2015

Environmental Federalism's Tug of War Within

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Concluding Chapter in Kalyani Robins, ed.,
THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS
(Edward Elgar, 2015)

--Erin Ryan[±]

The intensity of federalism disputes reflects inexorable pressure on all levels of government to meet the increasingly complicated challenges of governance in an ever more interconnected world. Yet even as federalism dilemmas continue to erupt all from all corners, environmental law remains at the forefront of controversy. This chapter argues that environmental law is uniquely prone to federalism discord because it inevitably confronts the core question with which federalism grapples—who gets to decide?—in contexts where state and federal claims to power are simultaneously at their strongest. Environmental problems tend to match the need to regulate the harmful use of specific lands (among the most sacred of local prerogatives) with the need to regulate border-crossing harms caused by these uses (among the strongest of national prerogatives). As a result, it is often impossible to solve the problem without engaging authority on both ends of the spectrum—and disputes erupt when local and national ideas on how best to proceed diverge. Ongoing jurisdictional controversies in energy policy, pollution law, and natural resource management reveal environmental law as the canary in federalism's coal mine, showcasing the underlying reasons for jurisdictional conflict in all areas of law.

Concluding the book, this chapter explores why environmental law regularly raises such thorny questions of federalism, and how environmental law has adapted at the structural level to manage federalism conflicts. Drawing from the theoretical framework that I introduced in FEDERALISM AND THE TUG OF WAR WITHIN (OXFORD, 2012), Part II reviews the central objectives of federalism, examining the conflicting values they imply and the resulting tension that suffuses all federalism-sensitive governance. Part III evaluates why federalism conflicts are heightened in the context of environmental law. Divisiveness not only reflects the intense competition among federalism values in environmental governance, it also provides key insights into the core theoretical dilemmas of jurisdictional overlap more generally. Part IV probes how environmental law has adapted to manage the challenges of overlap by asymmetrically allocating local, state, and federal authority within various models of collaborative or coordinated governance. Part V concludes with consideration of what the larger discourse can learn from the dynamic federalism and multiscalar governance innovations emerging from within environmental governance. Through processes that engage stakeholders at all levels of jurisdictional scale, environmental federalism is lighting a path away from the old presumptions of "zero-sum" federalism and toward a model of negotiated multiscalar governance emphasizing consultation, compromise, and coordination.

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I. Introduction

Anyone paying attention will have noticed that, of late, many of the most controversial issues in American governance involve questions of federalism. Lawmakers, judges, pundits, and average citizens are regularly embroiled in arguments over the federalism implications of pollution law,[1] health care reform,[2] energy policy,[3] marriage rights,[4] farm and forest regulation,[5] immigration,[6] species protection,[7]

[1] *E.g.*, EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014) (upholding EPA's Clean Air Act interstate pollution regulations); Rapanos v. United States, 547 U.S. 715 (limiting federal authority to regulate certain wetlands under the Clean Water Act); CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014) (holding that the federal Superfund statute does not preempt state statutes of repose).

[2] *E.g.*, National Federation of Independent Businesses vs. Sebelius, 132 S. Ct. 2566 (2012) (upholding certain mandates of the Affordable Care Act under the federal taxing power but invalidating other mandates relating to the state-federal Medicaid partnership for exceeding the spending power).

[3] *E.g.*, Adam Vann, et al., *Proposed Keystone XL Pipeline: Legal Issues*, U.S. Congressional Research Service (R42124, January 20, 2012) (discussing state-federal conflicts over the proposed pipeline, including siting issues

national security,[8] climate change,[9] and other hot-button political controversies.[10] Each one elicits diverging views about the appropriate policy content of the regulatory response, and federalism is sometimes invoked for purposes that are more strategic than principled.[11] Nevertheless, each one also forces us to confront the ultimate federalism dilemma of who, exactly, should have the final say over policy content.[12] Should ultimate control rest with the local community? The state? The national government? Some collaborative alliance among them? The dilemma is heightened in contexts of jurisdictional overlap, where different local, state, and national regulatory interests or obligations are simultaneously implicated.[13] The intensity of federalism disputes reflects the inexorable pressure on all levels of government to meet the increasingly complicated challenges of governance in an ever more interconnected world, where the answers to jurisdictional questions are less and less obvious.[14]

Yet even as federalism dilemmas continue to erupt all from all corners of the regulatory map, the forgoing chapters show that environmental law remains at the forefront of federalism controversy, and

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pitting state land use law against federal authority under the Commerce Clause and dormant Commerce Clause); Hari M. Osofsky and Hannah Wiseman, *Dynamic Energy Federalism*, 72 Md. L. Rev. 773 (2013) (discussing federalism issues in energy policy); Jeremiah I. Williamson and Matthias L. Sayer, *Federalism in Renewable Energy Policy*, 27 NAT. RESOURCES AND ENVIRON. 1 (2012) (listing different state programs).

[4] *E.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (enforcing the District Court's ruling that California's gay marriage ban was unconstitutional after concluding that the initiative sponsors lacked standing to appeal), U.S. v. Windsor, 133 S. Ct. 2675 (2013) (invalidating important parts of the federal Defense of Marriage Act).

[5] *E.g.*, Decker v. Northwest Environmental Defense Coalition, 133 S. Ct. 1326 (2013) (examining the Clean Water Act Silviculture Rule and holding that certain discharges from logging roads are exempt from Clean Water Act permitting requirements); Alt v. EPA, No. 2:12-CV-42, at 17–18 (N.D.W. Va. Oct. 23, 2013) (holding a concentrated animal feeding operation exempted from Clean Water Act permitting requirements as agricultural exemption).

[6] *E.g.*, Arizona v. U.S., 132 S. Ct. 2492 (2012) (affirming broad federal authority over immigration and naturalization while allowing some state regulation relating to immigration).

[7] *E.g.*, In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation, 709 F. 3d 1 (D.C. Cir. 2013) (upholding federal action listing the polar bear under the Endangered Species Act and rejecting, inter alia, Alaska's claim that the agency failed to properly account for state management recommendations).

[8] *E.g.*, Christopher Dickey, *The Spymaster of New York*, NEWSWEEK, Feb. 9, 2009, at 40-41, http://www.newsweek.com/2009/01/30/the-spymaster-of-new-york.html (reporting on overlapping counter-terrorism intelligence gathering by the CIA and NYPD).

[9] *E.g.*, Massachusetts v. E.P.A., 549 U.S. 497 (2007) (upholding a state's challenge to the federal agency's decision not to regulate greenhouse gases under the Clean Air Act). Several states have also initiated cap-and-trade programs in the absence of comprehensive federal climate regulation. *See* Western Climate Initiative, http://www.westernclimateinitiative.org/milestones (last visited Aug. 10, 2014) (detailing California's program); Midwestern Greenhouse Gas Reduction Accord, http://www.c2es.org/us-states-regions/regional-climate-initiatives/mggra (last visited Aug. 10, 2014) (reporting on the Midwestern states' program and noting that although it has not been suspended, participating states have ceased moving forward with it).

[10] *See* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN xviii-xx (Oxford, 2012) (cataloging high-profile federalism controversies in all fields of law, including gun control, violence against women, minimum wage requirements, marijuana policy, radioactive waste disposal, and others) (hereinafter, "TUG OF WAR").

[11] *Id.* at 35-37 (discussing the strategic use of federalism rhetoric).

[12] *Id.* at xii-xvii.

[13] *Id.* at 146-50.

[14] Erin Ryan, *The Once and Future Challenges of American Federalism*, *in* Alberto López Basaguren and Leire Escajedo San-Epifanio, eds., THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN, VOL. 1 (Springer, 2013).

that it is likely to do so for some time. From mining[15] to nuclear waste[16] to water pollution[17] to climate change,[18] the Supreme Court's environmental federalism cases have always been among the most contentious of its jurisprudence,[19] a phenomenon matched in the lower courts.[20] Environmental cases have also produced some of the most fractured judicial opinions on record (including some that have produced famously unworkable precedent going forward).[21] Federalism dilemmas are usually hard, and often divisive. But why is this so accentuated when the subject at hand is the environment?

In fact, environmental law is uniquely prone to federalism discord because it inevitably confronts the core question with which federalism grapples—*who gets to decide?*[22]—in contexts where state and federal claims to power are simultaneously at their strongest. Environmental problems tend to match the need to regulate the harmful use of specific lands (among the most sacred of local prerogatives) with the need to regulate border-crossing harms caused by these uses (among the strongest of national prerogatives). As a result, it is often impossible to solve the problem without engaging authority on both ends of the spectrum—and disputes erupt when local and national ideas on how best to proceed diverge.[23]

Famous environmental decisions like *New York v. United States* (invalidating parts of a state-federal plan to manage radioactive waste),[24] *Rapanos v. United States* (limiting federal authority over intrastate wetlands under the Clean Water Act),[25] and even *Massachussets v. EPA* (allowing a state to sue the federal government for failing to regulate greenhouse gases under the Clean Air Act)[26] all feature variations on the theme of jurisdictional conflict over competing regulatory concerns. Together with ongoing jurisdictional controversies in energy policy, pollution law, and natural resource management, they reveal environmental law as the canary in federalism's coal mine, showcasing the underlying reasons

[15] Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264 (1981).

[16] New York v. United States, 505 U.S. 144 (1992).

[17] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), 531 U.S. 159, 173-74 (2001); Rapanos v. United States, 547 U.S. 715, 739 (2006).

[18] *Cf.* Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007). As discussed further, *infra*, while this case is not usually viewed as a federalism decision, it raises the core environmental federalism problem of which aspects of environmental regulation are the primary prerogative of the federal and state governments.

[19] *See* RYAN, TUG OF WAR, *supra* note 10, at 145-46, 147-80 (discussing the intensity of environmental federalism disputes).

[20] *E.g.*, Gibbs v. Babbit, 214 F.3d 483 (4th Cir. 2000) (upholding under the Commerce Clause the Endangered Species Act's regulation of the hunting of endangered red wolves); Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 314 (2d Cir. 2009) rev'd, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (U.S. 2011) (allowing municipal plaintiffs to bring a public nuisance suit against defendant power plants over alleged harms from greenhouse gas emissions).

[21] *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 739 (2006) (limiting federal authority over certain wetlands but failing to set forth an articulable principle for state or federal agency interpretation going forward). *Rapanos* is discussed further *infra* in Part III.

[22] RYAN, TUG OF WAR, *supra* note 10, at xii-xvii (defining federalism as the constitutional means for allocating decision-making authority among the federal and state governments).

[23] *See id.* at 105-180 (discussing the challenges of jurisdictional overlap for the traditional "dual federalism" model of state-federal relations).

[24] 505 U.S. 144 (1992).

[25] 126 S. Ct. 2208, 2224 (2006).

[26] Massachusetts v. E.P.A., 549 U.S. 497 (2007). All three cases are discussed further *infra* at Part IV.

for jurisdictional conflict in all areas of law. And they indicate the critical need to better cope with the problems of jurisdictional overlap at the level of federalism theory.[27]

Concluding the book, this chapter explores why environmental law regularly raises such thorny questions of federalism, and how environmental law has specifically adapted to manage federalism conflicts. Drawing from the theoretical framework I introduced in FEDERALISM AND THE TUG OF WAR WITHIN,[28] Part II reviews the central objectives of federalism, examining the conflicting values they imply and the resulting tension that suffuses all federalism-sensitive governance. Against this theoretical backdrop, Part III evaluates why federalism conflicts are especially heightened in the context of environmental law. The characteristic divisiveness of environmental federalism reflects the intense competition among federalism values in environmental governance, while also providing key insights into the core theoretical dilemmas of jurisdictional overlap more generally.

After analyzing why environmental federalism is so fraught, the second half of the chapter assesses how environmental law has responded to the challenges of jurisdictional overlap at the structural level. Part IV probes how different environmental statutes asymmetrically allocate local, state, and federal authority within various models of collaborative governance or cooperative federalism, including programs of coordinated capacity, federally supported state implementation, conditional preemption, and shared and general permitting programs. Part V concludes with consideration of what the larger discourse can learn from the dynamic federalism innovations emerging from the study and practice of multiscalar environmental governance.

This analysis, supported by others in the book, reveals that the most successful environmental governance is conducted through processes of consultation, compromise, and coordination that engage stakeholders at all levels of jurisdictional scale. Indeed, the broader federalism discourse is increasingly recognizing environmental federalism[29] for lighting a path away from the entrenched "zero-sum" model, which treats every assertion of authority at one jurisdictional level as a loss of authority for the others.[30] Many areas of environmental law doubtlessly remain imperfect in their implementation of these ideals, and emergency circumstances will occasionally require less deliberative government action. Still, the most successful examples of environmental governance suggest that, at the end of the day, good multiscalar governance is essentially a project of negotiation.

II. Federalism as a Tool of Good Governance

To understand why environmental federalism is especially fraught, we must first understand why federalism itself is so fraught. This Part prepares the analysis of environmental federalism specifically by exploring the purposes and challenges of federalism more generally, beginning with the principles of good governance that federalism and other multiscalar forms of government are designed to promote. It

[27] RYAN, TUG OF WAR, *supra* note 10, at 7-17, 30-33.
[28] *Id.*
[29] *See* Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1902, 1909 (2014) (noting that environmental federalism has been "ground zero for much of the new thinking on federalism").
[30] *Id.* at 267-68; *see also* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 4-5 (2011).

then examines the governance challenges that arise when federalism interpreters are forced to grapple with the inevitable tension among these principles, at the level of both theory and practice.[31]

A. The Objectives of Federalism. Federalism is a system of government that divides sovereign power between a central authority and regional political subunits—American states, Canadian provinces, German Länder, the nation states of the European Union, etc.—each with the authority to directly regulate citizens within its own jurisdiction.[32] The American system of "dual sovereignty" recognizes separate sources of sovereign authority in the federal and state governments, but as demonstrated by the chapters in Part V of this book,[33] the range of federal systems worldwide demonstrates many different ways of allocating regulatory authority within the overall model.[34] Federalism issues usually present as questions about which level of government is entitled to decide the unfolding course of a given regulatory policy.[35] Each demands that we resolve whether the given regulatory matter is within the jurisdiction of local, state, regional, national, or international authorities—or some combination thereof.

In the United States and other formal federal systems, federalism questions are embedded within larger issues of constitutional structure, implicating additional questions about the separation of powers between state and federal sovereigns and interpretive authority among the three branches of government.[36] But even in non-federal national and international contexts, similar issues arise concerning regulatory scale, competition, and collaboration. And even within the American system, issues of regulatory scale and dynamic interaction extend beyond constitutionally cognizable state-federal relations to the various ways that towns, cities, counties, metropolitan partnerships, and regional associations manage interjurisdictional governance (not to mention the growing phenomenon of international partnerships between subnational actors).[37]

[31] Some of this analysis draws on previous scholarship. To avoid unduly reiterating that work, it provides supporting citations to the deeper analysis in earlier publications, usually without further reference in the main text.

[32] RYAN, TUG OF WAR, *supra* note 10, at 7-8.

[33] *See* Robert Fowler, *The Australian Experience with Environmental Federalism*, *supra*, Chapter 12; Nathalie Behnke & Annegret Eppler, *German Environmental Federalism in the Multi-level System of the European Union*, *supra*, Chapter 13; Sairam Bhat, *The Paradoc of Environmental Federalism in India*, *supra*, Chapter 14.

[34] *Id.* The Forum on Federations, which researches federalism and devolved governance, reports that the countries of the world include 25 federal systems at present, governing 40% of the world's population, with an additional two countries in transition to federalism. *See* "Federalism by Country," The Forum on Federations,, http://www.forumfed.org/en/federalism/federalismbycountry (last visited August 12, 2014).

[35] *See* RYAN, TUG OF WAR, *supra* note 10, at xii-xvii (defining federalism as the constitutional means for allocating decision-making authority among the federal and state governments).

[36] *See id.* (addressing constitutional interpretive questions associated with American federalism in detail).

[37] *See, e.g.*, Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 Ala. L. Rev. 237 (2011) (discussing the significance of government levels beyond the state-federal dichotomy); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PENN. L. REV. 1929 (2008) (discussing the role of local actors in federalism dilemmas); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (discussing how local and federal actors can align against state actors); David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378-79 (2001) (discussing the distinct spheres of local, state, and national power).

Nevertheless, for every system of multiscalar governance, the fundamental issue is the same: how to manage regulatory challenges in a way that best balances the good governance ideals that its framers seek to accomplish. In opening FEDERALISM AND THE TUG OF WAR WITHIN, I argue that "federalism is best understood not just in terms of the conflict between states' rights and federal power, or the debate over judicial constraints and political process, or even the dueling claims over original intent—but instead through the inevitable conflicts that play out among federalism's core principles."[38] This chapter's exploration of that conflict is based on the American model, because it was within the American constitutional experiment that the innovation of federalism was first born.[39] However, the principles of good multiscalar governance that undergird the American federal system have taken root within international norms, influencing governance in many other parts of the world as well.

B. Federalism Values and the Tug of War Within.[40] Analysis of the legislative history of the American Constitutional Convention, later Supreme Court interpretations, congressional and executive pronouncements, and the academic literature yields five foundational good governance values that American federalism is designed to advance.[41] These emphasize the maintenance of (1) checks and balances between opposing centers of power that protect individuals; (2) governmental accountability and transparency that enhance democratic participation; (3) local autonomy that enables interjurisdictional innovation and competition; (4) centralized authority to manage collective action problems and vindicate core constitutional promises; and finally (5) the regulatory problem-solving synergy that federalism enables between the unique governance capacities of local and national actors for coping with problems that neither can resolve alone.[42]

Governance in pursuit of these values advances individual dignity within healthy communities. It enhances democratic governance principles of self-determination while recognizing the responsibilities that group members hold toward one another. It creates a laboratory for innovations in governance from multiple possible sources[43] and facilitates multiple planes of negotiation among competing interests and

[38] *See* RYAN, TUG OF WAR, *supra* note 10, at xi.

[39] *See generally* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007).

[40] This section summarizes key insights from my book by the related title, FEDERALISM AND THE TUG OF WAR WITHIN, RYAN, *supra* note 10.

[41] *Id.* at 34-67. In the book, I discuss the four federalism values most directly voiced in American federalism jurisprudence: checks and balances, transparency and accountability, localism values, and the problem-solving value implied by subsidiarity. Here, I add overt discussion of the values of centralized power that counterbalance the localism values within federalism. Because they are implicit in the creation of an overall nation-state, these values are debated less directly in the many cases that presume the value of centralized national authority but debate its appropriate relationship with subnational authority. These values are also implied by the value of intergovernmental problem-solving synergy. That said, so many environmental laws especially tap these values of central authority that I believe it is worth explicitly highlighting here as the fifth in the series.

[42] *See id.* at xiv, 34-67 (specifically detailing the values of checks, transparency, localism, and synergy and dealing more holistically with the nationalism values necessarily implied by a federal system).

[43] For the most famous statement of this principle, see New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (comparing the states to laboratories in which to "try novel social and economic experiments").

interest groups.[44] It appropriately honors both sides of the subsidiarity principle—the directive to solve problems at the most local level possible[45]—which notably couples its preference for local autonomy in governance with the expectation of effective regulatory problem-solving (and by implication, at whatever level will achieve it).[46]

However, identifying what federalism is designed to accomplish is only the first part of the puzzle. The harder task is figuring out how these goals fit together. The core federalism values are doubtlessly all good things in and of themselves, and American governance has long aspired to realize each of them independently. Yet our success has been complicated by the fact that each individual good governance value is suspended in a web of tensions with the others. No matter how we may try, the hard truth is that they all cannot always be satisfied simultaneously in any given context. The regulatory choices we make inevitably involve tradeoffs, in which one value may partially eclipse another.[47] Conflicts between localism and nationalism are obvious, but the network of tension runs much deeper and among all the various values.

To take another example, consider the tension between the values of (1) checks on sovereign authority and (2) transparent and accountable government. Federalism promotes a balanced system of checks on sovereign authority at both the state and federal level, enabling the useful tool of governance that I have previously called "regulatory backstop," which protects individuals against government excess or abdication by either side.[48] When sovereign authority at one level fails to protect the vulnerable, regulatory backstop ensures that it remains available to do so at a different level. The history of civil rights law reveals especially famous examples, matching periods in which the federal government protected the rights of African-Americans forsaken by state law[49] with more modern examples in which states have acted to protect rights unrecognized by federal law, including those of LGBT citizens[50] and

[44] *See* RYAN, TUG OF WAR, *supra* note 10, at 265-367 (discussing negotiated federalism among the various levels and branches of government). *See also* Ryan, *Negotiating Federalism*, *supra* note 30 (introducing the analysis that evolved into this final part of the book).

[45] *See, e.g.*, Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 103 (2001). For various accounts of the subsidiary principle, see David P. Currie, *Subsidiarity*, 1 GREEN BAG 2D 359 (1998); James L. Huffman, *Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity*, 52 U. KAN. L. REV. 1377 (2004); John F. Stinneford, *Subsidiarity, Federalism, and Federal Prosecution of Street Crime*, 2 J. CATH. SOC. THOUGHT 495 (2005); W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 CASE W. RES. J. INT'L L. 61 (1995); Jared Bayer, Comment, *Re-Balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U. L. REV. 1421 (2004).

[46] *See* RYAN, TUG OF WAR, *supra* note 10, at 59-66.

[47] *Id.* at 38-39 (and more generally at 34-67).

[48] *Id.* at 39-44 (discussing checks and balances); 42-43 (discussing regulatory backstop).

[49] *E.g.*, Marilyn K. Howard, *Discrimination*, *in* 1 THE JIM CROW ENCYCLOPEDIA 222, 226-27 (Nikki L.M. Brown & Barry M. Stentiford eds., 2008).

[50] *See, e.g.*, VT. STAT. ANN. tit. 15, § 8 (2009) (amending marriage definition from union between a man and woman to a union between two people); COLO. REV. STAT. §§ 24-34-401 and 24-34-402 (2007) (barring discrimination in hiring based on sexual orientation); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (asserting that the Massachusetts constitution is more protective of civil rights than the federal Constitution in invalidating a state statutory ban on same-sex marriages). *Cf.* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (discussing San Francisco's decision to issue gay marriage licenses despite contrary state law).

the owners of property subject to eminent domain.[51] Environmental law showcases equally compelling examples of dual sovereignty at its best,[52] including the 1970s era in which the federal government acted to prevent excessive air and water pollution when most states had failed to do so,[53] and the current era in which many states are moving to address the causes and effects of climate change at a time when the national government has not succeeded.[54]

Yet the availability of regulatory backstop exacts a price. The very maintenance of checks and balances between state and national actors itself frustrates the independent value of transparency, making it harder for the average citizen to navigate the lines of governmental accountability (and know whom to blame for bad policy choices).[55] This is especially problematic in realms of extreme jurisdictional overlap, such as environmental or criminal law, where legitimate state and federal governance takes place simultaneously.[56] As I describe in FEDERALISM AND THE TUG OF WAR WITHIN, if all we cared about were the good governance values of transparency and accountability, the best alternative would be a unitary system of government, such as that in use by France or China.[57] Alternatively, if checks and balances were the primary governance ideal, then we should do away with the Constitution's Supremacy Clause,[58] which gives the national government a powerful edge in many state-federal conflicts.[59] If localism values were primary, then our best course of action would be a confederal system among powerful states and a weak center, lacking federal constitutional supremacy (not unlike the nation's first experiment with the Articles of Confederation).[60]

Instead, we tolerate the open tension between checks and transparency, and the obvious conflicts between localism values and strong national power, and all the other tradeoffs that palpably manifest among the five—precisely to reap the federalism-facilitated benefits of local autonomy when desirable, national uniformity when preferable, regulatory backstop when necessary, and interjurisdictional problem-solving when inevitable.[61] Strong local authority expands opportunities for democratic participation, encourages well-tailored governance, facilitates diversity, inspires innovation, and encourages interjurisdictional competition.[62] Strong national power resolves collective action problems,

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More recently, the Supreme Court removed an important federal obstacle to state efforts to legalize gay marriage. U.S. v. Windsor, 133 S. Ct. 2675 (2013) (invalidating parts of the federal Defense of Marriage Act).

[51] *See, e.g.*, Tim Hoover, *Eminent Domain Reform Signed*, KAN. CITY STAR, July 14, 2006, at B2 (reporting on new state law property rights).

[52] *See* RYAN, TUG OF WAR, *supra* note 10, at xxvii-xxix.

[53] Clean Air Act, 42 U.S.C. § 7401 *et seq.* (2006); Clean Water Act, 33 U.S.C. § 1251 *et seq.* (2006).

[54] *See, e.g.*, Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 PUBLIUS 432 (2009); Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments To Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006). *See also* Engel, Chapter X; Buzbee, Chapter Y; Kaswan, Chapter Z.

[55] *See* RYAN, TUG OF WAR, *supra* note 10, at 43-50.

[56] *Id.* at 145-80.

[57] *Id.* at 48.

[58] U.S. CONST. art. VI.

[59] *See* RYAN, TUG OF WAR, *supra* note 10, at 43-44.

[60] Notably, this unsuccessful experiment was rejected in favor of true federalism. *Id.*

[61] *Id.* at 34-67.

[62] *Id.* at 50-59.

facilitates markets, manages border-crossing harms and large-scale public commons, speaks to the world with a unitary voice, and vindicates non-negotiable constitutional promises.[63] Ideally, coupling healthy local authority with strong national power facilitates the kind of dynamic interjurisdictional synergy in governance that makes for the most effective regulatory response—drawing on the distinctive forms of governance capacity that develop respectively at the local and national level to solve pressing interjurisdictional problems that require both.[64]

C. The Once and Future Challenges of Federalism Theory.[65] With values-based competition implicit in all federalism quandaries, each dilemma demands that decision-makers choose, consciously or otherwise, how to prioritize among conflicting federalism values. Navigating the tension to a conclusion usually provides good direction on the related issue of where to assign regulatory responsibility within zones of jurisdictional overlap, or realms of governance that legitimately implicate both state and federal authority (discussed further in Part IV). Reconciling competing values and allocating authority are daunting tasks. Yet federalism theory—the conceptual roadmap that jurists have created over the centuries to help interpreters meet the challenge—has not always been helpful.

To be sure, there are some easy cases, in which federal supremacy cleanly resolves a given conflict in favor of nationalism, or a clear constitutional command resolves it in favor of localism values.[66] But even when the federal government *can* legally trump local initiative, does that necessarily mean that it *should*? Consider the current debates over the respective state and federal roles in regulating marijuana and immigration. In recent cases addressing these subjects, the Supreme Court affirmed that the federal government holds trumping regulatory authority.[67] But what are the competing considerations in each context that guide your own opinion about the relative strength of state claims for input into final regulatory policies? What theoretical tools are available to help answer these questions?

Indeed, the federalism discourse is only just beginning to appreciate how this unresolved "tug of war" for privilege among these competing values has led to the Supreme Court's notoriously fluctuating federalism jurisprudence.[68] Over the nation's history, the Court, Congress, and others have experimented

[63] *See, e.g.*, EDWARD MILLICAN, ONE UNITED PEOPLE: THE FEDERALIST PAPERS AND THE NATIONAL IDEA (1990).

[64] *Id.* at 59-66, 145-80, 265-367. *See also* Ryan, *Negotiating Federalism*, *supra* note 30 (exploring intergovernmental bargaining as a means of harnessing interjurisdictional synergy).

[65] *See generally* Ryan, *The Once and Future Challenges of American Federalism*, *supra* note 14 (inspiring the title of this section).

[66] *Compare* U.S. CONST. art. VI (federal supremacy) *with* U.S. CONST. amend. X (reserving non-enumerated powers to the states); *compare* U.S. CONST. amend. XV (conferring clear federal authority to ensure that voting rights are not abridged on the basis of race) *with* U.S. CONST. art. I, § 2, amend. XVII, art. II § 1, amend. XII (conferring clear state responsibility for conducting congressional and presidential elections).

[67] *See* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the criminalization of intrastate marijuana growers under the Commerce Clause); Arizona v. U.S., 132 S. Ct. 2492 (2012) (affirming federal primacy in immigration law).

[68] The federalism literature has exploded in recent years with interesting new perspectives on dynamic and innovative federalism theory. While all sources are too numerous to list, a worthy tour would include RYAN, TUG OF WAR, *supra* note 10, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009); JOHN NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING (2009); ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008); MALCOLM M. FEELEY AND EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE (2008); Jessica Bulman-Pozen, *Partisan*

with various theoretical models of federalism in which one value has been uncritically elevated above the others in importance, with corresponding costs for good governance.[69] At various points, most recently during the Rehnquist Court's New Federalism revival, the Court has grounded its federalism adjudication in an idealized model of "dual federalism."[70] Dual federalism privileges the check-and-balance value in idealizing a system of mutually exclusive state and federal jurisdictional spheres—notwithstanding the marked departure of this ideal from the reality of an American system suffused with jurisdictional overlap.[71] By contrast, the preferred model of federalism during the New Deal era privileged nationalism in service to the problem-solving value—elevating the need for strong federal power to solve critical societal problems after the Great Depression—but with less regard for the values of checks, localism, or accountability (and arguably fomenting the social frustration that would later lead to the modern New Federalism and Tea Party Movements).[72]

Notwithstanding the ghost of dual federalism that continues to haunt the Supreme Court's federalism jurisprudence, the model of cooperative federalism predominates in the actual practice of federalism-sensitive governance.[73] Cooperative federalism acknowledges the reality of jurisdictional overlap between legitimate state and federal interests, and it allows for regulatory partnerships in which state and federal actors take responsibility for interlocking parts of a larger regulatory whole.[74] This model seeks a middle ground between the excessive jurisdictional separation of pure dual federalism and the fear that New Deal federalism would obliterate dual sovereignty. Nevertheless, the critics of cooperative federalism variously assail the model as overly ad hoc, undertheorized, and coercive.[75]

In response to shortcomings in these paradigmatic models, a host of new scholarship is developing newer theoretical conceptions of federalism,[76] including the Balanced Federalism model that I

Federalism, 127 HARVARD L. REV. 1077 (2014); Abbe Gluck, *Federalism's Domain*, 123 YALE L.J. __(2014); Gerken, *Federalism All the Way Down*, *supra* note 37; Jessica Bulman-Pozen and Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L. J. 145 (2007); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006). More traditional and historical perspectives are also an important part of the recent federalism discourse. *See, e.g.*, MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (2012); ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010); JENNA BEDNAR, THE ROBUST FEDERATION (2009); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007).

[69] *See* RYAN, TUG OF WAR, *supra* note 10, at 68-104 (analyzing the different theoretical models of federalism in use over the history of American governance and jurisprudence).

[70] *See id*. at 98-104 (reviewing dual federalism), 109-44 (analyzing the Rehnquist Court's New Federalism revival).

[71] In fact, jurisdictional overlap is so prevalent in American governance that it has been famously compared to "marble cake," with entangled swirls of interlocking local and national law. MORTON GRODZINS, THE AMERICAN SYSTEM 8, 60–153 (Daniel J. Elazar, ed., 2d ed. 1984). *See also* RYAN, TUG OF WAR, *supra* note 10, at 145-80 (reviewing the interjurisdictional challenge to dual federalism).

[72] *See* RYAN, TUG OF WAR, *supra* note 10, at 84-88 (reviewing New Deal Federalism), 98-104 (reviewing the rise of New Federalism and the Tea Party).

[73] *See id.*at 89-98 (reviewing cooperative federalism).

[74] *Id.*

[75] *See id.* at 96-98 (discussing frustration with cooperative federalism), 273-76 (discussing the federalism safeguards debate). *See also* GREVE, *supra* note 68 (assailing cooperative federalism as coercive and collusive).

[76] *See, e.g.*, CHEMERINSKY, *supra* note 68, SCHAPIRO, *supra* note 68, GREVE, *supra* note 68.

proposed in FEDERALISM AND THE TUG OF WAR WITHIN.[77] Balanced Federalism emphasizes dynamic interaction among the various levels of government and shared interpretive responsibility among the three branches of government, with the overall goal of achieving a balance among the competing federalism values that is both dynamic and adaptive over time.[78] As I describe it there, the Balanced Federalism model involves:

> "a series of innovations to bring judicial, legislative, and executive efforts to manage the tug of war into more fully theorized focus. [Balanced Federalism] mediates the tensions within federalism on three separate planes: (1) fostering balance among the competing federalism values, (2) leveraging the functional capacities of the three branches of government in interpreting federalism, and (3) maximizing the wisdom of both state and federal actors in so doing. [This initial foray] imagines three successive means of coping with federalism's values tug of war, each experimenting with different degrees of judicial and political leadership at different levels of government. Along the way, the analysis provides clearer theoretical justification for the ways in which the tug of war is already legitimately mediated through various forms of balancing, compromise, and negotiation."[79]

The full elaboration of Balanced Federalism in the book helps provide the missing theoretical justification for the tools of cooperative federalism that predominate modern environmental law, as well as support for future moves by environmental governance toward even greater dynamic engagement.[80] It emphasizes the skillful deployment of legislative, executive, and judicial capacity at each level of federalism-sensitive governance, allocating authority based on the specific forms of decision-making in which they excel.[81]

In so doing, Balanced Federalism demonstrates how well-crafted multiscalar governance deflates the pervasive presumption of "zero-sum federalism," a misunderstanding of state-federal relations with roots in dual federalism that continues to haunt the American discourse.[82] Zero-sum conceptualizations of federalism assume that the state and federal governments are locked in an antagonistic, winner-takes-all competition for power, in which every victory by one side constitutes a loss for the other.[83] While this is sometimes true,[84] closer examination of federalism-sensitive governance reveals that the line between state and federal power is just as often a project of negotiation, through ongoing processes of consultation and coordination that can accrue to the advantage of both sides.[85] Several authors in this book have highlighted the theory of negotiated federalism that is central to Balanced Federalism model as an essential step toward more rational environmental governance.[86]

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[77] *See generally* RYAN, TUG OF WAR, *supra* note 10.
[78] *See id.* at 181-214, 265-70, 339-67.
[79] *Id.* at xi-xii.
[80] *See generally* RYAN, TUG OF WAR, *supra* note 10.
[81] *See id.;* Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers both Vertically and Horizontally (A Response to Aziz Huq).* COLUM. L. REV. SIDEBAR (forthcoming, 2015).
[82] *Id.* at 267-68; *see also* Erin Ryan, *Negotiating Federalism,* 52 B.C. L. Rev. 1, 4-5 (2011).
[83] *Id.*
[84] *See, e.g.,* Arizona v. United States, 132 S. Ct. 2492 (2012) (holding most of a state immigration statute preempted by federal law).
[85] *Id.* at 267-68; *see also* Erin Ryan, *Negotiating Federalism,* 52 B.C. L. Rev. 1, 4-5 (2011).
[86] *See* Hannah Wiseman, *Evolving Energy Federalism: Current Allocations of Authority and the Need for Inclusive Governance, supra,* Chapter 6; Alice Kaswan, *Cooperative Federalism and Adaptation, supra,* Chapter 9.

While this chapter does not further explore Balanced Federalism, it is no coincidence that the Balanced Federalism proposal was inspired by my own experience and research of environmental governance. Environmental law, land use planning, and public health and safety regulation address problems in which the tensions among federalism values and the questions of who should arbitrate among them are heightened, sometimes viscerally so.[87] The pressures of jurisdictional overlap in environmental law has driven the Supreme Court's federalism decisions to its extremes, exposing the fault lines between competing values that exist, if less ostentatiously, in all fields of federalism-sensitive governance.[88] But for the same reasons, environmental law can lead the way for all fields in developing innovative forms of collaborative multiscalar governance, in which policymaking is appropriately informed by consultation, negotiation, and compromise among all participants.

III. Environmental Federalism and the Tug of War Within

Tension among the core federalism values is especially heightened in the context of environmental law, where compelling claims for the importance of local autonomy and tailoring are coupled with equally compelling claims about the need for national capacity and uniformity. Concerns over accountability, checks, and problem-solving point decision-makers in different directions. Climate governance, other air and water pollution, coastal and forest management, wildlife protection, hazardous waste, energy law, and related environmental fields all demonstrate the difficulties of managing these tensions in regulatory territory where both local and national actors hold unique authority, interests, obligations, and expertise. Intertwined with both land use law and public health and safety regulation, environmental law implicates federalism's tug of war within perhaps more dramatically than any other single area of law.

Casting environmental law as the canary in the coal mine of wider federalism controversy, this Part explores why environmental federalism disputes so often become so intense. With analysis of current environmental challenges and examples from the Supreme Court's environmental docket, it examines how environmental dilemmas uniquely expose the underlying competition among good governance values. Clashes often arise because of the way the regulatory target matches the need for state authority to manage the local harms and benefits of particular land uses with the need for national authority to cope with the externalities and collective action implications of those uses. The first section illustrates these points in the context of several ongoing controversies in energy law, and the second section explores them through the competing opinions in three noteworthy Supreme Court decisions.

A. The Canary in Federalism's Coal Mine. Environmental law is prone to extreme federalism controversy because it effectively allocates power in regulatory contexts where state and federal claims to authority are simultaneously at their strongest. Environmental problems very often match a need to regulate the harmful use of a specific parcel of land with the need to police border-crossing harms

[87] *Cf.* Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233 (2003).

[88] *See* RYAN, TUG OF WAR, *supra* note 10, at xi.

associated with that use.[89] The state claim for regulatory priority is supported by the hallowed understanding that governing land use is among the most sacred of local prerogatives,[90] while the federal claim is buttressed by the fact that regulating externalities is among the original predicates of national authority.[91] Criminal law and public health federalism might be fraught for similar reasons, because they also implicate the state's police power to regulate for health and safety, and they also portend spillover harms to other states if poorly managed. And indeed, these realms of law are also marked by federalism controversy, as the recent Obamacare upheaval attests.[92] Yet most of the time, environmental federalism controversies are even more heightened, for reasons that appear to hinge on the special relationship between land use regulation and environmental law.

Conventional environmental laws regulate pollution or natural resources, but both are intertwined with regulation of the local lands on which resources are regulated or pollution produced. Harmful land uses must be regulated to prevent spillovers, and the failure of state environmental laws to accomplish this before the enactment of the major federal pollution statutes in the 1970s suggests that central authority may be necessary.[93] However, the regulation of land poses questions to which the answers are intensely more idiosyncratic—and more locally variegated—than most regulatory issues involving crime or public health. There is widespread consensus on what constitutes health, theft, or murder; state public health and criminal laws do differ, but mostly at the margins. By contrast, the answers to questions about how best to regulate land use can differ radically between states, or even between neighborhoods, because the nature of the land in question is so locally unique.

As Hirokawa & Rosenblum argue in Chapter 11, the contours of the land, soil quality, climate, precipitation levels, elevation, prevailing winds, habitat, population density, zoning laws, and the local economies dependent on that land will all differ dramatically from one community to the next. Managing water pollution in Oregon, Arizona, Iowa, New York, and Florida require wholly different sets of local expertise—you have to know what the watershed looks like, what the major stressors are, where the local industry is operating, the seasonal weather patterns, etc.—and these will likely result in diverging, locally tailored strategies. Moreover, bad land use decisions made without the benefit of local expertise can portend serious environmental, cultural, and economic harm if things go wrong. Applying an inappropriate regulatory strategy for given conditions could damage soil, water, and other local resources, with enormous collateral consequences for entire communities. Nevertheless, if one community fails to prevent spillover harms to another, then the stakes are equally high.

For these reasons, jurisdictional conflicts have long been part of the legal and political controversies that erupt within the vast gray area of environmental governance. Should EPA be able to

[89] *See* Ryan, *The Once and Future Challenges of American Federalism*, *supra* note 14, at Part 3.1.

[90] *See, e.g.*, Young v. American Mini Theaters, 427 U.S. 50, 80 (1976) (J. Powell, concurring) (identifying local land use regulation as among the essential functions of local government).

[91] *See, e.g.*, Missouri v. Illinois, 200 U.S. 496 (1906) (strongly affirming federal jurisdiction to resolve an interstate nuisance claim over discharges by Chicago of raw sewage into the Mississippi River).

[92] *See, e.g.*, National Federation of Independent Businesses vs. Sebelius, 132 S. Ct. 2566 (2012).

[93] *See, e.g.*, Robert V. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. Rev. 1141, 1160 (1995) (describing the failure of state law efforts as the precursor to federal environmental law).

regulate manmade irrigation ditches as wetlands?[94] Can California impose costs on "dirtier" energy imported from out-of-state?[95] Should municipalities have the right to ban fracking operations?[96] On the surface, these conflicts play out as contests between state and federal jurisdiction, where each has a legitimate claim to regulate. But environmental conflicts are especially charged because of the values contest that extends beneath the surface task of assigning primary responsibility. Regardless of who gets the final say, making that call requires the decision-maker to forge a path forward through the tension among federalism's core values—checks and balances, accountability and transparency, local autonomy, central authority, and problem-solving synergy—each pointing regulatory response in a different direction.

Should the primary consideration be the facilitation of interjurisdictional innovation, given uncertainty about the best regulatory approach (an interpretation favoring values of local autonomy)? Should the primary consideration be the need for preemptive central regulation to fully police collective action problems that may unravel other regulatory solutions (favoring values of central authority)? Is it the need for simultaneous local and national regulation to provide regulatory backstop and prevent regulatory capture (favoring checks and balances)? Or is this a situation in which state and federal regulation is needed to simultaneously manage different elements of an interjurisdictional regulatory problem that requires both local and national capacity (favoring problem-solving synergy)? If so, how do concerns about governmental transparency and accountability factor in?

Regulatory decision-makers navigate these conflicting values to establish a rough order of priority, and this enables them to determine which level of governance has the best capacity to act on the primary concerns. But in environmental law, clear answers are especially elusive. In some regulatory contexts, the value that cries out for primacy may seem clear to most observers—for example, the need for preemptive central authority in managing the war power. For generally accepted reasons, the armed forces ultimately respond to only one commander in chief. But in environmental contexts, the answer is often less clear. Sometimes the need for regulatory innovation really does clash with the need to resolve collective action problems—as powerfully demonstrated by the challenges of climate governance. In others, the majority of observers may firmly believe that one value clearly cries out for primacy—but they lack consensus on exactly which one it is.

Examples abound in environmental law, especially in realms where land use factors heavily, including the examples of nuclear waste disposal, water pollution law, coastal management, and climate

[94] *See* EPA, *Definition of Waters of the United States Under the Clean Water Act*, March, 2014, available at http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act (proposed rule extending Clean Water Act authority to, inter alia, agricultural ditches); Missouri Farm Bureau, *That's Enough ("Let it Go" Parody)*, YOU TUBE, May 23, 2014, available at http://www.youtube.com/watch?v=9U0OqJqNbbs&feature=youtu.be (video parody of Disney Film, FROZEN, criticizing the rule's application to agricultural ditches).

[95] *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013) cert denied 134 S. Ct. 2875 (2014) (overturning the lower court's conclusion that California's "lifecycle analysis" of imported fuel's carbon intensity unconstitutionally burdens interstate commerce in energy).

[96] *Compare* Robinson Township v. Pennsylvania, ___ A.3d ___, 2013 WL 6687290 (Pa. 2013) (upholding municipal rights to regulate fracking under the state constitution) *with* Colorado Oil & Gas Assn. v. City of Fort Collins, ___P.3d ___, 2014 (case number 13CV31385, Larimer County District Court, Aug. 7, 2014) (holding a local fracking ban preempted by contrary state law).

governance discussed further below. But for an initial example, consider how the tension among federalism values manifests in several ongoing challenges for energy law.

(1) Federalism Tension in Energy Policy. Federalism-sensitive energy law dilemmas include how to allocate authority over different aspects of energy harvest and infrastructure; how to share state and federal oversight of energy pricing and transmission; and how to appropriately structure energy markets to respect different realms of local, state, and federal prerogative. Energy law pits federalism's underlying values against one another as intensively as any other realm of environmental law, and in many respects more interestingly—because intergovernmental conflicts here are as likely to arise between local and state government as they are between state and federal government.

As Hannah Wiseman explains in Chapter 6, most energy governance takes place at the state and local levels, which maintain primary authority over the siting and operation of instate energy facilities and markets. States remain the primary regulators of oil and gas drilling operations and electric utilities, a jurisdictional realm explicitly preserved by the Federal Power Act.[97] In general, states regulate the intrastate elements of the energy industry (including production and retail sales), while the federal government regulates the interstate elements (including interstate transmission and wholesale pricing), mostly through the Federal Energy Regulatory Commission.[98] Drawing on federal authority over interstate commerce, the Commission oversees interstate energy markets and wholesale rate-making, interstate oil and gas pipelines and other fuels transportation, liquefied natural gas terminals, hydropower projects, and reviews certain mergers, acquisitions, and corporate transactions by electric companies.[99] State agencies regulate virtually all else (except nuclear power plants, under the separate jurisdiction of the federal Nuclear Regulatory Commission).[100]

Recently, federalism litigation has arisen over the extent to which state Renewable Portfolio Standards, carbon-intensity preferences, and other creative means of promoting sustainable energy use within state markets are preempted by federal authority under the dormant Commerce Clause. These policies capitalize on the regulatory innovation and interjurisdictional competition that local autonomy enables within federalism's laboratory of ideas, all in the service of solving critical problems associated with climate change, energy independence, and environmental sustainability. Nevertheless, they come into heated conflict with claims for the preeminent value of central authority to promote free markets and national uniformity in interstate commerce.

For example, in *Rocky Mountain Farmers Union v. Corey*, the Ninth Circuit recently upheld California regulations favoring low carbon-intensity fuels against a claim that they unconstitutionally regulated extraterritorial production, finding that they did not facially discriminate against out-of-state

[97] 16 U.S.C. §§ 824, 824a-824w (2012) (distinguishing state and federal roles in regulating electric utilities).

[98] *See, e.g.*, James J. Hoecker and Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 Energy L.J. 71 (2014) (arguing that the distinctions are blurring).

[99] Federal Energy Regulatory Commission, *What FERC Does*, at http://www.ferc.gov/about/ferc-does.asp (last updated June 24, 2014) (listing agency responsibilities and distinguishing the related responsibilities of state and other federal agencies).

[100] *Id.*

production.[101] Overturning a contrary conclusion by the lower court, the panel was persuaded by the localism values of innovation and competition, essentially holding that California was entitled to experiment with regulatory means of avoiding serious harms from climate change to its citizens, and that any interstate burden was justified by the fact that the formula accurately measured carbon intensity.[102] Highlighting the clash of values, however, a strongly stated dissent defended the importance of national uniformity and unfettered interstate commerce notwithstanding respect for California's "long history of innovative solutions to complicated environmental problems."[103] Advocates for California's rule praised the decision's reasoning, while critics called it "a thin veil attempting to mask a result-based conclusion."[104] The Supreme Court denied review.[105]

Nevertheless, perhaps the most interesting dilemmas of energy law include intrastate controversies over where, how, and whether to harvest different sources of energy when state and local preferences conflict. As Professor Wiseman describes, both traditional and renewable energy harvest are land-use intensive in ways that can disproportionately disperse the costs and benefits of extraction, leading to community protest.[106] For example, sprawling solar and wind power operations lay claim to large surface areas that can interfere with wildlife and community aesthetics. Citing harm to scenic resources and migratory birds, Massachusetts residents have unsuccessfully sought to block the establishment of a large offshore wind farm off the coast of Cape Cod.[107] Controversy over the siting of transmission facilities, including the proposed XL Pipeline, further embroils all levels of government in conflicts in which state and local interests are not always aligned.[108]

More poignantly, the drilling and hydraulic fracturing (fracking) of oil and gas wells has led to divisive regulatory conflicts between state and local interests. Local opposition to fracking, which can cause troubling air and water pollution,[109] has spawned a series of clashes between municipalities seeking to ban it and state efforts to preempt the local bans. In 2013, the Pennsylvania Supreme Court invalidated state efforts to preempt a local fracking ban under the state's Environmental Rights Amendment, an expanded and constitutionalized version of the public trust doctrine.[110] By contrast, two district courts in

[101] 730 F.3d 1070 (9th Cir. 2013), cert. denied 134 S. Ct. 2875 (2014) (overturning the lower court's conclusion that California's "lifecycle analysis" of imported fuel's carbon intensity unconstitutionally burdens interstate commerce in energy).

[102] *Id.*

[103] *Id.* at 1108, 1110 (Murguia, Circuit Judge, dissenting).

[104] Jonathan Marsh, *Ninth Circuit Holds that "California's Regulatory Experiment" Does Not Discriminate Against Out-of-State Ethanol and Crude Oil Producers*, KING & SPAULDING ENERGY NEWSLETTER, October 2013, available at http://www.kslaw.com/library/newsletters/EnergyNewsletter/2013/October/article5.html (last visited Aug. 20, 2014).

[105] *See* 134 S. Ct. 2875 (2014).

[106] *See* Hannah Wiseman, Evolving Energy Federalism, *supra* Chapter 6.

[107] *See, e.g.*, Jeremy Fox, *Federal Judge Dismisses Cape Wind Lawsuit*, BOSTON GLOBE, May 4, 2014, available at http://www.bostonglobe.com/metro/2014/05/03/district-court-judge-dismisses-suit-block-cape-wind-project/hiMjvDh22jsc10fqRPNV3N/story.html (reporting on local opposition to a large offshore wind project).

[108] *See* Vann, *supra* note 3 (discussing XL Pipeline controversy).

[109] *See, e.g.*, Jason Morris, *Texas Family Plagued with Ailments gets $3M in 1st-of-Its-Kind Fracking Judgment*, CNN, April 26, 2014, http://www.cnn.com/2014/04/25/justice/texas-family-wins-fracking-lawsuit/ (reporting on a successful private nuisance suit).

[110] Robinson Township v. Pennsylvania, ___ A.3d ___, 2013 WL 6687290 (Pa. 2013).

Colorado have concluded that local bans by the Cities of Fort Collins and Longmont are preempted by the Colorado Oil and Gas Conservation Act.[111] The Colorado controversy prompted a widely reported dispute between state and local interests leading up to the 2014 election, involving multiple competing ballot initiatives about local authority over fracking operations, culminating in a state task force to reconsider the extent of state and local authority over fracking and other locally sensitive energy extraction.[112]

The recent fracking controversies demonstrate an important disjuncture that the federalism debates often mask: the occasionally stark gap between state and local interests. Pure constitutional federalism presumes a false identity between state and municipal interests in vindicating localism values. The Constitution treats the state as the "local" branch of government, a historical conceit that is barely defensible in application to Wyoming (population: 576,412) or Delaware (land area: 2,489 square miles) and laughable in application to California (population: 37,253,956; land area: 163,695 square miles).[113] Effectively balancing localism values with other good governance values ultimately requires multiscalar governance with greater sensitivity to the distinction between state and local interests than is enabled by the more simplistic models of dual federalism and even cooperative federalism.[114]

More specifically, federalism tension arises in the fracking disputes between values of localism, centralized authority at both the state and federal level, and checks on sovereign authority. Fracking, wind farm, and pipeline controversies implicate core localism values regarding a community's right to self-determine local land uses and economic opportunities, with different municipalities reaching different conclusions about the kinds of communities they want to live in. Yet they also implicate competing values of centralized state and/or federal authority to protect larger scale public interests in stable access to affordable supply, environmentally sustainable production, or transmission safety. In addition, the virtually unlimited ability of most states to preempt or control conflicting municipal choices—vastly more powerful than the ability of the federal government to control the states—raises troubling questions about the protection of checks and balances between local and centralized power within states, a problem that is constitutionally invisible in the general federalism discourse.

B. Environmental Federalism and the Supreme Court. With such embedded tension at play, environmental cases are often among the most contentious on the docket. Judicial federalism analyses in environmental conflicts often fracture into multiple opinions, revealing greater theoretical instability than other areas of the Supreme Court's federalism jurisprudence. However, they are valuable to the overall

[111] Colorado Oil & Gas Assn. v. City of Fort Collins, ___P.3d ___, 2014 (case number 13CV31385, Larimer County District Court, Aug. 7, 2014). Two weeks earlier, on July 24, 2014, the Boulder County District Court held the City of Longmont's hydraulic fracturing ban was similarly preempted.

[112] Bradley Olson and Jennifer Oldham, *Colorado Fracking Opponents Losing Local Control Fight*, BLOOMBERG, Aug. 4, 2014, http://www.bloomberg.com/news/2014-08-04/colorado-governor-strikes-deal-seen-avoiding-fracking-curbs.html (reporting on ballot initiatives and a new state task force in Colorado).

[113] U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2010-July 1, 2012*, https://www.census.gov/popest/data/state/totals/2012/tables/NST-EST2012-01.xls+&cd=2&hl=en&ct=clnk&gl=us (providing state population statistics); U.S. Census Bureau, *State Area Measurements and Internal Point Coordinates*, available at https://www.census.gov/geo/reference/state-area.html (providing state area measurements).

[114] *See, e.g.*, Gerken, Osofsky, Resnik, and Davidson sources cited *supra* note 37.

study of American federalism for exactly this reason—and especially so because they leave such a clear paper trail, providing unparalleled windows into individual justices' efforts to grapple with the underlying tensions. Contrasting judicial analyses prioritize competing values differently, revealing federalism's fault lines in ways that mainstream economic regulation rarely does.[115] Famous environmental decisions invalidating state-led efforts to cope with radioactive waste,[116] limiting federal authority over intrastate wetlands,[117] and even allowing a state to force more thoughtful federal climate governance[118] all highlight environmental federalism's tug of war within. They also suggest weaknesses in the Court's preferred theoretical tools for managing jurisdictional overlap within a fuller conception of federalism.[119]

(1) *New York vs. United States* and Radioactive Waste Management. *New York v. United States*, the controversial environmental case that inaugurated the Rehnquist Court's New Federalism revival of dual federalism ideals, offers a vivid example of federalism values in conflict.[120] In *New York*, the Court invalidated key parts of the Low Level Radioactive Waste Policy Act, the statutory product of state-led efforts to more safely and equitably manage mounting streams of nuclear waste.[121] With few proper disposal facilities, hazardous waste was being stored without adequate safety precautions or shipped thousands of miles to the few states with open disposal sites.[122] Proposed to Congress by the National Governors Association, the Act required all states to share equitably in the burden of waste management by rotating responsibility within regional interstate compacts.[123] New York initially advocated for the Act, but later challenged it when it failed to identify a local disposal site.[124] When the majority agreed that the Act's enforcement provisions coerced state action in violation of the Tenth Amendment, it dismantled decades of negotiations between state and federal actors to resolve a critical public safety issue that, as a result, remains largely unresolved today.[125]

New York remains among the most famous federalism decisions of the twentieth century, setting forth the anti-commandeering doctrine that became a regular basis on which to challenge other programs of cooperative federalism (though usually unsuccessfully).[126] It also showcases many of the features that position environmental law as such a powerful federalism exemplar. Safe and equitable waste disposal draws on simultaneously strong local and national regulatory interests, requiring state land use authority to site local disposal facilities and national authority over interstate commerce and spillover harm. Siting a toxic waste dump implicates core aspects of local governance, including land use planning that protects

[115] *See* RYAN, TUG OF WAR, *supra* note 10, at 145-46.
[116] New York v. United States, 505 U.S. 144 (1992).
[117] Rapanos v. United States, 547 U.S. 715, 739 (2006).
[118] Massachusetts v. E.P.A., 549 U.S. 497 (2007).
[119] *See* RYAN, TUG OF WAR, *supra* note 10, at 7-17, 30-33.
[120] 505 U.S. 144 (1992).
[121] *Id.* at 187-88.
[122] *See also* RYAN, TUG OF WAR, *supra* note 10, at 215-30.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 215-41 (discussing the evolution of the Low Level Radioactive Waste Policy Act partially invalidated in *New York* and the chaos that ensued after the decision). *See also* Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 COLORADO L. REV. 1 (2010) (same).
[126] 505 U.S. at 187-88. *See also* RYAN, TUG OF WAR, *supra* note 10, at 199 n. 35 (reporting more than 70 such challenges filed in the first fourteen years after *New York* was decided.)

public safety and empowers citizens to create the kinds of communities they want to live in. (Indeed, New York State challenged the law it had once supported precisely because it could not find a municipality willing to host a disposal site.) Yet the problem also implicates critical aspects of national governance, including centralized authority to impose uniform obligations when needed to resolve collective action problems among the states. In this case, the states voluntarily sacrificed some local autonomy when they partnered with Congress to create the intergovernmental synergy that they believed was necessary to solve an ominous environmental problem they had failed to manage on their own.

The opposing arguments of the justices themselves provide the best evidence of the intense competition among underlying federalism values. Justice O'Connor's majority opinion was driven by explicit concerns over accountability and checks on sovereign authority. She argued that the intergovernmental partnership impermissibly compromised accountability, openly worrying that voters might not understand whether to hold state or federal representatives accountable for the results.[127] She also appealed to the importance of checks and balances in maintaining that state consent to the initial partnership was immaterial, because a state's sovereign authority against federal incursion was an inalienable right of its citizens that the state cannot waive.[128] Justice White vociferously opposed the majority's analysis, focusing on values of local autonomy, central authority, and problem-solving synergy. He would have upheld the law in affirmation of local autonomy, respecting the state's ability to bind itself to a regulatory promise, and of the central authority needed to give the interstate agreement binding legal force.[129] His opinion further stressed the importance of regulatory synergy between local capacity (to site waste disposal facilities) and national capacity (to prevent free-riders) in resolving the hazardous waste crisis.[130]

(2) *Rapanos v. United States* and Water Pollution. Since then, the Court has continued to issue divisive environmental decisions, several suggesting that federal regulation may be approaching the limits of federal authority under the Commerce Clause.[131] In the most recent, *Rapanos v. United States*, a private landowner successfully challenged the reach of federal Clean Water Act authority over certain

[127] 505 U.S. at 168.

[128] 505 U.S. at 180-82 ("How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment? The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'). *See also* RYAN, TUG OF WAR, *supra* note 10, at 231-41, and Ryan, *supra* note 125, 39-64 (critiquing this analysis).

[129] *Id.* at 196-97 (White, J., concurring and dissenting) (arguing that "these statutes are best understood as the products of collective state action, rather than as impositions placed on States by the Federal Government. [New York clearly signified] assent to the agreement achieved among the States as codified in these laws…. As it was undertaking these initial steps to honor the interstate compromise embodied in the 1985 Act, New York continued to take full advantage of the import concession made by the sited States, by exporting its low-level radioactive waste for the full 7-year extension period provided in the 1985 Act. By gaining these benefits and complying with certain of the Act's 1985 deadlines, therefore, New York fairly evidenced its acceptance of the federal-state arrangements").

[130] *Id*. at 196-97.

[131] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), 531 U.S. 159, 173-74 (2001); Rapanos v. United States, 547 U.S. 715, 739 (2006).

intrastate wetlands, including those connected to navigable waters by manmade channels or separated by artificial berms.[132] The court's rationale for limiting federal jurisdiction was splintered among four opinions, none of which commanded a solid enough majority to issue a clear principle for state and federal regulators to follow. Justice Scalia's plurality opinion explicitly invoked dual federalism theory to limit federal assertions of jurisdiction over remote and altered wetlands,[133] while Justice Kennedy's concurring opinion focused on the need to scientifically establish a hydrological connection to navigable waters in each individual enforcement action.[134]

With its multiplicity of conflicting opinions and unclear mandate for future regulation, *Rapanos* may rank among the least helpful Supreme Court decisions of all time. The jurisdictional uncertainty left in is wake has substantially altered enforcement of the statute and arguably led to declining water quality nationwide.[135] A major investigation several years after *Rapanos* found that regulators had abandoned nearly 1,500 water pollution investigations because establishing jurisdiction was too difficult, time-consuming, or expensive.[136] Eight years later, as this book goes to press, federal agencies are attempting to promulgate new rules to replace those *Rapanos* invalidated,[137] but the process has been politically strained and fraught by uncertainty about what the Court will approve in the inevitable next round of litigation.[138] This uncertainty reflects the multiplicity of views on the Court to this point, which itself reflects the underlying turmoil among competing good governance values.

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[132] 547 U.S. 715, 739 (2006) (rejecting the federal agency's interpretation of the CWA for infringing on traditional state control over land and water use and pushing the limits of congressional commerce power).

[133] *Id.* at 737-38 (noting that "the Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary power over land and water use').

[134] *Id.* at 780-82 (Kennedy, J., concurring).

[135] *See, e.g.*, Mark Berman, Toledo's Water Ban and the Sensitivity of Our Water Systems, WASH. POST, Aug. 4, 2014, http://www.washingtonpost.com/news/post-nation/wp/2014/08/04/toledos-water-ban-and-the-sensitivity-of-our-drinking-systems/ (reporting on recent drinking water bans in major metropolitan areas across the nation as a result of harmful water pollution); Charles Duhigg, *Clean Water Laws Are Neglected, At a Cost in Suffering*, N.Y. TIMES, Sep. 12, 2009, http://www.nytimes.com/2009/09/13/us/13water.html?pagewanted=all&_r=0 (reporting on the results of an extensive review of water pollution records showing that "in recent years, violations of the Clean Water Act have risen steadily across the nation"); *Toxic Waters Project: A Series About the Worsening Pollution in American Waters, and Regulators' Response*, N.Y. TIMES, August 2009 - March, 2010, http://projects.nytimes.com/toxic-waters (a collection of reports on the subject).

[136] *See* Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Foiling EPA*, N.Y. TIMES, Feb. 28, 2010, at A1, http://www.nytimes.com/2010/03/01/us/01water.html?emc=eta (also noting indications by that EPA officials that they may be "unable to prosecute as many as half of the nation's largest known polluters because officials lack jurisdiction or because proving jurisdiction would be overwhelmingly difficult or time consuming"); Jeff Kinney, *Internal EPA Memo Finds Enforcement Decreased Following Rapanos Decision*, 39 Env't Rep. (BNA) 1392 (2008).

[137] EPA, *Definition of Waters of the United States Under the Clean Water Act*, March, 2014, available at http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act. A final rule is expected in 2015.

[138] *Cf.* Lawrence Liebesman, Elizabeth Lake, and Joanna Meldrum, *Obama Administration Releases Proposed Rule on "Waters of the United States,"* Holland & Knight, April 4, 2014, http://www.hklaw.com/publications/obama-administration-releases-proposed-rule-on-waters-of-the-united-states-04-04-2014/ (last visited Aug. 10, 2014) (extensive analysis of the proposed rule by an industry-side law firm warning that the rule "is unprecedented in its reach and scope," "has received broad praise from environmentalists," and that clients should engage policymakers to "lessen[] the impact on the regulated community."). *See also* Missouri Farm Bureau *("Let it Go" Parody)*, *supra* note 94 (urging members to fight the proposed rule).

Like the regulation of radioactive waste disposal, the environmental dilemma in *Rapanos* pits local interests in land use sovereignty against federal interests in protecting the nation's waterways and preventing the boundary-crossing harm of water pollution. Its various opinions are also marked by consideration of competing values, though because it is primarily a statutory interpretation case, they are featured less forthrightly than in the explicit federalism dialogues of *New York*. Still, Justice Scalia focused on localism and check-and-balance values in limiting the expansion of federal authority beyond the traditional boundary of navigability, while Justice Kennedy was willing to privilege central authority and problem-solving values when extended federal jurisdiction is proved necessary to achieve the statutory goal of preventing water pollution. Justice Kennedy acknowledges the tension explicitly, noting that "[t]he possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's [commitment to resolving water pollution]."[139] Dissenting arguments by Justices Stevens and Breyer pull in still different directions, favoring deference to federal interpretive authority on the need for a centralized response to resolve a clearly interjurisdictional problem.[140]

(3) *Massachusetts vs. EPA* and Climate Change. While not overtly a federalism decision, even the famous *Massachussets v. EPA* climate change decision speaks to the fractious relationship between state and federal authority in the realm of environmental law.[141] There, a sharply divided Court allowed the state standing to force EPA's reconsideration of regulating greenhouse gases under the Clean Air Act, on grounds that EPA's failure to adequately justify its inaction harmed state sovereign authority over threatened coastal lands.[142] Quoting Justice Oliver Wendell Holmes in an environmental federalism case of the previous century, Justice Stevens wrote for the majority that "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[143]

More than any other area of environmental law, climate governance intersects local, state, federal, and even international claims to regulatory authority and obligation where they are strongest. With greenhouse gases from all parts of the world mixing evenly in the upper atmosphere, it is the quintessential collective action problem in which centralized authority is necessary to police free-riders and prevent boundary-crossing harms. Yet human contributions to climate change spans virtually the entire range of human activity—from personal decisions about diet and transportation, to municipal building codes, to state energy policy, to federal tax incentives, to international treaty making. Some contributions to climate change are more easily regulated than others, and some modifications more easily encouraged, but as Bill Buzbee, Kirsten Engel, and Alice Kaswan argue in Part III, effective climate governance requires coordinated efforts at all levels.

Indeed, Justice Holmes' famous passage points to the grand dilemma for environmental federalism more generally. In a nutshell, it is that both the federal and state governments have regulatory

[139] 547 U.S. 715, at 783 (2006) (Kennedy, J., concurring).
[140] *Id.* at 788 (Stevens, J., dissenting); *id.* at 811 (Breyer, J., dissenting) (noting that his "view of the statute rests in part upon the nature of the problem").
[141] 549 U.S. 497 (2007).
[142] *Id.*
[143] *Id.* at 518-20 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

interests and obligations regarding their citizens' ability to enjoy a clean, safe, and productive environment for generations to come. Environmental problems like radioactive waste, water pollution, and climate change pair local land use problems with border-crossing public health and safety problems. Like the problems with which energy law grapples, they cannot be resolved without partnering elements of state-specific expertise and authority with corresponding elements of national capacity. And while constitutional federalism sees the issue only in terms of state and national governance, the challenges of multiscalar governance goes far deeper, extending into the productive possibilities for regulation at the local, regional, and international level as well, in various permutations and combinations.[144]

The grand project for federalism and multiscalar regulation more generally is to figure out how these different levels of government can best work together in realms of jurisdictional overlap. The following Part explores how environmental law has responded to the challenge.

IV. The Response of Environmental Governance

Having analyzed the rip tides of federalism that so complicate environmental law, the chapter now turns to the question of how environmental governance has risen to meet the challenge, reviewing specific adaptations within programs of environmental federalism to cope with jurisdictional overlap.

While the dilemmas of environmental federalism are divisive for reasons that run deep among the underlying values of good governance, they surface in the jurisdictional disputes that erupt regularly in environmental law. As discussed in Part II, zones of overlapping state and federal regulatory jurisdiction complicate the administration of federalism-sensitive governance in ways that earlier theories of federalism did not always comprehend.[145] As a theoretical matter, jurisdictional overlap is the formal result of the underlying conflicts within federalism-sensitive governance, where implicated values are sometimes best served by state and local regulation just as others are best served by national action. As a practical matter, jurisdictional overlap provides the framework within which different levels of government advocate for their distinct concerns and a platform for their coordinated response.

Nevertheless, contests for regulatory dominance within realms of jurisdictional overlap often lead to divisive federalism controversies, requiring sensitive response from environmental governance. Sometimes dilemmas arise because of the way environmental law wrestles with newly identified problems, such as climate change, where there is no historically settled answer to the question of where primary regulatory authority should be seated (contrasted with, say, land use planning, historically regarded as a local matter). Other times, the evidence increasingly reveals that even problems once presumed to be essentially "local" in nature—such as water allocation, waste disposal, and even land use planning—have important regional, national, or even international dimensions. At the same time, such seemingly "national" problems as energy policy, telecommunications, and even international relations are increasingly bound up with the exercise of state authority over local land use and natural resource management. The ideal seat of regulatory authority over these matters is often hotly contested.

[144] *See* sources cited *supra* note 30.
[145] *See supra*, text accompanying notes 65-75.

Environmental law has contended with jurisdictional controversy by experimenting with the available tools of cooperative federalism, exploring variations that might enable the right balance of flexibility, durability, and responsiveness to address each particular constellation of concerns. This Part explores how environmental law deals with the challenges of jurisdictional overlap that are present in all federalism dilemmas but endemic in environmental governance. After reviewing the classic challenges of jurisdictional separation and unstructured overlap, it reveals how environmental federalism has adapted contrasting structures of intergovernmental coordination, including models of coordinated capacity, federally supported state implementation, conditional preemption, and shared and general permitting programs.

A. The Problem of Jurisdictional Overlap. Environmental law is hardly unique among realms of governance that include a zone of concurrent state and federal regulatory jurisdiction, but it does so in an especially palpable way. Jurisdictional overlap arises in regulatory contexts where both the federal and state governments have legitimate regulatory interests or obligations simultaneously.[146] Federal interests are created by constitutional delegations of federal responsibility, while state interests arise from the reservoir of police power that is constitutionally reserved to the states.[147] However, distinct state and federal regulatory mandates are often triggered by related or interdependent areas of law, creating an "interjurisdictional gray area" between clearer areas of primarily state or federal prerogative.[148]

There are, to be sure, areas of relative jurisdictional clarity within American dual sovereignty. The Constitution plainly enumerates some powers specifically to the federal government, such as the powers to declare war and manage foreign relations, while explicitly reserving others to the states, such as the authority to manage federal elections.[149] But even the states' exclusive constitutional obligation to manage elections collides with exclusive federal obligations to interpret the voting rights of citizens casting ballots in those elections.[150] And increasingly, states are engaging in regulatory activities with ramifications for the nation's conduct of international relations,[151] some of which the federal government has tolerated (including several international subnational climate governance partnerships)[152] and some of which it has not.[153]

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[146] RYAN, TUG OF WAR, *supra* note 10, at 145-80.

[147] U.S. CONST. amend. X.; *see also* RYAN, TUG OF WAR, *supra* note 10, at 1-33 (discussing indeterminacy among the details of constitutional delegations).

[148] *See* RYAN, TUG OF WAR, *supra* note 10, at 145-80; *see also* Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007) (providing the initial impetus for the fuller theoretical exposition in the book, TUG OF WAR, *supra* note 10).

[149] U.S. CONST. art. I, sec. 8 (empowering Congress to declare war); art. I, sec. 4 (delegating responsibility for the mechanics of congressional elections to state legislatures).

[150] U.S. CONST. amend. XIV (promising the equal protection of the laws); amend. XV (promising that voting rights will not be abridged on account of race); amend. XIX (promising that voting rights will not be abridged on account of sex). *See also* Bush v. Gore, 531 U.S. 98 (2000) (overturning state electoral decisions in a presidential election on federal equal protection grounds, though in a decision famously confining its reasoning to its facts).

[151] *See e.g.*, Gerken, Osofsky, Resnik, and Davidson sources cited *supra* note 37.

[152] In the West, California has joined four Canadian provinces to form the Western Climate Initiative, a carbon trading partnership. See, e.g., Western Climate Initiative, http://www.westernclimateinitiative.org/milestones (last visited Aug. 10, 2014). In the Midwest, six states and one Canadian province formed the Midwest Greenhouse Gas Reduction Accord, pledging to establish a multi-sector cap-and-trade system to meet regional greenhouse gas reduction targets. Midwestern Greenhouse Gas Reduction Accord, http://www.c2es.org/us-states-regions/regional-

Even seemingly simple delegations of exclusive authority can reveal jurisdictional overlap in application. For example, bankruptcy law is explicitly delegated to the federal government, but its actual administration relies on legal definitions of property provided by state law.[154] Although the federal commerce power implies a navigational servitude across all navigable waters in the United States,[155] the submerged lands beneath many of them are considered property of the states, held in trust for their citizens, under the public trust and equal footing doctrines.[156] With so many avenues for regulatory overlap, the interjurisdictional gray area runs deep in American law, from environmental law to criminal law to national security to financial services regulation and beyond.[157]

Still, the gray area is especially visceral in the environmental context. As noted in Part III, jurisdictional overlap is common here because so many environmental problems partner the need for (1) local land use regulation, to control the actual source of the harm at issue, with (2) federal authority, often under the Commerce Clause, to prevent locally uncontrolled harm from spilling over into neighboring jurisdictions that lack direct regulatory authority over the source of the harm.[158] Consider the prevention of water pollution. The best way of preventing harmful stream sedimentation by a local construction project is probably through the municipal construction permitting process (as EPA itself recognizes in its Clean Water Act regulations for preventing stormwater pollution by constructing sites).[159] But if the state or its local subdivisions fail to regulate that pollution, it can cause problems for downstream communities in other states that lack the means to control out-of-state activity. Federal authority is needed to effectuate the ability of these others states to perform their traditional police power obligations to protect the health and safety of their own citizens.

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climate-initiatives/mggra (last visited Aug. 10, 2014). However, although a Model Rule was produced in 2010 and the accord formally remains in effect, "the participating states are no longer pursuing it." *Id.*

[153] For example, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000), the Supreme Court invalidated a Massachusetts law that prohibited state and local actors from purchasing goods or services from companies doing business with the nation of Burma, also known as Myanmar, on grounds that the state law undermined the President's ability to conduct diplomacy. Similarly, the Court invoked the dormant foreign affairs power to invalidate a California law mandating public disclosure of instate insurance companies' holocaust policies, which had been enacted so that consumers could patronize companies that had rectified Nazi-era practices (when many had failed to honor the policies of Jewish holders). Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 417-20 (2003).

[154] U.S. CONST. art. I, § 8 (delegating bankruptcy administration to the federal government); Felicia Anne Nadborny, Note, *"Leap of Faith" into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate*, 13 AM. BANKR. INST. L. REV. 839, 889 (2005) (discussing the role of state law).

[155] *See* Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954) (describing how the Commerce Clause creates a dominant servitude to regulate navigation).

[156] *See, e.g.*, Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387 (1892) (affirming application of the common-law public trust doctrine to state ownership of the submerged lands beneath the navigable waters of the Great Lakes); PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012) (recognizing the general rule of state ownership of submerged lands under the public trust doctrine).

[157] *See* RYAN, TUG OF WAR, *supra* note 10, at 145-80.

[158] *See supra* text accompanying notes 89-94.

[159] OFFICE OF WATER, EPA, STORMWATER PHASE II FINAL RULE: FACT SHEET 2.1, at 2 (2005), http://www.epa.gov.npdes/pubs/fact2-1.pdf (discussing the Phase II Rule); OFFICE OF WATER, EPA, STORMWATER PHASE II FINAL RULE: FACT SHEET 2.9, at 3 (2005), http://www.epa/gov/npdes/pubs/fact2-9.pdf (discussing the conferral of municipal discretion under the general permit system); Environmental Defense Center v. EPA, 344 F.3d 832, 845-46 & n.20 (9th Cir. 2003) (discussing the Phase II Rule's regulation of construction site sedimentation).

With so many independent but overlapping sovereign interests, uncertainty can arise over which sovereign should be able to make which regulatory choices—the "who decides?" jurisdictional question at the heart of federalism dilemmas.[160] This uncertainty breeds additional controversy within federalism-sensitive governance that is already implicitly struggling with the tension among conflicting federalism values. Notably, jurisdictional uncertainty can arise both when we manage the problem by attempting to separate regulatory authority along bright jurisdictional lines, and also when we explicitly recognize overlapping local and national jurisdiction. Federalism dilemmas are thus marked by two different kinds of uncertainty: what happens after we draw a jurisdictional line, and what happens when we don't.[161]

In contexts of true overlap, the uncertainty resulting from efforts at jurisdictional line-drawing creates the more obvious problem. For example, as Blake Hudson describes in Chapter 4, managing forest resources at the local level provided short-term order but long-term difficulties as spillover issues eventually transcend local jurisdictional boundaries. The uncertainty that results from a decision not to draw jurisdictional lines is perhaps more the interesting problem, creating different challenges and opportunities for interjurisdictional governance. For example, the authors in Part III provide sophisticated analyses of the different challenges and opportunities of multiscalar climate governance. Meanwhile, the classical model of cooperative federalism splits some of these differences, eschewing both strict jurisdictional lines and unstructured regulatory overlap. The following discussion visits these three separate approaches to managing jurisdictional overlap.

(1) Untangling Jurisdictional Separation. Federalism uncertainty often arises about the actual boundary line between state and federal authority, in contexts where a bright line of separation seems important. For example, in *Arizona v. United States*, the Supreme Court recently reviewed state immigration legislation that, among other provisions, required immigrants to carry documentation of their immigration status at all times and punished those who hire or shelter the undocumented.[162] Distinguishing legitimate local regulation from exclusively federal authority, the Court invalidated all provisions except one (allowing state police to investigate immigration status under specified conditions).[163]

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[160] *See, e.g.*, WILLIAM BUZBEE, ED., PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (2011).

[161] *See* Ryan, *The Once and Future Challenges of American Federalism*, *supra* note 14, at Part 2 (discussing the two kinds of uncertainty).

[162] 132 S. Ct. at 2497-98. Arizona argued that the law was a necessary assertion of its police power to protect local communities, while the Department of Justice argued that the law exceeded the state's legitimate role, usurped federal authority to regulate immigration, and critically undermined U.S. foreign policy objectives. *Id.;* Press Release, Dep't of Justice Office of Pub. Affairs, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law (July 6, 2010), http://www.justice.gov/opa/pr/2010/July/10-opa-776.html.

[163] Arizona v. United States, 132 S. Ct. at 2510 (invalidating provisions allowing state police to arrest individuals on suspicion of undocumented status and criminalizing the presence and work of undocumented immigrants in the state, while upholding a provision enabling state police to investigate immigration status under certain circumstances). *See also* United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012) (granting in part and denying in part a preliminary injunction enjoining enforcement of the state's new immigration law); Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250, 1267 (2012) (holding that sections of the Georgia immigration law were preempted by federal law); Stella B. Elias, *The New Immigration Federalism*, 74 Ohio St. L.J. 703 (2013) (discussing federalism issues in immigration law).

Environmental law has struggled with issues of jurisdictional separation since its inception. For example, as *Rapanos* demonstrates, line-drawing uncertainty has plagued decades of rulemaking about the boundary between state and federal reach over wetlands regulation relating to water pollution control.[164] The location of that boundary will determine when a landowner must seek permission to fill wetlands that are not directly subject to the Clean Water Act, but which may bear a relationship to pollution in other waterways that are subject. After the Solid Waste Agency of Cook County, IL, successfully sued to invalidate federal authority over hydrologically isolated wetlands,[165] the issue of what would constitute a jurisdictional connection embroiled the Supreme Court in the *Rapanos* decision that failed to produce clear regulatory direction despite four separate opinions.[166] As noted above, years of regulatory turmoil that have followed, in which enforcement efforts have plummeted and water quality has degraded.[167] Federal agencies are accepting comment on a proposed rule to clarify jurisdiction after the two wetlands cases, but whatever emerges will almost certainly invite further legal challenge.[168]

(2) Untangling Jurisdictional Collaboration. Other federalism-sensitive contexts are more tolerant of concurrent jurisdiction and less committed to jurisdictional line-drawing, demonstrated by broadly overlapping state and federal roles in criminal law,[169] or even cooperative state-federal management of the national highway system.[170] But environmental law provides the most interesting examples, from realms in which state and federal actors regulate separately in related legal territory (such as energy law, discussed above in Part III), to complex programs of cooperative federalism that require deference to both state and federal concerns in different circumstances (discussed further below in Part IV). In areas where concurrent jurisdiction is the norm, less energy is spent resolving the proper spheres of state and federal authority on either side of a bright-line boundary, because no such boundary exists. However, uncertainty here arises over whose judgment should prevail when simultaneously operating state and federal choices conflict. When both have a role to play, the federalism question shifts from the relatively simpler *"who gets to decide?"* to the vexing permutation *"whose decision trumps?"* Should national objectives preempt, or should local priorities prevail?[171]

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[164] *See* RYAN, TUG OF WAR, *supra* note 10, at 151-53, 160-62 (discussing the interjurisdictional problem of water pollution and recent controversy in wetlands regulation).

[165] Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers, 531 U.S. 159, 173-74 (2001) (limiting federal authority over "hydrologically isolated" wetlands).

[166] Rapanos v. United States, 547 U.S. 715, 739 (2006) (casting further doubt on the reach of federal regulatory authority over wetlands without direct surface connections to navigable waters). Strictly speaking, *Solid Waste Agency* and *Rapanos* were both statutory decisions interpreting the Clean Water Act. However, the Justices and their observers clearly understood their task of statutory interpretation as taking place in the looming shadow of ongoing debate over the reach of federal Commerce Clause authority.

[167] *See supra* notes 136-138 and accompanying text.

[168] *Cf.* Liebesman, et al, *supra* note 138.

[169] *See* Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 104–06 (2006); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1553 (2002).

[170] Federal-Aid Highway Act of 1956, Pub. L. 84-627, 70 Stat. 374 (June 29, 1956) (creating a National Highway System jointly administered by the states and federal government).

[171] *E.g.*, Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 172-73 (2005) (questioning increasing federalization of environmental regulation formerly within state prerogative); Logan, *supra* note 169, at 104–06 (questioning the increasing federalization of criminal law).

The Constitution's Supremacy Clause affirms that the legitimate exercise of federal authority can always trump conflicting state law,[172] but federal law often leaves purposeful space for local participation even when Congress could theoretically preempt an entire regulatory field—especially in environmental law.[173] Notwithstanding enumerated federal authority over commerce and the channels of interstate commerce, international treaties and foreign relations, federal property, military readiness, national security, and others,[174] Congress usually leaves space for local participation to engage regulatory expertise or capacity that local governments have, but the federal government does not.[175] For that reason, the more difficult preemption question in these contexts is not whether the federal government *could* preempt, but whether (and to what degree) it *should*.[176]

Ongoing dilemmas about federal scope and restraint in environmental law—from wetlands to forests to air pollution regulation—demonstrate the force with which federalism and preemption controversies preoccupy American governance.[177] In some realms of open jurisdictional overlap, such as education[178] and health care law,[179] a significant federal presence is matched by trumping local authority, usually because the federal presence has been purchased with the federal spending power and is

[172] U.S. CONST. art. VI, cl. 2.

[173] *See* RYAN, TUG OF WAR, *supra* note 10, at 145-180, 271-314 (reviewing regulatory realms in which the federal government invites state involvement even though it could legitimately preempt the field, including many fields of environmental law).

[174] U.S. CONST. art. I, cl. 8 (enumerating most of Congress's constitutionally delegated authority).

[175] *See* RYAN, TUG OF WAR, *supra* note 10, at 326-38 (discussing reasons federal actors cede authority to local actors); Ryan, *Negotiating Federalism*, *supra* note 30 (providing additional source information for these conclusions).

[176] *See* RYAN, TUG OF WAR, *supra* note 10, at 339-67; *cf.* William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 NYU L Rev. 1547 (2007) (discussing the advantages of narrowly tailored "floor preemption", which enables state discretion to exceed a federal standard, over the alternative "unitary federal choice" or "ceiling preemption," which does not); Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009) (discussing the advantages of declining to fully preempt state discretion within a national program of air pollution prevention).

[177] *See* RYAN, TUG OF WAR, *supra* note 10, at 132-41.

[178] *See, e.g.*, Benton Martin, *An Increased Role for the Department of Education in Addressing Federalism Concerns*, 2012 BYU Educ. & L.J. 79, 81-84 (2012) (discussing the role of state and federal actors over the history of American education law). Education federalism issues have recently erupted over the Common Core, a set of curricular goals created by a partnership of states that were initially embraced by nearly every state. However, some states are now withdrawing from the initiative amid criticism that federal support for the standards represent federal overreach into a realm of state sovereignty. *See, e.g.*, Nancy M. Jackson, *Core Withdrawal? Some States Seem to be Reconsidering their Common Core Commitments*, Scholastic Administrator, Summer 2013, available at http://www.scholastic.com/browse/article.jsp?id=3757959 (last visited August 12, 2014) (listing states that have recently withdrawn from the common core standards); Lyndsey Layton, *How Bill Gates Pulled Off the Swift Common Core Revolution*, WASH. POST, June 7, 2014, available at http://www.washingtonpost.com/politics/how-bill-gates-pulled-off-the-swift-common-core-revolution/2014/06/07/a830e32e-ec34-11e3-9f5c-9075d5508f0a_story.html (noting emerging federalism controversy over the Common Core standards).

[179] *See, e.g.*, Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of National Federation of Independent Business v. Sebelius*, 46 Loy. L.A. L. Rev 541, 571 (2013) (describing federalism conflicts in healthcare law and the Affordable Care Act); Elizabeth W. Lenoard, *The Rhetoric Hits the Road: State Challenges to the Affordable Care Act Implementation*, 46 U. Rich. L. Rev. 781, (2012) (discussing the strategies some states have taken to combat implementation of the Affordable Care Act, including drafting state legislation).

untethered to independently enumerated federal power.[180] In others, federal priorities routinely trump local concerns, as demonstrated by federal finance law under the Commerce Clause,[181] and a spate of Supreme Court cases aggressively preempting state health and safety laws under competing federal regulations.[182]

Yet environmental law represents a substantial realm of overlap where the scales of state and federal influence go back and forth. Sometimes federal environmental law trumps all competing considerations, perhaps demonstrated by the force with which the Endangered Species Act is usually enforced against state actors as strictly as it is everyone else.[183] Often, environmental law resolves conflicts among independently operating state and federal regulators by allowing state judgment to trump federal judgment when state law is more protective, but federal judgment to trump state judgment when state law is less protective.[184] This "floor preemption" regime, adopted by most federal environmental laws, creates a federal "floor" of environmental protection that states may exceed but not undermine.[185]

In other legal regimes, states hold a privileged position in environmental decision-making that goes beyond mere cooperation, and despite available federal supremacy. From the perspective of environmental federalism, these are among the most interesting. For example, as Bill Andreen notes in Chapter 2, states play an important role in allocating water from interstate rivers,[186] notwithstanding clear Supreme Court precedent affirming federal supremacy in the allocation of interstate water[187] and requiring congressional approval for state compacts that empower state decision-making at the expense of federal prerogative.[188] In 2005, eight states negotiated the Great Lakes-St. Lawrence River Basin Compact to prevent the diversion of Great Lakes waters out of the watershed.[189] Congress approved the agreement, as it has for many similar state-led water compacts, even though it weakens federal

[180] *See* Erin Ryan, *The Spending Power and Environmental Law After* Sebelius, 85 COLORADO L. REV. 1003 (2014) (discussing the difficulties of Medicaid regulation because health law is beyond Congress's enumerated powers, reachable in federal law only through the spending power).

[181] *See, e.g.*, Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. Banking Inst. 221 (2000) (discussing federal banking and finance law). *See also See* RYAN, TUG OF WAR, *supra* note 10, at 284-85 (discussing jurisdictional overlap despite federal supremacy in the field of financial services regulation).

[182] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 530, 550–51 (2001) (holding that state tobacco advertising regulations were preempted by the Federal Cigarette Labeling and Advertising Act); Geier v. American Honda Motor Co., 529 U.S. 861, 863-64 (2000) (holding that a common law defective design claim for failure to equip an automobile with a driver-side airbag was preempted by a Federal Motor Vehicle Safety Standard); *but see* Wyeth v. Levine, 129 S. Ct. 1187, 1194-98 (2009) (declining to overrule *Geier* but creating confusing precedent going forward by upholding a common law failure-to-warn claim based on a dangerous method of injecting a pharmaceutical that had satisfied FDA labeling regulations). *See also* BUZBEE, *supra* note 160 (engaging the preemption issue from multiple angles); CHEMERINSKY, *supra* note 68, at 225-37 (discussing conflicts between the Supreme Court's preemption jurisprudence and the principles of federalism).

[183] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§1531-1544, § 1538 (2012)).

[184] *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007) (comparing floor-preemption and ceiling-preemption alternatives).

[185] *Id.*

[186] DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 10 (2009).

[187] Sporhase v. Nebraska *ex rel*. Douglas, 458 U.S. 941, 953-54, 959-60 (1982).

[188] TARLOCK, *supra* note 186, at § 10-24 (2009).

[189] *Id.* at § 10-32 (2009).

prerogative in limiting the federal government's ability to move water from the Great Lakes basin to the high plains or arid west.[190] In interpreting terms of the Yellowstone River Compact that require consent by Montana, North Dakota, and Wyoming for any water diversions outside the water basin,[191] the Ninth Circuit has held that congressional consent immunizes water compacts that encroach on the federal commerce power this way.[192] In allowing these compacts, federal courts and legislators have ceded federal supremacy to the states on the theory that state and local actors possess superior regulatory capacity for administering this scarce natural resource.

As Ann Carlson describes in Chapter 10, states hold a similarly privileged position in managing coastal resources under the Coastal Zone Management Act, which enables states to veto federal permitting decisions that conflict with state priorities in an approved Coastal Zone Management Plan.[193] Under a limited waiver of federal supremacy known as the "consistency provision," federal actors must seek state permission for any actions that could impact coastal resources protected under a state's coastal management plan, a regulatory program previously negotiated between state and federal actors.[194] States may review not only those activities conducted by or on behalf of a federal agency, but also activities that require a federal license or permit, including activities conducted pursuant to an Outer Continental Shelf Lands Act exploration plan, and any federally-funded activities that may impact the coastal zone.[195] The Act also provides a mechanism for resolving potential conflicts between state and federal priorities, fostering early consultation and negotiated coordination.[196]

Indeed, as I have described in previous work, the Consistency Provision represents the final stage in the Act's larger project of intergovernmentally negotiated coastal management policy.[197] Congress initiates the first stage of bargaining under its spending power, offering financial and technical assistance for voluntary state participation. In the second stage of bargaining, state and federal agencies haggle over the terms of a state's proposed coastal management plan, negotiating the provisions that each side most prefers to see in the final plan. Federal leverage climaxes here, because the federal agency maintains final approval authority and holds the ultimate carrot of federal funding. However, federal leverage is tempered by the fact that only the state possesses the local land use planning authority and governance capacity needed to implement effective management. In the final stage, the consistency principle shifts the negotiating leverage further toward the states. Once the federal government approves the state plan, it

[190] *Id.* at § 10-32 (2009).

[191] YELLOWSTONE RIVER COMPACT COMM'N, http://yrcc.usgs.gov/ (last visited Nov. 25, 2010).

[192] Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F. 2d 568, 570 (9th Cir. 1985).

[193] Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-1466 (2012)).

[194] 16 U.S.C. § 1456(c); NOAA, *Basic Statutory Tenets of Federal consistency*, 71 Fed. Reg. 789-90.

[195] *Id.* States may disapprove activities that "affect any land or water use or natural resource of the coastal zone" unless they are "consistent to the maximum extent practicable" with accepted state management programs. 16 U.S.C. § 1456(c)(1)(A). A federal agency may override objection only if it demonstrates that its activity is consistent with the approved plan to the maximum extent practicable. CZMA §307(c)(1)-(2).

[196] CZMA section 307 (16 U.S.C. §1456(h)(2)). *See also* Florida Department of Environmental Protection, *Coastal Zone Management Act*, http://www.dep.state.fl.us/secretary/oip/czma.htm.

[197] For more detail on intergovernmental power-sharing and negotiation under the Coastal Zone Management Act and other areas of law, *see* Ryan, *The Once and Future Challenges of American Federalism*, *supra* note 14, at Part 3.1; Ryan, *Negotiating Federalism*, *supra* note 30, at 59-62; RYAN, TUG OF WAR, *supra* note 10, at 302-05.

effectively agrees *itself* to be bound by the state plan going forward, ensuring that all federal activities directly or indirectly affecting the coastal zone will be consistent with the approved state plan.

These various platforms for state-federal negotiation set the stage for ongoing state-federal dialogue, exchange, and innovation in regulatory decision-making, openly defying the assumptions of zero-sum federalism. The three stages of bargaining "effectively engage state and federal actors in an ongoing, *ad infinitum* dialogue about coastal management, informed by both local and national insight in exactly the way that federalism intends:"[198]

> The CZMA enables broadly negotiated local initiative within a framework of federal law that ensures fidelity to both local and national concerns. It provides a useful model for interjurisdictional governance matching broad national goals with policies best implemented at the local level, especially where local land use authority or "place" is a necessarily salient feature of the regulatory problem.[199]

Hydroelectric licensing decisions by the Federal Energy Regulatory Commission similarly include negotiations between state and federal actors over permission to violate the otherwise applicable federal navigational servitude,[200] because the Clean Water Act's Section 401 certification process gives states a regulatory hook over an otherwise federal process.[201] These programs of environmental federalism represent unusual cases in which the states can hold legally trumping authority, creating rare instances in which the federal government must negotiate for state approval when regulatory policies diverge.

(3) Classical Cooperative Federalism. As the previous sections have shown, the challenges of jurisdictional overlap can alternatively inspire jurisdictional separation and less structured, simultaneous regulation. However, most environmental governance falls between the extremes of strict separation and unstructured overlap. Instead, it generally leans toward state-federal regulatory collaboration, often through programs of cooperative federalism in which the roles of state and federal actors are formally prescribed as asymmetrical complements.

Evolving climate and energy governance offers great opportunity to craft new models of dynamic intergovernmental regulation, but even the most established environmental laws—including the Clean Air[202] and Water Acts,[203] the Safe Drinking Water Act,[204] the Resource Conservation and Recovery

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[198] Ryan, *The Once and Future Challenges of American Federalism*, *supra* note 14, at Part 3.1.

[199] *Id.*

[200] *See* Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954) (describing how the Commerce Clause creates a dominant servitude to regulate navigation).

[201] 33 U.S.C. § 1330 (2006); *see also* GEORGE COGGINS & ROBERT GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 37:41 (2d ed. 2009) (noting that the state certification process "represents the states' best opportunity to significantly affect the licensing process for hydroelectric facilities on waters within federal jurisdictions"). The major federal licenses and permits subject to Section 401 are (1) FERC hydropower licenses, 16 U.S.C. § 797(e) (2006) (authorizing FERC to license hydroelectric facilities); (2) Rivers and Harbors Act Section 9 and 10 permits, 33 U.S.C. §§ 401, 403 (2006) (regulating construction in navigable waters); and (3) CWA Sections 402 and 404 permits in the few states that have not assumed NPDES permitting authority, 33 U.S.C. § 1342 (outlining the "National Pollutant Discharge Elimination System" permitting regime); *see also* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOLOGY L.Q. 201, 219–20 (1996).

[202] Clean Air Act, Pub. L. 88-206, 77 Stat. 392 (1963), codified as amended at 42 U.S.C. §§ 7401 et seq. (2011).

Act,[205] the Surface Mining Control and Reclamation Act,[206] the Superfund Act,[207] the Emergency Planning and Community Right-to-Know Act,[208] and even the Endangered Species Act[209]—all incorporate programs of cooperative federalism in which state and federal actors simultaneously operate within a single regulatory organism.[210] Rather than merely colliding over separate efforts that occasionally overlap, these traditional programs of cooperative federalism all purposely engage state and federal actors in an ongoing series of consultation, negotiation, and compromise.[211] The following section explores in more detail how the more traditional models of environmental federalism allocate state and federal authority in realms of jurisdictional overlap.

B. The Tools of Cooperative Environmental Federalism. Interjurisdictional environmental problems cannot be managed exclusively at the local or national level, because they require governance capacity from the full spectrum of governance scale.[212] For that reason, cooperative environmental federalism models strive to partner the needed elements that tend to be superior at the federal level with elements that are usually superior at the state and local level, ideally through processes that empower each level to perform to their strengths.

Federally superior governance capacity often includes, inter alia: scientific, technical, and financial resources; the legal authority to enforce nationally uniform standards; the ability to appropriately scale regulation for large-scale public commons; and the ability to police spillover effects from one autonomously acting state to another. Elements of governance capacity that tend to be superior at the state and local level often include: detailed expertise about local environmental, geographic, economic, demographic, political, and cultural factors that bear on the needs and workability of regulatory proposals; locally situated enforcement personnel; the legal authority to regulate local land use and engage in comprehensive land use planning; and other police power-based legal authority to regulate beyond the more limited set of federally enumerated powers. (Of course, these generalizations bear exceptions.)

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[203] Clean Water Act, Pub. L. 92-500, 86 Stat. 816 (1972), 33 U.S.C. §§ 1251 et seq. (2011).

[204] Safe Drinking Water Act, Pub. L. 93-523, 88 Stat. 1660 (1974), 42 U.S.C. § 300f et seq. (1996)

[205] Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795, codified as part of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901 et seq. (2006).

[206] Surface Mining Control and Reclamation Act, Pub. L. 95-87, 91 Stat. 445 (1977), codified as amended at 30 U.S.C. §§ 1201 et seq. (2006).

[207] Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), Pub. L. No. 96-510, 94 Stat. 2767 (1980), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, codified as amended throughout 42 U.S.C. §§ 9601 et seq. (2011).

[208] Emergency Planning and Community Right-to-Know Act, Pub. L. No. 99-499, 100 Stat. 1728 (1986), 42 U.S.C. § 11001 et seq. (2011).

[209] Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973), codified as amended at 16 U.S.C. §§ 1531 et seq. (2012).

[210] *See* Ryan, *The Spending Power and Environmental Law*, *supra* note 180 (separately describing each of these programs of environmental cooperative federalism with special attention to their spending power-related elements).

[211] My own research focuses heavily on the phenomenon of how much federalism-sensitive governance is, in fact, the product of intergovernmental bargaining. Negotiated federalism includes examples of conventional political haggling, formalized methods of collaborative policymaking, and even more remote signaling processes by which state and federal actors share responsibility for public decision making over time. *Id.* First explored in *Negotiating Federalism*, *supra* note 30, the negotiation of federalism-sensitive governance became a core insight of FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 10.

[212] *See* RYAN, TUG OF WAR, *supra* note 10, at 145-80.

Governance that skillfully partners complementary capacity across levels enhances the regulatory voice of each, harnessing synergy in a way that belies the old zero-sum federalism game.

Intergovernmental partnerships may involve direct state-federal coordination, but they are often mediated by statutory structures that asymmetrically allocate decision-making authority within programs of coordinated capacity, federally-supported state implementation, conditional preemption, and shared and general permitting programs. Each of these methods strives to maximize local and national authority where each can best contribute, and many have been pioneered by environmental law.

(1) Coordinated Capacity. Environmental federalism programs that coordinate capacity partner the distinct regulatory skillsets of state and federal actors relatively straightforwardly. For example, the Emergency Planning and Community Right-to-Know Act, codified as a later addition to the larger Superfund statute, engages state and local experts in coordinated planning for chemical and other emergencies.[213] It harnesses local capacity by requiring each state to establish an Emergency Response Commission drawing on technical expertise from all relevant state agencies.[214] It partners local expertise with federal capacity by authorizing the U.S. EPA to require compliance by all relevant facilities with the emergency planning provisions created by each state's commission.[215] This structure drew praise as an early cooperative federalism model, enhancing interjurisdictional synergy by trading a fully federalized response for one enabling more expert state implementation.[216] However, it was also criticized for not allowing states to opt out of participation in favor of direct federal regulation.[217]

(2) Federally Supported State Implementation. More often, however, environmental federalism partnerships are crafted around complex regulatory regimes that offer states greater regulatory choices. One model that is common in environmental law and elsewhere is the model of federally-supported state implementation, in which the federal government offers state governments financial and technical resources to help implement federal goals. Relying on Congress's power under the Spending Clause,[218] the federal government offers grants to states in exchange for their participation and to facilitate state accomplishment of related regulatory goals.[219] In this way, the federal government negotiates for state participation in spending power-based partnerships, with federal support for state implementation. (And

[213] 42 U.S.C. § 11001-11050 (2011).

[214] *See id.* §§ 11001(a), 11045; *see also* http://www.epa.gov/region4/air/epcra/sercs.htm (listing commissioners). For an example of the wide range of state capacity included in a state commission, see the membership of North Carolina's State Emergency Response Commission. North Carolina Department of Public Safety, *Commission Members*, https://www.nccrimecontrol.org/Index2.cfm?a=000003,000010,000064,000393 (last visited Sep. 23, 2014) (listing participants from state agencies addressing law enforcement, transportation, medical services, environment, agriculture, fire, and others).

[215] 42 U.S.C. §§ 11001(a), 11045 (2011).

[216] *See* Hubert H. Humphrey III, LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 27 (1990) (noting that EPCRA "for the first time gave states extensive direct authority to enforce a federal environmental law in federal court").

[217] *See* Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 IND. L. REV. 549, 550 (1994) (arguing that EPCRA "[e]schew[s] traditional incentives for eliciting state regulation," instead "issu[ing] a flat command").

[218] U.S. CONST. art I, sec. 8

[219] *See, e.g.*, Ryan, *The Spending Power and Environmental Law*, *supra* note 180, at 1009-1017 (discussing spending power bargaining and its legal history).

while the Supreme Court recently constrained spending power bargaining that would tie very large federal grants to indirectly related conditions,[220] few if any environmental programs are likely to be impacted.[221])

Spending power partnerships are attractive to states because they come with fiscal incentives and because they enable states the choice of participation, enhancing the potential for synergy with respect for local autonomy. In some cases, such as the Coastal Zone Management Act, a state maintains total discretion over whether the regulatory program will exist within its boundaries, because the law provides for no federal intervention if the state declines the deal.[222] Spending power partnerships are attractive to the federal government because they enable Congress to negotiate with states for policymaking influence in regulatory realms that lie beyond its more directly enumerated powers[223]—and is thus an important device in federal education,[224] social services,[225] and health care law.[226] By contrast, however, environmental law is usually grounded in such federally enumerated powers as the Commerce Clause,[227] the Property Clause,[228] and occasionally other grants of federal authority, such as the Treaty Clause.[229] In programs of cooperative environmental federalism, spending power partnerships are mostly used to invite state participation in regulatory efforts that the federal government could theoretically administer exclusively, but which will be far more effective when incorporating the local expertise and enforcement capacity of state and local partners.

For example, in the larger Superfund program—the Comprehensive Environmental Response, Compensation, and Liability Act—Congress incentivized state participation in the management of toxic waste through a series of spending power partnerships.[230] As Klass and Fazio describe in Chapter 3, the Act imposes liability for involvement with hazardous substances that endanger human health or the environment, and it is mostly federally administered. However, the statute authorizes discretionary grants to encourage state participation and leadership in cleanup efforts,[231] and it makes states and tribes eligible

[220] National Federation of Independent Businesses vs. Sebelius, 132 S. Ct. 2566 (2012).

[221] *See generally* Ryan, *The Spending Power and Environmental Law*, *supra* note 180 (evaluating all environmental spending power programs under the new precedent and concluding that all of them, even potentially vulnerable Clean Air Act highway fund sanctions, should survive scrutiny).

[222] *See* RYAN, TUG OF WAR, *supra* note 10, at 303.

[223] *See* Ryan, *The Spending Power and Environmental Law*, *supra* note 180, at 1011-1013 (explaining spending power bargaining), 1027-28 (listing spending power partnerships in various areas of law), 1033-34 (discussing the limited constitutional footing of certain spending power partnerships beyond the federal spending power).

[224] *See, e.g.*, No Child Left Behind Act of 2001, 20 U.S.C. §§§ 6301–7941 (reauthorizing the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301).

[225] *See, e.g.*, Temporary Assistance for Needy Families, 42 U.S.C. §§§ 601–79, 603 (authorizing federal grants to states to offer assistance to qualifying poor families).

[226] *See, e.g.*, Medicaid, 42 U.S.C. § 1396, §1396a (authorizing state-federal partnerships in the administration of health insurance).

[227] U.S. CONST. art. I, sec.8, cl. 3 (empowering Congress to regulate the channels, persons, and things of interstate commerce, as well as activities having a substantial relationship to interstate commerce).

[228] U.S. CONST. art. IV, sec.3, cl. 2 (conferring federal authority over all federal lands and other resources that constitute the property of the United States).

[229] U.S. CONST. art. II, sec.2, . 2 (together with the Supremacy Clause, art. VI, cl. 2, conferring federal authority to make and enforce international treaties with environmental implications).

[230] Pub. L. No. 96-510, 94 Stat. 2767 (1980), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended throughout 42 U.S.C. §§ 9601–9675 (2011).

[231] *See id.* § 9604.

for Brownfield Grants to lead management efforts at less-contaminated sites.[232] The Endangered Species Act is also primarily administered by federal actors, but it also invites collaborative state enforcement through several small federal grant programs.[233] As Kalyani Robbins explains in Chapter 5, the Act provides various protections for threatened and endangered species of animals and plants through federal consultation and enforcement,[234] but the statute also authorizes small-scale spending-power partnerships capitalizing on local capacity through the Cooperative Endangered Species Conservation Fund, Habitat Conservation Planning Assistance Grants, and Habitat Conservation Plan Land Acquisition grants.[235]

(3) Conditional Preemption. Still, the classic model of cooperative environmental federalism that has been pioneered, if not invented in environmental law is the model of conditional preemption, by which the federal government sets goals or standards that may be implemented by the states.[236] In this model, the states are invited to participate in accomplishing the overall regulatory goal by tailoring the implementation of federal standards in a way that best suits local political, geographic, economic, and demographic circumstances. However, if the states decline to participate, the federal government will regulate in-state activity directly, preempting any conflicting state law. These programs safeguard a centralized response while opening possibilities for local autonomy and interjurisdictional synergy. Of note, many environmental laws deploy federally-supported state implementation and conditional preemption simultaneously.

For example, under the Clean Water Act, state and federal actors share supervision of the National Pollution Discharge Elimination System, which prohibits the discharge of federally designated pollutants into protected water bodies without a permit.[237] The law is designed around a program of conditional preemption that allows EPA to act as the permitting authority or to delegate authority to willing states.[238] However, nearly all states have chosen to administer their own permitting programs, in order to maximize regulatory autonomy in managing in-state water resources and economic development.[239] The Clean Water Act also uses the federal spending power to support state implementation directly, authorizing various federal grants to states to improve water quality,[240] including

[232] *Id.* §§ 9604(k) (discussing brownfields revitalization funding), 9628(a)(1)(B)(ii) (providing that States and tribes may use grants to capitalize a revolving loan fund for brownfield remediation). Section 128(a) was added to CERCLA in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act. Pub. L. No. 107-118, § 128(a), 115 Stat. 2356, 2376–2377 (2002) (codified as amended at 42 U.S.C. § 9628 (2011)).

[233] Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973), codified as amended at 16 U.S.C. §§ 1531-1543 (2012).

[234] *Id.*

[235] *Section 6 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (July 16, 2014), .http://www.fws.gov/midwest/endangered/grants/S6_grants.html.

[236] *See, e.g.*, MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 87 (2009) (discussing conditional preemption); *see generally* Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PENN. L. REV. 289 (1984).

[237] Clean Water Act, 33 U.S.C. § 1251–1387, 1342(b) (2012).

[238] *Id.* at § 1342(a). *See also* Andree, Chapter X.

[239] *E.g.*, N.M. ENV'T DEP'T, NPDES STATE PROGRAM AUTHORIZATION BRIEFING PAPER (2004), *available at* http://www.nmenv.state.nm.us/swqb/PSRS/NPDES-DelegationBriefingPaper_June-04.pdf (discussing the benefits of self-administration).

[240] The CWA includes fourteen categorical grant programs to states, including those to provide water pollution control program support, public water system supervision, underground water source protection, beach monitoring,

those made under the State Revolving Fund (SRF).[241] The Safe Drinking Water Act further authorizes federal standards implemented by state and local agencies,[242] coupled with the Drinking Water State Revolving Loan Fund that helps public water agencies finance the infrastructure projects needed to comply with federal drinking water regulations.[243]

The Surface Mining Control and Reclamation Act, which regulates the environmental, social, and economic harms of surface mining,[244] uses a similar combination of conditional preemption and federally supported state implementation. The law enables states to implement their own regulatory programs or opt for direct federal regulation,[245] and it authorizes federal grants to assist states in developing their own permitting programs.[246] This Act takes the possibilities for state initiative one step further, authorizing cooperative agreements by which states may act as the primary regulators of coal mining operations on federal lands within the state.[247] Under these agreements, federal supremacy and federal sovereignty over nationally owned lands are exchanged for the efficiencies of scale and regulatory continuity offered by unified state management. The Resource Conservation and Recovery Act,[248] which regulates hazardous substances through lifecycle oversight, similarly enables states to choose whether to submit to federal regulation or implement the program within state boundaries.[249]

The Clean Air Act also merges a version of conditional preemption with spending power bargaining, though—perhaps uniquely among environmental law—as less of a carrot and more of a stick.[250] The Act anticipates that EPA will set ambient air quality standards and that states will design and administer State Implementation Plans for attaining these standards.[251] States that fail or decline to do so will eventually be regulated directly by EPA under a Federal Implementation Plan, a variation on the conditional preemption model discussed above.[252] In the meanwhile, however, noncompliant states may

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and nonpoint source pollution control. EPA, NATIONAL WATER PROGRAM GUIDANCE FISCAL YEAR 2011, at 49-50 (April 2010), *available at* http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100E5WU.pdf.

[241] 33 U.S.C. § 1381 (2006).

[242] Safe Drinking Water Act §1443, 42 U.S.C. § 300f.

[243] Pub. L. 104-182, 110 Stat. 1613 (1996) (codified as 42 U.S.C.A. § 300f-j (1996)).

[244] Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, 91 Stat. 445 (1977) (codified as amended at 30 U.S.C. § 1201-1328 (2006)).

[245] *See id.* §§ 1253, 1254 (describing the state and federal programs for regulating surface coal mining and reclamation operations).

[246] *Id.* § 1295; OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, *Regulatory Programs Overview*, *in* FEDERAL ASSISTANCE MANUAL (2010), *available at* http://www.osmre.gov/lrg/fam/5-100.pdf; *Basics of SMCRA Title IV*, W. PA. COAL. FOR ABANDONED MINE RECLAMATION (May, 2007), *available at* .http://www.wpcamr.org/projects/smcra_reauth/TitleIV%20Basics.pdf.

[247] 30 U.S.C. § 1273. (2006).

[248] Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as part of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (2006)).

[249] EPA, *Authorizing States to Implement RCRA*, *in* RCRA ORIENTATION MANUAL 2011, *at* III-133, III-134 (2011), *available at* www.epa.gov/osw/inforesources/pubs/orientat/rom311.pdf *(*"As of August 2008, all states, with the exception of Alaska and Iowa, are authorized to implement the RCRA hazardous waste program.").

[250] 42 U.S.C. §§ 7401–7671(q) (2012).

[251] *Id.* at § 7509(b)(1) (mandating state implementation plans).

[252] If a state declines to create a State Implementation Plan (SIP), or if the EPA concludes that a submitted SIP fails to meet statutory criteria, the EPA is required to create a Federal Implementation Plan (FIP) for that state within two years. 42 U.S.C.A. § 7410(c)(1).

be threatened with the loss of federal highway funds offered under a separate spending partnership with the federal Department of Transportation.[253] The threatened loss of federal funds for noncompliance sets the Clean Air Act apart from other environmental laws, most of which use federal funds as an enticement for action rather than as a sanction for inaction.[254] Nevertheless, the conditional preemption elements of the partnership limit the impact of the highway fund sanctions, because when EPA assumes regulatory responsibility within a noncompliant state, the threat of highway fund sanctions are lifted.[255]

As Glicksman & Wentz explain in Chapter 1, the design of the Clean Air Act reflects its architects' intentions that the federal government remains the senior partner in this state-federal partnership, reserving dominant centralized authority to resolve the collective action elements of the interstate air pollution problem. After all, this is a problem that results not only from polluting activities solidly rooted in place but also to countless mobile pollution sources (both domestically and internationally) that are less meaningfully related to local expertise and land use authority.[256] Nevertheless, the Clean Air Act remains an intergovernmental partnership that enables states to more efficiently manage the benefits and burdens of regulation on in-state communities and economies than a fully preemptive model--explaining why nearly all states have chosen to assume responsibility for State Implementation Plans rather than submit to a Federal Implementation Plan.[257]

(4) Shared and General Permitting Programs. The Clean Air Act especially showcases the asymmetry of state and federal roles within environmental federalism, but most state-federal partnerships follow a similar model, in which federal judgment usually trumps on regulatory goals and standards, while local judgment usually gets federal deference on matters of design and implementation that account for diverse local circumstances. In fact, environmental law has pioneered different ways of formalizing this asymmetrical allocation of state and federal authority through its different approaches to shared and general permitting programs.

[253] Clean Air Act §179 requires that federal highway funds be withheld from a state that has failed to prepare an adequate SIP or failed to implement requirements under an approved plan when that state includes "non-attainment areas," or areas that have not achieved the federally established National Ambient Air Quality Standards. 42 U.S.C. § 7401–7671q, 7509(b)(1) (2012). The EPA has considerable discretion about how and when to apply sanctions (and indeed, has only done so on one occasion), but the Act mandates withholding of certain federal highway funds if noncompliance extends beyond 18–24 months. 42 U.S.C.A. §7509(a). For a fuller discussion of the mechanics of the Clean Air Act highway fund sanctions, see Ryan, *supra* note 180180, at 1049-59.

[254] *See* Ryan, *The Spending Power and Environmental Law*, *supra* note 180, at 1034-49.

[255] Section 179 itself is ambiguous on this point, but EPA has formalized this interpretation in the implementing regulations, 40 C.F.R. § 93.120 (2013), to which a reviewing court must defer, . *See* Chevron v. NRDC, 467 U.S. 837 (1984). For a discussion of how this regulatory design likely immunizes the Clean Air Act highway fund sanctions against challenge under new spending power limits set forth in *National Federation of Independent Businesses vs. Sebelius*, 132 S. Ct. 2566 (2012), *see* Ryan, *supra* note 180, at 1034-49.

[256] For this reason, federal authority can intrude on state discretion even within state implementation plans, through federal regulations of tailpipe emissions and new source review and performance standards associated with large stationary sources. 42. U.S.C. § 7411 (2012).

[257] *See* United States Environmental Protection Agency, *Status of SIP Requirements for Designated Areas* (Last updated Sep. 21, 2014) http://www.epa.gov/oar/urbanair/sipstatus/reports/map_s.html (last visited Sep. 23, 2014) (providing details on all individual state SIPs)..

The conditional preemption model of shared permitting responsibility emerged in various formats over the 1970s in the Clean Air and Water Acts, the Surface Mining Control and Reclamation Act, and the Resource Conservation and Recovery Act, and also in the Occupational Safety and Health Act (OSHA), which enables states to assume permitting responsibility over safe working conditions or opt for direct federal regulation.[258] Interestingly, however, while nearly all states elect to assume permitting responsibility in the environmental context, fewer than half the states have opted to participate as co-regulators under OSHA.[259] While it is impossible to know the reason for this with confidence, it may suggest that environmental law sits at the equipoise of state and federal regulatory interests in a way that more conventional commercial regulation does not. If a state believes that federal decision-makers will be just as capable at regulating worker safety, then allowing the feds to absorb the political and financial costs of regulation is a rational choice. The fact that states usually make the opposite call in environmental contexts—choosing the burdens of regulating over the risk that federal regulators will cause damage—affirms that environmental governance includes factors that are intensely more local in valence, including regulation of land use.

Nevertheless, the environmental model is being viewed with increasing interest in other realms of cooperative federalism, for example, health law. After the Supreme Court invalidated portions of the Affordable Care Act for exceeding the federal spending power,[260] the architects of national health policy are taking great interest in the Clean Air Act's model of partnering mandatory state implementation plans with a federal fallback option.[261] Especially where federal authority is grounded primarily by the Spending Clause,[262] the conditional preemption model is likely to become a fixture in state-federal partnerships far beyond environmental law.[263]

Yet another regulatory device pioneered by environmental law for coordinating state and federal authority in realms of jurisdictional overlap is the use of general permitting programs. The general permit is a tool of regulatory governance that maximizes discretion and minimizes the regulatory burden for applicants, allowing permit applicants to obtain permission to engage in regulatory activity by following a general set of instructions that provide guidance about acceptable and unacceptable activity.[264] For

[258] Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78. (2012).

[259] *See* Occupational Safety and Health Administration, *All About OSHA*, https://www.osha.gov/Publications/3302-06N-2006-English.html (last visited Sep. 23, 2014).

[260] National Federation of Independent Business vs. Sebelius, 132 S. Ct. 2566, 2606-07 (2012).

[261] See Ryan, *The Spending Power and Environmental Law*, *supra* note 180, at 1061 (noting that "one scholar intimate with the development of the ACA suggests that if the drafters could do it again, they would likely have structured some sort of federal fallback provision [like the Clean Air Act's] into the Medicaid expansion"). *See also* Sara Rosenbaum & Patricia Gabow, *Open Exchanges to the Poor in States that Opt Out of Medicaid*, ROLL CALL (July 26, 2013), .http://www.rollcall.com/news/open_exchanges_to_the_poor_in_states_that_opt_out_of_medicaid_commentary-226677-1.html (last visited Sep. 23, 2014).

[262] U.S. CONST. art I, sec. 8.

[263] See Ryan, *The Spending Power and Environmental Law*, *supra* note 180, at 1061. While spending power partnerships face new scrutiny after the Affordable Care Act case, very few will involve federal grants large enough to trigger scrutiny under the doctrine, especially those that are also grounded in independent sources of constitutional authority. *See* Ryan, *supra* note 180, at 1027-30.

[264] *See, e.g.*, Eric Biber & J.B. Ruhl, *The Role of Permits in the Regulatory State*, REGBLOG, July 1, 2014, http://www.regblog.org/2014/07/01-biber-ruhl-permits-in-the-regulatory-state.html. *See also* Eric Biber & J.B.

example, the Army Corps of Engineers uses a general permit to govern the filling of wetlands protected by Section 404 of the Clean Water Act, allowing countless public and private actors nationwide to obtain permission to fill wetlands with minimal regulatory oversight according to a specified set of federal guidance, with state input.[265] Section 404 also allows states to assume responsibility for general permitting programs within their boundaries, combining the devices of general permitting and conditional preemption.[266]

More interestingly, though, general permitting can also be used to asymmetrically allocate state and federal authority within particularly federalism-sensitive governance, especially when state actors must seek federal approval for their own regulated activity or for state regulation of private activity that is also subject to federal regulation. For example, Section 404 also enables states themselves to seek coverage under a State Program General Permit to discharge dredged and fill material to wetlands.[267] Like other methods of allocating asymmetrical authority within environmental federalism programs, the general permit allows federal actors to establish the boundaries of permissible activity while enabling state and local actors to move creatively but responsibly within those parameters (at least in comparison to more intensive preemptive regulation).

When used in these federalism-sensitive contexts, general permits balance central authority with local autonomy by enabling state actors to satisfy broadly-framed federal standards by whatever means they choose. Ideally, the general permit alternative encourages synergy and innovation while streamlining the regulatory process. For example, the Clean Water Act's Phase II Stormwater rule administers municipal stormwater discharges under a general permit that enables localities to develop their own unique programs for meeting overarching federal goals.[268] The regulation of stormwater pollution sits "vexingly at the crossroad between land uses regulated locally and water pollution regulated federally,"[269] because most regulated stormwater discharges are by municipal storm drains.[270] Through a

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Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L. J. (forthcoming, 2014).

[265] United States Environmental Protection Agency, *Section 404 Permitting* (2013) *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/ (last visited Sep. 23, 2014) (explaining the Section 404 general permit program); US Army Corps of Engineers, ORM Permit Decisions, *available at* http://geo.usace.army.mil/egis/f?p=340:1:0 (last visited Sep. 23, 2014) (providing direction on how to apply for a § 404 general permit. *See also* Biber and Ruhl, *supra* note 264 (discussing the § 404 general permit option).

[266] United States Environmental Protection Agency, *State, Tribal, Local, and Regional Roles in Wetlands Protection* (2012), http://water.epa.gov/type/wetlands/outreach/fact21.cfm (last visited Sep. 23, 2014). EPA notes that states and tribes may also strengthen their roles in wetlands protection by: "undertaking comprehensive State Wetland Conservation Plans…; developing wetland water quality standards; applying the Clean Water Act Section 401 Water Quality Certification program more specifically to wetlands; incorporating wetlands protection into other State and Tribal water programs;" and comprehensive resource planning, including the protection of specified river corridors and watersheds. *Id.*

[267] *Id.* (noting that states "may strengthen their roles in wetlands protection by… obtaining State Program General Permits from the Corps for discharges of dredged and fill material in wetlands").

[268] 33 U.S.C. §1342(p)(4) (2000) (authorizing the "Phase I" and "Phase II" Stormwater Rules); EPA, Permits for Municipal Separate Storm Sewer Systems (MS4s), (July 14, 2014), http://water.epa.gov/polwaste/npdes/stormwater/Municipal-Separate-Storm-Sewer-System-MS4-Main-Page.cfm; *See also* RYAN, TUG OF WAR, *supra* note 10 at 153-56, 300-01.

[269] RYAN, TUG OF WAR, *supra* note 10, at 300-01; Ryan, *Negotiating Federalism*, *supra* note 30, at 55-56.

[270] *See* Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 840–41 (9th Cir. 2003).

decade of intense negotiated rulemaking, federal, state, municipal, environmental, and industrial stakeholders designed a general permitting program to empower local discretion as much as possible while still accomplishing federal Clean Water Act goals.[271] The resulting rule allows municipal dischargers to be covered under the general permit by tailoring local management plans to best address local circumstances while meeting five basic federal criteria.[272] Such general permitting programs mirror the classical environmental federalism balance of state and federal power, in which federal judgment prevails on matters of standards and state judgment prevails on matters of design.

General permitting represents another important tool of regulation that is not widely understood beyond the realm of environmental law. In fact, the legal community's failure to grasp the significance of general permits in environmental law may have led the Supreme Court astray in another environmental decision with important federalism implications,[273] *Utility Air Regulatory Group v. EPA,* limiting EPA's ability to regulate stationary sources of greenhouse gases.[274] The Court upheld Clean Air Act regulation of stationary greenhouse gas sources if they also emit other regulated pollutants, but not stationary sources that only emit greenhouse gases.[275] The majority concluded that allowing greenhouse gas emissions to be regulated independently would produce "calamitous consequences," because "extravagant" federal authority and resources would be required to administer so many sources.[276]

But as Professors Eric Biber and J.B. Ruhl have argued, general permitting represents an "alternative between complete exclusion of a range of activities from regulation and burdensome, complex permitting structures," alleviating the Court's seemingly unresolvable concerns about expansive federal reach.[277] Indeed, these scholars predict that general permitting structures will prove critical in the future regulation of climate change precisely because they enable streamlined regulation "of widespread and common activities in ways that are politically, legally, and administratively feasible."[278] Emerging

[271] *Id.* at 864. The Phase II Final Rule was published in the *Federal Register* on December 8, 1999. *See* Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, 124).

[272] *See* Envtl. Def. Ctr. v. EPA, 344 F.3d at 847–48. Specifically, dischargers may develop any program that: (1) educates the public about stormwater hygiene, (2) incorporates public participation, (3) prevents illicit discharges, (4) controls construction debris, and (5) manages pollutant runoff from municipal operations. 40 C.F.R. § 122.34(b) (2010).

[273] Eric Biber & J.B. Ruhl, *General Permits and the Regulation of Greenhouse Gases*, REGBLOG, (July 23, 2014),, http://www.regblog.org/2014/07/23-biber-ruhl-general-permits-and-the-regulation-of-greenhouse-gases.html.

[274] 134 S. Ct. 2427 (2014) (upholding portions of the Clean Air Act's Prevention of Significant Deterioration Program and Title V permitting program that regulated greenhouse gases from stationary sources under regulation for other pollutants, but invalidating them as applied to stationary sources only subject to regulation for greenhouse gases).

[275] *Id.* at 2449.

[276] *Id.* at 2442-44.

[277] Biber & Ruhl, *supra* note 273 (arguing that "the Court dismissed general permits out of hand as a way of addressing the challenges that greenhouse gases present to the Clean Air Act when, in fact, general permits have already been widely adopted by states and the EPA as a tool to manage permitting problems under both the Clean Air Act and the Clean Water Act. General permits are not novel, untested tools, as Scalia's footnote seems to imply. They are workhorses of the regulatory state").

[278] *Id.*

climate federalism partnerships should take note of the potential of these tools for effective multiscalar governance.

V. Conclusion: *Who Should Decide?*

Wrestling with the incendiary tensions at the intersection of local land use and spillover harm, environmental federalism has helpfully exposed the fault lines underlying our federal system to analysis. Some of the structural tools that environmental law has developed for managing these tensions may be instructive for health reform, education law, marijuana policy, and other areas of law contending with similar federalism controversies. To be sure, not every aspect of federalism can be generalized from the environmental experience, and environmental law has yet to perfect its task. Nevertheless, the challenges of environmental governance provide critical insight into the core conflicts of federalism-sensitive governance more broadly, and the successes of environmental governance indicate the potential for exporting effective regulatory strategies. This conclusion suggests a few potential lessons from the environmental experience for related areas of law.

Environmental governance has experimented with different means of allocating regulatory authority across multiscalar lines, often asymmetrically. Different statutory programs engage multiple regulatory stakeholders while allocating roles according to the distinctive strengths of local and national capacity. The conventional tools of cooperative environmental federalism—including coordinated capacity, federally-supported state implementation, conditional preemption, and shared and general permit programs—may prove useful in other realms of jurisdictional overlap, especially where the need for a centralized response is matched by strong local capacity rooted in core expressions of the states' police power. Education law, social services delivery, and public health laws may be good candidates, as might national security partnerships, criminal law enforcement, and even financial services regulation.

For example, the Affordable Care Act might have fared better on judicial review had the Medicaid Expansion been coupled with a federal fallback provision, borrowing from the environmental federalism model of conditional preemption.[279] Perhaps the skilled use of a general permitting partnership could help harmonize state and federal regulation of the complex financial services industry,[280] as Bieber and Ruhl argue it could for the complex project of greenhouse gas regulation, by streamlining points of contact around clear and critical standards. Programs of coordinated capacity and federally supported state implementation already exist in other areas of law, but the results in environmental law and elsewhere clearly show that programs enabling two-way exchange are more successful than federal efforts at unidirectional policymaking.[281] Famous failures in cooperative federalism, such as the No Child Left Behind Act or the REAL ID Act,[282] could learn from the channels of exchange cultivated in the most successful examples of environmental law, such as the Coastal Zone Management and Clean Water Acts.

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[279] *See supra* text accompanying notes 260-261.

[280] *Cf.* Ryan, *Negotiating Federalism*, *supra* note 30, at 30-31.

[281] *Compare id.* at 62-63 (discussing state-based innovations under the Social Security Act) *with id.* at 88-90 (discussing state resistance to the No Child Left Behind Act).

[282] *See id.* at 88-90 (No Child Left Behind), 56-58 (REAL ID).

Indeed, environmental scholars—especially among the emerging dynamic federalism literature—are increasingly emphasizing the values of overlap, fluidity, exchange, and negotiation among separately regulating local, state, and federal actors. Innovations in federalism theory, such as the Balanced Federalism model in Part II, should help the architects of governance further tailor the tools of conventional cooperative federalism in service of federalism's underlying values.[283] Architects could capitalize on the existing asymmetrical allocation of authority to more effectively engage insight and capacity at the local level, and to more strategically allocate roles among executive, legislative, and judicial decision-makers where each is most able. For example, a Balanced Federalism evaluation of New York's challenge to the Low Level Radioactive Waste Management Act[284] might have led the Supreme Court to defer to a federal legislative plan forged by nearly universal consent among state executives (one negotiated behind the veil of regulatory ignorance, before more parochial interests took hold), heading off the current crisis of regulatory abdication.[285]

Relatedly, federalism theory should push regulators to recognize that many of the difficult dynamics of jurisdictional overlap that are formally recognized within state-federal relations are equally meaningful in municipal-state relations. While the U.S. Constitution falsely presumes that municipal interests are synonymous with that of their state, federalism controversies over fracking and other energy harvesting especially reveals intrastate conflicts. Local-state conflicts may be cognizable under state constitutions, which occasionally empower local prerogative over other state interests.[286] At any rate, these conflicts should be duly considered in the elaboration of good federalism-sensitive governance.

One important lesson of environmental governance is that there is no one size to fit all regulatory needs, and different federalism values may take priority under different circumstances. For example, the CZMA, a federal statutory framework that enables multiple iterations of open bargaining between state executive actors toward the creation of corresponding state legislation, provides a good example of how to integrate state/federal and legislative/executive capacity where place-based local diversity is the most critical factor.[287] A very different model is taken by the Clean Air Act's mechanism for regulating motor vehicle emissions, which enables states to follow either the federal or California standard—limiting the variability of regulation within the national market of automobile manufacturing while still enabling the benefits of regulatory competition.[288] This model enables effective dynamic interaction within a more centralized regime, in which the constraints of a national market are the most critical factor.[289]

In general, governance architects designing new regulatory structures of cooperative federalism must consider all of the implicated federalism values, weighing carefully whether any one takes priority over another. While most federalism-sensitive governance should incorporate some means of multiscalar

[283] *See supra* text accompanying notes 76-86.
[284] New York v. United States, 505 U.S. 144 (1992).
[285] *See* RYAN, TUG OF WAR, *supra* note 10, at 215-64.
[286] *See, e.g.*, Robinson Township v. Pennsylvania, ___ A.3d ___, 2013 WL 6687290 (Pa. 2013) (upholding municipal rights to prevent fracking, notwithstanding contrary state law, under the state constitution).
[287] *See* RYAN, TUG OF WAR, *supra* note 10, at 305 (analyzing the CZMA).
[288] *See id.* at 310 (analyzing the Clean Air Act).
[289] *See id. See also* Ryan, *The Once and Future Challenges of American Federalism*, *supra* note 14, at Part 3.

coordination, the balance may shift as needed toward a more centralized approach, such as conditional preemption under the Clean Air Act, or a more locally empowering approach, such as the CZMA's reverse preemption within a program of federally supported state implementation. The more all values are in equipoise, the more the regulatory framework should allow for adaptive management through ongoing deliberation among regulatory stakeholders.

To that end, the preceding chapters demonstrate that ongoing environmental dilemmas require continued innovation and ongoing adaption. Improving the coordination of local, state, and federal capacity in realms of jurisdictional overlap remains the central challenge of environmental law. Several earlier chapters identify statutory systems in which more federal authority may be needed to resolve collective action problems, including Blake Hudson's discussion of forest resources (Chapter 4), Kalyani Robbins' discussion of species protection (Chapter 5), and Bill Andreen's discussion of water law (Chapter 2). Glicksman & Wentz defend the importance of federal authority in the Clean Air Act regulatory partnership (Chapter 1), prompted by competing claims for greater local devolution. These authors persuasively describe environmental regulatory contexts in which the values of central authority may outweigh countervailing values of local autonomy.

In their discussions of climate and energy law, Bill Buzbee (Chapter 7), Kirsten Engel (Chapter 8), Alice Kaswan (Chapter 9), and Hannah Wiseman (Chapter 6) tout the benefits of jurisdictional overlap between strong local and national regulators, in the hopes that regulatory dynamism will promote well-informed decisions, focus different regulatory capacity at different elements of the overall problem, and overcome agency capture through regulatory backstop. Here, the values of local autonomy and central authority each make strong claims for primacy, but the overall goals of regulatory problem-solving are most furthered by dynamic interaction. Robert Fowler (Chapter 12), Behnke & Eppler (Chapter 13), and Sairam Bhat (Chapter 14) describe how similar tensions are respectively navigated within the Australian, Indian, and German federal systems.

In still other areas of environmental law, localism values may appropriately take priority. Hirokawa & Rosenbloom argue that preserving the primacy of local land use authority is necessary to protect ecosystems and communities (Chapter 11). Ann Carlson shows how environmental regulation of coastal and water resources appropriately privilege local concerns over central oversight through mechanisms of "reverse preemption" (Chapter 10). However, Klass & Fazio warn that new Supreme Court precedent privileging state laws of repose over federal Superfund mandates can effectively "reverse preempt" hazardous waste cleanup, in ways that compromise the overall statutory mission (Chapter 3).

With so many considerations at play, it is hard to imagine environmental law—or any federalism-sensitive governance—reaching a definitive answer to the question of who should decide. Strictly segregating state and federal efforts in interjurisdictional contexts is unlikely to work well, as demonstrated by failed environmental governance over radioactive waste management and nonpoint source water pollution.[290] Yet leaving jurisdictional matters fully unresolved can also have serious consequences. Doctrinal uncertainty may deter effective regulatory problem solving where it is needed if

[290] *See* RYAN, TUG OF WAR, *supra* note 10, at 109-45 (discussing the pitfalls of jurisdictional separation).

regulators fear becoming embroiled in legal challenges to their assertion of contested authority.[291] The sharp decline in Clean Water Act enforcement after *Rapanos* demonstrates this peril, leading to worsening water quality across the country. Alternatively, doctrinal uncertainty can encourage self-serving regulatory abdication, if all levels of government cast the regulatory dilemma as someone else's responsibility.[292] And the two are sometimes related. As noted, there has been precious little movement in managing the problem of radioactive waste after *New York* eviscerated the enforcement provisions of the Low Level Radioactive Waste Policy Act.[293]

From the Balanced Federalism perspective, the lessons from these failures in environmental federalism suggest that the allocation of federalism interpretive responsibilities should not only better track national and local capacity, but the unique capacities the different branches of government.[294] Judicial federalism constraints should be reserved for clear legal questions that courts are equipped to answer, and political constraints should operate in contested contexts of overlap where multiscalar interests are well represented.[295] If the purpose of federalism is to ensure that governance affecting distinctively local and national interests appropriately accounts for both, then governance that is the product of informed, accountable, multiscalar collaborative process warrants deference because it accomplishes that goal.[296] At a minimum, courts reviewing federalism claims should carefully consider the larger ramifications for good governance when evaluating difficult jurisdictional questions.

Heeding these lessons, well-crafted multiscalar governance belies the perverse presumption of zero-sum federalism, which assumes that the allocation of decision-making authority among levels and agents of government is always a zero-sum game.[297] Defying the presumption that authority exercised by one is categorically removed from others, environmental governance has experimented with different ways of enhance authority among multiple agents simultaneously, through structured programs of consultation and exchange. This empirical assault on the mythos of zero-sum federalism warrants emphasis, drawing attention to what most American federalism actually looks like in practice, and how federalism in practice increasingly departs from the rhetoric of conventional federalism theory.[298]

In the end, perhaps the problem that stymies all federalism-sensitive governance is the assumption underlying the question with which we began. *"Who should decide?"* presumes a simple answer, and in contexts of profound jurisdictional overlap, there is rarely a simple answer. Environmental federalism has shown that the best response is often to inform interjurisdictional governance with multiple perspectives as feasibly as possible, through ongoing processes of exchange, adaptation, and negotiation among stakeholders at all levels of jurisdictional scale. Balanced federalism suggests that similar principles apply to the allocation of decision-making authority along the horizontal separation of powers.

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[291] *See id.* at 162-65.
[292] *See id.* at 165-67.
[293] *See id.* at 226-41 (discussing the chaos that ensued after the Court's decision).
[294] *See generally id.*; *id.* at xi-xii; Ryan, *Negotiating Federalism and the Structural Constitution*, *supra* note 81.
[295] *See id.* at 339-67; *see also* Ryan, *Negotiating Federalism*, *supra* note 30.
[296] *Id.*
[297] *See supra* notes 82-86.
[298] *See* Ryan, *The Once and Future Challenges of American Federalism*, *supra* note 14, at Part 2; RYAN, TUG OF WAR, *supra* note 10, at 268.

Good interjurisdictional governance engages not only the distinctive capacity at different levels of government vertically but from the different branches of government within each level. Legislative, executive, and judicial coordination at all levels of scale are needed to manage the difficult trade-offs that federalism-sensitive governance always has, and always will, require of us.