Multilevel Environmental Governance in the US: "Environmental Federalism’s Tug of War Within"

**FEDERALISM AND THE TUG OF WAR WITHIN**  
(Oxford Univ. Press, 2012)

**THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM**  
(Concluding Chapter, Edward Elgar, 2016)

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Presentation Outline

Introduction to the American federal system
• The foundations and mechanics of U.S. federalism
• Advantages and disadvantages of federalism

Environmental law at the epicenter of controversy
• Environmental federalism conflicts are especially acute
• Nature of environmental problems; nature of federalism

How has Envtl. governance responded structurally?
• Asymmetrical allocation of authority along axes of scale
• Feds: goals & standards; state: design & implementation
Constitutional “Dual Sovereignty”

Divides sovereign authority: state & national
• Which decisions should be made centrally, locally?

“Enumerated” federal powers
• Open ended: Commerce power, spending power…
• Specific: Postal service, voting rights...

Delegated and reserved state powers
• Delegates responsibility for managing elections
• 10th Amendment: reserves “police power”
The “Interjurisdictional Gray Area”

As a result, state and federal regulatory jurisdiction is both separated & overlapping
° (管辖权重叠):

Managed by the Supremacy Clause (art. VI)…
° (至高权力条款)

□ But still questions: Boundary line? Concurrent?
Consequences of Uncertainty

Litigation over “Gray Area” Governance
• Clean Power Plan, Clean Water Rule, Health Care

Hesitant Policymaking in the Gray Area
• Climate governance, financial service regulation

Abdication in the Gray Area
• Radioactive waste, Hurricane Katrina, Flint?
Given all this...

Why bother?
Core Federalism Values

**Checks & balances btw local & national 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** (管辖权的 协同效应) **re: capacity**
- To resolve different parts of interjurisdictional problems
Many of the Supreme Court's most contentious federalism cases are environmental cases:

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

Many of the Supreme Court’s most contentious environmental cases are federalism cases:

- Rapanos & Solid Waste Agency of N. Cooke County
- EPA v. EME Homer City Generation
Argument in a Nutshell

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?

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 the deserts of Arizona, the plains of Iowa, or tropical Florida 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 majorstressors are…
Police Power vs. Federal Power?

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 create devastating consequences for entire communities.

But if one community fails to prevent spillover harms to another, the stakes are equally high!
Reason #2:
The 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.
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Interjurisdictional Synergy between L&N Capacity
• To resolve different parts of interjurisdictional problems
Federalism’s Tug of War Within
Environmental Federalism Tugs
Underlying Problem:

Constitution mandates—but incompletely describes—our system of dual sovereignty

Requires exogenous (外生的) theory of falsm

...to “fill in the blanks” when vague directives are applied to actual cases and controversies

Result: vacillating (举棋不定的) jurisprudence as S. Ct. experiments w/different approaches
Competing Theories of Federalism

Dual Federalism (19th Century; ‘New Fedlsm.’)

Cooperative Federalism (Post New Deal era)

Empowerment Federalism (Chemerinsky)

Polyphonic (Schapiro)

Balanced (Ryan)
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

- Especially in realm of **Environmental Law**
Lesson: “Not a Zero-Sum Game”

The Mythology of “Zero-Sum” Federalism

• “Zero Sum”: 零和博弈游戏
  （也称非合作博弈，参与此种博弈的各方一方有收益另一方必然有损失，各方的收益和损失相加永远是零）

Federalism in practice vs. federalism in theory

Hope for moving beyond rhetorical paralysis