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FEDERALISM PROJECT ROUNDTABLE ON ENVIRONMENTAL POLICY

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PROCEEDINGS

MR. MICHAEL GREVE: Good afternoon, everyone. Thank you all for coming. We are here to discuss Jonathan Adler's paper, "Let 50 Flowers Bloom: Transforming the States into Laboratories of Environmental Policy." Mr. Adler will be summarizing his thoughts and providing some elaboration on the themes of his paper, and Becky Norton Dunlop has graciously agreed to provide comments on Jonathan's paper following his presentation.

Jonathan Adler is a freshly minted Assistant Professor of Law at Case Western Reserve University Law School. We have known each other for many years and I have long been an

admirer. He is a very prolific writer and one of the truly inventive thinkers on environmental policy.

Becky Norton Dunlop is Vice President for External Relations at the Heritage Foundation and previously served as Secretary of Natural Resources under Governor George Allen in Virginia. She is the author of *Clearing the Air,* a book about her experience there, published by the Alexis de Tocqueville Institution.

Following the scheduled presentations, we will open the floor for discussion.

PROFESSOR JONATHAN ADLER: Thanks, Michael. It is good to be back in D.C. This paper grew out of frustration that I--and I think many people--have about the state of environmental policy. There is a widespread consensus that we can't keep doing what we are currently doing. Whether we think the environmental laws that were enacted in the early 70's were the most effective means of dealing with our air and water problems or not, we almost all agree that the laws are not suited to the path that is ahead of us. We need to develop new tools and strategies to keep moving forward.

As Chris Schroeder of Duke Law School has written, the prescriptive strategies that have been the backbone of federal environmental regulations since 1970 are approaching the point of accomplishing as much as they feasibly can. Every serious study of environmental policy that has emerged in the past several years agrees at least on that much.

But a new vision of environmental policy is not entirely clear. We have ideas of how we would reconfigure environmental law if we were kings for a day, but filling in the details is a messy process and we need some experimentation. We need to try new approaches. Many proposals seem worthy in the abstract, but it is not necessarily clear how we begin to implement them.

So the question becomes the following: How do we experiment and how do we begin to develop new approaches to environmental policy? That was the genesis of this paper and the idea of what I call "ecological forbearance."

One of the key problems of the current approach--and I don't think this is particularly controversial--is the centralization of the existing regulatory regime. This induces various

pathologies in environmental policy: rigidity, a misalignment of priorities, a lack of accountability, various information problems, and the like.

We all recognize that economic central planning is ineffective and undesirable. But we are still struggling with the impulse to engage in something that is very close to ecological central planning. Upon reflection, I think that it is pretty clear that ecological central planning is much more complicated and difficult to accomplish than economic central planning—t is something we should be that much more reluctant to engage in if we can find alternatives.

We have reason to decentralize not only because the current approach has problems, but also because of what we know about decentralized systems and their benefits. The most obvious example is the nature of information--information about our environmental problems and potential environmental solutions. Information and knowledge tend to be fairly localized. The air pollution problem in Maricopa County, Arizona, is very different from the problem in and around Atlanta. There may be non-attainment problems in both places, but the sources, the causes, and the solutions are very different--and the knowledge necessary to put those solutions into place are going to be different from place to place.

Not only are the problems diverse and the sources of the problems varied, but the preferences and needs of different communities are quite diverse as well. A recent article in *The Washington Post* pointed out the potentially negative health impact of going ahead with a dramatically reduced arsenic standard for the people of New Mexico ("Poisonous Decision: A Low Arsenic Standard Carries a High Cost," 9/16/01).

Some states already have a low arsenic standards. There are other states where a low standard would have a very serious deleterious effect. We are a large, diverse country, and we can satisfy more people more of the time if we allow some of that diversity to play out in policy differences from place to place. Decentralization creates greater accountability by bringing those with the authority to make decisions closer to where those decisions are made and where the impact is felt.

In environmental problems, there are also ecologies of scale. Most of our environmental problems are not national problems. In fact, there probably isn't an environmental problem that

can accurately be classified as "national." There are local problems, there are regional problems, and there are probably global problems. Environmental problems don't respect political boundaries. This is something we have heard for years and yet we still rely on centralized decision-making in Washington, D.C. And so we perpetuate policies that are based more on political boundaries than on the actual scale of environmental problems.

Lastly, decentralization would prompt greater innovation in the states as laboratories. We have seen states play the role of policy laboratories in many areas. We saw some of this in welfare reform; a lot of states did a lot of different things. Wisconsin made some reforms that, in retrospect, many people think were the right reforms and they became models for further changes. Some other states that did things that, in retrospect, we probably think are crazy. But states were able to make those changes, they were able to try different things, and we learned from that experience. We learned from the process of trial and error, and it allowed for greater reform.

I would argue that, even if one believes that we want most environmental policy to proceed at the national level, there are still great benefits to be had from allowing experimentation in the states. Current laws and rules do not allow for this type of experimentation. There are various regulatory provisions and laws, but they remain insufficient. Efforts to use them and to engage in reinvention have generally failed—or, at least, they have not achieved what they should have achieved, what we wanted them to achieve, or what they need to achieve.

I think those of you who are on the Hill would agree that trying to go statute-by-statute—Clean Air Act, Clean Water Act, and so on—to reform these organic statutes from top to bottom would be very difficult. Politically, we'd say, "lots of luck." Right? That is simply not something we are going to see. The last real reauthorization was in 1990; the Safe Drinking Water Act was also reauthorized. In the last 11 years, however, nothing happened with all the other environmental statutes that were supposedly up for reauthorization. Politically, there was just too much on the table.

What I am putting forward is an idea that I call "ecological forbearance," which is about creating a formal legal mechanism to allow for greater experimentation at the state level. States should

be allowed to try new things, to set different priorities, and to allocate resources in accordance with their needs. The concept is modeled on Section 160 of the Telecommunications Act: In telecom, things are changing very quickly, and regulations and statutes quickly outlive their usefulness. Rules or dominant carrier regulations that are imposed today could be displaced by events tomorrow.

There needed to be a formal mechanism to allow regulations to keep pace with reality, so a provision was created that affects most of what the Telecom Act does, and allows companies to file a petition saying, "Hey, we would like you, the FCC, to forebear from enforcing certain provisions on us. Here is why we think you should do it. Here is why we think it is consistent with the FCC's general obligations to maintain the public interest and ensure reasonable rates and so on."

The FCC has a period of time where it looks at this proposal, engages in notice and comment rulemaking, and then publishes its decision. The FCC has wide latitude in saying "yes" or "no," but it has to explain why. It is not enough for the FCC to answer the question; they also have to explain it and it is subject its judgment to judicial review.

I propose that we create a similar mechanism in the environmental context across as many statutes as is politically feasible. It should be done in an across-the-board provision, so states could seek forbearance of requirements in one or more jurisdictions within their borders. This would be the case regardless of whether those are very narrow, procedural requirements, regulatory requirements, or even statutory requirements.

The EPA would have to explain why granting or denying the state's request is consistent with the EPA's obligations and its environmental goals, and the EPA's decision subject would be subject to judicial oversight. The decision would also be subject to political feedback because states and governors would be involved. We saw a similar process in the welfare context—when this mechanism is there and it is available (and states decide it is important), they actually win some flexibility. There is real accountability in this system because the agency has to really put up or shut up when it comes to deciding, "Are states going to get flexibility or not?" There have to be good reasons for denying them flexibility.

You want states to come forward and say, "Just let us redesign the inspection and maintenance program for cars." Or another state could come forward and say, "Let us not have to test for a pesticide that has never been used in the state, and don't make us test for that in our water, either. Don't make us adopt the arsenic standard that you proposed." Or, perhaps, a state could even get the EPA to forebear from enforcing certain clean-up standards. In the extreme case, if .08 parts per million becomes the new ozone standard, a state could come forward and say, "Hey, after .09, that is money down the tubes. We would rather spend that money on something else."

The EPA could say yes or it could say no, but it would have to explain its reasons. And the EPA would be forced to engage in a discussion of why the change would be positive or negative. I think, on the one hand, this is a very modest proposal because the EPA would have its own discretion. On the other hand, I think the political dynamic it establishes is one in which we will have a much needed debate about environmental policy, but where it is appropriate to loosen the reins on states. And it will also give states opportunities to come up with ways of explaining why they are, in many cases, better environmental stewards than the federal government.

There are a number of standard objections to a federalism-friendly environmental policy; I mention many in the paper. One is the race to the bottom claim. Professor Revesz and others have shown the analytical failings of the race to the-bottom argument. The theory argues that states are going to compete with one another for business and keep lowering their standards until we all live in states with terrible environmental standards.

Analytically, this line of argument is fraught with problems. It does not hold up empirically, either. We don't see the race to the bottom in practice. States do not compete merely for business; they also compete for tax advantages--and they compete by providing a quality of life that taxpayers want. So you see states and localities doing lots of expensive things to improve environmental quality in order to retain a good tax base by making people want to live there.

Take wetlands. The fact is, when you actually go and look at wetlands prior to the enactment of federal environmental legislation and test the race-to-the-bottom hypothesis, it fails. In my own work, I found that those states which, according to the race-to-the-bottom theory, should have

regulated last in fact regulated first--and regulated before the federal government did. So a race-to-the-bottom argument is not a compelling justification for federal regulation.

National good or commons-type problems certainly can justify federal involvement in environmental policy. But typically a common good, such as a public park, can be—and generally is--provided through means other than regulation. Such goods are provided by conditional grants, by direct federal spending, but not through regulation. So, I don't think that objection measures up.

The one significant criticism of ecological forbearance is the threat of spillover effects. I grew up in Philadelphia. What we did probably affected Camden, New Jersey. What Camden did probably affected us. In fact, I am sure whatever they did in Camden affected us in Philadelphia. But try to keep in mind that regional spillovers--and most spillovers are local or regional--don't justify a national regulatory infrastructure, even if they do justify federal involvement.

Interestingly, the vast majority of our existing regulatory schemes do not address spillovers. There are a few provisions in the Clean Air Act, but they are rarely invoked and only have been recently invoked at all. There are a few provisions in the Clean Water Act. But by and large, most of our regulations do not address the problem of people in State A hurting people in State B. So, while spillover effects represent a perfectly reasonable basis for federal regulation, we cannot defend much of what we have on that basis. There are provisions out there, but there are very few, so there is a mismatch. I would address the concern merely by requiring the EPA to explicitly address potential spillover effects in looking at a forbearance proposal. That is relatively easy to do. You don't need to deny states flexibility in order to address spillover concerns.

One additional point. The press has made much ado about GAO reports, Inspector General reports, and so on, saying states are not up to the task of environmental policy. If you actually go and read the reports themselves, however, I think they have been poorly served by the way they have been covered.

To give one example, take the most recent EPA Office of the Inspector General Report, entitled "State Enforcement of Clean Water Act Discharges Can Be More Effective." It says that states

can be more effective than they currently are. Interestingly enough, one of the reasons it says states are not more effective is because the EPA doesn't give them the necessary flexibility.

To quote from the OIG's Report: "States cannot be fully effective until the Office of Enforcement, Compliance and Assurance allows states more latitude in the redirection of their resources." And that is one of the report's recommendations. We should take some of the press reports with a grain of salt because what the actual studies themselves are saying isn't getting reported.

Of course, the states aren't perfect, but the question is not, "How do we have a perfect regulatory regime?" The question is, "How can we have a better approach to environmental protection?" I think that moving in the direction of greater flexibility is one way to do just that.

MS. BECKY DUNLOP: Thank you, Jonathan. I had the privilege of serving in state government for four years and as I read your paper, I not only cheered, I thought you weren't going far enough. I'll discuss just a few points.

First of all, those of us that share Jon's point of view have argued often, and repeatedly, that environmental challenges in our country--and indeed in the world--are site-and situation-specific. The very existence of the Environmental Protection Agency and the way that it operates denies that position. The EPA has one-size-fits-all views, regulations, and enforcement concepts. That belies what science tells us. This point is made in Jonathan's paper, but I kept thinking he should write more about it because it is such an pervasive problem in our environmental policy.

The arsenic example that he discussed today is a perfect example. Folks out in the Midwest tell me that they are very concerned that this EPA, let alone the last EPA, is going to come up with a standard that God cannot even meet, because the rivers in the West have a higher, naturally occurring arsenic level than the EPA might want to set. In that instance, perhaps we should require EPA to meet the standard out of their budget instead of forcing the states to do so.

With respect to the race to the bottom, I think history has demonstrated empirically that what we have out there is a race to the top. Wealthier is healthier. As our citizens grow wealthier and

there is more economic prosperity and development, in the sense of jobs and opportunities for citizens, people want a cleaner environment. They want to be able to have a community that they are proud and happy to live in, one that is flourishing not only economically but also environmentally.

We often saw this in Virginia, after Governor Allen initiated the Silicon Dominion and we brought new industries and thousands of new jobs to Virginia. One of the issues on which my department worked very closely with economic development was the environmental situation. Where were opportunities to develop? When these new citizens came to the Commonwealth of Virginia, what was available to them from an environmental standpoint?

In addition to that, governors are held accountable. We have a measurement for the race to the top and the race to the bottom, and that is success at election time. Citizens are very harsh in their judgments of politicians whom they believe are not doing well by their citizenry.

Again, the concept of "wealthier is healthier" is an important factor when it comes to the idea that there are preferences and needs. These are different everywhere in the country. They are different in each state. In a democratic republic like ours, those preferences should be given more consideration.

We've heard a lot about flexibility in recent years. When I was growing up, there was a commercial on television about the Phantom Police Car. You don't speed when you think of the Phantom Police Car. Well, if you believe in flexibility, I would say there is a phantom EPA that you always have to look out for. Whatever agreement you come to with industry is essentially second-guessed. In our case, that was done by the Region 3 Offices. If they didn't agree with you, then your flexibility was nonexistent.

There really is no such thing as flexibility, unless the EPA agrees with you; only then do you have flexibility. I think, in that regard, the EPA is picking the winners and the losers, both in terms of states and also in terms of businesses. It is not even-handed.

Now, the EPA itself has a very poor record of carrying out the environmental laws of our land. They have one jurisdiction over which they have direct authority. It is called the District of

Columbia. Well, what do we have in the District of Columbia? Lots of problems--glue plants, treatment plants, all horribly out of compliance, which contributes the most pollution to the Potomac River. Recently we found out the Corps of Engineers runs the Washington aqueduct that contributes more nutrients and more sediment to the Potomac River than any other. And, guess what—the Corps is doing that with an expired permit extended by the EPA.

So I think that if we are really intent on improving our environment, the EPA is not the place we should look for an organization with a sterling record.

Accountability is an important element that Jonathan talks about, especially measurable accountability. I do think that it is important that, as we look at this concept of flexibility, we think in terms of accountability and measurable results. If you are going to spend money on programs, you ought to be able to have a benchmark for starting, and be able to say what the money will do to improve the environment. One of the measurable elements that the EPA used when I was in office was how many meetings were held. I used to ask my team, "What did that do to improve the environment?" They often conceded that it was nothing, but they had to go to the meetings to protect the Commonwealth's interests, or we would be more heavily regulated.

Finally, let me say that I was unfamiliar with the FCC law that Jonathan cited. When I first came upon this in the paper, I thought Jonathan wanted to put the EPA under the auspices of FCC. What a novel idea, this could work! Then I read on, and saw it was just an example.

But I, myself, cannot say from reading Jonathan's paper that I am completely sold on this particular concept. What I can say is that we need to initiate reform, and this is a very good place to start the discussion. The concept is sound. The whole idea of having the states and the people of the several states in charge of their environmental future, I think, would be a wonderful transition for our country. Jonathan's paper gives us a good place to start on making that happen since the magic wand isn't working yet.

MR. GREVE: I will just say a few words, and they are mostly requests for clarification. Afterwards, Jonathan can talk for five to seven minutes in response to both Becky's comments and my questions, or anything else he wants to talk about before we begin the discussion.

My first point is this: You probably need a statutory change for this kind of a waiver. The FCC example is a statutory provision. You probably need something of that kind for this proposal as well. Then you are immediately into the question--how comprehensive would that statutory change have to be? The way your proposal sounds, is it is going to be very surgical. There is going to be a blanket waiver provision.

But, I wonder, what would actually fall under that waiver provision and what would not? It strikes me as obvious, but maybe it is not obvious, that you can't ask for a waiver of the tailpipe standards, right? That is a product standard for goods that go across state lines, across the country. Michigan cannot ask for a waiver on General Motors or Ford automobiles. That is the mobile source part of the Clean Air Act.

Once you get into the stationary source controls, you are immediately into the externality problems that are now being litigated. That is especially true if, as is frequently the case in these environmental statutes, the nuisance itself or the externality itself is defined, not with reference to anything in the real world, but as the permit violation. The permit violation or the standard violation itself is the nuisance for statutory purposes.

I wonder how much of that can you isolate and, in particular, how much would one lose to just say this applies only to regulatory standards and rulemakings, not to legislative standards so far as they exist?

My second question is also about the larger statutory context. It is not so much about the conditional preemption statutes, that is to say statutes where the statute itself says, "either you regulate the way we want it, or else we are going to take over." Most of these statutes are spending statutes; there is money changing hands. As the chief justice says, these statutes are in the nature of the contract between the state and the federal government.

Once you think about the waivers in those terms, that raises a number of questions. One is, after you applied for a waiver, are you then bound by what you promised? To take the dramatic case, you are no longer promising .8 or .12 or whatever it is, you are promising .15. Do you have to submit an SIP for that? Is the EPA still looking over your shoulder?

What happens if you don't get there? Might the state actually be *more* tolerant, because everybody knows the existing federal standards are a joke—there are 200 pages in the statute and lots of regulations about achieving results by "X" date, but everybody knows it can't be done. Whereas, if you affirmatively promise as a state, "We are going to get there," there might be an argument that in that case you deserve to be held to the standard.

What happens to the money? The federal dollars under the Clean Air Act are given on the understanding this money is there to help you achieve the statutory goals. Well, if you come in and ask for a waiver from those goals or from certain regulations, what happens to the money?

Another question: currently we allow bargains between states and the federal government to be privately enforced. In the waiver context, if it is a normal rulemaking procedure, I presume there would be some pre-enforcement or pre-entry review. Afterwards, once you have had your chance ("You, Sierra Club, have had your chance to protest the issuance of this waiver"), and the agency then nonetheless issues this waiver, you can't afterwards stroll into court and then complain about violations. That has to be the minimum, otherwise you can't make it stick.

What would it take to bring that about? Do you really have to change the statutes, the citizen suit provisions, or is there some normal background apparatus of administative law and constitutional law that would afford some protection against that?

My final question is slightly different; it goes to the political economy about this proposal. It seems to me it really has a chance if the business community and the states are both in favor of it. It wouldn't stand a chance if they were against each other.

I thought there was a very good discussion of business' hankering for centralized intervention in the paper. I wonder whether Jon was a little too pessimistic and a little too colored by his experience with K Street folks. I will share one experience. Ten years ago, I went to a briefing by one of the big environmental law firms here in town. It was about the stationary source implementation under the then-new Clean Air Act**.** The rule was around 1,800 pages, and there were representatives from the chemical industry who congratulated themselves on having "won," because this 1,800-page document allowed you to have not only Valve A, but also Valve B, in an emergency if you demonstrated that it couldn't be done any other way. When they celebrate that

as a victory, you just shake your head and walk away. Remember, though, that the exception is in the setting of product standards, because this is where business really can compromise. When it comes to siting decisions, production standards, how something is to be produced, what a factory has to look like, I think they would rather take their chances with state officials any day of the week. If that is true, you might get a coalition of businesses and states together.

PROFESSOR ADLER: Becky raised a point which I think is important to keep in mind in the environmental context: how much current enforcement and measurement is driven by what are essentially bean-counting exercises, and not actual measurement of what is really happening to the air and the water.

The EPA has been trying, in the last several years, to move away from this approach. They put out document after document about measuring the results of enforcement actions. But when you actually look at those documents and what they are doing, it is easy to see why that system is very difficult to escape--particularly for a centralized agency that is overseeing enforcement outside the beltway. They are that much further removed from what is actually happening on the ground.

This is a persistent problem. States, to their credit, have been trying very hard to get away from bean-counting. Some have just replaced that problem with another problem. But it is a persistent mistake to focus on trifles that are easy to measure rather than things of substance that are hard to measure.

Virginia's experience of fewer arrests, fewer fines, and fewer convictions can be read in one of two ways. One is that the cop was off the beat and not doing his job. The other possibility is that there were fewer violations in the first place. If all you are focusing on are arrests, fines, convictions, and so on, you have no idea whether not your environment is improving or getting worse.

I know that when Becky was in Virginia, she had a fight with the EPA over measurements. The EPA really wanted to see input measurements, and they weren't reflective of what was happening environmentally. And that is something we see often. States are trying very hard where they can to move away from that. It is not easy. The types of innovations that are celebrated as great

achievements for flexibility under current law are quite paltry. For example, flexibility advocates cheered triumphantly when they could devote fewer man-hours to training so they could devote more man-hours to actual on-site inspections of certain types of facilities. This was a "great victory" for flexibility. That is where we are in terms of bean-counting.

As for Michael's concerns, yes, reform would have to enacted in a statute. It can't be done through regulation. That is one of the primary reasons reforms like Project XL and NEPPS have failed-- they are not authorized by statute. The joke at the EPA for Project XL was this: If it is not illegal, it is not XL. All the things worth doing you couldn't do. That was one reason people wanted to be at the table. You weren't allowed to do all the things that needed to be done in terms of making the system more responsive and flexible.

This raises Michael's latter point about citizen suits. Another reason these programs were problematic was that you couldn't create a stable agreement. Anybody could blow the whole thing up by walking into court and saying the permit is not being followed. You need, therefore, a statutory change that changes the legal obligations; otherwise you don't get real flexibility. Whether it is my proposal or another, if you don't make a statutory change, you are not going to get real flexibility. It is that simple. I would include all of the immediate specific laws, at the very least, and the regulations. Again, states should be allowed to ask for forbearance from regulatory provisions, but it shouldn't be limited by that.

In terms of product standards, businesses and environmental groups essentially struck a deal. The businesses said they would let the government set national standards as long as they preempted the states from messing up the playing field. I think, as a general matter, respecting that deal and leaving product standards alone is something you can do without affecting the proposal very much.

Telling states that they either adopt the California standards for cars or keep their current ones isn't giving up very much, because there is so much else on the table. Given that there has been so much reliance on these product standards, you would expect the EPA to consider them in evaluating forbearance proposals.

My preference would be to tell the EPA to let product standards be on the table--there may be cases and there may be products for which the national standards, and the benefits from the national standards, aren't so great. There are probably some others, like automobiles, where moving away from that system would create other substantial costs, and would not be worth it.

But leave the rest on the table. When it comes to spillovers, most of the spillover concerns are focused on certain parts of the country and focused on certain types of facilities. There, again, is a lot on the table. My only concern is, if New Hampshire is getting polluted by Ohio, New Hampshire should not be forced to deal with that.

Tom Merrill has an interesting proposal that basically says New Hampshire can't require Ohio to maintain a standard that New Hampshire is not willing to impose upon itself. It is the "golden rule" for trans-boundary pollution. Incorporating something like that makes sense, because you don't want to allow states to beggar their neighbors by crying about spillover concerns. But, again, I don't think that takes much off the table at all.

In terms of spending, when states are asking for forbearance or asking forbearance relief from requirements that can be mandated, that can be a requirement on grants they receive. What they are asking for is a change in what is required of them within the status quo, and I think that that is the way you handle such a request.

In terms of more details about what conditions are set, let the states figure out what they want to ask for. They know better, certainly, than the EPA does, better than I do, and better than any of us about what their particular needs are, what they are willing to contribute, and what showing they are willing to make about how the changes they are proposing are in the public interest.

I think allowing this process to evolve much like the welfare process evolved--where states were initially doing really little things, then someone got the idea to ask for something big—will enhance the process even more.

About the political economy question: many in the business community thought that across-the-board federal environmental standards would give them stability, predictability, and uniformity in environmental regulations. But with the possible exception of product standards, the business

community did not get the deal they thought they were getting. Our current regulatory regime is anything but uniform and predictable.

If you are siting a facility somewhere, you are inevitably going to deal with local concerns. The question in most cases is, do you need to deal with various paperwork requirements that have nothing to do with what you emit, nothing to do with whether or not there may be someone downwind? That is what the regulations require, and it is really a problem. Much of the business community, certainly outside of K Street, would have work to do in devising forbearance proposals.

MR. GREVE: Let's open it up to comments and questions.

MR. **DAN TROY**: I am the chief counsel at the Food and Drug Administration, but when I was in the communications bar we were very excited to see a forbearance statute passed in 1996. I hate to introduce a note of pragmatism into a very elegant paper, but do you know how many times the FCC has invoked its forbearance authority?

PROFESSOR ADLER: I know of one case where the FCC denied requests, a petition in Arizona, without an explanation. And that was overturned by the D.C. Circuit.

MR. TROY: Right. But the FCC itself has never invoked forbearance. Unless you have the will of the agency to indulge in these kinds of experiments, nothing is going to happen. The forbearance authority at the FCC is emblematic of that.

The second point, in terms of thinking about the political feasibility of this proposal, is that if Congress is controlled by a different party than the administration they aren't going to give that administration the authority to ignore any of the statutes. I just don't think there is that level of trust. You need a commitment on the part of agencies that isn't there, and you need a degree of trust in the political branches that also--except in a case of a unified government--is not likely to be there.

MR. GREVE: I will use my privilege here. Has the FCC not invoked forbearance because of a lack of demand? Or is it that the regulated industries suspect, in advance, that the FCC isn't going to do it and so therefore they don't ask?

MR. TROY: Actually, there have been quite a number of requests. The cellular companies have asked for forbearance in certain contexts because the paradigms for common carriers sometimes don't apply to the cellular context where there is much more competition. They have asked for it, but the FCC has not invoked it. Why? Well, at least until very recently, the Kennard-Hundt FCC was looking to expand the scope of regulatory authority and not to contract it.

PROFESSOR ADLER: I think there are two factors that make this different and lead me to be more optimistic. The welfare experience is part of it. The political dynamic is very different when a *state* is asking for forbearance from an executive agency than when *a company* asks for forbearance from an independent agency.

Moreover, while there was some polarization on this in the late 1990s, flexibility of environmental policy, at the state level, is not a partisan issue. The audit and privilege law in Texas was signed by [Democrat Governor] Ann Richards, for example, and I believe that was the second such reform in the country. The first was in Colorado under a democratic governor; that was one of the initial efforts at state experimentation that infuriated the EPA. The EPA went ballistic under both the Clinton administration and the first Bush administration.

The nonpartisan component of reform changes the dynamic. It is part of what we saw in welfare overhaul and I think it is very important. Further, the fact that the EPA has to explain its decisions, and the FCC did not, is another distinction. The FCC, in the case I am familiar with, did not give the company asking forbearance much of an explanation. The D.C. Circuit said, "You can say no, but you have a long history of telling people what is in the public interest. You have standards, and you actually need to apply them. You can't just say, go away, we don't like what you are asking for."

These differences make me more optimistic. It does depend upon political will, of course, but it is better to have the forbearance tool than to be without it.

MS. DUNLOP: There are some environmental laws where the EPA has some authority to grant variances and they have done so, as in the Safe Drinking Water Act. But they very rarely choose to do that. They make things very bureaucratic.

Maybe a solution would be to have the EPA, at least in its explanation activities, bear the burden of proof—they should show *why* the agency should not approve a request; otherwise, the explanations will look symbolic and never really tackle the problems. For instance, would it help if audit laws were more flexible in this sense? I mean, there is no reason for the EPA to give its power back.

PROFESSOR ADLER: True, but the EPA was forced to give up some of it. The EPA is compromising with state audit laws because there is a political cost to beating up on governors of both parties. Additionally, most of the various waiver provisions that are out there tend to very narrowly define what provisions can be waived.

MS. DUNLOP: Well, they could make it much easier. They intentionally make it very difficult and expensive to do the paperwork.

PROFESSOR ADLER: Sure. What this proposal does is create broader waiver provisions. When the provisions are less narrowly confined the political costs of obstructing flexibility are greater for the agency. That is probably why the agency has compromised on audits in a way that it hasn't compromised in other areas.

If you broaden the provisions, you actually force people to come up with a good reason to deny a waiver. And when you create a formal legal mechanism, it is not a backward compromise that happens. The EPA actually goes on record to explain itself. Judicial review also forces the EPA to publicly present an explanation.

MS. DUNLOP: The decision is judicially reviewable, but still defaults to the EPA. What is the point of reviewing a decision when it has already defaulted? The assumption is that the EPA standards are appropriate and you must petition to try to get a lower standard--instead of having bringing the states up to a more equal level, perhaps by shifting the burden of proof.

PROFESSOR ADLER: I think that arbitrary and capricious review is more than defaulting to the EPA. The fact that the FCC lost one of its cases demonstrates that to be true. Agencies have a difficult time defending the indefensible, and they would much rather not be required to do so. So I think that is the difference.

Moreover, this proposal changes the dynamic that we have seen around Project XL and elsewhere. The EPA comes to the table, requests are made from the states, and the EPA has a set of fallback positions: "Well, that is not legal," or, if everyone doesn't agree, "We need a consensus." (That is, of course, "We need a consensus because it is not legal.") If it is not legal, and there's no consensus--someone can go into court and throw it out.

My proposal removes that excuse. I should add, however, that I am not optimistic that the EPA would support it. When Senator Lieberman proposed creating statutory authorization for Project XL, the EPA opposed it. The agency didn't want the permission to actually do something real because it would lose this excuse. It would lose the ability to say no in a politically costless way. This proposal would impose political cost. That doesn't mean the EPA would give up everything, but it changes the dynamic such that we could see some real experimentation.

MR. TOM SUSMAN: The EPA opposed Project XL legislation because of pressure from environmental groups. They opposed alternative compliance; they don't like the idea. So if you are right about the way states act and you are right about the states' ability to take care of their citizens in localized areas--and we are not sure about spillover--then why don't we have Congress simply direct forbearance to the states for localized problems? You can define those pretty easily.

Then, if you are nervous there will be some who doubt whether all fifty states will really protect their citizens, what do we do? Some cannot simply walk across the border to the next state if they are unhappy with their state's regulations. Perhaps a federal override is needed at the end as a failsafe.

PROFESSOR ADLER: I thought about things like that. I mean, we have a Congress now, for example, that essentially told the administration not to put forward an arsenic standard any higher than ten parts per billion. There is no justification for federal control of local decisions about drinking water. There is no spillover; there is no race to the bottom or any similar problem. On the other hand, you can readily demonstrate that certain parts of the country will endure serious public health problems if they are forced to meet that standard.

But Congress will not surrender power to the states, politically speaking. That will not happen. I would love to see it happen; David Schoenbrod has developed a brilliant proposal about how to remake the EPA overnight that involves giving a lot of authority to the states. Politically, however, the proposal is not on the table. What seems far more feasible is trying to replicate what actually worked in the welfare context. There, all the same political incentives were in place, the bureaucracy resisted giving up power, interest groups lobbied that bureaucracy not to give up power, states were trying to experiment because the system wasn't working--and it just so happened that there were provisions that could operate as a safety valve.

If I had fifty votes in my back pocket, I might propose more far-reaching reforms. But, given the political situation, it is much more difficult to oppose experimentation than it is to oppose an overhaul or weakening of the EPA. In the former case, the EPA still has the ability to say no. So, as a practical consideration, this is a very politically conscious proposal.

MR. GREVE: The other feature of the Susman proposal was to start with the easy statutes. Leave clean air alone because you are going to have the product standard problems and so on--start with the Safe Drinking Water Act, RCRA, Superfund, etc.

PROFESSOR ADLER: I don't have a problem with that. I wouldn't put that proposal on the table up front because you lose a lot. There are many places in the Clean Water Act and Clean Air Act where states need to be allowed to try different things, where there aren't real spillover effects, where there are policies that cannot be justified environmentally let alone economically.

Many of the original provisions of the Clean Air Act, as well as the 1990 amendments to the Act, mandate certain practices for specific types of non-attainment areas. Most of those rules are plainly unjustifiable in many non-attainment areas because they don't do much of anything given a particular non-attainment area's problems. But, nevertheless, there is a list of things you are required to do, and that is hard to justify.

Look, if someone could get through a reform measure that applied only to the easy statutes, I would be thrilled. But I think it would be politically easier to create an experimentation bill or experimentation proposal than it would be to pick a statute. Once you focus on reforming a

specific statute, you are essentially initiating a reauthorization. And once that is on the table, bar the door, the horse is out of the stable.

It would be better to have an ecological forbearance bill, or some kind of experimentation legislation and then, in the process of negotiation, decide what it is you are going to take off the table or what you are not going to have apply. You certainly don't lose any votes doing the latter. In fact, you gain them.

AUDIENCE MEMBER: But in certain areas, for example, you suggest that Congress can use the taxing and spending power instead of regulation. That suggestion deviates from your political consciousness approach; that is a different committee entirely and a whole different set of circumstances. It's unlikely to mesh with reform of an environmental statute at the same time. So if we are going to be politically conscious here, let's focus our attention on what is within the realm of politically feasible.

AUDIENCE MEMBER: With regard to the Safe Drinking Water Act, it is true the water doesn't spill over, but you still need to be careful because people do. Given the amount of travel that I do, you could argue that I have a very large interest in, say, in the water standard in New Orleans—maybe get there once or twice a year. Maybe I live in Maryland right now but the chances that, in the next five or eight years, I am going to be living somewhere else. So I may feel that I have a large interest at stake in the standards of other states. In this way, you basically have the spillover argument; it just takes another form.

PROFESSOR ADLER: It is voluntary. You choose to move.

AUDIENCE MEMBER: Well, I don't want to be forced to make my location decision in the United States on the basis of whether I think the water is clean somewhere or not.

PROFESSOR ADLER: You do that with regard to crime rates. I think that argument assumes too much. It is a justification for federal regulation of everything, right? Crime, traffic, you name it—a whole host of public policy decisions create differences from place to place. The other thing I would say is New Mexico is a great place to go skiing. I like to go skiing there. No

matter what their arsenic standard is, I don't think drinking that water one week a year is going to be a problem.

AUDIENCE MEMBER: I am not worried about arsenic. I am worried about the situation they had in Milwaukee, where, if you drink the water one day, you can get some kind of microbial disease.

PROFESSOR ADLER: I don't think that sort of scenario is something we are likely to see as a result of *state* failure to enforce an existing standard.

AUDIENCE MEMBER: Maybe the thing to do would be to have federal minimums, but then give states the opportunity to tighten the standard.

PROFESSOR ADLER: But your argument suggests that the people of Milwaukee don't have enough of an interest in keeping their water clean to force their government to make sure that the water is safe.

AUDIENCE MEMBER: In Milwaukee, if I remember correctly, the problem was not what the city did. Rather, there was a factor the system just wasn't focused on.

AUDIENCE MEMBER: It was because the federal statute mandated that every three years you must add an additional group of pollutants to the list, and it was diverting resources from known large risks to remote very speculate risks.

PROFESSOR ADLER: Exactly!

AUDIENCE MEMBER: And that was really a problem.

PROFESSOR ADLER: But it wasn't Milwaukee's failure. It was a systemic failure, on the national level, not a local failure.

MR. PAUL NOE: I wanted to ask Jonathan if he could clarify what the standard would be for granting these waivers.

PROFESSOR ADLER: I would like it to be fairly broad, something similar to the FCC's requirement that it serve the public interest—that, basically, the EPA would need to conclude that granting the standard would not present undue risk to public health and environmental protection, something that is generally in line with the EPA's overall mandate.

My proposal would require the EPA to be consistent and fair in the way it applies that standard, but I would give the EPA a fair amount of flexibility to define the standard. I think trying to hamstring the EPA, or define the standard too much, recreates the problem you already have in existing waiver provisions.

Furthermore, the solutions that states are going to develop will be new and original. If a standard is defined too narrowly, then you may have a really good square peg that can't get through the hole. There should be a fairly broad standard about not creating undue risk to public health and environmental protection, and then probably something about due concern for your jurisdiction.

AUDIENCE MEMBER: Has anyone cataloged the examples of states that want to do "X" but are prevented from doing it, even though it would improve environmental protection? That is the kind of ammunition that is needed to really get something off the ground.

Further, let me add that this proposal has already been considered. There were alternative compliance provisions in the regulation reform of the 1990s, but some of us were working on language that would apply to the states. I agree that the political dynamic is much better today. There are political safeguards built in when you have a state telling the federal government, "I think I can do this better." But I think that having a wide-open public interest standard would be a very tough sell.

MR. GREVE: I want to pursue this a little further. In issuing a waiver, an agency finds there is no undue risk to public health, or that the state's proposal is in the public interest. Good enough. But if you phrase it that way, it seems to me you haven't issued a waiver. You have changed the statute because the statute itself already defines risks to public health: "Adequate margin of safety, blah, blah, maximum health, every jogger in L.A. has to be able to run around at 120 degrees without keeling over." If you then issue a waiver, you have changed the statute

administratively because it no longer means what it used to mean. It is no longer even operative in that sense, right? Is "undue risk to public health" the same standard regardless of what the original statutory standard and language was?

PROFESSOR ADLER: Yes. One of the possibilities you create with something like this is the ability to move from a rigid, locked-in-cement regulatory structure that rarely, if ever, changes toward something that can evolve. That is an important innovation. It's simply not possible to protect the environment, something which itself is dynamic and ever-changing, with a structure that never changes and never can be modified to address new circumstances. You can defend a more dynamic system on an ecological basis because you want that kind of evolutionary approach. And, in some respects, yes, you would be terminally changing the statutory requirements to which states are held. .

Let me revisit the question of businesses versus the states. I think the political dynamic is different. I think helping the governor of my party is different than helping a CEO with a plant in my district, particularly in terms of how that sells with the public. When you grant waivers facility-by-facility, there is a rent-seeking problem in the sense that you create the possibility where one company with political connections gets regulatory indulgence that its competitors do not. And, if you can find the set or the number of companies that can get such relief, you create a real problem where folks start looking at these not as ways of improving environmental performance but of ways of getting an undue competitive advantage over competing firms. And that is something we see in environmental policy all the time.

AUDIENCE MEMBER: Doesn't your proposal mean states just ask for any level of indulgence? They would say this is just one site.

PROFESSOR ADLER: No, it would not be any particular site. I would say it has to go by jurisdictions.

AUDIENCE MEMBER: You would need to waive all or none? I thought you said it was like with the FCC; it was any geographic area.

PROFESSOR ADLER: I am less concerned about Virginia competing with Maryland by trying to create an environment that is more hospitable to both employers and employees than I am about a company by itself getting away with it. Effectively, if Virginia does that for Manassas, any company that decides to locate in Manassas is now going to get that same benefit. And I think that just makes environmental policy more like a whole bunch of other policies where you can create such an environment. Generally there will still be a risk, but I think the risk is less.

AUDIENCE MEMBER: I agree with you that it is better for the states. I am not saying it is better for companies, but I think you are going to have the same dynamic.

I also want to pick up on what a couple of people said about a broad versus a narrow statute. Surely, Ms. Dunlop, you know that when the EPA wants more power, they read a statute illegally. They say, don't worry; we are going to have flexibility. The flexibility is nonexistent. Even worse, everybody knows it is illegal; everybody knows it is probably going to get challenged in the D.C. Circuit.

So then they go state-by-state and try to do some convincing: state official, do you *really* want to challenge this in the D.C. Circuit and overturn our expansion of jurisdiction when we are telling you we are going to give you flexibility? And it seems to me that this really gives EPA the way to put the screws on the states in terms of doing what they do best--expanding their jurisdiction illegally in the first place.

PROFESSOR ADLER: I would be less worried about that under my proposal, primarily because you are giving states a tool that they didn't have before. I always come back to the welfare analogy because there are all kinds of political reasons that what happened in welfare shouldn't have happened.

AUDIENCE MEMBER: If it is welfare and it is money, that's one thing. The command and control environment of environmental law is another. Here you are talking about the EPA imposing regulatory costs, wanting to get power, and wanting to give indulgences to either states or businesses. There are enormous incentives for abuse.

PROFESSOR ADLER: Well, I don't think the EPA could really use this to expand its power because it has to react to a formal state request. And I think it also gives states political leverage they don't have now. Remember, in the welfare context, when the federal policies got bad enough and there was a tool on the table that states could use to get relief, they made it politically very difficult for the federal government to say no. They were coming up with the policy proposals that were hard to oppose. In environmental reform, the key is to get the same combination of factors.

The EPA plays the big heavy, and it is going to continue to play the big heavy. I think that on the margin the waiver proposal actually gives us substantial counterweight to those that go into the ring with EPA. I think it is hard to predict with utter certainty, but I think that is what the affect of this would be. I certainly hope that is what the affect is going to be.

But I do believe that is going to change, and I think that states that have good solid proposals, as many do--if you look at a lot of the initial audit bills or initial other bills that they came forward with and that the EPA forced them to back off on, a lot of states were doing a lot of things that are hard to oppose on environmental grounds, but that are often easy to oppose on technical grounds—i.e., this doesn't quite meet this regulatory standard or as we interpret it.

My proposal makes it much harder for the EPA to fall back on technicalities. It would force the EPA to stop saying no just because it wants to or because it can. I think the political costs of saying no are different than when the EPA can no longer say, "Oh, no, there are all these regulatory standards that may get in the way; we will let the courts sort it out; we don't think that we are allowed to do that."

MR. PAUL CAESAR: I think, politically, the only way we could sell your plan is if we really hammer home the idea that this is good for the environment. You, public, will actually get more environmental benefits if we adopt some sort of policy along federalism lines.

I like the idea of a compilation of what states think they can do better than the federal government. It would be great if a state could come forward to the federal government and say, "Look, I have a plan for an idea, but by law I cannot do today. In three years, I will get you this

environmental return which is better than the existing standard, which is better than what the federal law would give us in three years."

That way you are making the case that the environment is actually improving, and that is easy to embrace by members on both sides of the aisle. If you don't have that, you're sunk. In your paper, there is some discussion about having a waiver from Clean Air Act standards where the bar is actually *lowered* because of site-specific conditions. That might be a political possibility at home, but on the national scale it is going to be very hard for people to swallow.

PROFESSOR ADLER: I agree with most of your comments, and I think the failure of environmental reform has been that things that *can* be sold on environmental grounds and *should* be sold on environmental grounds have not been. For whatever reason, politicians that push for regulatory reform seem to be incapable of acknowledging that there are great environmental benefits to be achieved by reforming federal rules. Some of the governors have been willing to change this approach, and certainly some of the state environmental advocates have been trying to change. My colleagues have spent a lot of time trying to convince people to not to be afraid to state something has environmental benefits if it does.

I think in some cases that lowering the bar is, from an environmental standpoint, beneficial. The arsenic standard, I think, it is a good example. There is a very powerful case that can be made that having a less stringent arsenic standard in certain places maximizes protection of public health.

In short, what I envision is this: if, say, Atlanta decides to lower the bar a tiny bit, they would come forward and say, "We only have so many people working in our agency and our enforcers' time would be much better doing something which actually matters to the health of our citizens." That is really how I envision it playing out. One of the political tricks is getting people willing to talk in those terms. It's relatively easy to do. I don't understand why more of that doesn't happen.

AUDIENCE MEMBER: Clearly, there is a case to be made in the case of the arsenic standards, that in fact it will have negative effects on public health. I think that that case needs to be made more strongly because in the political dynamic, certainly in the Washington political

dynamic, the idea of letting states opt out of a national standard is just a really tough sell. There is a case to be made there, but in my mind it hasn't been made strongly enough yet. There is just too much per se opposition to it across the board.

MS. DUNLOP: I think the case would be made if the national EPA administrator weren't setting standards. I think there would be many state officials who would be willing to go to their citizens and make some of the arguments that we are talking about, like adjusting state standards and how that is beneficial for the people of that state because they communicate regularly with people across the state.

But as long as the federal government is determining which arsenic standard is a safe one for Americans, governors are unwilling, for practical political reasons, to stand up and rock the boat. Most are not willing to say, "I am going to have a less low standard because it is safe for my people" or "I have different priorities." It is just very, very hard.

MR. GREVE: I think the idea should be to take a look at not just environment but public health. Members of the community can be shown that high arsenic standards are going to cost $2 million a year or whatever. They can then be told, "For this $2 million per year, we can buy something else" and put *that* on the table. Unless you do that, you will never be able to change anyone's mind. Citizens are not persuaded by statistics and hypothetical examples, but if you have got something tangible like a dispensary or free mammogram, it convinces people that money that would go into an arsenic standard compliance could be better used in doing public health kinds of things.

If the arsenic argument is done properly, it is actually an opportunity to take a look at alternative approaches of improving not the environment but public health—that is, of a greater good. State governments could make the argument that money could be used a lot more gainfully doing other things. Most people hate to give anybody a free ride. They think their tax money should be used for something that furthers the general good. If a ransom has to be paid, why not do something useful with the ransom.

So let's go for public health. If New Hampshire has a problem with Ohio, the states should sit down together and Ohio should be willing to spend some money to buy something directly for New Hampshire. It could be hospital buildings or CAT scan machines.

MS. DUNLOP: I think you have advocated that well.

PROFESSOR ADLER: I agree with that and it is interesting.

MR. GREVE: But I think the states should do that. I am really surprised that GE did not do the same thing on PCBs. Hey, this could cost us $400 million. Take $100 million and do something decent with it, something that will get us some good public health.

AUDIENCE MEMBER: They might give it to the NRDC.

MR. DAVID JOHNSON: Just a couple general comments. When I first read the paper, my initial reaction was yes, this is the type of thing we are looking for. But the more I looked at it, the more incredulous I became based on practical experience. Why advocate forebearance? It says here we do so for the environmental cause and effect. I don't know what environmental "cause" is. If it is to improve the environment, to move to a goal of absolute zero discharge one day like the NPDS-type law says, then that is fine. It may be, however, that forbearance is it just to make life easier based on current levels of pollution. Much depends on what environmental progress is.

I echo the argument that to get any movement you have to have a dedicated objective of reducing overall pollution levels beyond the standards. Actually, we are talking out in the world of zero discharge, and it sounds impossible. But then when you look at where things have been in certain areas, in many cases, we are coming pretty dang close. Most of that based on going beyond the regulations, not reduced regulations. So we need a goal in order to know where you are going so that you can sell it.

I am not sold on the parallel with welfare because welfare, at that time--and I remember very clearly--was widely thought of by the general population as broken. It was taxpayers money that was being wasted through fraud and abuse. No one was getting much out of it. It was a broken system, and that was a general accepted premise.

In the trenches in which I work, there is no general population that says environmental protection isn't happening. Unless you are in certain particularly clean water or clean air problem areas, most people think that their environment is not too bad. If you ask, "should the environment get better?" people say, "of course." But there is not a huge outcry that the system is broken. I mean, I just don't see that. There is no one beating down our door saying what are you doing to make things better and make things cheaper, except for the regulating community which doesn't sufficiently move Congress. It has to be the general population.

Now to get to the more specific issue of flexibility. I speak from not only my experience from Virginia, but from also my experience with the ECOS (Environmental Council of the States). Virginia chairs the cross-media committee of the ECOS which overlooks environmental regulations. The language of "innovations" is getting very trite coming from the EPA. Everything needs to be a pilot program, everything is an improvement on past practices. It is getting to the point that we have about had it with this approach.

The ECOS has a process which you alert the committee when you have a request to innovate. So last February, in Virginia, we said to the other commissioners, okay, we are going to test this. We want every state to put in three proposals and we are going to flood the EPA with innovations and see what happens.

Well, to begin with, only about 25 states signed up--some didn't because they were very doubtful of any effect. In fact, Delaware told me specifically they weren't going to do it because they had had it with the EPA's form of "flexibility." They weren't going to go through the charade any more. I forgot how many proposals we ended up putting in—maybe 40 or 50. They did indeed have an effect: we confounded the EPA. And I am not sure, they may have granted a couple of approvals, but basically what it comes down to is that they don't have a system. They are not sufficiently staffed or sufficiently oriented toward approving these ideas. I will take, for instance, example 1 which you mentioned in your paper, the Texas [inaudible] flexibility. Well, I have not experienced one thing that has come out of a pilot, an ECOS innovation, an XL or anything like that that they have come out and said, "We have found something that works and now you can use it"; something where a pilot is truly piloted with the idea of broad implementation.

Before Virginia or Delaware or any other state invests time and money to get flexibility, we will have to know what we are going to get for our trouble. What is in it for me?

PROFESSOR ADLER: First, your point about public belief. We came surprisingly close to having that public belief in '93 and '94. We all remember it, right? The last democratic Congress took every major environmental authorization off the table because they were going to lose the votes on real property rights protections, real unfunded mandates reform and real risk assessment requirements. "No money, no mandate" was going to win on the floor in a Democratic Congress, so the reauthorizations were pulled.

Now, I think, the fundamental problems in the system that led to that political dynamic have not gone away. Some political events have intervened. Across the ideological spectrum, people that are serious students of environmental policy still believe those problems are there, but for a variety of reasons, public awareness of has dissipated. Now, I believe it will come back because I believe the flaws are there, and we were very close before. Remember, Charles Murray wrote his book about how welfare was making things worse [*Losing Ground*] 15 years before Wisconsin came around and actually made significant changes.

Knowledge among people who are experts precede political awareness. We are seeing this dynamic here. The knowledge has begun to seep out. It just hasn't seeped out as much as it had and could again.

AUDIENCE MEMBER: I am sorry to interrupt. But your point is not correct. If there was a 15-year difference between the realization by maybe people at this table and the general public, states would already have environmental waivers.

PROFESSOR ADLER: And I would argue we are about 10 or 11 years into that.

AUDIENCE MEMBER: Fine.

PROFESSOR ADLER: To propose and lobby these things will take several more years. On the second point, I know states are frustrated. I think states *should* be frustrated with the way flexibility has been dealt with at the EPA—as you say, there has been no formal legal framework that would allow flexibility to reliably happen. The EPA can make decisions however it wants,

whichever way it wants. To invest money in asking for flexibility is just to take a gamble. You might as well spend that money at the craps table.

My proposal changes the situation in certain respects. In terms of the EPA's internal culture, one thing I would definitely import from the Communications Act is a formal deadline. EPA needs a time limit in which it has to respond to a forbearance proposal—otherwise it gets granted. With this pressure, the EPA has to create the internal ability to deal with these proposals, evaluate them, and come up with an answer.

In terms of the pilot process, you know, one of the hallmarks of our turning to arbitrary and capricious review is that the agency has to be consistent. And there is an additional burden on the agency that wants to change its mind. So if the EPA approves a particular proposal with one state, and then a bunch of other states say, "Hey, we are going to do it too," the EPA has a hard time saying no to them. Judicial review forces agencies to be consistent.

Again, I don't think my plan solves all the problems you are talking about. I think it solves some of them, and I think it at least creates the potential for a bandwagon effect like we saw in welfare. There were a handful of states that were the leaders, and then a lot of states became creative.

I would like to think that this proposal creates the potential for that in a way that NEPPS and Project XL didn't. Those projects were one-shot deals and because and there was nothing that forced the EPA to make an institutional commitment to the process. Creating a formal legal mechanism with a deadline so that EPA *has* to respond forces the agency to make an institutional commitment, even if it doesn't want to grant any states waivers.

AUDIENCE MEMBER: The EPA currently has a deadline, but it works more or less the opposite way.

PROFESSOR ADLER: Right.

AUDIENCE MEMBER: In other words--

PROFESSOR ADLER: If they don't approve it, it is not enacted.

AUDIENCE MEMBER: Right.

PROFESSOR ADLER: I think you have to reverse that. In the Communications Act, the FCC is allowed one extension. In the case that they lost in the D.C. Circuit, the agency had asked for it. It was clear to the court that the agency was just dragging its feet. Because of the Act, it couldn't. It had to make a decision. The court sent it back and said, "Come up with something better or grant it."

A deadline with consequences forces the agency to make an institutional commitment to dealing with this process, even if it doesn't want to. It makes it harder for the agency to hide. It makes it harder for it to make this a low priority. It doesn't guarantee it will say yes, but I think it addresses some of those concerns.

Ultimately, if there is a recalcitrant EPA administrator, I can't promise that implementing my plan would make all the states' frustrations go away. I would like to think it would be better than the status quo and create the potential of being a lot better than status quo. But, again, as Dan mentioned before, if there is no political will, there is only so much you can do.

MR. GREVE: We will take one more question or comment.

AUDIENCE MEMBER: Have you considered whether the kind of pernicious rent-seeking you warn about might be transformed into publicly salutary ransom-seeking, like Michael mentioned, like making these waivers or allowances tradeable between states?

PROFESSOR ADLER: I don't know how you would make them tradeable. I think I do see the possibility of Ohio saying, "We want to do something different with our utilities," and New Hampshire saying, "Oh, no."

If the EPA is required to look at spillover effects, New Hampshire's complaining is going to have a lot of weight in the EPA's process and probably have a lot of weight before a review in court. There is certainly a possibility for Ohio and New Hampshire to sit down and cut a deal and come up with some cozy little bargain. I don't have a huge problem with that. Back when state contracts were the way some interstate pollution problems were dealt with—Bruce Yandle has done some work looking at interstate compacts with river pollution--that sometimes happened.

As long as downstream states have legal causes of action against upstream states, they have an ability to go to upstream states and say, "give us a reason to agree."

Now the Clean Water Act screwed all that up. Under the guise of protecting our rivers, the EPA told downstream states "Don't worry, we will protect you. You don't have a cause of action anymore." Restoring some of that dynamic, I think, is a significant improvement. Even if New Hampshire starts asking for things that don't really seem to have much to do with cleaning New Hampshire's air, I think it is still a significant improvement. You know, if New Hampshire is being ruined by Ohio, it might be entitled to ask for compensation in the form that New Hampshire finds most gratifying.

MS. DUNLOP: That would also allow states to agree themselves on what is good science and what protects the public health, as opposed to these artificial standards that are set by EPA. So I think that might be a good deal.

MR. GREVE: It is not that it is perfect, but it is better than what you have.

MR. ADLER: Exactly.

MS. DUNLOP: That is right.

MR. GREVE: I thank Jonathan for the terrific paper and discussion. I thank Becky Dunlop for kind and gracious and insightful comments. And I thank all of you for a very nice discussion.