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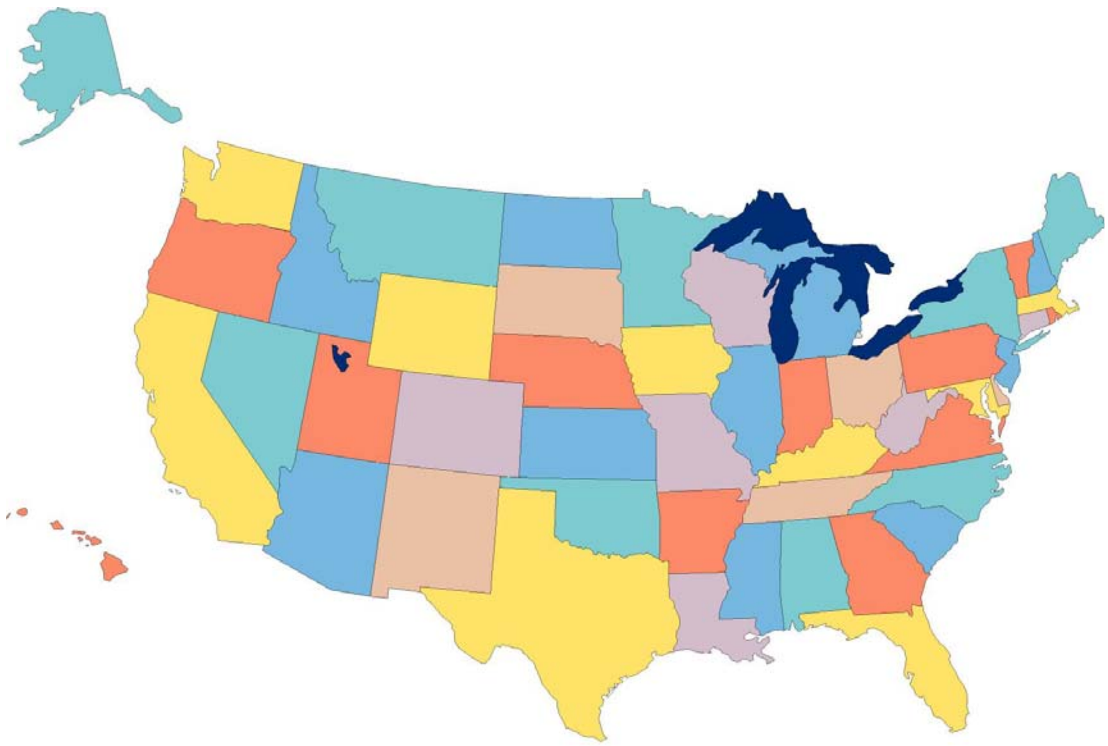

Tying the Hands of States

The Impact of Federal Preemption on State Problem-Solvers

The State PIRGs

State Public Interest Research Groups

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The Impact of Federal Preemption on State Problem-Solvers

National Association of State PIRGs
July 2004

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The state Public Interest Research Groups (PIRGs) are state-based, citizen-funded organizations that advocate for the public interest. We uncover threats to public health and well-being and fight to end them, using the time-tested tools of investigative research, media exposés, grassroots organizing, advocacy and litigation. The state PIRGs' mission is to deliver persistent, results-oriented activism that protects the environment, encourages a fair marketplace for consumers and fosters responsive, democratic government.

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Executive Summary

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

— Brandeis, dissenting, New State Ice Co. v. Liebmann, 285 U.S. 262, at 311 (1932)

States have long been the laboratories for innovative public policy, particularly in the realm of environmental and consumer protection. State and local legislatures, smaller and often more nimble than the federal government, can develop and test novel policies to address problems identified by local constituents. If a certain policy works, other states can try it. If the policy fails, the state or local government can quickly modify the policy without having affected residents in all 50 states. Success at the state level then often gives rise to federal policy.

Politicians and scholars have debated the balance of power between federal and state governments since the time of the Constitutional Convention. Far from being simply theoretical, this debate has real-world consequences. When considering federal policy that could conflict with state policy, Congress often has to choose between establishing its policy as the minimum protection or "floor," allowing states to enact stronger legislation to supplement that minimum standard, or as the "ceiling," in effect establishing maximum requirements that states cannot supersede. Over the last three decades, states have become increasingly active in passing strong laws to protect the health, safety, and well-being of their residents. The federal government has increasingly responded to state-level problem solving with its own powerful political tool—preempting the right of state governments to legislate on a given issue and establishing federal law as the ceiling.

This paper discusses just a few arenas in which the federal government has dictated federal law as the ceiling, effectively preempting state policies on issues ranging from financial privacy to health care to global warming.

• Consumer privacy. Congress has passed legislation preempting the right of states to pass credit accuracy and privacy laws that are stronger than federal law. At the center of the debate is a strong privacy law passed by California State Senator Jackie Speier that went into effect on July 1, 2004. Ultimately, the courts will decide if federal law preempts this California policy—which would close the door for other states to follow California's lead.

• Banking regulation. In January 2004, the Office of the Comptroller of the Currency (OCC) issued a sweeping rule that would prevent most state consumer protection laws from applying to nationally chartered banks. This likely will dissuade any state legislator or regulator from acting to impose rules on state entities stronger than those imposed by OCC on their primary competitors, national banks.

• Health care. In June 2004, the Supreme Court unanimously rejected efforts by states to give patients in HMOs the right to sue managed-care companies when they refuse to cover treatment that a doctor has deemed medically necessary. The court ruled that the Employee Retirement Income Security Act (ERISA) preempts the "right to sue" laws of Arizona, California, Georgia, Maine, New Jersey, North Carolina, Oklahoma, Texas, Washington and West Virginia.

• Global warming emissions from vehicles. In July 2002, California's then-Governor Gray Davis signed a new law to reduce greenhouse gas emissions from passenger cars and light trucks. The California law faces challenges from the auto industry and potentially from the federal government—both of which may argue that the proposal is preempted by federal authority to set fuel economy standards. The outcome of this fight will be felt outside of California. Just this year, New Jersey, Rhode Island and Connecticut said they intend to start following California's auto emissions standards instead of the federal standards. New York, Massachusetts, Vermont and Maine already do so.

• Nuclear power plants. Federal law preempts state regulation of the construction, operation, and licensing of nuclear power plants, placing sole authority with the Nuclear Regulatory Commission (NRC). These preemption issues are particularly salient in states, such as Ohio and New Jersey, where community groups, regulators and state officials are concerned about the safety and continued operation of aging nuclear power plants. State officials can submit public comments to the NRC and otherwise weigh in on NRC decisions; however, the authority to operate or close a plant rests squarely with the NRC.

As the stories and anecdotes from state legislators and regulators included in this paper show, federal preemption has often tied the hands of state legislators and regulators eager to solve problems facing their constituents. But this preemption hurts more than the residents within one state's borders. Federal preemption suppresses the creativity of state problem solvers and shrinks the marketplace of ideas—leaving us with "lowest common denominator" solutions.

These few examples are indicative of what appears to be a growing trend—conflict between state and federal lawmakers over the role state governments should play in protecting the health, safety, and well-being of their constituents in the face of inadequate federal regulation. Federal preemption battles are brewing on issues ranging from insurance regulation to energy efficiency requirements to regulation of toxic chemicals. While the policy context of each of these issues differs, the crux of the debate remains the same: where does the authority of the federal government end and the power of the states to do more to protect their citizens begin?

Background on the Preemption Debate

"If you lose the states as a laboratory for consumer protections and other innovations you lose a great attribute of our federalist system – the ability to find out what does and doesn't work. And also the ability to tailor the response to the problem – Wyoming doesn't necessarily need the solution for the problems we've identified in New York."

— Diana L. Taylor, Superintendent of Banks for the State of New York[1]

Constitutional Balance of Power

The modern preemption question has its roots in the Constitutional Convention and the debate over the nature of American federalism. In crafting the Constitution, the framers designed a federal system in which the national government exercises certain powers, including the power to regulate interstate commerce and to tax, and reserves other powers for the states. The Tenth Amendment outlines this balance of power:

> "The 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 Constitution, however, also establishes the power of the federal government to preempt the states. The Supremacy Clause of the Constitution states that the "Constitution and the laws of the United States...shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding."[2]

The ratification of the Constitution sparked some of the first lengthy debates about how best to structure American government. The Federalists, led by political leaders such as Alexander Hamilton, supported a strong federal government to protect against the tyranny of the majority; the Anti-Federalists, led by Thomas Jefferson and James Madison, believed the states offered the most legitimate unit of government and supported a more limited role for government at the federal level.

Jefferson and Hamilton's positions on the balance of power between the states and the national government reflected the constituencies they represented. Jefferson, in calling for strong state government, largely represented the agrarian and populist interests of the 19th century. Hamilton, conversely, supported a stronger central government to help industrialize the nation—buttressing the interests of the merchants and industrialists he represented.

Two hundred years later, political theory and political motivations often still go hand-in-hand. In many cases, those who call for federal preemption of state law are protecting the interests of the industry most affected financially by active state governments.

Mechanics of Preemption

When enacting federal legislation that could conflict with state policies already in place, Congress has three basic options. First, Congress can allow different regulatory schemes to co-exist, leaving it to the courts to settle any disputes. Second, Congress can set its policy as a "floor"—minimum requirements that all states must meet—but allow states to enact stronger legislation to supplement that minimum standard. Finally, Congress can establish a federal "ceiling," in effect establishing maximum requirements that states cannot supersede.

Preemption can be either express or implied. Express preemption occurs when the federal statute explicitly notes that states cannot enact laws that are more stringent than federal law. Historically, Congress has hesitated to expressly preempt the states, as it is the most obvious extension of federal authority into state affairs. The federal government has become more assertive in this regard, however, as states have become more active over the last three decades and as special interests opposed to increased regulation—such as the financial services industry, electric utilities, pharmaceutical industry, and others—have strengthened their foothold in the U.S. Congress.

Implied preemption, which is often determined by the court, occurs when Congress has "occupied the field" in which the state is attempting to regulate. According to the court in *Pennsylvania v Nelson* (1956), implied preemption occurs when there is "no room" left for state regulation because of the pervasiveness of the federal regulatory scheme.[3]

States as the Laboratory for Democracy

"The federal relationship between states and the national government is more than a historical nicety. It reflects a reasoned and historically effective attitude toward policy-making."

— California State Senator Liz Figueroa (D-Fremont)[4]

States and even local jurisdictions have long been the laboratories for innovative public policy, particularly in the realm of environmental and consumer protection. The federal Clean Air Act grew out of a growing state and municipal movement to enact air pollution control measures. In 1982, Arizona enacted the first "Motor Voter" law to allow citizens to register to vote when applying for or renewing drivers' licenses; Colorado placed the issue on the ballot, passing its Motor Voter law in 1984. National legislation followed suit in 1993. The 1988 federal law limiting abusive bank policies on deposited check holding was adapted from previously enacted laws in Massachusetts and other states. A recent and highly successful program of the Federal Trade Commission—the National Do Not Call Registry to which 58 million consumers added their names in one year—had previously been enacted in various forms in 40 states.

Preempting Policy Innovation

Competition for public policy ideas fosters accountability. A marketplace of public policy ideas is no different than a marketplace of consumer products—when you have only one seller, you have a monopoly. A monopoly of ideas is a market failure that leads to bad public policy. As Roderick Hills has articulated:[5]

> "The value of federalism, if any, will result from the often competitive interaction of the levels of government. In particular…the presumption against preemption makes sense not because states are necessarily good regulators of conduct within their borders but rather because state regulation makes Congress a more honest, more democratically accountable regulator of conduct throughout the nation. To reverse the usual formula, national values are well-protected by the states' political process."

Federal preemption of states' ability to go above and beyond the federal floor suppresses states' creativity in developing new approaches to solving public policy problems.

Principles of Preemption

Since the 1970s, states have been the most active agents of legislation to protect consumers, public health and safety, and the environment. In some cases, the federal government has followed suit on the coattails of the states' action. In other areas, however, this state action has incited a wave of federal proposals to preempt the states—often with the result of weakening, not strengthening, protections.

Within this context, we can discern two primary "principles" of preemption.

— Preemption is appropriate to set minimum standards of protection. —

In some instances, state action can compromise the legitimate goals of the federal government. The 1964 Civil Rights Act, for example, directly challenged segregation policies in the south by banning discrimination on the basis of race, color, religion, or national origin in public accommodations; many southerners argued that this dictate violated states' rights. In the words of California State Senator Liz Figueroa (D-Fremont):[6]

> "Federal 'floor' preemption is entirely appropriate because it reflects a common, minimum denominator about what it means to be an American. Hence, for example, in the areas of civil rights and the environment, having Congress and the President establish minimum guarantees appropriately reflects a national consensus about the rights and liberties that – at minimum – every American ought to enjoy as a birthright."

Federal preemption, in these rare circumstances in which it may be appropriate, should be drawn as narrowly as possible to allow states and localities to legislate on related issues.

— Federal law should establish floors, not ceilings, leaving states free to experiment and add protections for their citizens. —

Setting federal law as a floor of protection as the default—without also preempting the states—allows states to continue in their role as problem solvers, experimenting with innovative policy solutions to the most pressing social problems, while providing a basic level of protection for all citizens. Federal preemption of the right of states to complement federal policy impedes the ability of the governmental bodies most able to respond to local needs and values—state and local governments—and arguably undermines citizens' rights to participate more directly in governing.[7]

Again, in the words of California State Senator Liz Figueroa:[8]

> "[F]ederal floors should not lightly become federal ceilings. In our federal system, different states are and should be free to set their own 'ceilings;' especially in the areas traditionally reserved to the states. This is more than just a fine point of constitutional architecture. Because state legislators are literally closer to their constituents, they respond to social ills faster and more effectively than their federal counterpart. This, in turn, means that a newly evolved social ill can be addressed – and maybe slowed or cured – when it has victimized 'only' thousands, not millions. In contrast, a social ill will have to be pandemic before it results in the kind of national consensus that prompts the national branches—from Arkansas to Alaska—to act. And, as states differently struggle with different remedies, the federal government has had the luxury of waiting to see which ones work and which ones do not."

State laws influence the federal legislative agenda, serving as a "sort of informal committee system for Congress, screening policy proposals for a minimum level of political popularity."[9] In fact, Congress and federal regulators rarely initiate proactive legislation to protect the environment or consumers without impetus from the states. In contrast, state and local politicians are "natural policy entrepreneurs," making states the laboratories for new solutions to old or emerging problems.[10]

Consumer Privacy

"In my experience, 'federal preemption' is a bogeyman trotted out by opponents of strong consumer rights. It's similar to the argument state legislators hear all the time – that we shouldn't push for consumer protections because industry can't operate under '50 different state laws.' But you don't see the financial services industry lobbying Washington to give consumers the right to control what happens with their personal financial information – just the opposite. 'National uniformity' and 'federal preemption' are too often code words for 'lowest common denominator.'"

— California State Senator Jackie Speier (D-San Francisco) [11]

Federal regulation riddled with loopholes has left large bank conglomerates and other financial institutions with too much leeway to share consumers' private information and too little responsibility for the consequences. Technological advances also make it increasingly easy to aggregate, store, manipulate, and distribute data. As a result, consumers hold little or no control over the circulation of their private information and are increasingly powerless when it comes to aggressive and unscrupulous marketers and identity thieves.

The federal response to this problem has largely been inadequate. Congress has enacted two major laws that address financial privacy, the Fair Credit Reporting Act (FCRA) of 1970 and the Gramm-Leach Bliley Financial Services Modernization Act (GLBA) of 1999.

The 1970 Fair Credit Reporting Act established a comprehensive scheme to ensure the accuracy of credit reports and protect the privacy of consumers by imposing responsibilities on their users. As enacted, the act only preempted state laws that were inconsistent. In 1996, Congress strengthened FCRA to reduce errors in credit reports that wreak havoc with consumers' credit history. Under pressure from the financial services industry, Congress also agreed to a compromise, at that time temporarily preempting the right of states to pass some stronger credit accuracy and privacy laws, but only until 2004.

Congress drafted the 1999 Gramm-Leach Bliley Financial Services Modernization Act to allow mergers among the converging banking, insurance and securities industries. Consideration of GLBA came amidst a backdrop of several major privacy scandals, prompting Congress to insert a privacy provision known as Title V. Title V requires covered institutions to protect information, disclose privacy practices and to allow consumers to opt-out (say no to) the sharing of confidential account information with some (primarily telemarketers), but not all, third parties. Regardless of a consumer's views on sharing, sharing with affiliates or other third parties (those selling financial products in a marketing partnership with the bank) is always allowed under GLBA. During conference on the bill, Senator Paul Sarbanes (D-MD) inserted an amendment allowing states to enact stronger financial privacy laws regulating information sharing among affiliates and third parties.

GLBA, however, also includes certain language—the FCRA "savings clause"—saying that the law is not intended to amend FCRA. As such, the financial services industry has argued that FCRA's preemption of states' rights to limit affiliate sharing trumps the pro-state authority provision of GLBA inserted by Senator Sarbanes.[12] This argument has helped defeat numerous state-level proposals to enact stronger financial privacy laws and chilled efforts in other states to craft them.

Some states have resorted to unique means to protect and push through strong privacy policies despite this ambiguity at the federal level. In 1985, for example, the North Dakota legislature enacted a strict privacy law prohibiting financial institutions from sharing or selling private information with any affiliates or third parties. In the late 1990s, however, the banking industry started to chip away at this law, winning an exception for affiliated companies. Then, in 2001, the North Dakota legislature passed SB 2191, which replaced North Dakota's strong privacy law with the weaker standard of privacy outlined in the GLBA. Immediately, a small group of citizens organized and collected the 17,000 signatures need to refer SB 2191 back to the electorate. Due to the efforts of State Representative Jim Kasper and the many volunteers, North Dakotans voted 73% to 27% in June 2002 to throw out the law and revert back to the state's stronger privacy protections.[13]

More recently, in California, State Senator Jackie Speier (D-San Francisco) won passage of the California Financial Information Privacy Act (SB 1) in August 2003 after threatening to take the issue to the ballot. California's SB 1 provides for an opt-out for sharing of information among affiliates and some third-parties, with some affiliated company exceptions. GLBA provides only notice in these circumstances. In other third-party sharing circumstances, SB 1 requires an opt-in, whereas GLBA provides only for an opt-out option.

Because of the California law and interest in other states to pass similar legislation, the financial services industry made it a priority to convince Congress to extend the FCRA preemption set in 1996 and due to expire in 2004. As a result of the banks' intense lobbying, in December 2003, Congress passed the Fair and Accurate Credit Transactions Act (FACT Act), amending FCRA for the second time. The new legislation will help consumers fight identity theft and credit report errors by giving every consumer a free credit report annually, requiring businesses to verify identities and addresses before opening accounts, and instituting other measures to make it easier for consumers to monitor and protect their credit.[14] However, the FACT Act permanently extended the FCRA preemptions and expanded them in some areas to include the bill's new identity theft protections and its credit report and credit score disclosure provisions.[15]

Meanwhile, the courts have yet to determine with certainty if federal law preempts the right of states to enact stricter privacy laws. In July 2003, a U.S. district court judge, reviewing two San Mateo and Daly City (California) ordinances strengthening financial privacy protections, agreed with the industry view that the so-called FCRA savings clause in GLBA preempts states from enacting stronger financial privacy laws in the area of affiliate sharing.[16]

But on June 30, 2004, a different federal court upheld California's SB 1, rejecting the industry argument that the FCRA trumps the GLBA and instead agreeing with consumer groups and state attorneys general. The court held that Congress intended to grant states greater authority to regulate financial privacy with the Sarbanes amendment to GLBA. It argued that the previous court had misinterpreted the FCRA savings clause and relationship of the two laws.[17] The financial services industry is expected to appeal.

Congress likely will let the banks and consumer groups resolve the California question in the courts. If the banks lose, they could ask Congress for broader preemption of state law than they received under the FACT Act.

"Privacy is not a partisan issue. It is a constitutional issue. Each person's confidential financial information is a constitutionally protected property right, just like our homes, our farms, and our automobiles, and no institution should have the right to share or sell anyone's private financial information without prior consent. The privacy battle is not going to go away. As our constituents learn the facts about how federal law fails to protect their private financial information, I believe they will demand that state legislatures implement strict privacy laws."

— North Dakota Representative Jim Kasper (R-Fargo), who worked with citizen volunteers to overturn a North Dakota law that weakened the state's strong privacy protections.[18]

"When Congress was debating the FCRA renewal, they couldn't ignore the gauntlet that California had just thrown down with SB 1. They changed federal law to say that consumers can opt out of having their information traded among affiliated companies for marketing purposes. That's watered-down SB 1, but it's a clear nod to the work we did here, and a step in the right direction."

— California State Senator Jackie Speier (D-San Francisco), author of the California legislation, crediting the California law with forcing lawmakers in Washington to ensure that the FACT Act contained modest consumer protections.[19]

Banking Regulation and Predatory Lending

"States are able to serve as laboratories for innovative consumer protections. Data can be gathered to suggest which laws are promoting consumer protection while not discouraging credit and which laws seem to have the effect of discouraging lending activity to the detriment of the consumers. Upon this data, states can seek to adjust their laws to best follow those laws that have the best impact on predatory practices, the least negative effect on the legitimate institutions, and the best lending environment for the consumer. With a federal one-size-fits-all approach, there is no room for error because any error will be felt nationwide rather than limited to only one state."

— O. Dudley Gilbert, Legal Counsel, Oklahoma State Banking Department[20]

Financial deregulation has led to explosive growth of the so-called predatory lending industry, which includes check cashing outlets, payday loan companies, rent-to-own stores, high cost mortgage companies, sub-prime auto lenders, and the growing business of auto title loans. Although these predatory loans may provide cash-strapped borrowers with quick access to money, lenders often charge triple-digit interest rates and employ deceptive marketing practices to conceal the true cost of these loans, trapping borrowers in a cycle of debt. Rather than preventing abusive high-cost lending practices, current federal law regulating high-cost loans has allowed most predatory lending to continue with a legal stamp-of-approval.

In the absence of federal action, several states, including California, Georgia, New York, and North Carolina, enacted strong laws designed to regulate the predatory mortgage lending industry. When passed, the Georgia Fair Lending Act was the strongest in the nation, prohibiting loans made without regard to the borrower's ability to repay and allowing borrowers to sue not only the original lender but any investor or entity that subsequently buys the mortgage.[a]

[a] The Georgia legislature has since substantially watered down this law.

Unfortunately, an obscure government agency, the Office of the Comptroller of the Currency (OCC), has effectively nullified states' efforts to address predatory mortgage lending and is attempting to usurp all state authority to regulate national banks.

For more than a decade, the OCC, an arm of the Treasury Department, has misinterpreted its congressionally-delegated authority and over-stepped its legal bounds by preempting numerous state and local laws that protect consumers. OCC charters, regulates, and supervises national banks. When Congress vested OCC with "visitorial powers" over national banks in the 1863 National Bank Act, it specifically limited OCC's authority to that which is explicitly authorized by federal law or otherwise granted by Congress. Over the last decade, however, OCC has issued several regulations that broadly expand the agency's authority and effectively insulate national banks from state consumer protection laws—even when no federal law exists or federal law explicitly allows states to enact stronger laws.[21]

In 1992, OCC preempted a New Jersey statute to offer low-cost lifeline bank accounts, even though no federal law requires similar accounts. In response, in 1994 Congress called the agency's preemption determination "overly aggressive" and stipulated that the agency must grant greater deference to state consumer laws. In the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Congress clarified and restated the balance between federal regulation and the states' authority to protect the interests of their citizens.

Since then, OCC has accelerated its efforts to challenge state and local consumer protection laws. In 1999, for example, OCC filed a friend-of-the-court brief in support of Wells Fargo and Bank of America, two national banks that had sued the cities of San Francisco and Santa Monica for banning ATM surcharges. Even though no provision of the National Bank Act grants banks the direct authority to impose fees, and a contrary provision of the Electronic Funds Transfer Act explicitly grants states the authority to regulate ATM use, the agency successfully argued that a national bank's "right" to impose ATM surcharges was protected by the National Bank Act and therefore should not be subject to state or local law. In 2002, OCC supported successful bank efforts to overturn a new California state law requiring credit card companies to disclose on their monthly statements information about how long it would take consumers to pay off their balances if they only made the requested minimum payment. No federal law requires such a disclosure.

In 2003, the OCC also removed the power of states to protect their consumers from predatory mortgage lenders. After Georgia passed its strong predatory lending law, the banking industry quickly petitioned the OCC to preempt it. The Financial Services Roundtable, a national association that represents 100 of the largest financial services companies, requested that "the Comptroller of the Currency put to rest the 'scattergun' attempts by state and local governments to interfere with national bank powers by reaffirming broadly Congress's and the Comptroller's primacy in this area."[22] On July 31, 2003, OCC ruled that the Georgia Fair Lending Act and other state laws regulating predatory mortgage lending do not apply to national banks.

In January 2004, OCC followed up by issuing a sweeping rule that would prevent most state consumer protection laws from applying to nationally chartered banks and deny states most authority to enforce or investigate national banks or their state-licensed and incorporated subsidiaries. Most legal experts contend that OCC does not have statutory authority to regulate these non-bank operating subsidiaries, such as mortgage companies, but the OCC rule seeks to claim this jurisdiction as well.[23]

Under this rule, state laws that "obstruct, impair, or condition a national bank's ability to fully exercise the powers authorized to it under Federal law" are preempted. The rule explicitly preempts state requirements concerning "abandoned and dormant accounts, checking accounts, disclosure requirements, funds availability, savings account orders of withdrawal, state licensing or registration requirements, and special purpose savings services." In essence, state law applies to a national bank only if it falls into a few narrow categories related to contracts, torts, criminal law, debt collection, property transfer, taxes and zoning.[24]

This rule likely will dissuade any state legislator or regulator from acting to impose rules on state entities stronger than those imposed by OCC on their primary competitors, national banks. New York State Attorney General Eliot Spitzer commented that the rule will "entice state-chartered banks to obtain a national charter and seek the immunity that the OCC is offering. By giving banks a safe harbor, the OCC has a chilling effect on state laws."[25] In effect, this rule could make the OCC, an unelected body, the *de facto* regulator of the entire U.S. banking system, casting aside the expertise and resources of state banking departments, state legislatures, and state attorneys general in all 50 states.

"The traditional dynamic of the dual banking system has been that the states experiment with new products and services that Congress later enacts on a nationwide basis. We generally discuss this history in terms of expanded powers, but the states have been innovators in the area of consumer protection, as well. States enacted CRA and fair lending statutes before the federal government did, and states are now leading the way on predatory lending, identity theft, and privacy initiatives. These state laws, which the OCC sees as burdensome to national banks, are in fact providing all of us the opportunity to see what works and what doesn't, and find the appropriate balance before seeking legislation on a national level."

— Diana L. Taylor, Superintendent of Banks for the State of New York[26]

"Consumer protection will suffer under the OCC's regulation. Not only are our abilities to investigate and examine limited, but we are no longer handling consumer complaints, merely referring them to the OCC's Customer Assurance Group. With the limited staff available to the OCC, any prescreening and investigations would be from remote offices, if conducted at all."

— Floyd G. Lanter, Administrator, Division of Finance & Corporate Securities, Oregon Department of Consumer & Business Services[27]

"[The OCC rules] would, among other things, undermine the regulatory and enforcement structure established by the General Assembly of North Carolina with regard to home mortgage lending. The foundation of this regime is the North Carolina predatory lending law….The North Carolina predatory lending law was enacted in response to the conduct of a variety of firms (including a finance company that is now part of a banking organization that includes a national bank) that was unconscionable but was not prohibited by then-applicable federal law…. North Carolina's laws allow for tailored and specific enforcement actions with regard to consumer protection that can and should supplement OCC's supervisory powers."

— Joseph A. Smith, Jr., North Carolina Commissioner of Banks[28]

"The OCC's rules do more harm to our nation's consumers, states' rights and our dual banking system than any rules I have seen in 26 years as a state financial services regulator."

— Gavin Gee, Director of the Idaho Department of Finance[29]

"The OCC's new regulations…usurp the powers of the Congress, stifle states' efforts to protect their citizens, and threaten not only the dual banking system but also public confidence in our financial services industry. They challenge the functional regulatory structure created by Gramm-Leach-Bliley and set the Office of the Comptroller of the Currency as the nation's dominant regulator of financial institutions."

— Kevin P. Lavender, Commissioner of the Tennessee Department of Financial Institutions[30]

Payday Lending in Texas

Upon announcing independence from Mexico in 1836, the new Republic of Texas desperately needed able-bodied men to fight in the war. The state actively advertised in New York, Chicago and across the country, calling on families to move to Texas, promising land and relief from debt. Struggling from onerous debt and seeking to escape lenders, many moved west, famously writing GTT (Gone To Texas) on their doors. Debtors had the opportunity to rehabilitate and were granted protections against unfair interest rates. Years later, when Texas joined the Union, this principled stand against usury was enshrined in the Texas Constitution with specific restrictions against interest rates greater than ten percent.

A century and a half later, federal banking regulators have decided that payday lenders partnering with out-of-state banks avoid Texas' usury limits and consumer protections. Today, the most vulnerable Texans often struggle under the debt of payday loans, small-dollar, short-term, unsecured loans that borrowers promise to repay out of their next paycheck or regular income payment (such as a social security check). Because these loans have such short terms to maturity, the cost of borrowing, expressed as an annual percentage rate (APR), is very high. Texas State Senator Eliot Shapleigh (D-El Paso) has filed more than 20 bills to address the exorbitant interest rates charged by sub-prime "payday" lenders. He has been told federal law prevents him from taking action on the issue. Senator Shapleigh states: "Whether ideologues from the left or the right, we should honor our constitutional commitment to states' rights and let local jurisdictions develop policies that help people."[31]

Health Care and a Patient's Right to Sue

High health care costs and declining quality of care rank amongst Americans' biggest concerns, according to poll after poll. Health maintenance organizations (HMOs), which have replaced traditional medical insurance plans for the vast majority of American workers, are often the subject of these complaints. HMOs and other managed care companies, driven to protect their profit margins, often compromise the quality of our health care by denying physician prescribed treatments and limiting hospital stays. Patients who are improperly denied health care have little recourse to hold their health plans accountable and liable for the harm that they cause, even when it results in death.

In 1997, Texas became the first state to pass a strong patients' rights bill that became law without then-Governor George W. Bush's signature. The Texas Health Care Liability Act (Senate Bill 386) holds health plans liable for practicing the "ordinary standard of care" when making "health care treatment decisions" that involve quality of care and not those that deal with benefit coverage decisions.[32] The architect of the law, Texas State Senator David Sibley, stated that if "HMOs choose to make medical decisions—stand in the shoes of the doctor, as it were—they ought to stand in the shoes of the doctor in court, too."[33]

After the new Texas law went into effect, two patients filed suit against their HMOs for injuries they claim resulted from the health plans' refusal to cover certain medical services, in violation of an HMO's duty to exercise ordinary standards of care under the Texas Health Care Liability Act.[34] These cases were to become the focal point in the debate over whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts the Texas law and other state "right to sue" laws.

In 1974, Congress enacted ERISA to establish uniform federal standards to protect private employee pension plans from fraud and mismanagement. But the federal statute applies to all employee pension, health, and other benefits plans established by private sector employers (other than churches) or by employee organizations such as unions.

ERISA's "preemption clause," Section 514, makes void all state laws to the extent that they "relate to" employer-sponsored health plans. The Supreme Court and other courts have held that ERISA prohibits both state laws that directly regulate employer-sponsored health plans and some laws that only indirectly affect plans, such as regulating the provider networks ERISA plans may use.[35] Under ERISA, a patient can file claims in federal court for denying or delaying medically necessary treatment, but awards are limited to reimbursement for the actual cost of the medical procedures the provider denied. ERISA does not allow the court to award compensation or punitive damages for additional costs or harm resulting from the denial of benefits. Therefore, under ERISA, HMOs are exempt from lawsuits for business decisions they make that result in harm to people.

In November 2003, the United States Supreme Court agreed to hear the cases filed by the two patients in Texas against their HMOs to determine if ERISA preempts state "right to sue" laws. On June 21, 2004, the Supreme Court unanimously rejected efforts by states to give patients in HMOs the right to sue managed-care companies when they refuse to cover treatment that a doctor has deemed medically necessary.[36]

According to the ruling, ERISA preempts the Texas Health Care Liability Act and several other state "right to sue" laws. Arizona, California, Georgia, Maine, New Jersey, North Carolina, Oklahoma, Washington and West Virginia adopted laws similar to the Texas law between 1999 and 2001. In addition, Oregon also enacted a more limited law in 2001 that allows patients to sue their insurer only if the plan does not submit to an external review. Louisiana has a limited 1999 law that establishes a "cause of action" related to external review decisions.[37]

In reviewing the case, the Supreme Court had to decide whether ERISA left any room for Texas to give patients the right to sue for damages resulting from denied benefits. The court answered no, stating in its opinion that any state law that "duplicates, supplements or supplants" the remedy available under the federal law "conflicts with the clear Congressional intent to make the ERISA remedy exclusive." Justice Ruth Bader Ginsburg indicated that the court's decision returns the issue to Congress to address the "regulatory vacuum." [38] Meanwhile, debate over a meaningful patients' bill of rights has been stalled in Congress for more than two years.

Former State Senator Sibley, author of the now-preempted Texas law, called the Supreme Court's decision "a gross miscarriage of justice. It's a huge victory for the HMOs and completely contrary to what we were trying to accomplish. Our goal was to give patients a remedy when their HMOs make a decision that is adverse to their health. What we were trying to fix was the situation you had when your HMO made a decision that went against the proper care and treatment of a patient, and the HMO said, `you can't sue us, we don't practice medicine.'"[39]

"[As a result of the court decision], HMOs – alone among every kind of California business and citizen – cannot be required to pay for the cost of harms they cause. Instead, the cost of the harms they cause will have to be shouldered not by the wrongdoing HMO, but taxpayers and innocent families; even other HMOs that must provide ongoing treatment for injuries caused by prior HMOs…. My constituents are now being treated by HMOs that know the most they will have to pay if they deny care is the cost of the care they denied; no lost wages; no future medical bills; nothing."

— California State Senator Liz Figueroa (D-Fremont), sponsor of the state's "right to sue" law. In September 1999, then-Governor Gray Davis signed Senate Bill 21, which took effect in January 2001.[40]

"This legislation had the overwhelming support of both Democrats and Republicans. We simply want to make sure that Oklahomans have access to quality healthcare, and that they have the right to hold these companies accountable for their actions."

— Oklahoma State Senator (and now Governor) Brad Henry (D), author of Oklahoma's Managed Health Care Reform and Accountability Act, signed into law by then-Governor Frank Keating on April 28, 2000.[41]

"I was disappointed in the Supreme Court's decision. Citizens ought to have the right to pursue damages when they are injured by the actions of an HMO."

— Oklahoma Rep. Opio Toure (D-Oklahoma City), co-sponsor of Oklahoma's Managed Health Care Reform and Accountability Act, signed into law by Governor Frank Keating on April 28, 2000.[42]

Global Warming Pollution from Motor Vehicles

California was the first state in the nation to adopt specific policies related to reducing air pollution from motor vehicles. When the federal government followed suit in 1970 with passage of the original Clean Air Act, California was permitted to continue to issue its own automotive emission standards, based both on the state's regulatory history and its pressing air pollution problems. The 1977 revisions to the Clean Air Act gave other states the opportunity to adopt California emission standards for cars, provided that those standards are "identical" to California's standards and do not "create or have the effect of creating ... a 'third vehicle.'"[43] In other words, states have two choices when deciding how to regulate emissions from cars: they can follow the federal standards or the California standards. Just this year, New Jersey, Rhode Island and Connecticut have said they intend to start following California's car rules instead of the federal standards. New York, Massachusetts, Vermont and Maine already do so.

On July 22, 2002, California's then-Governor Gray Davis signed Assembly Bill 1493, authored by Assemblymember Fran Pavley (D-Agoura Hills), requiring the California Air Resources Board (ARB) to develop greenhouse gas standards for vehicles in model year 2009 and beyond. The standards will apply to automakers' fleet averages, rather than each individual vehicle.[44] In June 2004, the California ARB released its draft proposal to implement the Pavley law, estimating that the plan would reduce greenhouse gas emissions from passenger cars and light trucks by about 30 percent.[45]

In August 2003, however, EPA announced that it lacks the authority to regulate carbon dioxide as a pollutant under the Clean Air Act, arguing that Congress must provide it with explicit legal authority.[46] The ruling came in response to a petition by the International Center for Technology Assessment, Greenpeace and other environmental organizations asking EPA to comply with the law, which requires the agency to protect Americans against all harmful pollutants, including emissions that damage the climate. In October 2003, twelve states, several cities, and more than a dozen environmental groups joined forces to challenge EPA's policy, filing a lawsuit in the Court of Appeals for the D.C. Circuit.[b]

EPA's stance that it lacks authority under the Clean Air Act could undercut the California law, thereby preventing the northeastern states that have adopted the California vehicle standards from incorporating the Pavley program. The California law faces additional challenges from the auto industry and potentially from the federal government—both of which may argue that the proposal is preempted by federal authority to set fuel economy regulations.

The National Highway Transportation Safety Administration (NHTSA) has preempted state law in the past by claiming that the federal government has sole authority to regulate fuel economy standards. In 1992, Maryland became the first state in the U.S. to enact a "feebate" program. Under the policy, vehicles with a high fuel economy rating would receive a motor vehicle titling tax credit. Those with low ratings would pay a surcharge. Maryland's law also required that car dealers label each car with a notice of the fuel efficiency surcharge or credit to which it would be subject. NHTSA, however, ruled that the 1975 Federal Energy and Conservation Act preempted Maryland's law, arguing that states cannot enact laws that conflict with federal regulations on fuel economy

[b] States challenging EPA's decision are California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

disclosures or tax vehicles based on fuel economy. Maryland's Attorney General reviewed the law and concluded that federal law does not preempt the state from using the federal fuel mileage ratings to compute taxes owed in Maryland. The Attorney General suggested that the state could implement the feebate program by amending the sticker requirement to not conflict with federal disclosure requirements. NHSTA's ruling, however, has had a chilling effect on the feebate proposal in Maryland and similar proposals in other states.[47]

In addition, the auto industry has challenged other portions of California's clean cars program with the fuel economy argument. In 1990, California introduced the Zero Emission Vehicle (ZEV) Program. At that time, the California ARB required that in 1998, two percent of the vehicles produced for sale in California had to be ZEVs, increasing to five percent in 2001 and 10 percent in 2003. The California ARB modified the program in 1996 and again in 1998. In January 2001, recognizing cost and technical challenges, the ARB modified the ZEV program to allow large manufacturers to meet their ZEV requirement with a broader mix of vehicles, including hybrid cars like the Toyota Prius.[48]

In January 2002, General Motors, DaimlerChrylser, and several local California dealerships filed a lawsuit against the California ARB, alleging that the ZEV rules, as amended by the recently final 2001 revisions, violate the U.S. Constitution's Supremacy Clause by attempting to regulate fuel economy. The plaintiffs alleged that the California ZEV mandate forces manufacturers to produce and sell in California vehicles with higher fuel efficiency than required by federal standards. On June 11, 2002, the judge granted the plaintiffs' request for a preliminary injunction, preventing the California ARB from enforcing the 2001 ZEV regulations for model years 2003 and 2004.[49]

In its appeal to the Ninth Circuit, the California ARB argued that the fuel efficiency portions of the ZEV regulations only incidentally affect fuel economy; for federal law to preempt the ZEV program, the ZEV requirements would have to have "direct" or "acute" effects on the ability of the federal government to regulate fuel economy. The California ARB also argued in its appeal that Congress was unaware of any relationship between fuel economy and vehicle emissions when drafting the Energy Policy and Conservation Act.[50]

In 2003, the California ARB adopted new amendments to the ZEV regulations, giving manufacturers a choice of two options for meeting their ZEV requirements.[51] As a result, the parties to the lawsuits agreed to end the litigation in August 2003.[52] The litigation and California's resulting changes to the ZEV program, however, have complicated the efforts of states such as Massachusetts to adopt and implement the California ZEV program.

"It's important California leads the way, frankly, because of the lack of leadership on the federal level."[53]

— Assemblymember Fran Pavley (D-Agoura Hills), author of the California legislation to reduce global warming emissions from vehicles.

"As a general statement, the California emissions standards are a more effective way of helping to address air pollution from vehicles than the federal standards. While I can't predict whether or not California standards will become the national standard, I do know that the California standards have significantly influenced the national standards (i.e., made them more stringent)."

— Tom Moye, Section Chief, Mobile Sources, Air Pollution Control Division, State of Vermont[54]

Nuclear Power Plants

The U.S. Nuclear Regulatory Commission (NRC) is an independent agency established by the Energy Reorganization Act of 1974 to regulate civilian use of nuclear power and materials. According to the Commission's website, NRC's mission covers three main areas: reactors, nuclear materials, and nuclear waste.[55]

The governing piece of legislation concerning both civilian and military use of nuclear power is the Atomic Energy Act of 1954.[56] The Atomic Energy Act substantially preempts state regulation of radiological matters connected with the construction and operation of nuclear power plants. Under section 274 of the Act, the NRC may enter into an agreement with a state for discontinuance of the NRC's regulatory authority over some materials licensees within the state. But the NRC retains authority over all nuclear power plants within the state and exports of nuclear materials from the state.[57]

The landmark case dealing with federal preemption of the states on nuclear power issues is *Northern States Power Co v Minnesota*. This case has been the basis for striking down efforts of state and local legislative bodies to supersede the safety determinations of the Nuclear Regulatory Commission. The Court stated:[58]

> "While the [Atomic Energy] Act, as amended, and its legislative history, when viewed together, provide the strongest manifestation of Congressional intent to preempt the field of regulation over the construction and operation of nuclear reactors, we also find further evidence of an implied Congressional intention to pre-empt this area by the pervasiveness of the federal regulatory scheme which Congress directed and which the [Atomic Energy Commission, now the NRC] has carried into effect through the promulgation and the enforcement of detailed regulations governing the licensing of atomic power plants."

These preemption issues are particularly salient in states where community groups, regulators and state officials are concerned about the safety and continued operation of local nuclear power plants.

In New Jersey, for example, the Oyster Creek Nuclear Power Plant in Lacey Township is the oldest operating nuclear power plant in the country. In February 2004, Exelon announced its intent to apply to the NRC for a license extension, which would allow it to operate the aging plant for another 20 years. Community members, public officials and experts have been outspoken about their concerns, including concerns about an unworkable evacuation plan, poor security of the spent fuel pools and local cancer clusters. Experts also have asked questions about technical safety concerns such as core shroud cracking and a recent cable failure. In April 2004, Brad Campbell, Commissioner of the New Jersey Department of Environmental Protection (NJDEP), told local mayors at the Ocean County Mayor's Association meeting that the NJDEP has "significant safety and enforcement concerns" with the license extension.[59]

Similarly, the NRC had forced FirstEnergy's Davis-Besse nuclear power plant in Oak Harbor, Ohio to remain closed since March 6, 2002, when workers discovered a football-sized hole atop the nuclear reactor head. This hole left only 3/8 of an inch of cracked and bulging stainless steel between radioactive material and the residents of Ohio. Despite ongoing structural problems at the plant, a pending grand jury investigation of potential criminal wrongdoing by FirstEnergy, and NRC's stated lack of confidence in FirstEnergy's willingness to report problems, the NRC decided to allow FirstEnergy to restart the troubled nuclear power plant on March 8, 2004.

In both cases, federal law does not provide state officials with any statutory means to influence the operation or licensing of nuclear power plants. For example, states cannot exercise their authority to modify evacuation plans, regulate radioactive emissions, or establish other requirements that would provide their citizens with greater protections than those afforded by federal law. State officials can submit public comments to the NRC and otherwise weigh in on NRC decisions. Continued pressure from community members and state officials could in fact influence whether or not NRC decided to license or operate a plant. Ultimately, however, the authority to make that decision, which affects the health and safety of the population residing within a state's borders, rests squarely with the NRC, which has a long history of bias in favor of the nuclear industry over the public interest.

"With the health and safety of Ohioans at stake, we owe it to the public to ensure that there is no doubt about the safety of this plant. Given its track record, we cannot have confidence that the NRC is prioritizing public safety. In almost all instances regarding public health and safety, state officials have the power to do what is necessary to protect the public. Ohio's public safety officials should not stand by and allow the NRC to rubber-stamp another decision."[60]

— Ohio State Senator Teresa Fedor (D-Toledo) about the Davis-Besse nuclear power plant in Oak Harbor, east of Toledo.

Upcoming Preemption Debates

These few examples are indicative of what appears to be a growing trend—conflict between state and federal lawmakers over the role state governments should play in protecting the health, safety, and well-being of their constituents in the face of inadequate federal regulation. Federal preemption battles are brewing on issues ranging from insurance regulation to energy efficiency requirements to regulation of toxic chemicals. While the policy context of each of these issues differs, the crux of the debate remains the same: where does the authority of the federal government end and the power of the states to do more to protect their citizens begin?

The following summarizes just two of the emerging debates.

Insurance Regulation

In a March 14, 2004 speech to the National Association of Insurance Commissioners, Rep. Michael Oxley (R-Ohio), chair of the House Financial Services Committee, outlined a proposal to mandate that the states eliminate insurance rate regulation, establish a "single point of filing" for forms, and create a uniform system for agent licensing, company licensing, and market conduct regulation. Oxley's plan would preempt state laws like California's Proposition 103, a 1988 measure that requires insurers to justify proposed auto insurance rate increases to the state insurance commissioner, who has the authority to approve or reject them. According to J. Robert Hunter of Consumer Federation of America, under the Oxley plan, "'[i]ntransigent' state legislatures would be cut out of the process, because Chairman Oxley has stated that 'we can't rely on all 50 state legislatures to adopt exact uniform compliance.' State Insurance Commissioners would become mere federal functionaries in preempted areas, acting as tools to carry out federal edicts. Chairman Oxley would take this preemptive approach despite his praise for the states as 'laboratories for reform' and as 'more responsive to the local marketplace as well as to local consumers.'"[61]

Joel Ario, Oregon Insurance Administrator and Secretary-Treasurer of the National Association of Insurance Commissioners (NAIC), commented as follows about these federal proposals to preempt state law:[62]

> "Insurance has traditionally been regulated at the state level, but various stakeholders, led by large banks and large insurance companies, are currently seeking federal preemption of state regulation in order to achieve more uniformity and, in some cases, to achieve deregulation.
>
> If successful, these efforts will undermine consumer protection in three ways. First, a "one size fits all" federal approach will prevent states from being responsive to local consumer needs. This is particularly true in certain insurance markets, such as auto and homeowner insurance, where market conditions vary by state and region. For example, homeowners in hurricane-prone coastal communities generally need protections that are not as necessary in other areas less subject to catastrophic risk.
>
> Second, the federal government has generally not done an effective job in enforcing consumer protection laws, especially when it comes to protecting the individual consumer with a specific problem. All states have active consumer complaint handling units which collectively address 500,000 complaints per year. In areas where the federal government is responsible

for complaint handling, such as health complaints against self-insured ERISA plans, the focus has generally been on high profile criminal fraud cases with very little attention paid to individual consumers.

Third, the states, as "laboratories of democracy," are freer to experiment with different solutions and can be more flexible in modifying those solutions as circumstances warrant. In many cases, this process of experimentation and fine-tuning has eventually led to common solutions, which can be shared by the states or even turned into federal laws. For example, the 1996 health insurance portability law, which set minimum consumer protection standards for all states, was modeled on state laws that had been tested and proven effective. A single federal regulator would have to get it right the first time since it is generally much harder to change federal law than state law.

The bottom line point here is that the Congress should be very wary of "one size fits all" federal solutions to consumer protection problems, with the possible exception of cases where the states have developed common approaches that can provide a sound basis for federal standards."

Other state insurance commissioners have echoed these concerns. Ernst Csiszar, Director of Insurance for the state of South Carolina, has testified before Congress about potential federal regulation of the insurance industry. Speaking as the current president of the National Association of Insurance Commissioners, he stated in recent testimony: [63]

"[E]ffective consumer protection that focuses on local needs is the hallmark of state insurance regulation because we understand local and regional markets and the needs of consumers in those markets…. [W]e believe any federal legislation dealing with insurance regulation carries the risk of creating an unnecessary bureaucracy and the risk of undermining state consumer protections due to unintended or unnecessary preemption of state laws and regulations…. There have been charges from some industry groups that the state regulatory system is inefficient and burdensome, and that a single federal regulator would be better. As government officials responsible for operating the state system, we understand that any government regulation, including insurance regulation, may be considered inconvenient and occasionally frustrating to those persons who wish to do business on their own terms."

Regulating the Most Toxic Chemicals

A U.S. House of Representatives subcommittee is considering industry-supported legislation that would block state laws that regulate persistent toxic chemicals that are covered by the Stockholm Convention on Persistent Organic Pollutants.

Negotiated between 1998 and late 2000, the Stockholm Convention on Persistent Organic Pollutants (POPs) was signed by a number of nations, including the United States, in May 2001. The Stockholm Convention is intended to eliminate or restrict the production, use and/or release of twelve chemicals that, due to their persistence in the environment, can affect human health throughout the globe, regardless of the location of their use. The treaty initially targets the pesticides hexachlorobenzene, aldrin, chlordane, dieldrin, endrin, heptachlor, mirex, and toxaphene, as well as polychlorinated biphenyls (PCBs); restricts use of the pesticide DDT to disease vector control until safe, affordable, and effective alternatives are in place; mandates removal of PCB equipment; and encourages minimization of unintentional release of dioxins and furans. Importantly, like the LRTAP [Convention on Long-range Transboundary Air Pollution] POPs protocol, it includes provisions to consider and add other POPs to the treaty and prevent the introduction of new POPs into commerce.[64]

The House Environment and Hazardous Materials Subcommittee on July 13, 2004 held a hearing on potential legislation that would broadly preempt states from regulating toxic chemicals (except under the Clean Air Act). This legislation would amend the Toxic Substances Control Act in preparation for ratification of the POPs treaty. The proposed legislation states:

> "no State or political subdivision may establish or continue in effect any requirement that is applicable to a POPs chemical substance or mixture or LRTAP POPs chemical substance or mixture (as defined in title V) for which a listing under Annex A or B of the POPs Convention or Annex I or II of the LRTAP POPs Protocol has entered into force for the United States (except as permitted in section 116 of the Clean Air Act)."

This language would prohibit states from regulating any chemicals included under this treaty or chemicals that could be added to the treaty in the future. If parties to the treaty decide to add polybrominated diphenyl ethers (PBDEs) to the list of target chemicals, for example, then this proposed legislation would nullify bans on PBDEs recently enacted in California, Hawaii and Maine; Maryland, Massachusetts, Michigan, Minnesota, New York, and Washington all have proposed enacting similar bans. PBDEs are a class of widely used flame retardants, often added to the plastic material in televisions and computers, construction materials, furniture, and textiles. Studies indicate that these chemicals are akin to PCBs and may pose similar health risks to humans as they bioaccumulate in the body.

In addition, this proposed legislation could affect state cleanup standards for chemicals included in the treaty.

Conclusion

The American brand of federalism allows for a certain level of power-sharing between states and the federal government, giving states the freedom to enact regulations that are more stringent than federal law in many areas of policy-making. As a result, states are the laboratories for public policy solutions, allowing one state to experiment with a new way to enforce clean water standards or regulate state financial institutions and encouraging other states to replicate successful programs without big risk. In the 1990s, the states, not the federal government, passed the most innovative policies to protect the environment and consumers, imposing requirements that extend beyond what is required by federal law.

In order to preserve states as the laboratory for innovative policy solutions, federal law should be a floor, not a ceiling. Federal regulations should provide a platform from which state and local authorities can craft complimentary legislation to implement federal policy and tailor it to meet needs unique to that jurisdiction.

End Notes

[1] Testimony of Diana L. Taylor, Superintendent of Banks for the State of New York, before Congress on OCC preemption of state consumer protection laws, January 28, 2004. Available in full at http://www.banking.state.ny.us/sp040128.htm.
[2] U.S. Constitution, Article VI, Section 2.
[3] *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Argued November 15-16, 1955, decided April 2, 1956.
[4] Personal communication, June 25, 2004.
[5] Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, John M. Olin Center for Law & Economics, University of Michigan Law School, available at http://www.law.umich.edu/CentersAndPrograms/olin/abstracts/03-007.htm.
[6] Personal communication, June 25, 2004.
[7] S. Candice Hoke, "Preemption Pathologies and Civic Republican Values," 71 B.U. L. Rev. 685 (1991).
[8] Personal communication, June 25, 2004.
[9] Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, John M. Olin Center for Law & Economics, University of Michigan Law School, available at http://www.law.umich.edu/CentersAndPrograms/olin/abstracts/03-007.htm.
[10] Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, John M. Olin Center for Law & Economics, University of Michigan Law School, available at http://www.law.umich.edu/CentersAndPrograms/olin/abstracts/03-007.htm.
[11] Personal communication, June 25, 2004.
[12] The Sarbanes amendment (15 U.S.C. § 6807) on states' rights evinces clear Congressional intent. It was enacted in open conference. The provenance of the so-called FCRA preservation provision (15 U.S.C. § 6806), however, is much murkier; it simply appeared in the final law.
[13] Statement of James M. Kasper, Representative, North Dakota House of Representatives, Before the Senate Committee on Banking, Housing, and Urban Affairs, September 19, 2002. Available at http://banking.senate.gov/02_09hrg/091902/kasper.htm.
[14] For a full list of PIRG-supported provisions to protect consumers, see the statement of Ed Mierzwinski, Consumer Program Director for the state PIRGs, in response to the President's signing of the law. Available at http://www.pirg.org/consumer/pdfs/statementfcralaw.pdf.
[15] For a detailed analysis, see Gail Hillebrand, Consumers Union, "After the FACT Act: What States Can Still Do to Prevent Identity Theft," 2004. Available at http://www.consumersunion.org/pdf/FACT-0104.pdf. Accessed July 11, 2004.
[16] The third-party opt-in was not over-turned by the court, only the affiliate sharing provision. San Mateo Supervisor Mike Nevin led this fight and maintains a webpage archiving the history of the debate, including links to the District Court of the United States for the Northern District of California decision in Bank of America vs. Daly City, 279 F. Supp. 2d 1118 (N.D. Cal. 2003). See Supervisor Mike Nevin, County of San Mateo, Financial Privacy Information Ordinance, at http://www.co.sanmateo.ca.us/smc/department/home/0,,1864_4318241_4513009,00.html (last visited Apr. 6, 2004).
[17] Judge Morrison England Jr., American Bankers Association et al vs. Lockyer, June 30, 2004.
[18] Statement of James M. Kasper, Representative, North Dakota House of Representatives, Before the Senate Committee on Banking, Housing, and Urban Affairs, September 19, 2002. Available at http://banking.senate.gov/02_09hrg/091902/kasper.htm.
[19] Personal communication, June 25, 2004.
[20] Personal communication, June 18, 2004.
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