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
  - Article II vs. Equal Protection Clause
- **UARG v. EPA** (2014)
  - “Situs” vs. contextual “air pollutant” interpretation
Division of labor; democratic accountability

MODERN FEDERALISM
MODERN FEDERALISM

- 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.