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Alexandra B. Klass  
University of Minnesota Law School, [aklass@umn.edu](mailto:aklass@umn.edu)

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## Response Article

# Climate Change and Reassessing the “Right” Level of Government: A Response to Bronin

Alexandra B. Klass<sup>†</sup>

Climate change has caused lawmakers, policymakers, and scholars to reassess the traditional role of federal, state, and local governments to regulate a broad range of environmental, energy, and land-use issues.<sup>1</sup> While the problem of climate change would appear to be best addressed at the international, or at least the federal level, it has been local governments and states that have taken the first and most important steps in recognizing the problem and experimenting with different ways to address it. While some of these experiments show how the “lower” levels of government can have a significant and positive impact on national-level problems, these experiments also reveal limitations of such an approach, calling out for a response by “higher” levels of government.<sup>2</sup>

In an article recently appearing in the *Minnesota Law Review*, Professor Sara Bronin contends that it is time to reassess the placement of authority for traditional land-use regulation (e.g., zoning ordinances, building codes, design standards) with local governments rather than state governments.<sup>3</sup> Using the

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<sup>†</sup> Associate Professor of Law, University of Minnesota Law School. Copyright © 2009 by Alexandra B. Klass.

1. See, e.g., J.B. RUHL ET AL., THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW 1335–37 (2008) (discussing state and local responses to climate change); Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1688–90 (2008) (same).

2. See, e.g., J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1533–38 (2007) (discussing limitations of state climate-change initiatives and benefits of federal regulation).

3. Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulations, and the States*, 93 MINN. L. REV. 231 (2008).

example of the green-building movement, Bronin argues that local governments are ill-equipped to deal with “extralocal” land-use problems raised by green building and, at an institutional level, fail to address unintended barriers to green building raised by local ordinances.<sup>4</sup> She concludes that the traditional form of land-use regulation stands in the way of reforms that environmentalists and the building industry have worked together to develop.<sup>5</sup>

Her solution is to draw on the work by Fred Bosselman & David Callies in their 1971 report, *The Quiet Revolution in Land Use Control*,<sup>6</sup> in which they argued that where certain land-use issues transcend local boundaries, states should engage in a “quiet revolution” to shift governmental authority from local governments to the states, which could more adequately address such extralocal issues. Although commentators (including Callies himself<sup>7</sup>) agree that the quiet revolution has not materialized, Bronin argues that the green-building movement gives cause to revive it and to shift traditional local governmental authority in this area to the states in order to remove impediments to green-building development across the country.<sup>8</sup>

Bronin’s article and her focus on which level of government should regulate green buildings highlights how issues relating to climate change and sustainability are forcing policymakers, scholars, and courts to reassess traditional views about federalism and the “right” level of government to engage in regulation.<sup>9</sup> This Response puts Bronin’s discussion of green-building regulation in a broader context of how governmental entities at the local, state, and federal level have responded to climate-change challenges and their success or failure in those efforts. It concludes by suggesting that the traditional “cooperative federalism” approach historically used in governing many areas of environmental law can be applied to green-building regula-

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4. *Id.* at 240–60.

5. *Id.*

6. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

7. See David L. Callies, *The Quiet Revolution Redux: How Selected Local Governments Have Fared*, 20 PACE ENVTL. L. REV. 277, 296–97 (2002) (acknowledging that local land-use controls have not “withered away” but instead have expanded to include environmental-protection measures).

8. See Bronin, *supra* note 3, at 232–33.

9. *Id.* at 261 (discussing the drawbacks of a federal approach to land-use regulation).

tion in a manner that is generally consistent with Bronin's conclusions. Indeed, when it comes to building-related efforts to address climate change, it is the state, rather than local governments or the federal government that may be in an optimal position to take the lead. If states do so, they can not only override local government regulations that impede green-building development but also support those local governments that have already attempted to innovate in this area but lack the expertise, authority, or statewide vision that the states can provide. In this way, local governments can look to the states for expertise and guidance while still retaining authority over local concerns, just as states were able to look to the federal government for similar expertise and guidance at the dawn of the cooperative-federalism approach to environmental law.

#### I. LOCAL IMPEDIMENTS TO STATE CLIMATE-CHANGE EFFORTS: GREEN BUILDINGS AND LOCAL ZONING CODES

Bronin's thesis is that while the green-building movement is on the rise across the country, local zoning and building codes serve as an impediment to achieving building and development that is sustainable, innovative, and efficient in terms of energy and water use.<sup>10</sup> Bronin discusses how the U.S. Green Building Council's certification standards contained in the Leadership in Energy and Environmental Design ("LEED") program go a long way toward implementing positive principles of sustainable design.<sup>11</sup> She explains, however, that local zoning codes—particularly aesthetic-review laws and historic-preservation laws—often make it difficult to implement green technologies such as solar panels, wind power, water-efficient landscaping, and energy-efficient windows.<sup>12</sup> Her solution is to revive Callies' and Bossleman's "quiet revolution" in light of today's need for sustainable development and green buildings.<sup>13</sup> To do this, she argues that states must fully exercise their inherent land-use authority by amending the enabling acts that empower local governments to pass zoning codes or enacting other legislation that promotes green building.<sup>14</sup> She points to the examples of California and Connecticut, which have

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10. *Id.* at 233.

11. *Id.* at 241–42.

12. *Id.* at 250–53.

13. *Id.* at 273.

14. *Id.* at 269.

enacted legislation limiting the ability of local governments to deny solar-energy permits, and Arizona, which has regulated “gray water” (untreated household water) in a way that makes it easier for homeowners to reuse that water for watering lawns, irrigating crops, or flushing toilets.<sup>15</sup>

While local governments have acted as an impediment to some private efforts to create green buildings, increase energy efficiency, and address climate change, the federal government has also been an impediment when both states and local governments have attempted to innovate in this area. The federal barriers to state and local climate-change efforts, including sustainable development efforts, are discussed below and highlight the need to place more authority in the states to address barriers that come from above (the federal government) as well as below (local governments).

## II. FEDERAL IMPEDIMENTS TO STATE AND LOCAL CLIMATE-CHANGE EFFORTS: AUTOMOBILE EMISSIONS, STATE-WIDE CAPS, AND GREEN-BUILDING STANDARDS

The term “climate change” refers to “any significant change in measures of climate (such as temperature, precipitation, or wind) lasting for an extended period (decades or longer).”<sup>16</sup> Despite a growing body of scientific evidence linking greenhouse-gas emissions (“GHG emissions”), particularly carbon dioxide (“CO<sub>2</sub>”) emissions with climate change,<sup>17</sup> neither Congress nor the U.S. Environmental Protection Agency (“EPA”) has so far acted to take any major action on GHG emissions that would include mandatory caps on emissions.<sup>18</sup>

States and some local governments, by contrast, have actively attempted to reduce GHG emissions. Beginning in 2004, California developed regulations requiring certain levels of automobile-emission reductions from tailpipes and is currently in litigation with the EPA after the EPA denied California’s request for a preemption waiver for the regulations under the

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15. *Id.* at 270–71.

16. Env’tl. Prot. Agency, Climate Change, Basic Information, <http://www.epa.gov/climatechange/basicinfo.html> (last visited May 8, 2009).

17. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS 2–5, 10 (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

18. See Kate Galbraith, *E.P.A. Proposes Tracking Industry Emissions*, N.Y. TIMES, Mar. 11, 2009, at A16 (discussing an E.P.A. proposal that would merely require recordkeeping and reporting of GHG emissions).

Clean Air Act (“CAA”).<sup>19</sup> More than sixteen states have adopted or were in the process of adopting the California standards during the two years the EPA was considering the preemption waiver.<sup>20</sup>

On a broader scale, California adopted a statewide cap on GHG emissions in 2006, setting forth a goal of reducing state emissions to their 1990 levels by 2020, a cut of twenty-five percent.<sup>21</sup> Other states and cities have also committed to various GHG emission reduction targets and goals. Legislatures in at least twenty-two states require electric utilities to generate some of their energy from renewable sources.<sup>22</sup> Massachusetts, Oregon, New Hampshire, and Washington have set emission caps and created offset programs for new and existing power plants.<sup>23</sup> Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont are currently signatories to the Regional Greenhouse Gas Initiative (“RGGI”), which establishes regional limits on CO<sub>2</sub> emissions from fossil-fuel-fired electricity generation, and states in other regions are in the process of establishing similar programs.<sup>24</sup>

Efforts by state and local governments to encourage or require “green” construction through LEED certification is a component of this state and local effort to address climate change in addition to facilitating sustainable design more generally. According to one study, residential and commercial development account for one-third of U.S. carbon emissions.<sup>25</sup> As Bronin notes, several states and local governments have mandated that all state or municipal buildings meet LEED criteria or require that a certain percentage of electricity consumed by

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19. See 73 Fed. Reg. 12,156 (Mar. 6, 2008) (outlining the EPA’s denial of a waiver and discussing events leading up to it).

20. See Klass, *supra* note 1, at 1688–89 (discussing the adoption of California’s standards by other states).

21. See California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38550 (West 2009).

22. DeShazo & Freeman, *supra* note 2, at 1523 (describing state programs).

23. See Regional Greenhouse Gas Initiative, <http://www.rggi.org/about> (last visited May 8, 2009) (discussing the RGGI and the ten states that are currently participating); see also Klass, *supra* note 1, at 1689–90 (discussing the RGGI and additional state legislation).

24. Regional Greenhouse Gas Initiative, *supra* note 23.

25. See MARILYN A. BROWN ET AL., BROOKINGS INST., SHRINKING THE CARBON FOOTPRINT OF METROPOLITAN AMERICA 9–10 (2008).

those buildings must come from renewable sources.<sup>26</sup> State and local governments have also attempted to encourage or require the private sector to meet LEED standards by providing financial incentives or incorporating LEED standards into local zoning or building codes.<sup>27</sup> Indeed, while Bronin cites many examples of local governments attempting to limit green-building efforts by placing restrictions on solar panels, windmills, and wind turbines, she also cites examples of local governments incorporating sustainable design principles into their ordinances and creating green-building standards for private buildings in addition to government buildings.<sup>28</sup>

In response, however, appliance manufacturers and trade organizations have recently used the federal law governing energy efficiency standards to enjoin Albuquerque, New Mexico's green-building ordinance. In 2007, the Mayor of Albuquerque formed a task force to develop and implement changes to the City's building regulations to reduce greenhouse-gas emissions and make its communities and structures more eco-friendly.<sup>29</sup> This resulted in the City enacting the Albuquerque Energy Conservation Code and High Performance Building Standards in 2007.<sup>30</sup> These green-building code provisions applied to new residential and commercial buildings, additions to existing buildings, and alterations to existing buildings. The code generally provided three options for compliance: (1) LEED certification at the silver level; (2) thirty percent efficiency improvement; and (3) compliance with prescriptive standards for individual components of a building, including HVAC and water heaters.<sup>31</sup>

Federal law, however, preempts state and local energy efficiency standards where the federal government has already set such standards for the product or appliance in question.<sup>32</sup> In response to states, most notably California, enacting efficiency standards for appliances beginning in the 1970s, Congress

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26. See Bronin, *supra* note 3, at 248, 255–56.

27. See *id.* at 255–57.

28. See *id.* at 247–48, 251, 253–57.

29. See *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, No. 08-633, 2008 WL 5586316, at \*2 (D.N.M. Oct. 3, 2008).

30. See ALBUQUERQUE, N.M., ENERGY CONSERVATION CODE (2007), available at <http://www.cabq.gov/albuquerquegreen/pdf/volumeI.pdf> and <http://www.cabq.gov/albuquerquegreen/pdf/volumeII.pdf>.

31. See *id.*; *Air Conditioning, Heating & Refrigeration Inst.*, 2008 WL 5586316, at \*2–3.

32. See generally Klass, *supra* note 1.



enacted the Energy Policy and Conservation Act (“EPCA”) which preempts states from adopting energy efficiency standards for products such as central air conditioning, washers and dryers, heat pumps, furnaces, boilers, refrigerators, freezers, ovens, dishwashers, etc., if the Department of Energy (“DOE”) has adopted a federal efficiency standard for that same product.<sup>33</sup> Specifically, the law provides that subject to certain exceptions, when a federal energy conservation standard is established for a covered product, “no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product.”<sup>34</sup>

Although states may request a preemption waiver, the request must be based on “unusual and compelling State or local energy or water interests”<sup>35</sup> that are “substantially different in nature or magnitude than those prevailing in the United States generally”<sup>36</sup> and must be such that the “costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulations preferable or necessary [relative to other approaches].”<sup>37</sup> DOE has never granted a preemption waiver under the law to a state wishing to set more stringent standards than those the DOE has imposed and California is the only state that has even sought a waiver.<sup>38</sup>

Moreover, many of the DOE efficiency standards for appliances are outdated, resulting in a situation where there is no regulatory incentive for industry to increase energy efficiency and no way for the states to use more stringent energy-efficiency standards as part of green-building efforts.<sup>39</sup> In 2005,

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33. See 42 U.S.C. § 6297(c) (2000). Congress amended various provisions of the EPCA in the National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, 101 Stat. 103 (codified as amended at 42 U.S.C. §§ 6291–6293, 6295–6297, 6305–6306, 6308 (2006)); 42 U.S.C. §§ 6311–6317 (2006); the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified in scattered sections of 15, 16, 38, and 42 U.S.C.); and the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified in scattered sections of 42 U.S.C.).

34. 42 U.S.C. § 6297(c).

35. *Id.* § 6297(d)(1)(B).

36. *Id.* § 6297(d)(1)(C)(i).

37. *Id.* § 6297(d)(1)(C)(ii).

38. In 2006, the DOE denied the California Energy Commission’s petition for a waiver from federal preemption of California’s water conservation standards for residential clothes washers. See Energy Efficiency Program for Consumer Products: California Energy Commission Petition for Exemption From Federal Preemption of California’s Water Conservation Standards for Residential Clothes Washers, 71 Fed. Reg. 78,157 (Dec. 28, 2006).

39. See STEVEN NADEL ET AL., AM. COUNCIL FOR AN ENERGY EFFICIENT



fifteen states brought suit against the DOE for failing to update efficiency standards for appliances,<sup>40</sup> and in 2001 the Bush administration reversed course on new efficiency standards for all new air conditioning equipment that the Clinton administration had put in place.<sup>41</sup>

In the Albuquerque case, industry argued that the Code's prescriptive alternatives for compliance were regulations that "concern" the energy efficiency of products for which the DOE had set standards and thus were preempted under the EPCA.<sup>42</sup> The court agreed, finding that if a homeowner chose to replace an existing furnace with a federally compliant furnace, the homeowner must make other revisions to the home to make up the energy differential between a federally compliant furnace and a furnace that meets the requirements of the Code.<sup>43</sup> The court found that Congress intended to preempt state regulation of the energy efficiency of certain building appliances in order to have uniform, express, national energy efficiency standards; that the Albuquerque Code was subject to the federal statute's preemption provision; and that simply because Albuquerque provided alternatives for compliance did not prevent each of the alternatives from being a regulation itself covered by the federal preemption provision.<sup>44</sup> The court found that enough of the code violated the federal preemption provisions to justify an injunction while the case went forward on the merits. Thus, to the extent cities attempt to enact green-building ordinances that rely on increasing the energy efficiency of appliances, federal law stands as a roadblock to those efforts.

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ECON., LEADING THE WAY: CONTINUED OPPORTUNITIES FOR NEW STATE APPLIANCE AND EQUIPMENT EFFICIENCY STANDARDS, at v. 12, 44–45 (2006), available at <http://www.aceee.org/pubs/a062.pdf>.

40. Ann E. Carlson, Commentary, *Energy Efficiency and Federalism*, 107 MICH. L. REV. FIRST IMPRESSIONS 63, 66 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/carlson.pdf>; *States Sue Feds Over Appliance Energy Standards*, CONSUMER AFFAIRS, Sept. 9, 2005, [http://www.consumeraffairs.com/news04/2005/states\\_energy.html](http://www.consumeraffairs.com/news04/2005/states_energy.html).

41. Carlson, *supra* note 40, at 66–67; Press Release, Nat'l Res. Def. Council, Three State Attorneys General, NRDC, Consumer, and Low-Income Groups Sue U.S. Department of Energy Over Final Rule On Air Conditioners (June 19, 2001), available at <http://www.nrdc.org/media/pressreleases/010619.asp> (discussing the Bush administration's rollback of the Clinton administration's energy standards for new air-conditioning equipment and the subsequent lawsuit by states and environmental groups).

42. See *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, No. 08-633, 2008 WL 5586316, at \*1 (D.N.M. Oct. 3, 2008).

43. *Id.* at \*9.

44. *Id.* at \*7–8.

In sum, both state and local governments have been active in attempting address climate change through innovations in automobile emissions, statewide emission caps, energy efficiency, and green-building programs. But federal law and federal agency policy has served as a barrier to implementing those efforts. While the Obama administration has indicated that it plans to grant the California automobile emission waiver<sup>45</sup> and will likely otherwise support state climate-change efforts more than the Bush administration,<sup>46</sup> statutory and regulatory barriers to state and local innovation in this area remain.

### III. COOPERATIVE FEDERALISM: STATES, GREEN BUILDINGS, AND CLIMATE CHANGE

The struggles of state and local governments to combat climate change in the face of inaction or, in some cases, outright hostility from the federal government, show that neither local zoning ordinances nor federal environmental laws are sufficient to address the pressing problems surrounding greenhouse-gas emissions, sustainable development, and energy efficiency. On the state level, existing federal law makes it difficult for states to innovate when it comes to energy efficiency standards, automobile emissions, or other standards that come up against the understandable desire of industry to produce and sell uniform products in a national market, whether those products are cars or washing machines.

On the local level, the problems are different. Many cities are trying to encourage green building and sustainable design<sup>47</sup> but either run afoul of federal law (like Albuquerque) or, more often, simply have difficulty changing comprehensive zoning ordinances without the technical expertise and funding that often is more plentiful at the state or federal level. Indeed, the court in the Albuquerque case noted that city officials had ac-

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45. Ken Bensinger, *Tighter Emission Rules Seen: Barack Obama Is Expected to Let the State Impose Its Tough Air Rules on Carmakers*, L.A. TIMES, Jan. 19, 2009, at C1 (reporting that President Obama's proposed EPA head, Lisa Jackson, has said she will immediately revisit the Bush administration's denial of the California waiver request).

46. For example, President Obama nominated a state EPA commissioner, Lisa P. Jackson from New Jersey, as the federal EPA administrator. John M. Broder, *Obama Team Set on Environment*, N.Y. TIMES, Dec. 11, 2008, at A1 (discussing Jackson).

47. See, e.g., Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409, 415–19 (2008) (discussing Portland, Oregon's efforts).

knowledge in the litigation that they were unaware of the preemption provisions of the EPCA when they enacted the green-building code.<sup>48</sup>

What is needed is a more integrated approach to these problems. When Congress enacted the CAA in 1970, it declared that air-pollution prevention and control at its source “is the primary responsibility of the States and local governments” but that federal financial assistance and leadership is “essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.”<sup>49</sup> It also included a broad savings clause stating that except with regard to state regulation of automobile emissions (for which state standards are preempted except those enacted by California pursuant to a waiver),<sup>50</sup> nothing in the CAA shall deny the right of any state or political subdivision to adopt or enforce emission standards or pollution control requirements, so long as those standards are at least as stringent as federal standards.<sup>51</sup> Thus, the CAA creates a framework under which federal, state, local, and regional governmental entities can work together to control air pollution, while the federal government retains exclusive control over setting standards for new automobile emissions, except that California may seek permission to set its own standards and other states may adopt the California standards. Apart from the automobile emission provisions, this structure is typical of many other environmental

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48. See *Air Conditioning, Heating & Refrigeration Inst.*, 2008 WL 5586316, at \*2.

49. 42 U.S.C. §§ 7401(a)(3)–(4) (2006).

50. Under the CAA, California can set its own automobile emission standards if it receives a waiver from EPA, and other states can choose to adopt the California standards, resulting in a maximum of two automobile emission standards nationwide—the federal standard and the California standard. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1678, 1685 (codified at 42 U.S.C. §§ 7507, 7543 (2000)). This avoids the problem of auto manufacturers having to design cars to meet fifty different state standards but still allows valuable state innovation in setting optimal automobile emission standards. California obtained special treatment under the CAA with regard to automobile emissions because of its early regulatory action in attempting to reduce automobile emissions, its technical expertise in the area, and its unique air-pollution challenges resulting from automobile emissions. See Kevin M. Davis, *The Road to Clean Air is Paved with Many Obstacles: The U.S. Environmental Protection Agency Should Grant a Waiver for California to Regulate Automobile Greenhouse Gas Emissions Via Assembly Bill 1493*, 19 FORDHAM ENVTL. L. REV. 39, 51–63 (2009) (detailing the history of the Clean Air Act and California’s exemptions from it).

51. See Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1678, 1685 (codified at 42 U.S.C. §§ 7507, 7543 (2000)).

laws, such as the Clean Water Act, in which Congress has directed EPA to work together with state and local governments, creating a “cooperative federalism” approach to environmental protection.<sup>52</sup> Although the states and the federal government have often been at odds, particularly during the Bush administration, the basic structure calls for a cooperative effort with the federal government providing minimum standards and expertise and the states using those resources to innovate and experiment in accordance with state objectives and needs.

When it comes to local zoning ordinances, however, as Bronin points out, the delegation of authority from the states to local governments has been much more complete.<sup>53</sup> This has hurt the ability of both states and local governments to address climate change and sustainability efforts through the use of green-building standards. Bronin suggests that more states follow California, Connecticut, Arizona, and other states that have prevented local governments from using aesthetic zoning from prohibiting solar panels or other energy-efficient or water-efficient developments.<sup>54</sup> Along those lines, a Washington court recently upheld the application of a state law allowing the governor to override local zoning decisions to prohibit wind turbines under certain circumstances.<sup>55</sup>

Bronin is right that it is time for the states to exercise its inherent zoning and land-use power. The best way for states to accomplish this is to use their expertise to not only enact statewide policy that encourages green-building efforts despite local barriers, but also to use their authority to work with (and, where necessary, litigate against) the federal government to ensure that those local governments that want to take the initiative in these areas can be successful in doing so. After nearly four decades of cooperative federalism in the field of environmental law, states—particularly large and active states like California—have acquired significant policy, scientific, and technical expertise that rivals that of the equivalent federal

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52. See ROBERT E. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 103–04, 470–75 (5th ed. 2006) (describing the model of cooperative federalism).

53. See Bronin, *supra* note 3, at 235–40.

54. *Id.* at 270–72.

55. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153, 1158 (Wash. 2008) (holding that the governor properly exercised her authority under state law to approve the site certification for a wind-energy project that failed to receive local approval).

agencies.<sup>56</sup> Such expertise at the state level should no longer be underestimated. Lisa Heinzerling has recently suggested that just as courts give deference to federal agency interpretations of the statutes the agencies are charged with implementing under the *Chevron* doctrine, courts should also consider a state's relative expertise in the area in which it regulates when considering federal agency arguments that such state regulation should be preempted under federal law.<sup>57</sup>

Likewise, Ann Carlson contends that the EPCA should be amended to allow California to set more stringent energy efficiency standards than the federal government and that other states should be allowed to adopt the California standards if they wish.<sup>58</sup> California would receive special treatment, as it does under the CAA with regard to automobile emissions, because of its long history of regulating in this area (a history that predates federal regulation), its regulatory capacity, its expertise, and its large consumer market.<sup>59</sup> In this way, industry would avoid fifty different state standards, but states would be able to innovate, experiment, and move forward on energy efficiency even in the face of federal inaction.

Granting states the right to experiment in these areas can give states the authority to not only set innovative statewide policy but also encourage local governments to do the same. If states are allowed to create new energy efficiency standards for appliances, local governments can more easily incorporate these standards into their local zoning codes. Even without new statutory authority, more states can formally request preemption waivers to set their own energy efficiency standards, putting more pressure on the DOE to either grant the waiver or update its existing standards. States should also use their expertise to create model ordinances based on state sustainability policies that local governments can tailor to local needs. In this way, the cooperative federalism model that was created to govern air and water pollution (imperfect as it may be) can be used to create new state and local cooperation when it comes to integrating green-building principles with local zoning codes.

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56. See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 555–83 (2001).

57. See Lisa Heinzerling, *Climate, Preemption, and the Executive Branches*, 50 ARIZ. L. REV. 925, 934 (2008).

58. See Carlson, *supra* note 40, at 68.

59. *Id.* at 69.

## CONCLUSION

Prior to the 1970s, pollution control was almost exclusively a matter of state and local concern. As society became more aware of the magnitude of our air and water pollution problems, Congress stepped in to create a federal role to assist the states in controlling pollution. Likewise, today society is becoming more aware of the magnitude of the climate-change problem and the role of buildings in exacerbating that problem. The states are well-positioned to assist, and in some cases, fight for local government efforts to innovate in this area, just as the federal government did for the states in the 1970s. While there has been significant scholarly discussion about the relationship between the federal and state governments in addressing climate change generally, Bronin's article illustrates how the same dynamics exist with regard to the relationship between state and local governments in the context of green-building regulation.