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Essay

## Why Localizing Climate Federalism Matters (Even) During a Biden Administration

Sarah J. Fox<sup>†</sup>

### Introduction

After four years of a Trump Administration hostile to action on climate change, the United States is now under the leadership of the Biden Administration, which acknowledges the scope of the global climate crisis and has a number of proposals for addressing it.<sup>1</sup> For now, the Democratic Party also controls both houses of Congress. All of that is good news for progress on climate change. It does not mean, however, that the federal government will be immediately poised to solve the climate challenge. First of all, the COVID-19 pandemic is likely to continue to occupy a tremendous share of federal resources for many months. And even with control of both houses of Congress, federal climate legislation (assuming it is forthcoming) will still take time to be written and introduced. The Biden Administration has been working quickly to reverse rollbacks of Trump-era federal climate regula-

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1. See, e.g., Coral Davenport & Lisa Friedman, *Biden Plans to Move Fast with a 'Climate Administration.' Here's How.*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/climate/biden-climate-change.html> [<https://perma.cc/7E68-NRDQ>].

tions and guidance—but even such regulatory reversals may take up to several years.<sup>2</sup> And the Administration will also need to work on restoring confidence and resources within the government agencies tasked with addressing climate change, making changes to national energy policy, and taking myriad other actions critical to climate progress. All of this takes time, resources, and political capital.<sup>3</sup> Total reliance on federal executive action on climate has a number of other drawbacks as well, including vulnerability to reversal, likelihood of great political opposition, and uncertain responses by courts when many of these actions inevitably become the subject of litigation.<sup>4</sup>

These same issues have plagued the U.S. federal climate response to date, even in administrations otherwise inclined to take action on the issue. Correspondingly, the past several decades have seen an increase in environmental initiatives by state and local governments that aim to fill in the gaps in climate mitigation and adaptation efforts.<sup>5</sup> Those efforts have allowed sub-federal government actors to react to the impacts of climate change and to play a role in broader mitigation efforts. They are also likely to remain an important piece of climate engagement in the United States, as they may allow for some progress to be made in stemming harm from climate change, particularly where federal action is either absent or insufficient. Thus, climate federalism—meaning the allocation of responsibility for climate change policy among the federal, state, and local governments—is likely to remain important throughout the Biden Administration.<sup>6</sup> The discussion herein focuses on the particular role that local governments may play in that process. While local actors may not be the level of government ideally suited to address all aspects of a global issue like climate change, they have potential to perform

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2. Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/climate/biden-environment.html?action=click&module=Spotlight&pgtype=Homepage> [https://perma.cc/J8ZS-96EE].

3. Davenport & Friedman, *supra* note 1.

4. See, e.g., Barry G. Rabe, *The Limitations of a Climate Change Presidency*, BROOKINGS INST.: FIXGOV (June 23, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/23/the-limitations-of-a-climate-change-presidency/> [https://perma.cc/QR4W-HD5W].

5. See, e.g., Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575, 581 (2017); Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CAL. L. REV. 305, 310–11 (2020); *State and Local Adaptation Plans*, GEORGETOWN CLIMATE CTR., <https://www.georgetownclimate.org/adaptation/plans.html> [https://perma.cc/WUU5-9ADT] (compiling information about adaptation efforts nationwide).

6. Nicholas Bianco, Franz Litz, Devashree Saha, Tyler Clevenger & Dan Lashof, *New Climate Federalism: Defining Federal, State, and Local Roles in a U.S. Policy Framework to Achieve Decarbonization 2* (Oct. 2020) (working paper) (available at <https://files.wri.org/s3fs-public/new-climate-federalism-working-paper.pdf>).

an important gap-filling function within the federal system—at least in theory.<sup>7</sup>

For it is one thing to say that local climate action has importance, but another thing to pinpoint exactly what that means. Much of the national narrative around where to look for climate progress has focused on the potential of local governments as a general category, without attention paid to the particular and highly varied legal regimes in which local governments operate.<sup>8</sup> Discussions at such a high level do not capture the nuanced rules that apply to local government’s ability to act in different ways, and therefore miss an important component of the realities of climate governance in the United States. Developing a concrete understanding of the potential for local action on climate change must involve both precision in the discussion of the local authority available in the applicable jurisdiction<sup>9</sup> as well as consideration of the nature of the local action in question. This process of localizing the climate federalism discussion, or breaking down the legal frameworks that apply to local governments and the ways those frameworks dictate how local governments may be able to act on climate issues, allows for an accurate discussion of where local governments can and should focus their energies. Beyond that, making clear the role of local governments in the federal system helps to shore up an argument for new forms of cooperative environmental localism,<sup>10</sup> wherein the federal government may be able to use its tools to empower and support local climate action.

This Essay disaggregates local environmental responses into four categories: land use-based adaptation actions; affirmative litigation and symbolic local action; local governments as proprietary actors; and local regulatory responses. Within those categories, it offers examples of the different kinds of local environmental actions and explains the relative strengths or weaknesses of local authority in each category. These analyses make clear that, in

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7. For a longer discussion of how and why local governments have been and should be included in the environmental federalism conversation, see generally Sarah Fox, *Localizing Environmental Federalism*, 54 U.C. DAVIS L. REV. 133 (2020). See also William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1049 (2017) noting that empowering state and local action on climate change provides an “array of second-best benefits that are likely the optimal possible answer even where, as with climate change, the likely ideal arrangement would utilize a single, well crafted, preemptive and stable federal regulatory regime”).

8. See Fox, *supra* note 7, at 179.

9. See *id.*

10. See generally Nestor Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (explaining the concept of “cooperative localism” as the set of direct interactions between the federal government and local governments which arise in a wide variety of “areas of vital concern” including environmental protection).

talking about local climate action, conversations should focus on *where* the local government is located (and, therefore, its political and legal setting), as well as *what* the local government is trying to do. At a very high level of generality, it is the rare local government that has the authority and ability to take any action it wishes to on climate change—but nearly all local governments have the authority and ability to do something. Understanding the differences in types of local climate action can help make the extent of local authority clear and chart a viable path for continued local progress.<sup>11</sup> The Essay concludes by offering suggestions for ways that the federal government might support local climate action, while emphasizing the continued importance of a more unified federal response.

### I. A Brief Primer on Local Climate Authority

Local authority over climate action, as with any other kind of local action, is subject to state law and varies widely. Most states in the United States have some grant of home rule authority from which local governments derive their power.<sup>12</sup> Home rule is allocated either by statute or within the state's constitution, and, broadly speaking, combines elements of immunity from state interference and authority to take action on the local government's own initiative. Early home rule provisions often took the form of providing local governments with a strong core of authority over "local" matters, coupled with immunity from state actions in that realm.<sup>13</sup> This approach had the benefit of offering a sense of where local governments would be allowed to act, and where they had no authority to do so. These grants of authority were also generally accompanied by immunity from preemption for actions deemed to be within the local sphere. Historically, however, state approaches to home rule have shifted given the difficulties in policing the lines of what counted as "local," and the resulting uncertainty as to local authority.<sup>14</sup> Grants of home rule authority passed after the 1950s have tended to provide a much broader sphere of initiative authority to local governments. In these schemes, local governments can act on any matter, so long as it does not conflict with state law. That broad grant of authority is typically not coupled with any form

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11. Katherine A. Trisolini, *What Local Climate Change Plans Can Teach Us About City Power*, 36 *FORDHAM URB. L.J.* 863, 864 (2009) (advocating for the question of city action on climate change to be phrased as, "[c]ity power with regards to what?," for "[a] very small degree of relative power may have a substantial effect on a specific problem. Cities may turn out to be quite powerful in one realm despite being quite disempowered in another").

12. See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *COLUM. L. REV.* 1, 10 (1990).

13. *Id.*

14. *Id.*

of immunity from state interference. As a result of these shifts, in most states, local governments with home rule authority have the authority to act on any subject of their choosing but are vulnerable to the threat of preemption.<sup>15</sup>

The prospect of that kind of interference has become very real in recent years. The rise of new forms of preemption has meant that—particularly in states with conservative-dominated legislatures—local ordinances are often met with state legislation prohibiting the local conduct in question.<sup>16</sup> These forms of very explicit preemption have had a major chilling effect on local action.<sup>17</sup> And even in states where the legislature has not taken a targeted, reactionary approach to preempting local authority, local climate actions may be subject to implicit preemption if they are interpreted to conflict with a state law or regulatory scheme.<sup>18</sup> Thus, even where local action has a firm basis for its authority, the validity of the local action may still be called into question.

The highly variable nature of home rule means that discussion of capacity for local action in any one place requires analysis of the home rule provision in the relevant state and how the provision has been interpreted by courts. Nonetheless, the basic overview that follows here offers a sense of the potential for local climate action, and the possible pitfalls that await it as well. Local governments must ground their authority to act in a particular grant from the state, and must also be wary of preemption—both implied and explicit. Determining which local governments will be able to thread that needle certainly depends on location, state policies, and the aforementioned particularized home rule analysis. It may also vary, however, based on what kind of action is being taken, and how those actions fit into the contours of any given grant of authority.

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15. See, e.g., Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1065 (2017).

16. See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 GEO. L.J. 1469, 1473–74 (2018) (positing that these punitive state laws “seek[] not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place”); see, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018) (explaining dynamics of new forms of preemption); Richard Schragger, *The Attack on American Cities*, 96 TEXAS L. REV. 1163, 1164–65 (2017) (providing an overview of weakening city authority via preemption by highlighting several specific examples of recent state laws designed to heavily restrict the autonomy of local governments over a range of policy matters).

17. See Kim S. Haddow, *Local Control Is Now “Loco” Control*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10767, 10770–71 (2019).

18. See, e.g., *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593–95 (Tex. 2018) (holding that the 1989 Solid Waste Disposal Act preempted a locality’s attempt in 2014 to ban the use of plastic checkout bags); *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 19 (Tex. 2016) (interpreting the Texas Health and Safety Code to preempt a Houston air-quality ordinance).

## II. A Taxonomy of Local Climate Action

Action by local governments on climate change takes a variety of forms. Dividing these forms into specific categories is necessarily imperfect, as local actions are rarely identical and often blend elements of different kinds of responses. Nonetheless, it is possible—and useful—to discuss four main types of local action currently taking place with regard to climate change. Recognizing the types of actions being taken, and the forms of local authority that they require, helps make more accurate any predictions about the ability of local governments to act in the climate arena, and the state reactions that such local actions may provoke.

### A. *Land Use-Based Climate Adaptation Responses*

Local governments are the primary source of land use planning in the United States.<sup>19</sup> It is, therefore, perhaps expected that one of the main areas available for local climate action is land use. Particularly in areas already experiencing the impacts of sea level rise, more frequent storms, water shortages, and other shifts linked to the changing climate, local governments have been engaged for many years in shifting planning patterns to respond to community needs. For example, cities like Virginia Beach, Virginia have included as recommendations in their comprehensive plans items such as “prohibit construction in floodplains without acceptable mitigation,” and “[b]uild on higher ground where it is less susceptible to sea level rise and make higher ground the prime focus of development.”<sup>20</sup> Numerous other examples also exist of cities engaging in climate adaptation by modifying their land use plans to alter the local planning in response to climate impacts.<sup>21</sup>

Local policies that respond directly to physical changes occurring within the community, or that focus on upgrades to municipal property, fall squarely

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19. See Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1399 (2012).

20. CITY OF VA. BEACH, IT’S OUR FUTURE 7–12 (2009), [https://www.vbgov.com/government/departments/planning/areaplans/Documents/CompPlanDocuments/CP\\_Policy\\_Document\\_12\\_08\\_09.pdf](https://www.vbgov.com/government/departments/planning/areaplans/Documents/CompPlanDocuments/CP_Policy_Document_12_08_09.pdf) [<https://perma.cc/KF2C-6LPC>].

21. See, e.g., CITY OF DALLAS, DALLAS COMPREHENSIVE ENVIRONMENTAL AND CLIMATE ACTION PLAN 145 (2020), [https://27aabd9a-6024-4b39-ba78-f6074e2fc631.filesusr.com/ugd/349b65\\_38f32c6b85ae4b20b67b79ecb5b0b106.pdf](https://27aabd9a-6024-4b39-ba78-f6074e2fc631.filesusr.com/ugd/349b65_38f32c6b85ae4b20b67b79ecb5b0b106.pdf) (including in climate planning the need to reduce urban heat island effect expected to be exacerbated by climate change, and planning to “convert under-utilized areas such as public parking lots, space under freeways rooftops, etc. into gardens, parklets, vertical green walls or other public green spaces” as well as adopting “neighborhood-based targets . . . for reducing urban heat and stormwater run-off in a way that can inform land development decision making. Currently decisions are made on a site-specific case by case basis for new development. Building upon [t]he ‘Urban Heat Island Management Study (2017)’ and Smart Growth for Dallas mapping study, the Comprehensive Plan update will adopt neighborhood level targets for greening, cooling and stormwater run[-]off reduction strategies”).

within the kind of land use planning long said to constitute a “core” function of local government powers.<sup>22</sup> Thus, where a local government’s home rule authority must rest on a finding that the action is “local” in nature, such activities are likely to pass muster, potentially even gaining immunity from state preemption in the process. Where local initiative authority is broader but immunity is lacking, these kinds of land use planning actions are still likely to survive. The local governments have the authority to act, and because they are responding to problems with current, physical manifestations, such actions appear less likely to provoke state preemptive efforts.

It is worth noting that some proposed aggressive uses of state preemption have recently started to implicate local land use authority.<sup>23</sup> For instance, proposed state legislation in Florida would, among other things, require local comprehensive plans to include “a property rights element to ensure that private property rights are considered in local decisionmaking.”<sup>24</sup> If passed, this kind of legislation could limit the ability of local governments to engage in certain kinds of climate planning. At the moment, however, there do not appear to be any direct efforts by state legislatures to undermine adaptation-based land use planning efforts by local governments.

A potential dichotomy may exist between the strength of local ability to take on adaptation-oriented efforts and the willingness of local governments to engage in needed land use planning. As noted above, many local governments are engaging in land use adaptation policies that attempt to take on the physical impacts that climate change will have on their communities. The reality is, for many local governments the incentives to take the kinds of dramatic actions that may be needed to confront climate realities—disallowing

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22. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 452 (1990) (describing land use as “the heart of local autonomy”); Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 COLUM. J. ENVTL. L. 390, 393 (2014).

23. See, e.g., LOCAL SOLS. SUPPORT CTR., UNDER THE COVER OF COVID: A SURVEY OF 2020-2021 STATE PREEMPTION TRENDS 28 (2021), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/6010dd55027c241063e37840/1611717980992/UndertheCoverofCOVID.pdf> [<https://perma.cc/9E9B-ET44>].

24. See S.B. 496, 2021 Leg., Reg. Sess. (Fla. 2021) (stating, among other things, that “[a] local government may adopt its own property rights element or use the following statement of rights: The following rights shall be considered in local decisionmaking: 1. The right of a property owner to physically possess and control his or her interests in the property, including easements, leases, or mineral rights. 2. The right of a property owner to use, maintain, develop, and improve his or her property for personal use or the use of any other person, subject to state law and local ordinances. 3. The right of the property owner to privacy and to exclude others from the property to protect the owner’s possessions and property. 4. The right of a property owner to dispose of his or her property through sale or gift.”). A similar Florida bill was vetoed by the governor in 2020. See S.B. 410, 2020 Leg., Reg. Sess. (Fla. 2020).



rebuilding in certain areas, for instance, or eschewing the urge to rely on seawalls or other hard infrastructure—are simply not present. Thus, land use-based adaptation responses, while falling within the scope of local authority in most states, may in some instances suffer overall from misalignment between local interests and the climate realities of the future.

### B. *Local Climate Litigation and Other Advocacy*

Far from the core of their land use planning authority, many local governments have also chosen to take on climate action through litigation. For instance, in recent years cities in California and Colorado, along with New York City, have filed lawsuits against oil companies for their contributions to climate change.<sup>25</sup> Other cities filed amicus briefs supporting actions such as the Obama Administration's Clean Power Plan,<sup>26</sup> and opposing the Trump Administration's Affordable Clean Energy Rule.<sup>27</sup> Cities have also engaged in symbolic advocacy through local expressions of intent to uphold international climate accords like the Paris Agreement and the Kyoto Protocol.<sup>28</sup>

Generally speaking, to date the litigation and symbolic actions by cities have not been subject to preemption.<sup>29</sup> This may be partly attributable to the fact that many of these actions come from cities politically aligned with their respective states. That alignment is not universally true, however. And, perhaps more notably, there has not to date been widespread preemptive action

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25. See Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1238 (2018); John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/climate/exxon-climate-lawsuit-colorado.html> [<https://perma.cc/K24S-ACTC>].

26. Michael Burger & Justin Gundlach, *Cities Across the U.S. Support Clean Power Plan in Amicus Brief*, SABIN CTR. FOR CLIMATE CHANGE LAW: CLIMATE LAW BLOG (Apr. 1, 2016), <http://blogs.law.columbia.edu/climatechange/2016/04/01/cities-across-the-u-s-support-clean-power-plan-in-amicus-brief/> [<https://perma.cc/55W7-C9ZQ>].

27. Press Release, Nat'l League of Cities, *Cities and Counties File Amicus Brief in Objection to Trump EPA Power Plan Rule* (Apr. 24, 2020) (available at <https://www.nlc.org/post/2020/04/24/cities-and-counties-file-amicus-brief-in-objection-to-trump-epa-power-plant-rule/>) [<https://perma.cc/6USM-DK2W>].

28. See, e.g., *Who's In, WE ARE STILL IN*, <https://www.wearestillin.com/signatories> [<https://perma.cc/RDY2-XC75>] (tracking the number of signatories still pledging to support the Paris Agreement in light of the Trump Administration's abandonment); see also *Mayors Climate Protection Center*, THE U. S. CONF. OF MAYORS, <https://www.usmayors.org/programs/mayors-climate-protection-center/> [<https://perma.cc/HVR7-RMQQ>] (reflecting 1,066 signatures to the Mayors' Climate Protection Agreement). Sharmila Murthy has framed these kinds of actions as "norm-sustaining," arguing that they go beyond symbolism to play an important role in maintaining some amount of U.S. climate progress by strengthening norms of international environmental law and filling gaps in U.S. climate policy at the subnational level. Sharmila Murthy, *States and Cities as "Norm Sustainers": A Role for Subnational Actors in the Paris Agreement on Climate Change*, 37 VA. ENVTL. L.J. 1, 30–31 (2019).

29. See Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1265 (2018).

aimed at heading off this brand of local advocacy around the country.<sup>30</sup> In other realms of local activity, the absence of a particular kind of local climate response within a state has not prevented legislatures from enacting preemptive measures that would cut off future attempts by a local government to take certain actions. Thus, the absence of preemption in this context may demonstrate that state legislatures are not particularly focused on blocking climate litigation and other forms of signaling by their local governments—at least for the time being.<sup>31</sup>

### C. *Proprietary Capacity*

Local governments can also act in a proprietary capacity to achieve policy goals on climate change.<sup>32</sup> When playing this role, local governments act more as private than public actors. Examples of local proprietary action particularly relevant to work on climate change include local public procurement policies,<sup>33</sup> municipal provision of power and waste management,<sup>34</sup> retrofitting municipal lighting,<sup>35</sup> and modifying other municipal operations.<sup>36</sup> To date, these kinds of proprietary functions by local governments have not been the target of state preemption. To take municipalization of local power supply as an example—while efforts to municipalize electricity have been driven in the past more by cost concerns than environmental reasons, local

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30. New forms of preemption that limit the ability of cities to bring lawsuits have begun to emerge, however. *See, e.g.*, H.B. 1053, 2021 Leg., Reg. Sess. (Fla. 2021) (“[p]roviding that the Attorney General has sole authority to file certain civil proceedings, . . . authorizing the Attorney General to institute or intervene in . . . civil proceedings, [and] providing that certain local settlements and resolutions are void.”); S.B. 1487, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (limiting the ability of local governments to engage in contingency fee litigation and placing other restrictions on hiring of counsel by local governments).

31. The absence of preemption may be coming to an end, as entities like the U.S. Chamber of Commerce have called for greater preemption of municipal litigation, including environmental lawsuits. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, MITIGATING MUNICIPALITY LITIGATION: SCOPE AND SOLUTIONS 24–26 (2019), <https://src.bna.com/Gcx> [<https://perma.cc/6P6N-B255>].

32. *See, e.g.*, Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 723 (2010) (“Local governments’ most direct (and likely least politically challenging) route to reducing downstream energy consumption is through targeting their own resources and operations. Potential reductions from proprietary activities alone may be substantial given the sheer number of local governments, the size of their operations, and the types of things that they own and operate.”).

33. *See, e.g.*, Jason J. Czarnecki, *Green Public Procurement: Legal Instruments for Promoting Environmental Interests in the United States and European Union* 98 (Jan. 7, 2020) (unpublished dissertation, Uppsala University) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3504676](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504676)).

34. Trisolini, *supra* note 11, at 886.

35. *See id.* at 876.

36. *Id.*

decarbonization efforts may increasingly serve as a reason for this kind of local action.<sup>37</sup> Scholars have noted the potential for municipalization to address environmental justice concerns, broaden the availability of electricity to rural populations, and offer an easier path to conversion of the grid to renewable energy sources.<sup>38</sup> Local authority to act as a power provider rests in most instances on a grant of authority from the state.<sup>39</sup> Where that authority is conveyed by statute, the potential for revocation or alteration of that authority exists. Nonetheless, despite the potential for state revocation of local power to municipalize electricity, to date such preemption of local power has not occurred.<sup>40</sup> Likely even more protected from state preemption are efforts to adopt sustainable procurement and operations strategies, as municipal operations functions have historically been well within the purview of local authority. Local climate actions that involve a proprietary function may therefore also be thought of as relatively safe—in the current moment—from preemptive state action.

#### D. *Mitigation-Oriented Regulatory Responses*

In addition to land use action, symbolic action, and exercises of a proprietary function, many local governments have adopted regulatory climate measures, and many others are considering such actions. Such measures, which aim to limit local contributions to climate change (as opposed to adjusting to its local physical impacts), expand the sphere of possible local climate actions. These kinds of local regulatory actions vary, but include things like: emissions reductions and net zero emissions targets;<sup>41</sup> taxes to fund greenhouse gas reduction initiatives;<sup>42</sup> mandatory waste reduction

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37. See Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 271 (2017).

38. E.g., Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 586 (2018).

39. See Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. (forthcoming 2022) (manuscript at 6) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3793195](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793195)). In six states, this authority is made by constitutional grant. *Id.* at 21–22.

40. *Id.* at 7.

41. See, e.g., CLIMATE MAYORS, CITIES CLIMATE ACTION COMPENDIUM *passim*, [https://climatemayors.org/wp-content/uploads/2020/11/Cities\\_Climate\\_Action\\_Compndium\\_180105-1.pdf](https://climatemayors.org/wp-content/uploads/2020/11/Cities_Climate_Action_Compndium_180105-1.pdf) [<https://perma.cc/D24C-SL3C>] (listing numerous examples of cities adopting emissions reductions and net zero targets); Jonathan Mingle, *To Cut Carbon Emissions, a Movement Grows to 'Electrify Everything'*, YALE ENV'T 360 (Apr. 14, 2020), <https://e360.yale.edu/features/to-cut-carbon-emissions-a-movement-grows-to-electrify-everything> [<https://perma.cc/5AW3-79KQ>] (noting that cities like Takoma Park, Maryland, and Ann Arbor, Michigan, have recently adopted net zero policies).

42. See, e.g., CLIMATE MAYORS, *supra* note 41, at 6 (citing example of Boulder, Colorado Climate Action Plan tax).

measures;<sup>43</sup> and others.<sup>44</sup> These regulatory efforts differ from the other categories of local action in important ways. Unlike adaptation efforts, they are not focused on the particular impact of climate change in the community; unlike litigation efforts, they often incentivize or require action on the part of the local population; and unlike proprietary functions, they are outside the realm of core service delivery or functions. Instead, they focus on addressing the contributions of the local government to the global problem of greenhouse gas emissions. While individual, local strategies aimed at curbing emissions are not the most efficient means of addressing the climate crisis, they can play an important role in filling climate policy gaps where a broader emissions reduction strategy does not exist.

On the local authority front, where home rule is contingent on a finding that the action relates to local affairs, regulatory responses to climate change may face substantial hurdles. In the majority of states where local governments have broader home rule authority not tied to the realm of municipal affairs, however, the ability to exercise authority on climate issues is likely to be fairly easy to establish on the front end. That is, local governments will generally have the authority to act in this regulatory capacity, subject to specific delineations of home rule in each state, as well as possible state or federal preemption.<sup>45</sup>

To further break down preemption prospects in this context, local regulatory climate actions can be divided into voluntary incentive programs and mandatory local requirements. Local voluntary incentives to address greenhouse gas emissions take a variety of forms. For instance, local governments have experimented with offering density bonuses for use of renewable energy; providing priority parking for hybrid and other alternative-fuel vehicles; and making more attractive planning goals such as transit-oriented and infill development.<sup>46</sup> Such incentive programs, focused on voluntary local actions by property owners, appear relatively unlikely to provoke preemptive action by the state.

Many other examples of local action, however, involve mandatory measures. For instance, some cities have adopted emissions-reductions tar-

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43. See, e.g., S.F., CAL., ENV'T CODE §§ 1901–1912 (2010).

44. For a resource compiling many best practices for local action on climate change, see SUSTAINABLE DEV. CODE, <https://sustainablecitycode.org/> [<https://perma.cc/T4VX-3YGB>].

45. While the focus of this Essay is mostly on state preemption dynamics, the possibility for federal preemption by the Clean Air Act and other statutes exists for some local policies.

46. See *Chapter 1.1 Climate Change*, SUSTAINABLE DEV. CODE, <https://sustainablecitycode.org/chapter/chapter-1/1-1/> [<https://perma.cc/H6S9-M4DN>] (providing incentive programs and compiling examples of local governments enacting these incentives).

gets, and to achieve them have turned to building code mandates or revisions.<sup>47</sup> Where political objectives at the local level align with those at the state, preemption of local measures will often not be a concern.<sup>48</sup> In other places, local regulatory climate action may catalyze reactionary preemption of local energy conservation measures. For instance, in 2015 the City of Phoenix considered creating an emissions-disclosure policy for commercial buildings. The state legislature followed that proposed local action by removing the authority of local governments in the state to impose emissions benchmarking requirements.<sup>49</sup>

Another example of this dynamic has been local bans on heating by natural gas. Citing contributions to climate change of both fracking processes and natural gas combustion, as well as other health impacts from the use of natural gas,<sup>50</sup> a number of cities in California, Massachusetts, and New York have passed or are considering ordinances that ban use of natural gas within the city.<sup>51</sup> While the exact parameters of these bans vary, in general they prohibit some or all uses of natural gas, or provide that no building permits will be approved for construction that includes natural gas elements. Many of

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47. See, e.g., New York, N.Y., Local Law No. 97 (2019) (amending the building code to achieve GHG reduction goals). See also Trisolini, *supra* note 11, at 882.

48. This is not true across the board—notably, New York City faced preemption by the state of its congestion pricing plans that were part of an overall emissions-reductions effort. See Laurel Wamsley, *New York Is Set to Be First U.S. City to Impose Congestion Pricing*, NPR (Apr. 2, 2019), <https://www.npr.org/2019/04/02/709243878/new-york-is-set-to-be-first-u-s-city-to-impose-congestion-pricing> [<https://perma.cc/SEF6-D2R8>]. New York State eventually passed its own measure, but the City is left without authority to enact this kind of scheme. See *Congestion Surcharge in the New York City Congestion Zone*, N.Y. ST. DEP'T OF TAX'N & FIN., Technical Memorandum TSB-M-18(1)CS, (Nov. 16, 2018). Proposed legislation in New York state also has the potential to undermine New York City's Local Law 97, which requires certain emissions reductions from large buildings. See Colin Kinniburgh, *Top State Lawmakers Oppose Cuomo's Push to Override NYC's Landmark Climate Law*, N.Y. FOCUS (Feb. 18, 2021), <https://www.nys-focus.com/2021/02/18/cuomo-override-nyc-climate-law/?fbclid=IwAR0Q11-LGA-5ndeupeyTBgwJChQJialYb2BXJcx3jGM7gygHTPU0r-KESrs> [<https://perma.cc/4HAZ-4BXL>].

49. See *NAIOP Arizona Blocks Energy Benchmarking Ordinance*, NAIOP: DEVELOPMENT, (Fall 2016), <https://www.naiop.org/en/Research-and-Publications/Magazine/2016/Fall-2016/Advocacy/NAIOP-Arizona-Blocks-Energy-Benchmarking-Ordinance#:~:text=These%20mandates%2C%20commonly%20referred%20to,consumption%20of%20their%20commercial%20properties.&text=According%20to%20the%20city%2C%20the%20ordinance%20would%20have%20affected%201%2C398%20buildings.> [<https://perma.cc/N4U6-75CJ>].

50. Emily C. Dooley & Jennifer Kay, *Pro-Gas States Pass Laws Barring Natural Gas Bans, Limits (I)*, BLOOMBERG LAW ENV'T & ENERGY REPORT (May 27, 2020), <https://news.bloomberglaw.com/environment-and-energy/pro-gas-states-pass-laws-barring-local-natural-gas-bans-limits> [<https://perma.cc/69VG-BZB5>].

51. See, e.g., SANTA CRUZ, CAL., MUN. CODE ch. 6.100 (2020); Mike Baker, *To Fight Climate Change, One City May Ban Heating Homes with Natural Gas*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/05/us/bellingham-natural-gas-ban.html> [<https://perma.cc/NA4L-MAGR>].

these ordinances are directed at new construction only, while others require conversion of heating systems already in existence.<sup>52</sup>

These natural gas bans have been met with warnings and outright preemption by several states.<sup>53</sup> For instance, in Massachusetts, the city of Cambridge was told that it needed to submit a Home Rule Petition if it wished to proceed with a natural gas ban.<sup>54</sup> Otherwise, the state concluded, it faced likely preemption of such a measure.<sup>55</sup> And to date, states including Arizona, Georgia, Kentucky, Louisiana, Minnesota, Mississippi, Oklahoma, and Tennessee<sup>56</sup> have reacted to the possibility of local bans on natural gas by proposing or adopting state legislation that, in essence, prohibits local governments from “passing any ordinance, resolution, regulation or code that would prohibit [state residents] from accessing utility service based on the type of fuel provided.”<sup>57</sup> Notably, none of the states in which these preemptive measures have been passed have seen any local natural gas bans. Rather, the state legislatures are reacting to the possibility of local trends in one area of the country inspiring changes in their own state—or, quite possibly, legislation is being enacted merely as a symbolic articulation of values.

In addition to the passage of these kinds of new preemption statutes, local governments may also have to contend with claims that their actions are preempted by state law schemes already in existence. These kinds of claims have occurred frequently in the fracking context, as local governments attempt to restrict elements of natural gas extraction that may be regulated by

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52. Baker, *supra* note 51.

53. Jeff Brady & Dan Charles, *As Cities Grapple With Climate Change, Gas Utilities Fight to Stay in Business*, NPR (Feb. 22, 2021), <https://www.npr.org/2021/02/22/967439914/as-cities-grapple-with-climate-change-gas-utilities-fight-to-stay-in-business> [<https://perma.cc/YPE5-YT4M>].

54. Tom DiChristopher, *Gas Ban Monitor: California Clears Coronavirus Hurdles; Mass. Strategy Splinters*, S&P GLOBAL MKT. INTELLIGENCE (Apr. 6, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/gas-ban-monitor-california-clears-coronavirus-hurdles-mass-strategy-splinters-57926053> [<https://perma.cc/D5RF-PMNU>].

55. *Id.*

56. *Id.*; see also Tom DiChristopher, *‘Banning’ Natural Gas Is Out; Electrifying Buildings Is In*, S&P GLOBAL MKT. INTELLIGENCE (Jul. 8, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/banning-natural-gas-is-out-electrifying-buildings-is-in-59285807> [<https://perma.cc/XG8G-SMZZ>]; Dooley & Kay, *supra* note 50; Nichola Groom & Richard Valdmanis, *As Climate Fight Intensifies, U.S. States Seek to Block Local Natural-Gas Bans*, REUTERS (Mar. 5, 2020), <https://www.reuters.com/article/us-usa-climatechange-naturalgas/backed-by-industry-several-u-s-states-propose-blocking-cities-from-banning-natural-gas-idUSKBN20S1G8> [<https://perma.cc/MHD5-NFTP>].

57. DiChristopher, *supra* note 54.

the state.<sup>58</sup> Such arguments about preemption may take the conversation beyond current political dynamics, as the analysis has to do with the impacts of state statutes already in existence, not those directly targeted at local action. In consequence, local regulatory environmental work on climate remains vulnerable to claims of preemption. The likelihood of success of such claims has much to do with the specifics of the state's home rule and preemption framework and must be assessed on a case-by-case basis.<sup>59</sup>

Overall, then, many local governments will have the authority to address climate change through regulatory matters. Whether they are able to exercise that authority will depend on state politics and action, as well as interpretation of state environmental and energy statutes already in place. Current political realities mean that it is the states more likely to take climate action themselves that will not interfere with local forms of emissions controls and other forms of regulatory action. In consequence, while the potential for local governments to act remains vast, it is also often likely to echo actions already being taken at the state level, rather than represent a new and gap-filling form of climate action. And there are still many states that are unwilling to take action on climate change, and that bar local governments from doing so as well.<sup>60</sup>

### III. The Federal Government and Local Climate Action

Given that local climate action is likely to remain important for the duration of the Biden Administration and that local authority in parts of the country is likely to remain vulnerable to preemption, the question may become—what can a federal government sympathetic to local climate action do to support local communities? And in particular—what can a federal government sympathetic to local climate action do to support local communities at risk of having their authority preempted by the state? As explained above, that second question is particularly relevant when it comes to identifying ways for the federal government to support local regulatory, or mitigation-focused, responses to climate change. The areas of land use planning, local litigation, and municipal proprietary actions generally fall within home rule authority. Moreover, to date they have not seen a high degree of state preemption. In consequence those areas are less likely to see dramatic impacts from federal government support.<sup>61</sup> However, the more localized nature of those responses also means that they play less of a role in filling in gaps in climate

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58. See, e.g., *Wallach v. Town of Dryden*, 16 N.E. 3d 1188, 1195 (N.Y. 2014); *Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 977–78 (Pa. 2013).

59. See Fox, *supra* note 5, at 592.

60. See Fox, *supra* note 7, at 181.

61. Indeed, it is possible that federal government support for local land use could even have negative impacts if, for instance, federal money is funneled to local projects that are not in line with climate realities.

policy that may exist at the state or federal level. For both reasons, local regulatory climate responses deserve the focus in conversation about the potential for cooperative climate localism. Thus, this section will focus primarily on ways for the federal government to support this more vulnerable category of local action.

Democratic control of both the House and Senate may open a variety of avenues for the federal government to assist local climate regulatory action in ways that are shielded from preemption. One of those avenues is financial. Congress makes many kinds of monetary grants to state and local governments, and can place conditions on those grants.<sup>62</sup> Where Congress has designated funds for a particular purpose, or where it has explicitly left up to local governments the ability to spend the funds at their discretion, those local decisions may be protected from state preemption.<sup>63</sup> Thus, to the extent that Congress passes relief packages for state and local governments or includes funding in a climate-specific bill, it may be able to shield those funds from state interference. Congress also has the ability to pass comprehensive legislation that includes mandates, prohibitions, incentives, or other provisions applicable to local governments that could operate as its own form of preemption at the state level. Provided that the legislation is drafted in a way that satisfies the “clear statement” rule articulated by the Supreme Court, that kind of local empowerment by the federal government may be deemed permissible, even if faced by objections or attempted circumvention by a state.<sup>64</sup> Crafting winning arguments in support of such federal legislation may be bolstered by addressing concerns raised in cases like *Nixon v. Missouri Municipal League*<sup>65</sup> that center on federalism<sup>66</sup>—namely, the concern that Congressional interference in the state and local relationship is potentially disruptive of the federal structure. But local governments operate as part of the

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62. See BRIAN T. YEH, CONG. RESEARCH SERV., THE FEDERAL GOVERNMENT’S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS 1 (2017).

63. See *Lawrence Cty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 263 (1985).

64. See, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125, 138, 141 (2004); see also *City of Dearborn v. Comcast of Mich. III, Inc.*, No. 08-10156, 2008 WL 4534167, at \*5 (E.D. Mich. Oct. 3, 2008), *as amended* (Nov. 25, 2008).

65. 541 U.S. 125 (2004).

66. In *Nixon*, the Court assessed the legality of a provision of the Telecommunications Act of 1996 that authorized preemption of state and local laws and regulations “that prohibit or have the effect of prohibiting the ability of any entity” to provide telecommunications services. *Id.* at 129. Missouri enacted a statute prohibiting its political subdivisions from offering telecommunications services, but the Federal Communications Commission took the position that the state statute was not preempted by the Telecommunications Act on the basis that “any entity” in the statute did not refer to local governments. *Id.* at 129–30. The Supreme Court agreed, holding that interference by Congress in the state-local relationship would be upheld only where Congress stated its intention more clearly. *Id.* at 138.



federal system. This is particularly true in environmental law, both literally in terms of explicit local inclusion in a number of federal statutes, as well as functionally in terms of how local action is discussed in the academic literature and in how climate action plays out on the ground.<sup>67</sup> Making clear the role that local governments play in environmental federalism may help to shore up arguments for federal empowerment of local governments over the objection of the state (even if, in the case of a clear statement from Congress regarding its preemptive intent, this kind of federalism argument may not be legally necessary or dispositive).

Apart from explicit bolstering of local authority via congressional action, some cases suggest that federal executive authority may also be used to delegate federal regulatory authority to local governments, even in the face of opposition by the state.<sup>68</sup> The question has not been squarely decided by the current Supreme Court, and it is not clear how such an analysis would be conducted with today's Court.<sup>69</sup> However, if that kind of regulatory empowerment is deemed permissible, it may create additional possibilities for federally supported local climate action that would be relatively safe from state preemption. For instance, if the Biden Environmental Protection Agency were to move forward on a rulemaking regarding greenhouse gas emissions, that rule could create mandates and programs that confer certain power or obligations<sup>70</sup> on local governments in ways potentially shielded from state intervention. The full extent of that legal analysis has not been tested, and

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67. See Fox, *supra* note 7, at 136 (explaining local role in federal environmental statutes, and the role of local governments in environmental federalism more broadly).

68. See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958). In *City of Tacoma*, the Supreme Court considered whether the Federal Power Commission's grant of a license to the City of Tacoma to operate a power plant (over the state's objection) gave the city authority to exercise eminent domain over a fish hatchery owned by state. *Id.* at 333. The state of Washington argued that the federal government could not empower a local entity in this way, but the Ninth Circuit disagreed, holding that a state could not prevent the local government from acting under the license. *Id.* at 338–39. That decision by the Ninth Circuit was upheld in later litigation by the United States Supreme Court, essentially empowering the local government via grant of a federal license. *Id.* at 341. Although the Court's decision was rooted in issue preclusion, and it did not get into the merits of the local authority argument, “to some commentators the . . . decision has come to stand for a more general recognition of a scope of federal delegation of regulatory authority beyond state control.” Davidson, *supra* note 10, at 997–98; see also Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2044 (2018) (“There may be compelling reasons, consistent with the values of federalism, to recognize . . . federal power to free local governments from state control.”).

69. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1204 (1999).

70. Obligations created or directives imposed under federal law—as opposed to regulatory authority—may be subject to anticommandeering clause arguments.

may raise questions, for instance, not only about the federal ability to empower local governments over state objections but about the ability of states to prevent local officials from cooperating with federal programs.<sup>71</sup> Success for local governments in this context may again depend on a somewhat broad conception of environmental federalism, and the role that local governments play in environmental law. But this kind of regulatory response may be another avenue for federal support of local climate action shielded from state preemption.

Finally, the above discussion demonstrates that it is local governments in states that are disinclined to take action on climate change that are most vulnerable to preemption of their climate efforts. As described, this has the potential to lead to certain regions where very little climate action is taking place at any level of government. Comprehensive federal climate legislation or regulation could go a long way in addressing that problem. It may also be useful to think, however, about ways that the federal government could encourage climate action on the part of states. Such federal actions may not eliminate all local preemption concerns, but may help to eliminate pockets of climate inaction. Directing or incentivizing the states may also act as a hedge against some of the uncertain terrain in the realm of cooperative climate localism and whether federal interference in the state-local relationship would be permitted. Of course, the Tenth Amendment, and, more particularly, the anticommandeering doctrine, places limits on how the federal government may direct state behavior,<sup>72</sup> but the contours of the legal review of such federal actions is more developed than that involving empowerment of local entities. Federal legislation could create programs in which states must either participate or allow for federal control; federal appropriations or regulations could also require or incentivize certain state behavior. Statutes like the Clean Air Act, and its attendant regulatory framework, already involve tremendous

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71. For instance, during the Trump Administration, “California and Illinois constrained the ability of local governments to cooperate with federal immigration officials.” Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 973 (2019).

72. See, e.g., *New York v. United States*, 505 U.S. 144, 188 (1992). In *New York v. United States*, the Court considered the constitutionality of certain provisions of the Low-Level Radioactive Waste Policy Act. *Id.* at 149. The Act directed states to make arrangements to dispose of low-level radioactive waste by a given date and stated that if they failed to make such arrangements, the state must take title to the waste. *Id.* at 153–54. The Court found that while the federal government had Commerce Clause jurisdiction to act on this issue, the “take title” provision was unconstitutional. *Id.* at 174–75. The Court held that it was beyond Congressional authority to transfer title from generators to states or to compel states to regulate in a particular way, and that, because the “take title” provision offered no meaningful choice for states to escape this kind of direction from Congress, it was unconstitutional. *Id.* at 174–77. For a more recent interpretation of the anticommandeering doctrine, see *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018). See also Bulman-Pozen, *supra* note 68, at 2047.

amounts of state involvement, and may offer a relatively easy path to this kind of state action. Focusing the federal lens on the states would not necessarily shield local governments from state preemption, but it could provide a mechanism for overall climate progress and avoid the creation of regulatory gaps in certain parts of the country.

It is also worth saying that even outside the context of preemption, the federal government can support local climate action in myriad ways. These include funding better climate data and resources, improving federal climate planning in ways that directly impact local governments (such as revision of policies embedded in the National Flood Insurance Program), offering better funding and support for both climate adaptation and mitigation measures,<sup>73</sup> and bringing local governments to the table as stakeholders with regard to federal climate initiatives. The Biden Administration has acknowledged the importance of providing additional climate resources to local governments,<sup>74</sup> and continued federal support for local governments can perhaps be anticipated. To be sure, protecting the ability of each local government to act on climate change becomes less imperative if there is a more comprehensive federal—and even international<sup>75</sup>—climate response in place. But imperfections in the political and regulatory process mean that preserving state and

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73. See Elizabeth Elkin & Leslie Kaufman, *Deep South Towns are Counting on Biden to Keep His Climate Promises*, BLOOMBERG GREEN (Feb. 9, 2021), <https://www.bloomberg.com/news/articles/2021-02-09/an-alabama-town-is-counting-on-biden-to-keep-his-climate-promises> [<https://perma.cc/H5T7-UWJT>]. Provision of federal funding may have overall detrimental climate impacts where it is used to finance local projects that fail to take into account climate realities. Thus, federal funding should not be funneled to projects unsupported by climate science.

74. *E.g.*, Executive Order on Tackling the Climate Crisis at Home and Abroad, Executive Order 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> [<https://perma.cc/GT4A-KTJC>] (“[t]o assist agencies and State, local, Tribal, and territorial governments, communities, and businesses in preparing for and adapting to the impacts of climate change, the Secretary of Commerce, through the Administrator of the National Oceanic and Atmospheric Administration, the Secretary of Homeland Security, through the Administrator of the Federal Emergency Management Agency, and the Director of the Office of Science and Technology Policy, in coordination with the heads of other agencies, as appropriate, shall provide to the Task Force a report on ways to expand and improve climate forecast capabilities and information products for the public. In addition, the Secretary of the Interior and the Deputy Director for Management of the Office of Management and Budget, in their capacities as the Chair and Vice-Chair of the Federal Geographic Data Committee, shall assess and provide to the Task Force a report on the potential development of a consolidated Federal geographic mapping service that can facilitate public access to climate-related information that will assist Federal, State, local, and Tribal governments in climate planning and resilience activities.”).

75. As of February 19, 2021, the United States has officially rejoined the Paris Agreement on climate change. See Renee Cho, *The U.S. is Back in the Paris Agreement. Now What?*, STATE OF THE PLANET (Feb. 4, 2021), <https://blogs.ei.columbia.edu/2021/02/04/u-s-rejoins-paris-agreement/> [<https://perma.cc/NT9L-DG8G>].

local flexibility for climate progress is likely to remain imperative going forward, even with a federal administration dedicated to climate action.<sup>76</sup>

It is also worth noting that many of the actions suggested above are rooted in federal executive authority. Use of that authority has certain benefits in terms of how quickly progress can be achieved. Reliance on executive authority also comes with many drawbacks, however, not least of which is that it may make the legacy of such actions fragile and vulnerable to overturning by the next administration.<sup>77</sup> For that reason, it is important that many of the executive actions suggested here are aimed at empowering action by other levels of government, not simply on exploring the limits of the federal executive authority. In that way, such actions by the Biden Administration could support the ongoing functionality of federalism hedging within the context of climate federalism—that is, ensuring that concurrent roles on climate action remain possible, to protect against the possibility of regulatory failure at any one level.<sup>78</sup>

### Conclusion

Underlying the above analysis is something that has been clear for decades—climate change has been, and remains, an extremely political issue in the United States. That means that where local governments are perceived as taking actions that attempt to address local contributions to climate change, politically motivated state legislators may seek to quash that action. Even in places where climate change is a political hot button, local governments can feel relatively secure in engaging in certain kinds of climate policy strategies. But local action focused on mandatory measures to mitigate local contributions to climate change in particular may raise the prospect of state preemption.

The ability to articulate where local climate authority is vulnerable has important consequences. First, it allows local governments to make a more reasoned risk calculus regarding the kind of climate action they are pursuing. Second, it provides policymakers and scholars with a further tool for precise discussions about local authority on climate and how far that local authority is likely to extend. And finally, it has significant substantive ramifications for climate progress. While many local governments are engaged in efforts to fill in climate regulatory gaps, there is substantial overlap between states unwilling to take action on climate change and those that will enact preemptive legislation in response to local attempts to take action. Thus, part of the fed-

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76. See Buzbee, *supra* note 7, at 1093.

77. Rabe, *supra* note 4.

78. See Buzbee, *supra* note 7, at 1093.

eral government's role can be to support local initiatives where they are occurring and to either regulate in a more top-down fashion or attempt to shore up local authority in places where such authority has been blocked by the state. For all of those reasons, localizing the conversation around climate federalism will remain important even during a federal administration inclined to take climate action.

The shifts in federal administration in 2016 and in 2020 have been accompanied by markedly different positions on how (and whether) to handle the climate crisis. Those swings show the importance of national elections as well as the potential fragility of depending on only a federal response to climate change.<sup>79</sup> Thus, while comprehensive federal action on climate change is enormously welcome and needed, both Congress and the Biden Administration should also ensure that any action they take preserves the flexibility of and possibility for climate action at the state and local level as well. Federal climate action should work to include states as partners and responsible parties in any regulatory response. And where the federal government can empower climate action by local governments that would otherwise likely be subject to preemption by the state, it can have a lasting impact in shoring up the role of local governments as environmental actors within the United States.<sup>80</sup> In short, federal tackling the climate crisis during the Biden Administration should include a clear-eyed view of the federal, state, and local possibilities for action, and work to empower a climate response from all points along the federalism spectrum.

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79. See Marianne Lavelle, *2016: Obama's Climate Legacy Marked by Triumphs and Lost Opportunities*, INSIDE CLIMATE NEWS (Dec. 26, 2016), <https://insideclimatenews.org/news/23122016/obama-climate-change-legacy-trump-policies> [<https://perma.cc/MB72-3PL7>].

80. See Fox, *supra* note 7, at 192–94.