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The Federal Design Dilemma

A Puzzle of Intergovernmental Delegation

When policymakers craft legislation, they decide who will implement its policies. Congress routinely chooses the states rather than national-level agencies such as the Department of Health and Human Services or the Environmental Protection Agency to do so. In fact, as Mary Fallin, the Republican Governor of Oklahoma notes, governors believe they should be “on the front lines of developing solutions to the nation’s most pressing issues” (Mary Fallin, Oklahoma Governor State of the States Address, 2013). She adds:

The federal government can and should be a partner in developing good policy. Governors believe that a strong, cooperative relationship between states and the federal government is vital to best serve the interests of all citizens: “flexible federalism,” you might call it. As we work with Congress and the Administration, governors are committed to a vibrant and strong collaboration.

(Governor of Oklahoma, Mary Fallin, January 9, 2013, at the Inaugural State of the States Address, National Governors Association)

Such an approach would see Congress allowing maximum state flexibility to implement national policies on issues ranging from education to health to financial regulations, among others.

The metaphors often used to describe federalism in the United States – marble cakes, layer cakes, and picket fences – both reveal and mask the day-to-day functioning of the dynamic U.S. federal system.¹ Under “flexible federalism,” as the governors seek it, the national government

¹ Wright (1988) details the variety of metaphors in use through the 1980s, including layer cake federalism (where authority for certain policy areas is divided between national and state governments), marble cake federalism (where such authority is intermingled),

outlines the contours of a problem and provides funds for states to use with maximum flexibility in tailoring solutions. As Dave Heineman, the former Republican Governor of Nebraska, said regarding implementation of the Affordable Care Act (ACA), “Give me as a state the opportunity to determine more about the eligibility and benefits, and we’ll be glad to run that program. That’s the key for us” (Bacon and Balz 2011).

Before states can implement such solutions with federal backing, Congress must decide to involve the states in the national policy in the first place. This leads to the question at the heart of this book: How does Congress decide whether to use the states or the more traditional national executive branch apparatus to implement national policy? This question has arisen repeatedly and for some of the most significant policy initiatives of the past century. The 1935 Social Security Act, for example, involved the states in providing relief for the poor and unemployment insurance, but established a national administration for the social security system.² In 1965, Congress delegated Medicare (healthcare for older Americans) administration to a national agency rather than a partnership with the states, but chose to lean more heavily on the states for implementation of Medicaid (healthcare for the poor). How does Congress make these choices?

A brief look at two more recent landmark pieces of legislation, the ACA and the No Child Left Behind (NCLB) Act, brings this question into sharper focus. The NCLB Act, which became Public Law 107–110, passed by a Republican House and split Senate and signed by a Republican president, centralized power with the federal government for education policy and charged the states with implementing much of the law. Majorities of both Republican and Democratic Senators and Representatives voted in favor of the national and state roles delineated in NCLB, where the states were responsible for much of the policy while working alongside the Department of Education.

Contrast this legislation with the mostly partisan battle over the ACA, where the resulting delegation of authority to national and state actors

or picket fence federalism (where specific policy areas show intergovernmental actors working together across levels).

² Lieberman (1998) finds the undercurrent of racial issues during the crafting of the Social Security Act necessitated decentralization of certain policies to allow states the ability to implement as they desired. “Where African-Americans were potentially included among a policy’s beneficiaries, Southerners demanded institutional structures that preserved a maximum of local control” (Lieberman 1998, 7).

was similar to that in the NCLB Act. Congress made the states responsible for implementing the Medicaid expansion as well as many other features of the ACA while working mainly with the Department of Health and Human Services.

Health and education are not the only areas where Congress authorizes states to help implement national law. National policy debates show the amount of responsibility allocated to states can be crucial in policies ranging from environment and transportation to financial regulations and bioterrorism proposals. Indeed, many policy and federalism scholars suggest the states are key implementers of the majority of national domestic legislation (Conlan and Posner 2009; Nathan 2008; Grodzins 1966; Elazar 1962; Ripley and Franklin 1982; Derthick 1999). Congress has a variety of tools at its disposal for using the states and national executive branch actors as administrative agents. These include designing regulatory authorities, enforcement authorities, and delineating administrative responsibilities.³

Are these federal delegation design choices random or spur-of-the-moment decisions by national legislators, as Graves (1964) or van Horn (1979) posit, or are they deliberate? This book seeks to explain why and how national legislators use intergovernmental delegation in policy design. It addresses two major questions.

- What does intergovernmental delegation within and across policies look like?
- Under what conditions do national legislators choose to delegate more or less responsibility to the states?

Members of Congress are elected by constituents from their individual states and, if they are concerned about re-election, consider the outcomes that will result from the policy choices made as they write and vote on legislation. Implementation by states versus a national executive branch agency will result in differences in policy outcomes because different

³ A longer list of such tools used in the late nineteenth and early twentieth centuries, as Johnson (2006) notes, would include preemption for interstate commerce, total preemption, state enforcement and standard setting, national actors acting as backstops for states failing to do so, requirements for state planning, allowances for waivers, exemptions, and appeals. Such instruments may have been necessary given a lack of centralized bureaucracy to implement national policy across the states (Skowronek 1982), but Johnson (2006) also finds that individual members of Congress gleaned several benefits from them, including overcoming sectional divisions and strategic bicameral efforts to enact or stymie policy reform.

actors are involved in the policy. This variation in implementation possibilities across levels is the intergovernmental context of federal design choices.

Differences in state choices may be a boon or a barrier for members of Congress as they consider the outcomes that may result from policy choices. For example, in December of 2013 Senator Kay Hagan, a Democrat from North Carolina, sent a letter to her fellow Democratic Senate leaders Harry Reid and Max Baucus denouncing her state for passing “irresponsible legislation” and asking for help “to remedy the severely damaging impact of [a new North Carolina] law” (Binker 2013). Hagan wanted to include a provision in a Senate bill to make her state once again eligible for the federal emergency unemployment compensation program (EUC08). This program was pulled from North Carolina in July of that same year after a new state law went into effect and decreased the size of unemployment benefits. This decrease in benefits violated a federal rule, thus making North Carolinians ineligible for the federally financed benefits (Isaacs 2013).⁴

Eleven months earlier, Republican Pat McCrory had taken his place in the gubernatorial seat after a decade of Democratic North Carolina governors. The second bill he signed into law, HB 4, the Employment Security Law, cut not only the length of time out-of-work North Carolinians could receive unemployment benefits (a move seven other states had also recently enacted), but also the amount of state unemployment benefits provided (Reuters 2013). The bill was hashed out mostly by Republican lawmakers in the state’s General Assembly and signed into law by McCrory, who had campaigned about the state’s budgetary problems (Geary 2013; Ball 2012). Governor McCrory’s office responded to Hagan’s move with the following statement: “Name calling might be what Senator Hagan wants to focus on, but Governor McCrory remains focused on solutions-oriented approaches that will continue to improve economic opportunities for all North Carolinians” (Ryan Tronovitch, Deputy Communications Director quoted in Bennett 2013).

The intergovernmental context of North Carolina’s Senator changed less than one year later when Kay Hagan narrowly lost her bid for a second term in November 2014 to Republican Thom Tillis. Tillis was a leader in passing the North Carolina unemployment law and was endorsed by Governor McCrory. Since taking office Tillis has supported North

⁴ North Carolina failed to receive an estimated \$780 million dollars as a result (Isaacs 2013). This non-reduction rule was a part of P.L. 111–205.

Carolina's refusal to expand Medicaid (Hagan endorsed expansion), spoken on the Senate floor on the need to repeal and replace Obamacare, and has cosponsored a bill regarding off-shore energy exploration (a policy McCrory supports) that provides, among other things, the need for consultation with and appropriations to the governors of the mid- and south Atlantic states (Binker 2015).⁵ Not only have Tillis's policy choices more closely aligned with those of McCrory's, but Tillis has repeatedly supported McCrory in his lead up to the 2016 gubernatorial race (Binker 2015; Coastal Review Online 2015). If a Democratic governor wins, though, Tillis may find himself concerned about what the Democratic governor may do with national policy responsibilities.

In sum, members of Congress worry about the policy choices made by their state leaders and undertake many activities in the face of this inter-governmental context. One important activity is designing new legislation that may or may not include implementation by state-level actors.

DELEGATION?

The role of states in implementing national policy can be a contentious issue with a seemingly unending variety of phrases relied upon in debates. Political elites may seek to "turn back to the states a greater measure of responsibility" (Congressional Quarterly 1974), develop "new concepts of cooperation, a creative federalism" (Congressional Quarterly 1974), decry "the greatest grab for power ever made by the federal government" (Congressional Quarterly 1973), or contend "[t]he only question is at what level [the policy] should be done" (Congressional Quarterly 2000).⁶ From the perspective of members of Congress, the role of states in the policy at hand is a delegation question. Specifically, should Congress delegate implementation to the states, to the national executive branch, or to both jointly?

⁵ Tillis was one of fifty-nine cosponsors for S. 1: Keystone XL Pipeline Approval Act and co-author of S. Amdt 102 ("To provide for leasing on the outer Continental Shelf and the distribution of certain qualified revenues from such leasing"), dealing specifically with the mid- and southern Atlantic coastal states' role in off-shore resource development, federal monetary allocations, and programs. The amendment was withdrawn; the bill passed both chambers, but failed to pass over a presidential veto.

⁶ All quotes were taken from the Congressional Quarterly Almanac On-line edition (various years). Nixon and Johnson's statements were in the 1973 article entitled "Nixon's New Federalism Debated in Senate Hearings," Ervin in 1972 "Equal Jobs: Approval of Court Enforcement Approach" and Castle's remark was in the 1999 article "New 'Ed-Flex' Bill Allows States To Grant Waivers from Some Federal Regulations."

Traditional studies of congressional delegation have considered when Congress shifts governing authority from itself to another entity (Bendor et al. 2001).⁷ In a federal republic, the state and national governments derive independent authority from the people, casting doubt on the assumption that Congress is a principal and the states one possible agent.⁸ The U.S. constitution restricts the national government to a small number of specifically enumerated powers (e.g., taxing, commerce, spending) and reserves for the states and the people immeasurable residual powers. “[C]onflicting constitutional cues in the American federal system [make it unclear] which entity is the principal and which one is the agent” (Johnson 2006, 187). As Derthick (1999, 39) notes, “even when treated by Congress as administrative agents, [the states] are agents with a difference.”

The logic of delegation, though, can still apply if we consider Congress to be a buyer of *implementation* services (a principal) contemplating the design of a contract to engage with a provider of a service (the agent) instead of seeing agents as subordinate entities.⁹ A principal in a buyer/seller relationship compares the implementation services of potential agents and then chooses which agent will be the implementer. Because Congress typically cannot implement a national policy by itself, it must rely on an agent to implement on its behalf. Will Congress choose to rely on the states to bring a national policy to fruition or will Congress rely on the national executive branch to do so? Congress can also choose to give both sets of agents authority within the same policy – a joint partnership. Delegation to the national executive branch, the states, or a joint partnership is a choice about which level of government is responsible for implementing the policy and how much of it they will implement, or how centralized or decentralized the policy will be.

⁷ The literature on congressional delegation (e.g., Brehm and Gates 1999, Lupia 2004) also considers whether said agents will work or shirk – an issue of moral hazard. With Lupia (2004, 35), we can define delegation as “an act where one person or group, called a *principal*, relies on another person or group, called an *agent*, to act on the principal’s behalf.”

⁸ Johnson (2006) notes that in a federalist society there is a question of whether the states can be considered agents of Congress. Elazar (1968, 13), for instance, notes that “states are not creatures of the federal government, but, like the latter, derive their authority directly from the people . . . immune from federal interference.” I return to the states-as-agents question in Chapter 2.

⁹ See, for instance, Waterman and Meier (1998) on buying and selling and Shepsle (1992) on statutes as contracts, albeit incomplete ones.

Yet, as Johnson (2006) notes, Congress does not have “absolute” power over the states, including over whether and how states will implement a national policy. As bureaucracy scholars have long noted, Congress does not have absolute power over the national bureaucracy either (for instance, Mitnick 1984; Spence 1997; or Carpenter 2001). Johnson (2006) argues that the Congress-to-state relationship is a process of sharing of authority – and, we contend, delegation is a sharing of authority.¹⁰ By involving another individual or group to act on Congress’s behalf, Congress must share authority. Whether Congress has that particular type of authority is a constitutional question.¹¹

The ambiguities of constitutional interpretation on national and state powers coupled with expansive federal judicial decisions have allowed national authority to extend across all areas of domestic policy (Posner 1998; Eskridge and Ferejohn 1994; Harvard Law Review 1994). Since the New Deal, national dollars have become crucial to the states, giving Congress the power of the purse over them (Nathan 1983; Chubb 1985; Rosenthal 1987; Inman 1989; McCoy and Friedman 1988; Harvard Law Review 1994; Zimmerman 2005). This sprawl and brawn of national institutions of government have offered Congress the opportunity to consider whether national policy should be implemented by the states or not. As long as Congress takes its constitutional constraints and opportunities as a given, it can perceive of itself as a buyer of implementation services from the states, the national executive branch, or both.

INTERGOVERNMENTAL POLICY AND STATE POLITICAL CONTEXT

This book builds on the perspective that creative and evolving administrative structures have allowed Congress to use a variety of tools to structure delegations of authority to the states (Posner 1998 or Zimmerman 2005, 2010). If the states receive more authority in implementing

¹⁰ Delegation is “perilous,” according to Lupia (2004, 34), because “delegation entails a transfer of power – every time lawmakers delegate to bureaucrats, they give away a portion of their authority to govern.”

¹¹ According to the Chicago-Kent College of Law’s multimedia website Oyez, 68 Supreme Court cases have been argued (from 1955 to 2005) regarding federal preemption of state jurisdiction and 116 on federal preemption of state regulation (from 1954 to 2006). These issues, of course, do not cover the full gamut of federal-state authority divisions or even cases which were not brought before the Supreme Court. This data does provide support that Congress does decide to share authority, as well as the fact that Congress can also overreach. The latter issue is outside the scope of this project.

a law, then the national executive branch receives less. Alternatively, if Congress centralizes more authority with the national executive branch, then it allocates less to the states. Differences in structure lead to differences in outcomes, as post-Civil War congressmen knew (Johnson 2006) and as Southern legislators in the 1930s realized (Lieberman 1998).¹² Choosing how much authority to decentralize to the states or to keep at the national level is the *federal design dilemma* Congress faces even today.

This book does not consider whether Congress *should* delegate to the states.¹³ Instead, it focuses on one step of the process: the intergovernmental-delegation decisions made by national legislators in a federal structure. By concentrating on these decisions, we can develop and test a positive theory of intergovernmental delegation. Such a theory will consider *joint-partnership* decisions, that is, policies and programs characterized by a sharing of authority between the national and state levels of governance, *national* programs and policies specifically at the national level, and *state* programs and policies with authority delegated mainly to the state (or local) levels.¹⁴ I use the term *federal* more generally to refer to characteristics of policies or responsibilities within the entire governance system. My use of the term departs from conventional usage, where *federal* typically refers to the national government, but follows Peterson's (1995) narrowing of the definition to reduce confusion in this intergovernmental study of policymaking. For instance, in referring to the federal delegation of authority for policies, I refer to the designation of which level (national, state, or both) is in charge of a policy. This assignment

¹² Riker (1964) discusses these differences in outcomes in considering minority obstruction of policy choice in a federal republic where a minority in the center may be a majority at a subnational level. Derthick (2001), McConnell (1966), and Greve (2012) echo these considerations.

¹³ Among those who have considered whether Congress should delegate to the states, or when congressional choices overstep the national government's federal boundaries and how to keep the federal contract in place, are Wechsler (1954), Riker (1964), Dye (1990), Rivlin (1992), Eskridge and Ferejohn (1994), Yoo (1997), Kramer (2000), Walker (2000), Calabresi (2001), Bednar et al. (2001), Filippov et al. (2004), and Bednar (2009).

¹⁴ State programs and policies in this work are those services provided by the states as a result of national policy and not by the initiative of individual states. In addition, I assume local policies are subsumed into state policies. State and local government choices and initiatives likely play an important role in intergovernmental relations and the decisions of policymakers, and narrowing the scope of my work as I do miss some nuances of intergovernmental relations that require further study. Grogan (1999), Gormley (2006), Shelly (2008), Regan and Deering (2009), and Nicholson-Crotty (2012), for instance, have considered what state push-back means for specific federal programs.

includes responsibility for making rules, enforcing regulations, providing oversight, translating policies into action, and financing. Responsible parties can include national bureaucracies, independent commissions, state and local actors (such as state legislatures or bureaucracies), and even private entities – all potential federal design choices that we do not yet fully understand.

IMPORTANCE

The federal design and intergovernmental structure of national policies is fundamental to American politics and policy for at least three major reasons. First, the delegation of policy responsibility across levels of government yields varying policy outcomes because it involves different actors with their own ideas about the best policy outcome.¹⁵

Second, the design of federal-authority delegation crucially affects policy winners and losers because altering the location of policy responsibility changes the scope of the issue (Schattschneider 1975) and creates opportunities for policy entrepreneurs to achieve the ends they specifically want (Nice 1987; Baumgartner and Jones 1993). Such interests vary in their size and strength across the states (Gray and Lowery 2000) and a policy delegated to the states will be influenced differently in individual states. States “customize” and “mold” policies based on both political and need-based reasons (Karch 2007). This variation in actors, interests, and choices results in different policy outcomes.

Third, changes in the federal design of authority also result in diverse outcomes due to implications of federal design for the delivery of a policy’s package of programs and services, rules and regulations, and enforcement capabilities. The impact of actors differs by whether the states or the federal government are the lead, the support, or sole actors in implementing a policy, whether states can tailor policies to their population, and whether national law sets a ceiling or a floor for programs.

In sum, the congressional federal design dilemma involves the structure of authority, which has “important consequences for the content and direction of policy” (Moe 1989). More specifically, these architectural choices of who does what lay the foundation for which actors have

¹⁵ The “best policy outcome” loosely describes actors’ preferences over policy outcomes or ideal policy outcome. Riker (1964), for instance, refers to the best policy as the one you most want (and another person’s best is likely something different). This terminology is sharpened in the theoretical chapter.

power and alter the ability of policy administrators to do their work, including how decisions are made over the goals of programs and distribution of resources. These federal policy design decisions are important, ubiquitous, and vary in interesting ways, but previous literature has bypassed how strategic national actors make these choices and our current separate understandings of decentralization and delegation do not consistently explain variation in these choices over time and across policy areas.

BACKGROUND

Although this project is, to my knowledge, the first theoretical and empirical investigation of national legislators' individual-level federal design choices, work from a variety of scholars sheds light on the puzzle of federal delegation. For instance, federalism scholars provide theories of accountability, efficiency, and equity regarding the structure and operations of federal governments but only rarely consider the strategies, incentives, and constraints of individual members of Congress (see Peterson 1995; Volden 2005; and Bednar 2009 for exceptions). Similarly, congressional scholars have illuminated how the strategic interaction between policymakers leads to various substantive outcomes but have not yet considered the influence federal structures may have on those strategies and outcomes (see Karch 2007 for an exception). Previous research has also shown the incentives political actors face when considering devolving policy authority to the states or centralizing authority with the national executive branch, the legislative choices in a separation of powers system, the reasons for and ways in which legislators delegate policy authority to another entity, and the influence of the federal design and principles on policy. These fields of inquiry have led to a better understanding of certain aspects of the U.S. governance system. Yet scholarship in each field often does not engage with the questions and conclusions of the other fields. The intersection of their findings reveals the gap in knowledge this book attempts to fill.

Federalism and Distribution of Authority

My focus on intergovernmental policy places this work within that on federalism.¹⁶ Much scholarship on federalism focuses on the aggregate

¹⁶ I do not undertake an extensive review of federalism scholarship, as many excellent works on the topic are already available. See, for example, Elazar (1962, 1984), Grodzins