Adaptive environmental federalism

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Research output: Chapter in Book/Report/Conference proceeding › Chapter

Original language
English (US)

Title of host publication
Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question

Publisher
Cambridge University Press

Pages
277-300

Number of pages
24

ISBN (Print)
9780511552007, 9780521888059

Published - Jan 1 2008

Abstract

INTRODUCTION Environmental law is not neatly divided between the federal government and the states. The federal government continues to involve itself in highly localized issues with little clear connection to interstate environmental issues or a manifest need for federal uniformity. At the same time, states and local governments, especially recently, are not content to confine their attention to issues of local concern but are developing policies on environmental issues of national and even international importance. Nor do environmental issues “stay” in the control of any particular level of government but rather tend to pass back and forth, much like the proverbial football, between different levels of government. The current system of environmental federalism is therefore a dynamic one of overlapping federal and state jurisdiction. However, it is threatened by federal legislation and Supreme Court rulings. A wave of preemptive legislation has emerged from Congress in recent years. Numerous bills pending in Congress, for example, would preempt state actions to reduce greenhouse gas emissions (GHGs) that contribute to climate change. Similarly, following a long line of cases in which the Supreme Court has preempted a variety of state actions designed to protect the public, the Court recently (2004) preempted state auto-pollution regulations, despite, at best, ambiguous statutory language. Legal academics are similarly hostile to the dynamism of environmental federalism because it runs contrary to the prevailing view that an optimal level of government exists from which to set environmental policy.

Fingerprint

ASJC Scopus subject areas

Cite this

Adaptive governance of social-ecological systems depends on adaptive institutions. In order to adjust systems to environmental issues, and make and implement the right decisions, institutions need to be changed, adjusted, expanded, or created (Short and Phelps, submitted for publication). Not only will environmental federalism inject more on-the-ground knowledge into land management; but it could also reduce polarization by bringing parties to the bargaining table instead of the courtroom. COMMENTS POLICY. Join the Conversation.