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Limiting Federal Agency Preemption:

Recommendations for a New Federalism Executive Order

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CPR CENTER FOR PROGRESSIVE REFORM

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This white paper is a collaborative effort of the following member scholars and staff of the Center for Progressive Reform: **William Funk** is a Professor of Law at Lewis & Clark Law School in Portland, Oregon and a Member Scholar of the Center for Progressive Reform. **Thomas McGarity** holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas in Austin, is a member of the board of directors of the Center for Progressive Reform, and the immediate past president of the organization. **Nina Mendelson** is a Professor of Law at the University of Michigan Law School and is a Member Scholar of the Center for Progressive Reform. **Sidney Shapiro** holds the University Distinguished Chair in Law at the Wake Forest University School of Law, is the Associate Dean for Research and Development, and a member of the board of directors of the Center for Progressive Reform. **David Vladeck** is a Professor of Law and Co-Director of the Institute for Public Representation at Georgetown University Law Center and a Member Scholar of the Center for Progressive Reform. **Matthew Shudtz**, J.D., and **James Goodwin**, J.D. are Policy Analysts with the Center for Progressive Reform.

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Introduction

The structure of the U.S. Constitution reflects a profound respect for the principles of federalism and state sovereignty. These principles require the federal government to recognize and encourage opportunities for state and local governments to exercise their authority, especially in areas of traditional state concern such as the protection of the health, safety, and welfare of their citizens. However, over the last six years there has been a coordinated Executive Branch effort to use the regulatory process to shield certain product manufacturers from state tort liability. The Food and Drug Administration, National Highway Traffic Safety Administration, and Consumer Product Safety Commission, among others, have attempted to use the doctrine of preemption to block consumers' access to state courts. During the Bush Administration, executive agencies have included assertions of preemption in regulatory preambles, filed amicus briefs in litigation in which other litigants have argued that federal statutes preempt state law, and submitted to Congress draft legislation that would preempt state and local authority to protect public health, safety, and the environment.

The Obama administration should replace Executive Order 13132, which instructs administrative agencies to consider the federalism implications of their actions, with an Executive Order that is more protective of the legitimate interests of state governments in maintaining their traditional role in protecting the health, safety and welfare of their citizens. While the current order has some desirable features, it is inadequate to prompt the type of deliberations in which agencies should engage when they are considering whether to support the preemption of state law.

Replace the Existing Executive Order

The basic structure of the existing Executive Order is sound in some ways. It focuses first on defining the President's "Fundamental Federalism Principles" and it then lists a series of regulatory procedures designed to ensure that agencies carry out their duties in accordance with those principles. Nevertheless, the current order fails to recognize or endorse basic principles of federalism that the agencies should respect, and its procedural safeguards also need reform. President Obama should create a new Federalism Executive Order that embodies these changes.

Fundamental Federalism Principles

One of the strengths of the current Executive Order is that it clearly defines many crucial federalism principles. But the principles enunciated in the Order are incomplete. For instance, the first two paragraphs of the "Fundamental Federalism Principles" section of the Order emphasize the Constitution's limits on federal power and the belief that issues lacking

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The Executive Order should begin with the idea that all types of government can play a positive role in our lives, not with the idea that one source of law is inherently better than another.

national scope should be "addressed by the level of government closest to the people." While these ideas are generally sound, it would be better to start with the idea that the federal and state governments play a cooperative role in setting public policy and that each branch or level of government (i.e., each source of law) has strengths and weaknesses that complement the others. The Executive Order should begin with the idea that all types of government can play a positive role in our lives, not with the idea that one source of law is inherently better than another in all cases.

From a progressive perspective, the new Executive Order should include the following points:

General Principles

- **Federalism embodies the concept that national, state, and local sources of law can all provide unique input to the development of optimum public policy.**

  As explained above, the new Federalism Executive Order should begin with a more positive outlook on the role of government in our lives. The traditional concept of federalism as a description of limits on government power is rooted in an inherently negative view of government – the idea that government is bad and should be limited. Instead, the Executive Order should espouse a positive view of government – a view that all government institutions can provide useful input to public policy debates. Federalism should be viewed as a framework for ordering the interaction of the various government institutions in a way that accounts for each institution's strengths and weaknesses, and in a way that will encourage coordinated decisionmaking.

Preemption Principles

- **Agencies should limit their attempts to preempt state law under theories of implied preemption.**

  During the Bush Administration's era of expanding regulatory preemption, agencies have overlooked an important issue: What statutory authority can they claim as the basis for their assumed power to define the scope of regulatory preemption? Only in limited circumstances has Congress expressly granted an agency the authority to define the scope of its preemptive power. Their authority to make those determinations is less apparent when agencies use theories of implied preemption to justify their efforts to preempt state law. The Executive Order's "Principles" section should emphasize the idea that statutes that might impliedly preempt state law do not grant agencies the power to define the scope of that preemptive power.

- **Agencies should adopt a presumption against "ceiling preemption."**

  The term "ceiling preemption" refers to any instance where federal law invalidates states' attempts to create or enforce more stringent or more protective regulation. In some

limited circumstances, Congress has created a statutory scheme that relies on ceiling preemption. For instance, the 2005 Energy Act changed the way decisions are made about the siting of liquefied natural gas (LNG) terminals. The Act placed the decisions solely in the hands of the Federal Energy Regulatory Commission, eliminating the traditional role of local governments in the decisionmaking process. Absent such explicit directions from Congress, however, agencies should adopt and follow a strong presumption against ceiling preemption.

The Executive Order should mandate that agencies adopt this theory of preemption because it ensures that all levels of government have a role in important public policy debates. Unless Congress has unequivocally decided to displace certain government institutions, the President should encourage broad inter-governmental interaction through the enforcement of a presumption against ceiling preemption. That presumption should be strong in cases in which the federal government seeks to preempt state law that regulates activities traditionally addressed under the states' police powers (e.g., public health and safety or land use). The presumption against federal preemption of state tort law should be especially strong when the federal statute does not provide its own vehicle for compensating injured individuals, as is the case with most of the existing environmental, health, and public safety statutes.

- **Different concerns arise when considering preemption of state positive law versus common law.**

The current Executive Order fails to differentiate between state common law and state positive law. State positive law, such as statutes and regulations, is developed and enforced in ways that parallel federal statutes and regulation. State tort law, on the other hand, relies on institutional structures and decisionmakers that are entirely different from those found in the federal regulatory system. State legislatures, regulatory agencies, and common law courts have different institutional strengths and weaknesses that could – depending on the situation – either complement or complicate federal agencies' work.

- **The administration supports the principles embodied in the idea of corrective justice, and the right of states to define those principles as they see fit.**

The current Executive Order emphasizes the freedom of "[t]he people of the States" to "define the moral, political, and legal character of their lives." The Obama Administration should build on this language by adding a statement supporting a vibrant tort system. That statement should highlight the state tort system's capacity to provide corrective justice, as well as its embodiment of the principle of state sovereignty.

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Regulatory Processes to Protect Federalism Principles

Agencies should be held accountable for compliance with the Order's Fundamental Federalism Principles. The existing Order relies on the White House Office of Management and Budget (OMB) to monitor agencies' compliance with its principles. One reason for replacing Executive Order 13132 is to adopt a more effective method of White House supervision of agency compliance with its fundamental principles. A new Federalism Executive Order should first stress the view that a generally phrased statute should not be understood to give an agency the authority to preempt state law. Second, the Order should define procedures that ensure compliance with its principles in the limited cases where Congress has granted the agency the authority to preempt.

President Obama might ensure compliance with the Fundamental Federalism Principles in the new Federalism Executive Order using a number of different procedural mechanisms. But regardless of which system President Obama chooses, the Executive Order's procedural requirements should ensure that agencies implement the principles of federalism that are described above. The following procedures are necessary to ensure this outcome.

Enforcing the presumption against ceiling preemption and the presumption against agency preemption

New procedures should require agencies to publish a written justification when deciding to preempt state law despite the presumption against ceiling preemption. The justification would have to include at least two elements. First, it should include a legal analysis of the preemptive effect of the governing statute. That analysis must prove first that Congress intended to grant the agency the power to define the scope of regulatory preemption, and second that Congress intended to preempt conflicting state or local law. The second element of any agency written justification should be factual evidence and policy rationale that supports the agency's decision to preempt state or local law. The supporting evidence should demonstrate that the state or local law in question does in fact conflict with federal law.

Protecting state authority to regulate

A number of statutes that give federal agencies the power to write uniform federal regulations also give them a coordinate power to grant waivers that enable individual states to create their own, more stringent regulations. The existing Executive Order instructs agencies to review state waiver applications "with a general view toward increasing opportunities for utilizing flexible policy approaches at that State or local level." The new Executive Order can further that objective by adding limited procedural requirements. Agencies should be required to publish a justification for any denial of a state request to regulate in a manner more protective of public health, safety, or the environment. As with the written justification requirements for enforcing the presumptions against ceiling and agency preemption, that justification should have sound legal, policy, and factual evidence to support the agency's decision.

One reason for replacing the Executive Order is to adopt a more effective method of White House supervision of agency compliance with its fundamental principles.

Ensuring meaningful consultation with state and local officials, and their nonprofit advocacy groups

The new Executive Order should expand on the existing Order's consultation rules. When an agency plans to preempt state law, it should provide state and local officials adequate opportunity to review the proposal at an early stage in the rulemaking process, as well as a chance to meet with agency staff and management. The agency should also be required to publish a detailed account of the consultation that took place, with a summary of the state and local officials' concerns and the agency's detailed responses to those concerns. The consultation process should also engage nonprofit advocacy groups that represent state and local officials. Groups that should be included are: the National Association of Attorneys General, National Governors Association, National Conference of State Legislatures, Council of State Governments, National League of Cities, U.S. Conference of Mayors, National Association of Counties, and the International City/County Management Association. In recent years, some regulatory agencies have complained that their notices to state and local officials about new preemptive regulations did not produce a response. Actively engaging the nonprofit advocacy organizations might be more fruitful.

The proper regulatory mechanism

There are several models that President Obama could use for the new Executive Order's procedural requirements. If OMB continues to review regulations on a rule-by-rule basis, it should include a careful look at preemption in accordance with this Executive Order. Otherwise, President Obama should adopt a policy modeled on OMB's role in implementing the Data Quality Act. Some details on how these ideas could be implemented, as well as two variations on those approaches, follow:

Rule-by-rule review: If the new administration decides to continue the existing system of OMB review of agency regulations under Executive Order 12866, that system could be used to review individual agency proposals to preempt state law. In contrast to the existing Order's requirements, OMB would not simply rely on agencies' attestations that they have abided by the Order's principles. Instead, agencies would be asked to articulate clearly their findings with respect to the Executive Order's Fundamental Federalism Principles, and OMB would carefully review those findings.

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) is responsible for reviewing individual rules. President Obama could use the new Federalism Executive Order to establish an office within OIRA that would have the legal expertise to review agencies' compliance with the Order. Or, he could choose a different agency to perform the oversight function. The Department of Justice's inherent legal expertise might make it a good agency to review regulatory preemption decisions. But regulatory review is not a traditional responsibility for DOJ, and DOJ does not have the budget or infrastructure to review agency rules the way OMB does.

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Even so, President Obama might consider involving DOJ on a limited basis, say, by requiring agencies or OMB/OIRA to consult with DOJ any time a proposed rule will preempt state law.

A DQA-style approach: Under the Data Quality Act, OMB published detailed guidance on how agencies are to implement the law. Agencies were required to develop their own internal policies that were in turn approved by OMB. A revised Federalism Executive Order might follow that model, requiring OMB to develop minimum procedural requirements that will ensure agencies are considering fully the federalism implications of their actions and findings. The guidance should also ensure that agencies are actively engaging representatives of state interests in their decisionmaking process. As is the case under the DQA, each federal agency would be required to develop agency-specific guidelines that comport with the OMB guidance, and OMB would have to certify that the agency's guidelines are adequate. For each rule completed after OMB has approved the agency's guidelines, the agency would simply have to certify in writing that it has followed the approved guidelines in developing the rule. This approach is very similar to the requirements of Executive Order 13132 in its current form, but it would require more detailed guidance from OMB at the outset.

A hybrid system: A third option would be to combine the DQA-style approach with the rule-by-rule review process. In this scheme, OMB would first develop a government-wide guidance document that outlines some basic procedures agencies should adopt and questions they should answer in reviewing the federalism implications of their actions. Then, agencies would be required to develop their own guidelines that match the OMB guidance, have them approved by OMB, and compile a document describing their compliance with the procedures and answers to the questions for each action reviewed by OMB. OMB would be responsible for both ensuring that agencies have complied with their guidance for each reviewable rule and reviewing the substance of the decisions. Again, OMB is not necessarily the best institution to have centralized review power under this option.

Regulations, not guidelines: The last scheme the new President might adopt is one in which the revised Executive Order prompts agency adoption of regulations that dictate procedures for assessing the federalism impacts of agency actions. This scheme might be modeled on the National Environmental Policy Act (NEPA), under which the White House's Council on Environmental Quality crafted government-wide regulations for implementing NEPA and each agency has come up with its own, more detailed version of the regulations.

A Review of the Bush Record

The procedural safeguards proposed above will be a useful tool going forward – providing the Obama administration a way to effectuate a new policy on preemption in future regulations. But they do not address the myriad regulations in which the Bush Administration has argued for regulatory preemption. The new Executive Order should include a "look back" provision that assigns some office – be it within OMB, DOJ, or some other appropriate agency – the task of reviewing all Bush-era claims of regulatory preemption. The review should focus on whether those claims square with the new Executive Order's essential principles of limited agency preemption. For any instance where an agency has assumed a power to preempt state law without express statutory authority or without sufficient evidence of a direct conflict between state law and federal regulation, the reviewers should recommend a course of action for rescinding the preemptive decision.

Conclusion

This fall, the *Wall Street Journal* suggested that the multiyear effort to shield product manufacturers from liability through regulatory preemption might be one of the Bush Administration's lasting legacies. President Obama has the opportunity, through revisions to the Federalism Executive Order, to re-establish an appreciation for the principles of federalism, state sovereignty, and the importance of a vibrant state tort system in protecting public health and safety.

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Notes:

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