Power Conserving Federalism in U.S. Environmental Law

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Given the pervasiveness of state-federal conflict in U.S. law, courts and the legal commentariat are frequently at pains to defend the practice of federalism in normative, public regarding terms. Common themes in this discourse include experimentation (i.e. the “laboratories of democracy”), preference diversity, local expertise, and the superiority of local decision making for political participation and accountability.

Social science explanations for federalism, by contrast, often focus on how these arrangements mitigate conflict between competing groups in a political union. Federalism can be used as a way to protect religious and ethnic minorities, for example. It can also be used to entice relatively wealthy groups to cede political power by limiting the ability of centralized authorities to extract and redistribute resources. This latter function can be referred to as *power conserving federalism*.

The cooperative federalist arrangements in U.S. environmental law are typically understood in normative terms as a means to balance the relative merits of centralized and decentralized authority. But power conserving federalism also provides a compelling lens into federalist structures in U.S. environmental law. Environmental protection often brings about economic transitions, and many U.S. environmental regimes anticipate those transitions and use the allocation of authority between national and state actors to safeguard the interests of powerful actors and jurisdictions.

Even if power conservation provides a useful descriptive account of environmental federalism in U.S. law, the implications of this theory for legal interpretation are less clear. Under some interpretive accounts, agencies and courts should respect the initial bargains struck by Congress, even when doing so is normatively distasteful. But current and future generations are also justified in limiting the extent to which the dead-hand of prior political deals shape contemporary environmental governance.