

Utah Commission on Federalism
Functional Federalism
Restoring Governing Limits, Divisions & Independent Checks
(Oct 2017)

Introduction

The bigger and more centralized government becomes, the smaller becomes the impact of each individual voice. The structural protection of federalism, as Justice Kennedy explains, *"was the unique contribution of the Framers to political science and political theory."* The people's *"freedom,"* he adds, *"was enhanced by the creation of two governments, not one."*

Despite a theoretical understanding of federalism, our national government continues to grow, to centralize power, and to diminish the individual voice in the accountability, efficiency and effectiveness of their government.

The Utah Commission on Federalism was created to develop a functional approach to restoring the structural protections to the individual voice that federalism was intended to safeguard.

This overview recounts the challenges and discoveries of the Commission since 2011, sets forth what we believe are the basic **Building Blocks of Federalism** (clearly discernible governing limits, divisions and independent checks), and calls upon other states to join with us in restoring with clarity these fundamentals of federalism for the purpose of restoring the power of the individual voice of our people in the accountability, efficiency and effectiveness of their government.

To achieve this end, we call upon states, and organizations of states, to convene an Interstate Conference on Federalism/Intergovernmental Relations to take responsibility for reestablishing functional clarity to these Building Blocks of Federalism, and to develop the roadmap for restoring and maintaining them.

2011

Federalism Commission

Our concerted federalism efforts began in the 2011 session with the passage of the [Federal Law Evaluation and Response Act](#) (HB76) sponsored by Rep. Ken Ivory, Sen. Wayne Niederhauser Senate floor sponsor. This bill accomplished at least three important things.

- It established [the jurisdictional standard](#) ("the line") between the state and national governments by codifying in Utah statute the specific powers delegated to the national government. This may sound simplistic but we were unable to find anywhere a list of all the delegated constitutional powers of national government.
- It codified the [standard for reviewing federal law](#) (see subsections (2) and (3)). In the spirit of [the admonition of Chief Justice John Roberts](#), *"States are separate and independent sovereigns. Sometimes they have to act like it."*
- It created by statute [a measured dispute resolution process](#) for addressing federal

enactments that crossed our jurisdictional line, as determined of the State, directly with the relevant federal branches and agencies, with a view to restoring with certainty the constitutional division of governing powers.

At first, we housed this process in a joint executive-legislative commission chaired by the Governor (or his designee) but this proved unproductive. Consequently, in 2013, we moved these functions to a purely legislative commission -- The Utah Commission on Federalism.

Dearth of Federalism Knowledge

In 2013, the U.S. Department of Justice sued our state for passing a bill that clarified law enforcement jurisdiction as between the county sheriffs and federal law enforcement officers. With nearly 70% of all land in Utah still controlled by the federal government, we have federal officers frequently interfering with basic local law enforcement (writing tickets for speeding, expired vehicle registration, etc.) sending our citizens to federal court to respond.

During the hearing in federal district court regarding police power jurisdiction as between the state and the federal government, the federal district court judge exhibited his appreciation for the fundamental principles of federalism with this assertion from the bench, *"the checks and balances I have always heard about are between the branches of the respective governments, not between the federal and the state. There is delineated authorities between the two, but you're telling me there's some checks and balances in our constitutional system?"* Worse yet, the assistant attorney general representing our state responded only by saying that he thought there was something in the Federalist Papers on the subject. That was fundamentally the sum of the defense of our jurisdiction as a sovereign state, due to the critical lack of functional knowledge of the basic principles of federalism.

As a result of this hearing, Utah House Speaker Becky Lockhart and Rep. Ken Ivory began randomly testing the basic federalism knowledge of local, state and staff attorneys in a series of committee hearings. After reviewing that the Tenth Amendment establishes that all powers not delegated to the national government are reserved to the states or to the people, and that the Supreme Court had reiterated recently that the ["independent power of the states serves as a check on arbitrary federal power,"](#) they asked if the attorneys could identify just one power reserved to the states, to the exclusion of the national government. From a number of such encounters, not one of these attorneys could frame a response about the power and jurisdiction of the state. They could, if asked, opine on federal power under the Commerce Clause, Supremacy Clause, Necessary and Proper Clause, etc. but could not respond as to the scope of jurisdiction and authority of their employer, the state.

2014

Federalism Curriculum

Realizing that we can never do, what we don't first know... in 2014, we drafted and passed House Bill 120 [Continuing Education on Federalism](#). This bill requires every city, county, state agency, legislative counsel and attorney general's office to have at least one designated expert on federalism. These designees must take a Continuing Legal Education Course on federalism created by the Commission. The course would also be made available for free CLE for all Utah

attorneys.

We appropriated funds and formed a bipartisan curriculum review committee to prepare a Request for Proposals and to review responses. After reviewing private submissions, the review committee ultimately opted to work with the Center for Constitutional Studies of Utah Valley University. The [Curriculum on Federalism](#) produced by this partnership garnered the unanimous, bipartisan endorsement of the Commission. UVU assembled the top federalism scholars in the nation to produce a course consisting of six videos, each of which are approximately 10 minutes long ([Module 1](#), [Module 2](#), [Module 3](#), [Module 4](#), [Module 5](#), [Module 6](#)). The curriculum transcends party and politics and begins to promote a general, non-partisan understanding of the structural protections of our unprecedented system.

The [free, one-hour CLE course](#), which was finalized and unanimously approved by the Commission in 2016, is available online at the UVU Center for Constitutional Studies site. We are in the process of working with the Utah Bar Association to publicize and disseminate the curriculum. We are also working with UVU and school districts to disseminate this work in the K-20 systems. We envision further modules to address with specificity the jurisdictional line between the states and the national government and the specific independent powers of the states to secure and maintain this division of governmental responsibilities.

2017

Joint Resolution to Restore the Division of Governmental Responsibilities Between the National Government and the States (HJR17 2017)

At the start of the 2017 Utah legislative session, House Speaker Greg Hughes and Senate President Wayne Niederhauser announced that the Federalism Commission would meet as a standing committee throughout the legislative session. They each made reference to the recent inaugural remarks of our newly elected President ("We are not merely transferring power from one administration to another, or from one party to another-but we are transferring power from Washington, D.C., and giving it back to you, the American People."). They instructed the Federalism Commission to receive input from all pertinent standing and appropriations committee chairs and compile an initial petition of the Utah Legislature identifying specific areas for Washington to systematically "give power back to the American People."

The process of attempting to meaningfully ascertain jurisdictional lines, in a 2017 world, was as important as *the product* that became [HJR17 Joint Resolution to Restore the Division of Governmental Responsibilities Between the National Government and the States](#). In a series of public hearings, we provided each committee chair with a brief summary of the principles of federalism, which are incorporated in the opening pages of the Resolution. The following statement from Supreme Court Justices Scalia, Kennedy, Thomas and Alito in a dissenting opinion has become something of a credo to the importance of the work of the Commission:

"Structural protections—notably, the restraints imposed by federalism and separation of power ... tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court [the States themselves, we believe] to

*teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. **The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.***"

We asked the committee chairs to identify principles for restoring the structural division of governing responsibilities. However, we found our public hearings naturally gravitated to *problems* to be solved rather than *principles* and structure to be re-instilled. We found that over decades of federal centralization, we have become acculturated to think and speak more in terms of what the federal government might allow rather than to think and speak in terms of clear governing divisions and our power and responsibility to restore and maintain systemic divisions as a matter of principle.

HJR17 documents specific issues of federal overreach from the committee chairs in the areas of education, public lands and natural resources, health and human services, transportation, local government, law enforcement and revenue and taxation. The Resolution closes calling for various measures to halt the accelerating federal centralization and to restore clarity in the division of governmental responsibilities between the national government and the states. As included in the Resolution, the Utah Legislature recognizes that *"the restoration of our federalism structure will require extensive cooperation among the 50 states and with our federal counterparts, and calls upon all state and national government leaders to engage toward achieving a new nationwide consensus for decentralizing governmental power in the United States."*

Fundamental Principles of Federalism

In our first Federalism Commission meeting following the 2017 legislative session, we sought to distill the lessons learned in the HJR17 process into an agenda for the Commission concerning our constitutional role as states to restore and maintain the structure of federalism.

At the May meeting, our bipartisan commission [unanimously adopted an Agenda for 2017-2018](#). The commission determined that in order to functionally "do" federalism, we must sound working understanding of these three **Building Blocks of Federalism**:

- Clearly ascertainable **limits** of governing power actually delegated by the people.
- Clearly ascertainable **divisions** of governing responsibility between the national government and the states, and between the branches of government.
- Clearly understood **independent powers of the states to check** the overreach and centralization of the national government.

The Commission determined we simply cannot defend a limit or division of governing power that we can't clearly define and we can't exercise our duty to defend governing divisions and limits without a clear understanding of our power(s) to do so.

Federalism Agenda/Objectives

To implement the above principles of federalism the Commission identified, [The Commission adopted three specific actions items](#).

- First, disseminate the principles of federalism, including through greater distribution and expansion of our Federalism Curriculum and through local, state and national outreach.
- Second, actively interface with federal branches and agencies over identified areas of federal overreach to reestablish clear divisions of governing responsibility. Begin with issues identified in HJR17. Solicit advocacy of our federal delegation and coordinate with other states.
- Third, invite other states and organizations to join with the Utah Legislature to convene an Interstate Conference on Federalism/Intergovernmental Relations to the end of reestablishing a common understanding of governing limits, divisions, and independent checks, in order that we might collectively maintain them.

Federalism in Action - Jurisdiction Dispute Resolution Petitions

The development of the federalism curriculum and the HJR17 public hearing process fostered a unity, vision, and sense of purpose within the Commission to begin actively implementing the dispute resolution process for which the Commission was established.

Health, Safety and Welfare (Police Power) Jurisdiction

Under the most widely accepted division of governing responsibilities, states and their subdivisions have exclusive jurisdiction over, and bear the duty to protect, the health, safety and welfare of their citizens. As the U.S. Supreme Court recently reiterated, ["this general power of governing, possessed by the States but not the Federal Government, \[is known\] as the 'police power.'"](#)

However, nearly 70 percent of all lands within the boundary of Utah remain under federal control. Over the past several decades, federal forest and range management practices have severely restricted active wildfire management, resulting in dead and dying forests and record-setting catastrophic wildfires that pollute the air, kill wildlife, destroy habitat and decimate watersheds for decades. For years, Utah's local, state and national leaders have warned our federal counterparts of the disastrous consequences of federal mismanagement, particularly given that Utah is the second driest state in the nation. In June of 2017, the costliest wildfire in Utah history struck in the very area, and destroyed the very watersheds, that the affected counties had just two years earlier warned the US Forest Service would be destroyed if they did not either take aggressive action or allow the state and local governments to act. With 80 percent of Utah's federally managed forested lands in this same tinderbox condition, restoring clarity and respect for our police power jurisdiction is no longer an theoretical exercise -- it has literally become a matter of life and death, health and safety.

Accordingly, on August 4, 2017, following the dispute resolution mechanism of our Federalism Commission charter, we unanimously approved [this Petition](#), putting the Department of Agriculture, the U.S. Forest Service, the Department of the Interior and the Bureau of Land Management on notice of the specific jurisdictional conflict. We called for the engagement of these federal agencies with our Commission to restore clarity and respect for

our police power jurisdiction.

We sent a copy of this petition to each member of our congressional delegation ([Sen. Hatch](#), [Sen. Lee](#), [Rep. Bishop](#), [Rep. Stewart](#), and [Rep. Love](#)) with a request for them to actively engage these agencies and advocate for re-instilling clarity and respect for our right and duty to protect the health, safety and welfare of our state and people.

We also sent a copy of this petition to the House Speaker and Senate President of each state, and to the chairs of all federalism/state-federal relations committees we could identify, with [a formal request to join our Petition to clarify, restore and respect the police power jurisdiction of the states](#).

Water Jurisdiction

The next petition (presently being drafted), which has been unanimously approved by the Commission, seeks to clarify and restore state jurisdiction over all non-navigable waters within the state. This is a vital matter of health, safety and welfare particularly in the arid west. Federal intrusion over state water jurisdiction has accelerated in recent decades.

For example, during construction of a new airport in the arid, desert community of St. George, Utah, federal agencies deemed a dry, desert rivulet to be “Navigable Waters” and shut down road construction, delaying the project for years, substantially increasing the cost, and leaving several small business families to file bankruptcy. Ranchers have been threatened by federal agencies that if they didn’t sign over their water rights, their grazing permits for public lands would not be renewed.

Article V

Article V of the U.S. Constitution provides an express method, upon application of two-thirds of the states, to require Congress to call a convention of states for deliberating and proposing amendments to restore appropriate limits, divisions and independent checks on governing power. In his parting counsel, George Washington, the Father Of The Nation, warned: *"If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."*

By unanimous consent, our Commission has taken on the charge of reviewing all matters pertaining to the exercise of the Article V power of the states and of developing a Utah Plan with respect to all Article V developments.

Next issues

The Commission will continue to employ our statutory dispute resolution mechanism for the list of jurisdictional conflicts enumerated in our HJR17 Joint Resolution, as well as entertain other issues from members of the Commission, legislators, state and local officials and agencies, and citizens and community interest groups. We also anticipate coordinating with and supporting

other states on their particular jurisdictional issues.

Union of States

Increasingly, states, state leaders, state legislators, organizations of state legislatures and state think tanks (and even Congress itself), are coming to the conclusion that our primary governing problems are structural – federalism and separation of powers. Federalism is the structural protection by which the states, in union, restrain the national government to its limited division of constitutional powers. The division of governing power in our system is like the healthy tension of a tug o' war, where ambition is intended to check ambition. However, if the states drop the rope, Washington will not, and indeed cannot, "push" the healthy tension of federalism back into balance. The states, by design, have to pull. They have to pull together, and they have to pull always.

As the US Supreme Court recently reiterated, "our nation was, and is, a union of states." The Framers relied upon the states, acting in union, to secure and maintain the structural protection of federalism, as the following assertions typify:

- James Madison in Federalist 28 (*"It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. ...They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty."*)
- Alexander Hamilton in Federalist 46 (*"But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. ... one set of representatives would be contending against thirteen [50] sets of representatives, with the whole body of their common constituents on the side of the latter."*)

Following the federalism meeting at the NCSL conference in Boston in August of 2017, NCSL has taken action the recommendation from that meeting to convene the chairs of the various federalism/state-federal relations committees the first week of November 2017 to begin the process of rebuilding a "union of states" to pull together to restore and maintain our federalism structure. Other action items from the annual meeting include

- (i) Promote the establishment and operation of federalism/state-federal relations committees in each state;
- (ii) Develop a functional networking mechanism for these committees to act in union to protect state jurisdiction;
- (iii) Develop and disseminate training on functional federalism; and
- (iv) Generate support for convening an interstate conference on federalism/state-federal relations.

Conclusion & Request for Action

We look forward to working with the federalism/state-federal relations committees, chairs, state leadership, and organizations of states to clarify, restore and maintain the **limits, divisions and independent checks** of governing power that undergird functional federalism to the end

that the individual voice is once again empowered with meaningful accountability over the efficiency and effectiveness of their government.

WE CALL UPON our fellow States, and organizations of states, to join with us in accepting responsibility for reestablishing clarity in these basic **Building Blocks of Federalism** (clear limits, divisions and independent checks), and developing the roadmap for working together to restore and maintain the structural protections that federalism is intended to safeguard for our people.

To this end, the Utah Commission on Federalism and the Utah Legislature invite you and your state, and your organization, to help fund, prepare and convene the first (annual) Interstate Conference on Federalism/Intergovernmental Relations during the coming year (2018).

Please convey your willingness and ability to join in this effort to:

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