



The Political Roots of Uncooperative Federalism

Phil Rocco, Marquette University

On January 9, 2014, the people of Charleston, West Virginia and surrounding communities suddenly faced a loss of tap water fit for drinking, cooking, and even showers. More than 7,000 gallons of toxic chemicals had leaked from a badly maintained Freedom Industries tank just upstream from a major intake for the entire regional water supply. Public regulators had ignored this and similar tanks, which had not been inspected for decades.

On the same day, only 360 miles away in the U.S. House of Representatives, conservative Republicans passed a bill that would significantly delay cleanup of toxic spills like the one unfolding in Charleston. If the so-called Federal and State Partnership for Environmental Protection Act of 2013 were ever to make it into law, it would empower states to veto the cleanup decisions of the Environmental Protection Agency under what's known as the "Superfund" program. Supporters hailed the bill as a great example of "cooperative federalism," but in practice it would frustrate cooperation and make effective government action less likely.

Conservative opponents of regulation are no strangers to undermining federal policies aimed at protecting the environment and public health by demanding "more cooperation with the states." For decades, conservatives have pushed legislation that fragments authority between the states and the federal government. Contrary to conservative claims, less government red tape has not been the result; but effective and cooperative actions by regulators have been greatly hindered.

Indirectly Contesting Federal Power

Conservatives embraced uncooperative and fragmented federalism slowly. In the early 1950s, conservative opponents of the New Deal attempted to outright eliminate newly authorized federal powers of regulation and social provision and return them to the states. With Republicans in control of Congress and the White House and supported by the U.S. Chamber of Commerce and the National Association of Manufacturers, "Mr. Republican," Senator Robert Taft of Ohio, proposed bills to devolve authority over virtually every public policy back to the states under the banner of "constitutionalism" and "states' rights." But by the time the Taft-inspired Commission on Intergovernmental Relations released its final report in 1955, this approach had clearly failed. Opposition to conservative plans to "get the federal government out of public policy" was widespread, including from the Eisenhower administration. But conservatives were not about to give up. Instead, they switched to a more subtle and indirect strategy. They would espouse support for the goals of liberal federal policies, but demand more federal-state collaboration to implement major policies pursuing those goals.

State Flexibility as a Strategy to Weaken Federal Policy

During the Great Society of the 1960s and thereafter, conservatives won limits on federal power. In a string of important legislative debates – over policies on housing, health, job training, and new environmental and

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consumer regulations – interest groups like the Chamber of Commerce and the National Association of Manufacturers pushed for what they called “state flexibility” provisions. Such rules did not shrink government; rather, they placed constraints on what federal agencies could do without the approval of state governors and legislators, making each step in government action more complex. At the urging of industry groups, early water-pollution rules were written to give governors the right to challenge federal regulatory standards. This led to delays making final regulatory decisions virtually impossible to achieve. Even when tougher water-pollution measures were passed in the 1970s, states still got to take part in standard-setting and program implementation. A decidedly uncooperative variant of federalism resulted, stalling new water-pollution controls at first and, when controls were finally put in place, giving industry interests leverage to re-fight policy battles at the state level.

An analysis of over 200 pieces of significant regulatory legislation shows that counter-mobilizations by conservatives had a substantial impact – not defeating the legislation outright, but fragmenting authority to carry it through. Of 144 conflicts in which conservatives were highly mobilized against reforms, about 61 percent led to legislation that fragmented decision-making power between the federal government and the states. By contrast, in legislative processes where conservatives did not mobilize, only about 10 to 11 percent resulted in laws that fragmented authority along federal-state lines. The evidence clearly suggests that conservative support for fragmenting federal authority has a real impact on newly formulated legislation.

Of course, conservatives have not always managed to get the fragmented administrative designs they sought. In the 1960s and 1970s, broad public pressure for tougher regulations gave policy entrepreneurs in Congress the cover they needed to justify massive expansions of federal governing authority in consumer finance measures like the Community Reinvestment Act and in environmental laws like the National Environmental Policy Act of 1972. Some authoritative measures, including the Superfund law, were further toughened by Congress in the 1980s and 1990s. But battles are never really settled, as the current House effort to weaken that law reveals.

Fragmented Authority Undermines Effective Governance

Divisions of responsibility between state and federal governments can bring some benefits. States can serve as “laboratories of democracy” for experimenting with and strengthening public-interest reforms. Under the Affordable Care Act, for example, states that have established their own health-insurance exchanges are currently testing novel strategies for making health-insurance prices more transparent to consumers, and some are also testing policies like affordable housing and access to food to improve health outcomes.

Yet greater say for states in national policy implementation is not usually proposed to promote innovation or effective cooperation. Rather, groups with unpopular policy preferences push fragmentation in order to extend policy struggles past the point of a law’s enactment. Early anti-pollution laws thus allowed regulated industries to re-fight battles at the state level, with decades passing before successful cleanups could be done. Citizens were left wondering which level of government to blame for delays. Indeed, laws written to permit state and local interests to dispute and delay implementation frustrate democratic accountability and leave citizens thinking that government cannot accomplish what it sets out to do. Too often, as the West Virginia water crisis shows, government cannot cope with pressing threats and crises at all. Toxic waste does not wait for disputes to be resolved before it wreaks harm on people and the environment.