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DISCUSSION DRAFT
Statement of Federalism Principles

The United States Constitution grants to Congress the power to tax and spend; borrow money; regulate commerce; control naturalization and aliens; regulate bankruptcy; coin money and punish counterfeiters; establish a post office; promote science and the arts; establish courts in addition to the Supreme Court; punish piracy, felonies on the high seas and offenses against the law of nations; raise and support armies and call out the militia; create a federal district and acquire property; and to make all laws necessary and proper for the exercise of its delegated power. The United States Constitution also grants the President, with the advice and consent of the Senate, the power to make treaties. While operating within the sphere of its delegated power and in conformity with the Constitution or when enacting treaties, actions taken by Congress and President are the supreme law of the land and are binding upon the States. Pursuant to the Tenth Amendment, however, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The allocation of power between the States and the Federal Government set forth in the Constitution provides the States "sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause."[1] Pursuant to this system of dual sovereignty, the Constitution establishes "an indestructible Union composed of indestructible States," each of which is has its own government "endowed with all the functions essential to separate and independent existence." [2] This federalist structure assures a "decentralized government that will be more sensitive to the diverse needs of a heterogeneous society," that will increase "opportunity for citizen involvement in the democratic process" and "allow for more innovation and experimentation in government," and make government "more responsive."[3] The preservation of a "healthy balance" of Federal and State authority, was intended by the framers of the Constitution to protect "fundamental liberties," prevent an "excessive accumulation of power in one branch," and "reduce the risk of tyranny and abuse from either front."[4]

Among the powers not delegated to Congress, one of the most important is the police power to protect health, safety and welfare which since the earliest days of the Republic has been recognized to be reserved to the States.[5] The reservation of the police power to the states,

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[1] *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990).

[2] *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas* v. *White*, 74 U.S. 700, 725 (1869) and *Lane County* v. *Oregon*, 74 U.S. 71, 76 (1869)).

[3] *Id*.

[4] *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985).

[5] *Marbury v. Madison*, 5 U.S. 137 (1803); *McCulloch v. Maryland*, 17 U.S. 316, 420 (1819) (Where "the end be legitimate" and "within the scope of the Constitution," "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.).

however, does not prevent Congress in exercising its delegated powers, and in doing all things necessary for the exercise of its delegated power, to supersede and preempt state law.[6] This principle has resulted in Congressional enactments of laws to protect child labor, ensure civil rights, protect the safety of foods and drugs, create the Social Security System, establish the Medicare and Medicaid programs, and legislate in innumerable other areas. In particular, the exercise of power by Congress under the Commerce Clause has been recognized as akin to the police power and, with the rapid expansion of interstate commerce, has created substantial areas of dual and overlapping federal and state authority.[7] "As interstate commerce has become ubiquitous, activities once considered to be purely local have come to have effects on the national economy, and accordingly have come within the scope of Congress' commerce power."[8] For example, the power to regulate interstate commerce has been recognized to include not only activities that cross state lines, but also activities that may potentially burden interstate movement, such as discrimination in public accommodations, and persons or objects that have come into a state as a result of interstate commerce.[9] Likewise, the subsequent distribution of items in intrastate commerce that previously came into a state through interstate commerce has been found to be subject to Congressional regulation.[10]

Because members of the federal judiciary are not elected representatives of the people, since the 1930s the Supreme Court, with limited exceptions, [11] has largely ceded questions regarding the appropriate allocation of power between the States and the Federal government to the political process.[12] Unfortunately, Congress has far too often not given careful consideration to the

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[6] *Hamilton v. Kentucky*, 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.").

[7] *Brooks v. United States*, 267 U.S. 432, 436-37 (1925) ("Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce to permit immorality, dishonesty and the spread of any evil to the people of other States from the State or origin.").

[8] *New York v. United States*, 505 U.S. 144, 158 (1992).

[9] *Heart of Atlanta Motel v. United States*, 379 U.S. 241, (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[10] *United State v. Sullivan*, 332 U.S. 689 (1948) (Upholding the conviction of a Georgia druggist who imported tablets from Atlanta and six months later dispensed some of the tablets locally in two prescriptions that were not properly labeled). Even wheat grown solely for home consumption has been found to be subject to federal control on the premise that it supplies a need that might be otherwise met in interstate markets. *Fry v. United States*, 421 U.S. 542, 547 ("Even activity that is purely intrastate in character may be regulated by Congress where the activity, combined with like conduct by others similarly situated, affects commerce among the States.").

[11] *See e.g.*, *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (held that a federal statute prohibiting the possession of a gun at or near a school was not a valid exercise of power under the Commerce Clause as eliminating "any distinction between what is truly national and what is truly local"); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidated a provision of the Violence Against Women Act that created a federal cause of action for victims of gender motivated violence because Congress may not regulate "non-economic, violent criminal conduct based solely on that conduct's aggregate impact on interstate commerce").

[12] *South Carolina v.* Baker, 485 U.S. 505, 512 (1988) ("[L]imits on Congress' authority to regulate state activities … are structural, not substantive—i.e.,, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550 (1985) ("Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of States in the federal system lies in the structure of the

importance of preserving State law. Some efforts to improve this situation were begin in 1987, when President Reagan issued Executive Order 12612,[13] and again in 1999 when President Clinton issued Executive Order 13132,[14] both of which encouraged federal agencies to respect the role of State governments and avoid the preemption of state law whenever possible and to consult with and coordinate their actions with State officials. More recently, President Obama issued a Presidential Memorandum on May 20, 2009, directing federal agencies to review and re-evaluate the preemptive impact of all federal regulations issued within the last ten years.[15]

Unfortunately, these efforts focus primarily on the actions of the executive branch, and primarily stress the need to preserve state autonomy and avoid preemption where possible. They provide little meaningful guidance about how to integrate the roles of the Federal and State governments in areas of overlapping jurisdiction.

In the absence of any clear guidance regarding how in the interests of comity Federal and State authority should be allocated, where both the States and the Federal government have enacted laws in the same subject matter areas, two polar and competing models have emerged that are generally relied upon to integrate the role of federal and state law. One model treats federal law as creating a regulatory floor which establishes minimum standards binding upon the States and allows States to adopt their own laws and regulations that may be more expansive and stringent. A second model allows federal law to create a regulatory ceiling that exclusively or primarily controls a particular area of subject matter jurisdiction. In a large number of contexts, however, both models fail to perform well to integrate federal and state responsibilities and interests.

Treating federal law as a regulatory floor often generates a substantial lack of uniformity and a complex maze of unique state and local legal requirements that vary from jurisdiction to jurisdiction. A lack of uniformity often creates uncertainty that impedes economic progress, imposes burdensome costs on businesses and individuals engaging in interstate commerce, and generates an excessive and unproductive amount of litigation. Where federal law is regarded as a regulatory floor, significant uncertainty is also created regarding the extent of federal preemption and the role of federal and state courts in resolving conflicts. The resolution of disputes often becomes inefficient, protracted and unreasonably expensive where disputes arise regarding the scope of preemption and judicial jurisdiction, the circumstances in which federal courts should assert jurisdiction over pendent issues of state law or abstain from exercising jurisdiction, and how federal courts should interpret state law where the resolution of state issues may be dispositive.

Conversely, treating federal law as a regulatory ceiling in many circumstances also generates undesirable results. Entirely or substantially preempting state law may stifle innovation, impose unfunded mandates on state and local governments, and excessively centralize power in a manner that fails to recognize and respond to unique local needs and circumstances. The

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Federal Government itself," *i.e.*, the role of the States in selecting the President and equal representation of the States in the U.S. Senate).

[13] 52 F.R. 41685 (October 26, 1987).

[14] 64 F.R. 43255 (August 10, 1999).

[15] 74 F.R. 24963 (May 22, 2009).

substantial preemption of state law may also overburden federal courts and prosecutorial authorities, and fail to make efficient use of the much larger state judiciary and law enforcement systems that operate in much closer contact with local communities.

As a result of the significant shortcomings of using federal law to simply create regulatory floors or ceilings, a number of approaches have also been developed to integrate federal and state responsibilities. These models include the development and implementation of uniform state statutory law, the restatement of the common law, the negotiation of interstate compacts, regional and national cooperation by state regulatory authorities, and reliance on private or quasi-governmental standard setting organizations. In a number of areas these alternative models have created effective forums for federal and state interaction and cooperation that has been highly productive. Unfortunately, these alternative models are typically underutilized and misunderstood, and far too often ignored in the interests of short term political expediency.

To promote a more effective integration of federal and state law, before undertaking significant policy initiatives, members of Congress, federal regulators, state legislators, state regulators, members of the organized bar, professional and occupational associations, and consumer and public interest groups should attempt to identify for a particular legislative or regulatory undertaking the most appropriate manner in which to integrate dual federal and state responsibilities. In particular, efforts should be undertaken to determine whether to rely upon the use of regulatory floors or ceilings, or intergovernmental cooperation, to achieve policy objectives. Among the factors that should be considered in any such analysis are those listed below:

Federal Law Should Set a Regulatory Floor When:	**Federal Law Should Set a Regulatory Ceiling When:**	**Intergovernmental Cooperation Should be Relied Upon When:**
Individual states face unique problems due to differences in environment, resources or culture. The lack of substantial uniformity will not create excessive burdens on interstate commerce and the interstate coordination of non-commercial activities. The establishment of uniformity will impose unfunded obligations on state and local governments. There is a substantial lack of consensus about the best approaches to promoting	National security demands that a problem be addressed uniformly and comprehensively at the federal level. Prompt action is needed to address pressing national problems. Most states are presented with similar needs and problems. There is a need for a high degree of uniformity to promote economic growth and stability and promote the development of new technologies.	Both reliance on federal regulatory floors and ceilings pose significant problems. There is a need for substantial uniformity among the states, but room for local variation occurring within a well-defined legal framework. A reasonable likelihood exists that intergovernmental cooperation can successfully develop legal regimes. It is beneficial to develop a high degree of consensus and maintain stability within the law.

uniformity. There is a need to frequently modify and update laws and regulations. State laws and regulations are well-developed and historically have primarily controlled an area of subject matter jurisdiction.	Interstate competition will encourage a race to the bottom or impede the attainment of substantial uniformity. There is little need to frequently modify and update laws and regulations. Federal law historically has primarily occupied a field of subject matter jurisdiction.	The costs and time required to develop an intergovernmental consensus does not outweigh potential benefits. State law historically has primarily occupied a field of subject matter jurisdiction.

The above list represents only a partial identification of the factors that should be considered in selecting alternative models for the integration of federal and state responsibilities. More efforts are needed to more extensively identify and articulate these standards and to promote a dialogue among competing stakeholders about how to apply these factors in different subject matter areas.

Where the best approach to a particular problem is to rely in whole or in part upon intergovernmental cooperation, the role of different intergovernmental organizations should also be carefully considered. Generally, it will be desirable to identify an appropriate lead agency to take responsibility for a particular subject matter area to minimize jurisdictional competition. Structures should also be developed that effectively involve federal legislators and regulators in making these decisions.

In undertaking significant policy initiatives, decisions should also be made about whether to cede responsibility for a problem in whole or in part to state governments, or to use federal law or regulations to promote or encourage intergovernmental cooperation. For example, federal regulatory floors may be needed to facilitate interstate cooperation and to address issues upon which states are unable or unlikely to effectively address; federal incentives, sanctions or deadlines may be desirable to promote interstate cooperation and facilitate the timely development of needed legal solutions; and some aspects of a particular problem may need to be addressed by federal statutory or regulatory ceilings.

Conversely, where the best approach to a particular problem is to rely in whole or in part upon federal preemption of state law, it is important that the scope and extent of federal preemption be expressly and clearly articulated. While it is clear that if it is physically impossible to comply with both federal and state law at the same time, state law is impliedly preempted,[16] preemption has also be found to impliedly arise in a variety of other circumstances. For example, preemption may occur impliedly where state law "stands as an obstacle to the accomplishment and execution of the full purposes of federal law;"[17] state laws are "unduly burdensome or duplicative," "prevent or significantly interfere" with federal objectives," or curtail or hinder the "efficient exercise or other powers;"[18] and where federal regulation of an area is "so pervasive as

[16] *Florida Lime & Avocado Growners Inc. v. Paul*, 474 U.S. 132 (1963).

[17] *Barnett Bank v. Nelson*, 571 U.S. 25 (1996).

[18] *Watters v. Wachovia*, 550 U.S. 1 (2007).

to make reasonable the inference that Congress left no room for states to supplement it."[19] While the art of political compromise may at times justify and necessitate deferring questions about the scope and extent of preemption to the federal judiciary, wherever possible, clarity and precision is preferable to ambiguity, and wasteful and unnecessary litigation to divine the intent of Congress and federal regulatory agencies should be avoided.

When the United States seeks to ratify and implement the provisions of international treaties or conventions, careful consideration should be given to the same types of factors that are set forth in this Statement and on the impact of the chosen method of treaty implementation on the balance between state and federal law. Under the Constitution, treaties ratified by the United States become the supreme law of the land. Thus, when the United States negotiates private law treaties that involve, as they often do, subjects that are currently addressed by state law, such as commercial law, family law, consumer law, dispute resolution, and judicial cooperation, the federal government creates instruments that, if ratified, may preempt existing state law and affect the allocation of power between the states and the federal government. Efforts should be made to select a method of treaty implementation that both effectively implements the treaty, thus satisfying the United State's good faith obligation to implement the terms of a treaty that it has ratified, and that disrupts as minimally as possible the role of state law in areas governed by the treaty. When legislation is required to implement a treaty, federal legislation is not the sole available option, and it is possible to implement a treaty by a combination of federal and uniform state legislation.

Consistent with these objectives, to reaffirm a vibrant Cooperative Federalism, the Administration and Congress should:

1. Refrain from enacting proposals that would limit the ability of states and localities to exercise discretion over basic and traditional administrative functions of state and local government.

2. Promote the uniformity of law among the States where the diversity of State law impedes or imposes excessive costs on persons engaged in interstate commerce or unreasonably interferes with attainment of objectives sought to be achieved by Federal laws and treaties necessary and proper for the exercise of powers delegated to the Federal government.

3. Rely upon and promote intergovernmental cooperation to achieve uniformity among the laws of the States when intergovermental cooperation provides a viable and beneficial alternative to federal preemption.

4. Avoid the preemption of state and local laws without substantial justification. Regarding federal preemption of state and local laws, Congress should whenever possible allow states and localities the flexibility to shape public policy. By definition, every preemptive law diminishes other expressions of self-governance and should be approved only where compelling need and broad consensus exist.

[19] *Fidelity Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 218 (1982); *Rice v. Santa Fe Elevator*, 331 U.S. 218 (1947).

5. Weigh the benefits of such preemption against the loss of state and local accountability, innovation and responsiveness.

6. Provide reasonable notice to state and local leaders of any congressional intent to preempt and provide them with the opportunity for formal and informal comment prior to enactment.

7. Investigate which state laws would be preempted by federal legislation or agency rulemaking before a vote on preemptive legislation is taken or a rule is promulgated that usurps state authority. This serves to ensure that Congress and the agencies know the effect of their decisions on other levels of government.

8. Develop processes to understand better the impact of proposed bills and rules on federalism and on state and local governmental activity. Congress should refer bills that affect state and local powers and administration to intergovernmental subcommittees.

9. Where preemption of state law is found to be desirable, expressly set forth the extent to which state laws are preempted or preserved with as much specificity as possible and avoid reliance upon implied preemption or vague and unclear statements of intent regarding the scope of preemption.

10. Ensure that any federal agency intending to preempt state or local laws has the express authority to do so or clear evidence of Congressional intent to authorize preemption. Agencies should follow the consultation guidelines established in the Executive Order on Federalism (E.O. 13132) and examine the intergovernmental fiscal and preemptive impact on of proposed federal regulations on states and localities.

11. Consider reestablishing the National Advisory Committee on Intergovernmental Relations or another appropriate entity to facilitate dialogue among federal, state and local governmental leaders about American Federalism, about the general allocation of powers and responsibilities among the three levels of government, and about how best to address specific issues and problems in the spirit of Cooperative Federalism.

12. Avoid passing legislation or promulgating rules that create unfunded federal mandates or shifts costs to states and localities.