Environmental Federalism’s Tug of War Within

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Why is environmental federalism so contentious?
- Canary in the coal mine of wider federalism controversy?
- Nature of environmental problems; nature of federalism

How has E. governance responded structurally?
- Asymmetrical allocation of authority along axes of scale
- Consultation, negotiation, collaboration, competition

Model for other federalism-sensitive governance?
- Innovations of environmental federalism exportable?
- Unique to environmental management?
Many of the Court’s most contentious federalism cases are environmental cases:

- New York v. United States
- Hodel v. VA Surface Mining & Reclamtion Assn.

Many of the Court’s most contentious envtl. cases are federalism cases:

- Rapanos & Solid Waste Agency of N. Cooke County
- EPA v. EME Homer City Generation
- Massachusetts v. EPA
Environmental law is prone to such extreme federalism controversy...

...because it allocates power in regulatory contexts

...where state and federal claims to authority are *simultaneously at their strongest*.
Often match the need to regulate the harmful use of a specific parcel of land

...with the need to regulate the boundary-crossing harms associated with that use

Hallowed understanding that governing land use is among the most sacred of local prerogatives...

...while regulating harmful externalities is among the original predicates of national authority.
Police Power vs. Federal Power?

- Cf. Criminal law?
- Health law?
- Education law?
- Family law?
The Connection to Land Use
Widespread consensus on what constitutes health, theft, or math; states differ at margins

Envtl. mgmt. differs radically between (and within!) states, b/c land is so locally unique

Managing water pollution in OR, AZ, IA, NY, & FL require wholly different sets of expertise
Water Pollution Expertise

- Contours of the land, elevation, precipitation
- Seasonal weather patterns, prevailing winds
- Watershed, soil quality, habitat
- Population density, zoning laws
- Cultural uses, local economies
- Where the local industry is operating
- What the major stressors are...
Answers to question of how best to regulate water pollution can be wildly different in each context...

..and getting them wrong can be very costly to communities.
The Costs of Bad Envtl. Mgmt.

- Bad decisions without the benefit of local expertise can portend serious envtl., cultural, and economic harm if things go wrong...

- Damage to soil, water, and other local resources can cause bad collateral consequences for entire communities

- But if one community fails to prevent spillover harms to another, the stakes are equally high!
Interjurisdictional ‘Gray Area’

- Jurisdictional overlap, simultaneous interests
- Federalism Issue: *Who gets to decide?*
- Constitution gives guidance, but…:
  - Boundary line? Trump card?
- Preemption shift from “could” to “should?”
Nature of Federalism
Federalism is Best Understood...

- Not as a contest between state & federal reach
- Nor between judicial and legislative interpretive supremacy
- Nor between original intent and living constitutionalism...
- Federalism is a strategy for good governance, based on a set of clear values.
Core Federalism Values

- Checks & Balances between L & N Authority
  - Protect against govt. overreaching or abdication

- Accountability & Transparency in Governance
  - Enable meaningful democratic participation

- Local Diversity, Innovation, and Competition
  - Create space for the great “laboratory of ideas”

- National authority for spillovers, collective action
  - Vindicate core constitutional promises

- Interjurisdictional Synergy between L&N Capacity
  - To resolve different parts of interjurisdictional problems
Federalism’s Tug of War Within
Environmental Federalism Tugs
Environmental Governance

- Uncertainty about how to share and divide regulatory authority in contexts of overlap.

- One Response: Negotiation

- Discovery: substantial amount of federalism-sensitive governance is jointly constructed.

- Obvious dealmaking to iterative exchange.
Cooperative Env'l. Federalism

- Clean Air Act
- Clean Water Act
- Coastal Zone Management Act
- Compr. Env'l. Response, Compnsn, & Liability Act
- Emerg. Planning & Commnty Right-to-Know Act
- Endangered Species Act
- Resource Conservation and Recovery Act
- Safe Drinking Water Act
- Surface Mining Control and Reclamation Act
Asymmetrical L/S/F Allocation

- Structures of cooperative envtl. federalism:
  - Coordinated capacity (EPCRA)
  - Federally supported state implementation (CZMA)
  - Conditional preemption (CAA)
  - Shared and general permitting programs (CWA)

- Usual model:
  - F judgment trumps on regulatory goals & stds
  - S/L get deference on design and implementation to account for diverse local circumstances
Lesson: “Not a Zero-Sum Game”

- The Mythology of “Zero-Sum” Federalism

- Federalism in practice vs. federalism theory

- Hope for moving beyond rhetorical paralysis