



Uniform Law Commission

Principles of Federalism

(Approved by the ULC Executive Committee July 9, 2013)

Overview and Summary

Since the Republic's earliest days, balancing federal and state powers and responsibilities has posed a difficult challenge. 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 within the federal government.

At the same time, an increasing desire exists to preserve the diversity of our local communities. Recognition that the health of our democracy depends on the opportunity of citizens to make meaningful decisions at the state and local level is common. Fears persist of excessive concentration of federal power that may threaten basic liberties. These conflicting phenomena make it critical that a renewed effort be undertaken to develop policies, practices, and institutions that appropriately balance and efficiently integrate federal and state responsibilities.

Any effort to craft a better balance between federal and state powers must be based on a careful evaluation and understanding of our constitutional framework and the roles assigned to different units of government. 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." As the U.S. Supreme Court observed, "[t]he independent power of the states [also] serves as a check on the power of the Federal Government." *National Federation of Independent Business et al. v. Sebelius*, 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 government 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 preempt state law in order to discharge its responsibilities, except to the extent of a direct and irreconcilable conflict between federal and state law.

Historically the federal government 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 concurrent 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 freedom to experiment and innovate in the development of new policies and programs; and efficient administration is promoted by allocating to state and local agencies many responsibilities for implementing national policies.

Unfortunately, our dual system of law and regulation, if not properly balanced, can impose significant and unnecessary costs upon both levels of government and upon the private sector. If not well integrated, a dual system of federal and state law can create a complex and potentially inconsistent 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 generates 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 promote an improved balance of federal and state responsibilities by providing 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 laws and regulations.

Responsibilities of Congress and Federal Agencies

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

- Carefully evaluate the way in which state law addresses the issue under consideration;
- Determine the extent to which states face differing needs, circumstances, and requirements in responding to the issue 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 when appropriate, or create incentives for interstate cooperation;
- Exercise restraint when legislating in areas in which the states have historically played a primary role or which involve the internal affairs of state government, by taking action which preempts state law only when necessary to achieve objectives that cannot be reasonably achieved through alternative policies;
- When preempting state law other than to prevent direct and irreconcilable conflicts with federal law, specify as expressly as possible the extent to which state law is superseded or preserved;
- Avoid creation of unfunded mandates, the coercive use of federal grants and benefits, the commandeering of state resources to enforce federal law, 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, and particularly when the convention affects matters that are substantially regulated by state law.

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 in international agreements of principles that are generally compatible with existing state law in the United States, to the extent that there is a substantial body of existing relevant state law.

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 their members 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 a politically advantageous option.

Working Toward Predictable Criteria to Guide Decision Makers

In order to better determine the respective roles of various participants in the development of federal and state laws and regulations, it is 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 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.

Factors that Weigh in Favor of Federal Preemptive Law	Factors in Areas of Overlapping Jurisdiction that Weigh in Favor of Federal Law that Establishes Minimum Standards for the States	Factors that Weigh in Favor of States' Retaining Autonomy to Act
The effective exercise of enumerated federal responsibilities demands that a problem be addressed uniformly and comprehensively at the federal level.	The establishment of minimum standards satisfies federal objectives, and individual states face unique problems due to differences in environment, resources or culture.	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.
<p>Prompt action is needed to address pressing national problems.</p> <p>Most states are presented with similar needs and problems.</p>	There is a need for substantial uniformity among the states, but room for local variation occurring within a well-defined legal framework.	A lack of substantial uniformity will not create significant burdens on interstate commerce and the interstate coordination of non-commercial activities.
There is a strong need for a high degree of uniformity to promote economic growth and stability and promote the development of new technologies.	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.	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.
Interstate competition will encourage a race to the bottom or impede the attainment of substantial uniformity.	There is a substantial lack of consensus about the best approaches to promoting uniformity, but the establishment of minimum standards is essential.	It is beneficial to develop a high degree of consensus among the states and to maintain stability within the applicable state law.
There is little need to frequently modify and update laws and regulations.	There is a need to frequently modify and update laws and regulations.	The costs and time required to develop an intergovernmental consensus does not outweigh potential benefits.
Federal law historically has primarily occupied the field.	State laws and regulations are well-developed and historically have primarily controlled the area.	State law historically has primarily occupied the field.