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"Environmental Federalism's Tug of War Within"

Ryan, Erin

Ryan, Erin. "Environmental Federalism's Tug of War Within," preprint provided by the author, 2015.

The intensity of federalism disputes reflects inexorable pressure on all levels of government to meet the increasingly complicated challenges of governance in an ever more interconnected world. Yet even as federalism dilemmas continue to erupt all from all corners, environmental law remains at the forefront of controversy. This chapter argues that environmental law is uniquely prone to federalism discord because it inevitably confronts the core question with which federalism grapples—who gets to decide?—in contexts where state and federal claims to power are simultaneously at their strongest. Environmental problems tend to match the need to regulate the harmful use of specific lands (among the most sacred of local prerogatives) with the need to regulate border-crossing harms caused by these uses (among the strongest of national prerogatives). As a result, it is often impossible to solve the problem without engaging authority on both ends of the spectrum—and disputes erupt when local and national ideas on how best to proceed diverge. Ongoing jurisdictional controversies in energy policy, pollution law, and natural resource management reveal environmental law as the canary in federalism's coal mine, showcasing the underlying reasons for jurisdictional conflict in all areas of law.

Concluding the book, this chapter explores why environmental law regularly raises such thorny questions of federalism, and how environmental law has adapted at the structural level to manage federalism conflicts. Drawing from the theoretical framework that I introduced in FEDERALISM AND THE TUG OF WAR WITHIN (OXFORD, 2012), Part II reviews the central objectives of federalism, examining the conflicting values they imply and the resulting tension that suffuses all federalism-sensitive governance. Part III evaluates why federalism conflicts are heightened in the context of environmental law. Divisiveness not only reflects the intense competition among federalism values in environmental governance, it also provides key insights into the core theoretical dilemmas of jurisdictional overlap more generally. Part IV probes how environmental law has adapted to manage the challenges of overlap by asymmetrically allocating local, state, and federal authority within various models of collaborative or coordinated governance. Part V concludes with consideration of what the larger discourse can learn from the dynamic federalism and multiscalar governance innovations emerging from within environmental governance. Through processes that engage stakeholders at all levels of jurisdictional scale, environmental federalism is lighting a path away from the old presumptions of "zero-sum" federalism and toward

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a model of negotiated multiscalar governance emphasizing consultation, compromise, and coordination.

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