NOTICE & COMMENT

A Blog from the Yale Journal on Regulation and the ABA Section of Administrative Law & Regulatory Practice

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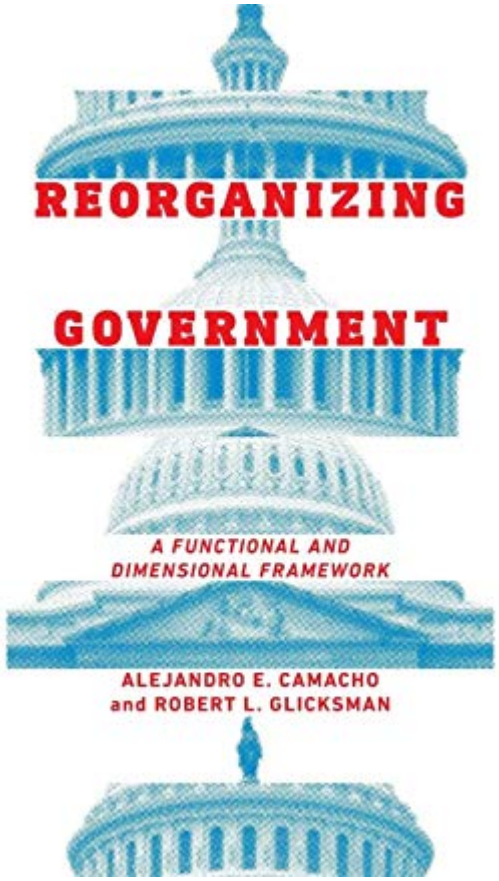
A Better Approach to Factoring Federalism Considerations into Regulatory Strategies, by Alejandro E. Camacho and Robert L. Glicksman

by Guest Blogger — Monday, Oct. 14, 2019

Controversies over the appropriate allocations of policymaking authority between the federal and state governments are almost as old as the Republic, as the Supreme Court pointed out in a 1992 decision involving the distribution of authority over radioactive waste disposal. Yet, the disputes never seem fully resolved. Certainly that is true of environmental regulation, as illustrated by disparate reactions to the Trump administration's recent revocation of California's authority under the Clean Air Act (CAA) to regulate greenhouse gas emissions from motor vehicles.

To be sure, those debates turn in part on different takes on the value of reducing environmental harms through regulation. However, we think that a fundamental overlooked reason for persistent debates about how best to allocate authority is that both proponents and detractors of laws such as the CAA and the Clean Water Act (CWA) actually do not fully appreciate the different ways in which these laws distribute federal and state authority or the consequences of doing so. As a result, policymakers and analysts routinely miss (or misunderstand) some of the advantages and disadvantages of particular allocations, while simultaneously failing to appreciate the range of possible alternatives for adjusting allocations to improve regulatory performance. Taking into account different dimensions and types of authority can clarify previously obscured tradeoffs and improve the performance of government.



In a new book, *Reorganizing Government: A Functional and Dimensional Framework* (NYU Press 2019), we argue that policymakers routinely fail to allocate government authority in ways likely to achieve statutory objectives and promote the important public values that regulation is designed to foster. Our analytical framework is based on two key insights:

- First, policymakers should differentiate the allocation of authority based on the government functions involved (like standard setting). An allocation of authority that makes sense for one function might be ill-suited to another.
- Second, our book identifies three dimensions of regulatory authority. In addition to authority ranging from centralized to decentralized, it also varies on a spectrum from overlapping to distinct, and from coordinated to independent.

Unfortunately, in choosing governance structures, policymakers routinely fail to differentiate between governmental functions, conflate dimensions, and inadequately assess the values tradeoffs of situating authority at different points along each dimension. The result is often poorly designed attempts to structure or restructure government,

The interaction of the federal and state governments under the federal pollution control statutes provides a good example of the neglected potential for well-informed structural choices to foster regulatory success. Congress built the core environmental statutes on a foundation of cooperative federalism. It established the overarching policies, such as the CAA's goals of improving and protecting the nation's air quality to avoid public health risks. But Congress shared the responsibility of implementing those policies between the states and the federal government, acting primarily through the Environmental Protection Agency (EPA).

The cooperative federalism model has worked reasonably well, resulting in enhanced public health and natural resource protection. It is a relatively rare example of Congress intentionally varying the allocation of authority along one of the three dimensions—the extent of centralization of authority—by regulatory function or task. In some cases, Congress created centralized authority by charging one entity with the sole responsibility for carrying out a particular function or task. Under the CAA, for example, EPA has exclusive authority to adopt national ambient air quality standards that identify maximum safe levels of air pollution. 42 U.S.C. § 7409(b). In other cases, the Act creates decentralized authority through shared regulatory authority between the two sovereigns. For example, the CAA authorizes EPA to set emissions standards for large new factories and for sources that emit hazardous air pollutants but preserves state authority to adopt more stringent standards for those sources. 42 U.S.C. § 7416. As often described by policymakers and scholars, such cooperative federalism can help leverage advantages of centralized federal governance (such as expertise and superior ability to address cross-jurisdictional externalities) as well as those of state governance (such as local knowledge).

However, as detailed below, neither policymakers nor scholars seem to appreciate that cooperative federalism also implicates key tradeoffs associated with the other two dimensions of authority.

The Overlapping-Distinct Dimension. The CAA creates overlapping authority for some regulatory functions (such as enforcement of state implementation plans) and distinct authority for others (such as EPA's authority to set national ambient air quality standards). Though Congress did usefully provide for federal and state roles in the CAA and other federal environmental

statutes, the common framing of these as creating largely distinct authority is incorrect. In fact, for most functions, the CAA and other environmental laws largely provide a range of *overlapping* authority, with the federal government sometimes serving as the primary authority but the states nonetheless also serving a core role.

Situating authority at different points along the overlap-distinctness dimension for each regulatory function results in different tradeoffs of the values that regulation is designed to serve. Overlapping authority, for example, can reduce risks of under-regulation by creating an additional regulatory safety net and minimizing opportunities for regulated entities to cherry-pick their favorite regulator. It can also enhance regulators' accountability by making it more difficult for industry to control all empowered regulators. Distinct authority, on the other hand, can promote efficient regulation by reducing administrative and compliance costs, the risk of conflicting regulatory approaches, the possibility of overregulation, and risks that each regulator will depend on the actions of others instead of diligently pursuing regulatory goals.

The failure to appreciate the consequences of alternative structural options often leads to missed opportunities to promote regulatory goals more effectively, efficiently, or equitably. The Trump administration, for instance, has heavily focused on reducing overlapping authority because of perceived administrative waste. To be sure, having two regulators do the same thing may raise administrative costs. But one should not reflexively assume that having two authorities involved in a program necessarily means duplication of tasks. Assigning one government control over one function and another government authority over a completely different one leads to little duplication of activity.

Even in cases where more than one authority has the same role, observers routinely fail to account for the significant *advantages* of overlapping authority. This includes, for instance, the safety net provided in case one level of government is unable or unwilling to act. The Trump administration's anticipated rollback of greenhouse gas emission controls for new cars and trucks implemented during the Obama administration would likely lead to increased emissions that heighten climate risks, give the anticipated growth in vehicle sales and usage. Congress anticipated such risks by vesting in California the right to seek EPA's approval for its adoption of emission standards more stringent than EPA's, and by allowing any other state to adopt California's approved standards. Many observers simply ignore these advantages, but they have proven to be key to the success of cooperative federalism laws. Indeed, the Trump EPA either has failed to appreciate or ignored these benefits of overlapping authority in its proposal to revoke prior EPA approval of California's standard-setting authority.

The Coordinated-Independent Dimension. Similarly, many policymakers have failed to appreciate that, designed properly, the extent and type of coordination between the federal and state governments can help mitigate any costs raised by overlap. As detailed in our book, in designing enforcement authority, Congress can combine limited state and federal overlap with clear coordination mechanisms between these governments. In so doing, it can achieve many of the safety net advantages of overlapping authority while minimizing the costs of duplication.

As is true for the other dimensions, creating coordinated or independent authority presents a different mix of advantages and disadvantages. Coordinated authority has the capacity to promote efficient and effective regulation by pooling the expertise of multiple regulators, ensuring harmonized or uniform regulation, and reducing the risk of a regulatory race to the bottom. On the other hand, independent authority can enhance accountability by reducing opportunities for shirking and free-riding by individual regulators. It also can generate efficiencies by skipping the administrative costs necessarily entailed in efforts to coordinate, and promote accountability and effectiveness by combatting groupthink, enabling beneficial competition among regulators, and reducing the risk of government inaction. The benefits available at one end of this dimension, like the two others, represent the costs of allocating authority at the other end of the same dimension. Legislators and other structuring regulatory programs should consider these tradeoffs in designing governance regimes.

Further, even if the tradeoffs favor coordination, policymakers should recognize that it is possible to vary the extent of coordination (as well as tradeoffs of doing so). Some aspects of shared regulatory authority can be coordinated (such as through the requirement that EPA approve state implementation plans under the CAA), while others may be exercised independently (such as state authority to adopt stationary source emission controls that are more stringent than EPA's).

Though Congress engaged in differential allocations of authority along the centralization dimension in adopting statutes such as the CAA, there is little evidence that it: (1) engaged in a comprehensive analysis of the available options (and accompanying tradeoffs) of structuring authority along the other two dimensions, (2) fully appreciated the opportunities to differentiate authority by function along each dimension, or (3) understood that situating authority along one dimension may mitigate the costs of doing so along a different dimension while retaining the benefits of that allocation. In considering how to improve laws like the CAA and CWA, Congress should not confine its focus to determining the desirable amount of centralized or decentralized authority, or rely solely on distinct and independent state and federal roles to implement statutory programs. Rather, it should judiciously leverage overlapping authority for regulatory functions for which it prioritizes reducing risks of under-regulation and regulatory capture. Similarly, it should adjust the type and extent of intergovernmental coordination when it gives precedence to pooling regulator expertise, harmonizing regulation, or reducing risks of a regulatory race to the bottom.

Alejandro E. Camacho is a Professor of Law and Faculty Director of the Center for Land, Environment, and Natural Resources at the University of California, Irvine School of Law. He is co-author of the recently published Reorganizing Government: A Functional and Dimensional Framework *(NYU Press) and a member scholar at the Center for Progressive Reform.*

Robert L. Glicksman is J.B. and Maurice C. Shapiro professor of Environmental Law at The George Washington University Law School. He is co-author of the recently published Reorganizing Government: A Functional and Dimensional Framework *and a member scholar at the Center for Progressive Reform.*

Cite As: Author Name, *Title*, 36 YALE J. ON REG.: NOTICE & COMMENT (date), URL.