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INTRODUCTION

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The last decade of dynamic change in the energy sector has been marked by a significant shift in the resources used to generate electricity in the United States. Centralized coal plants, once dominant, are now increasingly being displaced by facilities powered by natural gas and renewable energy. Last year marked a major milestone when renewable energy consumption surpassed coal.¹ Wind projects, followed by natural gas generators, comprised the majority of new additions to the electric grid in 2019.² These changes in energy vary regionally, but the nationwide trends have been steadily continuing as speculation that the coal industry would revive after the 2016 presidential election has gone unrealized.

Although the growth trajectory has been national, every new wind farm and every new natural gas extraction site has a local context. Hydraulic fracturing operations always mean new truck traffic along a particular road, past particular farms or forests. There will be ponds bordering a particular creek, and wastewater injection sites near particular wells for particular homes. A wind farm alters a particular view over a particular ridge important to particular people. It was clear early on that the more electricity generation is decentralized, the more dispersed across the

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1. Energy Info. Admin., *U.S. renewable energy consumption surpasses coal for the first time in over 130 years* (May 28, 2020), at: <https://www.eia.gov/todayinenergy/detail.php?id=43895>.

2. Energy Info. Admin., *Wind and natural gas-fired generators led U.S. power sector capacity additions in 2019* (Apr. 21, 2020), at: <https://www.eia.gov/todayinenergy/detail.php?id=43415>.

landscape energy resources become, the more *local* energy feels. With the impacts and possibilities of energy development being felt across more communities, the importance of local governments, and the contours of local authority to shape energy development, came into sharp relief.

The most significant source of local government power to shape energy development is traditional local authority over land use. Ten years ago, the *Journal of Land Use and Environmental Law* published a symposium issue on “The Energy-Land Use Nexus,” exploring the impacts of energy development on the environment and the growing role of local governments in relation to proliferating energy land uses. As Florida State law professor David Markell wrote at that time, the “challenges posed by climate change. . . are daunting,” and “[t]he legal regimes that govern our use of land and energy have already been, and will continue to be, integral to the effort to devise effective responses.”³

This year’s symposium confirms his prescient anticipation of local governments’ growing importance in the energy sphere. Now, at the start of a new decade, the *Journal* continues to be a leading forum for scholarly discourse on a topic that has only become more important with time. From a range of vantage points, the essays in this volume contribute to the scholarly literature, tied together by their common focus on local autonomy—local ambition for change, local resistance to change, and the contours of legal challenges arising from these related and often intensely personal impulses.⁴

In his article, *Death of Dillon’s Rule: Local Autonomy to Control Land Use*, leading local government and land use law scholar John Nolon comprehensively surveys the status of the field’s most storied legal doctrine.⁵ Dillon’s Rule has long been recognized as an obstacle to local self-determination by holding “municipalities are not sovereign entities but merely instrumentalities of states and that the legal powers delegated to them by state legislatures are to be narrowly construed.”⁶ Nolon’s state-by-state research leads him to conclude that the significance of Dillon’s Rule has been diminishing over time as it relates to local land use authority. He sees this as an important development to the extent it allows local governments to mitigate the effects of high-impact energy land

3. David Markell, *Climate Change the Roles of Land Use and Law: An Introduction*, 27 J. LAND USE & ENVTL. L. 231, 231 (2012).

4. The Symposium took place in February 2020 at the Florida State University College of Law. In addition to the scholars who contributed to this volume, Professors Richard Briffault, Alexandra Klass, Shelley Welton, and Erin Scharff were also presenters.

5. John Nolon, *Death of Dillon’s Rule: Local Autonomy to Control Land Use*, 36 J. LAND USE & ENVTL. L. 7, 7 (2020).

6. Nolon, *supra* note 5, at 8.

uses as well as advance clean energy. The full breadth of local government power to take such measures is critical now, he argues, lest the “ghost” of Judge Dillon, who articulated Dillon’s Rule, “frighten local officials and their attorneys and prevent them from solving the truly scary problems they will confront in the 21st century.”⁷ His article carefully documents, by state, where Dillon’s Rule remains in effect and where it has receded or been rejected, such that local governments can with greater confidence exercise land use authority to shape the local energy landscape.

Professor Michael Allen Wolf’s piece, *Check State: Avoiding Preemption by Using Incentives*, complements Nolon’s in interesting ways.⁸ As another of the nation’s foremost local government law experts, Professor Wolf zeroes in on practical strategic considerations for local governments seeking to avoid Dillon’s Rule-type conflicts with state level authorities as they pursue local policy goals. His piece opens with the current issue on everyone’s mind—the coronavirus pandemic—to highlight how local governments face the same risk of state preemption when they act in the energy sphere as they do in other areas, like public health and safety. With that in mind, Wolf “proposes a tactic that local government officials can employ to achieve a range of strategies designed to enhance the public good,” whether “reducing greenhouse gas emissions” or “providing more affordable housing units.”⁹ Such tactics are necessary, he argues, in the face of increasingly common state measures targeting local initiatives for preemption, thereby directly stifling policy experimentation at the local level, as well as through these measures’ chilling effect. His essay makes the case for indirect approaches to local policy goals, detailing local incentives and strategic, goal-centered public-private partnership examples, that have the potential to protect local autonomy from state interference.

In contrast with Wolf’s piece on avoiding preemption, Professor Ashira Ostrow argues *for* a limited but clear preemption of local governments to accelerate the pace of renewable energy development. In *Preempting the Local Wind Siting Process*, Ostrow builds on her robust body of scholarship in this area to address how local governments impede wind development at a time when adding more renewable energy on the electric grid

7. Nolon, *supra* note 5, at 9.

8. Michael Allen Wolf, *Check State: Avoiding Preemption by Using Incentives*, 36 J. LAND USE & ENVTL. L. 121, 121 (2020).

9. Wolf, *supra* note 8, at 123.

has never been more essential.¹⁰ In prior work, Ostrow argued for federal preemption of the process for making local land use decisions for wind facilities, modeled after federal telecommunications siting, which was designed to accomplish rapid expansion of telecommunications infrastructure. Here, Ostrow expands on that argument, showing how “process preemption” could be employed at the federal or individual state level to reconcile local objections about a project with the broader public need for clean energy.¹¹ As Ostrow rightly observes, federal and state “government’s *formal* legal authority to preempt local zoning regulations” does not mean it can “simply preempt local *political* authority and force an unwanted facility on a resistant community”—ultimately, in other words, local cooperation is key.¹² Accepting that it is local officials, and the communities they serve, who are in a position to speak to local impacts, Ostrow seeks to strike a balance with a procedural model that keeps *land use* local, framed by external constraints serving *bigger-than-local* goals.

Florida State’s own Professor Sarah Swan pivots to a very different yet critical perspective on local autonomy—the threat to local governance of SLAPP litigation’s chilling effect on citizen engagement in local matters.¹³ In *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, Swan considers the recent lawsuit by a private mining company, Lake Point LLC, against Maggy Hurchalla, “a 77 year old environmental activist and a former Martin County [Florida] commissioner from 1974 to 1994.”¹⁴ Swan discusses the case in some detail—a case that culminated in a headlines-grabbing damages award against Hurchalla of \$4.4 million, upheld on appeal. The case, she argues, demonstrates the serious danger to citizen engagement *and* autonomous local decision-making posed by the availability of a problematic tort theory—tortious interference with contractual relations—which she considers inappropriate when connected with citizens’ constitutional right to petition their government. Local officials in Martin County, Florida were persuaded to change their plans with the company after hearing from Hurchalla and other citizens

10. Ashira Pelman Ostrow, *Preempting the Local Wind Siting Process*, 36 J. LAND USE & ENVTL. L. 91, 91 (2020).

11. See Ostrow, *supra* note 10, at 91, note 23.

12. Ostrow, *supra* note 10, at 107.

13. Sarah L. Swan, *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. LAND USE & ENVTL. L. 57, 57 (2020).

14. Swan, *supra* note 13, at 58.

concerned about environmental impacts of limestone mining on local ecosystems. In this important piece, Swan maps what she sees as the necessary steps states must take to clarify the limits of the tort, protect citizen rights, and ultimately, preserve the possibility of participatory democracy. These include enacting SLAPP-suit legislation, not presently available in all states, and judicial clarification of the standard protecting citizens from tort suits that conflict with the right to petition. Swan further advocates rejection of the Restatement (Second) of Torts' overinclusive approach to tortious interference and adoption of the Restatement (Third)'s formulation, which she argues resolves problematic ambiguities in the Restatement (Second).

Finally, local government law and immigration law scholar Professor Rick Su pulls the volume back out from the citizen scale to offer a big picture view of local autonomy and energy law. In his essay, *The Promise and Challenges of Energy Localism*, Su opens by embracing "the localist turn in energy law," while at the same time recognizing the distinctly variable local government capacity to meaningfully serve democratic functions.¹⁵ To the extent this variability affects political legitimacy with local constituents, Su posits, it undercuts capacity for effective representation of local communities, and in turn the ability for energy localism to thrive. Su sees this as a particular concern for local governments in rural counties and towns, with limited resources, highly dispersed populations, and the sometimes outsized significance that a single energy industry can represent to the local economy. His essay underscores that benefits widely anticipated from applying local autonomy to the energy issues of our time will not be equally available in all jurisdictions. This observation reinforces from a different perspective the variability demonstrated by Nolon's Dillon's Rule research, on the one hand, and addressed by Ostrow's call for at least process uniformity in local decision-making for wind siting on other.

Together, these essays comprise a timely volume that advances current understandings of local autonomy as the energy sector continues to decentralize and decarbonize. With federalism and intrastate preemption themes inevitably framing local government law discourse, this volume contributes to the literature by addressing in depth opportunities, threats, strategies, and important reforms local communities grappling with energy issues need, now and in the decade to come.

15. Rick Su, *The Promise and Challenges of Energy Localism*, 36 J. LAND USE & ENVTL. L. (forthcoming, Spring 2021).

