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Multilevel Environmental Governance in the United States

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How decentralisation has helped the environment

Multilevel environmental governance in the United States

Erin Ryan discusses the benefits of a dynamic multilevel governance approach by the US Government for cross- and inter-state environmental management.

FEATURE

The intensity of multilevel environmental governance disputes reflects inexorable pressure on all levels of government to meet the increasingly complicated challenges of regulation in an ever more interconnected world. In the United States (US), debate over the responsibilities of different levels of government are framed within our system of constitutional federalism, which divides sovereign power between the central federal administration and regional states[1]. Dilemmas about devolution have been erupting in all regulatory contexts, but environmental governance remains 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.

Wrestling with these incendiary tensions at the intersection of local land use and spillover harm, environmental federalism helpfully exposes the fault lines underlying the American federal system to analysis—but also the available tools for coping with them. American environmental law has developed structural means of managing these tensions which may be instructive for other devolution conflicts or claims for decentralised environmental decision-making in other jurisdictions. This article suggests a few potential lessons from the American experience.

In the US, environmental governance often contends with jurisdictional controversy through programmes of cooperative federalism, in which state and federal actors take responsibility for separate but interlocking roles within an overarching regulatory programme[1]. Statutes engage regulatory stakeholders across multiscalar lines, allocating responsibility according to the distinctive strengths of local and national capacity, seeking the best balance of flexibility, durability, and responsiveness for each individual context. Intergovernmental partnerships may involve direct state-federal cooperation, but they are often mediated by statutory structures that asymmetrically allocate decision-making authority within programmes of coordinated capacity, federally-supported state implementation, conditional pre-emption, and permitting programmes.

FEATURE

COORDINATED CAPACITY

These programmes partner distinct regulatory skillsets of state and federal actors to operate independently in a shared regulatory space. For example, the Emergency Planning and Community Right-to-Know Act engages state and local experts in coordinated planning for chemical and other emergencies[2]. It harnesses local capacity by requiring each state to establish an Emergency Response Commission drawing on technical expertise from all relevant state agencies[3]. It partners local expertise with federal capacity by authorising the Environmental Protection Agency (EPA) to require compliance by all relevant facilities with the emergency planning provisions created by each state's commission[3]. This structure drew praise as an early cooperative federalism model, enhancing interjurisdictional synergy by trading a fully federalised response for one enabling more expert state implementation[4]. However, it was also criticised for not allowing states to opt out of participation in favour of direct federal regulation[5].

FEDERALLY SUPPORTED STATE IMPLEMENTATION

In more complex programmes, the federal government often negotiates for local participation in multilevel governance through conditional spending, offering financial and technical resources to persuade states to help implement federal goals and to facilitate state accomplishment of related regulatory goals[6]. These programmes are attractive to the federal government because they enable Congress to negotiate with states for policymaking influence in regulatory realms that lie beyond more directly constitutionally enumerated federal powers[7]. They are attractive to states because they come with fiscal incentives and enable state choice, enhancing the potential for jurisdictional synergy while maintaining respect for local autonomy. For example, the Coastal Zone Management Act (CZMA) enables each state to accept or reject the proposed partnership, because the law provides for no federal intervention if the state declines the federal invitation[8,9]. Another example is the Superfund Act, a federally administered programme that imposes liability for hazardous substances, but authorises discretionary grants to encourage state participation and leadership in clean-up efforts[10].

CONDITIONAL PREEMPTION

A classic model of cooperative federalism pioneered by environmental law is that of conditional preemption, by which the federal government sets goals or standards that may be implemented by either state or federal actors. This model invites the states to participate in accomplishing an overall regulatory goal by tailoring the implementation of federal standards in the way that best suits local political, geographic, economic, and demographic circumstances. However, if a state declines to participate, the federal government will regulate in-state activity directly, preempting any conflicting state law. These programmes safeguard a centralised response while opening possibilities for preserving local autonomy and fostering interjurisdictional synergy.

Many environmental laws deploy federally-supported state implementation and conditional pre-emption simultaneously, inviting state participation but guaranteeing a federal fall back if a state declines the invitation. For example, the Clean Air Act—perhaps uniquely among environmental law—uses conditional spending as less of a carrot and more of a stick. The Act establishes National Ambient Air Quality Standards and anticipates that states will design and administer State Implementation Plans for attaining them. If they do not, the federal government will eventually do so using a Federal Implementation Plan. In the meanwhile, non-compliant states may suffer the loss of federal highway funds offered under a related conditional spending partnership[11]. The design of the Clean Air Act reflects its architects' intentions that the federal government remains the clear senior partner, reserving dominant centralised authority to resolve a collective national problem. After all, air pollution results not only from activities solidly rooted in one place, but also from countless mobile sources (both domestically and internationally) that are less meaningfully related to local expertise and land use authority[12].

SHARED AND GENERAL PERMITTING PROGRAMMES.

Most state/federal partnerships follow a model similar to the Clean Air Act, in which federal judgment usually trumps on regulatory goals and standards, while local judgment usually gets federal deference on matters of design and implementation that account for diverse local circumstances. In fact, environmental law has pioneered different ways of formalising this asymmetrical allocation of state and federal authority through its different approaches to shared and general permitting programmes. In shared permitting programmes like those of the Clean Air and Water Acts, state and federal actors share authority for permitting private activity that implicates the overarching regulatory goal. In addition, general permitting programmes provide a streamlined means of negotiating the satisfaction of regulatory goals when governmental actors are themselves permit applicants.

General permits enable applicants to obtain permission to engage in regulated activity by following a general set of instructions that provide specific guidance about acceptable and unacceptable activity[13]. An under-sung

tool of cooperative federalism, they can maximise local discretion and minimise the overall regulatory burden on both ends, by facilitating locally tailored resolutions within exacting national guidelines. For example, the Army Corps of Engineers uses a general permit to protect wetlands under the Clean Water Act, allowing countless public and private actors to obtain land use permission with minimal regulatory oversight but according to a specified set of regulatory guidance[13,14]. The Clean Water Act also authorises municipal storm water discharges under a general permitting programme[15,16,17].

LESSONS FROM DYNAMIC FEDERALISM

The conventional tools of cooperative federalism provide critical forums for regulatory collaboration in realms of legitimate jurisdictional overlap, where the need for strong centralised response is matched by strong local capacity rooted in the states' pre-constitutional police power. Indeed, environmental scholars—especially among the emerging dynamic federalism literature—are increasingly emphasising the values of overlap, fluidity, exchange, and negotiation among separately regulating local, state, and federal actors (see **Box 1**).

BOX 1. BALANCED FEDERALISM

Innovations in federalism theory, such as the Balanced Federalism model I've set forth in previous work, advocate for dynamic interaction among the various levels of government. For example, Balanced Federalism emphasises shared interpretive responsibility among both branches and levels of government, to achieve a balance among the competing values of multilevel governance that is both dynamic and adaptive over time[1].

Drawing on these insights, governance architects could capitalise on the existing asymmetrical allocation of authority to more effectively engage insight and capacity at the local level, and to more strategically allocate roles among executive, legislative, and judicial decision-makers where each is most able. Federalism theory should also push regulators to recognise that many of the difficult jurisdictional dynamics that are formally recognised within state-federal relations are equally meaningful in municipal-state relations. While the US Constitution falsely presumes that municipal interests are synonymous with that of their state, federalism controversies over fracking and other energy harvesting, especially reveals intrastate conflicts. In addition, architects designing new regulatory models must consider all implicated governance values[18], weighing carefully whether any one takes priority over another. The more all values are in equipoise, the more the regulatory framework should allow for adaptive management through ongoing deliberation among regulatory stakeholders.

A key lesson of environmental governance is that there is no one size to fit all regulatory needs, and different federalism values may take priority under different circumstances. For example, the Coastal Zone Management Act (CZMA) establishes a federal statutory framework that enables multiple iterations of open bargaining between state and federal executive actors toward corresponding state legislation, providing a good example of how to integrate state/federal and legislative/executive capacity toward uniquely tailored regulatory endpoints, where place-based local diversity is the determinative factor[19]. A very different model is

"A key lesson of environmental governance is that there is no one size to fit all regulatory needs, and different federalism values may take priority under different circumstances."

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taken by the Clean Air Act's mechanism for regulating motor vehicle emissions, which enables states to follow either the federal or California standard, in order to limit the variability of regulation within the national market of automobile manufacturing while still enabling the benefits of regulatory competition[20]. This model enables effective dynamic interaction within a more centralised regime, in which the constraints of a national market are the most critical factor[21].

With so many considerations at play, it is hard to imagine environmental law—or any federalism-sensitive governance—reaching a definitive answer to the question of *"who should decide?"*. Strictly segregating state and federal efforts in interjurisdictional contexts is unlikely to work well, as demonstrated by failed environmental governance in the US over non-point source water pollution[22]. Yet leaving jurisdictional matters fully unresolved can also have serious consequences. Doctrinal uncertainty may deter effective regulatory problem solving where it is needed, if regulators fear becoming embroiled in legal challenges to their assertion of contested authority, as occurred during American efforts to regulate radioactive waste[23]. Alternatively, doctrinal uncertainty can encourage self-serving regulatory abdication, if all levels of government cast the regulatory dilemma as someone else's responsibility[24].

Heeding these lessons, well-crafted multiscalar governance belies the perverse presumption of "zero-sum federalism," which assumes that the allocation of decision-making authority among levels and agents of government is always a zero-sum game[25]. Defying the presumption that authority exercised by one is categorically removed from others, environmental governance has experimented with different ways of enhance authority among multiple agents simultaneously, through structured programmes of consultation and exchange. This empirical assault on the mythos of zero-sum federalism warrants emphasis, drawing attention to what most American federalism actually looks like in practice, and how federalism in practice increasingly departs from the rhetoric of conventional federalism theory[25,26].

CONCLUSION

In the end, perhaps the problem that stymies all federalism-sensitive governance is the assumption underlying the question with which we began. *"Who should decide?"* presumes a simple answer, and in contexts of profound jurisdictional overlap, there is rarely a simple answer. American environmental federalism has shown that the best response is often to inform interjurisdictional governance with multiple perspectives as feasibly as possible, through ongoing processes of exchange, adaptation, and negotiation among stakeholders at all levels of jurisdictional scale. Balanced federalism suggests that similar principles apply to the allocation of decision making authority along the horizontal separation of powers. Good interjurisdictional governance engages not only the distinctive capacity at different levels of government vertically, but from the different branches of government within each level. Legislative, executive, and judicial coordination at all levels of scale are needed to manage the difficult trade-offs that federalism-sensitive governance always has, and always will, require of us.

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