

One Green America: Continuities and
Discontinuities in Environmental Federalism
in the United States

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**ONE GREEN AMERICA:
CONTINUITIES AND DISCONTINUITIES IN
ENVIRONMENTAL FEDERALISM IN THE UNITED
STATES**

*David A. Dana**

INTRODUCTION

What should the role of the federal government, and federal law, be with respect to the environment? Should environmental law be an essentially federal domain, with the federal government setting the standards or at least minimum standards for environmental quality and natural resource protection? Should there be, in other words, a single “Green America,” an America with a singular legal commitment on air, water, wetlands, species diversity, and climate change from sea to shining sea? Or should the environmental realm be, like so many other realms of American life, one where it really does and should make a huge difference, in terms of law and policy and their implementation – whether one is speaking of rural Louisiana or urban Massachusetts or Wyoming or New Jersey?

These questions have been forcefully debated since before there was much in the way of federal environmental law, and the debaters have not mellowed. Intense calls for stronger, more comprehensive federal environmental standards and resource protection continue to be made, as do calls for the abolition of the federal tyranny supposedly embodied in the federal EPA, an agency that, if its critics were to be believed, has more power than the rest of the entire federal government. My goal in this Essay is not to try to answer the question whether we should aim for a singular Green America or what that would actually entail. Instead, I want to address somewhat “easier” questions. First, why is it that the debate over environmental federalism seems so muddled, confused and perplexing? My quick answer here is that what is encompassed in the “environment” and

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“environmental protection” is so multi-faceted and complicated, as well as so context-specific, that general discussions of environmental federalism either seem too sparse and theoretical to be of use in thinking about the real world or too contingent and “messy” to look like a theory or even a rule-of-thumb guidepost. Second, what continuities and discontinuities have there been over the last twenty years or so in the debate over environmental federalism? Here, I identify and address just a few: (1) the continuity of judicial unhelpfulness in facilitating federal involvement where the case for such involvement is absolutely the most compelling, namely in addressing clear, measurable interstate externalities or spillovers; (2) the ongoing special and intriguing role of California as the national laboratory for technologies and practices that might be suitable for acceptance and implementation at the national scale; (3) the arguable discontinuity that climate change has now arrived in its palpable effects and climate change adaptation is thus now (perhaps) finally a national focal point; and (4) finally, the possible discontinuity of increased ideological and partisan polarization in the United States, at the same time as intranational migration, immigration and urbanization may be lessening some regional differences.

I. THE MUDDLE OF TALKING AND THEORIZING ABOUT ENVIRONMENTAL FEDERALISM

We have to begin with what is encompassed in the concept of the “environment,” something which has not been a constant. The beginning of federal environmental law has been framed as two branches. First, the pollution control/public health/prevention-of-death-and-disease branch, what I will call “the pollution control branch.” The second is the natural resource conservation, trees and campers and Theodore Roosevelt branch, which I will call the “conservation” branch. The Natural Resources Defense Council (“NRDC”) is the go-to environmental NGO for the pollution control branch, whereas it is National Wildlife Fund and Sierra Club for the conservation branches, if you will. In reality, the two branches intersect often, even continually: clean water in a river is a natural resource and the pollution of the river is a potential conservation threat and a threat to human health if the river has pathways into human consumption. An endangered species is a natural resource but also something that may have important implications for medical

treatment. Still, there are these two branches that are conventionally understood, and even enshrined, in law school textbooks and curricula.

In the pollution control branch, a central focus has been on air and emissions of air pollutants. In both the pollution control and conservation branches, there has been a long focus on water, especially surface water, rivers, lakes, and oceans. An obvious feature of air and at least some water is that it moves across political boundaries such as county and state lines. The emissions of pollutants crossing state boundaries or polluted water travelling downstream is the paradigmatic case on which there is the broadest normative agreement for a leading role for federal environmental law and governance. Indeed, obvious, readily identifiable cross-boundary transport of indisputably harmful pollutants via water and air is an area where even those theorists and commentators who are highly critical of the federalization of environmental governance see an appropriate role for the federal government. According to the Matching Principle, as it was coined by Jonathan Macey and Henry Butler,¹ the legal response to an environmental problem should be matched to its physical scale. With physically localized problems, the response should be local, as it is local people who will bear the costs and benefits of the environmental problem and any response to it.² But with problems that scale over boundaries – pollution exported over state lines – the people in the jurisdiction creating and exporting the pollution lack an adequate incentive to abate it and hence a federal solution may be, indeed almost certainly is, optimal.

The Matching Principle is easily deconstructed to the point where, in practice it offers no particularly determinative guidance. To start

1. See Jonathan R. Macey & Henry N. Butler, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 25 (1996).

2. A sophisticated elaboration and defense of this approach is developed by Richard Revesz, who begins with a premise along the lines of the Matching Principle and then suggests that not much in the way of deviation from that principle can be justified on the basis of the rationales for federal authority that have been asserted. See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the Race-To-The-Bottom Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); James E. Krier, *On The Typology Of Uniform Environmental Standards In A Federal System – And Why It Matters*, 54 MD. L. REV. 1226 (1995).

with, the Matching Principle relies on the ability to distinguish between localized pollution phenomena and ones that cross state boundaries. But making such distinctions often requires information that is not available, and with better information, more transboundary connections often become apparent. It is truism in ecology that everything is connected to everything and, to the extent that is so, pollution in one jurisdiction is invariably to some extent connected to environmental conditions in others. For example, some commentators have suggested that because the water, air, and soil pollution from a fracking site generally will be localized, state or local regulation is appropriate, rather than federal regulation.³ But given the wide geographic scale of fracking, and the cumulative pollution that may well result from this massive undertaking, extraboundary transport of pollution in one form or another seems likely, at least to some extent.⁴

The Matching Principle becomes even less helpful when we step away from its assumption that, as a normative matter, what is optimal is what the aggregate of individual welfare functions tells us is optimal. The Principle is largely uninformative in a more expansive normative universe. When President Obama invoked a one America, not a Blue or Red one, what he was invoking was the idea that America as a collective – a national project – stands for certain values; that there are certain shared normative commitments as to what residence and/or citizenship should mean for every American.⁵

3. See, e.g., David Spence, *Federalism, Regulatory Lags and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 483 (2012). For a very helpful overview of state regulatory responses and variations among them, see generally Hannah Wiseman, *Fracturing Regulation Applied*, 22 DUKE ENVTL. L. & POL'Y F. 361 (2012).

4. See Michael Burger, *Fracking and Federalism Choice: In Response to David B. Spence, Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190445.

5. See *Barack Obama's Remarks to the Democratic National Convention*, N.Y. TIMES (Jul. 27, 2004), available at [http://www.nytimes.com/2004/07/27/politics/campaign/27TEXT-](http://www.nytimes.com/2004/07/27/politics/campaign/27TEXT-OBAMA.html?pagewanted=1)

OBAMA.html?pagewanted=1 (“The pundits, the pundits like to slice-and-dice our country into Red States and Blue States; Red States for Republicans, Blue States for Democrats. But I’ve got news for them, too. We worship an awesome God in the Blue States, and we don’t like federal agents poking around in our libraries in the Red States. We coach Little League in the Blue States and yes, we’ve got some

To take an extreme example, even if slavery in one state had only localized physical or economic effects and no such effects on other states, no one would question that federal law and federal values should intervene to extinguish it, and not just because the constitution as amended now says so. The recent debate over so-called Obama-care is in a sense about the question whether we have or should have a shared national value and normative commitment to the proposition that every American should live with some significant access to health care. The debate was not just a debate over whether the actions or inactions of people in, for example, New Hampshire or Colorado affect the health care options and costs of people in, for example, Florida or Pennsylvania (although it was also that). It was about, in part, what kind of care people should be able to receive as Americans, regardless of where they currently live or may come to live. Similarly, the question of minimum standards for pollution control, and environmental health, can be seen as a question of what sort of environmental welfare we as Americans believe is a fundamental American value or commitment that should not be contingent on state or county location. Since we as a nation are so unsure about even the provision of basic health care, it may be unsurprising that no consensus exists as to the national normative commitment to environmental welfare as an individual “right.”

When one moves from the pollution control discourse to the discourse of conservation, the Matching Principle seems even less tenable, as we are left with many, and largely highly contextual, questions the Principle cannot answer. First off, there is the question of what counts as a “natural resource” worthy of consideration for conservation, preservation, sustainable management or whatever term that one wants to use for something other than open exploitation. Second, there is the question of what kind of value makes the resource worth conserving or preserving. Is it use value, option value, or simple existence value?⁶ Whatever the nature of the value, even resources wholly located within a single state may matter greatly –

gay friends in the Red States. There are patriots who opposed the war in Iraq and there are patriots who supported the war in Iraq.”); see also *Barack Obama's Keynote Address at the 2004 Democratic National Convention*, PBS (Jul. 27, 2004), available at <http://www.pbs.org/newshour/bb/politics/july-dec04/obama-keynote-dnc.html?print>.

6. See generally David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343 (2004).

and in that sense affect the welfare – of Americans in every state. Old growth forests in Washington or Oregon matter to New Yorkers because they may want to visit them, because they see them as beautiful and special even without visiting them, and because they understand them to provide unique habitat that both normatively should be preserved for its own sake and that offers genetic and ecological diversity that may have unknown, more “concrete” use to them and future generations. And yet such resources are indeed physically located in particular states and their conservation or non-conservation may have the most obvious, most direct, most readily verifiable and measurable consequences on the people living near them.

Whether out-of-staters have a legitimate stake in natural resources – whether and when and to what extent there is a national or federal claim on a resource located in a single-state – has no obvious answer. Almost everyone would agree that there are some such resources, but what is and is not on the list and the applicable criteria in each case invariably has been and will be a matter of contention. We see such contention pointedly when the federal government moves to designate critical habitat for an endangered species or when there is a move to classify land as a federal monument or federal wilderness, as was the case with President Clinton’s designation of Utah’s Grand Staircase as a federal monument.⁷ But the broader question, beyond these particular cases, is what counts as the national or federal patrimony or endowment of natural resources that all Americans have a legitimate right to see preserved. Even when an area has been designated as federal wilderness, these debates continue, as we see with the tension between the views of many Alaskans and Alaskan politicians about oil exploration and exploitation in the Arctic National Wildlife Refuge (“ANWR”) and the opposing views of many environmentalists and others who live a great physical distance from Alaska.

The simple theory that local matters should be dealt with locally and national or transboundary ones nationally does not get as far at all with respect to either pollution control or conservation questions.

7. See Amy O’Donoghue, *Ruling Rejects Local Opposition to Grand Staircase Plan*, available at DESERET NEWS (Apr. 14, 2009), <http://www.deseretnews.com/article/705297252/Ruling-rejects-local-opposition-to-Grand-Staircase-plan.html?pg=all>.

Moreover, there is the reality that, even if in theory local residents should decide localized environmental questions, state and local governments sometimes do not produce policies that track their residents' genuine interests or preferences. This reality further complicates the question of when there should be federal law and governance. It is certainly true, as Richard Revesz has argued, that state and local governments are not always prone to public choice pathologies, or even necessarily more prone than the federal government.⁸ But certain state and local governments in certain cases arguably are "captured" or institutionally underdeveloped so that they cannot reasonably reflect residents' interests and protect them. As compared to the federal government, some state and local governments simply lack capacity regarding highly technical environmental questions or the ability to quickly build such capacity. The response of certain states and their localities to the fracking revolution, I would argue, should remind us that the limits of state institutional capacity sometimes justifies a federal role, if only as a transitional force while states individually and collectively develop adequate institutional capacity to address new technological practices and assess new environmental issues.⁹

When an environmental issue should be a federal issue, then, is question with no easy, catch-all, Matching-Principle answer. And the highly contextual, multifaceted, complicated approaches advocated

8. See generally Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001). It is also true that mere invocation of "race to the bottom" does not mean that states provide less environmental protection than is in some theoretical sense optimal. But even within the logic of conventional neoclassical economics, there are reasons to suppose that interstate competition for mobile capital sometimes produces sub-optimal levels of state regulation. For a lucid treatment, see Wallace E. Oates, *A Reconsideration of Environmental Federalism*, RESOURCE FOR THE FUTURE 7 (Nov. 2001), available at www.rff.org/documents/RFF-DP-01-54.pdf.

9. For an interesting historical treatment focusing on the period before the enactment of major statutes, see generally William L. Andreen, *Of Fables and Federalism: A Re-Examination Of The Historical Rationale For Federal Environmental Regulation*, 42 ENVTL. L. 627 (2012). See generally Inessa Abayev, *Hydraulic Fracturing Wastewater: Making the Case for Treating the Environmentally Condemned*, 24 FORDHAM ENVTL. L. REV. 275 (2013) (discussing hydrofracking and the negative results of "wastewater", or flowback, on the environment, while offering alternative ways to change the problem through federal regulations.)

by a number of excellent legal scholars in recent years, including, for example, Dan Esty, Kirsten Engel, David Adelman, and William Buzbee reflect that reality.¹⁰ Moreover, the law on the ground reflects that complicated, muddy, opaque reality. Some natural resources are treated as principally owned and managed by the states, such as, wildlife, for example. But that is not so with wildlife where federal the Endangered Species Act (“ESA”) or federal Clean Water Act (“CAA”) jurisdiction is implicated, which is a potentially huge category of cases.¹¹ However in practice, we know that when the federal government does and does not do such things as list species as endangered and habitats as critical it has a good deal to do with state and local politics. The inability of anyone, agencies or courts, to set intelligible lines – as to the statutory, let alone constitutional, reach of federal jurisdiction over navigable waters – is another testament to the difficulty of drawing clear federal/not federal lines.¹²

The best illustration of the (understandable) lack of clear lines in environmental governance is the dominant “cooperative federalism” model for pollution control whereby the federal government sets standards and states set (in theory additional and not conflicting) standards when they choose to or when they are allowed to, which is much of the time but not always. The states, on the other hand, enforce the federal and state standards, and often act more or less vigorously than the federal regulators say they would like, and often engage in coordination with federal regulators but, sometimes open conflict, from time to time even litigation.¹³ There are, in this reasonably stable if not fully rationalized or harmonious relationship, threatened federal sanctions and a few real ones. In all this, states end

10. See generally Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L. J. 108 (2005).

11. See, e.g., J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1447-48 (2003) (describing “backdoor federalism” whereby members of Congress influence Endangered Species administrative decisions that would affect their state).

12. See, e.g., the variety of views and indeterminate tests set forth by the Justices in *Rapanos v. United States*, 547 U.S. 715 (2006).

13. For a thoughtful recent discussion, see Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 781-86 (2006).

up having huge influence over the as applied substance and as applied actual enforcement of environmental law, but it can be next to impossible to say how much and what is due to federal initiative and pressure and what is due to state choice and intent. It has been noted that this kind of cooperative federalism may lessen government accountability. States can blame the feds and the feds can point to the states as the front-line decision maker. But I think our cooperative federalism is not being used as a mechanism to avoid accountability; the blurring of federal and state lines is necessary and appropriate. There are arguable federal and state interests at stake in almost every environmental issue and problem, and it therefore makes sense that both the federal and state governments are active in formulating the response at both a formal and practical level. Any confusion is the result of the fact that we do not live in the simple world of the Matching Principle or other parsimonious models of optimal environmental federalism.

II. THE CONTINUING IRONIES OF THE EASIEST CASES BEING HARDEST, AND COURTS IMPEDING STATE INTERESTS IN THE NAME OF PROTECTING AND RESPECTING STATE INTERESTS

One of the notable ironies of American environmental federalism is that the federal government has been relatively inactive and relatively ineffectual in addressing palpable, physically measurable, obviously harmful interstate externalities in the form of exported pollution, and relatively more effective regarding ostensibly more local (in a physical sense anyway) pollution.¹⁴ And yet it is the obvious exporting of pollution with obvious health effects that is the

14. See Revesz, *supra* note 2, at 2344 (“... the Clean Air Act—the statute designed to deal with the pollution that gives rise to the most serious problems of interstate externalities—has been unsuccessful at forcing the internalization of interstate externalities. Its core provisions cannot be justified by the need to control interstate externalities, and may have exacerbated the problem. Similarly, the relatively minor provisions directed at controlling interstate externalities have been wholly ineffective, largely as a result of the failure of the Environmental Protection Agency (“EPA”) and the federal courts to define a coherent and logical body of law. In fact, despite congressional preoccupation with the problem and the existence of statutory provisions expressly designed to correct it, the downwind states have always been unsuccessful at constraining upwind pollution. A similar situation arises under the Clean Water Act.”).

case everyone agrees is the easiest one to justify a role for federal law and regulation.

It took decades for Congress to act to address the interstate transfer of sulfur dioxide and the attendant problem of acid rain. And even after the 1990 amendments to the CAA, EPA has been relatively timid and ineffective with respect to pollution exports.¹⁵ In the context of water, Congress and federal agencies have not been effective in trying to address the exported “pollution” (if you will) of the Great Lakes by invasive species migrating up the Mississippi.¹⁶

The political economy of this irony – why the federal law and agency action is relatively thin when one region clearly is exporting some of its pollution to another – has not been fully explored. It may have to do with the fact that, in our Congressional system, and especially with the Senate, a geographic region that sees almost only costs and no benefits from a federal legal intervention is well-poised to block it. Our federal legislative and regulatory system is filled with veto points, some explicit and others de facto. With transboundary pollution within the United States, the polluting regions’ businesses and residents may see relatively little in the way of benefits, whereas with federal responses to pollution with much more obvious localized effects, there may be more visible local benefits in addition to local costs, and that may translate into more state and local support for federal regulation or at least less resistance. It also may be true that because it will always be somewhat contestable at the margin how much pollution in a region is locally produced and how much is the result of transboundary exports from another region, there is always a possible technical objection to addressing such transboundary exports.

Given this irony – that it is more difficult seemingly for the federal system to address the kind of environmental phenomena that everyone theoretically agrees is more properly the subject of federal attention than other kinds of more localized environmental

15. See generally Thomas O. McGarity, *EPA At Helm’s Deep: Surviving the Fourth Attack on Environmental Law*, 24 *FORDHAM ENVTL. L. REV.* 205 (2013) (arguing that during the first two years of the Obama Administration, EPA seized the offensive, however, the forces of environmental progress were pushed back by an unanticipated fourth assault from the business community).

16. See, e.g., Jane Cynthia Graham, *Snakes on a Plane, or in a Wetland: Fighting Back Invasive Nonnative Animals – Proposing A Federal Comprehensive Invasive Nonnative Animal Species Statute*, 25 *TUL. ENVTL. L. J.* 19, 22 (2011).

phenomena – one might think that the federal courts, acting helpfully, would encourage or at least not erect obstacles when Congress and federal agencies do take action to address transboundary pollution of an obvious, and obviously harmful, sort. But that brings us to the second irony – federal courts, responding to suits brought by or supported by the polluting states, have, in the name of state interests and federalism, made it their business to impede such federal solutions, even though such solutions not only are theoretically the most readily justified of federal interventions but also undertaken in the service of state interests, specifically the interests of the states on the receiving end of pollution crossing state boundaries.

To see the continuity in this respect over the last few decades, compare two decisions: *New York v. United States*, from 1992,¹⁷ and the very recent DC Circuit decision in *EME Homer City*.¹⁸ *New York* addressed a transboundary pollution problem, one rooted in the disposal of low-level radioactive waste. All states were generating significant such waste but not providing for storage facilities for it, but instead exporting to just a few sites. The receiving states in turn were becoming aggrieved, and threatening to close or limit their facilities, and there was broad recognition, as reflected by an agreement of all the states as part of an initiative of the National Governors Association (“NGA”), that some sort of cooperative solution was required to prevent one or two states from being overwhelmed with such waste and/or for there to be inadequate capacity anywhere within the United States. At the behest of the NGA, Congress enacted the Low-Level Radioactive Waste Act, which provided a series of encouragements/sanctions to persuade states, facing localized opposition to in-state storage of the waste, to develop their own storage capacity and/or enter into interstate compacts with another state regarding receipt and storage of waste. One of the sanctions for states that simply refused to take action for years was that the state, as a state, would be deemed to have taken title to the low-level radioactive waste generated within the state.

In a now-famous opinion authored by Justice O’Connor, this provision was struck down as violating the federalism-protective

17. *New York v. United States*, 505 U.S. 144, 145 (1992) (invalidating the Take Title portion of the Low-Level Radioactive Waste Act).

18. *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 12 (2012) (vacating the Transport Rule).

principle that the federal government cannot “commandeer” state governments implement federal policy.¹⁹ Justice White, in dissent, found an irony in the Court undermining a “cooperative federalism” solution to local problems crafted by the states acting cooperatively, through an organization of locally-elected officials, whereas, under the Court’s reasoning Congress could bypass the states altogether and directly regulate disposal of low-level radioactive waste. Justice White was correct to identify an irony in Justice O’Connor’s approach, but I think the irony was not quite what he saw. The problem of disposal of low-level radioactive waste was not (and still is not) simply a local one, but rather one of seeing that transboundary exports, which are inevitable to a degree, are done in an environmentally and politically sustainable way. The principal problem with Justice O’Connor’s approach was not that it privileged and hence encouraged more direct, heavy-handed federal regulation, as Justice White suggested, but rather that it impeded any federal response at all in a context where the case for federal intervention was theoretically very strong (that is, transboundary pollution) but the federal politics corresponding to such transboundary pollution was not conducive to effective federal action.

Fast forward several decades and one sees another opinion motivated explicitly by federalism concerns that, in reality, impedes federal efforts to protect some states from pollution exported by others after years of effort to convince the exporting states to act on their own and after huge investments in time and political capital by federal regulators to produce what appeared to be a workable rule. Issued pursuant to the so-called Good Neighbor provision of the CAA, EPA’s Transport Rule was designed to curb conventional air pollution from coal-fired plants that was crossing state boundaries and contributing to unacceptably high pollution levels in upwind states. EPA had been urging downwind states to address this pollution in their state implementation plans for years and had in effect put upwind states on notice that their state implementation plans (“SIPs”) were inadequate for that reason, and thus EPA proposed in its rule to move ahead with federal implementation plans

19. *See generally*, *New York v. United States*, 505 U.S. 144 (1992). For a critique of the rationale for the anti-commandeering principle, *see* David A. Dana, *The Case For Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1, 8-10 (1995).

(“FIPs”), which given the near certainty that downwind states would not address transboundary pollution in their SIPs, represented the only approach that could work to effect a stated legislative goal whose achievement was long overdue.

Nonetheless, applying a kind of technical strict scrutiny, ignoring the fact that petitioners had not properly made their current technical objections to the agency as part of the administrative proceedings, and expounding a deep solicitude for federalism generally and the downwind states in particular, Judge Kavanaugh, writing for the majority, held that the Transport Rule was invalid because it might impose burdens on downwind states out of proportion with their contribution to pollution level in upwind states, and because it did not grant downwind states an opportunity to implement the pollution limits in the Rule through SIPs before EPA moved on to issuing FIPs. As Judge Rogers wrote in a powerful dissent, the majority’s approach ignored precedent and principles of deference, and the long history of EPA’s cajoling and warning and cajoling again the downwind states to address transboundary pollution. The majority opinion reads as an ode to federalism, but just as Congress in the Low-Level Radioactive Waste Act was acting on behalf of states in a paradigm case for federal intervention, so too EPA in the Transport Rule was promoting the interest of states – the valid interest not to be subjected to pollution from other states – and indeed, playing the role a federal government should even under a restrictive reading of the Matching Principle.²⁰

20. The courts have not only impeded Congress and federal agencies when they take action to address interstate externalities but also have avoided using the federal common law to push action where Congress or agencies have not acted. Consider, in this regard, *Michigan v. U.S. Army Corps of Eng’rs*, No. 10 C 4457, 2012 WL 6016926 (N.D. Ill. Dec. 3, 2011), regarding the threat of invasive species from the lower Mississippi and barge traffic for the Great Lakes. Admittedly, however, public nuisance is a crude tool for resolution of complex environmental problems, and so one risk for courts in embracing public nuisance as a means of encouraging federal legislative or regulatory action is that such action won’t happen and the courts will be left in a legislative/regulatory role they understandably do not want. See David Dana, *The Mismatch Between Public Nuisance Law and Global Warming*, 18 SUP. CT. ECON. REV. 9, 21 (2010).

III. CALIFORNIA AS NEITHER GREEN AMERICA NOR JUST ANOTHER STATE, BUT RATHER AS A BRIDGE TO GREEN AMERICA

In the literature on federalism, there is a tendency to think of “the states” as a single category on the one hand and the federal government on the other. There are not some lesser or greater states, and indeed, the quasi-sovereignty of Rhode Island or Montana, with very small populations, is the same as that of California or New York, with very large ones.²¹ But at least in the environmental domain, California has had a distinctive, special role, both by virtue of Congress extending it special treatment under the CAA and by virtue of its market size and what its people and state government have repeatedly shown they are willing and able to undertake.

The special role of California is best understood in the context of Brandeis’ famous “Laboratories of Democracy” description of states in our federal system. In the Laboratories of Democracy vision, the various states experiment with solutions to problems and the best approaches that emerge then can be taken on by the federal government and nationalized or copied by other states. One constraint of the Laboratories vision is that one needs one or more states that have the capacity and willingness to experiment and to do so in a way that can convincingly teach the rest of the nation. Another constraint is that multiple experimentation can be costly for businesses and regulated entities that must struggle with multiple standards, and it may produce results that are too complex, and not obviously comparable, and result in indecision as to what was learned overall from experimentation. Sometimes, in effect, less is more.

Enter California. In the 1990 amendments to the CAA, Congress designated California as a state allowed to experiment with car standards that are stricter than federal standards and allowed the California approach to be de facto nationalized by allowing opt ins by other states.²² Congress thus balanced the need for state

21. For a critique of this approach, see David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 511-13 (2008).

22. For a history of the interplay between California’s state emissions standards and federal emissions standards, see Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1109-28 (2009); Clean Air Act, 42 U.S.C. §7543(b)(1), (e)(2)(A) (2012); Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership: California’s Climate Policy*, 24 *FORDHAM*

experimentation with business needs for protection against too many standards.²³

Building on this legislative grant, and fighting off federal preemption suits, California ran with this authority to help develop not just car standards for conventional pollutants that have spread well beyond California and become industry standard, but also, in effect, fuel economy standards that recently were adopted by Congress on a national scale. Most recently, Californians literally voted to remain at the vanguard, defeating a referendum that would have ended California's experiment with a cap-and-trade approach to mitigating carbon dioxide emissions.²⁴ That experiment moves forward an effort at mitigation that was unable to withstand cost and effectiveness objections when proponents sought to have it adopted as federal law.²⁵

Cost and effectiveness, in fact, are often obstacles to the adoption of federal environmental responses. Indeed, one way of thinking about California's role in One Green America is this: California has bridged the gap between an America divided over whether a regulatory response would cost too much given its benefits by showing costs were less than might have been claimed by industry while benefits were substantial. In sum, California has and can help

ENVTL. L. REV. 63, 64 (2013) (discussing how California has been able to pass ambitious legislation and implement a regulatory program of vast and complex scope.).

23. See, e.g., E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313, 326 (1985) (explaining that private industry responded to "inconsistent and increasingly rigorous state laws" by pursuing federal environmental legislation).

24. During the 2010 elections, Californians voted by a 61%-31% margin against Proposition 23, which would have suspended the implementation of Assembly Bill 32 (the state's 2006 emissions-regulation and cap-and-trade law) until unemployment rates remained at 5.5% or lower for four fiscal quarters. See Margot Roosevelt, *Prop. 23 Battle Marks New Era in Environmental Politics*, L.A. TIMES (Nov. 4, 2010), available at <http://articles.latimes.com/2010/nov/04/local/la-me-global-warming-20101104>; Colin Sullivan & Debra Kahn, *Voters Reject 2-Sided Assault on Climate Law*, N.Y. TIMES (Nov. 3, 2010), available at <http://www.nytimes.com/cwire/2010/11/03/03climatewire-voters-reject-2-sided-assault-on-climate-law-13439.html?pagewanted=all>.

25. See John M. Broder, *Cap and Trade Loses Its Standing as Energy Policy of Choice*, N.Y. TIMES (Mar. 25, 2010), available at <http://www.nytimes.com/2010/03/26/science/earth/26climate.html>.

teach a skeptical nation when it is in fact worth it. As has been repeatedly observed, it is often unclear what costs of new regulation will be; much of the relevant data is provided by parties with economic interests opposed to regulation,²⁶ and there is a long history of over-estimating costs.²⁷ On the other side of the equation, environmental problems are highly technical, relying on the complex interplay of physical, economic and political and psychological phenomena. Hence, it is not obvious how well any program will work.²⁸ Uncertainties over cost and effectiveness are enough to deter action at a national level, and but for California acting and generating important additional information, all that might remain would be differences of opinion and overall a lack of the consensus needed to move ahead. Other states are also “progressive” on environmental issues, but California, by virtue of the size of its economy, market and population and the sophistication of its bureaucracies and the political support for environmental regulatory innovation, is unique.²⁹

One of the questions that remains largely unexplored is why California politics are so supportive of the state playing this role between a divided America and One Green America. It may be path dependence. It may be that the development of a cultural identity and self-image among Californians at this point is self-generating. Sophisticated agencies such as CARB may become forces in their own right for ongoing policy innovation. Or it could be that the economic interests of the key players in key California industries

26. See Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 *TEX. L. REV.* 1997, 1998 (2002) (noting that “in preparing regulatory impact assessments for proposed rules, agencies are heavily dependent upon the regulated entities for information about compliance costs.”).

27. *Id.* (explaining that because regulatees know “that the agencies are less likely to impose regulatory options with high price tags . . . or to support them during the review process . . . [those] . . . regulatees have every incentive to err on the high side,” and often project costs that are higher “by orders of magnitude” than actual costs).

28. See Stephen Clowney, *Environmental Ethics and Cost-Benefit Analysis*, 18 *FORDHAM ENVTL. L. REV.* 105, 119-24 (2006) (explaining the shortcomings of the environmental cost-benefit analysis process). For a discussion of the psychological barriers to taking action with certain costs to realize uncertain benefits (or to avoid uncertain costs), see David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 *NW. U. L. REV.* 1315, 1320-26 (2003).

29. See Carlson, *supra* note 22, at 1138-44.

such as entertainment and high technology are consistent with, or at least not directly threatened, by stringent environmental regulation.

IV. CLIMATE CHANGE THAT WE CAN SEE

Climate change is not new, nor is the debate over whether there should be a federal or national response, and if so what that response should be. One possible discontinuity in the debate, however, is that the effects of climate change or at least the possible effects – giant storms, heat waves, drought, flooding – seem to be more apparent and more certain to continue.³⁰ The need to adapt to climate change – to continually adapt – seems now beyond question. So one question of interest is, how may or should climate change adaptation affect the discourse of environmental federalism?

One could see climate change adaptation pulling the country apart – adding to disunity – or creating a stronger felt need for national cohesion and national policy. On the one hand, some regions of the country will be more adversely affected by climate change and hence in need of taking greater proactive and reactive measures.³¹ That fact could translate into a kind of state-oriented isolationism, where, for example, Midwesterners and their political representatives balk at paying the costs of increasing sea level.³² And, indeed, the

30. For an overview of anticipated climate events, see CLIMATE CHANGE 2007: SYNTHESIS REPORT 53 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

31. See, e.g. Kenneth Strzepek, Gary Yohe, James Neumann, & Brent Boehlert, *Characterizing Changes in Drought Risk for the United States from Climate Change*, 5 ENVIRON RES LETT. 1, 5 (2010), available at http://iopscience.iop.org/1748-9326/5/4/044012/pdf/1748-9326_5_4_044012.pdf (showing that projected drought frequency will dramatically increase relative to 20th century levels in the South and Southwest, but will actually decrease over 20th century levels in parts of the Upper Midwest); SYNTHESIS AND ASSESSMENT PRODUCT 4.1: COASTAL SENSITIVITY TO SEA-LEVEL RISE: A FOCUS ON THE MID-ATLANTIC REGION 18-21 (2009), available at <http://www.climate-science.gov/Library/sap/sap4-1/final-report/sap4-1-final-report-all.pdf>, (explaining that sea levels in the Mid-Atlantic and Gulf Coast regions are rising far more quickly than in New England and parts of the Pacific Coast, placing these regions at higher risk of adverse impacts including flooding, wetland loss, and aquifer salinization).

32. The January 4, 2013 House vote to fund flood insurance for Hurricane Sandy victims illustrates this pattern. 67 members of the House voted against the insurance measure. Critics of the measure characterized their opposition in fiscal

commentary on climate change adaptation has emphasized its local character, and the leading political actors to date have been states and even more so, localities.³³ On the other hand, the reality of storms, heat waves, flooding and droughts has been that there has been an invariable provision of federal aid, in cash outlays as well as services. It is almost unimaginable that there will not be more federal expenditure to address effects associated with climate change over the coming decades. That gives rise to what I think is the most interesting question: will the usual deference to “localism” and state and local authority in land use planning and management fade as the federal financial stake in climate change adaptation increases? Will there be more federal pressure and even federal law actually requiring sensible zoning and building standards in areas near the seashore?³⁴ Will the federal government not just stop subsidizing

policy terms, but geographic factors may have played a role: of the “no” voters, only four represented districts in Mid-Atlantic states, and five represented districts with ocean coastline. The vast majority “no” voters (including former Vice Presidential Candidate Paul Ryan) hailed from the Midwest, Great Plains and inland South. See Raymond Hernandez, *Congress Passes \$9.7 Billion in Relief for Hurricane Sandy Victims*, N.Y. TIMES, Jan. 14, 2013, at A14, available at http://www.nytimes.com/2013/01/05/nyregion/house-passes-9-7-billion-in-relief-for-hurricane-sandy-victims.html?_r=0; *House Vote 7 - Passes \$9.7 Billion in Hurricane Sandy Relief*, N.Y. TIMES, <http://politics.nytimes.com/congress/votes/113/house/1/7>. Many of those voting no had previously sought disaster aid for their own districts. See Jennifer Oldham & Craig Giroux, *Republicans Called Hypocrites Asking Own Aid Not Sandy’s*, BLOOMBERG (Jan. 18, 2013), available at <http://www.bloomberg.com/news/2013-01-18/republicans-called-hypocrites-asking-own-aid-not-sandy-s.html>.

33. New York, Baltimore, and Washington, D.C. were members of the plaintiff class in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007). Boulder, Colorado enacted the nation’s first carbon tax in 2007, and the Bay Area followed suit the following year. Jenni Sumner, Lori Bird, & Hillary Smith, *Carbon Taxes: A Review of Experience and Policy Design Considerations*, NATIONAL RENEWABLE ENERGY LABORATORY 14-15, 17 (2009), available at <http://www.nrel.gov/docs/fy10osti/47312.pdf>. Other cities have drafted climate change adaptation and mitigation plans. For a comprehensive listing of such plans (updated in October 2012), see UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CLIMATE CHANGE ACTION PLANS, available at <http://www.epa.gov/statelocalclimate/local/local-examples/action-plans.html#all> (last visited Jan. 17, 2013).

34. See generally John R. Nolon, *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the Law of Sustainable Development*, 24 *FORDHAM ENVTL. L. REV.* 242 (2013) (proposing a more integrated and

excessive construction in flood-prone areas but take action to stop states from providing subsidies?

Climate change adaptation will not only translate into greater calls on the federal budget but also a greater realization of the scarcity of water in a large portion of the country.³⁵ As water in some regions becomes scarcer, there may well be calls to consider how to allocate it in order to maximize social welfare; reliance on a patchwork of state laws and state institutions, without much in the way of interstate coordination or federal law, may no longer seem acceptable in the face of water shortages and needs to transform practices regarding water usage.³⁶ Thus, climate change adaptation may have a federalizing effect on local land use law and state and local water law and, perhaps, the assumption that land use and water law must be, as a normative matter, state and local matters, will fade.

V. POLARIZATION AND HOMOGENIZATION IN AMERICAN CULTURE AND ITS IMPLICATIONS FOR ONE GREEN AMERICA

It is impossible not to hear and read about increasing polarization in the United States. We are told that Americans are increasingly divided by ideology and political party, and that their views on almost everything correspond to the ideological and party

comprehensive response at the federal level, particularly with respect to land use regulation).

35. See Alexandra B. Klass, *Climate Change and the Convergence of Environmental and Energy Law*, 24 *FORDHAM ENVTL. L. REV.* 180, 182 (2013) (discussing climate change as the focal point in environmental law today, as well as the important role of states in responding to that issue and arguing that climate change cannot be solely discussed with traditional normative tools, but also energy law).

36. This may be true even outside the historically arid West. The long-running dispute surrounding water use in the three-state Apalachicola-Chattahoochee-Flint (“ACF”) river system illustrates how fraught interstate water negotiations can become. The Army Corps of Engineers manages a system of dams on the ACF. Population growth in Greater Atlanta has led Georgia to press the Corps for more water for urban use, while Florida and Alabama, seeking to secure ACF water for local consumption and use (as well as for navigation and the maintenance of the Apalachicola estuary) have challenged these requests. Years of negotiation and litigation have failed to produce a durable agreement between the states. See Strzepak et al., *supra* note 31, at 1; see also J.B. Ruhl, *Water Wars, Eastern Style: Divvying up the Apalachicola-Chattahoochee-Flint River Basin*, 131 *J. CONTEMP. WATER RESEARCH AND EDUC.* 47, 49-50 (2005).

affiliation.³⁷ The cultural cognition scholarship envisions a few Americas seeing everything, including scientific evidence, though very different templates and offers no reason to imagine a convergence in perceptions.³⁸ We are told that we are increasingly living next to, working alongside and socializing with people who think as we do. One question is whether and how this polarization, assuming it is real, undermines a federal role in addressing environmental problems inasmuch as such a role is based – in part – on shared normative commitments as to what America means and what Americans as such have a right to demand from their fellow citizens and government.

The polarization thesis surely has a basis, but it may be overstated. The hope of one America – not Blue or Red – is that it is overstated.

37. See generally Bill Bishop, *THE BIG SORT* (2008); see also *Political Segregation: The Big Sort*, *THE ECONOMIST*, Jun. 21, 2008, at 41-42, available at <http://www.economist.com/node/11581447> (discussing Bishop's conclusion that increasing polarization has led to cultural "balkanization" with geographic, social, and political dimensions); Robert J. Samuelson, *Political Perils of a 'Big Sort'*, *WASHINGTON POST*, Aug. 6, 2008 at A17, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/08/05/AR2008080502933_pf.html (noting that notwithstanding some areas of convergence and lasting broad-based agreement in public opinion, the "vital center is becoming slowly disenfranchised.").

38. Professor Kahan, *et al.* note that scientific consensus or near-consensus with respect to climate change and a range of other issues, including "the safety of nuclear power...the toxicity of arsenic, radon, and other groundwater chemicals...[and] the health consequences of vaccinating school girls against the human *papillomavirus*" has "failed to achieve anything close to that among members of the general public." Dan Kahan, Hank Jenkins-Smith, & Donald Braman, *Cultural Cognition of Scientific Consensus*, 14-2 *J. RISK RES.* 147, 147 (2011). They posit that "[t]he problem, it seems, is not that members of the public are unexposed or indifferent to what scientists say, but rather that they disagree about what scientists are telling them." *Id.* at 148. Disagreement on climate change is especially pronounced: a 2010 public opinion poll shows that 79% of Democrats believe in human-induced global warming, while 70% of Republican tea party supporters do not. *Wide Partisan Divide Over Global Warming*, PEW RESEARCH CENTER (Oct. 27, 2010), available at <http://www.pewresearch.org/2010/10/27/wide-partisan-divide-over-global-warming/>. Bishop argues that ideological and political differences encourage (and subsequently reinforce) retreat into discrete, inward-facing spheres of public life, further impeding the search for common ground. See *THE ECONOMIST*, *supra* note 37 ("'We now live in a giant feedback loop,' says Mr. Bishop... [and Americans increasingly] 'find other Americans to be culturally incomprehensible.'").

But taken as a given that there is more polarization, it is also not clear how this polarization tracks onto environmental federalism debates. We may be in the process of becoming more polarized, but it is less clear that the polarization is regional: intrastate differences may be more pronounced than before, not interstate ones. As states like Virginia urbanize, there may be more similarities across states than ever before, but more differences between particular localities and areas within the same state. Moreover, even with polarization, there may be convergences mixed in with divergences. Climate change has become an ideologically charged and hence polarizing issue, but it is much less clear that protecting public health from smog is polarizing. The available polling data mostly is not focused on regional differences and, to the extent it addresses environmental issues, seems overwhelmingly focused on climate change.³⁹ Another question is whether polarization is reversible, which raises an important question as to why we witness, to the extent we do, increased polarization.

CONCLUSION

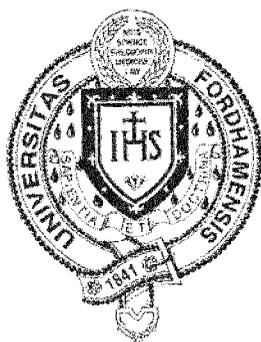
The debate over environmental federalism has been a mainstay in environmental legal discourse for decades, and will certainly remain so. The multiplicity of the values at stake in “the environment” and both pollution control and conservation ensure we will not see an allocation of authority among the federal and state authorities that is theoretically elegant or anything other than messy. There have been notable continuities in the history of environmental federalism, some less encouraging (the federal clumsiness at addressing obvious

39. See, e.g., Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP (Jul. 30, 2012), <http://www.gallup.com/poll/156347/americans-next-president-prioritize-jobs-corruption.aspx> (national survey which included a question about whether the next president should prioritize “environmental concerns, such as global warming”); Jeffrey Jones, *In U.S., Many Environmental Issues at 20-Year Low Concern*, GALLUP (Mar. 16, 2010), available at <http://www.gallup.com/poll/126716/environmental-issues-year-low-concern.aspx> (poll addressing several environmental issues, but only on a national scale); *More Say There is Solid Evidence of Global Warming*, PEW RESEARCH CENTER FOR PEOPLE AND THE PRESS (Oct. 14, 2012), available at www.people-press.org/2012/10/15/more-say-there-is-solid-evidence-of-global-warming/ (national poll).

transboundary pollution and judicial impediments to federal efforts), some encouraging (the use of California as a cost and effectiveness laboratory). How changes in the physical world due to climate change, and attitudinal changes due to an ideological and partisan polarization, will affect the discourse and reality of environmental federalism are questions that warrant attention by scholars as we continue to work out whether we have and should have one Green America.

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