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MIKE LIVERMORE: Welcome to the Free Range Podcast. I'm your host Mike Livermore. This episode is sponsored by the Program on Law, Communities, and the Environment, at the University of Virginia School of Law. With me today is Jonathan Adler, a law professor at Case Western.

He writes on environmental law federalism and regulation. His 2020 edited volume *Marijuana Federalism, Uncle Sam, and Mary Jane* was published by Brookings. Jonathan, thanks for joining me today.

JONATHAN ADLER: Good to be here.

MIKE LIVERMORE: So maybe we could start by talking about federalism a little bit.

JONATHAN ADLER: Sure.

MIKE LIVERMORE: One of the funny things that I've noticed, and I'm sure you've noticed, as well, about environmental discourse is that many people's views on federalism shift, depending on who is in power in Washington, DC. When there's a Republican in the White House, environmentalists are big fans of the states and regulated industry less so. And then that whole dynamic kind of flips when power changes in the White House.

But I see as a fairly consistent defender of the states, although that's probably a simplification. But that's how I think of some of-- at least some of your work. So I just wonder, just kind of zooming way out, what makes states attractive venues for environmental policy?

JONATHAN ADLER: Sure. So yeah, initially, I certainly try to be consistent--

MIKE LIVERMORE: [LAUGHS]

JONATHAN ADLER: --and nice to-- it's nice to see that those efforts are appreciated. I think when we think about environmental problems, I think we can recognize that different problems occur at different scales, and in a world of scarce resources. And that the fact that scarcity applies to governmental institutions and the political process, as well, albeit in slightly different ways, it seems to me desirable and certainly, consistent, as well, with the United States's constitutional structure to try and have environmental issues dealt with at the level that they occur or as close to the level at which they occur as possible.

So the federal government, insofar as it is able to focus on issues that are transboundary, focus on issues where the states are less likely to be competent, makes sense, and that state and local governments dealing with issues that occur mostly at the state and local level or local and regional level is generally desirable. I think some of the benefits of that are, one, problems manifest themselves really differently in different places.

One of the very first environmental issues I did a lot of work on was urban air pollution and state implementation plans, and the like. And I did some work out in Maricopa County, Arizona, where Phoenix is. And air pollution in Phoenix is very different from, say, Cleveland, where I am now. Part of that's a function of geography, much drier climate in Phoenix. Some of it's a function of economic factors, the nature of industry, the nature of the economic activity that's contributing to the pollution, and so on.

And as we make progress on dealing with environmental problems, those differences start to become more important, right? I mean, when you have cars without catalytic converters, OK, those regional differences probably don't matter a lot. But when you're talking about getting those additional increments of pollution reduction, being able to account for those differences, I think, matters. So that's one thing that I think is important.

Second, I think environmental issues are not merely questions of science. They're questions of values. And values differ from place to place. And priorities differ.

And I think that allowing those value differences to matter is generally a good thing. Different parts of the country have different environmental issues, in different places, the hierarchy of policy priorities. Another reason I like it, and this is one that I know that you're skeptical of, is experimentation and learning. Environmental issues are hard.

There are a lot of things that we've tried in our history as a nation and that we've tried in environmental policy space that have not always worked as well as we'd want them to or that have created incentives we didn't expect. And I do think that one value of experimentation is that, when experiments fail, and some percentage of them necessarily will, your downside risk from that failure is reduced, because you're not failing everywhere. And the fact that different places are trying different things generates information about how we can better address environmental problems in a way that's consistent with the other things that we care about.

And so those are some of the reasons why, as a policy matter, I like decentralization. Now, as a legal matter, sometimes the relevant law and doctrine supports a preference for decentralization or a rebuttable presumption in favor of decentralization, and sometimes it doesn't. But I certainly have argued that law doctrine supports more decentralization than we currently experience in most areas.

And then in one area that's current now is related to preemption, I think it certainly creates a stronger argument toward decentralization, certainly, than at least some are arguing for. That is to say, some folks are now arguing for much greater preemption of state law in the environmental space than I think current law and doctrine justify, even in some areas where I think the policy argument for centralization might actually be somewhat strong. I'm not sure the law does.

So I'm usually in the position of saying, the law supports more decentralization or should support more decentralization than we have. There are some areas now relating to preemption where I'm somewhat flipped, in that I think there are stronger policy arguments for centralized decision-making, but weaker legal arguments for it.

MIKE
LIVERMORE: Yeah. And it'd be fun to get into some of those preemption questions maybe in a little bit. Just when we're thinking about, again, just the big structure of US environmental law, one of the things that is interesting, and you and others have noted, is that the structure of many of the laws, the Clean Air Act, the Clean Water Act-- those are the two of the big ones anyway-- it doesn't seem to allocate federal power where federal power is most justified and doesn't seem to allocate power to the states where state authority is most justified.

And so basically, the federal government has a lot, a really big role to play under the law, with pollution that is primarily local in orientation. And let's just say, at the very least, it has taken a very long time to implement effective interstate transboundary, controls on transboundary pollution, even though that's an area where the federal government has an obvious and natural role. So this is peculiar.

I'd be curious of your thoughts on that. How did that come about? Are we just stuck with it? Should we think about radically reforming the law to change that?

JONATHAN
ADLER: Well, so there's a lot there. In terms of how it came about-- I mean, I've written some on this, and I have a book manuscript I'm trying to finish that tells my version of this story. And I think when the federal government really ramped up its presence in the environmental space beginning around in the late '60s and through the 1970s, there wasn't a lot of thought about jurisdictional choice. There was rather a dramatic increase in the demand for governmental action to reduce pollution and to protect environmental resources.

And there was a dramatic increase at the state level. There was also a dramatic increase at the federal level. And there wasn't a lot of attention to, OK, how do we rationalize who does what?

And it's similarly on the constitutional side of things, which, as you know, I've written about. There were constitutional issues folks were focused on that the environmental laws were raising. But they weren't the federalism issues, right?

So the Council on Environmental Quality publishes this book-length report on takings and how environmental law could be frustrated by takings claims. The idea that enumerated powers or sovereign immunity or commandeering, or what have you, would be obstacles, or conditional spending, or what have you, wasn't really thought about. And so it was kind of an accident, I think, about why we got it the way we did.

I also think politically, as a consequence of the Civil Rights movement, there was a lot of skepticism about state and local governments. That was very well deserved, right? And the line I always use is, if states couldn't be trusted to protect portions of their own citizenry, why would we expect them to be particularly proactive about protecting environmental resources and the like?

Many states had shown themselves to be some combination of incompetent or malicious, when it came to fulfilling their obligations. And so arguments, "oh, states can be trusted," really didn't have a lot of purchase at the time. And again, I think that's very understandable and given the time period, justifiable. Right?

And today, the state-level interest in environmental protection is much different than it was then. And so what we might think states would do today is not what we might have thought states would have done in, say, the '60s and '70s. So that's how we got here.

As you noted, for a long time, the federal government largely ignored or in some respects, even frustrated efforts to deal with interstate issues. That's changed some, especially under the Clean Air Act. The EPA has been more willing to use those authorities. Courts have been more willing to recognize the authority.

And so you've had the SIP call process and the Section 126 process and these various processes that allow downwind jurisdictions to get some degree of protection from upwind jurisdictions. There's been a lot more action there than there had been, a lot more efforts to control cross-state pollution. I'm not sure that that's the focus it should be. Or it hasn't reached the proportional focus I would argue it should have in terms of what the EPA does with air pollution. But it certainly improved.

And I think there's certainly there room for doing more, both to deal with interstate pollution, as well as to do some other things that I think the federal government has a comparative advantage in doing. Which I would include into that a lot of data collection and scientific research about understanding both the nature of pollution problems and their consequences and then, how we address them. There are economies of scale, and there's no reason to make states duplicate that sort of research.

And a lot of that work would actually also make it easier for states to play a larger role. In a little bit of my work, I've tried to pay some attention to, how is it the federal government can do things that will reduce the costs for states at being more effective environmental stewards? And there's room there.

In terms of what we do, as a practical matter, I'm certainly not going to be given complete control over environmental policy, environmental law. But also we're not likely to get revolutionary change. And we're not likely to get revolutionary change that is perfectly well thought out.

What I've argued for is that it would be nice to create a mechanism whereby we could facilitate a reorientation of priorities. So I've argued for a mechanism where states could seek to, essentially, opt out of federal supervision or superintendents or imposition of standards within those states, within the framework of the existing environmental laws.

And my belief is, that if states take that opportunity and do so in a way that people find to be congenial and effective, well, then more states will follow suit. And if some states take that opportunity, and we decide it's a mistake, well, then we still have the existing architecture of environmental federal environmental law to fall back on.

The other thing I would certainly do is, if Congress could, insofar as it's appropriating resources, we know that EPA never has the resources to do everything that the laws say EPA is supposed to be doing. And so the EPA has always engaged in some amount of triage. I think Congress could certainly facilitate the process by explicitly devoting greater resources to those areas where the federal government has a comparative advantage.

And the two biggest buckets there would be things that have cross-boundary effects, so interstate air and water pollution. And then increasing the knowledge base and technical capacity, that would give states more tools and more ability to do the things that are truly in their backyards more effectively. A lot can be done in the budget process just to put more money in those pockets and less money in some of the other buckets. So those are the two things I would do, if it were up to me, that I think are realistic.

And the last thing I'll say is it would also just help, I think, to have an EPA administrator who, if they are talking about these issues, is actually following through in a somewhat consistent way. I mean, I've argued that, for example, the Trump administration missed some opportunities in this regard. There was a lot of rhetoric about federalism coming from the EPA.

But if you actually look at what it did, it was not a principle of federalism agenda. It was an ad hoc war against pollution control agenda just cloaked in the rhetoric of federalism. And I think that sort of thing is not helpful. It doesn't yield good policy, and it doesn't help set the tone of thinking about, OK, well, where do we need the federal government, and where can the federal government back off to some degree?

**MIKE
LIVERMORE:** Right. Yeah, I mean, I can imagine it being very frustrating, actually. Because then what happens is the language around federalism gets associated with an anti-pollution control agenda that it doesn't have to be that way. I mean, it would be very interesting to-- it's hard to imagine.

But it would be very interesting, as a political move for an administration, for an EPA administrator, or for even coming from the White House, to say, we're going to ramp up our emphasis on interstate pollution, water pollution. We're going to focus on watershed management and where it crosses state boundaries. And we're going to focus on pollutants that cross state boundaries, while at the same time, we're going to bring the states in in a more central role on pollutants that are-- and these problems that are more local in nature. It's just hard to imagine either political party right now or the leadership of either political party being able to do that in a way that anybody would trust on either side.

**JONATHAN
ADLER:** I think it's hard. I mean, I do think that-- I mean, the Trump administration is, in some respects, I guess, generous. But I do think there were some opportunities there, in both the Bush administration and the Trump administration, to try and do that.

If you are, on the one hand, saying, OK, the EPA is not going to be imposing such great pressure on certain states, well, then just let California do its thing, right? But don't at the same time try to reinterpret the Clean Air Act to constrain what California is doing or in the case of the Trump administration, send these threatening letter, saying, oh yeah, we finally noticed that you're not doing enough to control particulate pollution in this part of California, where there is no claim of any kind of transboundary effects. But this is just an opportunity.

I mean, it certainly looked like nothing more than an effort to beat up on California, because it's California. And that clearly doesn't help, right? And I do think there are some opportunities there.

I also think that, at least in some parts of the country-- I mean, I live in Ohio. Ohio is a fairly red state. But Ohio cares a lot about the Great Lakes. It cares a lot about maintaining and improving water quality.

And I don't think there's anything inconsistent with saying, we don't want the EPA interfering with things that are localized issues. But we would certainly like support and obstacles to be removed, when it comes to figuring out how we in Ohio can ourselves do more for the Great Lakes, but also, work cooperatively with other Great Lakes states to ensure these resources are protected.

There will still be conflicts, right? When the EPA says, Ohio, you're spewing a lot of stuff that ends up in New York and Vermont, Ohio is not going to like hearing that. But I would think there's actually more room for that if EPA is not at the same time obsessing about something that doesn't have those sorts of effects.

And as I keep mentioning, if EPA, at the same time, is doing things that help increase state capacity, then there's less concern that Ohio is not dealing with some localized problems, because they don't any better or because they don't have the capacity. It's really a question of something else being prioritized more. So maybe I'm just too optimistic. I like to think there are opportunities there.

I suspect that you're more likely to see it from a Republican president, but maybe not. So I would argue that the closest we've had to a real effort to have meaningful-- push meaningful federalism in the environmental space probably occurred under the Clinton administration, programs like the [INAUDIBLE] program, which didn't go as far as they could have. I think we're a lot more positive than much of what we've seen since from either party. So I hope the opportunities are there, I guess I would say.

MIKE LIVERMORE: And it's interesting, just as you mentioned, the Clinton administration, they more broadly adopted a lot of language on federalism. There was the federalism executive order. There was a couple of things that they did.

And again, how that all that actually cashes out is a different question. But certainly, they were willing to talk about federalism in a way that it's interesting, just it is interesting. So one question-- and we could keep talking federalism. I actually would like to, because it is such an important component of US environmental law.

One concern that my students will often raise, when I talk about environmental federalism, and you discussed, as well, when we were talking about just the origins of the more nationally-oriented system that we have now, is issues around justice or public choice failure, or that kind of thing, where even if a harm is internalized within a state, within a jurisdiction, obviously, there's going to be some groups that are, more or less, exposed to these harms and that we might be worried about the states' willingness to address harms, when they fall on certain groups of people.

And so I guess-- and there's a lot of emphasis these days, a renewed emphasis on these environmental justice issues. So I'd be curious what your thoughts are. I find it hard to think about these things. I mean, because they do run-- because then there's always like, well, how good is the federal government at addressing these issues--

JONATHAN ADLER: Exactly.

MIKE LIVERMORE: --and so on. But yeah, I'd be curious to hear your thoughts.

JONATHAN ADLER: So I mean, some of my responses might be predictable, and then some I hope, at least, are less so. So I mean, the first question, I think, always has to be compared to what? I mean, yes, we might expect state governments-- in fact, we should expect state governments to often not do everything the way we would want them to. And we would expect government failure at the state level.

But we also expect that at the federal level. And I think that I have found theoretical claims about why we would expect failure to be more systematic at the state level than the federal level to be unconvincing. And I found the empirical evidence that the failures are more systematic at the state level to be lacking.

There are plenty of examples of federal environmental policy, including things done by the EPA, and not things the EPA is forced to acquiesce to, but the EPA does itself, that are perfect case studies of public choice and action and agencies, regulatory agencies, doing the bidding of interest groups, as opposed to those they're supposed to be helping. And one could throw in, just as the most recent example, the desire to increase the ethanol waiver to go up E-15 to try and reduce gas prices. I mean, environmentally, that's crazy.

And EPA has done that sort of thing a lot. The Clinton administration, that we were just praising, had a similar ethanol giveaway that it tried to justify under the Clean Air Act, that was thrown out in court. And if we're talking about things that affect-- that contribute to things like urban air pollution, for example, and we recognize that urban air pollution is not evenly distributed, we realize that these sorts of effects can have-- or these sorts of policies can have disproportionate effects on vulnerable communities, just like other ones. So there is the compared to what question that I think we have to ask.

The second thing is, when it comes to what we might loosely characterize as environmental justice concerns more broadly, the issues that I think are the most important, and this may be a function of the normative framework that I tend to operate out of, I'm most concerned about autonomy and choice and consent, more so than I am about the resulting distribution. Wealthier communities are subject to less than poor communities are. And that's true whether we're talking about environmental problems, or any other social will.

What's really problematic is when that's imposed, as opposed to a trade-off. And if one looks at the history of environmental justice, one sees examples of poor communities being imposed upon, other levels of government citing a waste site or landfill or diverting enforcement resources, or whatever else, in ways that are discriminatory or if not on purpose, certainly in effect.

But you also see examples of communities seeking opportunities and being denied those opportunities. When I worked in DC, there was a big effort in Virginia to bar the importation of waste from New York. One of the Virginia papers had published this picture of a landfill with an "I love New York" t-shirt conveniently placed in the middle of the picture.

And the Virginia legislature was going to pass this law. And I was involved in this issue a little bit, because there were efforts at the federal level to authorize states to impose these sorts of restrictions on importation and exportation. And when Virginia was considering this bill, the community where surrounding one of the landfills at issue showed up at the state house-- and this was a predominantly minority community-- to say, "what the hell are you doing?"

Yes, this facility is in our community, but this facility is paying for things that you the state legislature aren't paying for. It's providing resources that are going to help us from a health care standpoint, an education standpoint, that you and the legislature aren't paying for. Why would you deny us this opportunity, if this is something that our community actually chose and consented to."

And there were powerful speeches by pastors and others from the community, objecting to this policy that was going to be done in the name of environmental justice, but that was actually disempowering to the community. So I worry a lot more about what's happening. Is a community making a choice based on that community's values and its priorities? Or is that community being imposed upon.

I see much greater justification for imposition in the second context. And related to that, when it comes to what the federal government's role should be, more broadly, our constitutional framework does recognize-- it has recognized since what we often call the second founding, that the federal government has a lot more power to intervene in what we would otherwise consider to be state or local affairs, when state and local governments are not observing and protecting the rights of portions of the citizenry.

And that can occur in the environmental context. And if it does, I think that's a justification for federal intervention. But it doesn't justify to me broad prohibitions on certain sorts of activities or activities purely based on estimations of the impact. It justifies more targeted interventions where we see that communities are being imposed upon, as opposed to making choices that we might disagree with.

And it can be a hard balance to draw, but I think it's an important one. And I think if one looks at the way environmental burdens have been imposed disproportionately, one can, I think, try and separate out where it's been a function of communities being imposed upon or being deceived, or what have you. And I don't mind the federal intervention in those contexts, provided we have reason to believe the federal intervention will, in fact, be better.

There are times where we have to worry about that. And there are even examples of interest groups manipulating these sorts of concerns and narratives for their own pecuniary interests. And we have to be careful about that.

The regulatory process, the administrative process, systematically advantages well-resourced interests. Some work that Wendy Wagner has done has shown this in terms of who participates in the process. I think it's somewhat intuitive in the sense that the average person is much more likely to how to show up at a local town meeting than they are to how to file a petition with the EPA or to effect a rule-making, or what have you.

And so we want to be careful about thinking the answer to these problems is to shifting questions to an administrative regulatory process. Because that process isn't going to be particularly equitable, and it's manipulable, right? We know that if an interest group thinks it can cloak its agenda in more progressive garb, it will do so. And we have examples of that happening.

There was a fight between cement kilns and hazardous waste incinerators, and one group, one side, paid to create all these, quote, unquote "local groups formed around the kitchen table," and to file lawsuits, and to file administrative complaints, and so on. And in the conduct of litigation, it eventually came out that this was totally paid for by the other side.

This had nothing to do with local communities really objecting to one source of emissions, versus the other. It was the weaponization of these sorts of concerns by economically motivated parties. And we have to really be concerned about that sort of thing, because it happens.

**MIKE
LIVERMORE:**

Yeah. And it's an interesting, again, just thinking broadly about political framing, because that's, obviously, the lens through which all policy is refracted, is to A, an agenda that was to say, we're going to focus on interstate issues, big picture things, and environmental justice. And then, where there aren't environmental justice concerns, in particular, then we'll be more amenable to states-- to decentralization, more generally.

So it would be an interesting agenda. It's not one that either political party has adopted so far. It's clearly a mesh between the two. And sometimes, those could be really successful, and sometimes, they just they never come about.

**JONATHAN
ADLER:** Right.

**MIKE
LIVERMORE:** One thing that I thought we might return to is the point on experimentation. And I'd just be curious to hear your thoughts. So you mentioned that I've written a little bit of a skepticism about experimentation.

There's two parts to that. So one is in this paper, I talk about the concerns that people can learn good things, or they can learn bad things from experimentation. Right? Powerful organizations can learn how to exploit political processes to gain success just as well as policymakers can learn.

But one thought, one concern, I think, that there has been-- that's not just mine. I mean, others have discussed. And this has to do with states as the driver of policy, is that it's actually very, very hard to learn anything from state variation. Which I'm going to call it variation rather than experimentation. Because experimentation implies a controlled environment, like where you try one thing, and you hold other things constant.

And that's the problem with states, is states select into what their policies are going to be. And so it's very just hard to learn, because everything's confounded, because you're selecting into the treatment, or you're selecting into the policy. And you could imagine a coordinated regime where a bunch of states get together or the federal government, for that matter, and randomly assign policies to different states, or something like that, to see what their effects were.

We don't do that. It's a little hard to imagine us doing that in the states. Although, we would learn a lot if we did. So I'm just curious what your thoughts are on this problem of selection, when states are the ones who are making decisions about the policies to implement and the ways that interferes with our ability to actually learn from this variation that we see.

**JONATHAN
ADLER:** Well, I mean, I agree it's a problem. It's a complicating factor, as is the fact that states are not equal in terms of their preferences. So my claim is not that, oh, California will do something, and if it works, oh, then every state will rush to do what California did. Because some states will look at what California does and say, no, we don't want to do that.

So it's imperfect, right? I recognize that. And another complicating factor is that the federal presence in so many environmental areas, including areas where we would expect states to have a comparative advantage, distorts what states do. And I think it distorts what they do both as a practical matter, but also, politically.

And I have written a paper that has a model that documents how federal, even partial federal involvement in a field can prevent states from doing things they would have done otherwise, that would actually increase the overall level of environmental protection. And it's a crowding out sort of model. And so I agree all of that's complicated.

Now, I do think that one thing that's important to note is that, from the empirical literature we have, which is not great, but it's a lot better than one would find from looking at law reviews-- that is to say, the vast majority of empirical work in economics and political science on these questions appears nowhere in law reviews, unfortunately-- suggests that some of the downside risks that we're worried about, things like race to the bottom, we find very little evidence of.

And we find areas in which we actually find the opposite pattern. That may be historically contingent, i.e., a function of a 21st century environmentally aware populace and is not a claim that we would have seen that absent of federal involvement in the '70s and '80s, and so on. We also see, in areas where the federal government is not involved, some evidence of replication of policies in neighboring states, in areas where we would expect states to be very sensitive to whether or not policies are doing what the states expect them to do or want them to do.

So Paul Teske has a book, *Regulation in the States*, that documents this in a couple of areas, including some environmental areas. And the effect is not huge, but it shows that one Midwestern state does something for groundwater, and it seems to be cost effective and producing what the state wants. The likelihood that its neighbors do something similar goes up. We're not entirely sure why. That is to say, it's been very hard to document what the precise mechanism of that is, but we do see evidence that's suggestive of that.

One reason I'm skeptical of the let's centralize everything and plan the experiments is, some of the reason you get the variation is because different people want and try different things. And so you're not going to get that same impetus from a centralized location. A lot of it, I think, comes from a state deciding that it wants a different combination of goods than it had.

So I mean, just to take Virginia, where you are, I mean, there was a period of time where Virginia was much more agriculturally oriented and much more solicitous of agricultural interests and, say, meatpackers, and the like. And when I lived in Virginia, that was when, especially in Northern Virginia, the tech boom was going on. And a lot of the new voters coming into Virginia wanted economic prosperity, but didn't want a state that was just going to give the meat processing plants whatever it is they wanted.

And so Virginia had to figure out, OK, how can we provide the environmental amenities and the level of environmental protection that this new influx of highly educated, affluent voters and the companies that want to employ them want, without destroying our economic base? And so there's pressure to come up with something new that perhaps reconciles that trade-off between economic and environmental performance that might otherwise be limiting.

And you only get that from a bottom up. Or it's hard to replicate that if it's not coming in a bottom-up way. And again, the claim is not that every state that deals with that and struggles with that is going to get it right. But I believe that we're more likely to get it right more often in ways that we're ultimately satisfied with that way than the alternative, which is, again, the compared to what point right there.

And again, I think when you look at things like fracking and other things, you see this same sort of thing, right? In Ohio, the environmental and other effects of fracking that became really salient and important in Ohio, in the local communities where we saw a lot of hydraulic fracturing, were different than what the natural activists were focused on and arguably, far more important for quality of life and environmental protection, I mean, a lot of stuff that might not have been obvious.

Roads, you have these areas where the roads were not built for the volume of truck traffic they were suddenly exposed to. That's a public safety issue. That's a water quality issue from runoff. I mean, it can be an air pollution issue, if you're dramatically increasing air pollution sources in the area.

That's not what national folks wanted the EPA to focus on. But that made a huge difference. Noise, a big issue; light at night, during drilling operations, can be a big issue, I mean. And a state like Ohio, that wanted hydraulic fracturing to occur, had to figure out how to deal with those issues, how to deal with maintaining, for example, road infrastructure to prevent the environmental harms of-- that would result from the degradation of that infrastructure.

That knowledge and understanding and focus on that could not have occurred. Now, to use fracking as a last example and to return to something brought up earlier, Ohio was not going to care about fracking's contribution to methane emissions and the effect on the global atmosphere. It was not going to be concerned about whether or not there were emissions from those operations that were affecting Pennsylvania or New York, or what have you.

And that's where you would expect that those bottom-up pressures and knowledge creation to fail in a systematic way. That, to me, is where we're at. I would flip the presumption for being bottom up, versus top down, because we have reason to believe that the failures won't be occasional, but will actually be systematic. And that should affect the way we think about it.

MIKE LIVERMORE: Yeah, I think part of what has affected the way we think about this, this set of issues around learning and all that is that the original Brandeis-ian metaphor of laboratories of democracy, I think, was just very inept.

JONATHAN ADLER: Sure.

MIKE LIVERMORE: Of course, we've had some time to think it over. And because states aren't laboratories, right?

JONATHAN ADLER: Right.

MIKE LIVERMORE: In the analogy of experimentation or the term experimentation, I would think we should be talking about innovation rather than experimentation.

JONATHAN ADLER: Sure. That's fair, innovation discovery. I mean, I think the discovery part is part of it, right? Because it was part of what we're learning, is what matters. I mean, I've argued-- and some people find this convincing, some don't-- that you look at a lot of environmental issues, and our discovery of the nature of that problem, and why that problem mattered, and why we should do something about it.

For most environmental issues occurred on the front lines at the local level first, right? State wetland regulation began before federal wetland regulation. Local wetland regulation began before state wetland regulation. Private efforts to preserve habitat for migratory waterfowl, which wasn't at the time even thought of as wetlands, because we didn't call them wetlands back then. They were swamps and fens and marshes, and whatever. And it was even before that.

And part of what that reflects, I think, is a bottom up. I guess you could categorize it as a hierarchy and discovery process. I totally agree and take your point. It's not experimentation. It's not all laboratory. It's not something controlled in that way or systematized in that way. It's really more of a discovery process that results from people being aware of the world around them.

And we tend to be more aware of our more immediate circumstances. And the history of environmental law is filled with examples of that trickling up. And you could tell a similar story with air pollution and the history of the progressive smoke control movement, which had largely been forgotten.

I mean, a couple of folks, there's been some recent work documenting this history, which is fascinating, which is all about local communities realizing, hey, wait a second. Where we site factories matters. How we power our rail lines matters for our local community. And that was long before people were thinking about it as a broader national issue, but again, not experimentation so much as bottom-up discovery and innovation.

MIKE LIVERMORE: Yeah. Yeah, I mean, it's interesting, now that you raise that, is that there's something. This isn't a fully baked idea, but there's something about where we discover the harm and where it will be best addressed.

So just for example, climate change is not something-- the relationship between greenhouse gas emissions and the local climate is not something that anyone is going to be able to figure out on their own. Depleting the ozone layer is not something that a local community can figure out. You're just not going to observe it, because--

JONATHAN ADLER: I agree.

MIKE LIVERMORE: --there's no feedback--

JONATHAN ADLER: I agree, I agree.

MIKE LIVERMORE: --between what you're doing, right? And so that's just interesting, that whereas a local community can tangibly see local benefits of preserving wetlands or moving where adapting pollution control on some kind of stationary source, there's a remediate feedback there. Where, as in the case of climate change, just as you were mentioning with respect to methane, even a potent greenhouse gas like methane, it's not like a local community is going to see the effects themselves of their methane emissions. Because they're spread out over the whole planet.

JONATHAN ADLER: Exactly. Exactly. And I've argued that one of the reasons we have seen, over the last 20 years, so much state-level experimentation on climate is not because states can do much about climate change on their own or do much about the local climate effects, until very recently, when adaptation has become more of an issue. But rather, what I've argued is, is that it's been a function of two things.

One is there is a demand for environmental action at the state level. And there are both economic and political reasons why state-level policymakers should have an incentive to focus on areas where the federal government is doing less, independent of whether or not that's a smart policy thing to do. And so I've argued that's why you've seen so much state-level innovation on climate change.

Because they don't have the same degree of room to innovate and to be active in a meaningful way on other things, because the federal government has such a large presence. And even if a state could do something that helps on the margin, the ability politically to get credit for that marginal improvement in an area that's already occupied by the federal government is so small, that what policymaker is going to do that? And again, I have a model that tries to formalize the observation.

But I've argued that's why that happened. Now, we still may discover interesting things about how to help mitigate climate change as a result of this innovation and these efforts. But I do think it's been misplaced, in that the federal government has done so little in an area where it clearly has a comparative advantage, as compared to state and local governments. But in its absence, state and local governments have filled that vacuum. And so the process has been operating almost in the inverse of the way we would like it to, or the way I would like it to, at least.

MIKE LIVERMORE: Right, right. Just again, thinking really big picture-ey kind of questions in this area, is you mentioned state and local governments. And that's true. There's multiple levels of decentralization in the US state. Obviously, the states have a particular status in the Constitution that counties or cities don't.

And we're not going to be revising that element of the Constitution any time soon. But I'm curious what your thoughts are on federalism, versus localism, decentralization more broadly. Because we do sometimes see states interfering with the ability of localities to experiment-- well, let's not use that word-- to innovate or to try different things or just to adopt different policies, based on local preferences, or whatever.

And states have always struck me, actually, to be honest with you, as somewhat peculiar policymaking units, that cities and counties or regions are more natural. We have the system we have. But I'd just be curious what your thoughts are more generally on, is there anything that we can do to encourage more localism or encourage more decentralization? Or are we happy with the states as the decentralized agent defaults in our system?

JONATHAN ADLER: Yeah, I mean, it depends. I mean, those are the lines we're stuck with. I think that, for most issues, a presumption of greater state leadership, as opposed to federal leadership, I think is justified, not because the states are the best units, but because for, I would argue, a large proportion of environmental problems, they are better units than the federal government.

And they're better units in two directions-- one, because they're smaller, and so the possibility of more local innovation and leadership is possible. But also, because if we're talking about a regional problem, we might be able to assemble states in a way that's still preferable than it being a national issue.

So we see this around the Great Lakes. We see this with the Chesapeake Bay Compact. We see this with things like the Lake Tahoe Compact. And on my research agenda, and not that I'm going to get to anytime soon, is trying to think more about, are there ways of augmenting what we do in terms of regional stuff, where the states aren't too big, but too small?

Your question was about where states are too big. As a policy matter, my preference is applying the same sort of presumption, that as long as localities aren't exporting harms or externalizing harms onto their neighbors, downstream or downwind, I would like to let them do their thing. And again, and part of that is because different communities are going to have different priorities.

And especially when we're talking about land use, there is no one size fits all that makes sense. And I think we benefit from different communities being able to have different priorities. I also think that where local communities are given autonomy and control, they often do discover and innovate in ways that have important environmental benefits.

As a legal matter, the extent to which that's viable really varies from state to state. Because some states have a traditional and a doctrine of home rule. Some do not. The details of how home rule actually is operationalized can vary.

So legally, that can be hard. But in principle, I think that it's a good thing. And I think that you see, when you look at things like ballot initiatives for Green space and the like, you see that, oh, the extent to which community local communities are willing to make environmental protection a priority is often higher than we give them credit for. We channel that energy into some very narrow spaces, right?

So you can do a Green space / you might not be able to do other sorts of things. So as a policy matter, I would love to facilitate more localism, as well as more private efforts where they can happen. I think, when you look at things like the-- was it the American-- I'm not going to forget their name, the group that's trying to restore the great American prairie largely through purchases.

You look at the history of land trusts and the like here in Ohio, the Western Reserve Land Trust. There are a lot of opportunities there that we could facilitate, as well, that build upon localism, in a lot of cases. I think we could definitely emphasize that a lot more.

And in many cases, that would be facilitating local communities to do far more than they do now and to be far more protected than they do now. And we learn from that, right? Because when communities do that in a way that doesn't cut off economic opportunity and the like, I would like to think that other communities would then want to follow those models.

MIKE
LIVERMORE: Yeah. So something we raised earlier, I didn't want to totally to drop it. So maybe now would be a good time for us to return to it, is you discuss the more legal question. We've been talking a lot about policy questions. That tends to be my orientation, is around something-- actually, a bit of innovation coming from a lot of municipalities is this litigation over climate damages and suing oil companies.

And there was a recent development, the Second Circuit decision, that pretty much closed the door in that Circuit for these kinds of claims. And one of the things, it's a little in the weeds, but just to get it on the table, there's a Supreme Court decision that found that the federal common law was displaced by the Clean Air Act in such a way, that states, actually, in that case, were not going to be able to use the federal common law as a way of litigating the question of climate damages. Or actually, in that case, they were looking for injunctive relief from the courts.

But what was funky about this Second Circuit decision is that the municipalities were bringing these claims under state law. And the Second Circuit somehow got us to, essentially, a preemption-like result. And I guess the question is-- you've written a little bit about this, is this is kind of a technical matter. But I think it's worth maybe explaining a little bit the stakes of the difference between, say, the federal common law and state common law, and displacement, versus preemption.

JONATHAN Sure.

ADLER:

MIKE And then some maybe just what your thoughts are about what happened in the Second Circuit.

LIVERMORE:

JONATHAN Yeah, I'm not a fan of the Second Circuit opinion. I've made bad jokes about the fact that it came out on April 1st.

ADLER: But so yeah, so generally, for the last 100 years or so, federal courts have taken the position that federal common law is disfavored. The idea is that federal courts are not common law courts that are really supposed to be in the position of discovering or developing-- or I mean, we can have a whole separate discussion-- a common law that's something that occurs at the state level, and that where federal law is necessary for a rule of decision, the preference is for legislation.

And so a consequence of that notion is this idea of displacement, which is, in the past, where when two states have a dispute with one another, they might be able to raise a federal common law claim. The idea is, that if there's any legislation in that space, that that federal common law has been displaced in favor of whatever the statute does or does not do.

And so the Supreme Court has first said that about water pollution. I'm going to [INAUDIBLE] it's in 1981, in the '80s, and has now said the same thing for air pollution. And doctrinally, that part's, I think, unobjectionable.

MIKE A [INAUDIBLE] decision in the Supreme Court.

LIVERMORE:

JONATHAN Right, right. So once the Court said that about the Clean Water Act, there's no reason why that wouldn't be true
ADLER: of the Clean Air Act as well. The preemption question is a different question, because preemption is always about state law. And that can mean preemption of state regulations, adopted pursuant to state legislation.

And it can also mean state common law, so state tort law and nuisance law and the like. And generally there, we've adopted a presumption against preemption, the idea that states are-- one consequence of state sovereignty is that states are themselves sources of law, both positive law or public law in the terms of statutes and regulations, but also, in terms of the background common law.

And a lot of municipalities have started filing lawsuits, claiming, hey, look, we are spending money dealing with the consequences of climate change. We are dealing with flooding. We are dealing with the changes in air pollution, other changes that we have to deal with. I mean, weather-related, flooding-related, and air pollution-related are some of the big ones. But we're investing money to deal with the current and expected effects of climate change.

And so they're filing tort suits against those that produce fossil fuels or those that market fossil fuels, and so on. And these are aggressive state law claims. And from a tort law standpoint, they may or may not, ultimately, be good claims and strong claims or not. And there may be questions down the road about whether or not recovery can be obtained for actions that occurred out of state. Those are all, I think, legitimate questions.

What occurred in the Second Circuit, and I've been critical of, is federal courts saying, the very nature of the claim is inherently federal, because it's climate change. And so therefore, you cannot bring the claim at all, even though you are basing it and grounding it in state common law. And I think that that's doctrinally problematic under preemption law, under a particular case called-- that I always mispronounce, *International Paper v. Ouellette*.

And I also think, in the Second Circuit case, it was also based on just a gross mischaracterization of the nature of state authority to deal with environmental problems. And the New York case was filed in federal court. So there was a clean holding on the preemption question there.

All these other cases, they get even more complicated than we've already addressed. Because they're filed in state court. Then the question is removal and the way preemption claims apply in removal. Unless you're a real civil procedure maven, it will make your head hurt.

But you I've argued that there, to argue preemption, you really have to argue that Congress came in and told states they had to stop. And we see that in some areas of law, not very often in environmental law. We see it with regulation of automobiles [INAUDIBLE].

We see it as standards for oil tankers. They're preemptive. Some pesticide regulation is preemptive. Typically, it's product regulation that's preemptive, if we're going to generalize.

But dealing with pollution and its effects, we generally don't preempt. And we place a high burden on those claiming preemption to show that Congress has, in fact, preempted. And I've certainly argued that while I would argue that dealing with climate change at the National level is better than dealing with it at the state and local level and would support policy efforts in that regard, unless and until Congress steps up to that plate, there's no basis for holding these suits as preempted.

And they will rise or fall, I would argue, or should rise and fall on their own internal merits as a matter of state tort law and of course, should not be welcoming to the claims of oil company defendants that these claims are preempted. Even if, in my perfect world, would I trade a carbon tax for, among other things, preemption of, at least, some of these sorts of claims? Yeah, probably would. But that's a legislative judgment.

MIKE Right. that's a different. That's a different question.

LIVERMORE:

JONATHAN ADLER: Right. So that's what's going on there. And it's interesting, because you have folks that we often to be sympathetic to federalism arguments, to, in fact, being sympathetic to what I would argue are fairly aggressive federal power arguments. Because they rely on this assumption, that even when the federal government has done very little, it should be casting this big shadow across state level innovation.

And while some of my friends on the right sometimes forget, litigation, including aggressive tort litigation, is a very innovation discovery-oriented process. Just like there can be good and bad regulations, there can be good and bad litigation. And we learn something about it. And litigation can be information forcing in ways that we should be reluctant to squish.

MIKE LIVERMORE: Yeah, I mean, there's some interesting stuff to talk about with respect to litigation, actually, in the tort system and how that feeds in. But we're running out of time. I don't know if we can get into that.

So I just have one final question for you. You've been generous with your time. The comment that you just made circles us back to where we started, which is the degree to which folks' views on federalism tends to go with the wind, depending on the outcomes of particular disputes. And I guess that just leads me to my final question for you, which is we circled around this issue of polarization on environmental issues and the degree to which that that's hampered our ability to make progress anywhere.

And I guess I would just be curious about your thoughts at the intersection of political polarization and questions of federal, versus state, versus local authority. Is there a way in which that, thinking about this question of centralization and decentralization or changes in how we have turned that particular dial might have implications for polarization or even some potential to depolarize what has become an extremely polarized set of issues?

**JONATHAN
ADLER:**

Yeah, I mean, I wish I knew how to facilitate de-polarization. I mean, I do tend to think that a principled federalism can help depolarize. Because it can lessen the stakes. That other people are living under a set of rules that they like, but I don't, there's less at risk there than when I'm fighting with other people over the rules we all have to live under.

And again, that doesn't work for every issue. And we do have to worry about we do, as a country, have a baseline commitment to a certain degree of rights protection and human dignity that is off the table and non-negotiable. But there is a broad space where I think that decentralizing helps depolarize.

And conversely, unnecessary centralization magnifies polarization. But I don't want to overstate the claim. But I don't want to say, like, oh, if we got this right, we'd solve our problems. It's these are the effects that I think, on the margin, decisions to central-- decisions to centralize on the margin, I think, are going to tend to increase polarization. Decisions to decentralize are on the margin are going to tend to turn the dial a little bit the other way.

But I don't want to suggest that the question about centralization is the most important variable or the most important factor. I don't even know how one would measure that claim, let alone defend it. But I think that's part of it.

And I think that if we could reorder the way we approach environmental policy, so that the things that are centralized are the things where we can recognize we can't address otherwise, that might help. Because I do think that, when you look at jurisdictions that have very polarized positions on some environmental questions, do tend to be somewhat less polarized when it's in their own backyard. Right?

I gave the example earlier about Ohio being a fairly red state, a state that-- the same attorney general in Ohio that loves suing the federal government for overregulating is also very happy to celebrate tangible on-the-ground environmental enforcement actions that are actually reducing pollution and holding polluters accountable in the state. And I don't think there's a conflict there.

And so I do think that there are opportunities there. I'm not going to say that it's the key to some great political victory or anything else. But I do think there are opportunities there to take advantage of the fact, that when we are closer to the consequences, there's less room for the ideological polarization. And there has to be a greater focus on what's actually going to work.

And for those environmental problems where we are dealing with quality of life on the ground, I think that has an effect. When we're just talking about environmental issues that are much more value driven, that's harder, right? Because then we're bringing all the ideological and other normative stuff that feeds into polarization and other contexts in ways that I wish I knew how to deal with better. So that's a kind of answer.

MIKE
LIVERMORE: Yeah, no, I mean, with something as complicated and as multi-causal as political polarization, I think maybe making changes on the margin is actually a huge, is a huge opportunity. So yeah, so thanks so much, Jonathan, for taking the time to chat with me. This was a really fun conversation.

JONATHAN
ADLER: My pleasure. Happy to do it.

[MUSIC PLAYING]