Federal–State Jurisdiction III:
Jurisdictional Peace Requires Joint Purpose

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Through the evolutionary process, those who are able to engage in social cooperation of various sorts do better in survival and reproduction.

— Robert Nozick

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The essay, "Federal–State Jurisdictional Relations: Pick Your Metaphor," noted that while federal–state simultaneity for interstate industries is unavoidable, this interdependency still produces irritability. "Coordinated Regulation or Jurisdictional Wrestling: Which Will Produce Better Industry Performance?," argued that outcomes will improve if the state commission acts as an industry co-regulator rather than a state consumer advocate. Having described the problems and their sources, I now start toward solutions. The theme is simple: Jurisdictional peace requires joint purpose.

Avoid Oversimplification by Understanding the Jurisdictional "Why"

People talk of the "federal–state relationship" as if there were only one. There are at least five. Understanding the "why" behind each—the "why" always consisting of a mix of national purposes and local values—can replace tension with jointness. Consider these different federal-state relationships:

1. Federal law directs states to take specified actions to carry out national policy. Section 210 of the Public Utility Regulatory Policies Act of 1978 requires each state to administer its utilities' obligation to purchase wholesale power from "qualifying" generating facilities (renewable energy producers and cogenerators), at state-approved rates based on each utility's "avoided cost." ***Why?*** Congress decided to diversify the nation's electric generation, in terms of fuel types and supplier types, but saw states as experts on utilities' supply alternatives and costs.

2. Federal law establishes national policy, recognizes states' need for involvement, but limits states' range of motion. In 2005, Congress added Section 215 to the Federal Power Act of 1935. Section 215 made FERC the master of electric bulk power system reliability, allowing state regulation only if "consistent with" federal rules. ***Why?*** Congress wanted a national entity (a FERC-certified "electric reliability organization") to establish national standards for users, owners, and operators of the multi-state, interconnected grid, but viewed state-level variations as

theoretically possible provided they did not undermine the national standards. Allow multiple chefs in the kitchen, if the extra activity does not spill the soup.

3. Federal law precludes state activity entirely. In Section 201 of the Federal Power Act (as interpreted by the U.S. Supreme Court in *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002)), the 1935 Congress granted FERC exclusive jurisdiction over "unbundled" transmission of electric energy in interstate commerce. ***Why?*** The interconnected, interstate grid knows no state boundaries. Electrons entering the highway in one state affect traffic in other states. As our Framers foresaw in the 1780s, a nation of commerce cannot yield to the sum of conflicting state preferences.

4. Federal law conditions federal benefits on state actions. We have federal transportation grants for states if they enact speed limits and right-turn-on-red rules. We have federal stimulus grants for states that investigate electricity rate design. ***Why?*** National tax revenues should serve national goals—here, reduction in fossil fuel use.

5. Federal law leaves states free to act without limit. Section 201 of the Federal Power Act of 1935 denies FERC authority over retail sales of electric energy. ***Why?*** Congress believed that (a) retail use equals local use, and (b) local use has only local effect. True in 1935, false today. One state's waste is another state's burden. If one state's retail rates cause an unnecessary contribution to peak load, the extra capital investment for transmission and generation costs the region. Unnecessary consumption, similarly, causes more fuel burning, which raises the price of fuels and of emissions allowances for everyone. Put another way: Markets for fossil fuel and emissions are multistate markets. Unnecessary demand raises market prices; a decrease in demand lowers market prices. Do you want your neighboring state to increase demand or decrease demand? Do you figure your neighboring state feels the same about your state's excess demand? Back to jurisdiction: What once was local now is national. So we see Congress and FERC entering the retail territory, addressing retail rate structure and demand-side management. "Trampling state values," or protecting states from each other?

Define the Joint Goal, Then Allocate Duties to Achieve It

In the area of jurisdictional collegiality, there are three prerequisites for success:

1. Find the shared mission, then define who does what best. Consider the hospital operating room or the Habitat for Humanity construction site. Workers focus on purpose and performance, their roles determined by expertise. No one argues about jurisdiction.

2. Think clay, not concrete. My state colleagues often say that states do "consumer protection"; the feds do—something else. Aren't the roles more malleable? There is nothing state-only about "consumer protection." There are numerous examples of an exclusively federal presence. Take food and drug safety. Nothing could be more "local" than an individual's ingestion of potatoes and pills, but food and drug safety is regulated nationally. ***Why?*** Because a local scare would up-end national markets. (Spinach contamination on the West Coast

unloaded shelves on the East Coast.) Radioactivity poisons persons—more local effects. But nuclear safety is exclusively federal. (Three Mile Island: one local event, an entire nation loses confidence for decades.) An industry's integrity needs a federal footprint.

3. If the purpose of regulation is performance, place jurisdiction where performance risk arises. Take pharmaceuticals: Some risks arise in research, design, production, and labeling—national markets, national regulation. Other risks arise in prescription, marketing, and sales—local activities, so the states license physicians and pharmacists. No one disputes these common-sense allocations. In water, capture, storage, treatment, delivery, and sale are largely local, thus regulated in-state. Water quality has both national and local causes and solutions, so its regulation occurs at both levels (requiring federal-state consistency and coordination).

Perhaps the dialogue's problem is the very phrase "consumer protection." Protection from what? If regulation is about performance, then "protection" means protection from subpar performance. Regulate performance where it occurs: Performance affecting national markets needs national regulation; performance affecting only local markets needs only local regulation.

Solve the Problems at Their Source: Congress

In electricity, telecommunications, and gas, jurisdictional disputes have come to the courts. But courts cannot fashion solutions where old laws have lost their logic; they can only pick winners and losers among parties disputing those old laws. Courts do not ask, "What is the best allocation of jurisdictional roles?" They ask only, "In the case before us, who wins and who loses?"

Today's jurisdictional roles arise from 75-year-old federal statutes designed for a simpler world. We have amended them episodically and opportunistically, rather than comprehensively and objectively. Only Congress can re-craft a solution. Does Congress have the capacity? Knock off that tittering and chuckling. We all know congressional members and staff of high intellect and integrity. The problem is not Congress. The problem is those of us who pull it in multiple, inconsistent directions, producing statutes containing multiple inconsistencies without direction. Whether and how we can pull together is for future essays.