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MODERN CLIMATE POLICY A MODEST PROPOSAL

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OVERVIEW

- Today's Legal Profession
 - A paradoxical moment in time
- Modern Federalism
 - Division of labor; democratic accountability
- Modern Climate Policy
 - A modest proposal

A paradoxical moment in time

TODAY'S LEGAL PROFESSION

OUR PARADOXICAL PROFESSION

- Strategy Paradox
- Scalian Paradox
- Republican Advocacy Paradox

LEGAL PROFESSION PARADOXES: MISSING STRATEGY

- Elite lawyers only species of competitive homo sapiens not conversant in concepts of strategy
- Compare military, business, athletic competition
 - All top-15 MBA programs offer classes focused on strategy
 - Almost all require studies in strategy to graduate; 11/15 require strategy in first year
- Prominent MPP programs require strategy-based classes

LEGAL PROFESSION PARADOXES: MISSING ADMINISTRATIVE JURISPRUDENCE

- Justice Antonin Scalia:
 - Joins Court with perhaps best administrative-law resume in history (Justice Stephen Breyer)
 - Expressly repudiates one principal decision; impliedly repudiates another; appears on verge of repudiating most consequential decision of all;
 - Untimely death leaves no coherent administrative-law legacy.

LEGAL PROFESSION PARADOXES: REPUBLICAN ADVOCACY

- With exceptions,
 - and for various reasons,
 - in litigating hugely important, closely contested issues,
 - elite Republican lawyers,
 - tend initially to gravitate toward
 - the *least* persuasive, plausible argument available.

LEGAL PROFESSION PARADOXES: REPUBLICAN ADVOCACY

- *U.S. Term Limits v. Thornton* (State-Established Term Limits for Congress) (1995)
 - Article I “ballot access” vs. legitimate additional qualification
- *Bush v. Gore* (Presidential Election) (2000)
 - Article II vs. Equal Protection Clause
- *UARG v. EPA* (2014)
 - “Situs” vs. contextual “air pollutant” interpretation

Division of labor; democratic accountability

MODERN FEDERALISM

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- **NOT about:**
 - Feudalism (“balance” federalism)
 - Localism
 - Opportunism

MODERN FEDERALISM

- **IS about:**
 - Accountability-enhancing division of political labor between multiple sovereigns responsible for same population and territory
 - “Division rules, not end-states”

MODERN FEDERALISM

- Assigns global-climate-management policy uniquely to national level of government
 - Recognizes national policy can define avenues appropriate for help/supplementation from States

A modest proposal

MODERN CLIMATE POLICY

MODERN CLIMATE POLICY

- Opportune moment:
 - Urbanization make co-benefits of paramount importance to “New Global Powers” (NGPs) and other large emitters
 - Development/deployment of carbon-lite technologies makes control more cost-effective
 - Mainstream policy reassessment may provide window of opportunity

MODERN CLIMATE POLICY

- Efficient, national, scalable, legislated policy response is best:
 - Carbon tax trumps “cap and trade”
 - No initial allocation decisions
 - Less susceptible to capture/favoritism
 - Easily accommodates changing circumstances
 - Easily accommodates border adjustments to address “leakage”

MODERN CLIMATE POLICY

- Legislated, State-supplementation rules needed:
 - Under current law, much of what California wants to do is likely preempted, contrary to constitutional principle, or both:
 - CAA 209(a) prohibition on “conditions precedent” to retail sale, titling, registration
 - CAA 209(b) waiver for standards “needed” for “extraordinary” conditions
 - “States can’t negotiate a treaty with India or China”

MODERN CLIMATE POLICY

- Negotiated international rules needed:
 - Bi-literalism trumps multilateralism
 - Bi-lateral agreements –
 - More easily enforced
 - Readily accommodate border-adjustments for differentials in carbon taxes
 - Recognize reality of China and India as NGPs
 - Agreements between U.S. and core allies, US and EU, US and China, and US and India would address vast majority of global GHG emissions

MODERN CLIMATE POLICY

- Intergenerational, substantive, quasi-constitutional policy vehicle needed:
 - No such thing as “revenue-neutral tax”
 - Nobel laureate Vernon Smith calls for Permanent Citizens Fund on Alaska Fund model

(Same issue seen in budget amendment proposals, immigration controversy, and “pensions crisis”)

CONCLUSIONS

- Problem of climate change primarily for national government to solve;
- Current law not conducive to State initiatives;
- Better solutions require national legislation, recognized state-policy enclaves, bi-lateral treaties, enhanced governmental institutions.