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Energy Federalism: Who Decides?*

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What is the Issue?

Questions about energy are acquiring renewed urgency in the 21st Century. Some go to the heart of our system of federalism, or the way authority has been divided between central and more local political units. What is at stake? According to one author, it matters who the “decider” is: “the choice of regulatory forum often seems to determine the outcome of the controversy. That may explain why Americans have traditionally shed so much metaphorical and genuine blood deciding what are essentially jurisdictional disputes between governmental institutions.”¹

Background

Decisions about energy are increasingly important because of the depletion of low cost oil, new energy extraction technologies, and increased awareness of the link between energy and climate change, all in the absence of a broad based consensus over federal energy policy. Decisions on these issues are affected by our nation’s political divide. Mostly “conservative” and anti- (or anti-“big”) government forces mobilized for more local devolution, deregulation, privatization, and property rights. In contrast, “progressive” movements evolved in response to increased globalization (of economic and environmental issues) and personalization (e.g. of communications technology) by promoting global governance in some arenas and local empowerment in others. This brief illustrates these tensions with a couple specific cases.

High Volume Hydraulic Fracturing (HVHF) for Natural Gas Extraction

The first example involves hydraulic fracturing, a controversial technology used to extract oil and gas from “unconventional” reserves located in shale and other rocks. State authority dominates the regulation of natural gas drilling, but is currently being contested by both federal and local government interests. In general, the challenges to state control are led by critics of HVHF who suggest that regulations imposed by the federal or their own local government would be stricter than those imposed by states. By the same token advocates of maintaining state authority tend to favor HVHF.

Though state regulation dominates, federal authority applies to some aspects of HVHF and many other energy issues. However, federal regulators have exempted key elements of oil and gas

operations from national jurisdiction, determining that select federal regulations were “unwarranted” in light of existing state and federal regulation. One example, the 2005 “Energy Policy Act”, exempts the underground injection of most hydraulic fracturing fluids from regulation under the Safe Drinking Water Act (SDWA), i.e. it defers to state regulation. However, this controversial provision of the 2005 law has promoted vigorous challenges to the current distribution of regulatory authority. Democratic critics in Congress introduced the 2009 “FRAC Act” to include hydraulic fracturing as a federally regulated activity under the SDWA. However, this act has not, to date, passed either the House or the Senate. In the meantime, more than one state official has already complained about perceived federal trespass on their turf.

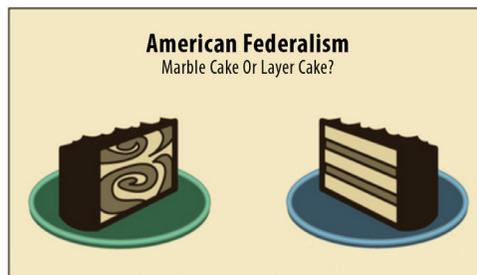
The authority of states to regulate hydraulic fracturing is also being challenged by local governments. In several Northeastern shale gas rich states, state law appears to “supercede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries”² However, in New York State (NYS) alone, at least two dozen communities have adopted seemingly contrary bans or moratoria. The precise meaning of such language -- whereby the state preempts local government authority to control oil and gas operations --

and the corresponding validity of local laws, is still being interpreted by each state’s courts. The stage of litigation, appeal, and legal clarity on this issue differs in each state. In none has it been finally settled.

Power Plant Siting and Electricity Transmission

Jurisdiction over power plant siting and the transmission of electricity have received relatively little attention from the popular media, but they have received extensive attention from energy industries, legal scholars, industry analysts, affected communities, and various policy making bodies.

The Energy Act of 2005 stipulated that a federal agency (FERC) has siting authority for certain electric transmission lines, and for all natural gas pipelines destined for resale markets involving interstate commerce. Fossil and renewably fueled electricity is most often generated in areas remote from its location of use. The Energy Act of 2005 was intended to reduce state and local obstacles, including procedural friction and political resistance, to transmission investment. The large investment upgrades in transmission



Source: <http://www.teresaherrin.com/constitutional-underpinnings/>

¹ Brumberg, Samuel R. 2005-2006. Getting The Camel Out Of The Tent: Behind The Federal Energy Regulatory Commission’s Rise To Power And The Importance Of States’ Continued Regulatory Oversight, William & Mary Environmental Law and Policy Review 30(691-730)

² NYS Environmental Conservation Law §23-0303(2). Similarly, Section 602 of the Pennsylvania Oil and Gas Act provides that municipal ordinances may not “impose conditions, requirements or limitations on the same features of oil and gas operations regulated by the Act.” Keneally, Michael E. and Todd M. Mathes. 2010. Natural Gas Production and Home Rule in New York State, New York Zoning Law and Practice Report 10(4):1-7. Regarding West Virginia, see W.VA. CODE § 22-1-1, et seq. (1994), and Ohio: Ohio Revised Code Section 1509.

infrastructure are projected to be necessary to deliver new sources of electricity.

Under federal law (16 U.S.C. § 824p), the FERC may “designate a national interest electric transmission corridor” and may trump state siting authority for a variety of reasons, including lack of state authority to account for “interstate benefits” or state failure to issue permits that would reduce interstate “transmission congestion” in a reasonable time and manner. This “backstop” permitting authority of FERC has yet to be used and some question whether it will ever be effective. Supporters of grid modernization in the electricity industry advocate strengthening FERC’s authority even further. Others remain concerned that good decisions require state and local oversight. Similar issues surround the distribution of authority over the siting of electricity generating facilities. In NYS, for example, recently passed legislation shifts jurisdiction to the state and away from local government for facilities rated 25-80 MW capacity. Though not differentiated by fuel source, the implications for wind energy are noteworthy. Advocates and opponents alike see the legislation as an effort to facilitate the siting of new wind farms, in part by reducing the influence of localized opposition that holds greater sway under local government “home rule.”

Energy Federalism

These examples of contested regulation show that the federalism status quo is being questioned in the energy sector. What criteria, other than short term political advantage on a particular issue, are or should be used to evaluate whether authority should be assigned to local, state, or federal government, or some combination? Sovocool³ offers a list of organizing principles derived from theories of “environmental federalism” that can be applied to energy decision-making:

Claimed benefits of centralized authority:

Internalizes externalities (e.g. when pollution crosses political boundaries). Costs and benefits are borne by groups represented by the deciding authority, promoting fairness and better economic choices.

Consistent and uniform regulation. Costs of regulation are reduced for businesses active in multiple communities. Larger scale enables more efficient administration and enforcement, and improves the science on which regulation is based.

Negotiating power. Centralization assembles power, reducing the mismatch between small state and local governments and large corporate or other special interests.

Prevents a race to the bottom. Centralized minimum standards of human health and environmental quality can remove the incentive for state and local governments to compete for investment by lowering standards.

Claimed benefits of decentralized authority:

Experimentation and innovation. Decentralized authority stimulates a race to the top as state and local governments compete to adopt successful innovation.

Reduced chance of regulatory capture. Powerful interests have a harder time influencing, or “capturing”, separate agencies than a single centralized one.

Flexibility. Approaches can be more responsive and easily tailored to variable state and local conditions.

Democracy is enhanced. Government closer to the people facilitates more meaningful democratic participation and citizenship.

Claimed benefits of shared but discrete authority (“layer cake federalism”):

Different governments are best suited to different roles. Some decisions (e.g. about small scale energy facilities) have only local impacts and are best made by decentralized government. Others (e.g. about interstate transmission of electricity) affect multiple jurisdictions and require a central, mediating authority.

Claimed benefits of shared, overlapping authority (cooperative or “marble cake” federalism):

Creative, cross-jurisdictional dialogue: Shared authority enables creative interaction between different perspectives, supporting coordination, innovation, participation, and partnership. Learning and best practice solutions are promoted.

Backup authority: Overlap provides a kind of insurance, as protection remains even if one part of the system fails.

Accountability: The alertness of each regulator increases with shared responsibility, and it is more difficult for a single special interest to have undue influence with multiple regulators.

Best of both worlds: The advantages of centralized economies of scale and decentralized experimentation are combined, e.g. by setting central standards, but as a minimum only.

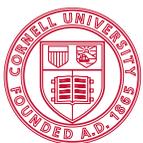
Conclusion

New Yorkers are “spilling blood” - in the metaphorical sense suggested above - over whether local, state or federal government should control the fate of hydraulic fracturing in NYS. Blood pressures have also risen over who should permit moderately sized electric generating facilities and control the siting of natural gas and electricity transmission corridors. Not infrequently, advocates who argue for or against federal or state or “home rule” in one context reflexively take the opposite position in another. This may make strategic sense in the heat of battle over specific policy decisions about particular energy technologies or fuels or sites. However, a danger exists for partisans and policy makers who fail to lift their line of sight above the battlefield. Unless principled arguments about the benefits and costs of rebalancing federalism are considered, the distribution of power and passion that lead to precedent and victory in one arena may well simply set the stage for defeat in another.

Sovocool suggests that “marble cake” federalism is the best suited and most practical approach to energy policy making. Be that as it may, it should be evident that the claimed benefits of each approach he lists are more of a promise than a guarantee. The point of this *Brief* is not to identify a universally preferred structure of federalism, but to advocate that energy literacy engage with basic governance principles. This would require all involved to step back from the fray for a harder look at the implications of energy federalism for long term strategic concerns as well as short term tactical arguments.

³ Sovocool, Benjamin K. 2008. The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change, *Stanford Environmental Law Journal*, 27(397-476).

*For a longer, fully footnoted version of this paper, go to: <http://devsoc.cals.cornell.edu/cals/devsoc/outreach/cardi/programs/energy.cfm>



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