Principles of Federalism

(Draft Prepared by ULC Committee on Federalism and State Law)

Overview and Summary

Since the earliest days of the republic, finding the right balance between federal and state powers and responsibilities has posed a difficult challenge for our political institutions. In recent years, economic and cultural globalization, the use of fiscal and monetary policies in efforts to stabilize the economy, and the desire to use the resources of the federal government to address unmet social needs have resulted in an accelerating centralization of power with the federal government. At the same time, there is an increasing desire to preserve the uniqueness and diversity of our local communities, a recognition that the health of our democracy depends on the ability of citizens to meaningfully make decisions at the state and local level, and persistent fears that an excessive concentration of power in the federal government may threaten our basic liberties. These conflicting trends make it critical that a renewed effort be undertaken to develop policies, practices and institutions which promote an appropriate balance and efficient integration of federal and state responsibilities.

Any effort to better integrate federal and state responsibilities must be based on a careful evaluation and understanding of the roles assigned to different units of government by the Constitution. The Constitution creates a strong federal government with the power necessary to protect our territorial integrity and defend our national interests and with sufficient authority to bind the states together into a single republic in which citizens can freely move and commerce can flourish. At the same time, the Constitution reserves to the states’ sovereign authority in all matters not delegated to the federal government or denied to the states, or necessary and proper for the federal government’s exercise of enumerated responsibilities. This diffusion of sovereign power assures that “the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed” and allows “[t]he independent power of the states to serve as a check on the power of the Federal Government.” National Federation of Independent Business et al. v. Sibelius, 567 U.S. ___, ___(2012) (slip op., at 4)

An important characteristic of the manner in which the Constitution allocates powers and responsibilities between the federal governments and the states is that unless powers are exclusively granted to the federal government or denied to the states, concurrent jurisdiction may be exercised by both levels of government. For example, to the extent activities substantially affect interstate commerce, the same or similar objectives can be served both by Congress through the exercise of the power to regulate commerce and by the states through the exercise of the police power to do all things necessary to protect the public health, welfare and safety. In these areas of concurrent jurisdiction, while the Supremacy Clause allows the federal government to preempt state law as necessary to exercise its delegated responsibilities, the federal government need not do so to discharge its responsibilities, and historically has generally elected to allow federal and state laws to complement one another and to function side by side.

Reaching a proper balance of state and federal responsibility, especially in areas of concurred jurisdiction, promotes a variety of different objectives. Individual liberties and freedoms are protected; the diversity of cultures, resources, needs, and priorities among the states is preserved;
the states are provided the ability experiment and innovate in the development of new policies and programs; and an efficient allocation of administrative responsibilities to implement national policies to state and local agencies is facilitated. Unfortunately, our dual system of law and regulation if not properly balanced can also impose significant and unnecessary costs upon both levels of government and the private section. If not well integrated, a dual system of federal and state law can create a complex regulatory environment that retards economic growth and innovation. The lack of clarity about the scope of federal preemption may create uncertainty about legal requirements that discourages investment and generate expensive and socially unproductive litigation about the extent of federal preemption. Poorly integrated federal and state laws may also impede the efficient operation of the courts and administrative agencies.

These Principles of Federalism attempt to promote an improved balance of federal and state responsibilities by providing the following guidelines and recommendations intended to facilitate a more effective definition of the respective roles of the federal government, the states, individual citizens, and public and private institutions in adopting, revising and improving the laws and regulations:

**Responsibilities of Congress and Federal Agencies.**

When considering the adoption of laws and regulations, Congress and federal agencies should:

- Carefully evaluate the way in which state law addresses the issue under consideration and whether the states have already successfully or unsuccessfully addressed these issues;

- Determine the extent to which states face differing needs, circumstances and requirements in responding to the issues under consideration;

- Identify the range of options to integrate federal and state responsibilities and compare the costs and benefits of each available option to determine how federal action will affect state law;

- Partner with the states to develop uniform systems of law and regulation where appropriate, or create incentives for interstate cooperation;

- Exercise restraint in using preemption in areas in which the states play a primary role by legislating only when necessary to achieve objectives that cannot be reasonably achieved through alternative policies;

- When preempting state law, specify as expressly as possible the extent to which state law is superseded or preserved;

- Avoid the creation of unfunded mandates and the impairment of state taxing authority; and

- When implementing private international law conventions, consider the use of state law for implementation to the extent practicable.
Responsibilities of States and their Political Subdivisions.

To facilitate a better relationship between federal and state laws and regulations, state and local governments should:

- Address emerging problems of national significance and avoid taking actions that may generate the need for federal preemption;
- Avoid imposing burdens on interstate commerce or creating conflicts between federal and state law;
- Participate actively in the development of federal laws and regulations;
- Create and support institutions that represent the interests of the states and participate actively in the federal legislative and regulatory process both directly and through public-private partnerships; and
- Engage federal policymakers working on private international law agreements to ensure incorporation of principles of law and equity that are primarily governed by state law in the United States and for which state courts may be better suited to provide required interpretations.

Responsibilities of Citizens and Non-Governmental Organizations.

Individual Citizens, Community Groups, Professional and Trade Associations, Non-profit Organizations and Businesses Participating in the Political Process should:

- Educate ourselves and members of our organizations about the importance of cooperative federalism;
- Focus advocacy efforts both at the federal and state levels; and
- Take principled positions regarding the role of federal and state law, rather than merely embracing whatever option is politically advantageous.

Working Toward Predictable Criteria to Guide Decision Makers

In addition to defining the respective roles of various participants in the development of federal and state laws and regulations, it is also critically important to develop criteria to determine how to integrate the roles of the federal and state governments in areas of overlapping jurisdiction. The following matrix provides a partial identification of the factors that should be considered in selecting alternative models for the integration of federal and state responsibilities. In particular, in situations in which creating a more uniform system of laws among the states is necessary to promote interstate commerce, the matrix attempts to identify the situations in which it may be desirable to preempt or preserve state law, or to allow federal law to complement state law by providing minimum standards for state laws and regulations. More efforts are needed to more extensively identify and articulate these standards and to promote a dialogue among competing stakeholders about how to apply these factors in different subject matter areas.
<table>
<thead>
<tr>
<th>Factors that Weigh in Favor of Federal Preemptive Law</th>
<th>Factors in Areas of Overlapping Jurisdiction that Weigh in Favor of Federal Law that Establishes Minimum Standards for the States</th>
<th>Factors that Weigh in Favor of States’ Retaining Autonomy to Act</th>
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<tr>
<td>The effective exercise of enumerated federal responsibilities demands that a problem be addressed uniformly and comprehensively at the federal level.</td>
<td>The establishment of minimum standards satisfies federal objectives and individual states face unique problems due to differences in environment, resources or culture.</td>
<td>There is a reasonable likelihood that uniformity or minimum national standards can be achieved through cooperative state action or that adverse consequences will arise from full or partial preemption of state law.</td>
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<td>Prompt action is needed to address pressing national problems. Most states are presented with similar needs and problems.</td>
<td>There is a need for substantial uniformity among the states, but room for local variation occurring within a well-defined legal framework.</td>
<td>A lack of substantial uniformity will not create significant burdens on interstate commerce and the interstate coordination of non-commercial activities.</td>
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<td>There is a strong need for a high degree of uniformity to promote economic growth and stability and promote the development of new technologies.</td>
<td>Federal preemption may impose unfunded obligations on states and local governments that may counterbalance the desirability of national uniformity, but the establishment of minimum standards is essential.</td>
<td>Federal preemption may impose unfunded obligations on states and local governments and a reasonable likelihood exists that intergovernmental cooperation can successfully achieve uniformity or meet minimum standards.</td>
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<td>Interstate competition will encourage a race to the bottom or impede the attainment of substantial uniformity.</td>
<td>There is a substantial lack of consensus about the best approaches to promoting uniformity, but the establishment of minimum standards is essential.</td>
<td>It is beneficial to develop a high degree of consensus and maintain stability within the law.</td>
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<td>There is little need to frequently modify and update laws and regulations.</td>
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<td>The costs and time required to develop an intergovernmental consensus does not outweigh potential benefits.</td>
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<td>Federal law historically has primarily occupied the field.</td>
<td>State laws and regulations are well-developed and historically have primarily controlled the area.</td>
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Detailed Statement and Analysis of Principles of Federalism

Introduction

This document seeks to set forth principles which describe the importance of preserving a healthy balance between the roles of the federal and state governments and identifies the harms to our political institutions which may arise when inadequate attention is paid to properly allocating responsibilities between the federal government and the states. It further recommends actions which should be taken by the federal government, the states, and citizens active in the political process to improve the relationship between federal and state law.

§ 1.0 Objectives Promoted By Preserving the Sovereignty of the States

The Constitutional reservation to the states of all powers (1) not delegated to the federal government; (2) denied to the states; or (3) necessary and proper for the exercise of federal government’s delegated powers, creates a division of responsibilities between federal government and the states which promotes the following objectives:

- The diversity of cultures, resources, needs and priorities which exist among the states is respected and variations in laws and rules are authorized which recognize and accommodate these differences.
- Opportunities are provided for experimentation, so that new governmental programs and policies may be developed to address emerging problems and existing programs and policies can be modified to address changing needs and priorities.
- Intergovernmental cooperation is promoted which encourages the assignment of responsibilities to federal and state governmental entities in a manner that facilitates the efficient and effective use of executive, legislative and judicial resources based upon the comparative advantages possessed by each level of government.
- The citizens of each state are given a greater stake in political decision making which promotes participation in local democratic institutions.

Discussion

The United States Constitution grants to Congress the power to tax and spend; borrow money; regulate commerce; control naturalization and aliens; regulate bankruptcy; coin money and punish counterfeiters; establish a post office; promote science and the arts; establish courts in addition to the Supreme Court; punish piracy, felonies on the high seas and offenses against the law of nations, raise and support armies and call out the militia; create a federal district and acquire property; and to make all laws necessary and proper for the exercise of its delegated power. The United States Constitution also grants the President, with the advice and consent of the Senate, the power to make treaties. While operating within the sphere of its delegated power and in conformity with the Bill of Rights or when enacting treaties, actions taken by Congress and President are the supreme law of the land and are binding upon the states.
Seven of the original thirteen states ratified the United States Constitution with a reservation that the powers not enumerated for the federal government were reserved for the states.¹ To address these concerns, the Tenth Amendment provides that, “Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.”

The allocation of power between the states and the federal government set forth in the Constitution provides the states “sovereignty concurrent with that of the federal government, subject only to the limitations imposed by the Supremacy Clause.”¹² Pursuant to this system of dual sovereignty, the Constitution establishes “an indestructible Union composed of indestructible states,” each of which is has its own government “endowed with all the functions essential to separate and independent existence.”³ This federalist structure assures a “decentralized government that will be more sensitive to the diverse needs of a heterogeneous society,” that will increase “opportunity for citizen involvement in the democratic process” and “allow for more innovation and experimentation in government,” and make government “more responsive.”⁴ The preservation of a “healthy balance” of federal and state authority was intended by the framers of the Constitution to protect “fundamental liberties,” prevent an “excessive accumulation of power in one branch,” and “reduce the risk of tyranny and abuse from either front.”⁵

This system of dual sovereignty reflected the beliefs of framers of the Constitution that men are not to be trusted with power, because they are selfish, passionate, full of whims, caprices and prejudices. They are not fully rational, calm or dispassionate. In Federalist Paper 45, James Madison writes:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in state governments are numerous and infinite. The former will be exercised principally on external objects as war, peace, negotiations, and foreign commerce; with which last the powers of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of people and the internal order, improvement, and prosperity of the state.⁶

It has been said that any federal system suffers from two sources of instability: the threat of disintegration expressed in the form of demands for local autonomy and the threat of secession and the accumulation of excessive central authority which may undermine individual rights and liberties and stifle growth and creativity. The United States has experienced both challenges. The first threat was overcome at the enormous cost of the Civil War, and the second threat is perceived by many as an emerging challenge growing out of the continuous and rapid expansion of federal authority since the 1930s.

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¹ *We the States*, Virginia Commission on Constitutional Government (1964). The states stating a reservation were: Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island. (See pages 38, 70 and 75).
⁴ *Id.*
⁶ Benjamin F. Wright, editor, the Federalist Papers, at page 27.
The drive towards centralization in the United States has many causes, but two are most significant. The Constitution delegated to the federal government two areas deemed critical to the creation and growth of the new nation: national defense and interstate commerce. In 1789, both of these areas were relatively small and distinct parts of the national landscape—especially as experienced by most persons. Yet today, both are larger and more intertwined with areas otherwise reserved to the states. Most commerce is national in scope and increasingly global in scope. Many economic issues are too large for any single state to successfully address. National defense also is an immensely larger undertaking and is increasingly intertwined with other, domestic areas.

Despite these forces that have driven the growth in federal responsibilities, the benefits of federalism remain as important today as they were in 1789. The preservation of individual liberty was easier when the United States was a society composed principally of independent farmers tilling their own land and meeting their own needs from that labor. Today, each of us is profoundly dependent upon others and the large institutions—whether public or private—that address our various needs. In such an environment of dependency, a concern for individual liberty is greater than ever. But the importance of federalism extends beyond the rights of individual. It also makes an important contribution to the health of the group or community.

Federalism permits states to innovate and adapt. Political scientists and economists increasingly recognize the importance of innovation and adaptation to a successful political system and economy. Human knowledge is profoundly imperfect; none of us know with certainty the best means of addressing any given problem. Both the ability to accurately perceive the present and the ability to predict the future are so flawed that experimentation usually will promote better results. In addition, nothing is as certain as change. Whatever circumstances existed when a given governmental structure or program was created will necessarily change, and it is likely that the program or structure will need to adapt to that change. Federalism provides greater opportunities for change and adaptation than would exist in a unitary system.

The states have a long and continuing role as “laboratories” for governmental and social innovation and adaptation. State constitutions served as models for the United States Constitution, including with respect to the Bill of Rights, which was modeled upon comparable provisions in the constitutions of some of the states. The list of state innovations and changes that predated national laws includes the abolition or outlawing of slavery, state antitrust laws that predated the Sherman Act, minimum wage and child labor laws, accident insurance programs for industrial workers, and conservation laws. Indeed, the Progressive Era of American history began in the crucible of state experimentation. That experimentation continues today with public school reform including the charter school movement, state civil rights guarantees beyond those created under federal law, biotechnology research funded or subsidized by various states, reform of medical malpractice laws, health care programs in the states before the recently-passed federal law, medical marijuana laws, differing laws respecting state employees and unionization, differing means of raising revenue, and differing laws governing domestic relations, such as civil unions and same sex marriage. These differing laws allow for experimentation—to determine if the changes have either the benefits envisioned by their advocates or the detriments envisioned by their opponents.

The variation in state laws serves another, important purpose besides allowing for experimentation. Variation in the law accommodates political and cultural differences among the states. Allowing such variations avoids imposing the same set of values on all groups and serves to de-escalate the conflicts that arise in connection with the differences over these issues. The adage that the same size does not fit all is nowhere more compelling than when it comes to the political, cultural and religious differences among the various states. Those differences often relate to differences over the weight or priorities to be accorded to competing values. Federalism allows for the variation that these nuanced differences often require.
§ 2.0  Risks Associated with the Failure to Expressly and Efficiently Define the Relationship between Federal and State Law

Where federal powers are exercised in a manner which fails to effectively integrate the role of federal and state law or provide clear guidance regarding the extent federal preemption, the following economic and social costs may arise:

- Uncertainty is created about the role of state and federal law which increases transactional costs and deters investment and innovation.
- Litigation is generated to determine the scope and extent of federal preemption which is time consuming, costly and socially unproductive.
- Confusion and controversy may arise regarding the respective jurisdiction of federal and state courts which delays and impedes the resolution of disputes.
- The limited resources of the federal judiciary are overburdened with matters better resolved at the state level.
- Federal courts are required either to resolve controlling issues of state law for which they are poorly equipped or to certify questions regarding the interpretation of state law to state courts, which substantially delays the resolution of disputes.
- Federal agencies are required to engage in administrative activities for which they lack the necessary resources and direct community contacts needed to efficiently and effectively implement and enforce laws.
- Interstate controversies may be promoted and political discourse polarized by perceptions that unwanted mandates are being imposed upon the states.

Discussion

The division of responsibilities between the federal government and the states has not generated a bipolar distribution of power where matters not subject to the exercise of federal powers are exclusively reserved to the states, but rather has resulted in a system of shared responsibilities and overlapping authority. This has occurred due to the closely related scope of the power to regulate interstate commerce delegated to the federal government and the scope of police powers reserved to the states and the broad scope of authority granted to the federal government to take all actions reasonable and proper to implement the powers expressly delegated to the federal government.

Since the earliest days of the Republic, the police power to protect health, safety and welfare has been recognized to be reserved to the states.7 The exercise of power by Congress under the Commerce Clause, however, has been recognized as akin to the police power and, with the rapid expansion of interstate

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7 Marbury v. Madison, 5 U.S. 137 (1803); McCulloch v. Maryland, 17 U.S. 316, 420 (1819) (Where “the end be legitimate” and “within the scope of the Constitution,” “all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.).
commerce, has created substantial areas of dual and overlapping federal and state authority. 8 “As interstate commerce has become ubiquitous, activities once considered to be purely local have come to have effects on the national economy, and accordingly have come within the scope of Congress’ commerce power.” 9 For example, the power to regulate interstate commerce has been recognized to include not only activities that cross state lines, but also activities that may potentially burden interstate movement, such as discrimination in public accommodations, and persons or objects that have come into a state as a result of interstate commerce. 10 Likewise, the subsequent distribution of items in intrastate commerce that previously came into a state through interstate commerce has been found to be subject to Congressional regulation.11

The reservation of the police power to the states also does not prevent Congress, when exercising its delegated powers, and doing all things necessary and proper for the exercise of its delegated power, from superseding and preempting state law.12 From the earliest days of the Republic, the necessary and proper clause has been recognized as conferring broad authority on the federal government by, for example, creating a national banking system essential to protecting the well-being of the nation. In more recent years, the interplay between the commerce clause and the necessary and proper clause has resulted in Congressional enactments of laws to protect child labor, ensure civil rights, protect the safety of foods and drugs, preserve the quality of the environment, create the Social Security System, establish the Medicare and Medicaid programs, and innumerable other federal programs.

While the system of shared and overlapping responsibilities created by the U.S. Constitution promotes and preserves the values referenced above in Principle 1.0, inherent in such a system is the confusion and uncertainty that results when federal and state roles are not clearly defined. This confusion and uncertainty, moreover, often comes at a high price.

When the role of federal and state law is not well defined, parties to interstate transactions often must engage in complex and expensive legal analysis which in many instances cannot provide guidance that has a high degree of reliability. The need to incur these costs may cause parties to forgo certain projects, or undertake activities subject to substantial risks of non-compliance with legal requirements. Uncertainty about the role of federal and state law also generates extensive amounts of expensive and time consuming litigation. Where parties seek to resolve disputes, this uncertainty also increases the costs of litigation materially by generating disputes about primary and pendant jurisdiction, and whether issues which arise under both federal and state law appropriately belong in federal or state courts. Federal courts

8 Brooks v. United States, 267 U.S. 432, 436-37 (1925) (“Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce to permit immorality, dishonesty and the spread of any evil to the people of other States from the State or origin.”).
11 United State v. Sullivan, 332 U.S. 689 (1948) (Upholding the conviction of a Georgia druggist who imported tablets from Atlanta and six months later dispensed some of the tablets locally in two prescriptions that were not properly labeled). Even wheat grown solely for home consumption has been found to be subject to federal control on the premise that it supplies a need that might be otherwise met in interstate markets. Fry v. United States, 421 U.S. 542, 547 (“Even activity that is purely intrastate in character may be regulated by Congress where the activity, combined with like conduct by others similarly situated, affects commerce among the States.”).
12 Hamilton v. Kentucky, 251 U.S. 146, 156 (1919) (“That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.”).
which exercise jurisdiction in cases where there are state law issues are also at times forced to certify questions of state law for interpretation by state courts, thereby generating increased costs and delays in resolving disputes.

The careless exercise of federal authority in areas that impinge upon state police powers also results in a misallocation of judicial resources in a manner than overburdens the federal judiciary. For example, while members of Congress understandably wish to respond aggressively to emerging issues, the inappropriate reliance on the commerce clause as a thinly veiled pretext to create new federal criminal offenses is widely perceived as leading to an over-criminalization of federal law. As a result, the resources of our federal courts are being overtaxed with routine matters, such as trials involving drug law violations, which more appropriately fall within the domain of state courts.

The assignment of administrative responsibilities to federal agencies also often results in the enforcement of laws by officials who lack a well-developed network of community institutions and without a clear understanding of local needs, circumstances and requirements. Even where federal agencies develop standards under which state and local agencies are required to administer federal programs, rather than engaging in the direct implementation of federal law, when these efforts are excessively prescriptive, rather than performance oriented, they generate disputes between federal and state agencies and create substantial uncertainties within the regulated communities.

The failure to efficiently and clearly define federal and state roles also contributes to partisanship and political gridlock, which undermines our democratic institutions. Solutions to problems that are developed gradually and in an experimental manner by the states often generate needed compromises and a political consensus that is difficult to achieve by top-down federal mandates.

§ 3.0 The Role of the Political Process

The primary responsibility for developing and preserving an effective and proper balance between federal and state law falls upon Congress, state legislatures, federal and state administrative agencies, and citizens active in the political process. While the judiciary plays an important role in resolving disputes about the respective powers of the federal government and the states, courts are only able to determine outer limits of federal power.

Discussion

Because the role of the judiciary is not to make policy or administer government programs, but instead to preserve and protect the rule of law by policing clear violations of constitutional principles, except for defining the outer limits of federal authority, since the 1930s the Supreme Court has largely ceded questions regarding the appropriate allocation of power between the states and the federal government to

13 See e.g., United States v. Lopez, 514 U.S. 549, 567-68 (1995) (held that a federal statute prohibiting the possession of a gun at or near a school was not a valid exercise of power under the Commerce Clause as eliminating “any distinction between what is truly national and what is truly local”); United States v. Morrison, 529 U.S. 598 (2000) (invalidated a provision of the Violence Against Women Act that created a federal cause of action for victims of gender motivated violence because Congress may not regulate “non-economic, violent criminal conduct based solely on that conduct’s aggregate impact on interstate commerce”).
the political process. As originally enacted, the U.S. Constitution included several structural measures to enhance the ability of the states to participate in the political process and protect their interests. These mechanisms included the selection of the President by the Electoral College, the selection of U.S. Senators by state legislatures, the allocation of equal representation to all states in the U.S. Senate, and the establishment by the states of standards for the election of members of Congress. With the amendment of the Constitution to provide the direct election of U.S. Senators and the decline in the role of members of the Electoral College in selecting a President, the effectiveness of these structural protections has diminished. In addition, the gradual accretion of power by the federal government, and the effectiveness of many federal programs, has generated a self-reinforcing tendency towards a greater centralization of power in the federal government. As a result, vigorous advocacy by the states before Congress and federal regulatory agencies, and efforts to promote the fundamental values of federalism, have become more important.

States have sought to protect their interests through the establishment of offices representing most states in Washington, D.C., and through their participation in various intergovernmental organizations which represent their interests, such as the National Governors Association, the Conference of Chief Justices, the Council of State Governments, the National Association of Attorneys General, the National Center for State Courts, the National Conference of State Legislatures, the Uniform Law Commission and other similar intergovernmental organizations. Organizations established by the legal community, such as the American Law Institute and the American Bar Association, also play important roles in promoting an effective balance of federal and state authority. The federal government has also contributed to these efforts by establishing agencies and programs to promote intergovernmental cooperation, such as the Administrative Conference of the United States, the National Alliance for Uniform State Drug Law, the National Bureau of Standards, and the currently defunct Advisory Committee on Intergovernmental Relations. These institutions, however, must not be seen simply as another group of supplicants pleading special interests, but instead as essential components of the political process which promote and protect the role of the states.

§ 4.0 The Role of Congress and Federal Agencies

In order to improve the relationship between federal and state law, Congress and federal agencies should consider the following factors when adopting or amending federal law:

- The manner in which existing state laws deal with issues of federal concern should be identified and the success or failure of state law to address those issues should be evaluated.

- The extent to which states face differing needs, circumstances and requirements when addressing issues of federal concern should be investigated.

- The range of federal options available to determine role of state law should be identified, including (1) providing advice and recommendations to the states; (2)

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14 South Carolina v. Baker, 485 U.S. 505, 512 (1988) (“[L]imits on Congress’ authority to regulate state activities … are structural, not substantive—i.e.,, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”); Garcia v. San Antonio Metropolitan Transi Auth., 469 U.S. 528, 550 (1985) (“Apart from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of States in the federal system lies in the structure of the Federal Government itself,” i.e., the role of the States in selecting the President and equal representation of the States in the U.S. Senate).
providing funding or incentives for state action; (3) adopting minimum standards or requirements that supplement state law; (4) preempting state law, while granting states the right to assume primacy over the administration and implementation of federal programs; or (5) preempting a field of state law and providing for exclusive federal implementation and enforcement.

- The costs and benefits of the various available options to integrate federal and state responsibilities should be compared.
- Consideration should be given to creating incentives for states to develop, improve, and keep up-to-date uniform systems of law and regulation by considering options such as conditional preemption, the delegation of federal law enforcement powers to state and local officials, and the granting of “primacy” to the states to implement laws and regulations in conformity with minimum national standards.
- Institutions and policies that promote cooperative federalism should be established, protected and preserved.
- State law should be preempted only when necessary to achieve national objectives that cannot otherwise be reasonably attained through alternative policies and exercise restraint in utilizing preemption in areas in which (1) constitutional authority is not clearly conferred on the federal government or has not been historically exercised by the federal government, (2) the law has been historically the province of the states, (3) states are developing uniform laws or regulations or have entered into interstate compacts, or (4) federal initiatives affect private rights of action under state law.
- When it is necessary to preempt state law, the extent to which state law is superseded or preserved should be specified as clearly as possible.
- The federal spending power should not be used to coerce states to change existing state laws or participate in federal program.
- Caution should be exercised in adopting laws or regulations which impose unfunded mandates upon the states or impair the power of states to adopt taxes and raise revenues.

Discussion

Before developing proposals for the adoption or revision of federal laws or regulations, decision makers responsible for federal actions should, in consultation with state representatives, evaluate the extent to which issues of federal concern are governed by state law. Factors to be evaluated should include: (1) how state laws, including statutes, regulations, ordinances, policies, and judicial precedents, address issues of direct federal concern, and how federal actions will have both direct and indirect (and possibly unintended) effects on state laws; (2) the extent to which states have successfully or unsuccessfully addressed issues of potential federal concern, and whether state law itself has imposed obstacles to the attainment of desired objectives; (3) the identification of obstacles that have impeded the effectiveness of state actions taken to address issues of federal concern; (4) the extent to which states are working together
on a regional or national basis and in cooperation with the federal government to address emerging problems; and (5) the extent to which states face differing needs, circumstances and requirements when addressing issues of federal concern.

In addition to understanding how issues of federal concern are addressed by state law, the range of available options for integrating federal and state law should be identified. These options at one extreme may consist solely of offering advice and recommendations to the states, but taking no action that substantively affects state law, or delaying federal actions to give states an opportunity to more effectively address issues of federal concern. Conversely, federal law may also be used to completely occupy a field and totally preempt state law. Between these two extremes, other options include: (1) providing funding or incentives for state action, including interstate cooperation, to address issues of federal concern; (2) enacting minimum standards or requirements that supplement but do not preempt state law, except to the extent that state laws fail to satisfy minimum requirements or standards; (3) preempting state law only to the extent states fail to adopt a uniform set of laws or regulations developed by the states to address the same issues as those of federal concern; or (4) preempting state law, while granting states the right to assume primacy over the administration and implementation of federal initiatives using state laws and regulations that conform to federal requirements. Efforts should also be undertaken to identify new and creative ways to integrate federal and state law, some of which may combine different options to address different aspects of a problem of federal concern.

While more extensive use of federal authority and the preemption of state law may provide a quick, efficient and effective manner in which to pursue federal objectives, the disadvantages and costs of doing so must also be taken into consideration. These costs include: (1) the potential loss of state and local accountability, innovation and responsiveness; (2) the loss of the flexibility needed to accommodate the particular needs and circumstances of the various states; (3) the risk that federal action will create uncertainty and disputes regarding the scope and extent of preemption and the jurisdiction of federal and state courts; (4) the potential for overburdening federal courts with matters that may be better suited for state and local adjudication; (5) the difficulty of using centralized federal agencies to implement and enforce laws at the state and local level; and (6) the risk that political discourse will become more polarized because of the imposition of top-down mandates that may be opposed by a significant minority of states.

Although each federal undertaking must be evaluated based on the particular circumstances under which the need for action arises, as a general principle the federal government should preempt state law only to solve problems that are truly national in scope and where the national interest requires a uniform solution. Furthermore, as a general principle, state law should generally be preempted only in areas in which constitutional authority is clearly conferred on the federal government or has been historically exercised by the federal government unless there is a compelling necessity to expand federal authority, and the power to preempt state law should be exercised only to the minimum extent necessary to achieve federal objectives.

When deciding whether to preempt state law, restraint is particularly called for in areas in which the states have historically played a primary role. The Constitutional allocation of power between the states and the federal government has resulted in states assuming primary governmental authority in a variety of vital areas of governmental responsibility, thereby generating an extensive body of state law and regulations, administrative talent and judicial expertise. These areas include education, domestic relations, criminal justice, real property transactions, land use permitting and planning, commercial law, trusts and estates, contract and tort law, state and local taxation, professional regulation and licensing, and judicial and governmental administration.

Federal decision makers should also act with great care and restraint in areas in which the states have developed, or are developing, uniform state laws or regulations, have entered into interstate compacts, or have incorporated into state law the recommendations of private or quasi-public standard making
organizations. Likewise, federal decision makers should show great deference to the actions of the states in these areas and, except to the extent essential to achieve national objectives of significant priority, not take actions which supersede or undermine efforts at interstate cooperation. Similarly, careful deliberation is called for when taking federal actions which affect private rights of action arising under state law.

Where the best approach to a particular problem is to rely in whole or in part upon federal preemption of state law, it is important that the scope and extent of federal preemption be expressly and clearly articulated. While it is clear that if it is physically impossible to comply with both federal and state law at the same time, state law is impliedly preempted, preemption has also been found to impliedly arise in a variety of other circumstances. For example, preemption may occur impliedly where state law “stands as an obstacle to the accomplishment and execution of the full purposes of federal law;” when state laws are “unduly burdensome or duplicative,” “prevent or significantly interfere” with federal objectives, or curtail or hinder the “efficient exercise or other powers;” and where federal regulation of an area is “so pervasive as to make reasonable the inference that Congress left no room for states to supplement it.” While the art of political compromise may at times justify or necessitate deferring questions about the scope and extent of preemption to the federal judiciary, wherever possible, clarity and precision is preferable to ambiguity, and wasteful and unnecessary litigation to divine the intent of Congress and federal regulatory agencies should be avoided.

In situations in which it appears that some preemption is essential to achieve national objectives, but it is also appropriate to preserve important roles of state action, the federal government should consider taking action to promote and encourage interstate cooperation and cooperation between states and the federal government. For example, the federal government should: (1) create incentives for states to develop, improve, and keep up-to-date uniform systems of law and regulation; (2) consider the desirability of engaging only in “conditional preemption” by superseding state law only if the states fail to enact uniform laws or enter into interstate compacts to achieve federally desired objectives within reasonable deadlines; (3) authorize state officials to exercise concomitant responsibility to enforce and implement federal laws; or (4) grant states “primacy” to implement laws and regulations in conformity with minimum standards established by the federal government and to adopt stricter state and local standards which do not impose excessive burdens on interstate commerce.

All the states, except Vermont, have a legal requirement of a balanced budget. These requirements are instituted either as constitutional requirements, statute, executive order, or judicial decision. Actions by the federal government that impose costs on the states without reciprocal funding create financial difficulties for states attempting to balance budgets. Recognizing the burdens that federal programs can place on the ability to produce balanced state budgets, the federal government should provide funding to the states to implement new federally mandated responsibilities, and should exercise restraint in adopting new systems of taxation which impair the ability of states to continue to use their traditional systems of taxation.

While any particular President, Congress, or regime of federal administrators may strive in good faith to create a healthy balance between the exercise of federal and state powers and to minimize interference with areas of traditional state responsibility, systemic and institutionalized measures are needed to ensure that these efforts are maintained and preserved. For example, consideration should be given to: (1)

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creating intergovernmental advisory organizations dedicated to promoting and enhancing a system of cooperative federalism; (2) promoting awareness of the need to preserve a healthy balance of federal and state responsibilities by educating members of Congress, their staff members, and federal regulators about the important role played by the states in our system of government; (3) building into federal regulatory procedures and Congressional deliberations checks and balances to ensure that the proper role for state law will be fully and carefully evaluated before laws and regulations that preempt state law are proposed; and (4) incorporating into federal laws and regulations periodic requirements to re-evaluate the need for and advisability of preempting state law.

§ 5.0 International Treaties and Conventions

When the United States negotiates, seeks to ratify, or implements the provisions of international treaties or conventions, consideration should be given to using uniform state laws to implement their provisions based upon the factors set forth in § 4.0 and taking into consideration the following additional criteria:

- To what extent will treaties and conventions affect areas that are predominantly governed by state law, especially in areas in which states have widely adopted uniform legislation?

- Can state rather than federal law be used to carry out the provisions of treaties and conventions?

- Should state be given options regarding the manner or extent of implementation of treaties or conventions?

- Will the provisions of treaties or conventions affect the jurisdiction of courts or the allocation of cases between federal and state courts?

- Do treaties and conventions incorporate principles of law and equity that are primarily governed by state law in the United States and for which state courts may be better suited to provide required interpretations?

- Will implementation through state law give better notice of changes to existing law by maintaining the controlling law in one place?

- Will state law implementation better align the provisions of treaties and conventions with other state law, thereby advancing predictability?

- Will federal or state law implementation provide for a more effective “translation” of the terms used in treaties and conventions?

- Will state law implementation pose difficulties for those affected by the terms of treaties or conventions, especially parties located outside of the United States?
Discussion

When the United States seeks to negotiate, ratify and implement the provisions of international treaties or conventions, careful consideration should be given to the same types of factors that are set forth in § 4.0 of this statement and on the impact of the chosen method of treaty implementation on the balance between state and federal law. Under the Constitution, treaties ratified by the United States become the supreme law of the land. Thus, when the United States negotiates private law treaties that involve, as they often do, subjects that are currently addressed by state law, such as commercial law, family law, consumer law, dispute resolution, and judicial cooperation, the federal government creates instruments that, if ratified, may preempt existing state law and affect the allocation of power between the states and the federal government. Efforts should be made to select a method of treaty implementation that both effectively implements the treaty, thus satisfying the United State’s good faith obligation to implement the terms of a treaty that it has ratified, and that disrupts as minimally as possible the role of state law in areas governed by the treaty. When legislation is required to implement a treaty, federal legislation is not the sole available option, and it is possible to implement a treaty by a combination of federal and uniform state legislation. In this regard, there are several potential advantages of using uniform state law to implement conventions which should be considered.

Implementation using state law avoids disruptions to the pre-existing balance of federal and state law and may thereby facilitate the implementation of treaties and conventions in a manner that minimizes confusion and avoids jurisdictional disputes. If a treaty or convention is implemented through the amendment of existing state law, the process of implementation and amendment will require that those with expertise in the affected state law determine the areas of conflict and conform state law accordingly. Without state law implementation, determination of the continued validity of state law will be left to future court decisions (unless preemption provisions in federal implementing legislation are unusually clear), and will increase the risk that the effect of the convention on state law will not be interpreted and applied uniformly. In addition, the lack of meaningful participation by states in the implementation of treaties and conventions may generate political opposition to the approval of treaties which may undermine international confidence in the ability of the federal government to negotiate treaties that will be ratified by the Congress.

Cases that arise under the application of a convention may require the application of other state statutory and common law, such as the law of contract, fraud, waiver, estoppel, good faith, or equity. The states' existing network of laws may be necessary for or may affect or be affected by convention provisions. State law implementation may provide a closer alignment between the provisions of treaties and convention and other state law, thereby advancing predictability, and is more likely to assure good faith implementation without disrupting state law.

State courts and practitioners currently look to state law as the controlling law in subject areas historically allocated to the states. Implementation of treaties and conventions by uniform state law may give practitioners and others affected more effective notice of the controlling law, maintain the controlling law in one place, and ensure that existing state law and the provisions of treaties and convention law are well aligned and integrated.

When a treaty or convention that affects subject matter that is traditionally the province of state law includes terms that are not commonly used in the United States or that do not have accepted meaning in state law, implementation through the enactment of state law allows “translation” from terms used in international agreements to domestically used terms with similar meaning, but of more common usage. Because different terminology is sometimes used in different states for equivalent concepts, implementation through uniform state laws (that may be modified to comply with the terminology used in particular states) may also reduce uncertainty in the application of terms contained in treaties and conventions.
State law implementation also enhances the ability of states to adjust the application of specific aspects of a treaty or convention to new or unaddressed circumstances while adhering to the requirements of the treaty or convention. Such adjustments may be more difficult to make if Congressional action is required because Congress may lack the time, the expertise, or the information necessary to make such adjustments.

The subject matter of private international law is such that, without the existence of a treaty or convention, disputes in those subject matter areas normally would be resolved in state courts. Without the existence of a treaty or convention, federal courts generally would not have jurisdiction to consider disputes in those subject matter areas, unless they did so by virtue of the diversity of the parties, and in that case the federal courts would apply state law. Treaties and conventions that are self-executing or that are implemented by federal legislation preempt state law and create federal question jurisdiction. This additional jurisdiction increases the burden on federal courts and requires them to apply new federal law. Federal legislation, federal regulations and federal court decisions could conflict with state legislation and state court decisions, could affect the federal/state balance of power, and could decrease predictability in the implementation and application of conventions. When treaties or conventions that address subject matter that has historically been a matter of state law are implemented by state law, disputes in those subject matter areas will continue to be resolved in state courts that are familiar with those subject matter areas and that, due to their greater number and geographic dispersion, may be more geographically accessible to parties and practitioners.

The subject matter of treaties and conventions in the area of private international law is such that state agencies or administrative systems often exist to execute and administer law in areas affected by a convention. If a convention is self-executing or implemented by federal law that preempts state law, the formation of federal agencies or administrative systems may be required that duplicate existing state agencies or systems and at a cost to the federal government. Implementation through state law may avoid that duplication and cost.

§ 5.1 Methods for the Use of State Law to Implement Private International Law Conventions

When the United States implements private international law conventions, the following alternatives for using state law for their implementation should be considered:

- Existing state law can be used to implement treaties or conventions which are substantially consistent with state law, or preemption utilized only if inconsistent state laws are not modified.

- Federal appropriations can be used to fund efforts to promote the adoption of uniform state laws that implement treaties or conventions or states can be given the option to receive funding for programs relevant to the implementation of treaties or convention if uniform state laws are adopted.

- Federal legislation can be coordinated with the adoption of uniform state law to implement treaties or conventions.

- Federal legislation can be adopted which incorporates provisions of uniform state laws.
**Discussion**

Existing state law can be used to implement a private international law convention when (1) a convention has been negotiated in terms that are consistent with existing state law; and (2) states have widely enacted a uniform state law that addresses the matter or will do so.

The federal spending power may be used to create incentives for the adoption of uniform laws to implement a convention when (1) a convention is negotiated in terms that are consistent with an existing uniform state law, or the states can draft a consistent uniform state law that meets its criteria; and (2) there is a federal funding mechanism that relates to the subject matter of the uniform act that can be used to ensure that the act will be adopted by states so as to enable the United States to assure other countries, in good faith, that it will implement the convention by adoption of the uniform state law. Implementation by conditional spending requires the adoption of federal legislation requiring that states enact the text of the uniform state law or be ineligible to receive specific federal funds for programs related to implementation of a treaty or convention.

Implementation by state and federal coordinating legislation may occur when (1) a convention is negotiated in terms that are consistent with an existing uniform state law, or the states can draft a consistent uniform state law that adequately implements the convention; and (2) the federal government insists that there be federal legislation to implement the convention in the event a state does not enact the implementing uniform state law. Implementation by federal legislative coordinating legislation requires the adoption of federal legislation that preempts inconsistent state law but permits states to opt out of the preempting federal legislation by adopting the uniform state law. Implementation by coordinating federal legislation provides an excellent vehicle for permitting states to make some choices concerning whether or how to implement particular provisions of a convention.

Implementation by federal legislation incorporating, either expressly or by reference, the official text of a uniform state law may occur when (1) a treaty is negotiated in terms that are consistent with an existing uniform state law; (2) to be consistent with the treaty, no changes or only small changes in the uniform state law are necessary, and no or very limited substantive federal legislation is needed; and (3) practical considerations require some assurance that the official text of a uniform act be the implementing legislation in lieu of state enactment of a uniform act. Implementation by federal legislation adopting the official text of a uniform state law requires the adoption of federal legislation that incorporates the official text of the uniform state law.

State law is not, however, always an appropriate method for implementing private international law conventions and in some circumstances conventions may be self-executing, or may be executed exclusively through federal law.

Self-execution occurs when it is recommended to the Senate that a convention be self-executing and the Senate gives its advice and consent on that basis. Then, upon ratification by the U.S., the convention itself becomes controlling law in the U.S., without any implementing state or federal legislation.

Federal implementing legislation without state legislation should be used to implement conventions when implementing by state legislation is not feasible or practical. Federal implementing legislation may provide statutory notice of the convention and either contains some or all of the terms of the convention or provides that the convention itself is controlling law.
§ 6.0 State Responsibilities.

To improve the coordination between federal and state law, when considering the enactment or revision of state laws and regulations, states should take the following actions:

- States should take the initiative to address emerging problems of regional or national significance.
- States should avoid creating conditions which lead to federal preemption by avoiding actions that impose unnecessary burdens on interstate commerce.
- States should strive to minimize conflicts between federal and state law.
- States should participate actively in the development of federal laws and regulations.
- States should support and create institutions that represent the interests of the states and participate actively in the federal legislative and regulatory process.
- Efforts should be undertaken to promote and develop public-private and intergovernmental partnerships.

Discussion

Far too often Congress and federal agencies have felt compelled to act in a manner that preempts state law because of the failure of states to effectively address emerging issues of vital national importance. If states are to preserve and enhance their role in a healthy system of cooperative federalism, it is essential that states work more aggressively to develop solutions at the state level to issues of national concern.

State legislatures and regulatory agencies should also recognize and respect the substantial difficulties imposed upon profit and non-profit enterprises operating on a nationwide or regional basis to identify laws and regulations that differ from state to state, monitor changes in these laws and regulations, and understand how to comply with differing state laws and regulations. As a result, efforts should be made whenever possible to enact state and local laws and regulations that are reasonably uniform and for which unique state requirements can be readily and easily understood and identified.

In areas in which the federal government has exercised its authority by partially preempting state law, states should consult with federal agencies before adopting new laws and regulations in areas in which the scope of federal preemption is unclear or uncertain, and should seek to be as clear as possible about the relationship between federal and state law, so as to avoid uncertainty and wasteful controversy about the limits of state and federal law.

Frequently Congress and federal agencies take actions which interfere with state laws due to a lack of knowledge about state laws and a failure to appreciate unique state perspectives. States need to ensure that the concerns and perspectives of the states are brought to the attention of Congress and federal regulators by being well informed and active participants in deliberations and debates regarding new federal initiatives.
For the interests of the states to be adequately represented and protected, it is critical that well-financed organizations be supported and created where needed to participate on behalf of individual states in the federal legislative and regulatory process. Such organizations include the National Governors’ Association, the Conference of Chief Justices, the Council of State Governments, Interstate Compact Commissions, the National Association of Attorneys General, the National Center for State Courts, the National Conference of State Legislatures, the Uniform Law Commission, and other similar organizations. The important role of private sector national professional, business and non-profit associations in developing federal and state law should also be recognized by state governments, and state governments should actively consult with and share their concerns and perspectives with these organizations by becoming active partners where appropriate in their deliberations.

§ 7.0 Responsibilities of Citizens

Individual citizens, community groups, professional and trade associations, non-profit organizations and businesses also bear the following important responsibility for promoting a healthy and effective balance of federal and state responsibilities:

- Individuals and members of organizations should understand the role of the federal government and the states in our political system.

- Education regarding the role of federal government and the states in adopting laws and regulations should be encouraged.

- Members and representatives of organizations engaging in advocacy to influence legislative and regulatory actions should consider the importance of cooperative federalism.

- Advocacy efforts should be focused at all appropriate levels of government and efforts should be undertaken to remain informed about both federal and state legislative and regulatory actions.

- Principled positions should be taken regarding federal and state responsibilities and federal preempted should not promoted or opposed merely because it represents the most expeditious manner of achieving political objectives.

Discussion

The political process inherently involves vigorous competition among persons with differing ideologies and objectives and who seek to ensure that legislative and regulatory actions at the federal and state level promote their desired objectives. It is reasonable and proper to expect that participants in the political process will make decisions based upon self-interest. Ethical conduct by participants in the political process, however, involves more than merely a vigorous commitment to achieving particular desired goals and objectives. It also requires respect for the rule of law and a commitment to protecting and preserving the values incorporated into the Constitution of the United States, including the need to promote and maintain a healthy and effective balance of federal and state responsibilities.

Because how to maintain a reasonable balance between federal and state responsibilities is often not obvious, however, and the consequences of ill-conceived preemptive proposals may not be readily apparent, education and research how best to integrate federal and state roles is essential. Education
should focus on the historical and contemporary importance of preserving a healthy balance between federal and state law and the adverse consequences of failing to do so. Research should complement these efforts by continuously evaluating how federal and state roles are defined and how effectively and efficiently duties and responsibilities have been assigned to different levels of government.

§ 8.0 Criteria to Guide Decision Makers

All parties with responsibilities to promote a healthy balance of federal and state responsibilities should work together to identify specific criteria to guide decisions about the relative roles of the federal and state governments. These criteria should identify particular circumstances in which it is appropriate to preserve areas of the law primary or exclusive regulation by the states; address problems on a regional or national level through intergovernmental cooperation or the adoption of uniform state laws, or in which federal law should be used to either establish minimum standards for the states to or substantially preempt state law.

Discussion

To promote a more effective integration of federal and state law, before undertaking significant policy initiatives, members of Congress, federal regulators, state legislators, state regulators, members of the organized bar, professional and occupational associations, and consumer and public interest groups should attempt to identify for a particular legislative or regulatory undertaking the most appropriate manner in which to integrate dual federal and state responsibilities. In particular, efforts should be undertaken to determine when it is most appropriate to use federal law to establish minimum standards applicable to all states; when federal law should substantially preempt state law or exclusively occupy a field; and when it is best to rely upon intergovernmental cooperation to achieve policy objectives.

Some efforts to develop criteria and standards for the integration of federal and state law were begun in 1987, when President Reagan issued Executive Order 12612, and again in 1999 when President Clinton issued Executive Order 13132, both of which encouraged federal agencies to respect the role of state governments and avoid the preemption of state law whenever possible and to consult with and coordinate their actions with state officials. More recently, President Obama issued a Presidential Memorandum on May 20, 2009, directing federal agencies to review and re-evaluate the preemptive impact of all federal regulations issued within the last ten years. Pursuant to the Presidential Memorandum, the Administrative Conference of the United States on December 9, 2010, completed a review of compliance with Executive Order 13132 by federal agencies, and developed further detailed recommendations regarding procedures to be followed by agencies in adopting regulations which may expressly or impliedly preempt state laws.

Unfortunately, these efforts focus primarily on the actions of the executive branch, and primarily stress the need to preserve state autonomy and avoid preemption where possible, and provide little meaningful guidance about how to integrate the roles of the federal and state governments in areas of overlapping...

19 52 F.R. 41685 (October 26, 1987).
20 64 F.R. 43255 (August 10, 1999).
21 74 F.R. 24963 (May 22, 2009).
22 Administrative Conference of the United States, Recommendation 2010-1, Agency Procedures for Considering Preemption of State Law, (December 9, 2010).
jurisdiction. As a result, a renewed and expanded effort is required to develop a healthier balance between federal and state law and to avoid the exercise of federal authority in a manner that imposes excessive and unnecessary costs upon the economy and the political process.

Among the factors that should be considered in any such analysis are those listed below:

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<tr>
<td>The effective exercise of enumerated federal responsibilities demands that a problem be addressed uniformly and comprehensively at the federal level.</td>
<td>The establishment of minimum standards satisfies federal objectives and individual states face unique problems due to differences in environment, resources or culture.</td>
<td>A reasonable likelihood exists that uniformity or minimum national standards can be achieved through cooperative state action and full or partial preemption may generate the problems enumerated in Principle 2.0.</td>
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<tr>
<td>Prompt action is needed to address pressing national problems.</td>
<td>A lack of substantial uniformity will not create excessive burdens on interstate commerce and the interstate coordination of non-commercial activities.</td>
<td>There is a need for substantial uniformity among the states, but room for local variation occurring within a well-defined legal framework.</td>
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<td>Most states are presented with similar needs and problems.</td>
<td>There is a need for a high degree of uniformity to promote economic growth and stability and promote the development of new technologies.</td>
<td>Federal preemption may impose unfunded obligations on states and local governments that may counterbalance the desirability of national uniformity, but the establishment of minimum standards is essential.</td>
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<tr>
<td>Federal preemption may impose unfunded obligations on states and local governments to promote uniformity, but the establishment of minimum standards is essential.</td>
<td>Federal preemption may impose unfunded obligations on states and local governments and a reasonable likelihood exists that intergovernmental cooperation can successfully achieve uniformity or meet minimum standards.</td>
<td>Federal preemption may impose unfunded obligations on states and local governments and a reasonable likelihood exists that intergovernmental cooperation can successfully achieve uniformity or meet minimum standards.</td>
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<td>Interstate competition will encourage a race to the bottom or impede the attainment of substantial uniformity.</td>
<td>There is a substantial lack of consensus about the best approaches to promoting uniformity, but the establishment of minimum standards is essential.</td>
<td>It is beneficial to develop a high degree of consensus and maintain stability within the law.</td>
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<td>There is little need to frequently modify and update laws and regulations.</td>
<td>There is a need to frequently modify and update laws and regulations.</td>
<td>The costs and time required to develop an intergovernmental consensus does not outweigh potential benefits.</td>
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<tr>
<td>Federal law historically has primarily occupied the field.</td>
<td>State laws and regulations are well-developed and historically have primarily controlled the area.</td>
<td>State law historically has primarily occupied the field.</td>
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The above list represents only a partial identification of the factors that should be considered in selecting alternative models for the integration of federal and state responsibilities. More efforts are needed to more extensively identify and articulate these standards and to promote a dialogue among competing stakeholders about how to apply these factors in different subject matter areas.
Where the best approach to a particular problem is to rely in whole or in part upon intergovernmental cooperation, the role of different intergovernmental organizations should be also be carefully considered. Generally, it will be desirable to identify an appropriate lead agency to take responsibility for a particular subject matter area to minimize jurisdictional competition. Where laws and regulations are developed primarily through interstate cooperation, structures should also be developed to effectively involve federal legislators and regulators as important stakeholders in deliberations among the states.