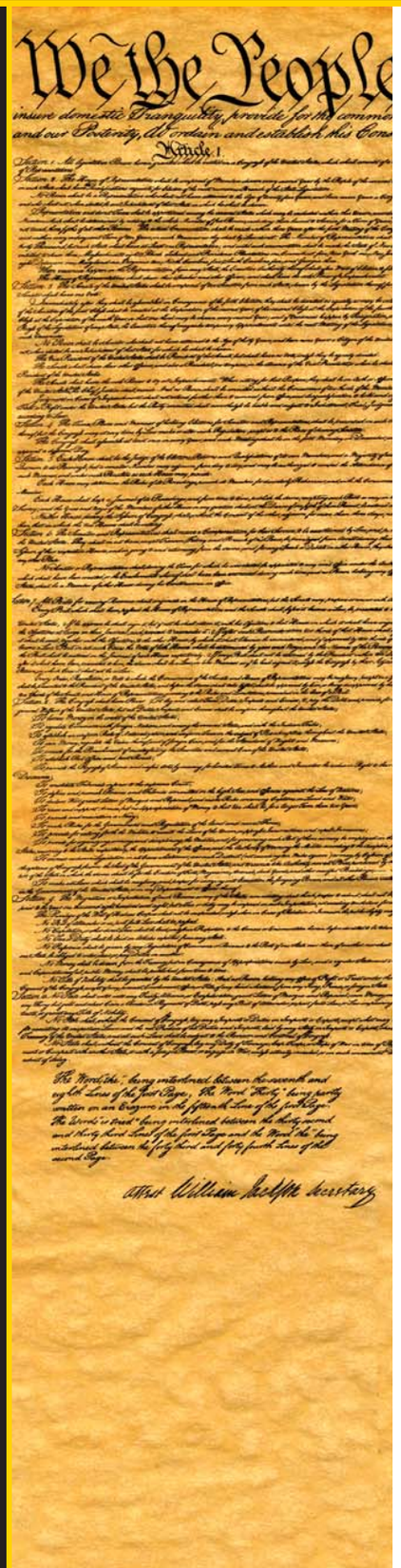
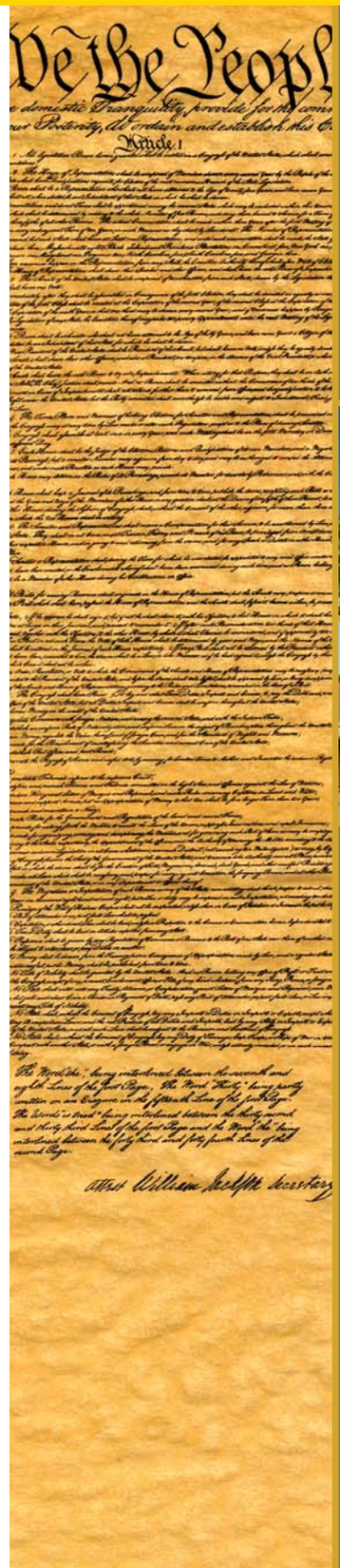
National Academy of
Public Administration

1100 New York Avenue, N.W.
Suite 1090 East
Washington, DC 20005
Phone: (202) 347-3190
Fax: (202) 393-0993
Web: www.napawash.org





A Report by a Panel of the
NATIONAL ACADEMY OF PUBLIC ADMINISTRATION
for the National Governors Association

Beyond Preemption:

Intergovernmental Partnerships to Enhance the New Economy

May 2006

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Beyond Preemption: Intergovernmental Partnerships to Enhance the New Economy

Panel
DeWitt John,* *Chair*
Carl Stenberg*
Charles Wise*

* Academy Fellow

NATIONAL ACADEMY OF
PUBLIC ADMINISTRATION

National Academy of Public Administration
1100 New York Avenue, N.W.
Suite 1090 East
Washington, D.C. 20005
www.napawash.org

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Foreword

One of the most valuable features of American federalism, and a major reason it has lasted longer than any other modern democracy, is its adaptability. With 50 laboratories of democracy in the states, and a strong central government designed to focus on needs that transcend state borders without getting bogged down in local issues, this system has been able to find ways to meet new public service needs as they have emerged over the centuries to challenge old practices that no longer work as well as they once did.

As we enter a new century, the speed of these changes is accelerating, and with them the immediate challenges facing the federal system. Since about 1965, the federal government has found itself thrust into one domestic program after another that used to be left entirely or largely to the state and local governments. And increasing numbers of these new roles for the federal government have resulted in federal preemption of state and local roles and responsibilities where the national government had not tread before. Of the 520 statutory preemptions enacted between 1790 and 2004, two-thirds occurred after 1965. Nevertheless, the state and local governments remain heavily involved in implementing many of these activities, even paying many of the costs. But, they no longer call the shots—the federal government does.

This steady 40-year centralization of authority has begun to fundamentally alter the balance in the federal system, and globalization is now pushing in the same direction. This has not been an intentional shift in governmental philosophy so much as a pragmatic, issue-by-issue response to changing conditions. And the prospect for the new century is that new technologies, globalization, and the fading of governmental boundaries in the face of borderless markets and communications networks will accelerate the forces of change—and the practice of preemption.

The Academy has been concerned about the health of the federal system since its earliest years. So, when the National Governors Association (NGA) requested that we reexamine the issue of federal preemption, we were delighted to have the opportunity. Preemption, of course, is closely related to unfunded federal mandates, the management of intergovernmental grants, and the administration of interlocked public finance systems—issues with which the Academy is also vitally concerned.

I congratulate the Academy Panel and staff that prepared this study. They did an excellent job of laying out this complex issue and recommending practical paths for our nation to explore. Although the Panel did not have resources to support new research, it reviewed the current scholarship and assembled it in a very helpful way.

The Panel and I hope this report will energize a more thorough reexamination of federal preemption and related issues. We invite comments and dialogue toward that end. And we are indebted to NGA for the opportunity help raise this vital issue closer to the top of the nation's public policy agenda.

C. Morgan Kinghorn
President
National Academy of Public Administration

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Acronyms

The Academy	National Academy of Public Administration
ACIR	Advisory Commission on Intergovernmental Relations
CBO	Congressional Budget Office
CDC	Centers for Disease Control and Prevention
CHPA	Consumer Healthcare Products Association
EO	Executive Order
FAP	Federalism Action Plan
GAO	Government Accountability Office
IPA	Intergovernmental Partnership Act
NAPA	National Academy of Public Administration
NCSL	National Conference of State Legislatures
NGA	National Governors Association
OMB	Office of Management and Budget
OTC	Over-the-counter (healthcare products)
PIRG	United States Public Interest Research Group
UMRA	*Unfunded Mandates Reform Act of 1995*

Executive Summary

The National Academy of Public Administration (the Academy) Panel on Federal Preemption prepared this paper on the current status of regulatory federalism and Congressional preemptions of state and local powers. It is intended to guide Congress, federal agencies, states, and local governments as they respond to increased pressures for preemption of state and local responsibilities.[1]

The Panel members drew upon their own many years of direct experience with diverse parts of the intergovernmental system, as well as a long history of prior and continuing Academy studies in this field. In addition, the Panel reviewed a 2000 report of the National Governors Association on a similar topic (see Appendix C); listened to diverse views from representatives of federal, state and local governments, as well as advocates for business, labor, consumer, natural resource, and environmental groups; and consulted with national experts on intergovernmental relations and preemption. The Panel also analyzed a number of articles on regulatory federalism and tracked recent court decisions on preemption. Although the Panel found substantial need for additional research on this topic, resources were not available to perform it.

Until about 1965, federal preemptions were infrequent. Then the number of statutory preemptions began to increase. Of the 520 statutory preemptions enacted by Congress since 1790, nearly two-thirds came during the past 40 years. Much of this new activity has been spurred by the advent of modern information technologies, faster and more efficient transportation, globalization, and deregulation of economic markets. Congress and state legislatures have received increasing political and economic pressures to react rapidly to proposals for facilitating the operation of nationwide and international markets, travel, and communication, using more uniform national and international standards. During the 21st Century, these centralizing forces are likely to exert increased pressures for preempting state and local responsibilities. Yet state and local governments exercise important responsibilities and play vital roles in achieving national policies and program goals. These policies and goals may be damaged by the growing use of federal preemption unless care is exercised to harness essential intergovernmental partnerships to the tasks at hand.

[1] Although the Panel did not find separate research on federal preemption of Native American tribal powers, or have resources to study them itself, the Panel notes that tribal governments often face the same issue as state and local governments. The Panel believes that the potential for federal preemption actions to alter federal-tribal relationships should not be overlooked. However, because of the distinctive nature of that relationship, the Panel believes that a separate study of those relationships is needed. Therefore, tribal preemption is not addressed in this report.

For this report, the Panel defined preemption as actions of the national government—by Congress or federal agencies—which would either (i) substitute nationwide policies and programs for those of states and localities; or (ii) prohibit states and localities from exercising certain powers that have previously been their responsibility. Part I of this report presents the Panel's findings and recommendations, which are designed to develop more effective intergovernmental partnerships as an alternative to unilateral, disruptive, and counterproductive federal preemptions. Part II presents the Panel's background considerations and accompanying analyses that support the findings and recommendations in Part I.

Part I—Findings and Recommendations

In reviewing available information on federal preemption and related issues, the Panel found that the use of this tool of government has risen very substantially over the past 40 years and is likely to continue rising. But, alternatives to preemption exist and should be used more because of the benefits they offer. Unilateral federal preemptions are shifting power away from the state and local governments, undermining their ability to contribute most effectively to the achievement of national goals, and putting them increasingly in a severe fiscal bind.

The Panel's blueprint for reversing this dangerous trend centers on more fully assessing alternatives to preemption and choosing to use those that emphasize intergovernmental partnerships as much as possible. For this approach to succeed, the capacity to perform federalism assessments that fairly and precisely compare the alternatives is desperately needed—including much improved intergovernmental data and research. The following Panel findings and recommendations support this blueprint.

Panel Findings

Finding 1: Rise in Federal Preemption. Federal preemption of state and local responsibilities has grown rapidly in the past 40 years and will likely continue to grow.

The number of federal preemption statutes enacted during this period amounts to nearly two-thirds of all such laws enacted since 1790. And the purposes of preemption have also broadened during this period. Instead of mostly interstate commerce, the purposes are now a stronger mix of health and safety, banking and finance, civil rights, natural resources, and other. And continuing shifts can be expected as international pressures become more dominant.

Much of the current pressure for these uniform laws, rules, and standards is coming from proposed needs to facilitate business operations and protect consumers across multiple political borders, and these standards often can be most easily and quickly adopted by Congress or through international treaties negotiated by the federal government. When this happens, any inconsistent state and local provisions are preempted—often forever. National lobbyists for business, labor, environmental, civil, and other rights often have had greater influence in supporting uniform national standards than have the countervailing lobbyists for federalism principles. At the same time that Congress has been preempting state and local responsibilities, it has been deregulating the private sector and offering businesses more incentives for flexibility in their operations.

New technologies and globalization appear very likely to continue to strengthen pressures in this same direction.

Congress has little or no access to independent analysis of proposals to create new uniform national standards and the resulting adverse impacts that such standards may have on state and local governments. Thus, preemptions are being enacted more as a result of political pressures than as a result of balanced analyses of competing needs.

Finding 2: Centralization of Power. Increased use of federal preemptions has already caused a significant shift in the balance of powers and responsibilities within the intergovernmental system. The more it occurs, the more the federal government unilaterally substitutes its will for the self-determination of the state and local governments.

This trend toward centralization is a cause for concern, because it under-values the benefits that can be added to many regulatory programs and policies by intergovernmental partnerships between the federal government and the state and local governments, and it restricts their discretion to use existing or improved methods to meet implementation requirements for which they often become responsible—financially as well as programmatically. In this situation, the preempted governments are particularly concerned about federal limits placed on their revenue-raising abilities. Caught in this tightening squeeze, the state and local governments are increasingly feeling a loss of control over their own destinies.

Finding 3: Undermining Service Capacity. Unilateral federal action undermines the federal system's overall capacity to make programs work better, because it reduces the ability of state and local governments—and incentives for them—to experiment with new ways to implement programs. In most cases this is a serious matter, because participation by the state and local governments is vital to the success of the federal program. "New-style" federal preemptions that set maximum rather than minimum levels of attainment are especially damaging to state and local innovation because of the arbitrary limits they create.

Although federal preemptions for the purposes of securing greater uniformity—to minimize business costs or satisfy needs for uniform consumer, health, safety, and environmental protections—may appear particularly apt, they may not always be necessary. Alternatives to preemption may be able to engage the full capacities of federal, state and local governments in more effective approaches to delivering public services, programs, and policies. Federal preemptions—and unfunded mandates—may ignore or fail to develop these capacity-building essentials. Many of the most effective innovations adopted by the federal government were first developed and proven by other governments; air quality and coastal protection standards are examples. Program-by-program analysis is necessary to compare alternatives and determine the most balanced and beneficial approaches.

Finding 4: Rising State and Local Fiscal Squeeze. State and local, governments are increasingly being placed in the position of having to cover very substantial and growing proportions of the costs of federal programs. They take very seriously any limits on their revenue systems and demands on their expenditures resulting from unilateral Congressional preemptions or unfunded mandates that intensify the squeeze they experience between revenues and spending.

The federal government is contributing to the growing structural imbalance in state and local budgets and the worsening prospects of these governments for achieving financial sustainability (NAPA November 2005). These governments have much less ability than the federal government to overcome such imbalances except by making unpopular—and arguably damaging—cuts in public services. The fiscal issues at all these levels of government are so intertwined that no single level—including the federal government—can resolve them on its own.

Finding 5: Options for Joint Action. Joint state and local action can also achieve nationwide goals.

Federal preemption of state and local powers is only one of several tools for implementing nationwide policies and programs. Until recently, the most common way to engage state and local governments in national initiatives was by imposing conditions on federal funding of intergovernmental grants, loans, loan guarantees, and cooperative agreements. Those tools often have been effective in establishing federal standards and engaging other levels of government in their administration.

This approach relies on the federal government's Constitutional spending powers rather than on preempting state and local powers without compensation. But, as federal budgets for domestic programs have been stretched thinner, Congress has increasingly relied on unfunded mandates and preemptions to achieve national goals while reducing or disavowing federal financial responsibility.

In doing so, Congress and federal agencies often disregard readily available alternatives that could engage states and localities in more effective and less repressive intergovernmental partnerships with the federal government. Alternatives include:

- Partial preemptions
- Federal-state performance partnerships
- Uniform state laws
- Interstate compacts
- Federal incentives to encourage consistent state action

The common theme among these alternatives is the idea of intergovernmental partnerships, which can be sustained through multilevel consultations and agreements, but which are endangered by unilateral actions. Each level needs the others to be fully successful, so accommodation, cooperation, and coordination are generally better strategies than one level acting alone.

In assessing these possibilities for fuller intergovernmental partnerships, the alternatives to be considered could include such other commonly used tools of government as grant conditions, partial and conditional preemptions, cooperatively arrived at standards, and minimum standards. These tools generally allow greater ability to take advantage of the special contributions of the various governmental partners. Without comparing the advantages and disadvantages of these alternatives, it is unlikely that Congress will enact the most beneficial proposals.

Finding 6: Capacity to Perform Federalism Assessments. Existing intergovernmental data and research are not adequate to support fully developed assessments of the alternative tools of government that might be used instead of federal preemptions.

A small investment in improving the Census of Governments, encouraging the Government Accountability Office's (GAO) reestablished program of intergovernmental studies, building upon Congressional Budget Office's (CBO) fiscal notes work in support of requirements in the *Unfunded Mandates Reform Act of 1995* (UMRA), and other similar efforts could go a long way toward establishing a more adequate capacity to perform reliable and practical federalism assessments. Every federal agency with intergovernmental responsibilities currently has federalism assessment responsibilities, but needs help to understand and meet those responsibilities. Census funding has steadily declined for many years, and its results are released later than before. No organization is now producing the types of combined, consistent intergovernmental data formerly produced by the Advisory Commission on Intergovernmental Relations (ACIR). Long-standing special surveys—vital for state and local planning purposes such as the National Personal Transportation Survey—are proposed for elimination, and GAO has found that federal agencies seldom prepare required federalism assessments (Stevens 1999).

Thus, even as the nation's technological capacity to produce and analyze data is leaping ahead, data collection and analysis is not being effectively applied to the intergovernmental sector. Existing federal organizations are not filling this growing gap.

Panel Recommendations

The Panel believes that federal preemptions should be used as seldom as possible, and only as a last resort because of their permanence and their high potential for adversely impacting state and local governments, as well as the lost opportunities for partnering that they represent. Alternative models of response should be carefully evaluated to determine the best role for each level of government to play in governing and delivering public services. And Congress and federal agencies should appreciate and respect the need for balance between nationwide uniformity and creative diversity.

The Panel also believes that a new spark is now necessary to ignite a fire for driving this issue to a higher level of concern and action. The Panel's recommendations outline a strategy for moving forward to achieve the essential goal of building dynamic new intergovernmental partnerships that can respond effectively to the demands of the 21st Century.

Recommendation 1: A New Strategy. Changing times call for rethinking traditional strategies and conceiving new ideas. Thus, the Panel's new strategy follows a blueprint for more dynamic intergovernmental partnerships that can build upon the traditions of federalism to meet new, unforeseen demands as they come into play in the new century.

This strategy includes a new Intergovernmental Partnership Act (IPA) enacted by Congress, and a Federalism Action Plan (FAP) powered by the national associations representing the state and local agencies. The new IPA and FAP would work together to create a new approach for increasingly effective intergovernmental cooperation and partnerships.

Recommendation 2: A National Dialogue. The Panel recommends that the National Governors Association, the National Conference of State Legislatures, and other public-sector interest groups consistently and effectively support a concerted call for official hearings to be held at the Congressional, state, and local levels to engender serious discussions of the role of federal preemption in the past, present, and future—in the context of alternative tools of government.

What the U.S. really needs is a practical, workable approach to sharing powers among federal, state and local governments. In the Panel's view, the fine points of intergovernmental tax and regulatory frictions are hard for most people to understand; and public attention to these issues rarely rises to a level that can compete with their more fundamental economic, health, safety, financial, and consumer concerns. Thus, the Panel believes that federalism issues need to be framed in more understandable, less complex terms.

Hearings on this issue should focus on specific intergovernmental practices and impacts that the nation:

- experienced in the past
- is experiencing now
- would benefit from most in the future

The hearings should be as inclusive as possible—with testimony from state, local, and tribal officials most directly affected by federal preemptions, as well as from representatives of business, labor, consumer, environmental, and other interest groups that may be involved or affected—and the agenda should include drafting a new Intergovernmental Partnership Act and an effective Federalism Action Plan.

The most important purpose of these hearings is to create a high-level national dialogue to elevate this issue to the top of the national public policy agenda.

Recommendation 3: Federalism Assessments. The Panel recommends that Congress and federal agencies increase their commitment to prepare and their capacity to use actionable intergovernmental assessments. These assessments should evaluate options and provide rational criteria for making decisions that will reduce or avoid unnecessary and undesirable intergovernmental consequences and costs.

The Panel's research uncovered very little evidence that Congress or federal agencies are either preparing or using the assessments of intergovernmental impacts required by the *Unfunded Mandates Reform Act of 1995* and Executive Order 13132 on Federalism. Without the capacity and commitment to implement them, these requirements are ineffective.

The Panel believes that an assessment of intergovernmental impacts should be prepared and considered by Congress and federal agencies whenever a federal preemption is proposed and before it is adopted in a statute or rule. Moreover, each assessment should evaluate the pros and cons of using alternative intergovernmental approaches—such as grant conditions, partial and conditional preemptions, cooperatively developed standards, and minimum standards.

Recommendation 4: Intergovernmental Partnership Act. The Panel recommends that Congress adopt a new Intergovernmental Partnership Act that would establish procedures and technical capacity for Congress and federal agencies to prepare intergovernmental assessments and to use them in developing and implementing federal program policies. This act should also broaden the applicability of UMRA, specify procedures for imposing preemptions, and require soundly researched reviews of future preemptions.

The Panel believes that UMRA and the Executive Order on Federalism provide good starting points for building more effective intergovernmental partnerships. Both already include some level of assessment for the impacts of preemptions, but both need to be improved. This new legislation should provide the following improvements for consideration by the Administration and Congress.

i. Title I of the IPA should reexamine and strengthen the processes by which Congress and the federal agencies draft and approve bills that may have significant intergovernmental implications. This effort should specifically consider broadening the scope of programs covered by UMRA and tightening the rules for overriding bills that contain preemptions or unfunded mandates.

ii. Title I of IPA should require any law containing a preemption to (i) declare explicitly Congress' intent to preempt and (ii) establish a specific, appropriate deadline for the preemption to expire—a "sunset" clause—unless Congress prepares a new intergovernmental assessment and either modifies or reconfirms the preemption before it expires.

iii. Title II of IPA should require similar assessments of the intergovernmental impacts of any proposed federal rules.

iv. Title III of IPA should designate the entity specifically responsible for preparing the non-financial element of intergovernmental assessments for Congress and give this entity access to adequate statistical resources from the Census and from other appropriate federal, state and local agencies as may be necessary to document and support these assessments.

v. Title III should further require that Congress and federal agencies adopt practical methods for intergovernmental consultation during the preparation of intergovernmental assessments.

These provisions are intended to require that Congress and federal agencies explicitly and seriously consider realistic alternatives before imposing further federal preemptions, and revisit their preemption decisions periodically. Although these provisions have been proposed in prior years, and not accepted, the Panel believes they are so important to the long-term effectiveness and efficiency of American federalism that they should be given further consideration. Additional work should be done to recognize and accommodate legitimate objections to them.[2]

[2] It should be noted that a sunset provision has been included in the Internet tax preemption legislation, and has triggered renewed debate periodically. The Panel believes that these debates have been valuable.

Recommendation 5: Federalism Action Plan. The Panel recommends that the national associations of state and local officials work together to create, adopt, and consistently promote a Federalism Action Plan for the new century.

The national associations of state and local officials are key to any effort to strengthen the role of their governments in the federal system. If they do not take on this task and stick together to form a strong and lasting coalition for this purpose, no one else will. They will need to increase their strength in advocating their case for equal partnership with the federal government relative to the many interest groups and other forces that are supporting increased centralization.

The body they would form to coordinate this process could also become a permanent conduit through which Congress and federal agencies can consult more effectively and efficiently with state and local governments in developing the intergovernmental assessments required by the IPA, as well as for other purposes such as demonstrating the feasibility and effectiveness of intergovernmental networks, uniform laws, and interstate compacts in achieving national goals.

Business interests have often been successful in promoting self-regulation as an alternative to federal action. Similar initiatives by state and local governments should be explored.

FAP should establish a process for ensuring that model state laws are revisited periodically, so states can determine whether their model laws need to be updated or are still appropriate for addressing the many new policy issues that will be generated by globalization, technological advances, and deregulation.

Recommendation 6: Federalism Research Agenda. The Panel recommends that the federal government and a coalition of state and local government officials support development of a Federalism Research Agenda.

During its work on this report, the Panel continually found that the information it needed to precisely define and illustrate the trends and cases it was reviewing was incomplete, outdated, episodic, or absent. Although several scholars and research or academic organizations continue to pursue relevant work (as referenced elsewhere in this report), there is currently no lead organization or clearinghouse for intergovernmental statistics and studies. The U.S. Census of Governments has

been diminished in recent years, and no one has filled the regular statistical reporting and analytical and policy development roles once filled by the U.S. Advisory Commission on Intergovernmental Relations.

The Academy is assembling a federalism research agenda, with the cooperation of representatives from other interested organizations. However, no funding sources have been identified to pursue it in a systematic, sustained manner. The current lack of long-term data sources and intergovernmental analysis provides an inadequate basis for preparing credible federalism assessments of the type the Panel believes necessary to support an appropriate rebalancing of the federal system. Without better data and research, it will be difficult to moderate the current drift toward greater concentrations of policy making in the federal government.

Part II—Background Report

This part of the Panel's report has four sections. The first section sets the stage for examining intergovernmental partnerships and federal preemptions by:

(a) Describing how the major forces pressing on our current system of governance reinforce centralization tendencies

(b) Laying out the Constitutional framework of federalism that allows forces of centralization and decentralization to compete with each other

(c) Examining the benefits provided for achieving national goals when state, local, and tribal governments join federal agencies in effective partnerships

The second section compares complete federal preemption of state laws or policies with alternative programs or models—tools of government—that Congress or federal agencies might use to develop more effective partnerships with states, localities, and tribes to reach the same goals more effectively and with less intergovernmental friction. These options would encourage Congress and federal agencies to benefit from the other governments' participation in policies and programs designed to achieve national goals. This section also proposes criteria for analyzing these alternatives and making choices among them that would take greatest advantage of intergovernmental partnerships.

Section 3 sets forth federalism principles and criteria, and examines how Congress and federal agencies could use them to prepare federalism assessments that would identify the most effective use of partnerships among federal, state and local agencies in lieu of new preemptions. This section also provides checklists of questions for members of Congress, their staffs, and federal agency officials to ask when developing programs, rules, or policies that involve intergovernmental issues.

Section 4 explores various state options for initiating their own actions that could reduce pressures on Congress or federal agencies to use the preemption option. This final section also provides a checklist of questions for state officials to consider when developing uniform, multi-state approaches to new or changing policy areas.

Section 1: Major Forces Transforming American Governance

The Academy Panel found that the forces of new technologies—especially the Internet—plus globalization and deregulation of the economy are driving broad changes in American governance. Legislatures and government agencies are reacting to, not leading, these changes.

Commercial markets and the Internet are playing off one another. Both now easily cross interstate and international boundaries to create increasing worldwide pressures for government action. Bilateral or multilateral trade agreements and treaties are emerging to magnify these pressures at national and international levels. These negotiations often do not involve sub-national governments, even though they may have significant impacts on state and local laws, policies, and programs.

In the U.S., more effective intergovernmental efforts are especially essential for addressing this transformation, but they should be based on the fundamental framework of our Constitution. This section briefly outlines these issues and summarizes our Constitutional framework. It then examines the strengths that state and local governments can bring to the bargaining table for discussions with Congress and federal agencies. In this manner, they can jointly develop workable, intergovernmental methods for sharing power and delivering governmental services through effective partnerships.

Implications of Global and Technological Pressures on States and Localities

Increasingly, powerful multi-national corporations that are energizing the nation's new domestic and international markets view barriers to growth of interstate and international markets as governmental interference. They often exert considerable pressure to reduce barriers they perceive would hurt them and to support tariffs, regulations, and taxes that would benefit them and protect them from competition in various markets. They also involve themselves with non-tariff barriers to trade involving a wide array of state and local laws and regulations that will be coming under assault via the World Trade Organization and trade agreements in the upcoming decades.

In addition, for many years Congress has refused to help states collect sales taxes on goods bought elsewhere but shipped to customers in a state with a sales tax. For example, Congress recently renewed for another three years the prohibitions on state and local taxation of the Internet service providers and transactions that take place on the Internet (Reuters, November 20, 2004). As a result, states and local governments cannot collect significant revenues from these sales. This loss affects 45 states and the District of Columbia that all depend heavily on sales taxes to fund government services.

A 2004 study conducted by Donald Bruce and William F. Fox at the University of Tennessee's Center for Business and Economic Research estimates the losses in FY 2003 to be $236.3 billion in Internet sales, which amounted to an estimated $15.5 billion in lost tax revenue; by 2008, the state and local tax revenue losses are expected to climb between $21.5 billion and $33.7 billion (Bruce and Fox 2004).

One bright spot in the most recent renewal of the Internet taxation legislation is the exclusion of taxes for services that bundle telecom and Internet technologies—since telecom services have long been taxable by state and local governments.

This federal restriction on sales taxes is becoming an increasingly important source of intergovernmental friction as untaxed Internet markets expand while traditionally taxed on-site retail sales significantly decline.

At the same time, recovery from the economic recession has been uneven, and many other factors have made local revenues increasingly unstable. Even the states are losing some control of many spending decisions due to other federal actions (NAPA 2005). Structural imbalances between revenues and expenditures are becoming increasingly obvious at all levels of government in the United States (NAPA 2005). These changes in the U.S. economy and new relationships with the federal government are also making it increasingly obvious that the nation needs to restructure its current public revenue systems (Tannenwald 2004).

Private businesses understandably prefer to comply with single, streamlined tax and regulatory structures. Thus, they support uniform national standards and international treaties to achieve these simplifications. Although industry's support for deregulation of various markets is not surprising, the chief consequence is increased federal regulation or control of the activities or powers that states and localities have traditionally exercised.

In theory, political remedies are available to state and local governments by intervening with the Congress when it considers legislation or with the President when he negotiates treaties. But the influence of state and local governments seldom matches that of the private sector, as documented in a study of how bills on federalism fared in the last Congress (Dinan 2004).

On the other hand, consumer, environmental, labor and other public interest groups care more about raising standards to achieve greater fairness and protection of health, safety, finances, and environment or extending coverage to more consumers and workers. These groups have been effective advocates in preemption debates (Dinan 2004). They have supported federal preemptions and mandates to maintain standards that are stricter than state or local rules, but they have also objected to preemptions that would restrict the ability of states or localities to exceed federal standards (Cassady 2004).

There has also been a strong trend to federalize criminal law in recent years, generally to increase and standardize sentencing.

Constitutional Framework for Addressing State and Local Needs

The federal government's powers are limited to items enumerated in the Constitution, so regulating interstate commerce and adopting international treaties are clearly federal responsibilities. As shown in Table 1, interstate commerce is a power listed in Article I, Section 8 of the Constitution; and Article II, Section 2 authorizes the President to negotiate international treaties, which are then adopted with the Senate's advice and consent. As markets become more interstate and international, Congress and the President are being pushed to exercise their Constitutional powers to centralize rather than share federal power with state and local governments.

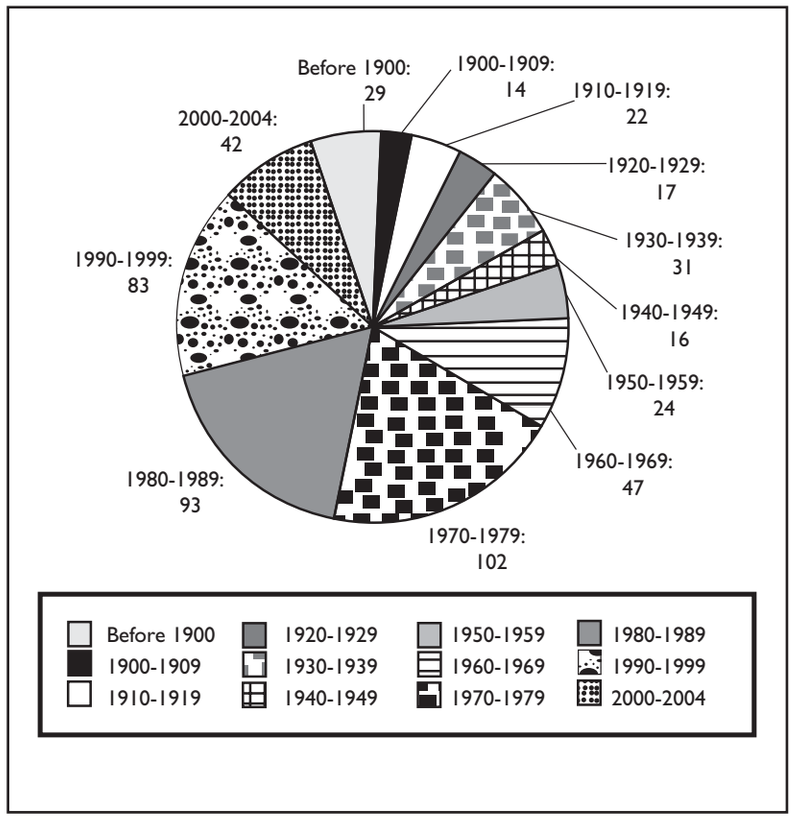
Table 1
Summary of Federalism Provisions in the U.S. Constitution

Powers of the Federal Government	Powers Reserved to the States or to the People (Amendment X)
Article I, Section 8: Congress has power to make laws needed to implement the following matters: • Create money and punish counterfeiting • Collect taxes and other forms of revenue • Borrow money (including income tax, Amendment XVI) • Provide common defense, declare war, etc. • Establish and support military forces • Coordinate state militias (National Guard) • Spend for the general welfare • Regulate interstate, foreign, and tribal commerce • Regulate bankruptcies, weights, and measures • Provide copyrights and patents • Provide for immigration and naturalization • Establish post offices and post roads • Provide federal courts • Legislate for the District of Columbia Article II. Section 2: President's power, with advice and consent of the Senate, to make treaties Article III, Section 2: Jurisdictions of the federal courts Article IV, Section 1: The "public Acts, Records, and judicial proceedings" of each state are valid in the other states (such as births, deaths, marriages, divorces, drivers licensees, and many more). Article IV, Section 2: "The Citizens of each State should be entitled to all Privileges and Immunities of Citizens in the several States." Also provides for extradition of persons fleeing from justice, back to the state having jurisdiction. Article IV, Section 3, Clause 2: Administration of U.S. territory and property Article VI, Clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."	All powers not delegated to the national government by the Constitution (see first column) All powers **not prohibited** to the States by the Constitution, such as those enumerated (prohibited) in Article I, Section 10: • Make treaties, alliances or confederations • Tax imports (with some exceptions) • Tax tonnage, without the consent of Congress • Coin money • Impair contracts • Grant titles of nobility • Keep troops or warships in peacetime, unless approved by Congress (subsequently modified by Amendment II) • Engage in war unless invaded or approved by Congress • Make compacts and agreements with other states and nations, unless approved by Congress • Pass bills of attainder Abridgment of Rights and Freedoms Prohibited: • Freedoms of religion, speech, press, and assembly (Amendment I) • Freedom to petition for redress of grievances (Amendment I) • Freedom to bear arms (Amendment II) • Freedom from unreasonable searches and seizures (Amendment IV) • Proper judicial procedures (Amendments V-VIII) • Slavery prohibited (Amendment XIII) • Dual U.S. and State citizenship, with guarantees of due process and equal protections of law (Amendment XIV) • Voting Rights (Amendments XIV, XV, XIX, XXIV, XXVI)

ADAPTED FROM: Commission on the Bicentennial of the United States Constitution, *The Constitution of the United States* (1988). This table is intended to be illustrative, rather than exhaustive or precise. Although these provisions leave a very wide range of governmental powers and responsibilities open to exercise by the state and their political divisions, the boundaries are not always clear. Interpretation by the courts and clarifying legislative acts are often needed.

Nevertheless, the Constitution does not require Congress, the President, or federal agencies to preempt state powers. Indeed, until about 1965, preemptions were very infrequent, but then the number of statutory preemptions began to increase. As Figure 1 shows, Congress has enacted 520 statutory preemptions since 1790; and Congress has adopted nearly two-thirds of them during the past 40 years.

Figure 1
Federal Preemption Statutes Enacted from 1790-2004 (520 total)*



* Several statutes were subsequently repealed

SOURCES: U.S. ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, A-121 (1992) p. 9; Zimmerman, "The United States Federal System: A Kaleidoscopic View" (November 2004); Zimmerman, "Congressional Preemption: Regulatory Federalism" (September 2004).

Table 2 further shows that roughly 40 percent of the preemptions adopted through 1991 focused on various ways to regulate commerce. Other policy areas where Congress enacted preemptions in declining order by number of laws through 1991 include:

- Health and safety
- Banking and finance
- Civil rights
- Environment and natural resources
- Taxes
- Other miscellaneous powers

Table 2
Categories of Federal Preemptions from 1790-1991

Type	Number	Percent
Commerce	176	40
Health & Safety	113	26
Banking & Finance	50	11
Civil Rights	33	8
Environment and	27	6
Natural Resources	21	5
Taxes	19	4
Other	--	--
Totals	**439**	**100**

SOURCE: U.S. ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, A-121 (1992).

Governors and state legislatures sometimes support federal preemptions. Two recent examples of preemptions supported by states are portability of individual and family health insurance from one state to another, and cross-checking licenses of truck drivers so that they cannot simply obtain a new commercial license in another state after losing one in another state. Governors also supported most aspects of the North American Free Trade Agreement and the General Agreement on Tariffs and Trade, but they opposed

provisions downgrading the status of state laws from the legitimate exercise of state power and converting them into punishable trade barriers.

Other recent preemptions that Governors have opposed include:

- Loss of prior state authority to regulate nationally traded securities and large investment advisors
- The prohibition of class action lawsuits in state courts even when based on violations of state laws
- Loss of state regulatory authority over pesticides used in the shipping, handling, and production of food
- Loss of regulatory authority over local telecommunications services
- Giving the Federal Communications Commission authority to override state and local zoning restrictions on locating television antennas, wireless transmission towers, and small satellite dishes
- Loss of ability to tax satellite television services and Internet transactions
- Questioning state ability to regulate powerline locations, waste site clean-ups, emergency responses at chemical facilities, and transportation of hazardous materials

In judging the constitutionality of federal preemptions, federal courts have traditionally taken the view that a preemption of state or local powers is not effective unless Congress has explicitly stated its intent to preempt in the legislation, or unless the contested state or local laws clearly contradict federal law (Preemption Working Group, March 2004). Although this position shows considerable deference to protecting state powers, as provided by the Tenth Amendment to the Constitution, simply clarifying its intent to preempt is often all Congress must do to resolve an issue in favor of federal intervention.

The courts have begun to impose a few limits on Congress' increasingly broad interpretations of Commerce Clause and attempts to exert wide-ranging federal powers. Since 1995, the Supreme Court has declared that possessing a gun within 1,000 feet of a school is not an activity of interstate commerce that can be federally regulated, nor is gender-motivated violence (Preemption Working Group, March 2004). However, the reach of these decisions has been cast into doubt by the Court's recent ruling that the cultivation of marijuana for medicinal purposes could be deemed to affect interstate commerce and therefore must be regulated by Congress (Gonzales v. Raich, 125 S. Ct. 2195, June 6, 2005).

Perhaps the Supreme Court's clearest limits on Congress' power to preempt states have been expressed in recent litigation over attempts to coerce states into performing federally-mandated duties. These cases include conducting background checks on handgun purchases (1997), regulating the disposal of radioactive wastes (1992), and assistance to schools for removing lead from their drinking water fountains (1997) (Preemption Working Group, March 2004).

Alternative Methods for Achieving National Purposes

In many cases, Congress and the President have other means of achieving national goals without preempting state, local, or tribal powers. Other methods for adopting nationwide policies or programs while sharing powers across levels of government include:

- **Partial preemptions** that provide for optional state enforcement of minimum federal standards, sometimes including options for flexible enforcement methods and/or state authority to voluntarily exceed minimum federal standards
- **Federal-state performance partnerships** in which states or localities reach advance agreements with federal agencies to produce specific program results, instead of rigidly prescribed rules or standards for administering federal policies or programs (NAPA 1997)
- **Uniform state laws**, model state legislation, and/or model codes and ordinances to produce simpler, more uniform yet widespread control of behaviors by regulated entities without federal intervention (Council of State Governments, revised annually)
- **Interstate compacts** to effectuate joint state and local action across broad geographic areas—such as major river basins and electric power-grid regions—with or without direct federal participation
- **Federal incentives to encourage consistent state action through** the use of interstate compacts and agreements, uniform state laws, or other similar mechanisms for joint or multi-state action

These approaches to intergovernmental partnership and power sharing are all tried and tested, at least to some extent; and most have been used extensively. They provide a wealth of experience that can be built upon, refined, and made increasingly effective as Congress, federal agencies, states and localities gain additional experience in applying them.

A new yet rapidly emerging model for delivering government programs or services is based on networks that can tie together or link all the key players needed for a program across any relevant geographic area (Wise 1990; Goldsmith and Eggers 2004). The networked "area" may be as small as a single locality, or as large as metropolitan, statewide, multi-state, national, or international.

A current example is the "small world" network established by the U.S. Centers for Disease Control and Prevention (CDC) to track Severe Acute Respiratory Syndrome and anthrax outbreaks (Gerberding 2004). In almost real-time, this network links national, state, and local health departments—worldwide—as well as public and private schools, hospitals, clinics, doctors' offices, and other potential places that might detect diseases before they spread. Early detection then enables early response and increases opportunities to limit the extent of outbreaks, whether from natural causes or acts of bioterrorism.

Of course, such a large and far-flung network requires a new management concept called "commanders intent" (Gerberding 2004, p.11). This statement of intent must be so well thought out, so clear, and so well communicated throughout the network that all the sub-managers—wherever they may be located—will be able to make the necessary and appropriate decisions at their own level without having to wait for approvals to be issued elsewhere along the chain of command. This practice is essential to avoid gridlock in managing large, dispersed systems like these small world networks.

Benefits of Intergovernmental Partnerships

Robust state, tribal, and local roles in shaping, implementing, and influencing national and international policies and programs are essential for making the American system of federalism more effective, efficient, flexible, and accountable. Table 3 arrays some generalized comparative advantages that state and local governments bring to the overall effort. Although one reviewer of this report commented that this table is over-simplified and contains information that could be disputed in particular cases, the Panel believes it provides helpful hypotheses that should be explored when analyzing preemption proposals.

Table 3
Complementary Government Roles in the U.S. Federal System

Predominant Characteristics	Federal Government	State and Local Governments
Most Important Purposes	▪ Nationwide policy ▪ "Wholesale" allocation of national resources ▪ Making regulations and setting national standards ▪ Equity across entire population	▪ Adjusting broad policies to local customs and needs ▪ Flexibility in applying standards ▪ Allocation of state and local resources ▪ "Retail" delivery of services (including case work) ▪ Uniform enforcement of national rules and standards ▪ Experimentation and innovation in strengthening standards beyond national minimums ▪ Creating new standards to fill gaps or to be models for national standards
General Orientation	▪ National consensus ▪ Lowest common dominator ▪ Program-oriented ▪ Systems-oriented ▪ Efficiency of expenditures ▪ Research and development	▪ Customer-oriented ▪ Effective service delivery ▪ Focused on producing results ▪ Innovate and experiment with best means of implementation ▪ Closer to the people ▪ More aware of public pulse ▪ Involving public is easier and more practical
Coordination and Simplification	▪ Very slow and difficult, largely due to size, diversity, and organizational complexity ▪ More layers of management, policy making, and approvals ▪ Acute program stove-piping ▪ Narrower spans of control by operating employees	▪ Smaller, potentially more nimble organizations ▪ Fewer layers; quicker action ▪ Broader spans of program responsibilities, enabling better coordination and integration
Accountability	▪ A higher level of abstraction ▪ More indirect, especially for intergovernmental and third-party delivery programs	▪ More direct ▪ Results-specific

SOURCE: Compilation by Academy staff

The subnational governments provide public services and benefits that the federal government alone cannot deliver. And the reverse is true as well. State and local governments cannot effectively provide many of the basic programs and services that the federal government does well. So, intergovernmental partnerships make good sense for all parties.

Intergovernmental partnerships are similar to wholesale and retail relationships in business. The federal government focuses on the nation as a whole, while state, tribal and local governments focus on delivering services directly to their people.

Congress and federal agencies focus on designing large-scale programs, allocating national resources in rough proportion to public and program needs, setting nationwide standards, and achieving system-wide efficiencies. Meanwhile, state and local governments are more likely to experiment with how to make the programs actually work in specific situations that often differ in important respects from the more generalized assumptions the Congressional or federal agency program managers had in mind.

State and local governments often must translate broad national policies and programs into customer-oriented results on the ground, and they often are more effective and efficient. Because their employees come in close contact with members of the public and other beneficiaries when delivering government services, public involvement is more practical for them. As a result, they may be more in tune with the pulse of the individuals or businesses who use or consume public services.

These generalized differences in roles are evident in how the various levels of government staff their public programs. Table 4 shows the relative numbers of employees in six functions, analyzed originally for their relevance to Homeland Security issues (Beaumont and McDowell 2004). The federal share of employees ranges from near zero to about 20 percent, while the state and local shares range between 80 and 100 percent.

Table 4
Percentages of Employees Working in Some Government Functions

Function of Government	Federal Employees	State and Local Employees
▪ Health	▪ 20 percent	▪ 80 percent
▪ Hospitals	▪ 15 percent	▪ 85 percent
▪ Police	▪ 10 percent	▪ 90 percent
▪ Fire	▪ (very small)	▪ 100 percent
▪ Corrections	▪ 3 percent	▪ 97 percent
▪ Judicial/legal	▪ 12 percent	▪ 88 percent

SOURCE: U.S. ACIR, *The Changing Public Sector: Shifts in Governmental Spending and Employment,* M-178 (1991).

As these data illustrate for key programs or functions, state and local agencies provide the lion's share of public employees. In a sense, they provide the "ground forces" needed to deliver government services and produce actual results. This situation often is equally true for enforcing agency rules or standards and for delivering program benefits.

There is also a major difference in the ability of various levels of government to coordinate among themselves, reduce red tape, and be accountable to the public. Compared to many state and local governments, Congress and federal agencies tend to be large, complicated entities that are influenced by many different constituents. They often may be slower to act and more resistant to change because they have multiple layers of management, policymaking, and approvals. And their component units may be more firmly stove-piped in ways that hamper their productivity.

Smaller state and local agencies tend to have fewer layers of bureaucracy, less diversity among constituents, and broader spans of control for individual managers. They, in turn, may be able to more easily integrate their policies and programs, act more nimbly, respond more quickly to their programs' consumers, and feel more directly accountable to produce specific results.

Intergovernmental partnerships can work well when there is close and continuing consultation and collaboration. Instead of asserting that one level of government is better than another, these partnerships recognize the positive differences in each level of government and the different strengths they can contribute.

Increasingly, these relationships are described as the emergence of "networked" government. Vertical and horizontal networks among governments—and increasingly with private sector partners (NAPA September 1997)—are now being facilitated as never before by the ever-improving miracles of information technology. Used to their fullest, as the CDC has demonstrated, these new technologies can knit intergovernmental partnerships together with increasingly timely communications and greater levels of accountability.

To be effective, however, this enhanced communication capacity among levels of government should be coupled with greater flexibility for states and localities to act according to specific facts as unexpected situations develop in their particular locations. Rigidly prescribed national standards, offering little opportunity to adapt to situational diversity, may limit the natural advantages of this new potential for networked governance.

The Panel agrees that the rapidly emerging new approach to American governance in the 21st Century is for governments at all levels to become more "flexible and adaptable, market-oriented, consumer-friendly, … performance-driven, and accountable" (Scheppach and Shafroth 2000). Governments themselves are striving to reach this vision by reengineering their operations to:

- Ensure competition, choice, and quality
- Provide the human capital and physical infrastructures needed to fuel workers and businesses for the new economy
- Facilitate business expansion and eliminate market distortions caused by outmoded taxes and regulatory standards or procedures

Thus, the Panel believes that this paper can help officials in all levels of government to build more effective intergovernmental partnerships and to strengthen their networks. Ultimately, the goal should be to use these partnerships and networks to the greatest extent possible as the tool of choice.

Then they can replace preemptions and prescriptive national rules that prohibit or severely restrict the innovative, responsive roles that states and localities can play when effectively networked with federal agencies. Because the 21st Century is bringing ever newer technologies, global markets, and pressures for deregulation, the U.S. must develop dynamic intergovernmental partnerships to compete in the worldwide economy.

Section 2: Intergovernmental Partnerships for Achieving National Goals

This section examines the various forms of preemption and compares them with alternative program options and models for achieving national goals, sometimes referred to as the "tools of government." This section also describes criteria that might be used to analyze the various options for achieving national policy goals more uniformly across all states. These criteria can then help policymakers at all levels to make reasoned choices among various options in order to accommodate, as much as possible, needs of affected parties, including public agencies, constituents, and beneficiaries of public services.

Forms and Functions of Federal Preemptions

As discussed previously, the U.S. Constitution enumerates certain functions that are the responsibility of the national government. It also prohibits the states from exercising a few other functions and reserves the remaining functions to the states or the people directly. These provisions are quite general, however, and subject to varying interpretations by Congress, state legislatures, and the courts.

In practice, both the federal and state governments have often operated in a number of the same areas of responsibility, thus exercising "dual" sovereignty. But when their policies or activities come into direct conflict, the Supremacy Clause of the Constitution allows the federal government to prevail (Commission on the Bicentennial of the U.S. Constitution 1988). Under these ground rules, U.S. federalism has evolved in an *ad hoc* way, and the relative responsibilities of each level of government have been sorted out as needed over the years.

In this context, federal preemptions of state roles and responsibilities have developed into a complex of over 500 statutes interpreted by many court decisions, and they encompass a wide variety of approaches for managing intergovernmental relationships. A detailed 1992 study by the U.S. Advisory Commission on Intergovernmental Relations categorized the diverse types of preemptions in federal statutes adopted between 1790 and 1991, as shown in Table 5.

Table 5
Categories of Preemptions with Examples

Dual Federal-State Sovereignty	Complete Federal Preemptions
1. State powers not subject to federal preemption—state sales taxes	1. State and/or local assistance not needed—bankruptcy
2. Direct conflicts between state and federal laws—civil rights or gun control	2. State economic regulations not allowed—airline deregulation
3. Statutory, administrative or judicial rulings that allow stricter state rules—voting rights or transportation safety	3. State and local assistance needed—emergency planning and evacuation zones around nuclear power plants
Partial Federal Preemptions	4. State activities exception—safer equipment on state-owned motor vehicles
1. States meet minimum federal standards to avoid federal take-over —worker safety	5. Limited voluntary regulatory delegations—railroad safety and grain inspections
2. Federal government pays a portion of state agency costs—environmental protection	6. Federal mandates to enact state laws—equal employment opportunity and fair labor standards
	7. Federal promotion of interstate compacts—disposal of low-level radioactive wastes
	8. Governors' petitions to remove preemption—collecting New York bridge tolls
	9. State vetoes of federal decisions—selection of site for high-level nuclear waste disposal (but Congress can override)
	10. Contingent total preemption—voting rights

SOURCE: U.S. ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, A-121 (1992), 15-20.

Most notable about this array of options is the creativity Congress has used in designing such widely diverse intergovernmental relationships. Even for various types of complete preemptions, only two of the ten options do not allow for some state and local role in implementing or determining the final outcomes of programs.

These state and local roles often include:

- Enacting and administering state laws and local ordinances to implement federal rules or standards
- Voluntarily assuming responsibility to administer federal laws or rules
- Federal payments for state or local administration of laws and regulations
- Adopting interstate compacts to achieve uniformity among states for national purposes
- State options for seeking waivers or exceptions to federal preemptions

Thus, even complete preemptions often have focused as much on bringing state and federal governments together into some sort of partnership as on separating their roles.

Partial preemptions, which Congress has mostly developed and expanded since 1965, have become the usual way of implementing some statutes, such as for protecting public health, worker safety, and the environment. In many cases, partial preemptions allow the states to adopt standards that are stricter than the federal statutes.

Partial preemptions usually require that states comply with minimum federal standards, and they sometimes offer federal grants to assist states in funding their delegated responsibilities. As a result, however, they rely heavily on the states to use their own regulatory powers and employ state or local personnel for implementing statutory requirements and achieving results. Moreover, federal agencies often do not have much leverage to enforce the national standards, other than by withholding state grants, because their own resources are not adequate for taking over state programs that later prove to be deficient.

These examples demonstrate that preemption does not necessarily exclude states, tribes, or localities; nor does it even predetermine what their roles will be. Instead, the statutory, regulatory, and judicial processes that create preemptions provide substantial leeway for Congress or federal agencies to design provisions in each policy area that are appropriate to the needs of the intergovernmental partners.

Alternatives to Preemption for Achieving National Goals

There are two main alternatives to preemption for establishing and achieving national goals and standards:

- Federal-aid programs, which come in a wide variety of forms
- Intergovernmental standard-setting processes with or without federal agencies participating

The GAO recently compared complete and partial preemptions, including mandatory federal standards and minimum federal standards that states may exceed, with these two alternatives (GAO March 2002). In its analysis, GAO used four criteria: degree of uniformity achieved, amount of flexibility provided to the states to satisfy their own needs, state capacity to perform delegated responsibilities, and state accountability to the federal government for results. Table 6 contains the results of GAO's analysis.

Table 6
Standard-Setting Tools and Factors for Balancing Federal-State Roles

Factor	Federally mandated standards	Federal minimum standards	Grant conditions	Cooperative standards	External standards
Uniformity	Uniform standards Covers all states	Uniform minimum standards with; other variations among states Covers all states	Uniform, same minimums, or state-specific standards Coverage limited to participating states	Uniform model standards that states can adopt in whole or in part Coverage limited to states that adopt the standards	Uniform model standards that states can adopt in whole or in part Covers only adopting states unless incorporated into federal regulations
State Flexibility	None unless there is a state waiver provision	Can establish standards more stringent than the federal	Varies as specified in each grant	Free to adopt these standards or use other state standards unless bound by their participation	Free to adopt these standards or use other state standards unless they conflict with federal regulations
State Capacity	Federal funds can match state resources for implementation Division of costs an issue	Federal funds can match state resources for implementation Division of costs an issue	Federal funds can match state resources for implementation Division of costs an issue	Relies primarily on state resources, but can be augmented through federal grants Division of costs an issue	Relies primarily on state capacity unless incorporated into federal regulations
State Accountability	Federal agency oversight to hold states accountable	Federal agency oversight to hold states accountable	Conditions can hold states accountable	State agencies accountable to state officials	State agencies accountable to state officials unless incorporated into federal regulations

SOURCE: U.S. General Accounting Office, "Regulatory Programs: Balancing Federal and State Responsibilities for Standard Setting and Implementation," GAO-02-495 (March 2002), p. 27.

In general, GAO's analysis showed that complete and partial preemptions probably provide the greatest uniformity and accountability for the federal government. But they may not provide as much flexibility for the states, nor do they offer adequate capacity for states to implement national policies and programs. In practice, though, GAO identified the following challenges that may arise when federal agencies share implementation with states or localities:

- Federal-state relationships may be delicate or controversial.
- Allocating implementation costs between the federal and state agencies may become a problem.
- The federal back-up and oversight roles may produce unexpected costs for federal agencies if state implementation is ineffective or states drop out of the program.
- State implementation may vary so significantly that it impairs desired national uniformity.
- Frequent changes in federal programs (often every two years) may place significant burdens on the states to adjust in a timely manner.

Criteria for Analyzing and Comparing Approaches to Intergovernmental Partnerships

GAO's report listed questions for Congressional staff and agency policymakers to ask at the following three stages when designing a new policy or program:

1. Identifying the national regulatory objective and reviewing pertinent background information
2. Selecting a standard-setting mechanism appropriate to that objective
3. Designing appropriate federal and state roles for implementing that objective

Questions for the background stage are:

- What risks must be addressed?
- Do existing federal and/or state statutes and/or regulations provide sufficient authority for the policy or program?
- Are sufficient enforcement resources and capacities available?
- Are there any other factors specific to this policy or program that should be considered?

Questions for selecting the standard-setting mechanism are:

- Would mandatory or minimum federal standards be most appropriate?
- What could be gained by using cooperative standard-setting mechanisms if nationwide uniformity is not essential?
- Would mandatory federal standards coupled with possible state exceptions be more workable?
- Would incorporating the federal standards as a condition of grants to states be as effective as preemption?

Questions for evaluating implementation options are:

- Who should be responsible?
- What accountability mechanisms could be used?
- How uniform or flexible does implementation have to be?
- What level of government has the resources to achieve implementation?
- Is the level with the resources willing and able to do the job?

GAO also framed these questions in three decision trees to illustrate how Congress or federal agencies could conduct this assessment of options for various intergovernmental relationships (GAO March 2002: 31, 32, 34). GAO's decision trees are reproduced in Appendix D of this paper.

Because GAO addressed only federal-state relationships in its questions and decision trees, it warned that there is a need to look separately at federal-only and state-only approaches. The fourth and final section of this paper examines some state-only options.

A somewhat different set of criteria for assessing how proposed laws or agency rules may impact other levels of government has emerged in the three Executive Orders (EOs) on federalism. The first order was issued in 1987 by President

Reagan (EO 12612). It was revised in 1999 by President Clinton (EO 13132) after extensive state and local consultation. Then a third order by President Clinton (EO 13175) established similar criteria for recognizing the special relationships among federal agencies and Native American tribes.

In combination, the three orders establish both fundamental federalism principles and criteria for federalism policies. They also impose special requirements for limiting preemptions by federal agency rules and for agencies' legislative proposals that may have intergovernmental implications.

These criteria can be summarized and simplified as follows:

- Governmental activities that are not national in scope or significance should be performed by state, tribal, or local governments.
- The federal government should defer to states, tribes, and localities in the absence of clear needs for national uniformity.
- The Constitution's enumeration of federal powers and reservation of the remaining powers to the states or to the people should be followed.
- As much self-determination as possible should be reserved to the states and the people.
- States should be encouraged to operate as laboratories of democracy.
- Displacement of state standard-setting and administrative discretion and intrusive federal oversight of state determinations should be avoided when possible.
- One-size-fits-all federal policies and programs should be avoided whenever possible.
- Federal policies and programs should respect and encourage cooperative efforts by state, tribal, and local governments, individuals, families, and private associations to achieve their own social and economic objectives.
- When federal agencies are formulating or implementing policies, standards, and programs with intergovernmental implications, they should adhere to the principles above.
- Federal agencies should carefully evaluate the necessity of proposed federal actions, including determining whether national objectives can be achieved by other means.

- Federal agencies should consult with potentially affected state, tribal, and local governments.
- When adopting regulations that preempt state, tribal, or local powers, federal agencies should:
  1. Act in strict adherence to the law
  2. Minimize the extent of preemption consistent with the clear intent of Congress
  3. Consult with the potentially affected state and local governments
- Unless federal agencies will pay for or reimburse costs, they should avoid, if possible, promulgating rules that impose substantial compliance costs on state, tribal, or local governments.
- Federal rules should include streamlined and timely processes for state, tribal, and local governments to apply for and obtain exemptions or waivers that allow flexibility in implementing national policies or programs.
- When drafting legislation for consideration by Congress, federal agencies should avoid proposals that:
  1. Interfere with functions essential to the separate and independent existence of states or localities
  2. Impose federal grant conditions not reasonably related to the statutory goals
  3. Completely preempt state, tribal, or local powers unless the preemption is clearly constitutional and there is no other way to achieve the national purpose

All three executive orders are enforced by requiring (i) federal agencies to prepare and publish in the *Federal Register*, as part of the Office of Management and Budget's (OMB) regulatory review process, "Summary Impact Statements" for state, local, or tribal impacts, and (ii) the OMB Director and the Assistant to the President for Intergovernmental Affairs to consult with state, local, and tribal officials. Nevertheless, the most recent study of this process found that very few such assessments had been prepared (Stevens 1999).

Business and consumer interest groups have also proposed criteria for allocating intergovernmental authorities in ways that will meet their needs. For example, the Business Roundtable has offered principles for "new regulatory federalism," as summarized below (Business Roundtable, June 2000).

- A national solution should be provided when an issue is national or global in scope and significance, affects interstate commerce, requires consistency among the states, addresses problems that originate in one state but has impacts across state lines, or involves constitutional concerns or fundamental citizen rights or other important matters of fairness.
- Overlaps and duplications of regulatory responsibility among federal and state agencies is usually wasteful, unnecessarily burdensome, and should be avoided.
- The same level of government does not need to both create and enforce regulations in situations where state implementation may be appropriate and cost-effective.
- States should retain flexibility to experiment with alternative compliance mechanisms.
- State tort liability laws may be tantamount to state regulation that can unduly burden interstate and foreign commerce and, in such cases, federal preemption should be considered.
- Regulation—whether federal, state, tribal, or local—should be market-oriented, flexible, performance-driven, cost-effective, and accountable.

Consumers represented by U.S. Public Interest Research Group (PIRG)—the national association of public interest research groups—often oppose federal preemption of stricter state and local consumer and environmental protection laws. They view the states as problem-solvers and public policy laboratories (Cassady July 2004). For example, according to U.S. PIRG, the states developed the first solutions to problems of identity theft and credit reporting errors, years before Congress acted.

In these two cases, the issue of balkanization and lack of nationwide uniformity were not problems. Rather than create 50 separate approaches, a few states created innovative solutions to common problems. Other states then copied them and shared them through model state legislation. Only much later did Congress copy the states. This fairly common process illustrates the vitality of the U.S. system of federalism and the states' important role as laboratories experimenting with creative program approaches or policy solutions.

Some environmental advocates who support uniform national standards are concerned that court cases seeking to preserve strong state roles might rely on the interstate commerce clause of the Constitution to reduce the significant federal role in protecting public health and environmental quality (Austin and Schang 2004). On the other hand, when facing a threat that national standards may be weakened, environmental advocates usually support dual sovereignty because it preserves the power of states or localities to adopt standards stricter than the federal minimums.

The Consumer Healthcare Products Association (CHPA) strongly promotes nationwide uniformity in regulating and labeling over-the-counter (OTC) healthcare products and dietary supplements because they are sold in nationwide and, increasingly, international markets. Citing the fact that this field is already thoroughly regulated by the federal government, CHPA argues that state or local regulations would add "differing, confusing, and costly requirements for OTC medicines that would provide no public health benefit: undermine public confidence in our federal regulatory system." CHPA also worries about the risk of "inconsistent, state-by-state scientific judgments about label warnings or other information" (CHPA November 2004).

In each field of regulation that may be subject to preemption, businesses and consumers, as well as federal, state, local and tribal governments, are likely to assert their diverse views, which will need to be compared and evaluated. Criteria for analyzing options for intergovernmental partnerships, such as those cited above, offer Congress, federal agencies, states, tribes, and localities a starting point for facilitating this sorting-out process.

Section 3: Implementing Effective Intergovernmental Partnerships

In recent years, federalism criteria have been applied in two primary approaches for evaluating and adopting federal initiatives that have intergovernmental implications. One is the cost-estimation process required by Congress in the *Unfunded Mandates Reform Act of 1995* (Public Law 104-4, 2 USC 1501). The other is the requirement of Executive Order 13132 that a federalism assessment be prepared by federal agencies when promulgating rules or proposing new legislation. Although these processes have not been particularly successful, they do provide a starting point for building future improvements that will help to make intergovernmental partnerships more effective.

This section and Section 4 examine the UMRA and EO 13132 processes, and offer checklists of questions for Congress, federal agencies, and states. They can ask these questions to ensure that new intergovernmental proposals can be implemented most effectively even within the federal system.

Representing the interests of state, tribal, and local governments in federal court litigation is also important. Although this paper does not cover that facet of federalism—due to inadequate resources and time—the National Association of Attorneys' General and the State and Local Legal Center are leading these efforts and can provide additional information about the relevant legal issues (see, for example, Preemption Working Group, March 2004).

Congressional Approach to Assessing Intergovernmental Impacts

During the mid-1990s, adoption of UMRA was strongly advocated by a coalition of state and local government associations. They held several National Unfunded Mandate Days. These events were led largely by high profile Mayors who showcased the heavy financial and bureaucratic burdens that Congress was shifting onto the cities while reducing appropriations for federal funding to support state and locally administered programs.

These efforts were also fueled by the high-profile *Mandates Monitor.* It was published by the National Conference of State Legislatures (NCSL) to shine a spotlight on the accumulating numbers of new cost-inducing laws and regulations being imposed by Congress and federal agencies (NCSL July 14, 2004).

UMRA provides two basic procedures:

1. Fiscal notes prepared by the Congressional Budget Office (CBO) before floor deliberation on any new law to provide Congress with estimates of "significant" intergovernmental fiscal impacts

2. A point-of-order that any Senator or House member may invoke to require a vote on whether to proceed with floor consideration without any estimate of the costs when there is a significant unfunded mandate

CBO's estimates that bills will impose significant unfunded mandates are prepared for the members' information only and do not determine whether the bills will pass. Nor does UMRA limit Congress's ability to work its will on these bills and even to pass them despite the CBO report documenting significant costs for state and local governments.

According to some participants in the UMRA process, the requirement for CBO to prepare cost estimates has had a significant effect behind the scenes as bill sponsors work to keep the intergovernmental impacts beneath the triggering thresholds and to avoid points-of-order. UMRA has rarely been invoked on the floor of Congress, but serious consideration reportedly is given to its requirements during committee deliberations (Scheppach October 12, 2004).

CBO prepares an annual public report on the bills it analyzes for UMRA. In 2003, CBO reported that it prepared mandates statements on 615 intergovernmental mandates and 613 private sector mandates (CBO April 2004). Of the bills analyzed by CBO, 86 intergovernmental and 100 private bills contained mandates with significant funding impacts that were subject to UMRA. However, CBO estimated that only seven intergovernmental and 24 private mandates would exceed UMRA's cost threshold. CBO could not determine the costs of another 5 and 18 mandates, respectively.

Several of the 2003 mandates analyzed by CBO are listed as preemptions. Thus, under UMRA, the form of federal action is not as important as its fiscal impact. The only criterion is the threshold dollar amount of federally imposed costs. Costly preemptions are identified by UMRA's fiscal notes process, and CBO reports those costs to Congress and the public. However, preemptions that do not impose significant direct costs may not be identified through the fiscal notes process.

Some observers criticize UMRA because:

1. It applies only to future legislation, not existing reauthorizations.

2. It does not apply to conditions that are attached to federal-aid programs or constitutional rights—including voting rights, Social Security, national security, treaty ratification, and a few other activities.

3. Its dollar threshold and the difficulty of estimating some types of costs limit the usefulness of the point-of-order mechanism.

4. It considers only financial criteria, not the broader federalism criteria identified in Section 2 of this report.

5. CBO's estimates cover only individual bills, not cumulative financial impacts over time (NCSL July 14, 2004).

Because of these limitations, NCSL asserts that major federal mandate costs are not being identified by UMRA's process. It estimates cumulative gaps in federal funds to the states that total $26.6 billion for FY 2005 and $31.9 billion for FY 2006. Having identified this undercounting, NCSL recently began again to publish its *Mandates Monitor* so it can provide what NCSL views as truer estimates of the federal costs that Congress is shifting to the states (NCSL, July 14, 2004). NCSL has also recently begun publishing a *Preemption Monitor* (http://www.ncsl.org/standcomm/sclaw/PreemptionMonitor_Index.htm).

Based on UMRA, other legislation has been introduced in both houses of Congress to apply a broader analysis to proposed preemptions. Throughout the 1990s, variously named bills tried to develop a preemption counterpart to UMRA, focused on institutional impacts rather than just financial impacts (Dinan 2004). Their thrust was to require that (i) Congress explicitly declare its intent to preempt state or local powers, (ii) federal agencies consult with state and local officials when developing any preemption proposals, and (iii) federal courts validate preemptions only when Congress has explicitly stated its intent. One of the House bills also would have required CBO to prepare federalism assessments for any bills reported out by Congressional committees (Dinan 2004).

In 1999, some of these bills received serious attention with strong support from state and local government associations, but well-mobilized opposition from health, labor, environmental, and business groups kept them from passing. These groups feared that preemption requirements would block passage of legislation they favored, and frequent litigation would challenge the legitimacy of implied preemptions (Dinan 2004).

One serious problem that limits the effectiveness of Congressional procedures like UMRA's fiscal notes is Congress' increasing reliance on attaching "riders" to must-pass legislation, such as appropriations. These riders are sometimes slipped into larger, more complex bills as they are about to pass, specifically to avoid public scrutiny; and they may not even be germane to the larger bills. By this means, federal preemptions can escape assessments of any type, including UMRA's federalism assessments. An example in the FY 2005 Appropriations Act was preemption of state laws and regulations offered by health-care providers (*New York Times,* November 23, 2004).

Federal Agency Assessment of Intergovernmental Impacts

The principles enunciated in the three federalism executive orders have barely been used by any agencies. A 1999 GAO report on the Reagan order, prepared to support Congressional hearings on federalism bills that year, found that the agencies had prepared these assessments for only five of the 11,000 final rules issued between April 1996 and December 1998, and only one of the 117 major rules had such an assessment (Stevens 1999).

GAO concluded that:

- Agencies are free under the order to determine whether any rule would have federalism implications "significant" enough to require preparation of a federalism assessment
- Some agencies have set very high thresholds for identifying rules that would require assessments
- OMB has taken little follow-up action to promote consistent procedures in the agencies to require that they prepare federalism assessments

The revised executive order issued by President Clinton in 2000 tried to address this lack of implementation, but there have been no studies about how well it has operated.

Questions Congress and Federal Agencies Should Ask Before Adopting Federal Rules and Statutes with Intergovernmental Implications

It will be important for Congress and federal agencies to ask the right questions when developing new statutes and rules that contain preemption provisions or when reviewing and reconsidering such statutes and rules. The Panel has developed the following checklist to serve as a general guide for asking those questions.

Because every bill and rule is different, Congressional staff and agency rule-writers will need to tailor these questions to the precise issues raised by their proposed policies or programs. However, this checklist can guide them in examining key intergovernmental issues.

The main categories of questions are national goals and their basis in the Constitution, federal experience and capacity in this policy or program area, extent of impacts on parties likely to be affected, and alternative tools for implementing the policy or program.

1. Federal Objectives

- •What is the federal government's objective?
- •How necessary is it? To whom?
- •How urgent is it to achieve these objectives?
- •What tools, other than full preemption, are appropriate to meet these objectives?
- •Is there time or willingness to cooperate with state and local governments on developing a suitable intergovernmental alternative to preemption?

2. Constitutional (and Statutory) Basis

- •Is the constitutional basis clear and/or likely to be contested?
- •Can the proposed preemption be reframed to be more clearly constitutional and less likely to be contested?
- •For proposed agency rules, are they clearly authorized by law and within the agency's authority?

3. Federal Experience and Capabilities

- •What capacity does the federal government have to exercise its responsibilities within this field of activity? Is the federal capacity adequate?
- •What intergovernmental relationships have already been developed as a result of prior experience?
- •Are these relationships effective and satisfactory to the parties involved?
- •Are improved relationships needed to achieve new national objectives?

- •How would the proposed preemption alter existing federal responsibilities and any related responsibilities of state and local governments?
- •Under this proposal, will the federal government need assistance by the state and/or local governments to achieve success?
- •How capable and willing are state, local, and tribal agencies to provide the needed assistance?
- •Would new methodologies, competencies, technologies, or partnerships need to be created to enable the federal goals to be achieved?
- •How could these advances be made?

4. Federal Assistance

- •Would the federal government itself be willing and able to develop the new methods, technologies, and partnerships required?
- •Would the federal government be willing to support the participation of state, local, and tribal agencies in the policy or program and contribute toward its success?

5. Alternatives

- •Have the pros and cons of alternatives to full federal preemption been considered?
- •Have the following alternatives been evaluated?
  - ◆Partial preemption, using state and/or local implementation of federal standards
  - ◆Conditions on federal funding
  - ◆Uniform, cooperative state action, either independently adopted by states or induced by federal incentives
  - ◆Regulatory partnerships using flexible performance standards rather than pre-specified means of compliance
- •Is the proposed preemption the result of reasoned choices that considered these other alternatives?

Section 4: State Strategies to Strengthen Intergovernmental Partnerships

One of the strongest arguments for complete federal preemption is that the states cannot act quickly and uniformly to adopt a nationwide policy. However, states have readily available mechanisms to do so, including uniform state laws and interstate compacts.

These arrangements may be difficult to set up, or may take a long time to activate. They often may not provide as much nationwide uniformity or as much simplicity as regulated entities might prefer. Nevertheless, states have accumulated substantial experience with these mechanisms, and their growing potential is receiving new attention (Tubbesing; Mountjoy).

One example of the potential for joint state action is adopting a nationwide system for administering state and local sales taxes. At least 45 states and many more localities rely on sales taxes to fund significant portions of the public services they provide, including services also supported in part by federal aid. Preserving state and local tax bases or finding substitute revenue sources is in the best interest of the entire nation.

Yet, the growth of out-of-state mail-order sales, underway for many years, and the recent rapid increase in Internet sales have eroded this important state and local tax base. Meanwhile, the U.S. Supreme Court has ruled that states cannot collect sales taxes from companies selling to their residents unless those companies have a physical presence in the taxing states. Many mail-order and on-line businesses also resist collecting state and local sales taxes because there are so many different rates levied in each place and on different products or services.

To reduce these acknowledged complexities, 43 states have jointly agreed to enact a simplified and automated process for collecting sales taxes. The Streamlined Sales Tax System includes uniform definitions for adoption in all state or local sales tax laws (Streamlined Sales Tax Project 2004).

This system would allow only one rate for sales taxes in each state (with limited exceptions) and only one local sales tax rate in each locality. Each participating state or locality would take responsibility for administering the program within its own jurisdiction. They would agree to fund the system, reduce sellers' audit requirements, and make certain other simplifications.

To participate in the system, each state or locality would agree to enact the Uniform Sales and Use Tax Administration Act. They would then obtain a certificate of compliance and would ratify an interstate agreement governing the system's operations. A board of representatives from each participating state or locality would administer the agreement. Two other boards would advise the governing board; one would represent state and local governments and the other, businesses and taxpayers. So far, 30 states have approved the interstate agreement, and 19 of them have changed their laws to conform to the Uniform Sales Tax Act. The Agreement went into effect on October 1, 2005, and a governing board has been established to run the program.

Many businesses expect to take advantage of this streamlined system voluntarily because they have participated in its development. If this approach is as effective as planned, the Uniform Sales Tax Act may be a model for other interstate initiatives to meet national needs without complete or partial federal preemption.

A large number of interstate compacts and agreements (as well as thousands of inter-local agreements) already exist for a wide variety of purposes ranging from river basin management to transportation coordination, tax administration to criminal justice cooperation, pollution control to waste management, and many other functions. So there is a great deal of experience to draw upon in developing multi-jurisdictional strategies. Although compacts require legislative action to give them effect in each state affected, and sometimes approval by Congress as well, similar results can be obtained in some cases through administrative agreements (Zimmerman 1996, 2004, 2006).

Questions State Officials Should Ask Before Adopting Multi-State Alternatives to Federal Preemptions

In reviewing, evaluating, and commenting on proposed federal preemptions, or extensions of existing preemptions, state, local, and tribal officials should ask questions similar to those the Panel is recommending for Congress and federal agencies in Section 3 above. Like the prior set of questions, this checklist for state, local, and tribal officials provides a general guide and may need to be tailored to each preemption proposal.

1. The Proposed Preemption

- Is it clear what the federal objective is? How clear?
- Does it require complete nationwide uniformity? If so, why?

2. Effects of Proposed Preemption on States, Localities, or Tribes

- What are the impacts on existing state policies, programs, laws, or activities?
- What are the impacts on existing local policies, programs, ordinances, codes, or activities?
- What are the impacts on existing tribal policies, programs, laws, ordinances, or activities?
- What are the impacts on the public, consumers, businesses, and others in the state?
- Would it displace a current state, local or tribal authority either completely or partially?
- Would it commandeer state, local, or tribal authority, activities, or employees?

3. Alternatives

- Could states, either alone, jointly, or in combination with their local governments, achieve the national objective?
  - By their own actions
  - With federal funding, incentives, or other assistance
- What would make it difficult or impossible for states, localities, or tribes to succeed?
- How could they overcome such difficulties?
- Would they require federal assistance, either financial, technical, or organizational?
- Has Congress or the federal agency considered alternative intergovernmental approaches for achieving the national objective?

  - Partial preemption, using state and/or local implementation of federal policies, programs, or standards
  - Conditions on federal funding
  - Uniform cooperative action by all states, either independently achieved or induced by federal incentives
  - Regulatory partnerships using flexible performance standards rather than pre-specified means of compliance

4. States' Counter-Proposal

- Having carefully considered the preemption, what alternative approach could states, acting together, propose to the federal government?

In making a counter-proposal to replace preemption, states, localities, and tribes may choose among the alternatives identified in item 3 above, or they may want to devise some other entirely different option, acting in their traditional role as the laboratories of democracy. One or more states may have already developed and implemented an alternative approach that is working successfully in one or more states to implement the constitutionally-based national objective.

Such models might then demonstrate to Congress or a federal agency that preemption is unnecessary. Any counter-proposal should highlight these existing state, local, or tribal approaches. They can then form the basis for building a proposed new alternative to preemption that Congress or a federal agency should seriously consider.

Conclusion

In the Panel's view, Americans care most that the U.S. economy will improve, unemployment will decrease, financial markets will operate openly and fairly, the environment will be protected, and other public services will be provided. The fine points of intergovernmental tax and regulatory frictions are hard for most people to understand; and public attention to these issues rarely rises to a level that can compete with their more fundamental economic, health, safety, financial, and consumer concerns. For most public services, the fact is that unless the federal, state, and local relationships are configured to work well, the public expectations of program effectiveness will not be met.

Thus, the Panel believes that federalism issues need to be framed in more understandable, less complicated terms. What the United States really needs is a practical, workable approach to sharing powers among federal, state, tribal, and local governments.

For example, it may be more productive if the states work together to support systematic reforms to the intergovernmental tax system than for them to resist powerful economic forces by automatically opposing every proposal to preempt state and local taxes (Scheppach and Shafroth 2000). Consequently, the Academy Panel believes that these issues should be focused on developing tools for more effective intergovernmental partnerships and delivering more productive governmental services, rather than relying solely on debating the legally complex and sometimes abstract concepts that underpin federalism and preemption. Above all, enhanced intergovernmental partnerships must be able to demonstrate their practical benefits.

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Appendix A
Panel Member Biographies

DeWitt John, *Chair*—Director, Environmental Studies Program, and Lecturer in Government, Bowdoin College. Former Director, Center for the Economy and the Environment, National Academy of Public Administration; Director, State Policy Program, Aspen Institute; Policy Studies Director for Economics, Trade, and Agriculture, National Governors Association; Director, Governor's Office of Policy, and Acting Director, Colorado Division of Mines, State of Colorado.

Carl Stenberg—Professor, School of Government, University of North Carolina at Chapel Hill. Former Dean, Yale Gordon College of Liberal Arts, University of Baltimore; Director, Center for Public Service, University of Virginia; Executive Director, Council of State Governments; Assistant Director for Policy Implementation and Acting Executive Director, U.S. Advisory Commission on Intergovernmental Relations; Research Assistant, New York State Division of the Budget.

Charles Wise—Professor, School of Public and Environmental Affairs, Indiana University. Former positions with the School of Public and Environmental Affairs, Indiana University: Associate Dean; Associate Professor; Assistant Professor; Director, Graduate Programs in Public Affairs; Director, Undergraduate Programs in Public Affairs. Former positions with the Office of Legislative and Intergovernmental Affairs, U.S. Department of Justice: Director of Intergovernmental Affairs; Special Assistant for Policy Analysis.

Appendix B
Individuals Contacted

During the course of this study, the following individuals were consulted about it, either in person or through correspondence.

Bill Becker, Executive Director, State and Territorial Air Pollution Program Administrators/ Association of Local Air Pollution Control Officials

Timothy Conlan, Professor, School of Public and International Affairs, George Mason University

John Dinan, Zachary T. Smith Associate Professor, Department of Political Science, Wake Forest University

David Doniger, Policy Director, Climate Center, Natural Resources Defense Council

Harley T. Duncan, Executive Director, Federation of Tax Administrators

Richard Goss, Project Manager, DecisionQuest

John Kincaid, Robert B. and Helen S. Meyner Professor of Government and Public Service and Director, Meyner Center for the Study of State and Local Government, Lafayette College

William Kovacs, Vice President, Environment, Technology and Regulatory Affairs, U.S. Chamber of Commerce

Paul Posner, Professor and Program Director; Master of Public Administration, George Mason University

Raymond C. Scheppach, Executive Director, National Governors Association

Peg Seminario, Director of Safety and Health, American Federation of Labor-Congress of Industrial Organizations

Diane Shea, Executive Director, National Association of State Energy Officials

David Spangler, Vice President and Assistant General Counsel, Consumer Healthcare Products Association

John Walke, Director, Clean Air Program, Natural Resources Defense Council

Joseph F. Zimmerman, Professor of Political Science, Rockefeller College, State University of New York at Albany

Appendix C
2000 Report by the National Governors Association

"Governance in the New Economy" (Scheppach and Shafroth 2000), was prepared for a meeting of the Governors with members of the U.S. Senate on February 29, 2000. The NGA's report compared the current era of burgeoning new technologies, globalization, and deregulation with three other periods in the nation's history that produced historic reevaluations of the nation's business and governmental practices: the Industrial Revolution, the Progressive Era, and the New Deal. NGA suggested that the circumstances of the 21st Century may produce revolutionary changes in our nation's federal-state partnerships.

NGA examined four critical areas of federal-state governance: discretionary grants, entitlement programs, tax and revenue systems, and regulations. It also raised related issues to begin developing a blueprint for how to build a new, more vibrant, quickly responding approach to federal-state relations that would produce more effective, results-oriented intergovernmental partnerships. Finally, NGA's report recommended that the Governors examine various options for next steps.

To focus the Governors' meeting with the Senate, NGA's blueprint proposed:

- Developing more performance-oriented and accountable government by clarifying the roles and responsibilities of the respective levels of government
- Clarifying which level of government should create various types of regulations and which level should enforce them
- Identifying programs that could be transferred to the states
- Coordinating and rationalizing federal, state, and local tax systems

Based on several appendices documenting recent trends in federal-state relations, NGA's report concluded that there had been some progress in controlling unfunded federal mandates and in devolving federal programs for states to administer. But NGA found that federal-state relationships had deteriorated in several policy areas where:

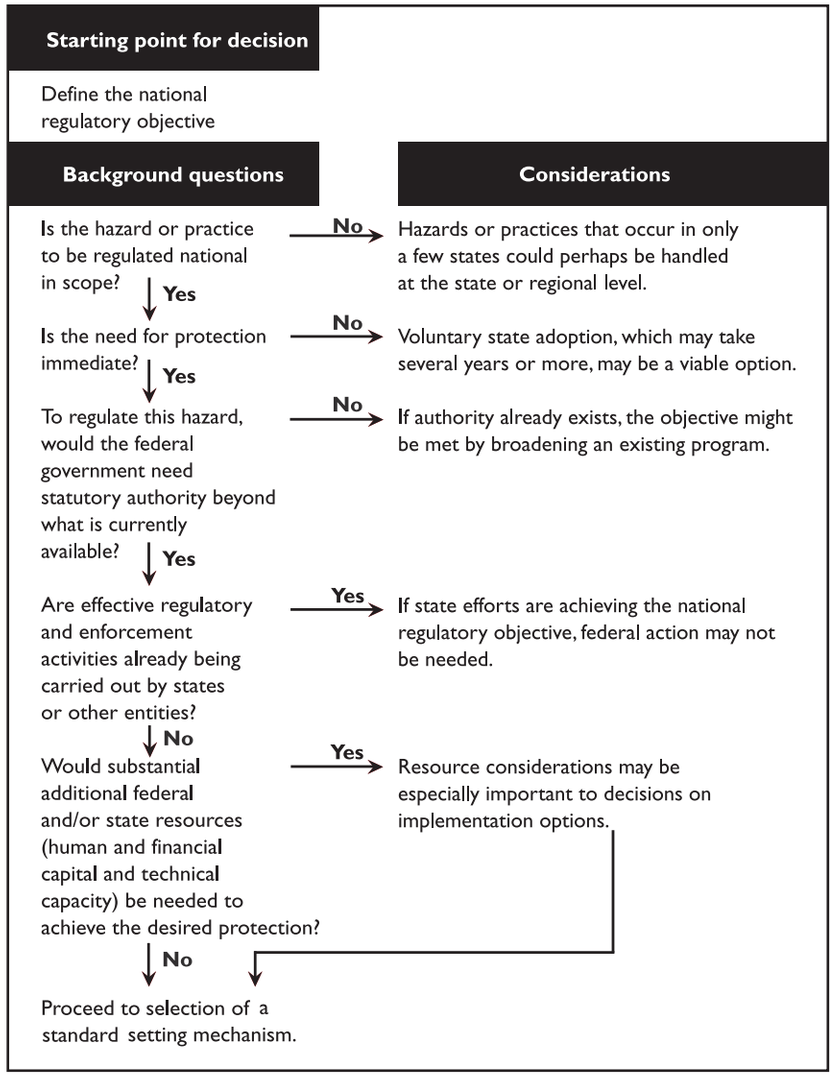
- Greater federal administrative burdens have been transferred to states
- Federal restrictions on state and local revenue sources have increased
- Congress or federal agencies have adopted explicit preemptions of state programs

NGA then characterized these preemptions as "a serious threat" and cited several examples (Scheppach and Shafroth 2000: 56).

Appendix D
GAO Decision Trees for Setting and Implementing Regulatory Standards

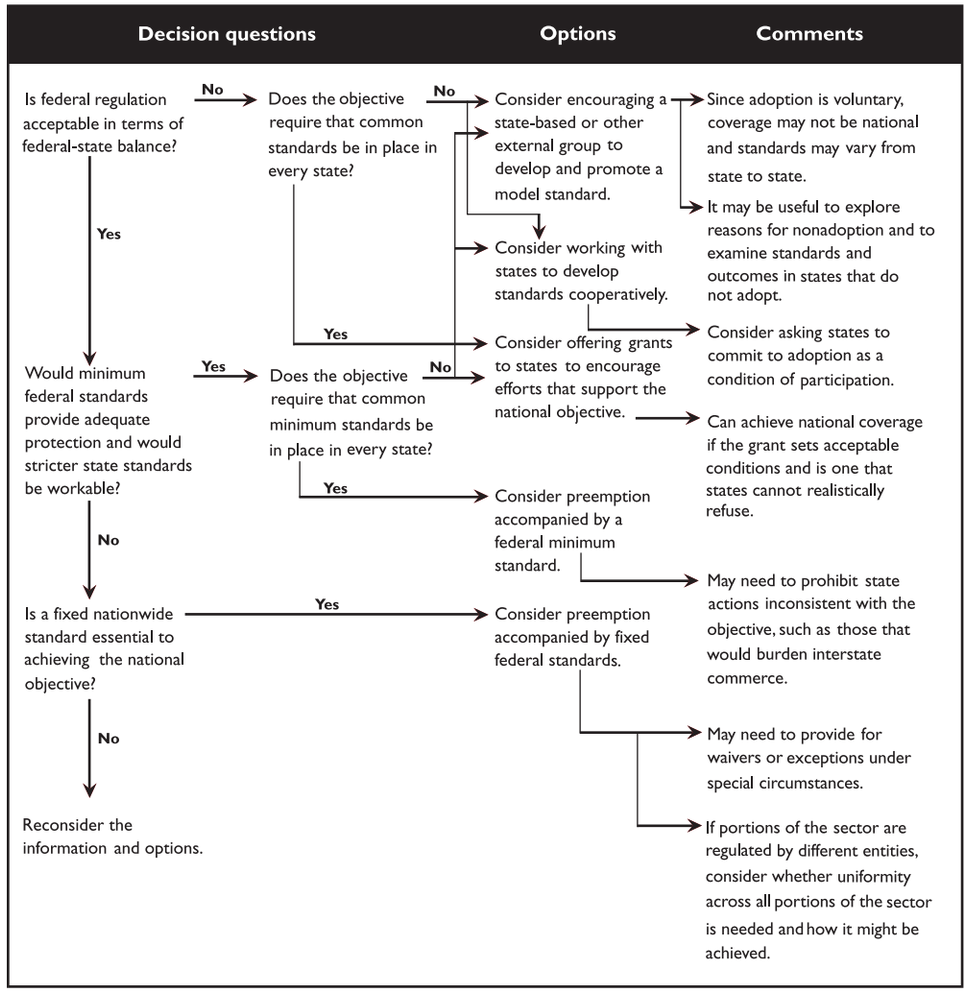
Excerpted from: GAO, *Regulatory Programs: Balancing Federal and State Responsibilities for Standard Setting and Implementation*

Figure 1
Defining the National Objective and Exanining Background Questions



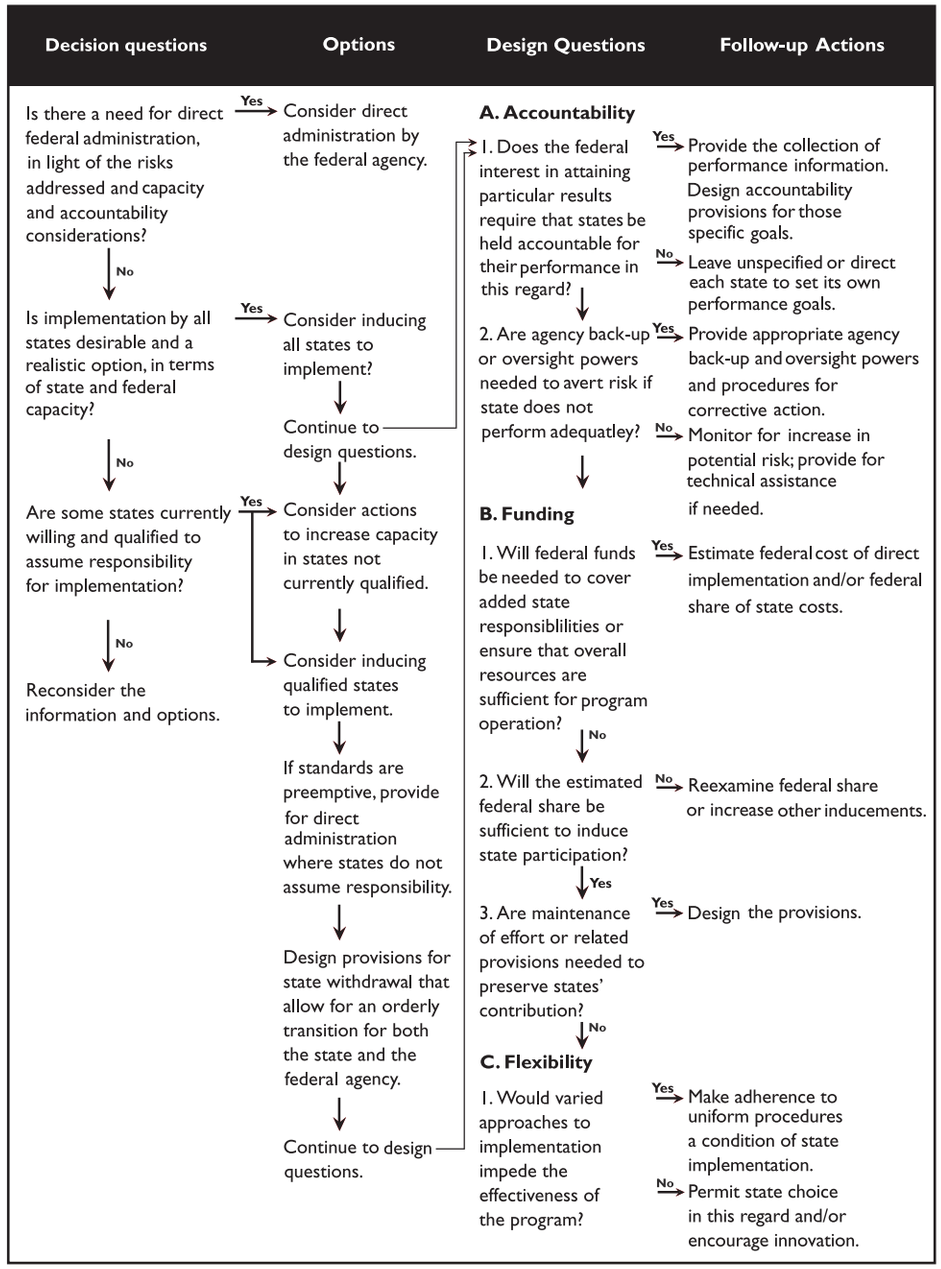
SOURCE: GAO-02-495 *Regulatory Programs: Balancing Federal and State Responsibilities, p. 31*

Figure 2
Selecting a Standard-Setting Mechanism



SOURCE: GAO-02-495 *Regulatory Programs: Balancing Federal and State Responsibilities, p. 32*

Figure 3
Examining Implementation Options



SOURCE: GAO-02-495 *Regulatory Programs: Balancing Federal and State Responsibilities, p. 34*