

Navigating Climate Change Policy: The Opportunities of Federalism

Carly P. Wolfrom¹

Citation: NAVIGATING CLIMATE CHANGE POLICY: THE OPPORTUNITIES OF FEDERALISM (Edella C. Schlager, Kirsten H. Engel & Sally Rider eds., 2011).

Relevant Legal and Academic Areas: Environmental Science, Law, and Public Policy

Summary: Because of climate change's inherently global nature, most proposed solutions have been tailored to a global scale. *Navigating Climate Change Policy: The Opportunities of Federalism* challenges the idea that because climate change is a global issue, only actions on a worldwide scale can lead to a resolution. It considers the perspective that since climate change itself has both global and local causes and implications, the most effective policies for adapting to and mitigating climate change must involve governments and communities at many different levels. The editors and authors feel federalism is well-suited to address the challenges of climate change because it permits distinctive policy responses at a variety of scales. This book uses a variety of viewpoints and blends legal and policy analyses to provide thought-provoking coverage of how governments in a federal system can cooperate, coordinate, and accommodate one another to address climate change.

INTRODUCTION

This book takes the stance that a policy created by one level of government cannot possibly achieve an effective climate change policy because it would fail to touch on the vast variety and layers of actions and choices the area involves.² The book argues that federalism offers a way to create the necessary complementary policies at differing scales to better address climate change because federalism acknowledges different powers, responsibilities, interests, and

¹ Syracuse University College of Law, Juris Doctorate Candidate 2013, Syracuse Journal of Science & Technology Law Associate Editor 2010-2011.

² NAVIGATING CLIMATE CHANGE POLICY: THE OPPORTUNITIES OF FEDERALISM (Edella C. Schlager, Kirsten H. Engel & Sally Rider eds., 2011).

competencies at different levels of government.³ The contributors to this work seek to aid all three branches of local, state, and federal government in creating future climate change law by identifying the strengths of American federalism, recognizing the challenges it poses to efficient governing, and posing the possibilities it can offer for climate change policy.⁴ Since climate change policy will “reveal the capacity of our political and legal systems to respond to new and immensely complex and diffuse challenges,” this book aims to lay a foundation for new policy and structure how to resolve conflicts in the future.⁵

SECTION 1: Scientific Background on Climate Change

Chapter 1: Global Climate Change as a Local Phenomenon

In this chapter, a climate scientist, law professor and social scientist lay out the scientific framework of climate change and explain how it is simultaneously a global and local happening.⁶ Climate change is measured as a global mean in a single global climate system since greenhouse gases combine together in the collective atmosphere, however; these gases began at an individual-produced level.⁷ Geographic variations create significant differences in causes impacts and capacities for responses from place to place.⁸ The most important aspect of this

³ SCHLAGER, *supra* note 2.

⁴ *Id.* at 3.

⁵ *Id.* at 5.

⁶ *Id.* at 3.

⁷ SCHLAGER, *supra* note 2, at 9-10.

⁸ *Id.* at 10.

variation is that it occurs over multiple political scales, allowing local and regional actors to influence climate change decision.⁹

Although climate change warms the planet as a whole, some areas will be affected more so and more quickly than others. The authors highlight the increased temperatures and changes in precipitation US Southwest to demonstrate how a particular location, its residents and its ecosystems may experience various climate change effects.¹⁰ Changes in water temperature will also increase the probability of tree death and wildfire frequency, duration and season length across the West.¹¹ “A similar story with different emphases and impacts applies to each region, state, and watershed in the United States.”¹²

The authors identified only a few implications of climate change and did not address other topics such as endangered species, disease and human health, energy use and productions, cities, or agriculture.¹³ The author’s objective was to illustrate how the “dramatic and varied local and regional impacts of climate change explain and justify the demand for local and regional political and policy responses.”¹⁴

The authors refer to climate change as happening on Earth’s stage. The built environment of states, cities, towns, roads and water systems serve as its “furniture,” human inhabitants play its “actors,” and the interaction between the two shows how global climate change occurs on a

⁹ SCHLAGER, *supra* note 2, at 10.

¹⁰ *Id.* at 11.

¹¹ *Id.* at 13.

¹² *Id.*

¹³ SCHLAGER, *supra* note 2, at 15.

¹⁴ *Id.*

much smaller scale, unique to each region.¹⁵ Relationships, such as the one between the federal government and American Indian Tribes, and events, like Hurricane Katrina, demonstrate how social factors such as poverty, race, and class affect climate change challenges.¹⁶

Locality influences two major approaches to climate change policy: mitigation and adaptation. The authors believe the current understanding of mitigation as solely a large scale effort is wrong. Mitigation is inherently regional because it dependent upon “regional advantages and disadvantages in both traditional and alternative energy and resource production” based upon environmental factors and social factors, such as wealth, political institutions, knowledge, industry, housing and transportation.¹⁷ Adaptation traditionally takes place at local, state or regional levels because it requires knowledge and experience particular to the specific area much like when responding to a natural disaster.¹⁸ However, the federal government is pivotal to cover deficits in state and local actions.¹⁹

The authors conclude the chapter stating it will be localities that feel firsthand and therefore respond to the effects of climate change, but not all will be able to effectively respond due to a lack of resources.²⁰ Climate change policy must therefore include all scales of governance to best respond to the challenges that lie ahead.

¹⁵ SCHLAGER, *supra* note 2, at 15.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 18-19.

¹⁹ SCHLAGER, *supra* note 2, at 20.

²⁰ *Id.* at 20-21.

SECTION 2: The Institutional Context

In Section 2, the book looks at federalism as a whole, its individual parts, and how federalism operates.²¹ The challenge of federalism is combining its twin concepts of self-rule and shared-rule to benefit the interests of the individual, the nations, and the planet as a whole.²² This section forms the legal and policy structure of the book by identifying forms of federalism, how American Indian tribes fit in the federal system and how governments, interest groups and citizens can best collaborate.²³

Chapter 2: The Varieties of Federalism

The author of the second chapter, Robert A. Schapiro, explains the models of dual federalism and polyphonic federalism, ultimately arguing the latter is best suited for addressing climate change.²⁴ Dual federalism strictly separates federal power from state power so that there is no overlap and each level of government maintains its own designated area, nothing more and nothing less.²⁵ While the Great Depression seemed to lessen this categorical concept of federalism in the United States, the author thinks the Supreme Court today may be reintroducing dual federalism as reflected in its decision in *United States v. Morrison* and *United States v.*

²¹ SCHLAGER, *supra* note 2, at 4.

²² *Id.* at 31.

²³ *Id.* at 32-34.

²⁴ *Id.* at 35-36.

²⁵ SCHLAGER, *supra* note 2, at 37.

Lopez.²⁶ However, in his opinion, climate change cannot be divided so absolutely because its “problems and potential solutions are both global and intensely local, as noted in chapter I.”²⁷

Polyphonic federalism, unlike the dual concept, combines political authorities from state and federal levels and enhances their ability to act by facilitating “plurality, dialogue, and redundancy.”²⁸ Plurality allows approaches to the same issue by both the state and the federal government so that the strengths and weakness of each can be identified and resolved to create better solutions.²⁹ Dialogue allows the dissemination of information from one area to another, so that jurisdictions can learn from one another and develop policy by learning from each other’s wins and losses.³⁰ Redundancy, multiple actors addressing the same challenge, embraces the overlap of state and federal power and uses it to create stronger oversight which leads more resilient and innovative systems.³¹ Polyphonic federalism is preferable to dual because, unlike dual federalism, the polyphonic approach “recognizes the need to develop intersecting global, national, and local responses to issues that cross jurisdictional boundaries” rather than trying to divide climate change into unworkable divisions between state and federal authorities.³²

²⁶ SCHLAGER, *supra* note 2, at 37-38.

²⁷ *Id.* at 38.

²⁸ *Id.* at 40.

²⁹ *Id.* at 40-41.

³⁰ SCHLAGER, *supra* note 2, at 42.

³¹ *Id.* at 43.

³² *Id.*

Chapter 3: Tribal Sovereignty and Climate Change: Moving Toward Intergovernmental Cooperation

American Indian tribes are another part of the federal framework and this chapter explains the role they play in regards to climate change. Underneath the often superficial assumptions of tribal relations with the US government there lays a deeper narrative of resource management.³³ The author explores the historical and legal framework of tribal sovereignty, then investigates the possible adaptation of tribal governments to climate-change policy and concludes by considering how the issues of resource depletion and nongovernmental organizations will contribute to tribal resource management in the future. The author describes historical federal Indian policy as five distinct eras, ending with the present era of self-determination.³⁴

The book focuses on federal Environmental Protection Agency (EPA) laws and tribes as states, arguing that tribes should be seen as a “third sovereign” because of their inherent sovereignty and their statutory power from pollution control laws.³⁵ The National Environmental Policy Act in 1970 started US EPA tribal policy and continued in the 1980s when the EPA enacted a policy acknowledging tribal governments as “the primary parties for setting standards, making environmental policy decisions and making programs for reservations” and when Congress sanctioned treating tribes as states (TAS) in order to amend several EPA statutes such as the Clean Air Act, the Clean Water Act and the Safe Drinking Water Act.³⁶ In *Albuquerque v.*

³³ SCHLAGER, *supra* note 2, at 48-49.

³⁴ *Id.* at 51.

³⁵ *Id.* at 58-59.

³⁶ *Id.* at 59.

Browner, the Court upheld a tribe's right to set higher standards, like a state may do, and illustrated how a court can inquire into a statute's objective and intent to define a tribe's scope of power.³⁷ The impact of *Browner* is a "unique and vital extension of tribal sovereignty beyond the territorial limits of the reservation and where the regulation of a common resource" so that both tribes and states are empowered to "pursue higher standards and ensuring that neither party is precluded from seeking US EPA review."³⁸

In the next section of the chapter, the author examines the role of environmental justice in terms of tribal sovereignty, climate change and international human rights. By accessing US Court and international bodies, tribes have been able to seek relief from climate-change on human rights grounds, demonstrating tribes' proactive approach to climate change policy.³⁹ The author concludes by emphasizing the importance of cooperation, echoing the arguments of the first two chapters. Like the specialized knowledge of localities and regions, the expertise contained in many tribal management organizations can and should be used to create effective climate change policy.⁴⁰

Chapter 4: Collaborative Public Management and Climate Change

In this chapter, the author examines collaborative management and climate change. Collaborative public management builds off the idea of polyphonic federalism and advocates

³⁷ SCHLAGER, *supra* note 2, at 59-60.

³⁸ *Id.* at 60.

³⁹ *Id.* at 48.

⁴⁰ *Id.* at 67.

multilevel approaches to climate change.⁴¹ The author identifies the benefits and challenges of collaborative management and discusses the concerns that will determine the potential success of the system's climate-change policies.

Climate change policy poses a number of challenges because solutions are uncertain, there is no agreed upon best approach and no one jurisdiction or authority has the ability to solve global warming on its own.⁴² Collaborative management is best addresses these challenges because "lacking one 'silver policy bullet,' a portfolio of policy strategies and instruments working on many different fronts and at different scales is needed."⁴³ Four types of collaborative management networks exist: informational; developmental; outreach; and action.⁴⁴ Implementing a collaborative federal-state climate change policy depends on context. A matrix is used to illustrate how ambiguity and conflict influence policy. Collaborative management makes the most of undesirable contexts. "In highly conflictual situations, collaboration supports conflict resolution, the building of social capital, and policy compliance. In situations of significant scientific uncertainty or ambiguous policies, collaboration supports learning and risk sharing."⁴⁵

The biggest threat collaborative management faces is ensuring the cost of participation does not exceed the value of benefits received from contributing.⁴⁶ The author argues that laws regarding collaborative management must be clarified and incentivized so collaboration can be

⁴¹ SCHLAGER, *supra* note 2, at 73-74.

⁴² *Id.* at 74.

⁴³ *Id.* at 75.

⁴⁴ *Id.* at 77.

⁴⁵ SCHLAGER, *supra* note 2, at 73.

⁴⁶ *Id.* at 86.

fully utilized.⁴⁷ Since collaborative management demands shared responsibility, accountability for performance becomes pivotal. The author believes internal and external transparency must exist among all actors and that performance metrics must be closely tracked and scrutinized.⁴⁸

SECTION 3: Policy Initiatives Among and Across States

This section assesses individual state action and collective state interaction concerning climate change. Whether interaction occurs purposefully or accidentally, states end up learning from each other.⁴⁹ “It is by transforming how energy is generated and used that states are likely to have the greatest effect in mitigating climate change.”⁵⁰

Chapter 5: Policy Diffusion and Climate-Change Policy

Chapter 5 discusses how policy diffuses from state to state using political science research to evaluate the popularity of some policies and future implications. Competition, emulation and politics are the causes of diffusion.⁵¹ The author takes a closer look political factors influencing climate change policy, such as agenda setting, information generation, customization and enactment.⁵² With the aid of professional organizations, policy research institutes and think tanks, policy makers can gain a “clearer understanding of diffusion

⁴⁷ SCHLAGER, *supra* note 2, at 88.

⁴⁸ *Id.* at 88-89.

⁴⁹ *Id.* at 99.

⁵⁰ *Id.* at 102.

⁵¹ SCHLAGER, *supra* note 2, at 102.

⁵² *Id.* at 107.

mechanisms” in order to “better predict when diffusion is most likely to occur and when efforts to overcome the obstacles to diffusion should be directed.”⁵³

Chapter 6: Changing the Climate: The Role of Translocal Organizations of Government Actors (TOGAs) in American Federalism(s)

The role of nonprofit organizations, referred to as translocal organizations of governmental actors (TOGAs) in facilitating state collaboration is examined in this chapter. TOGAs form vertical and horizontal relationships, providing sources of law and policy that cut through and across the federal and state governments to create interjurisdictional bonds.⁵⁴ The US Conference of Mayors’ Climate Protection Agreement is an example of a TOGA which realizes “‘local,’ ‘federal’ and ‘international’ interests are not fixed but emerge based on interactions among interdependent actors.”⁵⁵ The US Senate has refused to accept the Kyoto Protocol, but 1,000 localities endorsed the agreement through the US Conference of Mayors.⁵⁶

TOGAs’ actions should not be seen as vertical or horizontal but diagonal, since they are uniquely both nongovernmental and nationally recognized..⁵⁷ TOGAs merit should have greater lawmaking powers because, through doctrine, statutes and regulatory rights, these groups would be responsive to the developments within US federalism that they represent.⁵⁸ Climate change

⁵³ SCHLAGER, *supra* note 2, at 103.

⁵⁴ *Id.*

⁵⁵ *Id.* at 125.

⁵⁶ *Id.* at 120.

⁵⁷ SCHLAGER, *supra* note 2, at 125-26.

⁵⁸ *Id.* at 132-37.

cannot be pigeonholed and TOGAS can create better policy and enhance understanding through actions that embrace the layers of federalism.

Chapter 7: Acting in Concert: State Efforts to Regionally Address Climate Change

Continuing the discussion of interaction between all scales of government, this chapter explores climate change administrative agreements, their strengths, weakness and obstacles. Administrative agreements embrace a polyphonic interpretation of federalism by enabling states to enact policies that address regional problems.⁵⁹ However, unlike compacts, states are not bound to follow such agreements so their effectiveness depends on cooperation.⁶⁰ Thus far, only administrative agreements have been used to pursue multi-state climate change goals and objectives.⁶¹ The Northeast, West and Midwest states have engaged in administrative agreements more so than other US regions to form regional cap-and-trade systems and complementary policies involving energy production, energy efficiency and conservation and transportation.⁶²

Ultimately, administrative agreements permit states to retain independence, foster collaboration around a particular region and can influence the national government.⁶³ Their flexibility both encourages their creation while limiting their effectiveness by allowing states to back out of nonbinding agreements.⁶⁴ Administrative agreements should be encouraged because “climate-change policy in a federal system is not an either/or proposition – for either state or the

⁵⁹ SCHLAGER, *supra* note 2, at 144.

⁶⁰ *Id.* at 144-45.

⁶¹ *Id.* at 145.

⁶² *Id.* at 149-51.

⁶³ SCHLAGER, *supra* note 2, at 159.

⁶⁴ *Id.*

federal government to enact. It is an ‘and’ issue – the states acting individually *and* collaboratively with each other *and* the federal government.”⁶⁵

Chapter 8: Reorienting State Climate-Change Policies to Induce Technological Change

In the final chapter of this section, the authors argue that state action can impact climate change because states are “well positioned to engage in technology development and adoption by creating incentives for businesses and consumers to adopt energy-efficient and alternative energy technologies.”⁶⁶ States can design innovative policies that harmonize with federal regulations by looking at channels for technological change and gaps in the federal system.⁶⁷

For the authors, technological change means the diffusion of existing technology rather than the creation of new technology, which is subject to speculation.⁶⁸ Several Scandinavian countries mixing environmental regulations and policies to incentivize technological change through a portfolio approach best addresses climate change.⁶⁹ The authors disagree with critics who argue that state policies cannot address global climate change by citing existing state programs centered on carbon emission caps, renewable portfolio standards, public benefit funds and tax credits, product standards and building codes.⁷⁰ States therefore play a meaningful role in the federalist response to climate change. While one state may not be capable of reducing global

⁶⁵ SCHLAGER, *supra* note 2, at 160.

⁶⁶ *Id.* at 101.

⁶⁷ *Id.* at 164.

⁶⁸ *Id.* at 165.

⁶⁹ SCHLAGER, *supra* note 2, at 168.

⁷⁰ *Id.* at 169-74.

greenhouse-gas emissions, it can impact climate change through programs that incentivize technological change, especially when integrated with federal programs.⁷¹

SECTION 4: State and Federal Dynamics

The final section of this book concentrates on the legal and policy interactions between the states and federal government to illustrate how this relationship can address climate change.

Chapter 9: Clean Air Act Federalism as a Template for Climate-Change Legislation

To demonstrate how national policy could be fashioned, the authors use the Clean Air Act as a model.⁷² Focusing on reducing greenhouse-gas (GHG) emissions, the authors believe a cap-and-trade policy is politically acceptable, environmentally-effective and economical.⁷³ Illustrating the how the Clean Air Act works in the federal system, transferring that structure to GHG emissions would allow climate-change legislation to “set carbon emission reduction targets rather than asking the US EPA to set air quality standards for GHGs, but ... leave to the states the primary role in determining how to meet those targets.”⁷⁴ This again reflects the importance of a multi-scale approach to climate change. States are most capable of addressing their region’s needs and the federal government is able to provide standards and supports.

Chapter 10: State Climate-Change Regulation: Will It Survive the Federal Challenge?

The chapter discusses how the American judicial system will determine the success of state action when federal legislation could preempt state climate-change policy. Even without

⁷¹ SCHLAGER, *supra* note 2, at 176.

⁷² *Id.*

⁷³ *Id.* at 176.

⁷⁴ *Id.* at 191.

federal preemption, courts still must “consider whether Congress left enough room for states to supplement federal climate-change legislation or foreclosed state regulation altogether.”⁷⁵

Presently, “legal doctrine interdicts certain kinds of state regulations but leaves the bulk of state regulation subject to judicial overview under vague standards of ‘undue burden’ or posing an ‘obstacle’ to federal law.”⁷⁶ What seem like minor local changes can come together in the aggregate to greatly impact global climate change.⁷⁷ The authors promote a split solution: courts should reject regulations that discriminate against interstate, foreign commerce or other lawful transactions but should adopt a strong presumption of validity for state climate change regulation that can only be overcome if state law was in direct conflict with a statute or international agreement or clearly preempted.⁷⁸

Chapter 11: American Federalism in Practice

The final chapter of this section examines how the inactivity of the federal government has allowed the states to take actions unique to their jurisdiction. Using past experiences, the author hypothesizes possible future policies and alternative approaches to climate change policy.⁷⁹ State policy concerning GHG emissions varies dramatically because of context, as illustrated by table 11.1 on state climate policies and greenhouse gas emissions intensity on page 236.⁸⁰ However, most states have chosen to take a less visible approach to climate change policy

⁷⁵ SCHLAGER, *supra* note 2, at 191.

⁷⁶ *Id.* at 229.

⁷⁷ *Id.* at 229.

⁷⁸ *Id.* at 216.

⁷⁹ SCHLAGER, *supra* note 2, at 233.

⁸⁰ *Id.* at 236.

costs, paying more for a program that costs more as long as it is not a direct utility bill or at the point of product purchase.⁸¹ The author outlines different options of state climate policy tools based on political feasibility and economic desirability, concluding that Cap-and-trade policies seem the most likely to be embraced, but the issue is still divisive.⁸²

As states run up against the federal government, the future holds three possible directions for climate change policy: a shift toward top-down policy, continued bottom-up policy, or greater collaborative federalism.⁸³ Although the Obama administration and 111th Congress posed an opportunity for a new federal approach to climate change policy, the handful of climate change hearings and deeply divided Congress suggests that bottom-up policy development will continue.⁸⁴ Despite politics “that climate policy can no longer be framed as the exclusive province of international relations and instead must be acknowledged as an enduring challenge for multilevel governance.”⁸⁵

CONCLUSION: Celebrating and Protecting Diversity in Climate-Change Responses

In conclusion, the volume reiterates that in order to think globally, the multiple levels of American government must act locally. The authors argue that six principles should guide future policy: (1) local and regional actions create the foundation for climate-change response; (2) Congress and the executive branch should support state and local responses; (3) federal courts

⁸¹ SCHLAGER, *supra* note 2, at 242.

⁸² *Id.* at 248-49.

⁸³ *Id.* at 249-51.

⁸⁴ *Id.* at 252.

⁸⁵ SCHLAGER, *supra* note 2, at 253.

should narrowly construe preemption claims against state and tribal climate-change policy; (4) regional and non-governmental alignments should be supported; (5) Congress and state legislatures should encourage collaborative policy responses; and (6) federal policy must establish a national carbon pricing system.⁸⁶ Using the inherent strengths of the federal system, the United States can make a global impact on climate change through the collective power of its scales of governance.⁸⁷

⁸⁶ SCHLAGER, *supra* note 2, at 258-61.

⁸⁷ *Id.* at 261.