

Chapter 6

Cooperative Federalism and Environmental Laws: Coping with Two Masters

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§ 6.01. Introduction.

The concept of federalism is relatively straightforward. Both the state and federal government are independent sovereigns with power to directly govern the people. According to the Constitution, the powers of the federal government are limited (enumerated) and all powers not expressly delegated

to the federal government “are reserved to the States respectively, or to the people.”¹ As Chief Justice John Marshall once remarked, demarcating the reach the federal government’s power is not an easy task. “This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”²

Much has been written about the inherent constitutional design of federalism. This chapter barely scratches the surface of the volumes of scholarly materials that delve into the purpose, history, evolution, and meaning of federalism. The goal of this chapter is to contribute to that scholarship by addressing how “cooperative federalism” — state government administration and implementation of initially federal law — has evolved in recent years, particularly in the area of environmental regulation. Section 6.02 briefly addresses the basics of federalism — what it is and how it works — and the cooperative federalism model. Section 6.03 traces the evolution of the United States Supreme Court’s federalism jurisprudence from the early years of the republic through the present. Section 6.04 provides an overview of the cooperative federalism approach to environmental regulation that began in the 1970s. Lastly, Section 6.05 describes a series of recent efforts by both the national government and non-governmental organizations to diminish the role and authority of the states in environmental regulation.

§ 6.02. What Is Federalism?

As noted above, federalism is a model of governance that has two separate and independent layers of government: (1) a national government that, at least in theory, has limited authority as spelled out in a Federal constitution; and (2) separate state and local governments for each of the sovereign states, each of which has more general powers as limited by each state’s constitution.

¹ U.S. Const. Amend. X.

² *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (as quoted in Erin Ryan, *Federalism and the Tug of War Within* 71 (2011)).