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Commandeering Federalism: The Rise of the Activist State Attorneys General

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One of the most important developments in American politics and governance is that the attorneys general of the 50 states have become major players in national policy. Once relatively obscure stepping-stone positions focused mainly on small-bore issues, state AGs make their presence known today in area after area, be it health care, environmental regulation, guns, immigration, or cultural issues. The lawsuits they bring against federal agencies and the legal settlements they reach with corporations have led to stronger horizontal relationships among the AGs, and to any given AG's working with—or against—his or her counterparts in other states as part of multistate coalitions.

In many ways, this development should not be a surprise. As several astute observers have noted, we are now living in an age of “executive federalism.”[1] This term, borrowed from descriptions of political practice in parliamentary federations such as Canada and the European Union, refers to the increasing domination over the operation of federalism by the executive branch rather than Congress. Typically, what is being described is the operation of the contemporary administrative state through “bargaining” and “negotiation” between federal and state officials. The proliferation of federal waivers in federal regulatory programs is among the most salient examples of this trend. Working in the shadow of—and sometimes in direct conflict with—statutory language created by Congress, exceptions and additions to state obligations in federal policy have now become commonplace. This, in turn, has empowered the President and federal bureaucrats in the policy process.

But, of course, the presidency is not the entirety of executive governance in America. The states have executives as well—in most states, multiple executives. They include AGs, most of whom are elected independently from a state's Governor and most of whom have the sole authority to represent their state in litigation.[2] Much like the President, federal agencies, and Governors, state AGs have used their authority to influence policy without the input of legislatures. The state AGs' mode of executive federalism is through the legal process, with lawsuits, threats of lawsuits, and out-of-court settlements as their main policymaking tool.

The emergence of executive federalism is striking, and state AGs' rising activism is a concerning example of how it plays out in practice. What does AG activism mean for federalism? Put most bluntly, are AGs “ruining” federalism? In short, I believe the answer is yes.

Contours of Contemporary AG Activism

First, let's step back and take stock of the emergence of nationalized activism by state AGs. Inklings of their new role appeared as early as the Reagan administration, but the critical moment for these state officials as a power in national politics was the signing of the infamous \$206 billion tobacco settlement in 1998. This was executive federalism in action, providing a new national regulatory structure governing the tobacco industry, and without any input from the U.S. Congress.[3] Since then, the national policy goals pursued by the state AGs have burgeoned, and to reach those goals they have used three basic strategies.

The first takes the tobacco agreement as inspiration and seeks to make policy through multistate settlements with corporations. This policy-creating litigation uses threats of lawsuits founded on novel and untested legal theories as a way to force corporate defendants to the bargaining table. In exchange for an AG's not filing suit, a defendant typically agrees to pay penalties into state-controlled funds and to adhere to new codes of conduct. These codes are the ultimate prize. They set up new corporate requirements not existing under current law, and they occasion the establishment of new institutions to oversee compliance. Such a process, often coming on the heels of congressional “inaction,” has followed dozens of AG-led settlements with drug companies, gradually reshaping that industry's norms as to drug pricing, production, and advertising.

The 2012 mortgage settlement between state AGs, federal agencies, and five major banks is another recent example of use of the tobacco model. The \$25 billion agreement established new mortgage-industry rules and created new housing policies that Congress had considered but rejected.

While policy-creating litigation is a big part of what contemporary AGs do, some of their most high-profile activism takes another form. Rather than suing corporations as a way to regulate industries in ways that federal policymakers declined to do, the other two strategies—policy-forcing litigation and policy-blocking litigation—target the federal government directly.

Such litigation, which first blossomed during the administration of George W. Bush, seeks court judgments that oblige federal agencies to expand regulation. The classic (but hardly the only) example was several AGs' efforts to force the Bush administration's EPA to regulate greenhouse gases. This effort, which resulted in *Massachusetts v. Environmental Protection Agency* (2007), set the stage for virtually the entirety of the Obama administration's climate program. Much like the first-mentioned strategy of suing private companies, these lawsuits aim to circumvent congressional action (or inaction). The *Massachusetts* litigation, for example, was launched after Congress voted down a cap-and-trade bill.

Policy-blocking litigation, which involves AGs turning to courts to prevent new regulations or policies from taking effect, has been particularly prominent during the Obama administration. These efforts, some successful and others less so, include the AG-initiated constitutional challenge to the Affordable Care Act, as well as to parts of the Dodd-Frank financial reform law, climate-change rules, and President Obama's executive orders on immigration.

AG Activism and Persistent Myths of American Federalism

To hear the AGs tell it, all three forms of litigation represent federalism in action. Former New York Governor Eliot Spitzer, once a rising star in his party, claimed that his activism was in the service of a "new states' rights." Other AGs invoke the Brandeisian rationale of federalism-as-experimentation to defend their activism. Oklahoma AG Scott Pruitt has been among the most vocal Republican AGs, arguing that, when it comes to fighting against federal authority, "who else but a state attorney general is in a position to respond?"[4]

The problem with these and similar justifications is that they rely on largely outmoded assumptions about how contemporary American federalism works. These assumptions—also prevalent in the opinions written by judges and justices today—begin with the idea that "the states" primarily serve as a counterbalance to federal power by providing a check on centralization. The bulk of the litigation now pursued by the state AGs explodes this myth: it is not about pushing back against federal power but supplementing and bolstering it.

Take the policy-creating litigation—the suits against companies that form a significant portion of the work of contemporary AGs. The settlements that emerge from these suits are state-initiated yet centralized and national in scope by their very design. The AGs self-consciously pursue injunctive relief to accomplish things that Congress has "failed to do," and the corporate defendants go along, knowing that it is better to have a single global settlement than die the death of a thousand (or at least 50) cuts. Far from resisting centralized policy solutions through state "experimentation," then, the AGs' activism discourages varied regulatory possibilities and instead seeks to lock all states into a single policy option.

Additionally, the AGs' regulatory strategies resemble a regulatory ratchet moving only in one direction: toward more regulation. The terms of regulatory settlements only add to, and they never subtract from, whatever corporate obligations already exist under federal law. Settlements with banks or pharmaceutical firms do not (indeed cannot) involve clauses freeing corporation entities from the existing regulatory floor. Instead, settlement terms pile additional regulatory requirements on top of that floor.

What is more, many of these settlements—regardless of whether the AGs are working by themselves or with federal partners—explicitly empower oversight by federal agencies beyond what Congress granted those agencies. Take

the regulation of pharmaceutical advertising, for example. Congress has frequently considered and rejected efforts to grant the U.S. Food and Drug Administration authority to require government preclearance of drug advertisements, in part because of the free speech concerns such policies raise. Yet in a series of settlements with pharmaceutical companies, state AGs have included provisions requiring the companies to pre-clear future advertisements with the FDA. Settlements in other areas, from finance to energy production, include similar expansions of both state and federal oversight of corporate activities.

Policy-forcing litigation against the federal government represents an even more explicit attempt to centralize and expand the power of the government in Washington. These efforts, including *Massachusetts v. EPA*, amount to calls by some state AGs to “come and please regulate us.” They would place every state of the union, not just their own, onto a higher floor of regulation through the mechanism of federal mandates. This is what the coalition of AGs who intervened in court to defend the Clean Power Plan, which raises the regulatory standards that states must meet to reduce carbon emissions, are trying to do. It is precisely because the plan uses federal sticks to enforce state compliance, and not despite it, that the AGs supported the plan.

Unlike the policy-creating suits against companies, which are largely bipartisan, the suits brought against the federal government pit one group of AGs against another on a partisan basis. And this brings us to the second fiction that contemporary AG activism exposes: the notion that one can any longer speak of “the states” in a meaningful way. Rather than “the states” sharing some coherent set of goals, federalism disputes have increasingly come to set blocs of states in opposition to other blocs of states. Not only are lawsuits against the federal government brought increasingly by coalitions of same-party AGs, but these suits are frequently opposed directly by AG coalitions of the other party.

Of course, American federalism has always featured major cleavages among states with competing interests. Yet while some of the most persistent differences among the states have been geographic or economic, today’s cleavages, particularly when it comes to the AGs’ federalism, increasingly boil down to the Democratic Party versus the Republican Party. These conflicts feature Red versus Blue doing battle for or against a federal policy depending on its ideological direction. In many ways, this reflects the greater political polarization in the country generally. But it also poses several concerns when it comes to the AGs’ impact on federalism.

AGs’ Activism and Competitive Federalism

That AG litigation is used to further partisan goals means that it may sometimes be tactically useful to challenge federal regulation, as with several of the Republican AG-led policy-blocking efforts during the Obama administration. These lawsuits have met with mixed success, but some have delivered effective checks to administration policy. As long as AGs are playing a critical role in national policymaking, however, on balance their partisan and entrepreneurial incentives make them at best unsteady allies in the cause of limited government.

Advocates of limited government frequently argue in favor of a competitive model of federalism in which states vie with one another to attract citizens and investment, particularly through opening markets and reducing regulation. As Michael Greve has explained, the alternative is a cartel federalism in which states collude to raise governmental spending and regulatory authority.[5] Key to maintaining cartel federalism is preventing any given state from exiting the arrangement, which would place pressure on remaining states to exit as well.

Preventing states from defecting from a regulatory cartel is difficult. Even methods that worked well in the past—such as strings-attached federalism, in which federal money serves as a carrot for states’ participation in federal policy schemes—don’t necessarily work today. Several Republican Governors and legislatures refused to accept federal money to expand Medicaid under the Affordable Care Act, for example. Yet Republican AGs have not similarly defected from attempts to cartelize regulation through litigation. Regardless of party, AGs continue to sign on to regulation-expanding settlements even in this era of Red-Blue polarization.

This is because the incentives for AGs are different from those of other state actors. Governors and legislators

belong to a larger partisan network, with all the attendant partisan expectations and incentives. So do AGs. But Governors and legislators also must contend with other fiscal realities. They can justify a refusal of “free” federal money by arguing that the money is not free at all. Refusing it also means evading any federal strings attached to it, and can forestall the prospect that accepting the federal money now requires the state to spend more of its own budget later. This provides an independent reason beyond partisan position-taking not to enter the federal scheme.

Republican AGs, by contrast, have little incentive to defect from regulation-expanding settlements. For one thing, new regulatory requirements embodied in settlement form are not affected by state defectors. If the defendant agrees to a settlement, it is bound to the terms whether the settlement is with 10, 25, or all 50 states. An AG rejecting the proceeds from a settlement accomplishes little more than passing up money without gaining the potential long-term benefits of doing so that Governors and legislators can claim. This contrasts with defecting from (say) the Medicaid expansion, which, at least if done by a large enough number of states, can lead to instability within the entire program.

Furthermore, the defendants themselves will be pushing for as many states as possible to join the settlement, preferring as they do to settle all legal claims in a global agreement. Few are the AGs who have understood this dynamic and hesitated to join multistate settlements. One thinks of Alabama’s William Pryor, with the tobacco settlement and Oklahoma’s Scott Pruitt, with the 2012 foreclosure settlement. These rare instances make little difference to the ultimate result. (Even Pryor signed on to the tobacco settlement in the end.)

This political economy piece is only part of the story, however. Just as importantly, AGs have achieved bipartisan regulation-through-litigation because they have been able to frame what they are doing in ways compatible with the partisan coalition of which they are a part.

This is particularly important when Republican AGs sign on to settlements that effectively expand regulation over the private sector. Even as Democratic AGs emphasize settlements as getting justice for victimized consumers against predatory corporations, Republican AGs tout them as compatible with a commitment to law-and-order principles. In some cases, as with “Medicaid fraud” enforcement actions against pharmaceutical firms, Republican AGs have been able to hail legal actions as recovering taxpayer money from companies that had taken advantage of a wasteful and inattentive federal government—even as these legal actions have the effect of expanding government oversight across an entire private industry.

It is a lot easier to reject money from the Obama administration than it is to refuse the “free” money that flows from corporations that the AGs (though not the courts) have determined broke the law.

For these reasons, the AGs’ bipartisan regulation-through-litigation—their taking aim at private companies—is likely to persist. Meanwhile, it is precisely because the other two forms of AG activism (policy-forcing/blocking litigation against the feds) are partisan that one is led to doubt that they will be used to advance a principled commitment to limited government. Democratic AGs can and will continue to pursue greater regulation, even if (actually because) it means expanding federal power and limiting the discretion of the states. Yet because Republican AGs seek the goals of their broader partisan coalition, as opposed to any principled commitment to competitive federalism, they have expanded, and will continue to seek to expand, federal power in ways compatible with whatever issues are privileged by any given Republican coalition.

We’ve seen this already in numerous cases in which Republican AGs have taken positions conflicting with the “states’ rights” position. It was the Republican AGs who intervened in *United States v. Windsor* (2013) to support the Defense of Marriage Act, despite its representing federal encroachment on the traditionally state-defined institution of marriage. The conservative AGs of Nebraska and Oklahoma unsuccessfully sued Colorado in the Supreme Court, seeking to prevent Colorado’s new marijuana laws from going into effect. Republican AGs called upon the Supreme Court to invalidate states’ gun laws (in some cases, even their own state’s gun laws) in *McDonald v. Chicago* (2010). In each of these cases, it was Democratic AGs claiming the “federalism” mantle.

The point is that AGs' commitments to checking federal power will be unstable precisely because their incentives are to follow the goals of their broader partisan coalition, and not to vindicate any abstract principle of competitive federalism. Governors and legislators can benefit from a commitment to competitive federalism because they must worry about the economies of their respective states. By contrast, AGs' main worry is advancing the "correct" positions of their broader partisan coalition. Particularly as the Republican Party moves further away from libertarian commitments and adopts a more protectionist, populist, Trumpian vision, there is little reason to think Republican AGs won't follow the GOP down this path.

AGs and Executive Federalism

The nature of AGs' incentives makes them unsteady allies for any sustained commitment to a vision of federalism that promotes limited government. Yet even in terms of the model of executive federalism itself, AG activism may be problematic. Whether one approves or disapproves of the rise of executive federalism, it is at least plausible that the negotiation and bargaining processes inherent in executive federalism can have positive effects.[6] Such negotiation can potentially accommodate diversity by allowing for regional variation in regulatory programs and can provide a venue for bipartisan compromise. These advantages might help temper the problematic elements of executive federalism, such as its lack of transparency and political accountability.

On the other hand, the AGs' particular form of executive federalism borrows its pathologies while jettisoning several of the purported benefits. Concerns about the lack of transparency and accountability of executive federalism are quite applicable to AG activism, particularly given the behind-closed-doors nature of the settlement-negotiation process. Moreover, the AGs' policy toolkit is poorly suited to achieve the purported values of negotiation and compromise. While they share part of the executive power on the state level, AGs' policy tools rely chiefly on judicial power, power that is not well-suited to fostering negotiated policy outcomes.[7]

Unlike waiver programs, for example, which involve a back-and-forth between Governors and federal agencies and can be tailored to particular jurisdictions, AG activism seeks one-size-fits-all solutions that apply everywhere. The AG coalitions on each side of highly partisan litigation are not seeking compromise; they are seeking court judgments that get them everything they want. Even policy-creating litigation against private companies, which does involve negotiated out-of-court settlements, fails to reflect "bargaining" in any real sense. As noted above, settlements discourage experimentation and, rather than providing for true negotiation between different interests, inevitably move the needle toward more regulation.

Conclusion

I admit to concluding, perhaps frustratingly so, without offering suggestions as to what to do about this state of affairs. Except to say this: Even if it is conceded that the AGs are ruining federalism, it is not as if they have seized their newfound influence in national policy under cover of darkness. They have had a lot of help, largely because federal lawmakers and the federal judiciary continue to operate under outmoded myths about American federalism.

Congressional efforts to empower AGs are consistently bipartisan, whether that means including anti-preemption language in statutes at the behest of the National Association of Attorneys General, authorizing AGs to enforce new federal laws, or providing federal grants for state enforcement. The leader of efforts to incentivize AG lawsuits since the early 2000s has not been a Progressive but one of the more conservative members of the Senate, Charles Grassley (R-Iowa).[8]

Meanwhile, the courts have thrown open the doors to state AGs even as they have been critical of expansive standing for other plaintiffs. Since the early 1980s, the Supreme Court has supported AGs' ability to maintain broad *parens patriae* suits on behalf of "the health and well being—both physical and economic—of [the state's] residents in general." [9] *Massachusetts v. EPA* announced that henceforth AGs would be granted "special solicitude" in the Court's standing analysis when it comes to challenging federal policy.[10] More recent cases have continued to illustrate the courts' extraordinary deference to AGs' claims of standing.[11] In the 1960s, Alexander Bickel argued

that broad state standing to challenge federal law “would make a mockery . . . of the constitutional requirement of case or controversy, which . . . forms an essential limitation on the reach of the power of judicial review.”[12]

Yet the courts have opened the door to AGs ever wider, under the flawed assumption that bolstering state actors invariably means bolstering “federalism.” This assumption ought to be rethought. Romanticized notions of “the states” as a cohesive bloc fighting the federal government’s intrusion upon their priorities simply do not describe reality in the modern era of executive federalism. This is particularly true of the AGs, who are partisan actors operating within a federalism that privileges entrepreneurial interests seeking for ways—any ways—to achieve their goals. The AGs, far from “protecting the interests of their states,” as they frequently claim, are doing the bidding of partisan and interest coalitions on the Left and Right alike.

Furthermore, AGs are not well-suited to take advantage of any purported benefits of the new executive federalism—particularly flexibility, negotiation, and compromise. Instead, the rise of AGs has, on balance, contributed to more regulation and added to the incoherent kludgeocracy of modern American governance.[13] This is not the recipe for limited, efficient, or transparent government.

[1] Jessica Bulman-Pozen, “Executive Federalism Comes to America,” *Virginia Law Review* 102 (2016): 953-1030; Frank Thompson, “The Rise of Executive Federalism,” *The American Review of Public Administration* 43 (2012): 3-25; [Michael Greve](#), “Living Under Executive Federalism,” *Law and Liberty*, November 6, 2015.

[2] Currently, the attorneys general of 43 states are elected independently of the Governor. The principle that AGs have the sole right to represent their state in litigation relies upon well-established precedent, but has been challenged recently in states in which a Governor and an AG are in opposing political parties.

[3] Indeed, Congress rejected the “Global Settlement Agreement” the year before, and AGs achieved through out-of-court settlements much of what had been contained in the unsuccessful legislative proposal.

[4] Fred Barnes, “The Last Redoubt,” *Weekly Standard*, July 22, 2013.

[5] Michael Greve, *The Upside-Down Constitution* (Harvard University Press, 2012).

[6] This argument is perhaps made most forcefully in an article by Jessica Bulman-Pozen, “Executive Federalism Comes to America,” *Virginia Law Review* 102 (2016): 953-1030.

[7] The classic criticism in this vein is Donald Horowitz’s *Courts and Public Policy* (Brookings, 1977), which examines the pathologies of the judicial process in the making of public policy.

[8] Senator Grassley has been a leader in efforts to expand the federal False Claims Act, which enables prosecutors to seek treble damages in cases involving allegations of making false claims to the government. This act has been a staple in the growth of AG litigation against the pharmaceutical industry, which has become the most frequent target of multistate lawsuits.

[9] *Alfred L. Snapp and Son v. Puerto Rico*, 458 U.S. 592, 607 (1982).

[10] *Massachusetts v. EPA*, 127 S.Ct. 1438, 1454-1455 (2007).

[11] For example, in *Mississippi v. AU Optronics*, 134 S. Ct. 736 (2014), the Court unanimously adopted the AGs’ contention that the Class Action Fairness Act did not limit *parens patriae* actions brought by state AGs.

[12] Alexander M. Bickel, “The Voting Rights Cases,” the *Supreme Court Review* (1966): 79-102.

[13] Steven M. Teles, “Kludgeocracy in America,” *National Affairs* 17 (Fall 2013).

