this growth for natural gas. According to the American Petroleum Institute, over a million wells have been hydraulically fractured in the United States already, and over 80 percent of wells drilled over the next decade will also be fractured. The practice involves injecting millions of gallons of water, proppant, and chemical lubricants into deep shale formations to release oil and/or natural gas through pressure fractures in the shale. Natural gas is expected to surpass coal as the leading fuel used for electricity generation in the United States by 2035.

Renewable energy has increased from the single digit percentages only a few years ago to providing 13 percent of United States electricity in 2013, and this percentage is rising. To drive project development, more than half of the states have set renewable portfolio standards (RPS) that require utilities to derive a percentage of total electricity sold at retail from renewable energy sources, increasing the share of renewable energy over time. The United States Energy Information Administration projects growth for wind energy will continue, with the share of electricity generation from renewable sources rising to 16 percent in 2040 assuming status aeo/pdf/0383(2013).pdf, archived at http://perma.cc/KGD4-WTXN. [hereinafter ANNUAL ENERGY OUTLOOK].


By contrast, alternative scenarios reflecting sustained support for renewables and other greenhouse gas emission reduction policies indicate renewable energy could account for almost twice as much electricity generation, exceeding 30 percent in the same timeframe. President Obama’s Climate Change Plan, announced in June 2013, affirms support for the upward trend in renewables with plans to permit 10 gigawatts (GW) of renewable energy projects on public lands, install 100 megawatts (MW) of renewable energy capacity on federally assisted housing, and shift 20 percent of the federal government’s energy use to renewables, all by 2020.

Most of the growth in United States renewables to date is the result of new commercial-scale wind power facilities. Wind projects accounted for 42 percent of all new electric generating capacity added in 2012, exceeding every other fuel source used for electricity, including natural gas. With commercial-scale wind installations now generating electricity in thirty-nine states, the American Wind Energy Association counted “61,946 MW of installed wind capacity in the United States and over 46,300 wind turbines” midway through 2014.

Looking forward, the interaction between increased reliance on natural gas and renewable energy development at the national and international scale raises important policy questions with implications for climate change mitigation.
goals. On the one hand, using more natural gas to produce electricity is often credited with driving down coal consumption and reducing emissions of carbon dioxide (CO₂), the greenhouse gas (GHG) most affecting the climate today. At the same time, natural gas emits the potent GHG methane (CH₄), which climate scientists warn could speed the pace of climate disruption. In a 2010 analysis of the future of natural gas, researchers at Massachusetts Institute of Technology (MIT) concluded that “a combination of demand reduction and displacement of coal-fired power by gas-fired generation is the lowest-cost way to reduce CO₂ emissions by up to 50 percent.” These conclusions supported what has become a common view of natural gas as a “bridge” to a low-carbon future. Yet this view is being called into question, by MIT researchers and others, as subsequent estimates of methane leakage rates “have challenged the benefits of switching from coal” to natural gas.

30. See, e.g., CTR. FOR CLIMATE & ENERGY SOLUTIONS, LEVERAGING NATURAL GAS TO REDUCE GREENHOUSE GAS EMISSIONS vii (2013) (noting how “[t]he substitution of gas for coal in the power sector, for example, has contributed to a recent decline in U.S. greenhouse gas emissions,” yet highlighting that “[a]part from the emissions released by its combustion, natural gas is composed primarily of methane (CH₄), a potent greenhouse gas, and the direct release of methane during production, transmission, and distribution may offset some of the potential climate benefits of its expanded use across the economy”).


32. MIT ENERGY INITIATIVE, THE FUTURE OF NATURAL GAS: AN INTERDISCIPLINARY MIT STUDY 2 (2011). This research has been criticized as insufficiently independent of oil and gas industry financial support and other ties. See PUB. ACCOUNTABILITY INITIATIVE, INDUSTRY PARTNER OR INDUSTRY PUPPET? (2013), available at http://public-accountability.org/2013/03/industry-partner-or-industry-puppet, archived at http://perma.cc/8GSW-WB3L.

Researchers reviewing available data warn that “[i]f natural gas is to be a ‘bridge’ to a more sustainable energy future, it is a bridge that must be traversed carefully . . . to ensure that leakage rates are low enough to achieve sustainability goals.” Moreover, there is common agreement that even optimistic GHG reduction from substituting natural gas for coal is not a long-term mitigation strategy—cleaner alternatives are critical. The bridge-fuel potential of natural gas is further complicated by the risk that increased production will lead to cheap prices undercutting renewable energy development, the linchpin of emissions reduction from the electricity sector. For these reasons, energy law scholar Joseph Tomain cautions against legal classification of natural gas as “clean” energy, warning that the shale gas boom risks “further strengthening our traditional hydrocarbon economy while threatening the growth of the clean energy sector.”

34. Brandt et al., supra note 33, at 733; see also Ramón A. Alvarez et al., Greater Focus Needed on Methane Leakage from Natural Gas Infrastructure, 109 PROC. NAT’L ACAD. SCI. 17, 6435 (2012), available at http://www.pnas.org/content/109/17/6435.full, archived at http://perma.cc/Q2KY-N955 (discussing the environmental impact of increased natural gas usage).

35. Brandt et al., supra note 33, at 735. Environmental Defense Fund, which participated in the research producing Alvarez, supra note 34, summarized a key finding: “Assuming the Environmental Protection Agency’s (EPA) 2009 leakage rate of 2.4% (from well to city), new natural gas combined cycle power plants reduce climate impacts compared to new coal plants; this case is true as long as leakage remains under 3.2%.” Envtl. Def. Fund, What Will It Take to Get Sustained Benefits from Natural Gas?, EDF.ORG, http://www.edf.org/methaneleakage (last visited Nov. 2, 2014), archived at http://perma.cc/U58P-2KF2.

36. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE: SUMMARY FOR POLICY MAKERS, 9–13 (2014) (discussing the impending effects on the environment without the implementation of mitigation strategies).

37. See ANNUAL ENERGY OUTLOOK, supra note 19, at 5 (2013) (noting “the rate of growth in renewable electricity generation is sensitive to several factors, including natural gas prices”); INT’L ENERGY AGENCY, GOLDEN RULES FOR A GOLDEN AGE OF GAS: WORLD ENERGY OUTLOOK SPECIAL REPORT ON UNCONVENTIONAL GAS (2012) (discussing the costs and benefits of increased natural gas usage); Henry D. Jacoby et al., The Influence of Shale Gas on U.S. Energy and Environmental Policy, 1 ECON. ENERGY & ENVTL. POL’Y 1 (2012), available at http://www.iea.org/ieep/EEE01_01_A05_Jacoby-EPUB/eeeipissue.aspx, archived at http://perma.cc/2FZJ-MGY8 (observing that “cheaper gas serves to reduce the rate of market penetration of renewable generation”); MIT ENERGY INITIATIVE, supra note 2, at 2 (finding that “in the U.S., natural gas sets the cost benchmark against which other clean power sources must compete to remove the marginal ton of CO2”).

38. Tomain, supra note 4, at 1193; see also Patrick Parenteau & Abigail Barnes, A Bridge Too Far: Building Off-Ramps on the Shale Gas Superhighway,
proliferation of new pipelines to accommodate increased oil and gas production underscores this concern, locking in new fossil-based infrastructure for decades to come.\textsuperscript{39}

It is possible that, if well orchestrated, competition between natural gas and renewable energy might be minimized. Indeed, the two resources may be mutually supportive in the near term. Research produced for the Texas Clean Energy Coalition, for example, highlights opportunities for gas-renewables complementarity, for both energy policies and relative fuel prices.\textsuperscript{40} As renewable production increases, it feeds at least short-run demand for natural gas as a balancing fuel, as renewable energy production increases and decreases with wind flow and sunshine.\textsuperscript{41} As reliance on natural gas increases, wind power may also serve to balance natural gas supply prices and insulate the impact of price spikes.\textsuperscript{42} The International Energy Agency, while citing natural gas as a threat to renewable energy, also notes that “expansion of gas in the global energy mix can . . . facilitate greater use of renewable energy, if policies are in place to support its


\textsuperscript{41} WEISS ET AL., supra note 31, at 7. Renewable energy cannot be dispatched (turned on or off, or increased or decreased on command) like fossil-fired power plants, but minute by minute, based on their variable costs, renewables are the lowest cost source of electricity because there is no fuel cost. \textit{Id.} at 6–8. Natural gas is presently the most cost-effective fossil fuel to back up renewables. \textit{Id.} at 8, 11; see also Josie Garthwaite & Christina Nunez, New “Flexible” Power Plants Sway to Keep Up with Renewables, NAT'L GEOGRAPHIC (Oct. 31, 2013), http://news.nationalgeographic.com/news/energy/2013/10/131031-flex-power-plants-california, archived at http://perma.cc/2KKG-S39T (on trends associated with managing renewables’ intermittency with natural gas power plants).

As the relationship between natural gas and renewables clarifies, United States energy policy will have to account for their interaction—something the Obama Administration seems to recognize, despite its generalized “all of the above” energy policy stance. Against the backdrop of these national and international policy questions, landowners and energy developers face issues of compatibility between natural gas and wind development at the local land use scale.

At the state and local level, however, implications of gas-renewables competition or complementarity are less pronounced. Instead, present state-local tensions in the energy sector mostly center on whether, where, and how to erect a wind farm or drill for oil or gas. Tensions over fracking at the local level, though often intertwined with environmental concerns, are strongly rooted in property interests. In the wind context, property values are frequently cited as the basis for project opposition. In the fracking context, property law regimes governing split estates have produced confusion and conflicts between surface owners and mineral rights holders, and between mineral rights holders and neighbors whose subsurface land may be affected by horizontal drilling.

43. INT'L ENERGY AGENCY, supra note 32, at 80.
44. E. Donald Elliott, Obama Administration Proposes New Federal Role in Siting Shale Gas Development in Combination with Renewables, 44 ENVL. L. INST. 10185 (2014). The “all of the above” meme is the Obama Administration’s catchphrase for United States energy policy. “[W]e can’t have an energy strategy for the last century that traps us in the past. We need an energy strategy for the future—an all-of-the-above strategy for the 21st century that develops every source of American-made energy.” President Barack Obama, Remarks by the President on Energy (Mar. 15, 2012), available at http://www.whitehouse.gov/energy, archived at http://perma.cc/FZ6L-2QLM.
46. See infra Part IV.
47. An Emmy-award winning documentary film—“Split Estate”—addresses this subject from the perspective of unsuspecting surface owners in Garfield County, Colorado. See SPLIT ESTATE, http://www.splitestate.com/index.html (last visited Nov. 30, 2014), archived at http://perma.cc/G4M6-9XRX; see also
Residents and local officials find themselves in the position of weighing promises of environmental safety and economic growth against risks of environmental and economic damage that cannot easily be undone.

II. INTRASTATE PREEMPTION DOCTRINE

The doctrine of preemption provides the legal infrastructure for rationalizing relative powers across levels of government. Lawmaking authority of lower levels of government may be limited when courts invalidate a law as expressly or impliedly preempted by existing law at a higher level of government. Likewise, legislative action by a higher level of government may affirmatively preempt regulation by a lower level of government. 48 Although federal and state preemption are often regarded as analytically interchangeable, the shifting energy sector unsettles this assumption by highlighting important differences between the two. As this section explains, the contours of local power fundamentally frame the intrastate preemption doctrine as courts apply it to resolve state-local disputes. This framing creates doctrinal variability across jurisdictional lines that reinforces heterogeneous lawmaking and is not mirrored in federal


48. A third way, less relevant to this Article and subject to more debate, is by preemption through agencies of a higher level of government acting within the scope of their legislatively delegated authority. See, e.g., Thomas W. Merrill, Preemption and Institutional Choice, 102 NW. U. L. REV. 727, 759–78 (2008) (discussing federal agencies as a source of preemption, noting “[t]hey can make federal law, by rulemaking for example, that a court later concludes is in sufficient tension with state law that the state law must be declared preempted. Or, a federal agency can issue a proclamation declaring state law preempted on its own authority.”). In the federal-state context, there are also examples of preemption by federal common law and preemption by the Dormant Commerce Clause. See Viet D. Dinh, Reassessing the Law of Preemption, 88 GEO. L.J. 2085, 2107–18 (2000).
preemption law.

A. Contours of Local Power

State preemption of local law performs hierarchical enforcement similar in concept and analytical terms to federal preemption of state law. Nonetheless, the doctrinal underpinnings for state-local preemption are distinct from those defining the federal-state relationship. Although the United States Constitution is not the source of states’ power, the states’ position within the federal system is constitutionally articulated and recognized as equivalent across all fifty states. The Tenth Amendment provides that “powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people”—this is known as the states’ general “police power.”

Local governments are not identified by nor do they derive power from the United States Constitution. In the early Hunter v. City of Pittsburgh case, the Supreme Court famously clarified local governments’ lack of federal constitutional legal status. There, the Court described local authority as fundamentally insecure, explaining that the “number, nature, and duration” of their powers “rests in the absolute discretion of the state,” and that such state discretion may be exercised

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50. U.S. CONST. amend. X; Nat’l Fed’n of Indep. Bus., 132 S. Ct. at 2578 (explaining that “state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government . . . even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”).
51. Matthew J. Parlow, Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 372 (2008) (“Local governments are not mentioned or even considered in the United States Constitution.”); see also Terrance Sandalow, The Limits of Municipal Home Rule: A Role for the Courts, 48 MINN. L. REV. 643, 644 n.2, 646 n.11 (1964) (discussing lack of federal constitutional status for municipalities). But see Annie Decker, Preemption Conflation: Dividing the Local from the State in Congressional Decision Making, 30 YALE L. & POL’Y REV. 321, 329 (2012) (arguing that “local governments have more of a constitutional presence than that story suggests,” pointing to the 10th amendment language declaring “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The ‘to the people’ clause was not mere surplusage.”).
52. 207 U.S. 161 (1907).
“conditionally or unconditionally, with or without the consent of the citizens” and “unrestrained by any provision of the Constitution of the United States.”

The relationships between states and their local governments have evolved significantly in the century since Hunter, however. Numerous scholars have recounted the historical accretion of local authority, from the early Dillon’s Rule era, in which courts construed local government powers as only those narrowly and explicitly assigned by a state, to the rise of home rule, which expanded and strengthened local governance. I will not repeat that history here, but instead will highlight several features that are especially important to understanding modern intrastate preemption. The first is that the legal doctrines used to structure local power developed ex post—that is, local governments were performing governance functions before the precise contours of that authority were clarified. Professor James Herget examined this facet of local government history over thirty years ago, showing how legal doctrine developed as a response, in part, to the early divergence between weak legal recognition for localities—“original state constitutions did not allocate any governmental power to local governments”—and the practical reality that local governance was nonetheless occurring.

The second important historical feature, which follows the first, is that as states formalized legal status for local governments, they did so in varied ways. Some afforded state

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56. Id.
constitutional status to one or more classes of localities.\textsuperscript{57} Others recognized local power by statute, detailing with varying degrees of specificity the subjects to which local authority could be applied.\textsuperscript{58} Some states did both, providing constitutional recognition to some localities and statutory authority to others.\textsuperscript{59}

The legal source of a local government’s power has important ramifications in at least two respects. First, it dictates how states can limit or alter the scope of local authority. Even in \textit{Hunter}, the Court qualified state supremacy by noting that the legislative body of a state must conform “its actions to the state Constitution.”\textsuperscript{60} If localities have state constitutional powers, the scope of those powers cannot, for example, be altered by legislative action.\textsuperscript{61} In contrast, authority derived from a statute can be more readily withdrawn or changed by amendment or repeal of statutory provisions. Second, the legal source of local authority may influence the application of preemption principles by courts. Constitutional empowerment may preclude preemption, for example, if the state law asserted to preempt local action infringes a locality’s constitutionally-defined scope of authority.\textsuperscript{62} Alternatively, where local power is defined by statute, courts may seek to harmonize its meaning with the legislative intent of a purportedly preemptsing statute.

A third historical feature of the modern state-local relationship is the diversity and distribution of shared governance structures that obtain under the umbrella term “home rule.”\textsuperscript{63} The concept of home rule captures the generic ideal, as one reference work puts it, of a local government’s ability “to act and make policy in all areas that have not been

\textsuperscript{57} \textit{Krane ET AL}, supra note 54, at 476–78 (presenting summary tables with lists of enabling authority and providing in depth information in individual chapters for each state).

\textsuperscript{58} Id.

\textsuperscript{59} \textit{See id}.

\textsuperscript{60} Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907).

\textsuperscript{61} \textit{See Decker}, supra note 51, at 350.

\textsuperscript{62} According to Diller, “[o]nly in the few states with imperio regimes, where the subject matter concerned is deemed ‘local’ will the state legislature lack the power to expressly preempt.” Diller, supra note 54, at 1138 n.111. \textit{But see id.} at 1126–27 nn.63–65 (noting the difficulty of characterizing imperio regimes).

\textsuperscript{63} \textit{See Sandalow}, supra note 51, at 645 (“As a legal doctrine . . . home rule does not describe the state or condition of local autonomy, but a particular method for distributing power between state and local governments . . . .”)
designated to be of statewide interest through general law, state constitutional provisions, or initiatives or referenda.”

David Barron’s historical account demonstrates that a range of countervailing aims besides increased local autonomy drove the home rule movement, including substantive social, administrative, and political goals. Home rule doctrine emerged and developed across the states in ways reflective of this variability. Thus, he explains, home rule is not equivalent to “local legal autonomy. Rather, it is a mix of state law grants of, and limitations on, local power that powerfully influences the substantive ways in which cities and suburbs act.”

In some instances, granting limited local authority has meant demarcating certain sub-state entities, even within a single state, as home rule localities or general law entities, separated by the degree to which local authority is constrained. The Kansas Constitution, for instance, grants Kansas cities home rule powers in article 12, section 5. Subsection (b) empowers cities to “determine their local affairs and government,” and subsection (d) states that the powers granted to cities are to be “liberally construed for the purpose of giving cities the largest measure of self-government.” Counties, however, are treated very differently, deriving more limited home rule powers from statute. Section 19-101 of the Kansas statutes establishes counties as corporate and political bodies authorized “to determine their local affairs and government” consistent with section 19-101a. Section 19-101a, in turn, empowers counties to “transact all county business and perform all powers of local legislation and administration it deems appropriate” subject to over thirty

64. KRANE ET AL., supra note 54, at 2.
65. See Barron, supra note 54, at 2291, 2291–322 (describing “three distinct (and even contradictory) visions of home rule” that drove early reformers, with conservative, social and administrative variants on the theme).
66. Id.
67. Id. at 2263; see also GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 60–61 (2008) (discussing varied formulations of home rule authority across the states).
68. General law entities are also referred to as general-purpose entities.
69. KAN. CONST. art. 12, § 5.
70. KAN. CONST. art. 12, §§ 5 (b), (d).
72. Id.
enumerated exceptions.\textsuperscript{73} One such exception constraining counties but not cities and especially pertinent here is subsection (a)(19), which specifically prohibits counties from “regulating the production or drilling of any oil or gas well in any manner which would result in the duplication of regulation by the state corporation commission and the Kansas department of health and environment. . . .”\textsuperscript{74} The statute likewise precludes counties from requiring any license or permit or imposing any fee for the drilling or production of oil and gas wells.\textsuperscript{75} Kansas cities are afforded extraterritorial powers that counties are denied, such as the power to purchase property outside city boundaries if the purchase serves a public purpose.\textsuperscript{76}

In Colorado, similarly, a so-called “home-rule municipality” has “inherent powers,” but a county, by contrast, “is not an independent governmental entity existing by reason of any inherent sovereign authority of its residents; rather, it is a political subdivision of the state, existing only for the convenient administration of the state government, created to carry out the will of the state.”\textsuperscript{77} Similar distinctions between substate governing bodies, including cities and counties, but also special districts, exist in many states.\textsuperscript{78} Whatever precise form it takes, home rule is, as Professor Laurie Reynolds has put it, a “political choice” by the state “to respect intermunicipal variation in degree, scope, and amount of local regulation.”\textsuperscript{79} The durability of this respect in any given state will depend, in turn, on how effectively and cohesively local governments participate in state lawmaking to defend or advance their autonomy.\textsuperscript{80}

\begin{flushright}
\textsuperscript{73} Id. § 19-101a(a).
\textsuperscript{74} Id. § 19-101a(a)(19).
\textsuperscript{75} Id.
\textsuperscript{76} Krane et al., supra note 54, at 159. For a summary of states that provide municipal extraterritorial jurisdiction for a variety of limited purposes, see id. at 482.
\textsuperscript{78} See Krane et al., supra note 54, at 476–78, for reference showing variability among municipal and county government home rule across the states.
\textsuperscript{80} Daniel B. Rodriguez, Localism and Lawmaking, 32 Rutgers L.J. 627, 627–28 (2001) (observing that “local governments have unstable legal protections from state control, but they make up for some of that by deploying political power
Variability resulting from the political choices that comprise a state’s sovereign posture can be further compounded by judicial norms within the state courts. As courts make “[d]ecisions about the level of judicial intervention,” Professor Clayton Gillette has observed, they shape “the allocation of decisionmaking authority, and, thus, the configuration of institutional design.”81 The possibility of what Professor Ethan Lieb terms “localist statutory interpretation” by local judges in state court systems presents an additional point of divergence that may enhance doctrinal difference across jurisdictions.82 Indeed, as he observes, there is potential for reciprocal influence between how states’ sui generis legal cultures express state-local dynamics and “the degree to which local interpretation of statewide law may be tolerated.”83

The contours of intrastate preemption, therefore, interweave the legal status of local governments, the sources of legal authority, and the judicial decisions interpreting the scale and scope of that power as they have evolved in each state. Today, despite common doctrinal underpinnings, each state has its own legal framework for local authority and its own preemption jurisprudence.84 If this evolution has not called Hunter’s basic precept into question—as the 10th Circuit recently noted, “the core holding of Hunter has retained its vitality”85—it is fair to say it substantially oversimplifies modern state-local relations. Generic notions of state sovereignty may be convenient touchstones, but they ignore how states have actually allocated intrastate power—allocations that developed over time, and were solidified by governmental and judicial decisions, as well as by events, problems, and political contexts particular to the individual state.86

83. Id. at 924.
84. See generally KRANE ET AL., supra note 54 (offering a fifty-state survey of the various structures of the political relationships between state and local governments).
85. City of Herriman v. Bell, 590 F.3d 1176, 1185 (10th Cir. 2010).
86. Reynolds, supra note 79, at 999; see also Rodriguez, supra note 80, at 627
B. Relationship to Federal Preemption Analysis

Federal law can preempt state or local laws in equal measure.\(^87\) Consistent with a view of local governments as arms of the state, the doctrine of federal preemption can invalidate state or local action that offends the Supremacy Clause of the United States Constitution.\(^88\) The law of federal preemption, as it has developed in the federal courts, provides the framework for analyzing conflicts between federal authority and sub-federal governmental action. Although there may be differences between state and local governments for purposes of federal preemption, the Supreme Court has typically applied the doctrine uniformly in both contexts,\(^89\) anchored with a set of now-familiar doctrinal principles.\(^90\) Sub-federal action is precluded where federal law expressly preempts it.\(^91\) Absent express preemption, courts may imply preemption when sub-federal action infringes on an area of law in which Congress intended to occupy the field or when implementation of the sub-federal law would conflict with

\(^87\) While it is common place to note the subservience of local governmental units, including cities and counties, to state authority given our theory of state constitutionalism, the reality of state and local relationships paints a more complicated picture."

\(^88\) See, e.g., New York SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 103 (2d Cir. 2010) ("Under the Supremacy Clause of the Constitution, state and local laws that conflict with federal law are ‘without effect.’" (quoting Altria Group, Inc. v. Good, 555 U.S. 70 (2008))).

\(^89\) See Merrill, supra note 48, at 733 (noting and citing cases in which "[t]he Supreme Court has repeatedly identified the Supremacy Clause as the source of its authority to declare state law displaced (preempted)").

\(^90\) See Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) ("It is . . . axiomatic that ‘for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.’" (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)). But see Decker, supra note 51, at 323–24 (noting tendency to conflate federal preemption of state and local law but arguing that Congress differentiates more frequently than is generally acknowledged and urges more systematic consideration of “state-local differences . . . when drafting preemption provisions”); Reynolds, supra note 79, for a discussion of differential treatment of states and localities where federal preemption applies to one but not the other level of government.

\(^91\) See, e.g., Mount Olivet Cemetery Ass’n v. Salt Lake City, 164 F.3d 480, 486 (10th Cir. 1998) (holding that local zoning ordinance was preempted by federal law).
federal law.\textsuperscript{92} This triumvirate of analytic touchstones—express, field, and conflict preemption—\textsuperscript{93}—has proved enduring, if not reliable, for predicting outcomes of cases applying the federal doctrine.\textsuperscript{94} Under the Supremacy Clause, the relative position of sub-federal governments is structurally uniform from one state to the next, absent unique statutory treatment in a particular context.\textsuperscript{95}

In the context of energy transition, the ubiquitous “shadow” of preemption by state law is closer to home for local governments than the possibility of federal preemption.\textsuperscript{96}

Considering the doctrine more closely, intrastate preemption differs from its federal counterpart in at least two ways that inflect state-local dynamics in this transition.

First, just as federal preemption is contextualized by federalism principles, intrastate preemption aligns with the contours of local power as defined by a state’s constitution or

\textsuperscript{92} Id. ("[F]ield preemption . . . occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it" or "conflict preemption . . . occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

\textsuperscript{93} See, e.g., New York SMSA Ltd. P’ship v. Town of Clarkstown, 612 F.3d 97, 104 (2d Cir. 2010) ("In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." (citing Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 313 (2d Cir. 2005); English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990))). Some scholars break conflict preemption down further to separate conflicts based on state laws that present obstacles to implementation of federal law and those that frustrate the overall purpose of a federal law. See, e.g., Gregory M. Dickinson, An Empirical Study of Obstacle Preemption in the Supreme Court, 89 Neb. L. Rev. 682, 685 (2011) (breaking preemption doctrine into express, field, impossibility, and obstacle); Merrill, supra note 48, at 739 (breaking preemption doctrine into express, field, obstacle, or frustration).

\textsuperscript{94} As Professor Daniel Meltzer notes at the opening of a recent article on the topic, “[f]ederal preemption doctrine has few fans . . . .” Daniel J. Meltzer, Preemption and Textualism, 112 Mich. L. Rev. 1, 2 (2013) (citing Thomas W. Merrill, Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules, in FEDERAL PREEMPTION 166, 187 (Richard A. Epstein & Michael S. Greve eds., 2007)). The opening to Meltzer’s article offers a useful summary of the common critiques of federal preemption.

\textsuperscript{95} See, e.g., Clean Air Act, 42 U.S.C. § 7543 (2012) (allowing California to request a waiver from otherwise applicable prohibition on state emissions standards for motor vehicles).

\textsuperscript{96} Barron, supra note 54, at 2366.
The United States Supreme Court has reiterated the “two cornerstones” of its federal preemption jurisprudence: “[T]he purpose of Congress,” and “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.” 97 Hence, federal preemption case law recognizes a presumption against preemption of state law in areas traditionally subject to police powers, reinforcing, in Professor Mary Davis’s words, “the federal nature of our system of government.” 98 As Professor Daniel Meltzer recently summarized, the presumption is invoked on several related grounds: “that Congress did not intend to displace historic police powers of the States; that Congress did not intend to displace state law; or sometimes that the presumption can be overcome only when preemption was the clear and manifest purpose of Congress.” 99

As this Part described, the legal status of local governments is fundamentally different from states’ position relative to the federal government. This difference inheres as an important component in the judicial review of state preemption claims as courts interpret the posture and scope of authority defined by state law. Importantly, the presumption against preemption, with its federalism-based justifications, is not a uniform element of intrastate preemption. Some state constitutional or statutory home rule provisions direct courts to liberally construe local authority; others continue to apply the narrowing Dillon’s Rule as a statutory rule of construction. 100 The differential scope of authority across sub-state entities found in some states, such as in the Kansas example, likewise creates potential for legislative control over some entities more than others. 101 Even for express preemption, the area of

99. Meltzer, supra note 94, at 52 (internal citations omitted). Cf. Davis, supra note 98, at 971 (arguing recent Supreme Court preemption decisions suggest a shift toward presumption in favor of preemption, “contrary to the Court’s oft-quoted dicta that there is a presumption against preemption of historic state police powers”).
100. States that still apply Dillon’s Rule in at least some circumstances include Alabama, Connecticut, Hawaii, Idaho, Nebraska, Nevada, North Carolina, Virginia, and West Virginia. See KRANE ET AL., supra note 54, at 476–78.
101. Id. at 159.
clearest commonality between the federal and intrastate frameworks, there are points of divergence. Just as with federal preemption, state courts will typically preclude a local government action if state law expressly preempts it. However, if local governments are constitutionally empowered to act independently within certain spheres, then a state law purporting to prevent local action would be deemed unconstitutional. Congress, on the other hand, may not preempt state law by means that exceed the scope of its enumerated powers. For example, a federal law purporting to preempt states will be invalidated if it is deemed to transgress the limits of the Interstate Commerce Clause and is not otherwise justified by another enumerated power. Conversely, however, federal preemption can result from the dormant Commerce Clause, which “forbids [s]tates and their subdivisions to regulate interstate commerce.” No such parallel legal principle obtains in the state-local relationship.

Second, although state courts hew closely to the federal framework analytically, state preemption principles are sufficiently nuanced by variable state-local relationships to produce different outcomes. In a recent dissenting opinion, then-Colorado Supreme Court Justice Martinez pointed to sources for this diversity:

“Preemption” is a concept used, somewhat confusingly, to

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102. See, e.g., In re Wallach v. Town of Dryden, 23 N.Y.3d 728, 743 (N.Y. 2014) (“Under the preemption doctrine, a local law promulgated under a municipality’s home rule authority must yield to an inconsistent state law as a consequence of ‘the untrammeled primacy of the Legislature to act with respect to matters of State concern’.”) (citation omitted)).

103. See, for example, the discussion of Robinson Township, infra Section III.

104. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (“The Federal Government is acknowledged by all to be one of enumerated powers.” (internal citations and quotation marks omitted)).

105. Id. at 2579–80 (“[T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.” (citing Marbury v. Madison, 1 Cranch 137 (1803))).


107. See, e.g., Brown v. Hovatter, 561 F.3d 357, 364 (4th Cir. 2009) (“[I]t is a trade barrier to the free flow of goods, materials, and other articles of commerce across state lines that violates the dormant Commerce Clause. The Clause does not purport to restrict or limit intrastate commerce, nor protect the participants in intrastate or interstate markets, nor the participants’ chosen way of doing business.”).
describe a variety of analyses undertaken to resolve conflicts of law. There are three types of preemption analyses; federal preemption, found in the United States Constitution; home-rule preemption, based on the Colorado Constitution; and statutory preemption, which is not a constitutional analysis at all, but rather is a specialized rule of statutory construction, concerned with the legislative intent behind conflicting state and county laws. Each type of preemption commences with its separate premise and utilizes its own distinctly different analysis.\textsuperscript{108}

In Colorado, there are “the three basic ways in which a state statute can preempt a county ordinance or regulation[:] express preemption, implied preemption, and operational preemption.”\textsuperscript{109} Although Colorado’s preemption scheme closely tracks federal law, the third basis for preemption—conflict based on “operational effect”—emphasizes the degree to which “effectuation of a local interest would materially impede or destroy the state interest.”\textsuperscript{110} As Part III will indicate, this has proved a key test in the state’s oil and gas cases.

State formulations of the doctrine also differ in the degree courts will imply preemption, relative to other states and the federal framework. The Kansas courts, for example, have rejected invitations to imply preemption of local law.\textsuperscript{111} Preemption occurs only where the legislature makes a clear statement within a statute that it intends to reserve the jurisdiction to regulate exclusively in the state.\textsuperscript{112} The doctrine is nuanced further by a Kansas Supreme Court “court-imposed exception to constitutional and statutory home rule” that allows a municipality “to legislate by ordinary ordinance or


\textsuperscript{109} Id. at 724; see also Bd. of Cnty. Comm’rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1057 (Colo. 1992) (“[A] local law may be partially preempted where its operational effect would conflict with the application of the state statute.” (internal citations and quotation marks omitted)).

\textsuperscript{110} Bowen/Edwards Assocs., 830 P.2d at 1059.


\textsuperscript{112} Id.; see also 143rd St. Investors, L.L.C. v. Bd. of Cnty. Comm’rs of Johnson Cnty., 259 P.3d 644, 655 (Kan. 2011) (reiterating the idea that field preemption requires express statutory language).
resolution non-conflicting local police powers even though there are state laws on the subject uniformly applicable to all municipalities.”113 In contrast to this posture of restraint in the Kansas doctrine, intrastate preemption can lean against local authority, as it does, for example, in West Virginia. The West Virginia Supreme Court has held that “[i]f any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.”114

The influence of state-local structures on state court approaches to implied preemption may combine with “pragmatic considerations” courts bring to the analysis.115 Professors Daniel Rodriguez and Lynn Baker have offered several pertinent insights with respect to courts’ role in state-local conflicts regarding the contours of home rule. In deciding whether home rule precludes preemption by state law, they observe, “courts make what are fundamentally distributive decisions involving the quantum of state and local power”—at once allocating authority and, inevitably, making substantive policy choices.116

Finally, intrastate preemption may turn on rules designed to take the subject of local regulation into account. Looking again to Colorado as an example, “in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute,” but in “a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city.”117 Alternatively, if a matter reflects “mixed local and state concern, a home-rule municipal ordinance may coexist with a state statute as long as there is no conflict between the ordinance and the statute,” but the local ordinance gives way in the event of a conflict.118 The legal

114. Davidson v. Shoney’s Big Boy Rest., 380 S.E.2d 232, 235 (W. Va. 1989); see also Diller, supra note 54, at 1123 (discussing early restrictions on municipalities’ power and lawmaking authority generally).
115. Rodriguez, supra note 80, at 639–40 (commenting that implied preemption is “entirely judge-made” and “enables courts to curtail local powers by introducing pragmatic considerations into the question whether the state has properly displaced local power with state control”).
118. Voss, 830 P.2d at 1066
status of the locality, combined with the characterization of the nature and scale of the regulated concern, thus shapes state preemption analysis here in ways distinct from federal preemption.

III. THE STATE-LOCAL DYNAMICS OF FRACKING

Dryden, New York, is among the hundreds of localities that have expressed opposition to fracking through official governmental channels. Residents and local officials faced the specter of fundamental and unwelcome change in their community when they learned that Anschutz Exploration Corp. had leased two-thirds of the land area within the town's borders to drill for natural gas.\(^\text{119}\) Oil and gas drilling is an industrial land use that can dramatically alter a landscape.\(^\text{120}\) The impact of this activity, combined with the unique features of the fracking process, raises concerns that residents bring to their local governments.\(^\text{121}\) They may worry about negative effects on the existing local economy, and on quality of life and property values.\(^\text{122}\) They may be concerned about impacts to local environmental resources, to local air quality, and to roads and other infrastructure.\(^\text{123}\) The risk of water contamination has been a special concern in areas where local residents draw


\(^{121}\) See, e.g., Thomas W. Merrill, Four Questions About Fracking, 63 CASE WEST. RES. L. REV. 971, 981–85 (2013) (observing that although many of the local impacts associated with hydraulic fracturing operations are no different from conventional oil and gas production, fracking poses unique risks and local concerns: water consumption, water contamination, and earthquakes).


household water from wells and where water is scarce.\footnote{124} Although debate continues over the extent of the risk, there appears to be broad consensus among experts from a range of pertinent disciplines that water contamination is a legitimate basis for concern.\footnote{125} Surface waters can be contaminated by spills at the drilling site, at wastewater storage pits or tanks, or from wastes discarded improperly on the surface.\footnote{126} Groundwater contamination may occur where gas escapes at a faulty well, or it can result from the underground disposal of fracking wastewater, containing fracking chemicals along with naturally occurring subsurface contaminants that are released in the extraction.\footnote{127} Even the 2010 MIT analysis, which concluded with some optimism that environmental impacts of fracking are “manageable but challenging,” premised its conclusion on the yet-to-be-achieved conditions that “both large and small companies follow industry best practices, that water supply and disposal are coordinated on a regional basis, and that improved methods are developed for recycling of returned fracture fluids.”\footnote{128} The Rocky Mountain Institute predicts that “[i]t will probably take a decade to resolve fracking controversies, reform bad operators, and build a stable

\footnotetext[124]{This is the central focus of Food & Water Watch in its effort to drive support for local, state, and national fracking bans. See Why Fracking is Dangerous, FOOD & WATER WATCH, http://www.foodandwaterwatch.org/water/fracking/why-fracking-is-dangerous (last visited Nov. 30, 2014), archived at http://perma.cc/UW8N-NYWN.}


\footnotetext[126]{Hannah J. Wiseman, Fracturing Regulation Applied, 22 DUKE ENVTL. L. & POL’Y F. 361, 374 (2012) (reporting on violations involving pit construction and maintenance, and surface water spills).}


regulatory regime that earns public confidence.”

Lack of public confidence in existing regulatory regimes provides the backdrop for the trend in local government trepidation about fracking. Recent reports of state shale gas regulation reveal that significant differences in scope and approach persist in areas with genuine local effects, such as surface water storage and enforcement. In tracing state agency enforcement activity at hydraulically fractured well sites, Professor Hannah Wiseman has shown that a too-narrow focus on groundwater and injection wells has led other serious risks to be under-scrutinized, such as the risk of chemical and other surface spills, leaking disposal wells, and water withdrawals. Her work also shows that response efforts across the states have varied widely. As individual property owners sign leases for exploration and production on their land, local governments consider possible effects of those private transactions on the rest of the community.

In what follows, this section charts the state-local dynamics of hydraulic fracturing. It first details the spectrum of local responses to fracking, and then considers the role of intrastate preemption in this context.

A. Official Local Responses to Fracking

The public interest non-profit Food & Water Watch (FWW) has cataloged anti-fracking action by over 400 local governments. Working with the FWW collection as a

129. *Id.*


starting point for research, together with other sources, this Article is the first to articulate the spectrum of approaches that comprise the trend of local government resistance to fracking. The spectrum includes (1) outright bans on fracking, in at least three forms; (2) moratoria on fracking pending development of local parameters or safety assurances; (3) resolutions staking a position regarding the regulatory future of fracking at the state or federal level; (4) localized compatibility requirements or restrictions; and (5) generic existing powers applied in the fracking context.

Before considering these local responses in more depth, several aspects and limits of the FWW compilation are worth noting. First is geographic: the FWW data clearly show the trend in local fracking resistance measures is most pronounced in the eastern United States, though it extends across the nation.\footnote{The Anti-Fracking Movement, supra note 133.} Second, and almost as noteworthy, is what does not show up in the compilation. The FWW data include bans, moratoria, and resolutions, but do not account for local ordinances in the fourth category, designed to conform fracking activity to locally acceptable parameters. Although not resisting the practice per se, these ordinances are nonetheless critically important in the intrastate preemption context. Accounting for these ordinances would show local activity to be occurring less dominantly in the east, but also across central and western parts of the United States, including traditional oil and gas producing states like Texas, where local governments in highly populated areas have set restrictions for urban drilling,\footnote{See infra Part III.A.4.} or Kansas, where local governments have long imposed local requirements on oil and gas practices that may also apply to fracked wells.\footnote{See, e.g., Bohrer v. Ramsey Petroleum Co., 44 P.2d 239 (Kan. 1935) (involving city ordinance limiting number of oil wells to one per block and requiring that royalties be paid to other lot owners in the block).} Local actions in the fifth category, pursuant to generic powers, are also not reflected in the FWW data. Moreover, the compilation’s focus on local measures captures very little of the flurry of legislative activity at the state level that directly addresses fracking but either fails to pass or does not at least temporarily limit or prohibit fracking. In 2013, for example, state legislatures considered


\begin{itemize}
  \item[134.] The Anti-Fracking Movement, supra note 133.
  \item[135.] See infra Part III.A.4.
  \item[136.] See, e.g., Bohrer v. Ramsey Petroleum Co., 44 P.2d 239 (Kan. 1935) (involving city ordinance limiting number of oil wells to one per block and requiring that royalties be paid to other lot owners in the block).  
\end{itemize}
over 300 bills addressing natural gas in some respect. Some of that activity, which I discuss below, is directly on point to local authority over fracking.

In short, the representation of state-local dynamics offered by the FWW is extremely useful but not comprehensive of all local activity on fracking—there is a bigger story still. Bearing this broader context in mind, this section considers how local responses obtain in the ordinances themselves, beginning with the most controversial: the fracking ban.

1. Fracking Bans

Local bans on fracking tend to take one of three forms, depending on whether they are drafted to derive from (a) land use regulatory authority, (b) local police power authority to protect public health and safety, or (c) community rights.

Dryden, New York’s zoning amendment on “prohibited uses” exemplifies the local fracking ban based on land use authority. The ordinance, challenged in Anschutz v. Town of Dryden, was clearly framed as land use regulation—“No land in the Town shall be used . . . ” and precluded land use for natural gas or petroleum exploration; land use for the storage, treatment and disposal of exploration and production materials or wastes; and land use for support activities. The validity of local land use ordinances is typically reinforced both by the local government’s home rule, or other generically defined powers, and an enabling statute specific to zoning.
In contrast to land use-based bans, the health-safety-welfare variation is not couched in zoning authority but frames ordinances in terms of more generalized public protections. Creedmoor, North Carolina, for example, relied on state statutory authority to prohibit fracking within its borders and within a one-mile radius, declaring fracking to be a public nuisance and threat to public health that may adversely impact the citizens, drinking water supply, and property within the city.  

Finally, contrast the first two traditional forms with the community rights-based approach. This variation reflects a set of ordinances that assert community members’ right to health, safety, and a clean environment and the value of holding community rights above corporate interests. The Community Environmental Legal Defense Fund (CELDF) has assisted over 140 local governments in drafting community rights ordinances to oppose polluting activities, including fracking. An early fracking example was enacted in Pittsburgh, Pennsylvania, and titled “Pittsburgh’s Community Protection from Natural Gas Extraction Ordinance.” The ordinance banned commercial extraction of natural gas within the City and purported to create a “bill of rights” for the residents of the City and remove “certain legal powers from gas extraction corporations operating within the City.” This model consistently emphasizes the goal of reordering power in the jurisdiction to favor citizens over corporate entities. Under the Pittsburgh ordinance, for example, it is “unlawful for any

145. Id. § 3.
corporation to engage in the extraction of natural gas within the City of Pittsburgh,” and the bill of rights articulates a right to water, rights of natural communities, and rights of self-government.\footnote{146} Similar ordinances passed in Mora, New Mexico and Lafayette, Colorado.\footnote{147} To date, there is little case law on this variation of the fracking ban. In \textit{Range Resources-Appalachia, LLC v. Blain Township}, a Pennsylvania state court rejected local efforts to constrain corporate rights under this model, concluding that “the Township does not have the legal authority to annul constitutional rights conferred upon corporations by the United States Supreme Court.”\footnote{148} Nonetheless, the movement to adopt this approach continues, with an emphasis on its communicative content, as numerous localities across several states are working to adopt rights-based ordinances to prevent fracking.\footnote{149} CELDF is now working to advance model state legislation and state constitutional amendments to reinforce local government authority and preclude state preemption of local control.\footnote{150}

\begin{footnotesize}
\footnote{146. \textit{Id.} § 5.1.}
\footnote{147. \textit{See Local Actions Against Fracking, supra} note 140. For more on the community rights-based fracking ban model in New Mexico, see Jonas Armstrong, \textit{What the Frack Can We Do? Suggestions for Local Regulation of Hydraulic Fracturing in New Mexico}, 53 NAT. RESOURCES J. 357 (2013).}
\end{footnotesize}
2. Moratoria

Fracking moratoria have typically been premised on the need for more time to establish permitting standards or other governance infrastructure in the interest of protecting public health and safety. Localities have long used moratoria as a means of ensuring sufficient time for public deliberation to inform local governance of a wide range of issues that confront communities. The potential for moratoria to burden property rights, however, raises the risk of constitutional challenges. United States Supreme Court precedent dictates that the validity of moratoria cannot be analyzed according to a bright-line rule. In 2010, a California state court upheld Culver City’s moratorium of new oil and gas wells in an active oil and gas field. The city cited a compelling need to update its local regulations in light of environmental and health concerns, and the court deferred, rejecting the driller’s vested rights claim. Subsequently, Culver City took the moratorium further as it contemplated a ban on fracking.

Moratoria do not necessarily correspond with wholesale opposition to fracking, yet they do, at minimum, represent opposition to immediate use of the practice and register concern that state and federal regulation is insufficient to

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154. *Id.* at 16–18.

protect local interests. For example, Colorado Springs, Colorado, passed an emergency six-month moratorium on processing applications for oil and gas activities within the City limits to allow it time to develop rules to control local impacts. Similarly, Kent County, Michigan, alert to the intrastate preemption issues arising across the country, voted to impose a six-month moratorium on oil and gas drilling specifically to develop protective regulations that would not be preempted by broad state jurisdiction over oil and gas wells. Compatibility restrictions, fourth on the spectrum described here, are typically expected to follow after a moratorium expires.

3. Resolutions

A third approach on the spectrum is the local resolution, typically expressing local government support or opposition to federal or state fracking legislation. Looking to proposed federal regulation, Berkeley, California, like a number of other localities, passed a resolution supporting specific bills in Congress—the Fracturing Responsibility and Awareness of Chemicals Act (FRAC Act), and Bringing Reductions to Energy’s Airborne Toxic Health Effects Act—that would curb environmental harm from fracking. In an expression of opposition to the state of North Carolina lifting a de facto statewide ban on fracking, Stokes County, North Carolina, passed a resolution formally urging “the North Carolina General Assembly to take no action and pass no legislation that would legalize hydraulic fracturing or horizontal drilling” until

and unless it could be “fully demonstrated that North Carolina public health, waters, land, air, economy, and quality of life can be fully protected from the impacts of allowing shale gas development in the State.”

Resolutions are primarily communicative, but that communication can have a powerful effect. A resolution expresses the sentiments of a community through its elected officials. In the context of this trend, resolutions convey solidarity with other local governments in resistance to fracking, reinforcing the message of concern and trepidation that other localities send using the more forceful fracking ban or moratorium. The FWW compilation of bans, moratoria, and resolutions suggests localities have adopted these measures in close to equal parts, with the largest group by a small margin being resolutions.

4. Compatibility Restrictions

This fourth approach, compatibility restrictions enacted through zoning ordinances or otherwise, neither bans fracking nor overtly discourages drilling. Indeed, they may be designed to facilitate fracking in ways acceptable to local residents. They are part of this spectrum of local responses, however, because in working to minimize local impacts, such restrictions can, deliberately or inadvertently, lead to conflicts with fracking operations, depending on their stringency. Local governments have enacted ordinances addressing matters ranging from well protections to noise controls, local permitting, and notice provisions.


161. Advocates for various causes advance local resolutions to build community consensus, educate local officials and residents about an issue, show solidarity with others supporting a shared goal, and send a message to higher levels of government. For example, in the same vein as the community rights-based fracking bans, Move to Amend is an organization focused on building support to amend the United States Constitution to eliminate “corporate personhood,” which was solidified by a divided Supreme Court in the Citizens United case. See MOVE TO AMEND: PASS A RESOLUTION, https://movetoamend.org/pass-local-resolution (last visited Mar. 2014), archived at https://perma.cc/R8DD-96YT.

162. Special thanks to Michelle Fuchs for this diligent research, which analyzed the local actions against fracking listed by Food and Water Watch. See Local Actions Against Fracking, supra note 140.
Compatibility restrictions are common in urban areas of Texas, notably Dallas, and other areas affected by urban drilling. As drilling encroaches on population centers, the possibility of harmful impacts becomes relevant to more people and property interests. Dallas, Texas, bordering the Barnett Shale formation and with a population of 1.2 million, enacted an ordinance in 2013 imposing restrictions such as a 1,500-foot setback from drilling pads to property lines of neighboring homes or businesses. The move was criticized by oil and gas industry representatives as effecting a functional ban on drilling in city limits, and was especially controversial in light of the fact that an energy firm paid millions to the city for mineral rights only two years earlier. In a similar vein, Los Angeles, California, with a population nearing four million, is crafting a prohibition against “well stimulation” practices that would effectively ban fracking, as residents worry about the effects of more than 1,800 active oil and gas wells and nearly 3,000 abandoned wells within city limits. Compatibility concerns also arise in low population areas, however. In southwest Kansas, for example, local planners are concerned about the need to restrict water use for fracking in drought conditions to ensure compatibility with other water-dependent land uses.


165. Id.


167. See, e.g., Ellen M. Gilmer, KANSAS: County Planners Address Fracking Regs in Workshop, ENERGYWIRE/E&E PUBL. (Aug. 20, 2012), http://www.eenews.net/energwire/2012/08/20/stories/1059908979, archived at http://perma.cc/RWS8-YNN5 (on file with author) (discussing counties welcoming the oil and gas industry but recognizing the need to address water usage and “protect our citizens”).
5. Generic Powers

Finally, the fifth approach captures local governments’ role in issuing special or conditional use permits, variances, and related permissions for fracking operations under the auspices of generic land use authority. In these instances, the local government has not enacted local law specific to fracking, but simply applies existing powers to preclude drilling or other fracking related activities. Special or conditional use permitting can preserve local siting control, allowing for a reasoned rejection of an individual permit based on aesthetic or other compatibility issues. For example, several months after an energy firm signed an oil and gas lease on sixty-seven unincorporated acres in Clinton County, Illinois, and obtained a state permit to drill, the City of Carlyle, Illinois, annexed the land. The effect was to automatically reclassify the land into the residential district where the zoning code does not allow drilling for oil and gas. In this way, the city used its neutral annexation powers in a way that had the indirect effect of expanding the area where drilling was prohibited, without reliance on a jurisdiction-wide ban.

Similar issues have arisen in connection with fracking support industries, such as in the northern Midwest where demand has increased for sand used as a proppant in fracking fluids. The Minnesota town of St. Charles, for example, rejected a request for annexation to accommodate a plant that would have processed and supplied proppant to the fracking industry.

This spectrum of approaches reveals strong trepidation


170. Id. (upholding the city’s annexation).

171. Id. at 817. The court did not decide whether Tri-Power had a takings claim. Id.

172. For a visual representation of the geographic distribution of mines and industrial facilities that support the fracking boom, see Frac Sand Industry Map, FRACTRACKER ALLIANCE, http://maps.fractracker.org/latest/?webmap=2f382d5fd6db748deba89e6104b59551d (last visited Nov. 30, 2014), archived at http://perma.cc/GQP3-5C37.

about local impacts from fracking, a lack of confidence among local officials in state regulatory regimes for oil and gas drilling, and uncertainty about whether and how a local government can avoid preemption in efforts to manage local impacts.

B. Intrastate Preemption in the Fracking Context

Most official local fracking measures, including bans, have not been challenged in court, but the varied results in state courts to date comprise a growing body of case law that teaches more than the current status of individual state law. Reinforcing the central claim of this Article, the interactions between state-local power structures, judicial interpretations of the preemptive effect of existing oil and gas statutes, and the policy questions for legislatures that the cases raise, show that intrastate preemption law, in its variability, is enhancing local governments’ ability to participate in national energy transition.

The most important intrastate preemption controversies decided by courts to date underscore this dynamic. This section provides texture and content to the doctrine as it has been applied in pertinent case law. It then takes up intrastate preemption in the legislative context—how states have responded to assertive local governments, in ways directly addressing state-local dynamics as well as ways responsive to local government concerns.

Among the localities challenged in court on preemption grounds is Dryden, New York. Dryden’s ordinance, noted earlier as an example of a land use-based fracking ban, was at the center of state court litigation closely watched across the nation. Anschutz Exploration Corp., the company holding leases to a third of the town’s land area, sued to invalidate Dryden’s ordinance as preempted by the New York Oil, Gas and Solution Mining Law’s supersedure clause, which provided “[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution

The court framed the issue as one of first impression in land use terms: “whether a local municipality may use its power to regulate land use to prohibit exploration for, and production of oil and natural gas.” The Superior Court held Dryden could regulate where drilling operations could occur, but not how operations could occur.

The New York Appellate Division affirmed the ruling in favor of the local government, explaining that “[t]he zoning ordinance at issue . . . does not seek to regulate the details or procedure of the oil, gas and solution mining industries. Rather, it simply establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally.” Finding no “clear expression of legislative intent to preempt local control over land use” in the statute or legislative history, the appellate court declined to construe the statute as preempting “the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions.”

The New York Court of Appeals, the state’s highest court, heard the appeal under the case name Wallach v. Town of Dryden in 2014 and affirmed that the statewide law did not preempt the home rule authority vested in municipalities by the state constitution and by statutory authority to regulate local land use. In regards to the “regulation of land use through zoning ordinances as one of the core powers of local governance,” the court clarified that it only invalidates a zoning law “where there is a clear expression of legislative intent to preempt local control over land use.”

Although the court was clear that the state legislature has the right to eliminate “the home rule capacity of municipalities to pass zoning laws that exclude oil, gas and hydrofracking activities,” preemptive intent is not expressed in the existing

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176. Id. at 461.
177. Id. at 467–71; see also Cooperstown Holstein Corp. v. Town of Middlefield, 64 N.Y.S.2d 431 (App. Div. 2013) (holding that local fracking ban was not preempted by state law).
179. Id. at 721.
181. Id. at 743 (internal citations and quotation marks omitted).
In avoiding intrastate preemption absent express legislative intent, the New York courts’ restraint stands in contrast with the analytical approach taken by the West Virginia courts. When an energy firm challenged a Morgantown, West Virginia ordinance that banned horizontal drilling with hydraulic fracturing within the city limits as a nuisance, a state court declared the measure invalid and preempted by state law.\textsuperscript{183} In \textit{Northeast Natural Energy, LLC v. City of Morgantown}, the court reasoned that “the State’s interest in oil and gas development and production throughout the State as set forth in the [West Virginia Code] provides for the exclusive control of this area of law to be within the hands of the [West Virginia Department of Environmental Protection].”\textsuperscript{184} In drawing this conclusion, the court emphasized the narrow scope of local authority in the state, citing the West Virginia Supreme Court for the proposition that “municipal corporation powers are so narrowly proscribed that... ‘if any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.’”\textsuperscript{185} Accordingly, the court held that state law did “not provide any exception or latitude to permit the City of Morgantown to impose a complete ban on fracking or to regulate oil and gas development and production.”\textsuperscript{186}

In Colorado, prior preemption case law specific to the oil and gas context is being revisited as the City of Longmont faces lawsuits from two directions—the Colorado Oil and Gas Association (“COGA”), representing drilling interests, and the Colorado Oil and Gas Conservation Commission (“COGCC”), a division of the state’s Department of Natural Resources.\textsuperscript{187} The lawsuits challenge Longmont ordinances regulating drilling

\begin{itemize}
\item 182. \textit{Id.} at 754–55.
\item 184. \textit{Id.}
\item 185. \textit{Id.} at *7.
\item 186. \textit{Id.} at *9.
\end{itemize}
and a ballot measure that banned drilling in residential areas. Both suits allege the state Oil and Gas Conservation Act preempts the measures. Preemption precedent in the state includes two cases from the 1990s: Board of County Commissioners v. Bowen/Edwards Associates, Inc. and Voss v. Lundvall Brothers, Inc. The Colorado courts have applied the doctrine with emphasis on the potential for implied preemption if local regulations pose operational conflicts with state objectives. In Bowen/Edwards, the court rejected the claim that the Conservation Act “implied total preemption of a county’s authority to enact land-use regulations for oil and gas developmental and operational activities within the county.” In Voss, however, the court held “that the state’s interest in efficient development and production of oil and gas in a manner preventative of waste and protective of the correlative rights of common-source owners and producers . . . preempts a home-rule city from totally excluding all drilling operations within the city limits.”

Subsequent cases in lower state courts have explored the boundaries of operational conflicts. In La Plata County v. Colorado Oil & Gas Conservation Commission, the Colorado Court of Appeals invalidated a COGCC rule providing that a "permit-to-drill shall be binding with respect to any conflicting local governmental permit or land use approval process.” The court sided with the county, which attacked the rule for expanding the Bowen/Edwards operational conflict standard to “any” conflict to preempt “local government actions beyond those that materially impede or destroy the state interest,” effectively giving “oil and gas operators license to disregard local land use regulation.” In a consistent holding on reverse facts, the Court of Appeals in the Town of Frederick v. North American Resources Co. granted the town an injunction against an energy firm for drilling in violation of a local ordinance. Rejecting the firm’s argument that the ordinance was wholly

188. See Order Granting Motions for Summary Judgment, supra note 187.
190. Bd. of Cnty. Comm’rs, La Plata Cnty., 830 P.2d at 1059.
191. Voss, 830 P.2d at 1069.
193. Id. at 1125.
preempted by state law, the court held that provisions such as “building permits for above-ground structures, access roads, [and] emergency response costs” for which the court “found no corresponding state rule that gave rise to an operational conflict” were not preempted and could be enforced.  

However, provisions regulating “technical aspects of drilling,” or conflicting with state regulations, were deemed unenforceable.

This legal precedent looms large over Longmont and other localities concerned about fracking impacts, including two other localities COGA has sued, Lafayette and Fort Collins, for taking official steps to control drilling. Nonetheless, even as this litigation appears to be having a chilling effect on localities, as recently as March 2014 a fracking ban by ballot initiative in Broomfield, Colorado survived a legal challenge to the initiative process. In July 2014, a Colorado district court rejected Longmont’s ban as preempted by state law, but stayed the decision pending appeal. Fort Collins’s five-year moratorium was also rejected, and the court did not stay the decision pending appeal.

State-local dynamics have perhaps been most contentious in Pennsylvania. In 2009’s Huntley & Huntley v. Borough of Oakmont, the Pennsylvania Supreme Court ruled that a residential zoning ordinance affecting the location of a well was

195. Id.
196. Id. at 763, 766.
not preempted by the state Oil and Gas Act.\textsuperscript{201} Key to its analysis was that “zoning controls are both broader and narrower in scope” than the state statute.\textsuperscript{202} The court explained, “[t]hey are narrower because they ordinarily do not relate to matters of statewide concern, but pertain to the specific attributes and developmental objectives of the locality in question.”\textsuperscript{203} They are simultaneously broader, however, “in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development.”\textsuperscript{204} The court recognized localities’ “unique expertise” in making siting decisions that account for “the community’s development objectives, its character, and thesuitabilities and special nature of particular parts of the community”—an expertise reinforced by state law enabling local land use planning.\textsuperscript{205}

This reasoning led the court to conclude that “absent further legislative guidance . . . the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, its overall restriction on oil and gas wells in [residential] districts is not preempted by that enactment.”\textsuperscript{206} In contrast, the court issued another oil and gas opinion on the same day, \textit{Range Resources-Appalachia, LLC v. Salem Township}, which held that local regulation was preempted when held to be regulating aspects of oil and gas operations rather than land use.\textsuperscript{207} This where-how distinction is similar to the New York state courts’ analysis of local bans and moratoria under New York law.

In response to Pennsylvania towns’ success in court, the state legislature sought to provide the “further legislative guidance” previously unavailable to the state courts. In 2010, the Pennsylvania General Assembly passed Act 13 to promote shale gas drilling by, among other things, prohibiting local government bans on fracking within the state.\textsuperscript{208} The statute

\begin{thebibliography}{99}
\bibitem{201} Huntley & Huntley, Inc. v. Borough of Oakmont, 964 A.2d 855 (Pa. 2009).
\bibitem{202} Id. at 865.
\bibitem{203} Id.
\bibitem{204} Id.
\bibitem{205} Id. at 866 (internal citations and quotation marks omitted).
\bibitem{206} Id.
\bibitem{208} Act No. 13 of Feb. 14, 2012, P.L. 87 (codified as amended at 58 PA. CONS.
\end{thebibliography}
preempted local authority with a far-reaching affirmative requirement that localities amend zoning ordinances to include oil and gas operations in all zoning districts.\textsuperscript{209}

Local governments challenged Act 13 and prevailed.\textsuperscript{210} The Pennsylvania Commonwealth Court invalidated Act 13’s preemption provision on state constitutional grounds, holding in pertinent part:

\begin{quote}
[B]y requiring municipalities to violate their comprehensive plans for growth and development [Act 13] violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications—irrational because it requires municipalities to allow in all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise.\textsuperscript{211}
\end{quote}

The Pennsylvania Supreme Court affirmed the key preemption question in the local governments’ favor on different grounds.\textsuperscript{212} In a lengthy opinion, a plurality of the court analyzed the constraints of the Environmental Rights Amendment to the Pennsylvania Constitution—a strong but underutilized formulation of the public trust doctrine.\textsuperscript{213} The court reiterated a critical constraint on intrastate preemption, explaining that “constitutional commands regarding municipalities’ obligations and duties to their citizens cannot


\textsuperscript{210} Id.

\textsuperscript{211} Id. at 484.


\textsuperscript{213} The Pennsylvania Constitution provides:

\begin{quote}
The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.
\end{quote}

PA. Const. art. 1, § 27.
be abrogated by statute."214 Moreover, the court observed, “the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”215 Guided by these principles, the court held that “although the Commonwealth purports to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations . . . the General Assembly transgressed its delegated police powers which, while broad and flexible, are nevertheless limited by constitutional commands, including the Environmental Rights Amendment.”216

The opinion has prompted a flurry of analysis about its implications. One commentator, summarizing “what we think we know about Robinson Township,” goes so far as to assert “it may be difficult, perhaps impossible, to regulate land use on a statewide basis” and the “ruling effectively gives counties, cities and boroughs independent status as equal sovereigns.”217 Others celebrate the opinion for reinvigorating state constitutional environmental law and the public trust doctrine—a common law articulation of governments’ responsibility, varying by state, to treat water resources as held in trust for the public.218 At the very least, it is now clear that in Pennsylvania the state constitution is an active

214. Robinson Twp., 83 A.3d at 977.

215. Id.

216. Id. at 978. Among the Act 13 provisions held unconstitutional were section 3304, mandating that “all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources,” and section 3303, providing:

Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.

58 PA. CONS. STAT. §§ 3303, 3304 (2012).


constraint on legislative preemption of local environmental regulation.

Although Pennsylvania’s Act 13 has received by far the most press, it is not the only state legislation proposed or enacted for the purpose of curtailing local authority in the fracking context. In 2012, Idaho enacted H.B. 464 in response to local government activity, clarifying that “it is the intent of the legislature to occupy the field of the regulation of oil and gas exploration and production.”\(^{219}\) Notwithstanding this preemptive language, the statute conceded to “the limited exception of the exercise of planning and zoning authority granted cities and counties.”\(^{220}\) Under the new law, no ordinance may “actually or operationally prohibit the extraction of oil and gas,” but “extraction may be subject to reasonable local ordinance provisions . . . which protect public health, public safety, public order or which prevent harm to public infrastructure or degradation of the value, use and enjoyment of private property.”\(^{221}\)

In North Carolina, where drilling has been prohibited, the legislature cleared the way in 2012 for fracking to begin in the near future with S.B. 820, establishing a new Mining and Energy Commission and directing it to develop the regulatory framework needed for oil and gas development.\(^{222}\) With an eye toward potential conflicts with local governments, the law directs the Commission to recommend how it might “allow for reasonable local regulations, including required setbacks, infrastructure placement, and light and noise restrictions, that do not prohibit or have the effect of prohibiting oil and gas exploration and development activities, and the use of horizontal drilling and hydraulic fracturing for that purpose, or otherwise conflict with State law.”\(^{223}\) It remains to be seen how well the “modern regulatory program” and “appropriate environmental standards” the Commission develops will address local governments’ concerns.\(^{224}\) In the interim, fracking

\(^{220}\) Id.
\(^{221}\) Id. § 47-317(10)(b).
is still prohibited statewide. 225 Until last year, only Vermont had passed a statewide ban on hydraulic fracturing, but at the end of 2014, Governor Cuomo of New York announced a ban on fracking based on potential health risks, resolving—at least in the short term—the uncertainty created by a multi-year moratorium. 226 Bans have also been proposed in several more states, including California and New Mexico, and a statewide moratorium is being lifted in Maryland following the development of fracking rules. 227

This account of litigation and legislation touching on the state-local control over fracking is not exhaustive, and with each passing month, the body of law on this issue continues to grow. 228 Taken together, the case law applying intrastate preemption, combined with legislative activity adjusting the contours of state-local preemption, underscores that local governments' legal authority over fracking remains in flux, remains a source of uncertainty and controversy, and will likely continue to vary meaningfully state by state. Similar legal issues are spilling over from the fracking context to local efforts to control aspects of oil and gas support industries, such as sand mining. 229


227. For a useful resource on fracking litigation, addressing challenges to municipal actions as well as other controversies, see Hydraulic Fracturing, ARNOLD & PORTER, LLP (last updated Nov. 12, 2014), http://www.arnoldporter.com/resources/documents/Hydraulic%20Fracturing%20Case%20Chart.pdf, archived at http://perma.cc/VY9U-N44B. For a useful resource on state fracking legislation, see ADVANCED ENERGY LEGISLATION TRACKER, supra note 227.

IV. The State-Local Dynamics of Wind Power

With over 850 utility-scale wind farms across the country, wind energy is now part of the American landscape. This development is supported by the RPSs now enacted in the majority of states. Although they vary in form, these laws typically require electric utilities to supply an increasing percentage of electricity with renewable resources, creating a market for renewable electricity without addressing specific siting issues. Instead, siting a wind project depends on a range of factors, such as resource intensity, land availability and proximity to transmission lines, and the state-local relationship in siting decisions.

Recent wind growth highlights the important role of local governments in energy transition. As this Part details, local governments exert substantial control over the siting of onshore wind farms. With this authority, local governments have responded to wind proposals with cooperation as well as opposition.

In ways similar to natural gas drilling, wind projects represent an intensive land use with localized impacts that can be lost in the broader energy dialogue. In contrast to


232. Id. (providing links and summary information for individual state RPS provisions); see also Lincoln L. Davies, State Renewable Portfolio Standards: Is There a “Race” and Is It “To the Top”? 3 SAN DIEGO J. CLIMATE & ENERGY L. 3, 13–16 (2011) (describing RPS basics).


environmental risk-based objections to fracking, however, a predominant local objection to wind farms is aesthetic. A 1980 study surveying state law highlighted a trend toward increased acceptance of aesthetic regulation by state courts: at that time, sixteen states authorized regulation solely on the basis of aesthetics, while another ten states allowed aesthetic regulation when combined with other factors. In over half the states, however, there were no reported cases where aesthetic regulation remained an “open question.” Revisiting the status of aesthetic regulation across the states over twenty-five years later, researchers confirmed that the trend had continued but that states still vary in the degree to which regulation based on aesthetics is permissible. They found that all states now allow “regulation based on aesthetics combined with other factors.” Although not every jurisdiction had clarified the “aesthetics alone issue,” the highest courts of twenty-three states approved regulation based on aesthetics alone, while ten had rejected this.

This case law suggests that, absent express preemption of local authority, intrastate preemption could potentially yield different results for local regulation of fracking and wind development. Local regulation tends to address a combination of aesthetic concerns and other factors. Opposition to wind development also commonly concerns the possibility of excessive noise, safety issues, shadow flickering, harm to migratory birds and—coextensive of the aesthetic—effects on property values. Recent research shows no statistical evidence that commercial wind projects erode property values. Still, the persistence of this concern underscores how

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237. Id.
238. Id. at 1121–82 (reporting on individual state law status of aesthetic regulation).
239. Id. at 1180–81.
240. Id.
241. See Brisman, supra note 235; AM. PLANNING ASS’N, PLANNING FOR WIND ENERGY 35–52 (Suzanne Rynne et al. eds. 2011) (discussing local impacts and concerns relating to wind farms).
242. BEN HOEN ET AL., ERNESTO ORLANDO LAWRENCE BERKELEY NAT’L
individual property interests, in ways that parallel fracking opposition, anchor local government responses to proposed wind farms. Unlike the discernable trend in the fracking context, however, official opposition to wind projects has been sporadic and geographically dispersed.

In what follows, this section offers points of comparison to the fracking context, looking first to local government responses to wind and then to the state-local relationship in large-scale wind development.

A. Official Local Responses to Utility-Scale Wind Projects

Most of the forms of local government action addressed in Part III also pertain to wind development. A number of localities have banned utility-scale wind farms. A 2007 ban in Waubaunsee County, Kansas was among a handful of similar bans that drew early attention to the potential for local governments to hinder wind energy, and localities continue to adopt wind bans. Recent examples include Marshall County, Indiana; Piedmont, Virginia; Windham, Vermont; and Baldwin, Alabama. In Falmouth, Massachusetts, residents came close
to passing a measure to dismantle “two wind turbines that were once the pride of the area” after noise complaints.\textsuperscript{246}

In addition to bans, local governments have imposed time-limited moratoria, even after a project has been proposed.\textsuperscript{247} These moratoria, as in the fracking context, may be used to allow the locality to prepare to accommodate wind development responsibly—the local government may have had no regulations in place in advance of a project being proposed. For example, the Town of Italy, New York, imposed a moratorium prohibiting the “construction or erection of wind turbine towers, relay stations and/or other support facilities” after Ecogen had purchased property rights and easements for a wind farm.\textsuperscript{248} The moratorium’s stated purpose was to prohibit wind projects “for a reasonable time pending the completion of a plan for control of construction of such structures in the Town of Italy as part of the adoption of comprehensive zoning regulations . . . .”\textsuperscript{249} The company challenged the moratorium in federal court, but its request for a preliminary injunction was denied and the moratorium was deemed facially valid.\textsuperscript{250}

In the neighboring Town of Prattsburgh, however, Ecogen challenged a moratorium under a different set of facts that altered the result.\textsuperscript{251} There, the town had signed an agreement with Ecogen that stipulated “no building permit [could] be required by the Town for [petitioners’ proposed wind energy project]” as “[t]here are no Town laws or ordinances which prevent [petitioners] from proceeding with construction.”\textsuperscript{252} After an election replaced most of the town’s board, the town imposed a moratorium on wind development. In this case, the


\textsuperscript{248} Ecogen, LLC \textit{v.} Town of Italy, 438 F. Supp. 2d 149 (W.D.N.Y. 2006).

\textsuperscript{249} Id. at 152–53.

\textsuperscript{250} Id. at 161–62.


\textsuperscript{252} Id. at 1283.
court rejected the moratorium, finding the agreement to be valid and enforceable.253

Although some localities have used generic powers to reject unwelcome projects,254 many have worked to craft local compatibility restrictions in, it would seem, a genuine effort to harmonize wind energy with the local environment, sometimes with the help of state-developed model ordinances.255 In a rare state-level response, Connecticut imposed a three-year moratorium on large-scale wind development statewide, which concluded in 2014 with the release of compatibility regulations addressing setbacks, noise, and other impacts.256

A notable difference in local responses to wind and fracking is that resolutions, widely used among local governments to express anti-fracking policy preferences, do not appear to have been used in parallel ways to oppose wind. Rather, research shows there is widespread support for renewable energy development, and that opposition is much more localized to particular projects.257 A number of scholars

253. Id. at 1283, 1285.
254. See, e.g., PPM Atl. Renewable v. Fayette Cnty. Zoning Hearing Bd., 13 Pa. D. & C. 5th 458, 480 (Pa. Ct. Com. Pl. June 17, 2010) (reversing conditions imposed by zoning board on a wind farm proposal, declaring them unreasonable in light of limits of local authority, clarifying that “a zoning hearing board’s jurisdiction is limited to enforcement of the zoning ordinance . . . [and the board] does not enjoy broad, inchoate powers to advance its members’ visions of what constitutes the public welfare”) (internal citations omitted); Optiwind v. Planning & Zoning Comm’n of Goshen, No. LLICV0840078198S, 2010 WL 4070580 at *2 n.3 (Conn. Super. Ct. Sept. 15, 2010) (considering challenge to zoning commission decision to deny company wind farm permit based on finding that proposed wind farm did not meet requirement that “there will be no adverse effects upon the existing and future character of the neighborhood or its property values”); Johnecheck v. Bay Twp., 119 F. App’x 707, 710 (6th Cir. 2004) (upholding denial of a conditional use permit and finding “Bay Township has a legitimate interest in regulating the location and size of three hundred-foot [wind turbine generators] within the Township’s Agricultural District”).
257. Salkin & Ostrow, supra note 5, at 1062; see also Joanna Schroeder, Poll: Americans Want More Wind Power, DOMESTICFUEL.COM (Dec. 1, 2014), http://domesticfuel.com/2014/12/01/poll-americans-want-more-wind-power,
have argued for more centralized siting regimes for wind out of concern that local governments may stymie renewable energy development with NIMBY (“not in my backyard”) regulation.\textsuperscript{258} The overview in Part III and the wind-focused literature on local barriers need not be repeated here. However, the state and local roles in wind siting frameworks, discussed below, offer another distinct view of the role of intrastate preemption in the shifting energy sector.

\textbf{B. Intrastate Preemption in the Wind Context}

State-local dynamics in the wind context provide a useful counterpart to the discussion in Part III. Recent research by the Environmental Law Institute (ELI) verifies that in forty-eight of the fifty states, local governments still exert significant control over the siting of commercial-scale wind facilities.\textsuperscript{259} ELI describes five basic models of state-local interaction in wind siting, ranging from the greatest to the least local influence: (1) local siting with local autonomy, (2) local siting with a defined scope, (3) dual authority with independent decisions, (4) dual authority with state preemption, and (5) state siting that incorporates local requirements and limits local discretion.\textsuperscript{260} A handful of states have preempted local governments and site wind facilities at the state level.\textsuperscript{261}

The models most states employ are the most locally empowering, the first and third: autonomous local siting and dual authority with independent decisions. Well over half the states—ELI counts thirty-four—take the first approach, with


\textsuperscript{258} See, e.g., Salkin & Ostrow, supra note 5 (arguing for federal restraints on local wind siting, including precluding local governments from banning wind farms); Wiseman, supra note 5 (arguing fragmented federal, state, and local authority is a problem in siting large-scale renewable energy projects).


\textsuperscript{260} Id. at 5.

\textsuperscript{261} Id.
local governments having “substantial autonomy over both the process and substantive requirements for siting commercial-scale wind facilities.”

Roughly a quarter of the states use the third model, so that both levels of government have authority to approve or disapprove a wind facility. A handful of states allow local authority over siting that is bounded in scope by “limitations defined by state law,” while eleven states structure state-local relations on the basis of wind project size, shifting authority to state boards for facilities that exceed a certain MW-capacity threshold. Importantly, only a few states have preempted local siting authority for all commercial-scale wind facilities in favor of state boards.

This account of wind siting regimes shows that states have made wide-ranging political decisions balancing state interests in wind development with local interests in wind siting. Much as we have seen in the fracking context, legislative preemption is highly varied and legal challenges to official local action interact with state-specific local government and preemption doctrine.

In Ecker Bros. v. Calumet County, for example, a Wisconsin state court held a county ordinance that restricted construction of wind turbines was preempted, and therefore ultra vires, exceeding local authority. According to the court, Wisconsin Statute § 66.0401(1) “expressly forbids political subdivisions from regulating solar and wind energy systems.” Although the scope of preemption allowed local control that met one of three conditions, the local restriction imposed on the project did not meet these standards and was void.

Kansas provides an example of state-local dynamics that contrasts sharply with the Wisconsin regime. In Zimmerman v.

262. Id. at 6. For a list of states, see id.
263. Id. at 9–10.
264. Id. at i. These include Colorado, New Mexico, and Connecticut. Id. at 10–11.
265. Id. at i.
266. Id. at 13. These include New Hampshire, Vermont, Washington, and Ohio.
268. Id. at 245 (citation omitted).
269. Id. at 246. The conditions were: “(a) Serves to preserve or protect the public health or safety. (b) Does not significantly increase the cost of the system or significantly decrease its efficiency. (c) Allows for an alternative system of comparable cost and efficiency.” Id.
Board of County Commissioners of Wabaunsee County, the Kansas Supreme Court addressed state preemption of local regulation in the context of a ban on commercial wind energy development in the Flint Hills, one of the few tall grass prairies remaining in the United States.\textsuperscript{270} Under the Kansas Electric Public Utilities Act, the court ruled that the Kansas Corporation Commission could only preempt local zoning in two circumstances: the siting of nuclear power plants,\textsuperscript{271} and the siting of certain electricity transmission lines.\textsuperscript{272} The case represents simple statutory interpretation inflected by state preemption law. The court emphasized its history of rejecting the notion that statutes can implicitly preempt local regulations.\textsuperscript{273} Preemption occurs only where the legislature makes a clear statement within a statute that it intends to reserve the jurisdiction to regulate exclusively in the state.\textsuperscript{274}

The Supreme Court of Washington considered a reverse set of facts, where parties opposed to a wind project argued against state preemption of a local government’s opposition. These facts gave the court occasion to clarify the state-local relationship in wind siting under Washington law. In Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, the court held that the state’s Energy Facility Site Location Act (EFSLA) preempted a county land use decision affecting wind turbines.\textsuperscript{275} Petitioners argued against preemption, positing that language in the subsequently enacted Growth Management Act (GMA) empowered local governments in land planning in ways that should be read as

\textsuperscript{270} Zimmerman I, 218 P.3d 400 (Kan. 2009); Zimmerman v. Bd. of Cnty. Comm’rs (Zimmerman II), 264 P.3d 989 (Kan. 2011). The Kansas Supreme Court addressed the lawfulness, reasonableness, and state preemption issues of this case in Zimmerman I.

\textsuperscript{271} KAN. STAT. ANN. § 66-1,162 (2014) (stating that, once the KCC has issued a permit for a nuclear power plant, no local ordinance, resolution, or regulation can prohibit construction of the plant, and the utility can proceed with construction regardless of any local ordinance, resolution, or regulation that would require the utility to obtain a building permit).

\textsuperscript{272} Id. § 66-1,182(b) (stripping cities and counties of jurisdiction to control the siting or construction of electric transmission lines over a certain size).

\textsuperscript{273} Zimmerman I, 218 P.3d at 429 (citing City of Junction City v. Griffin, 607 P.2d 459 (Kan. 1980); City of Junction City v. Lee, 532 P.2d 1292 (Kan. 1975)).

\textsuperscript{274} Id.; see also 143rd St. Investors, L.L.C. v. Bd. of Cnty. Comm’rs of Johnson Cnty., 259 P.3d 644, 655 (Kan. 2011) (reiterating that preemption of a field of regulation occurs only via express statutory language).

\textsuperscript{275} (EFSEC), 197 P.3d 1153, 1158 (Wash. 2008).
altering the preemption provisions of the EFSLA.\textsuperscript{276} However, the GMA did not expressly override the preemption provisions, and state law in Washington resolved the ambiguity resulting from the statutes’ overlapping scope in favor of the state.\textsuperscript{277}

In another case considering the preemption effect of state land use laws, an Oregon state court considered in\textit{ Hatley v. Umatilla County} the pertinence of a statewide land use planning goal to protect natural resources and conserve scenic, historic, and open-space resources to local wind regulation.\textsuperscript{278} The court held the state goal did not restrict the county in adopting protections for threatened and endangered fish and wind farm restrictions.\textsuperscript{279} The court remanded without resolving whether a two-mile setback ordinance on wind development was preempted by state law supporting renewable energy.\textsuperscript{280}

These cases and the siting regimes that structure wind siting across the states, like their fracking counterparts, reflect the inherent and context-specific variability of intrastate preemption—in judge-made doctrine and in legislative preemption decisions—interacting with the contours of local authority defined by state law.

V. IMPLICATIONS: COMPARING ACROSS CONTEXTS

Comparing across contexts clarifies the role of intrastate preemption in the shifting energy sector in at least three ways. First, it calls into question the common view that the primary effect of local government resistance is to frustrate development. Although local action is a barrier in individual instances—the\textit{ Zimmerman} case in the Kansas Flint Hills is a prime example—the overall trend of unprecedented growth in both fracking and wind belie the notion that local regulation is necessarily at odds with state objectives favoring energy development.

According to the data collected by ELI, states affording the greatest autonomy to localities—Texas, most notably, and even

\begin{footnotes}
\item[\textsuperscript{276}] Id. at 1169–70.
\item[\textsuperscript{277}] Id.
\item[\textsuperscript{279}] Id. at 928.
\item[\textsuperscript{280}] Id.
\end{footnotes}
Kansas, post-Zimmerman—generate the most wind power.\footnote{See EnvTL. L. INST., supra note 259, at 7.} Similarly, Pennsylvania—despite preserving local authority and despite numerous local fracking bans—is “the fastest-growing natural gas-producing state,” jumping from the seventh to the third largest producing state between 2011 and 2012, and approaching second in 2013.\footnote{U.S. ENERGY INFO. ADMIN., Today in Energy: Pennsylvania is the Fastest-Growing Natural Gas-Producing State (Dec. 17, 2013), http://www.eia.gov/todayinenergy/detail.cfm?id=14231, archived at http://perma.cc/CLQ8-RJ54.} This suggests that the fear of local governments dramatically hampering nationwide development—the primary justification for backlash preemption of local control—may be overdetermined.

Rather, looking broadly across the states’ legislative landscape, it appears that the trend in official local action on fracking coincides closely with state efforts that are responsive to local concerns. Since 2010, in response to worries about water contamination, for example, nearly half the states have enacted fracking-fluid composition disclosure laws, including in the major natural gas-producing states.\footnote{Keith B. Hall, Hydraulic Fracturing: Trade Secrets and the Mandatory Disclosure of Fracturing Water Composition, 49 IDAHO L. REV. 399, 405–09 (2013).} Recent state legislation has addressed not only local authority over where and whether fracking can occur, but also a broader set of issues to which local governments are attracting state attention. An analysis of states’ 2013 legislative sessions by the Center for the New Energy Economy shows a prevalence of proposals pertaining to local impacts from oil and gas development, split estates, and regulation of fracking waste storage, transport, and disposal.\footnote{CTR. FOR THE NEW ENERGY ECON., STATES SEEK TO BALANCE NATURAL GAS DEVELOPMENT WITH ENVIRONMENTAL AND LOCAL RIGHTS ISSUES 2–3 (2013), available at http://www.aeltracker.org/graphics/uploads/AEL-Tracker-Natural-Gas-Paper_Final-Draft.pdf, archived at http://perma.cc/4N6H-NTZ6.} Local impact legislation addressed safety through spill reporting requirements and well inspections, noise concerns, air and water protections, as well as surface reclamation and local infrastructure.\footnote{Id. at 2.} The Center’s analysis saw a “prevalence of local impact legislation” as representing “even clearer trend when also considering the twenty-five of fifty split estate bills that focus specifically on landowner rights.”\footnote{Id. at 3.} Enacted legislation in 2013 included ten of fifteen split estate bills focused on surface owner rights, exceeding all
other enacted natural gas legislation topics other than taxation. These issues continued to garner legislative attention in the 2014 sessions. At the federal level, EPA has increased its scrutiny of environmental impacts from fracking, prompted in part by environmental and community groups that are supporting local government efforts to regulate fracking. In May 2014, for example, the agency issued an Advance Notice of Proposed Rulemaking under the Toxic Substances Control Act to determine what information should be disclosed for fracking chemical mixtures and “the mechanism for obtaining this information.” The agency took this action in response to a citizen petition filed by Earthjustice, which represented Dryden, New York, in its successful litigation. EPA issued Oil and Natural Gas Air Pollution Standards under Clean Air Act authority in 2012 and is proposing to develop amended Effluent Limitations Guidelines for the Oil and Gas Extraction Category under its Clean Water Act authority.

Similarly, in the wind context, local opposition prompted wind advocates and wind-supportive states to take affirmative steps toward facilitating local compatibility restrictions to protect local interests while advancing wind projects. Indeed, according to the Center for the New Energy Economy,

287. CTR. FOR THE NEW ENERGY ECON., supra note 137, at 8.
290. For more on Dryden’s story and the role of Earthjustice in the litigation, see NY Communities Triumph Over Fracking Industry in Precedent-Setting Case, EARTHJUSTICE (June 30, 2104), http://earthjustice.org/news/press/2014/ny-communities-triumph-over-fracking-industry-in-precedent-setting-case, archived at http://perma.cc/VQK4-6YES.
“the overall impact” of recent renewable energy legislation at the state level has been to expand the state RPS market, despite concerted efforts to repeal RPSs in a number of states. 294

Second, the doctrinal diversity inherent in intrastate preemption elevates the relevance of state-local dynamics to energy transition. A commentator on oil and gas regulation in Colorado observed over a decade ago that “the goal of local regulation advanced by many residents is to make oil and gas ‘invisible.’ Unfortunately, industrial development facilities are not invisible.” 295 Although there may be truth in this assertion, the inverse may also be true. Localities’ assertive engagement is making the impacts of fracking visible to the rest of the natural gas-dependent communities in their own states, as well as in non-producing states enjoying the benefits of gas production.

In this way, local governments—distinct from community and environmental groups—make a particularized contribution to the discursive environment of energy policymaking. The form and extent of local government engagement with fracking suggests that the communicative power of this lawmaking is a central force driving the continued trend. Indeed, local assertiveness can be seen as bridging a structural division between energy and environmental concerns. It helps shine a spotlight on the disaggregation of energy-resource selection and environmental harms that have long characterized United States energy policy. Local governments’ trepidation makes visible a disconnection between state-defined objectives and local experience that points to the need for a more integrated assessment of United States energy choices. This is especially important given the increased role of natural gas in electricity generation across the United States, making it possible for national policy questions to be anchored by a clear understanding of local impacts.

Pivoting the particularities of the local context with the abstraction of national goals and projections supports a more complete conversation about energy, integrated across geographic and governance scales. This integration demands,

294. CTR. FOR THE NEW ENERGY ECON., supra note 137, at 3.
for example, that value judgments about reliable and affordable electricity generated from natural gas be informed by the water constraints and risks of fracking. Local perspectives are also important because for many states, fracking is not a pressing concern due to the simple fact that they have no natural gas resources. 296 Most of those states invariably will be using natural gas for electricity, however. Even as hydraulic fracturing is affecting traditional natural gas markets, it is proving highly relevant to the electricity sector as more utilities turn to natural gas as a fuel source. Local government resistance communicates across city, county, and state borders what reliance on this resource across the nation means locally.

Third, the nuanced state-local dynamics for fracking and wind development show there is a risk of oversimplifying governance questions as a simple level-of-government choice. Local, state, and federal perspectives can overlap but also diverge, emphasizing matters of importance distinct to each scale. This can easily be missed in the federal-versus-state debate, as well as in the state-local context. New York courts have identified just the kind of how-where distinction that might easily be lost if states favor sweeping preemption in the mode of Pennsylvania’s Act 13. 297 State aims in regulating and promoting oil and gas development are distinct from local interests in the provision of services, property rights, and specific natural resources. As Robert Freilich and Neil Popowitz explained in a recent article aimed at local officials, “only local regulation . . . can deal with the secondary impacts of fracking upon the communities’ roads, schools, fire, police, and emergency response systems, as well as preserving offsite environmentally sensitive lands.” 298 Using Santa Fe County, New Mexico’s Oil and Gas Plan and Ordinance as a model, they show how state preemption risks missing a range of important

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297. Wallach v. Town of Dryden, 23 N.Y.3d 728, 745 (2014) (highlighting precedent recognizing that “the distinction is between ordinances that regulate property uses and ordinances that regulate . . . activities” (internal citations omitted)).

functions of local land use regulation, letting key local compatibility issues go unaddressed by states.299

CONCLUSION

The heterogeneity of intrastate preemption has preserved a legal environment of possibility for local influence in energy development beyond the purely local. For the many reasons considered here, there is no one way to characterize the legal validity of local regulation over fracking or wind power. This research suggests that the resulting uncertainty for legal actors in the fracking context has been productive—driving important environmental controls, data gathering, and enforcement. Likewise, it may be argued that local governments have, on the whole, been a force driving improved siting and compatibility for large-scale wind farms. At the same time, urgent demands of climate change mitigation present a point of departure across the fracking and renewable energy contexts. Recent research calling for “deep decarbonization” of the energy sector estimates wind and solar generation must be developed to thirty times present capacity by 2050.300 To embrace such a goal creates intense pressure to further streamline renewable energy siting regimes at every level—pressure that runs counter to the corresponding call to reduce GHG emissions from fossil energy sources like oil and gas.301

Whatever normative conclusions one may draw with regard to the pace and direction of energy transition, this Article has shown how the dynamics of intrastate preemption have expanded the reach of local contributions. As local governments test the boundaries of authority in their own

299. Id.; see also John R. Nolon & Victoria Polidoro, Hydrofracking: Disturbances Both Geological and Political: Who Decides?, 44 URB. LAW. 507, 527 (2012) (urging local governments to develop gas drilling elements for their comprehensive plans to control for environmental harm as well as economic benefits of fracking not addressed by state law with locally-defined “goals, objectives, strategies, and implementation measures . . .”); AM. PLANNING ASS’N, supra note 241, at 89–108 (addressing planning needs and considerations for utility-scale wind at the local level).


301. Id.
states with fracking bans, moratoria, and other local regulation, they frame local environmental and property interests as concerns state officials must reconcile with state goals. At the same time, they highlight the relevance of these interests to the role of natural gas and renewable energy across the United States. Advancing community-scale concerns through official governmental action pivots the specificities of the local—individual and community-based health, property, and environmental concerns—into state and national energy-policy spheres, where economic growth, energy security, and climate change are more dominant themes. In this way, local governments inhabit a unique policy space in the shifting energy sector, more prominent than acknowledged, and distinct in form and identity from community, environmental, or industry groups working to shape public opinion. From this space, buoyed by preemption diversity, localities have been an influence for a more responsible energy transition.