

2017

Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance

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Wis. L. REV. FORWARD 17 (2017),
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**NEGOTIATING ENVIRONMENTAL FEDERALISM:
DYNAMIC FEDERALISM AS A STRATEGY FOR GOOD
GOVERNANCE**

--Erin Ryan*

Prepared for:
Reflections on Executive Power and the Administrative State
University of Wisconsin Law School Program
April 14, 2016

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INTRODUCTION

I begin with great thanks to the *Wisconsin Law Review* for the opportunity to be a part of this timely and important conversation about executive power and administrative governance. I have been invited here to share my work on negotiated federalism, which explores the way that good multiscalar governance is often the product of intergovernmental bargaining among decision makers at various levels of government. As I have described in this work, negotiations are sometimes conducted purposefully, in statutorily prescribed ways, and elsewhere more serendipitously or even inadvertently, as a byproduct of the wider political process. The privileged constitutional status of the federal and state governments brings special attention to the negotiations that take place among state and federal actors, but similar dynamics apply in negotiations involving local, regional, national, and international actors. And while all three branches of government participate in different forms

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of negotiated governance (some more and less obvious), the executive branch features especially prominently in these efforts.

For this symposium, I would like to distill a few important points from my research about the need for negotiated governance and the options for accomplishing it.¹ The project began with a series of law review articles that culminated in *Negotiating Federalism*, which identified the pervasive use of intergovernmental bargaining as a tool for dealing with jurisdictional uncertainty.² In that piece, I described the phenomenon of federalism bargaining, provided a taxonomy of ten basic ways in which it takes place, and proposed a theory for discerning the circumstances in which it can serve as a uniquely bilateral form of constitutional interpretation.³ Those ideas became the basis of a later book, *Federalism and the Tug of War Within*, which folded the concept of negotiated governance into a general theory of Balanced Federalism.⁴ Balanced Federalism diagnoses the inevitable conflicts among the underlying values that animate federal systems of government, and the book explored how they are managed (some more and less successfully) by various means of consultation, competition, and collaboration.⁵

Federalism and the Tug of War Within was filled with vivid examples from environmental and land use law, realms that are notoriously rife with federalism conflict and have accordingly inspired interesting means of negotiated resolution.⁶ For that reason, I was later asked to contribute the closing chapter to a book specifically addressing environmental federalism, *The Law and Policy of Environmental Federalism*.⁷ In that piece, I applied Balanced Federalism and negotiated

1. See generally Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011); Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 COLO. L. REV. 1 (2010); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007); Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 COLUM. L. REV. SIDEBAR 4 (2015) (a response to Aziz Z. Huq's *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014)); Erin Ryan, *Response to Heather Gerken's "Federalism and Nationalism: Time for a Détente?"*, 59 ST. LOUIS L.J. 1147 (2015); Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 COLO. L. REV. 1003 (2014); Erin Ryan, *The Once and Future Challenges of American Federalism*, in *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN*, VOL. 1 (Alberto López Basaguren & Leire Escajedo San-Epifanio eds., 2013); Erin Ryan, *Negotiating Federalism Past the Zero-Sum Game*, 38 ADMIN. & REG. L. NEWS 4 (2012).

2. Ryan, *Negotiating Federalism*, *supra* note 1, at 4–5.

3. *Id.*

4. ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011).

5. *Id.*

6. *Id.* at xv.

7. *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* (Kalyani Robbins ed., 2015).

governance theory to bridge the collection's separate analyses of different areas of environmental law.⁸ I will especially draw from that chapter here because environmental law uniquely highlights both the need for negotiated governance and the available variety of innovative approaches to accomplish it.

From this prior body of work, this conversational essay draws out two separate themes, digesting the implications of negotiated federalism for: (1) administrative environmental governance; and (2) American federalism in general. The latter takes us into heavy theoretical territory, but the first half eases into it, using environmental law as a substantive laboratory to demonstrate the challenges in American federalism that have led us toward negotiated governance in all fields. Part I thus begins by exploring why environmental law seems always at the epicenter of federalism controversy—why it is, as I have previously called it, the “canary in federalism’s coal mine.”⁹ In Part I, I will ask why environmental controversies become so intense that they require negotiated resolution, and I will suggest that it has to do with both the nature of environmental problems specifically and the nature of American federalism itself.

Having set the substantive stage for our more abstract conversation, I will delve into the contribution that federalism itself makes, showing how the very nature of American federalism is also responsible for the dilemmas that lead us toward negotiated resolutions. Federalism, after all, is a strategy for good governance—a means of accomplishing the underlying good governance values that the Constitution envisions, and for coping with the inevitable values conflicts identified in *Balanced Federalism*.¹⁰ Part II reveals how unresolved issues in constitutional interpretation lead to persistent jurisdictional uncertainty, encouraging the use of negotiation to mediate multiscalar governance disputes. It considers how state-federal bargaining is not only a rational means of coping with jurisdictional uncertainty, but deployed effectively, a wise means that confers benefit up and down the jurisdictional scale. Flirting with issues treated more deeply in the book, it ponders the significance of all this for the ultimate questions federalism begs: how to decide exactly who gets to decide which regulatory policies.¹¹

8. Erin Ryan, *Environmental Federalism's Tug of War Within*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* 355 (Kalyani Robbins ed., 2015).

9. This point was provocatively demonstrated at our symposium by the State Attorneys General panel, in which environmental controversies were raised more often than any other substantive area of law.

10. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 34–67.

11. *Id.* at xii–xiii.

In Part III, I will bridge Part II's conversation about federalism's underlying values clash back to Part I's discussion of environmental law, demonstrating negotiated environmental federalism as an innovative technology of good multiscalar governance. Part III touches on the ways that environmental law has responded to federalism's challenge at the structural level, experimenting with various means of asymmetrically allocating regulatory authority to encourage different valences of consultation, negotiation, collaboration, and competition. It shows how different approaches to cooperative federalism can be adapted to procure distinct mixtures of local and national input. I will conclude with reflections on the critical insight with which the phenomenon of negotiated federalism should leave us: despite centuries of rhetoric to the contrary, federalism need not be, and indeed never has been, a zero-sum game.

I. ENVIRONMENTAL LAW AS THE CANARY IN THE COAL MINE

I begin with the proposition that environmental law uniquely showcases the need for, and also the potential for, negotiated federalism. Negotiated multiscalar governance is a response to problems of jurisdictional conflict that are raised in many areas of law, but they are raised acutely in environmental law. In prior work, I have called environmental law "the canary in federalism's coal mine,"¹² and this Symposium's panel of State Attorneys General reinforced that point, focusing frequently on controversies surrounding the Clean Power Plan,¹³ the Clean Water Rule,¹⁴ the Good Neighbor Rule,¹⁵ National Monument designations,¹⁶ energy harvest on public lands,¹⁷ and so forth. Why is this so?

In fact, this special relationship is also reflected in the Supreme Court's federalism and environmental law docket. Perhaps you have noticed that many of the Supreme Court's most contentious federalism

12. *Id.* at 358.

13. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

14. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).

15. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72 et al.).

16. Michael Margherita, *The Antiquities Act & National Monuments: Analysis of Geological, Ecological, & Archaeological Resources of the Colorado Plateau*, 30 TUL. ENVTL. L.J. 273, 275 (2017); Executive Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017).

17. Executive Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

cases are, in reality, environmental cases. *New York v. United States*,¹⁸ the first case of the Rehnquist Court's "New Federalism" revival, is known for establishing the Tenth Amendment anti-commandeering doctrine—but of course, it's really an environmental case about siting hazardous radioactive waste. *Hodel v. Virginia Surface Mining Reclamation*¹⁹ is another famous Tenth Amendment case, but it is substantively about managing the harmful effects of mining activities. At the same time, many of the Supreme Court's most contentious environmental cases are, in reality, federalism cases. Both *Rapanos v. United States*²⁰ and *Solid Waste Agency of Northern Cooke County v. United States*²¹ are nominally statutory interpretation cases about the Clean Water Act—but they are suffused with constitutional anxiety of the reach of the federal commerce power. *EPA v. EME Homer City Generation*²² is a Clean Air Act case, but it is really about federal preemption. So why is it that environmental law is so often at the epicenter of federalism controversy?

My argument, in a nutshell, is that environmental governance is uniquely prone to federalism controversy because environmental laws allocate power in regulatory contexts where both the state and federal claims to authority are *simultaneously at their strongest*.²³ The big question in federalism controversies is always the same—it is some variation of the theme: "Who gets to decide?"²⁴ Is this something that should be handled centrally, with the same answer for everyone? Or should it be handled locally, where the answer may differ depending on where you are? The federalism debate will be over whether the state or federal government gets to call the shots, and environmental federalism debates are especially raw because environmental law is the place where both the state and federal claims to authority—the argument each side will make about why it should be the one to decide—are unusually strong. Why is that?

We can probably come up with a few reasons for this, but the first one has to do with the very nature of environmental problems.

18. 505 U.S. 144 (1992), 159–66 (invalidating key enforcement provisions in the state and federally negotiated Low Level Radioactive Waste Policy Act).

19. 452 U.S. 264 (1981) (concluding that the Surface Mining Control and Reclamation Act of 1977 did not violate the Tenth Amendment).

20. 547 U.S. 715, 739 (2006) (limiting federal authority to regulate certain wetlands under the Clean Water Act).

21. 531 U.S. 159, 173–74 (2001) (limiting federal authority to regulate hydrologically isolated wetlands under the Clean Water Act).

22. 134 S. Ct. 1584, 1584–85 (2014) (upholding EPA's Clean Air Act interstate pollution regulations).

23. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 372.

24. RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at xii.

Environmental problems very often match the need to regulate the harmful use of a specific parcel of land—something we normally think of as a local matter—with the need to regulate the boundary-crossing harms associated with that use.²⁵ And boundary-crossing harms, by definition, impact interests that go beyond the local jurisdiction.

The resulting jurisdictional clash becomes immediately clear. Americans share a hallowed understanding that regulating land use is among the most sacred of local prerogatives—part of the very backbone of the police power to protect public health and safety.²⁶ Nevertheless, the need to regulate spill-over harms and externalities is among the original predicates of national authority.²⁷ Indeed, our first take at nationhood (under the Articles of Confederation) failed precisely because it lacked the stronger national power that the Constitution ultimately conferred to deal with interstate conflict.²⁸ At some ironic level, then, the reason environmental federalism is so hard is because everyone is just so *right*—at least about why their chosen side deserves the final say.

Now, you might reasonably respond, “Maybe so, but what’s so special about environmental law?” Don’t we see the same conflict playing out between the police power and later assertions of federal authority in all sorts of other legal realms—like criminal law, health law, education law, and family law? Aren’t these all facing the very same problem? The answer, of course, is—yes! Powerful federalism controversies have recently erupted in every one of these areas of law, from debates over immigration enforcement to health insurance reform to same-sex marriage.²⁹ It’s just that environmental law got there first—and in many respects, environmental federalism conflicts can be viscerally worse, or even more resistant to resolution. Especially in the United States.

The reason has to do with the intimate relationship between environmental law and the land, especially given the enormously diverging character of land across our nation.³⁰ And while the shape of the land can impact other legal problems (for example, the delivery of health, education, or emergency services), the diversity of the underlying land remains a much more salient factor in environmental management than most other areas of law. Of course, the diversity of the American people is a source of national pride—we are a great, big, delicious salad

25. Ryan, *Environmental Federalism’s Tug of War Within*, *supra* note 8, at 372.

26. *Id.*

27. *Id.*

28. RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 59.

29. Ryan, *Environmental Federalism’s Tug of War Within*, *supra* note 8, at 355–56, nn.1–10 and accompanying text (documenting a list of contemporary federalism controversies in all areas of law).

30. *Id.* at 372.

bowl of different kinds of people with unique needs and preferences—but no matter how different our communities may be, the land beneath them is even more different. And this is really the bottom line: *land* is more different than *people*.

Much more different, as it turns out. Think of the varying American landscape—from sea to shining sea, and not to mention all those islands in the middle of said sea. From purple mountains majesty to red rock desert, Pacific Northwest rainforests to Gulf Coast bayou, from the heat of Death Valley to subarctic Alaskan tundra. So, if the question is whether we are going to make this decision locally (with different answers for different people, depending on where you are) or nationally (with the same answer no matter where you are)—then the fact that land is more different than people turns out to be very significant.

In fact, the whole “where you are” piece may matter a lot more when it has to do with environmental management than when it has to do with, say, criminal law. After all, murder is murder—but pollution management is going to be completely contingent on the landscape. Important differences between local communities should clearly register in effective policy-making, but even though communities can be very different, we still have fairly widespread consensus about what constitutes “public health,” or “theft,” or “math.”³¹ And even where state law differs in these areas, it differs mostly at the margins. After all, math is math (although we may differ on how we prefer to teach it).³² By contrast, environmental management is geographically idiosyncratic—it varies widely, radically even, between the states, and sometimes even within states because the land we are regulating on top of is so unique.³³

To give an example, think about what you would need to do to manage water pollution in a state like Florida, where summer rains regularly drench the ground. Development is constructed around an ambitious system to channel drainage, and one of the most productive freshwater aquifers in the world flows just beneath the surface of much of the state.³⁴ What kind of measures would you consider to prevent surface pollutants from infiltrating the state’s water resources? If you

31. *Id.* at 372–73.

32. See Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. [manuscript p. 32-34] (forthcoming, 2017).

33. *Id.*

34. ERIC H. LIVINGSTON & ELLEN MCCARRON, FLA. DEP’T ENVTL. REGULATION, STORMWATER MANAGEMENT: A GUIDE FOR FLORIDIANS (1991), http://www.dep.state.fl.us/water/nonpoint/docs/nonpoint/Stormwater_Guide.pdf [<https://perma.cc/Q65X-86LC>]; USGS, GROUND WATER ATLAS OF THE UNITED STATES (1990), https://pubs.usgs.gov/ha/ha730/ch_g/G-text6.html [<https://perma.cc/9AKJ-XBG3>] (last visited Oct. 2, 2017).

have an idea in mind, even a foggy one—now think of what you might have to do instead to manage water pollution in a desert state like Arizona. Or a plains state like Iowa. Or the contrasting urban, rural, mountainous, coastal, and agricultural environments in states like New York or California.

As you can imagine, each scenario requires a wholly different set of expertise and management strategies. To wit, consider this partial list of what you would need to account for in managing water pollution in these areas. You would need to know: the contours of the land, the elevation, the precipitation, seasonal weather patterns, prevailing winds, watershed, soil quality, habitat, population density, zoning laws, cultural uses, local economies, where the local industry is operating at any given time, what the major stressors are in that particular area, and so on.³⁵ These answers are going to be different in each place. And you would probably have to be there on the ground to know these things, and more to the point, to keep track as they change over time, as they inevitably will.

None of this means that the federal government cannot play an important role. After all, our system of regional administration ensures that somebody will be there on the ground to follow all this from an appropriate vantage point.³⁶ However, it does mean that the answer to the question of what environmental managers should do to manage water pollution may be wildly different in all of these different circumstances. And in the environmental context, getting the answer wrong can be extremely costly. Bad environmental decisions made without the benefit of local expertise can portend serious environmental, cultural, and economic harms if things go wrong. Damage to soil, water, and other local resources can create devastating consequences for entire communities. This, of course, is the case for local decision making in the environmental context.³⁷

Yet here's the rub: if one community fails to prevent environmental spillovers to another community—that will portend the *very same harms*. The stakes are equally high for the unlucky neighbors. And that, of course, is the case for national decision making.³⁸ Which is why, of course, we have both! The problem is figuring out how to get all these well-intended decision makers working well together, and as we'll see,

35. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 373.

36. See Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 79 (2016).

37. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 373.

38. *Id.*

this very often turns out to be through various forms of consultation, collaboration, competition, and other forms of negotiation.³⁹

Regulatory realms like this, where the state and the federal governments have simultaneous interests and obligations, constitute a zone of jurisdictional uncertainty that I have previously described as the “Interjurisdictional Gray Area.”⁴⁰ These are realms of jurisdictional overlap, like environmental law, where both the state and federal governments have legitimate claims to regulatory authority. And if the federalism issue is “Who gets to decide?”, then these claims to regulatory authority pose an especially vexing problem for us. If both sides have a legitimate claim to authority, then how do we decide who gets to decide? The Constitution gives us valuable guidance: there are the enumerated federal powers, there are a few constitutionally assigned state responsibilities, the Tenth Amendment suggests that there are additional reserved state powers, and the Supremacy Clause would appear to adjudicate conflicts.⁴¹ It all looks very tidy on paper—but in reality, we know that it’s not at all tidy.

Every federalism controversy is a realm in which jurisdictional overlap has raised questions about who should get to decide. The Supremacy Clause suggests that federal authority overrides when there are conflicts, but even that does not fully resolve the issue because there are different ways of managing jurisdictional overlap.⁴² Should we draw a boundary line down the middle and clarify that on this side of the line only the state will regulate, and on the other side, only the feds? Environmental law, for example, has taken that approach with wetlands regulation—attempting to differentiate between those subject to the federal Clean Water Act and those that are not.⁴³ Alternatively, should we allow concurrent regulation within a statutory framework? Environmental law often takes that approach through “floor preemption” regimes, in which both state and federal laws may operate, so long as state regulation does not undermine some federally mandated minimum.⁴⁴ For example, states and localities can regulate ambient air pollutants more stringently than the federal Clean Air Act, but not less so.⁴⁵

39. See Ryan, *Negotiating Federalism*, *supra* note 1, at 4–5. See also Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, *supra* note 1, at 567-95.

40. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 145.

41. *Id.* at 145–214.

42. See *id.* at 145–80, 271–314.

43. Ryan, *Environmental Federalism’s Tug of War Within*, *supra* note 8, at 391.

44. *Id.* at 395.

45. *Id.*

In this respect, many of the most interesting debates about preemption have shifted from questions about whether the federal government *could* preempt state regulation to questions about whether it *should* preempt state involvement, even when it could.⁴⁶ There are many areas of law in which the federal government could theoretically preempt state authority all the way down the regulatory scale under one of its constitutionally enumerated powers—but it specifically chooses not to do so, in order to enable the benefits of local regulation that outperforms federal capacity.⁴⁷

II. FEDERALISM AND THE TUG OF WAR WITHIN

This brings us to the second half of the analysis—the role that federalism itself plays in fomenting constitutional controversy, and in forcing us to the jurisdictional bargaining table. To facilitate this part of the conversation, I would like to convince you to think about federalism perhaps differently from the way the discourse has conventionally framed it. I want to persuade you that federalism is more than just a contest between state and federal reach.⁴⁸ It may express itself that way, but that contest is more a symptom than the underlying problem. Nor is it merely a contest between judicial and legislative interpretative supremacy, though the discourse often focuses on that conflict as we wrestle with the underlying problem.⁴⁹ Nor should we see it as just another contest between original intent and living constitutionalism, though proponents on each side may position it that way.⁵⁰

What I would like to convince you (and if I could persuade you to read my book, maybe I would!), is that federalism is nothing more, and nothing less, than a strategy for good governance, based on a clear set of values. Federalism is a strategy—an innovative technology of good governance—representing our best attempt to accomplish a set of basic, good-governance principles in the system of government we have created.⁵¹ The principles at the heart of this project are very important. I call them “federalism values” in prior work, but what I mean there is that these are good-governance principles that we are trying to actualize through federalism. We created a federal system of dual sovereignty on the belief that federalism was likely to increase the salience of these values in our day-to-day experience of government. And I suspect you will recognize this list of the top five federalism values.

46. *Id.* at 393.

47. Ryan, *Negotiating Federalism*, *supra* note 1, at 12.

48. RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at xi.

49. *Id.*

50. *Id.*

51. *Id.* at 38.

First, federalism enables checks and balances between local and national authority that help protect against government overreaching or abdication on either side of the line.⁵² It is a familiar point, and both environmental and civil rights law showcase many famous examples in which the regulatory backstop feature of federalism has played a critical role.⁵³ Second, we hope that federalism will protect accountability and transparency in governance, by enabling meaningful democratic participation along all points of the jurisdictional continuum.⁵⁴ Third, federalism promotes local diversity, innovation, and competition—making space for the great “laboratory of ideas” that we admire so much in dual sovereignty.⁵⁵ But fourth, we also like the way federalism provides strong national authority to deal with spillover harms, manage collective action problems, and vindicate core constitutional promises.⁵⁶ Finally, federalism allows us to harness the interjurisdictional synergy that arises between the unique governing capacity that inheres at both the local and national levels—different sets of skills and expertise that we need to reach the different parts of complex problems that cannot be solved at either end of the spectrum exclusively.⁵⁷ Interjurisdictional synergy—the space that federalism creates for multiscalar problem-solving—is the fifth (and most overlooked) value of federalism.

The invention of federalism yielded an unprecedented technology of good-governance to enhance access to these values in democratic systems of government.⁵⁸ And I want to emphasize that when we talk

52. *Id.* at 39.

53. *Id.* at 42–43.

54. *Id.* at 48.

55. *See id.* at 50–59.

56. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 366. In the original TUG OF WAR book and article, 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. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 34–67. The values of centralized authority are implied by the value of intergovernmental problem-solving synergy, but in later exploration of the material, I added more overt discussion of how centralized power counterbalances localism values within federalism. *See, e.g.*, Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 362–64. Because the values of central administration are implicit in the creation of an overall nation-state, they are debated less directly in the many cases that presume centralized national authority but debate its appropriate relationship with subnational authority. However, as the dynamic federalism discourse progressed, I decided it was worth highlighting the values of central administration more explicitly as the fifth in the series.

57. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 59.

58. For excellent historical accounts of the invention of American federalism, see ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 177–79* (2007).

about being faithful to federalism, we should recognize that what we are really talking about is being faithful to these underlying federalism *values*. We often forget this, wrapped up in the politics of the moment, but we should keep this touchstone at the forefront of constitutional analysis. When we ask “Who should get to decide—the state or federal government?”, at some irreverent level the answer is: “*Who cares?*” The real question is, “How are we going to be most faithful to these values?” “What will help us achieve the best balance in the present circumstance?” Whether it should be the state or federal government depends on whatever allocation of power is going to get us closer to these values in this particular context.

But of course, there is another rub, and this one is federalism’s “tug of war within”: what do we do when the different federalism values point that analysis in multiple possible directions? This is a serious problem for American federalism, and all multiscalar governance systems. The federalism values I’ve described are all associated with good governance, and proponents of democratic process generally hold them all in high esteem. Few Americans are really against any of these values as a matter of principle. Even so, the problem is that we cannot always satisfy all of these values all at the same time.⁵⁹ In fact, they are suspended in a virtual web of tension with one another, and when they conflict, we have to make hard decisions about which value will take priority. This is obvious for some of the values—for instance, there is clear tension between values of localism and nationalism—but if you look more closely, you will find that there are actually deep tensions running among all of them.⁶⁰

For example, take the first two on the list: checks and balances on the one hand, and accountability and transparency on the other.⁶¹ Everyone praises transparent and accountable governance, but consider this: the purpose of this value is to empower voters to hold elected representatives to account for their performance in government service. If we *really* wanted the most transparent and accountable governance possible, then the truth is that federalism (deep breath!) is probably a bad idea. After all, federalism is pretty confusing to the average voter, who has to keep track of two different sets of laws and elected representatives, not to mention the different aspects of government for which each is responsible. If things are going badly and voters want to “throw the bums out,” think of how much harder that is when voters have to adjudicate between two separate sets of bums! Consider how much more straightforward this would be in a unitary system, where voters deal with only one set of laws and representatives. Monitoring multiple

59. RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 39.

60. *Id.*

61. *Id.* at 39–44.

levels of governance in a federal system makes it substantially harder for individuals to hold the right representatives accountable for the results of poor performance. And yet we generally tolerate this unwieldy feature of federalism because we really want to reap the checks and balances that those two sets of bums enable.

Then again, if checks and balances were the most important value in governance, then we should probably lose the Supremacy Clause, which gives federal power an upper edge in so many jurisdictional conflicts.⁶² Instead, we could just let the local and national sides fight it out, and may the best idea win! But we don't do that either, because we want to preserve strong federal power to help manage pesky collective action problems, like interstate commerce. And we want to be able to foster interjurisdictional synergy between local and national power, to manage complicated problems like water pollution with an able blend of national standards and local implementation.⁶³ And so on.

The point is that the tensions between these values are real, and we have to find a way to manage them where they conflict in administration. And the big challenge is that—unabashed fan though I am—the Constitution is not terribly helpful to us in doing that.

The underlying problem is that the Constitution mandates, but incompletely describes, our system of dual sovereignty.⁶⁴ It mandates federalism as a strategy for good governance, but it provides an incomplete design for this new governance technology. It tells us that we are going to have dual sovereignty, and it tells us a little bit about what it is going to look like, but it does not tell us much about how to deal with the inevitable problems that arise within this system of dual sovereignty.⁶⁵

Coping with these problems requires that we turn to some exogenous theory of federalism—one that you just can't find within the Constitution itself—to help us make good choices about how to balance these values and manage these tensions.⁶⁶ In the end, we have no choice but to draw on theory—or some notion about what federalism means or is for—to fill in the blanks that are inevitably left open when the Constitution's relatively vague federalism directives are applied to actual cases and controversies.

62. *Id.* at 43. See also Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 365.

63. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 365–66.

64. RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at xiv.

65. *Id.* at 7-17.

66. *Id.*

Over the years, a critical result of this problem has been the spectacular vacillations of the Supreme Court’s federalism jurisprudence as the Court has experimented with different theoretical models over time.⁶⁷ You will probably recognize some of these models. The “Dual Federalism” model prevailed in the 19th century,⁶⁸ and it was revived during the Rehnquist Court’s New Federalism Revival of the 1990s,⁶⁹ which sought to minimize the interjurisdictional gray area as much as possible. The “Cooperative Federalism” model that came to power after the New Deal⁷⁰ tolerates greater jurisdictional overlap in the gray area and best describes the current structure of U.S. governance, but it maintains tension with some principles of the Court’s New Federalism jurisprudence.⁷¹ There have been a series of newer theories of federalism that all try to grapple with these unresolved federalism problems in different ways, including Erwin Chemerinsky’s Empowerment federalism,⁷² Robert Schapiro’s Polyphonic federalism,⁷³ and my own theory of Balanced Federalism.⁷⁴

Whatever theory appeals most to you, it is important to acknowledge the result of this roiling federalism discourse for actual governance in the gray area—and that result has been an awful lot of uncertainty about exactly how gray area governance should operate.⁷⁵ The people who actually have to carry on governance in contested realms of law face an enormous amount of uncertainty about how exactly to manage that jurisdictional uncertainty—how exactly to share and divide regulatory authority in contexts of jurisdictional overlap.⁷⁶

About ten years ago, I decided to try and find out what they were doing to manage it, and I spent a number of years collecting anecdotal information about these dilemmas from anyone in state or federal government who would talk with me about it. It was a fascinating journey, and the headline was that for many of them, the way they managed this uncertainty was simply to negotiate their way through it.⁷⁷

67. Ryan, *Environmental Federalism’s Tug of War Within*, *supra* note 8, at 367–68.

68. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 86–87.

69. *Id.* at 97. *See also id.* at 121.

70. *Id.* at 89–98.

71. *Id.* at 96–98.

72. ERWIN CHEMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* 165 (2008).

73. ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 91 (2009).

74. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 181.

75. Ryan, *Negotiating Federalism*, *supra* note 1, at 4–5. *See also* RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 249, 324.

76. Ryan, *Negotiating Federalism*, *supra* note 1, at 4–5. *See also* RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 249, 324.

77. Ryan, *Negotiating Federalism*, *supra* note 1, at 5.

They worked together with counterparts on the other side of that state-federal line, both directly and indirectly, to jointly construct gray-area policies in a surprising variety of ways.⁷⁸ Negotiation theorists define negotiation as a process of joint decision making through an iterative process of exchange,⁷⁹ and once I learned where to look, I saw it everywhere.

In other words, in contexts where it really was not clear who should get to decide, state and federal actors had worked out various ways of deciding together, by means that ranged from straightforward deal-making to more subtle forms of intersystemic signaling and other forms of policy exchange resulting in jointly constructed governance.⁸⁰ When thus engaged, whether purposefully collaborating or inadvertently competing or dissenting to decide, they are effectively deciding together.⁸¹ The discovery of just how much federalism-sensitive governance is actually the product of some form of negotiation is what launched my last ten years of research.

In the original *Negotiating Federalism* article, and later in *Federalism and the Tug of War Within*, I described many of these methods in a taxonomy of ten different forms of federalism bargaining,⁸² including outright horse-trading in legislative design or criminal enforcement,⁸³ reallocating constitutional authority under the Spending and Compacts Clauses,⁸⁴ and elaborate joint policy making forums, such as the Clean Water Act or Medicaid, statutory programs designed to facilitate state and federal coordination in producing collaborative governance outcomes.⁸⁵ Many of these represent sophisticated examples of how to refine the good-governance technology of federalism to meet specialized demands within different areas of substantive law.

78. *Id.* at 24–101; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 280–314.

79. Ryan, *Negotiating Federalism*, *supra* note 1, at 5; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 268.

80. Ryan, *Negotiating Federalism*, *supra* note 1, at 19–24; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 276–80.

81. Ryan, *Negotiating Federalism*, *supra* note 1, at 102–20; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 339–56. *See also* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

82. Ryan, *Negotiating Federalism*, *supra* note 1, at 28–73; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 280–314.

83. Ryan, *Negotiating Federalism*, *supra* note 1, at 28–36; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 283–87.

84. Ryan, *Negotiating Federalism*, *supra* note 1, at 37–50; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 288–96.

85. Ryan, *Negotiating Federalism*, *supra* note 1, at 50–73; RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 296–314.

III. NEGOTIATING ENVIRONMENTAL FEDERALISM

Having considered the problems and promise of federalism in general, let us steer the conversation back to our opening consideration of environmental federalism. At this point, I would like to explain why everything we have learned about federalism theory contributes to why environmental law has always been the canary in federalism's coal mine. Now we understand that there are pressing conflicts between the underlying federalism values in many contexts of governance—federalism's "tug of war within."⁸⁶ And at the end of the day, in every context where the tug of war arises, we have to decide which values are going to take precedence. In many legal realms, we do a reasonable job of reaching a general consensus. For example, there is a solid consensus that military action should be a federal affair.⁸⁷ We do not always achieve universal agreement, but there is usually enough of a majoritarian view that we can move forward in a consistent direction.

In other areas of law, it becomes harder to reach that consensus, and especially in environmental law, it seems we almost never can.⁸⁸ That's why the Clean Power Plan, the Clean Water Rule, and the Good Neighbor Rules have prompted such enormous controversy (as the State Attorney Generals participating in our program confirmed here). In environmental law, the values conflict is exquisitely difficult because each of the values are pulling hard for preeminence. In many environmental federalism disputes, there is nothing close to consensus. In my book chapter, *Environmental Federalism's Tug of War Within*, I analyzed the multiple Supreme Court opinions in three federalism-sensitive environmental decisions, *New York v. United States*,⁸⁹ *Rapanos v. United States*,⁹⁰ and *Massachusetts v. EPA*,⁹¹ to show how different justices reached different conclusions in the same case on the bases of different values analysis.⁹² I won't rehash all the details in this short essay, but in each case, the different authors came to a different conclusion about which underlying values should prevail in the same context (and each on the basis of strong, if conflicting, arguments).⁹³

In the same piece I also demonstrated the values tug of war in the realm of energy law, including debates over the regulation of fracking

86. RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 34–67.

87. U.S. CONST. art. I, § 8.

88. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 387.

89. 505 U.S. 144 (1992).

90. 547 U.S. 715 (2006).

91. 549 U.S. 497, 532–35 (2007) (upholding a state's challenge to the federal agency's decision not to regulate greenhouse gases under the Clean Air Act).

92. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 379–85.

93. *Id.*

and renewable portfolio standards, where consensus-resistant contests for power span the jurisdictional spectrum.⁹⁴ Jurisdictional disputes in energy law implicate wrenching questions of local autonomy and centralized efficiency, and especially notably, they are as likely to arise between the local and state levels of government as between the state and national levels.⁹⁵ The multiscalar jurisdictional controversies of energy law highlight an important failing in the larger federalism discourse, and one with special resonance for environmental and land use law. It is the way that problems of jurisdictional overlap reverberate all the way up and down the jurisdictional scale in ways that are often constitutionally invisible, because the Constitution only acknowledges these conflicts when they arise between state and federal actors.⁹⁶

In this essay, I have been using ‘local vs. national’ vocabulary to refer to state and federal actors because these are the two levels of government the Constitution considers. However, if we substitute the vocabulary of ‘local vs. central,’ we can bridge this discussion to related jurisdictional debates about the states’ preemption of local regulations, not only over issues of fracking and energy harvest, but the regulation of short-term real property rentals (such as Airbnb), local antidiscrimination laws, minimum wage laws, and others.⁹⁷ We could use the very same vocabulary to bridge our discussion to related debates between member nations and the European Union over environmental and immigration policy that span multiple nations.⁹⁸

In multiscalar governance systems like ours, the same “who should decide” jurisdictional dilemma takes place between every level of scale. Questions of when to centralize or decentralize decision making prompts municipal-state conflicts, regional conflicts among separate states, international conflicts among separate nations, and even international conflicts among national governments and other transnational institutions such as the European Union, the World Trade Organization, and the

94. *Id.* at 377–78.

95. *Id.*

96. *Id.* at 379.

97. Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 929 (2015); *Airbnb, Inc. v. City & Cnty. of San Francisco*, 217 F. Supp. 3d 1066, 1069–72 (N.D. Cal. 2016); NICOLE DUPUIS ET AL., NAT’L LEAGUE OF CITIES, *CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE BY STATE ANALYSIS* (2017); Lauren Doroghazi, *Heat Between Cities and States Rises as Local Preemption Continues*, MULTISTATE INSIDER (Apr. 18, 2017), <https://www.multistate.us/blog/heat-between-cities-and-states-rises-as-local-preemption-continues> [https://perma.cc/KM6A-KG39] (last visited Aug. 29, 2017).

98. See Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society*, 96 OR. L. REV. (forthcoming 2017) (describing federalism and secession conflicts in the European Union).

International Court of Justice.⁹⁹ Opportunities for conflict and cooperation arise diagonally across subnational units within states, in separate nations, or even among subnational units and other nations.¹⁰⁰ Familiar issues pervade these disputes, each balancing calls for voice, accountability, autonomy, efficiency, and interdependence.¹⁰¹

Returning to the specific context of environmental governance, environmental federalism disputes resist consensus with special force because they match strong claims for both decentralized and centralized decision making, they prompt fierce clashes among other federalism values, and they trigger intense competition among multiple levels of would-be governmental decision makers. And as noted in Part I, there are often compelling arguments on all accounts.

Nevertheless, environmental governance has responded to these challenges with noteworthy innovations—new inventions, as it were, of good-governance technology. In *Federalism and the Tug of War Within*, I described ten overarching ways in which government actors negotiate through jurisdictional uncertainty,¹⁰² and in *Environmental Federalism's Tug of War Within*, I explored more specifically how environmental governance has tailored different statutory formats for intergovernmental bargaining.¹⁰³ Analyzing the major programs of cooperative environmental federalism, I identified four basic regulatory approaches that asymmetrically allocate authority among local and national actors in different ways, enabling joint environmental governance that draw on complementary aspects of state and federal capacity.¹⁰⁴ This broad typology includes methods of Coordinated Capacity, Federally-Supported State Implementation, Conditional Preemption, and Shared and General Permitting Programs.¹⁰⁵

Coordinated Capacity programs partner the distinct regulatory skillsets of state and federal actors in a relatively straightforward manner—for example, the Emergency Planning and Community Right-

99. *Id.*

100. Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237 (2011); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007).

101. See Ryan, *Secession and Federalism in the United States*, *supra* note 98 (analyzing centralization and decentralization disputes in terms of competing calls for autonomy and interdependence).

102. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 280–314.

103. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 366–67.

104. *Id.* at 400–12.

105. *Id.*

to-Know Act (a component piece of the Superfund statute), which engages state and local experts in coordinated planning for chemical and other emergencies.¹⁰⁶ These programs mandate state and federal coordination on interjurisdictional problems but with limited interaction, like “parallel play” among young children.

Other environmental federalism partnerships offer states greater regulatory choices in more developed programs of interaction. In programs of federally-supported state implementation, Congress offers financial and technical resources to states in exchange for their help implementing federal goals. These laws assign local and national actors complementary roles with different relative strengths. For example, the Coastal Zone Management Act provides assistance for states to create coastal management plans that are approved by federal regulators, but it then constrains federal decision-making in conformity with the state plan in regulated coastal areas.¹⁰⁷ These plans encourage coordinated decision making, but the state maintains the discretion whether to participate.¹⁰⁸

Other programs create an even stronger federal role. In the Conditional Preemption model pioneered in environmental law, states choose between implementing federal standards themselves or accepting federal regulation of in-state activity to meet federal standards.¹⁰⁹ State and federal actors follow this model in sharing supervision of the Clean Water Act’s National Pollution Discharge Elimination System, which prohibits pollution discharges into protected water bodies without a permit (under permitting systems required by federal law but usually managed by the states).¹¹⁰ Some environmental laws merge the carrot of federally-supported state implementation with the stick of conditional preemption. For example, the Clean Air Act¹¹¹ combines federal standard setting with state implementation that is required to avoid penalties associated with various sanctions, including the potential loss of federal highway funds.¹¹²

Environmental law has also pioneered the use of general permitting programs to coordinate state and federal authority in realms of

106. 42 U.S.C. § 11001–11002 (2012).

107. 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)).

108. RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN*, *supra* note 4, at 303 (discussing the mechanics of the CZMA).

109. Ryan, *Environmental Federalism’s Tug of War Within*, *supra* note 8, at 404.

110. Clean Water Act, 33 U.S.C. § 1251 (2012).

111. Clean Air Act, 42 U.S.C. § 7509 (2012).

112. Ryan, *The Spending Power and Environmental Law After Sebelius*, *supra* note 1, at 1009–17.

jurisdictional overlap.¹¹³ General permits have been used to harmonize state activity with federal goals when a federal agency wishes to maximize state discretion and minimize the regulatory burden for permit applicants. Applicants receive permission to engage in a federally-regulated enterprise by following a general set of instructions that provide guidance about acceptable and unacceptable activity. For 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 actors nationwide to obtain permission to fill wetlands in accordance with federal guidance, and with state input.¹¹⁴ Environmental scholars have recognized the potential for this innovative regulatory tool in future efforts to regulate the cumulative impacts of activity with unwieldy numerous participants, such as greenhouse gas production.¹¹⁵

This very brief introduction to the technology of environmental governance shows that each type facilitates interjurisdictional decision making in different ways. The usual model prioritizes national judgment in setting goals and standards, while allowing local judgment to lead on design and implementation.¹¹⁶ However, each seeks a different valence of contribution from regulatory partners, some more cooperatively and others more competitively, adjusting for the unique demands of each substantive area of law.¹¹⁷ The resulting decisions incorporate multiscalar input in ways that serve environmental governance well, and some models of collaborative environmental governance might prove useful in other areas of law as well.¹¹⁸

CONCLUSION: NOT A ZERO-SUM GAME

This essay has summarized a large body of work in a small space, but I hope it has inspired you to reflect on three core ideas: (1) federalism

113. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 407–08.

114. United States Environmental Protection Agency, *Section 404 Permit Program*, <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/> [<https://perma.cc/DY79-HWYS>] (last updated July 3, 2017) (explaining the Section 404 general permit program); US Army Corps of Engineers, *ORM Permit Decisions*, <http://corpsmapu.usace.army.mil/egis/f?p=340:1:0::::> [<https://perma.cc/6W48-Z9Y6>] (last visited Sep. 23, 2014) (providing direction on how to apply for a § 404 general permit). *See also* Eric Biber & J.B. Ruhl, *General Permits and the Regulation of Greenhouse Gases*, REG. REV. (July 23, 2014), <http://www.regblog.org/2014/07/23-biber-ruhl-general-permits-and-the-regulation-of-greenhouse-gases.html> [<https://perma.cc/T3R9-BAG3>].

115. Biber & Ruhl, *supra* note 114 (discussing the § 404 general permit option).

116. *Id.*

117. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 8, at 400.

118. *Id.* at 413.

forces us to grapple with inevitable conflicts among underlying good governance values; (2) which can be especially exacerbated in contexts of environmental law; and (3) negotiated governance can be a useful way of managing the resulting problems of jurisdictional uncertainty. As I conclude now, I would like to leave you with a fourth idea, perhaps the most important point of all: that federalism is not a zero-sum game.

This is a big lift because the constitutional discourse has historically presented federalism as exactly that—an epic power struggle between state and federal actors in which every gain for one side is a loss for the other.¹¹⁹ However, my research and that of others has revealed that the boundary between state and federal power in the gray area is itself an ongoing project of negotiation, and one that creates many opportunities to avoid zero-sum distributions of power. Deployed wisely, both collaborative and competitive means of joint decision making can empower both sides—and more importantly, effective interjurisdictional governance—if for no other reason, by ensuring that the ultimate policy is informed by the concerns and wisdom of all levels of government within our multiscalar system.¹²⁰

The good news is the discourse is finally catching up. When I first started writing about negotiated federalism, I criticized “armchair federalism theory” for distorting the scholarly conversation about good governance, citing a disturbing gap between what federalism looked like in legal scholarship and what it actually looked like on the ground.¹²¹ I critiqued the disjuncture between “federalism in rhetoric” and “federalism in practice.”¹²² Ten years later, I am happy to report that the literature is now closing that gap, thanks especially to dynamic federalism theorists, or theorists by whatever name that study the interaction between multiple levels of government as a site of continuous contest, coordination, and exchange.

It is no accident that the pioneers of dynamic federalism came from within environmental law, including scholars like Kirsten Engel,¹²³ Bill

119. Ryan, *Negotiating Federalism*, *supra* note 1, at 4.

120. *Id.*

121. *Id.* at 4–5. *See also* RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 267–68.

122. Ryan, *Negotiating Federalism*, *supra* note 1, at 4–5. *See also* RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, *supra* note 4, at 267–68.

123. *See, e.g.*, Kirsten H. Engel, *The Enigma of State Climate Change Policy Innovation*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* (Kalyani Robbins ed., 2015); Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 *PUBLIUS* 432 (2009); Kirsten H. 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); Kirsten H. Engel,

Buzbee,¹²⁴ Ann Carlson,¹²⁵ Rob Glicksman,¹²⁶ and many others¹²⁷—but the field has also benefited from theorists working in other areas of law, like Erwin Chemerinsky,¹²⁸ Heather Gerken,¹²⁹ Jessica Bulman-Pozen,¹³⁰

Harnessing the Benefits of Dynamic Federalism in Environmental Law, 56 EMORY L.J. 159 (2006).

124. See generally William W. Buzbee, *Climate Federalism, Regulatory Failure and Reversal Risks, and Entrenching Innovation Incentives*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM* (Kalyani Robbins ed., 2015); *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* (William W. Buzbee ed., 2009); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007).

125. See generally Ann Carlson & William Boyd, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810 (2016); Ann Carlson, *Regulatory Capacity and State Environmental Leadership: California's Climate Policy*, 24 FORDHAM ENVTL. L. REV. 63 (2013); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. UNIV. L. REV. 1097, 1099 (2009); Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003).

126. See generally Robert L. Glicksman & David L. Markell, *Dynamic Governance in Theory and Application, Part I*, 58 ARIZ. L. REV. 563 (2016); Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. UNIV. L. REV. 579 (2008); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006).

127. See, e.g., Robin Kundis Craig, *THE CLEAN WATER ACT AND THE CONSTITUTION* 7 (2d ed. 2009); Hannah Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. 293 (2016); Hari M. Osofsky and Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 778 (2013); Blake Hudson, *Dynamic Forest Federalism*, 71 WASH. & LEE L. REV. 1643, 1649–53 (2014); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1800 (2008); Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 DENVER U. L. REV. 791, 792–93 (2008); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IA. L. REV. 545, 547 (2007); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 217–22 (2002); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 570–74 (1996).

128. See e.g., CHEMERINSKY, *ENHANCING GOVERNMENT*, *supra* note 72; Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 78–79 (2014); Erwin Chemerinsky, *Reconceptualizing Federalism*, in *LAW AND THE QUEST FOR JUSTICE* (Marjorie S. Zatz et al. eds. 2013).

129. See, e.g., Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85 (2014); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014); Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

130. See, e.g., Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation*

Abbe Gluck,¹³¹ and many others.¹³² Federalism theory has finally caught up with federalism in the field, and the literature is now much more cognizant of the role of consultation and contestation that informs good multiscalar government. My hope is that this recognition, and ongoing conversations like these, will lead us toward even better federalism-sensitive policymaking and administration in the future.

of Powers, 112 COLUM. L. REV. 459 (2012); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

131. See, e.g., *What is Federalism in Health Care For*, 70 STAN. L. REV. (forthcoming 2018); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749, 1752 (2013).

132. See, e.g., Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248 (2014); Pasachoff, *Two Cheers for Evidence*, *supra* note 32; Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 741, 791–94 (2013); Catherine M. Sharkey, *Preemption as a Judicial End-Run Around the Administrative Process?*, 122 YALE L.J. ONLINE 1, 1 (2012); Cristina Rodríguez et al., *Legal Limits on Immigration Federalism*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 31, 48 (Monica W. Varsanyi ed., 2010); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1423–24 (2009); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028–29 (2008); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005).⁴