

# **The Politics of Preemption:**

## **The Role of State and Federal Government in Environmental and Consumer Protection under the Bush Administration**

**U.S. PIRG Education Fund  
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## **Acknowledgements**

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## Executive Summary

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States have long been the laboratories for innovative public policy, particularly in the realm of environmental and consumer protection. State and local legislatures, being smaller and often more nimble than the federal government, can develop and test innovative 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. Traditionally, Congress and the federal government have acted to protect the environment and consumers only after several states have taken the lead and provided the momentum for regulatory change.

Ironically, it is the success of state-level efforts to protect the environment and consumers that give rise to federal efforts to preempt state law.

Throughout U.S. history, politicians and academics have vigorously debated the balance of power between state and federal government and the realms in which states are allowed to exercise authority over the federal government. The contemporary debate about the rights of states vis-à-vis the federal government, however, has little to do with which level of government best serves the people and more about how those in power—particularly at the federal level—can advance the agenda of the special interests that helped elect them to office.

Before his inauguration, President George W. Bush summarized his thoughts about the principle of states' rights: "While I believe there's a role for the federal government, it's not to impose its will on states and local communities." As the record shows, however, the Bush administration's ideological commitment to states' rights has been one of convenience rather than purity. When its corporate campaign contributors are faced with strong consumer and environmental protections at the state level, the Bush administration is quick to call for "uniform" national regulations that trump state law. When federal regulation seems too burdensome to industry, the Bush administration calls for more "local control" and states' rights—effectively devolving regulation to local officials eager to please oil, timber, drilling and other corporate interests.

Examples of this ideological double-speak abound.

- ♦ On environmental policy, the Bush administration has proposed weakening the widely popular Roadless Area Conservation Rule to protect 58.5 million acres of pristine forests in order to give local officials—and therefore the timber industry—more control over logging in our national forests. This call for more "local input" ignores the 1.6 million citizens, representing every state, who commented in favor of the roadless rule and the 600 public hearings attended by local citizens during the rule-making process. Conversely, the Bush administration's utility-supported rollbacks to the Clean Air Act's New Source Review program will impede, or even preclude, the ability of states and municipalities to implement air pollution programs that are stronger than federal requirements.

- ♦ On consumer policy, the Bush administration has long since abrogated its commitment to states' rights. Under pressure from large banks, the Treasury Department's Offices of the Comptroller of the Currency (OCC) and Thrift Supervision (OTS) have already ruled that tough state laws to curb usurious mortgage lending practices, such as the one passed in Georgia in 2002 and others, do not apply to nationally-chartered banks. In August 2003, OCC also proposed a sweeping rollback of most state authority to impose consumer protection rules on not only national banks, but also their non-bank operating subsidiaries, which have traditionally been regulated by the states. Now, belying a campaign promise to strengthen privacy protections, the Bush administration is calling on Congress to preempt states from implementing strong financial privacy laws such as the one enacted in California in August.

- ♦ On energy policy, the Bush administration is trying to have it both ways. The administration has worked to give state officials—and therefore the oil industry—more control over

oil and gas development on federally-managed public lands by making it easier to skirt environmental reviews required under federal law. Conversely, the administration is quietly rewriting federal rules to limit states' authority to control oil and gas drilling off their coasts. Similarly, at the behest of electric utilities, the Bush administration has opposed a federal renewable portfolio standard requiring more power generation from renewable energy sources, saying that this is best left to the states. At the same time, the administration is supporting efforts to usurp state authority over the siting of transmission lines and grant private entities, such as utilities, the power of eminent domain to seize private property to build new transmission networks.

This tendency to play both sides—calling for states' rights on the one hand and federal preemption on the other—is a dangerous combination. Because Congress rarely acts to protect the environment or consumers without impetus by the states—unless compelled by crisis or scandal—the administration's preemption of state law in effect dissuades states from developing innovative policy solutions to pressing environmental and consumer problems. Federal law becomes a ceiling, rather than a floor from which states can improve and expand upon existing regulation. As the Bush administration then weakens federal law in other areas to accommodate big oil companies, the timber industry, the financial services industry, and other interests, the remaining framework of environmental and consumer laws may fail to adequately safeguard those it was designed to protect.

## Introduction

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*"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 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. The national organic labeling law, enacted in October 2002, was passed only after several states, including Oregon, Washington, Texas, Idaho, California and Colorado, passed their own laws. 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. Cities and counties have long led the smoke-free indoor air movement, prompting numerous states to act, while Congress has proven itself virtually incapable of regulating the tobacco industry.

In fact, Congress rarely passes proactive legislation to protect the environment or consumers without impetus from the states, unless compelled by a crisis or scandal—such as the Enron and Worldcom crises that led to the passage of corporate accountability reform. As such, the Bush administration's double dealing strategy of calling for states' rights on the one hand and federal preemption on the other—pushing weak regulation at the federal level if at all or devolving control to sympathetic local officials, depending on which forum best serves the interests of its campaign contributors—threatens the means through which concerned citizens have won strong environmental and consumer protections over the last three decades.

## Background on the Preemption Debate

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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 elected to design a federal system in which the national government exercises certain powers and other powers are reserved for the states. In effect, the framers granted few explicit powers to the federal government, reserving most areas of domestic public policy to the domain of state government. 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."

The ratification of the Constitution sparked some of the first lengthy debates about how best to structure American government, pitting the Federalists versus the Anti-Federalists. The Federalists, led by political leaders such as George Washington and 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.

President Franklin Roosevelt's "New Deal" programs that emerged out of the Great Depression represented a significant shift in power from the states to the federal level, with the national government now administering social programs such as Social Security and welfare. This trend continued in the 1950s and 1960s, when the U.S. Supreme Court and federal government intervened to strike down state-supported racial segregation, and peaked in the 1970s, with the creation of the federal Environmental Protection Agency and passage of the Clean Air Act and Clean Water Act.

President Ronald Reagan's 1987 executive order on federalism set the stage for devolution of this federal authority back to the states. The order stated that in most areas of governmental concern, "the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are 'the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies.'"<sup>1</sup> In 1998, President Clinton issued a rescinding executive order, noting that effective public policy is best "achieved when there is competition among the several States in the fashioning of different approaches to public policy issues" but allowing for federal action when matters of national or multi-state scope, broadly defined, justify it.<sup>2</sup>

This debate, while seemingly theoretical, has real-world consequences. Since the birth of the nation, politicians have used the federalism debate as a vehicle for advancing specific agendas. In the 1850s, for example, the debate over slavery evolved into one about states' rights versus the right of the federal government to set national policy. As this paper demonstrates, today's modern federalism debate is less about how government best serves the interest of the people than about how government can best serve the interests of powerful corporate campaign contributors.

## **The Bush Administration's "States' Rights" Doctrine: Principles are Politics**

Before his inauguration, President Bush told a group of Governors, "While I believe there's a role for the federal government, it's not to impose its will on states and local communities."<sup>3</sup> The record shows, however, that the administration's commitment to states' rights quickly evaporates when state regulation would be more burdensome to industry than federal regulation. When states go "too far" to protect the environment and consumers, the Bush administration and its industry allies call for federal preemption of state law. When its campaign contributors complain that federal law is too stringent, the Bush administration holds up the venerated principle of states' rights. The administration is simply forum-shopping for the best venue in which to advance the narrow agenda of the oil industry, the timber industry, electric utilities, large banks and other special interests.

### **Environmental Policy**

The Bush administration's nomination of Utah Governor Mike Leavitt to head the Environmental Protection Agency pays homage to the notion of devolution of federal power to state and local governments. In announcing Leavitt's nomination, President Bush said that Leavitt "respects the ability of state and local governments to meet [environmental] standards, [and] rejects the old ways of command and control from above." This was an important qualification for any EPA nominee, as many of the Bush administration's environmental policies rely on discarding critical federal environmental protections under the thin veil of "states' rights" and "local control" of resources. Even in the realm of environmental policy-making, however, the Bush administration's ideological commitment to states' rights only goes so far as its wealthy donors will allow, and not all of the Bush administration's corporate contributors fare well at the state level.

### *Devolving Federal Power to the Timber Industry: Forest Policy*

The Roadless Area Conservation Rule, a landmark conservation policy finalized in January 2001 after decades of scientific study, 600 public hearings, and a record 1.6 million supportive comments, would protect 58.5 million acres of pristine national forests from most logging and road-building. At the behest of powerful timber companies and other interests eager to log in our national forests, the Bush administration announced in May 2001 its intention to implement the roadless rule, but not without several weakening changes that purport to address "concerns raised by local communities, tribes, and states impacted by the rule."<sup>4</sup> In July 2001, the administration opened up another public comment period in order to obtain more local input and "be responsive to the concerns raised by local communities, states, tribes and other stakeholders"—rather ridiculous given the thousands of citizens that already attended hundreds of public hearings and the millions of public comments already collected from residents of every state across the country.<sup>5</sup>

Republicans for Environmental Protection (REP), in criticizing the Bush administration's May 2001 announcement that it was revamping the roadless rule, noted that the administration spoke only of local interests—which, in the West, often signifies allies of logging, mining and drilling industries—and nary of the broader public interest. REP pointed out that the "Agriculture Department's press release contained the word national only twice (these are national forests we're talking about) but the word local was repeated seven times. There was no talk of national interests, but plenty about 'local input,' 'local communities,' and 'local expertise.'"<sup>6</sup>

In June 2003, the Bush administration announced a plan to propose allowing governors to seek exemptions from the roadless rule for forests in their states in "exceptional circumstances, such as to protect public health and safety or reduce wildfire risks to communities and critical wildlife habitat."<sup>7</sup> These exemptions, broadly defined, would give governors substantial decision-making power over natural treasures owned by all Americans. This same announcement included plans to exempt the Tongass National Forest in Alaska from the roadless rule entirely.

As written, the roadless rule already allows local communities to make many decisions, including maintaining existing roads, building roads to fight catastrophic wildfires, and cutting dense underbrush and small fire-prone trees to reduce the risk of fire. In contrast, the Bush administration's changes, if proposed and enacted, would give local officials, who typically bow to the demands of the timber industry, power to modify the plan on a case-by-case basis. In effect, "local control" is nothing more than a catch phrase to finesse the virtual transfer of power directly to logging, mining and drilling interests to "manage" our national forests.

#### *Preempting Strong State Laws to Mitigate Air Pollution: Clean Air Policy*

Section 116 of the Clean Air Act explicitly allows state and local air pollution agencies to adopt programs that are more stringent than those of the federal government; taking this to heart, many states have enacted programs to reduce emissions from tailpipes, power plants and other industrial facilities. In December 2002, the Bush administration responded to the demands of large energy companies and finalized changes to the Clean Air Act's New Source Review program that will impede, or even preclude, the ability of states and municipalities to implement air pollution programs that are stronger than federal requirements.

The so-called New Source Review (NSR) provisions of the Clean Air Act are a central part of the nation's clean air protections. In simple terms, these provisions set a limit on how long more than 17,000 large older industrial facilities such as power plants, refineries and industrial factories can operate without meeting modern clean air standards. The Clean Air Act requires that any plant making a facility modification that increases emissions also must install modern pollution control technology. Without such provisions, the nation's industrial base would be "grandfathered," or excused, from having to contribute to efforts to clean the nation's air.

On December 31, 2002, New Year's Eve, EPA Administrator Christine Todd Whitman signed into law the first phase of the administration's rollback of the Clean Air Act's New Source Review program. EPA made these changes despite the vocal opposition of state regulators, a coalition of Attorneys General, hundreds of thousands of private citizens, more than one thousand medical doctors, and many in Congress. These final rules will:

- Allow power plants to avoid modern emission control requirements by setting a baseline for future emissions based on their most polluting 24-month period in the last five years.
- Allow sources that have installed pollution control technology in the past 10 years to escape New Source Review for 10 years after that installation, even if the source makes major changes that significantly increase pollution emissions.
- Allow non-utility sources of pollution to use a more lenient method of calculating whether a significant emission increase has occurred as a result of a major modification, and therefore whether pollution control may be required.

- Allow a source to avoid cleaning up to modern standards for all pollutants if the source has installed pollution controls for only one pollutant.

The State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) registered their opposition to rollback of the NSR program, citing concerns that the new rules will increase air pollution by allowing a large number of sources to escape air pollution controls. STAPPA/ALAPCO also objected to the mandatory nature of the NSR rule changes, which will compromise or eliminate states' flexibility to implement air pollution programs that are more stringent than federal programs. ALAPCO President Ellen Garvey stated that since EPA's reforms will weaken the existing NSR program, "we cannot afford to have our hands tied from pursuing more stringent requirements that will better protect air quality and public health in our jurisdictions."<sup>8</sup>

STAPPA/APALCO has noted that although the new NSR rules contain a procedure for allowing states to enforce stronger state regulations, they must first prove to EPA that their programs are more effective in protecting air quality. Since EPA has maintained that the NSR rule changes will encourage pollution sources to reduce their emissions, STAPPA/APALCO contends that EPA will be unlikely to approve a state request to implement state laws that exceed federal requirements.<sup>9</sup> Executive Director Bill Becker has said that the Bush administration "talk[s] about states' rights, but they take away key tools states have needed to clean up the air."<sup>10</sup>

EPA is quick to claim that states remain free under the revised NSR program to adopt their own programs that go beyond the federal minimum. However, STAPPA/ALAPCO released a report in December 2002 showing that more than one half (26) of state air pollution control agencies have restrictions on their ability to adopt programs that are more stringent than federal law, 22 of which cite state law or regulation as the reason.<sup>11</sup> STAPPA/ALAPCO notes that industry, including the electric utilities, has successfully lobbied state legislatures to tie the hands of state air pollution regulators by restricting their ability to craft and implement air pollution programs that are stronger than federal law. Upon releasing the study, Executive Director Bill Becker noted that at while industries are lobbying in Washington DC for weak federal regulation of air pollution, "some of those same industries are pushing—successfully—for restrictions in state and local governments that keep air agencies from adopting anything but the federal minimum."<sup>12</sup>

Fourteen states and the District of Columbia have filed lawsuits against EPA for violating the Clean Air Act with its rule changes.<sup>a</sup> These states are among those with more protective NSR programs already on the books, and they do not wish to abandon these safeguards by being forced to adopt EPA rule changes that states view to be weaker. In announcing the legal action, they stated: "The changes made today are particularly damaging because . . . the Bush Administration has made the new rules effectively mandatory for all states, potentially undermining any state's ability to adopt stronger clean air protections."<sup>13</sup> In response to filings by the states in that litigation, EPA has recently acknowledged that it will need to reopen at least some of its rule changes to public comment and reconsideration. Yet, even as EPA considers recalling parts of the rules, the rules are being imposed today in some states while other states are being directed to change their rules to adopt these unsettled and weaker measures. Numerous states and DC were forced to implement the revised NSR rules in March 2003, despite having just 60 days to review the changes. These states include Illinois, Indiana, Minnesota, Michigan, New York, New Hampshire, New Jersey, South Dakota, and Nevada. All other states have to implement the rules within three years.

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<sup>a</sup> These states are California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin.

## **Consumer Protection Policy**

In the realm of consumer protection, the Bush administration has long since thrown states' rights out the window. On issues ranging from identity theft to predatory lending to tort reform, the states have moved to pass strong legislation to ensure consumers' privacy and protect them from unfair business practices in the absence of meaningful action by the federal government on these issues. Losing at the state level, the financial services industry has turned to Congress and the Bush administration for help, often willing to accept modest but inadequate regulation in return for federal preemption of more stringent state laws.

### *Trumping Strong State Identity Theft Laws with Inadequate Federal Legislation: Privacy Policy*

During his 2000 presidential campaign, then-Governor George W. Bush stated: "I believe privacy is a fundamental right, and that every American should have absolute control over his or her personal information.... I am committed to protecting personal privacy for every American and I believe the marketplace can function without sacrificing the privacy of individuals."<sup>14</sup> Belying this campaign promise to strengthen privacy protections, the Bush administration is urging Congress to prevent California from implementing its strong financial privacy law enacted on August 28, 2003 and preempt the identity theft and credit protection laws of numerous other states.

In 1996, Congress strengthened the Fair Credit Reporting Act (FCRA) to reduce errors in credit reports that wreak havoc with consumers' credit history. Under pressure from the financial services industry, Congress agreed to a compromise, at that time temporarily preempting the right of states to pass most stronger credit accuracy and privacy laws. Since that time, Congress has done nothing to address the growth of identity theft, aside from criminalizing it in 1998. Even the financial services industry supported this effort, since all it did was impose criminal penalties on individual identity thieves without requiring the financial industry adhere to stronger standards to prevent the crime. Criminalization alone has not worked; just last month, the Federal Trade Commission released a major survey finding that fully 1 in 8 adult Americans has been a victim of identity theft in the last five years, at a cost to U.S. businesses and financial institutions of nearly \$48 billion.<sup>15</sup>

On January 1, 2004, the temporary 1996 preemption clause expires; the number one priority for the financial services industry is to win a permanent extension, and even an expansion, of the preemption provision. Permanent FCRA preemption would strengthen the financial services industry's case against states eager to pass privacy laws stronger than the modest provisions of the 1999 Gramm-Leach-Bliley Financial Services Modernization Act.

Gramm-Leach-Bliley was enacted primarily to allow mergers between banks, insurance companies and securities firms. While it was under consideration, however, several privacy scandals occurred, compelling Congress to respond. Nationsbank (now Bank of America) paid civil penalties totaling \$7 million, plus millions more in private class action settlements, after sharing confidential bank account holder information with an affiliated securities firm that switched conservative investors with maturing certificates of deposits into risky financial derivative products. Some of the victims, a majority of whom were low-income senior citizens, lost part of their life savings.<sup>16</sup>

Although a bi-partisan group of lawmakers sought strong privacy protections in the 1999 Gramm-Leach-Bliley law, Congress responded only with privacy disclosure, not protection. So long as a firm provided a "privacy notice," it could share confidential consumer information not only with affiliated firms but also with most third parties, even if the consumer's preference would be to prevent the sharing. Gramm-Leach-Bliley did provide a limited opportunity for consumers to opt-out of this information sharing, but only when the bank sought to share with certain third parties, primarily telemarketers.

At the insistence of Senator Paul Sarbanes (MD), the Gramm-Leach-Bliley Act also explicitly grants states the right to enact financial privacy laws that are stronger than federal law. However, the law also includes certain language saying that the Gramm-Leach-Bliley Act 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 the Gramm-Leach-Bliley Act

inserted by Senator Sarbanes. Recently, a federal court agreed with the banks, challenging local privacy ordinances in several California cities that are similar to the state's new financial privacy law, saying that the FCRA limits state and local authority to regulate affiliate sharing.<sup>17</sup> While the court upheld the parts of the ordinances that restrict information sharing with third parties, the federal Office of the Comptroller of the Currency is expected to step in and administratively preempt those rules as they apply to national banks.

But if the state preemption provision of FCRA is allowed to expire, then states would will have full authority under the Gramm-Leach-Bliley Act to enact strong privacy legislation limiting the ability of banks to share confidential customer information with corporate affiliates.

Acting at the behest of the large banks and financial services industry, both Treasury Secretary Snow and the White House Office of Management and Budget (OMB) have asked Congress to extend and make permanent “the uniform national standards of the Fair Credit Reporting Act,” in effect preempting all state financial privacy laws that are stronger than federal law.<sup>18</sup> With the president's blessing and heavy lobbying from Snow's Treasury Department, the House of Representatives passed legislation on September 10, 2003 that eliminates state authority to pass stronger laws to protect consumer privacy.<sup>b</sup> The administration-supported House proposal actually expands FCRA's preemption of some areas of state law, jeopardizing numerous new state laws intended to rein in identity theft and regulate the growing and controversial use of credit scoring for insurance ratemaking. In exchange for this blanket preemption, the financial services industry has accepted modest reforms to prevent identity theft, improve credit report accuracy and protect medical privacy. These provisions fall short of solving significant problems such as the use of credit scores for unfair insurance rating purposes and the failure of the existing law to include adequate penalties for creditors and credit bureaus that violate the law.

According to both the Congressional Research Service and other experts, this legislation, endorsed by the Bush administration, would preempt numerous stronger identity theft laws recently enacted in California, Connecticut, Illinois, Indiana, Louisiana, Nevada, Texas, and Virginia. This would preempt nearly all of the strong privacy legislation passed in California since 1996, including the legislation signed into law in August 2003 that would stop banks, insurers and other financial companies from sharing consumers' private data without their consent.<sup>19</sup>

#### *Preempting Strong State Consumer Protection Laws: Banking Policy*

For more than a decade, the Office of the Comptroller of the Currency (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 to protect consumers.<sup>20</sup> OCC charters, regulates, and supervises national banks. When Congress vested OCC with “vistorial powers” over national banks in the 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.

In 1992, OCC preempted a New Jersey statute banks 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.

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<sup>b</sup> The Senate is considering a similar bill that permanently extends the expiring preemptions, but allows the states to act on identity theft and regulate most credit scoring and credit reporting disclosures.

Since then, OCC has accelerated its efforts to challenge state and local consumer protection laws. For example:

- In 1999, 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 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.

This trend has continued unabated under the Bush administration, despite its "states' rights" mantra. In August 2003, OCC issued a sweeping proposed rule that would prevent most state consumer protection laws from applying to nationally chartered banks. In addition, despite the view of many legal experts that OCC does not have statutory authority to regulate non-bank operating subsidiaries, such as mortgage companies, the proposed OCC rule seeks to claim this jurisdiction for the agency as well.

State laws on the following issues would no longer apply to big and small national banks, nor to their operating subsidiaries:

- Anti-predatory lending laws;
- All state laws on checking accounts;
- Requirements on banks to assist identity theft victims;
- Restrictions on credit card company practices;
- State laws on when a bank can get a credit report and how it can use it;
- Requirements on abandoned and unused accounts;
- Mandates for bank disclosures in credit contracts and ads for credit;
- Restrictions on credit terms for any kind of loan;
- Loan to value ratios;
- Requirements on escrow and impound accounts; and
- Requirements to cancel private mortgage insurance.

Under this proposed rule, a state law could apply to a national bank only if it falls into a few narrow categories or if the OCC specifically decides that the particular state law has "only an incidental effect on the exercise of national bank powers or is otherwise consistent with [the purposes of the regulation]." <sup>21</sup> Unless the OCC acts to authorize a specific state law, the only types of state laws that would ordinarily apply to a national bank are laws related to contracts, torts, criminal law, debt collection, property transfer, taxes and zoning. National banks could ignore even these types of laws unless the state law "only incidentally affects the exercise of national bank powers." <sup>22</sup>

If enacted, this rule likely would 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. In effect, this proposed 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.

### **Federal Energy Policy: Trying to Have It Both Ways**

In the national debate over federal energy policy, the Bush administration has trumpeted “local control” and “leaving it to the states” on some issues and preemptive federal power on others—depending on how to best serve the narrow agenda of the oil industry and electric utilities.

A top priority of the Bush administration and the oil industry has been expediting oil and gas exploration on federally managed, and taxpayer-owned, public lands in the West. As such, the administration has focused on eliminating what it sees as the primary obstacle to new oil and gas development—compliance with federal environmental regulations, such as the National Environmental Policy Act. In its most recent move to relax federal control over road-building, logging, drilling and other development on America’s public lands, the Bush administration in August 2003 ordered Bureau of Land Management (BLM) employees in Colorado, Montana, New Mexico, Utah and Wyoming to look for ways to skirt federal environmental protections in order to “reduc[e] or eliminat[e] impediments to oil and gas leasing on BLM-managed lands.”<sup>23</sup>

This directive is consistent with the administration’s mantra that the federal government should give states and local communities more of a say in how they comply with federal environmental standards on public lands. As with the debate over road-building and logging in our national forests, demands for “local control” of our public lands in effect call for devolving more power to oil companies, their allies in local government, and states that have a less stringent environmental review process than the federal government.

At the same time, however, the Bush administration is quietly rewriting federal rules to limit states’ control over oil drilling off their coasts, directly contradicting the expressed will of local communities in California, Florida and other coastal states. The National Oceanic and Atmospheric Administration’s proposed changes to the Coastal Zone Management Act (CZMA) would limit states’ ability to participate in coastal planning decisions for federal agency activities or federal permitted activities as currently guaranteed under the CZMA.<sup>24</sup> Specifically, the proposed rule changes could exempt from state review activities that could result in direct coastal impacts, such as offshore oil and gas development, even if the policies contradict federally-approved state coastal management plans. The rule changes also would reverse court opinions that have affirmed states’ authority to review certain offshore drilling decisions, therefore making it easier for development to occur off of protected coasts. Representative Lois Capps of California and 90 other members of Congress have called the proposed revisions a “pernicious assault on states’ rights.”<sup>25</sup>

The administration also is playing both sides of the debate over electricity generation and transmission. In a letter to Senator Pete Domenici (NM) and the conference committee reconciling the House and Senate energy bills, the Bush administration outlined its formal opposition to the renewable energy standard for power generation contained in the Senate bill—saying that it is “best left to the states.”<sup>26</sup> This position mirrors that outlined in numerous papers and letters to Congress from the Alliance for Energy & Economic Growth, a trade association representing 1,300 energy companies, trade associations and other industry interests, including the Edison Electric Institute, American Petroleum Institute, and American Gas Association.<sup>27</sup>

In that same letter, the administration calls for preemption of states’ rights, outlining its “strong support” for two provisions in the House version of the energy bill providing “last-resort federal siting authority for high-priority transmission lines.”<sup>28</sup> These provisions would force the Department of Energy to conduct a study of the transmission grid every three years to identify “interstate congestion areas.” Within these areas, if a state does not respond to or grant a permit request to site new transmission lines within a year, the federal government can override the state’s authority and issue the permit without the state’s permission. Moreover, this proposal would give permit holders—most likely utilities—the right to exercise the power of eminent domain over private property in order to build these new transmission lines. This proposal, supported by American Electric Power and other utility giants, faces staunch resistance from the National Governors Association, which opposes preemption of traditional state and local authority over siting of electricity transmission networks.<sup>29</sup>

## **Conclusion: Protecting America's Framework of Environmental and Consumer Protections**

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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 progressive public policy, 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. 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.

A number of states have enacted innovative public policy in areas where the federal government has legislated but not explicitly preempted the states' ability to pass non-conflicting regulation. It is the success of state-level efforts to protect the environment and consumers that give rise to federal efforts to preempt state law.

Federal preemption of state law presents a serious challenge to environmental and consumer protection in two primary ways. Federal preemption of state law threatens to limit the states' traditional role as the laboratories of democracy and progressive change. State and local legislatures, being smaller and often more nimble than Congress, can develop and test innovative 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 it having affected residents in all 50 states. Federal preemption suppresses this innovation and limits the policy jurisdiction of state and local governments.

Federal preemption of state law also threatens to compromise consumer and environmental protection overall. As noted earlier, Congress only protects the environment and consumers under two circumstances: following a crisis or a scandal or after several states experiment with a policy and Congress follows suit with a federal policy. By preempting state law and effectively removing states from the equation, then we are left to rely on Congress to act without impetus from the states—or to wait until systemic abuses, such as those seen in the Enron debacle, cause widespread harm and rise to the level of scandal or crisis.

In order to preserve states as the laboratory for innovative policy to protect the environment and consumers, 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. The best way to guarantee an eventual strong uniform federal law is to retain states' rights to pass stronger laws.

At the same time, the federal government—with the Bush administration at the helm—should ensure that the federal floor for environmental and consumer protection remains a high bar to achieve, rather than supporting weak regulations accepted by industry in exchange for preemption of meaningful state laws or gutting federal protections to serve the agenda of a few parochial interests.

## End Notes

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- <sup>1</sup> Executive Order 12612, available at <http://www.federalismproject.org/masterpages/publications/odd%20things/exec%20order.html>.
- <sup>2</sup> Executive Order 13083, available at the National Archives and Record Administration at <http://clinton6.nara.gov/1998/05/1998-05-14-executive-order-13083-on-federalism.html>.
- <sup>3</sup> "Bush tells governors that states' rights, education will be priorities." *CNN.com*. January 6, 2001. Available at <http://www.cnn.com/2001/ALLPOLITICS/stories/01/06/bush.governors/>.
- <sup>4</sup> USDA news release, May 4, 2001. Available at <http://www.usda.gov/news/releases/2001/05/0075.htm>.
- <sup>5</sup> USDA news release, July 6, 2001. Available at <http://www.usda.gov/news/releases/2001/07/0118.htm>.
- <sup>6</sup> Republicans for Environmental Protection, <http://www.rep.org/opinions/op-eds/15.html>. Excerpt from an opinion-editorial printed in the *Philadelphia Inquirer* on May 8, 2001.
- <sup>7</sup> USDA press release, June 9, 2003. Available at <http://www.usda.gov/news/releases/2003/06/0200.htm>.
- <sup>8</sup> STAPPA/ALAPCO press release, "EPA's New Source Review Reforms Will Undermine Environmental Protection, Say State/Local Air Pollution Control Agencies," November 22, 2002. Available at <http://www.cleanairworld.org/stappa/news.html>.
- <sup>9</sup> "States Prevented From Adopting Measures More Strict Than EPA's, Regulators Say." *BNS Daily Environment Report*. December 18, 2002.
- <sup>10</sup> Elizabeth Shogren, "States, White House at Odds on Environment." *Los Angeles Times*. December 29, 2002.
- <sup>11</sup> *Restrictions on the Stringency of State and Local Air Quality Programs*. STAPPA/ALAPCO, December 17, 2002.
- <sup>12</sup> STAPPA/ALAPCO press release, "Half of States Restricted from Greater Environmental Stringency than Federal Government," December 17, 2002. Available at <http://www.cleanairworld.org/stappa/news.html>.
- <sup>13</sup> See, for example, the State of New Hampshire Department of Justice press release dated December 31, 2002. Available at <http://www.state.nh.us/nhdoj/Press%20Release/123102Cleanair.html>.
- <sup>14</sup> "Candidates on the issues: Internet Privacy." *Associated Press*. October 6, 2000.
- <sup>15</sup> Federal Trade Commission press release, "FTC Releases Survey of Identity Theft in U.S. 27.3 Million Victims in Past 5 Years, Billions in Losses for Businesses and Consumers." September 3, 2003. Available at <http://www.ftc.gov/opa/2003/09/idtheft.htm>.
- <sup>16</sup> See the Securities and Exchange Commission's Consent Order, <http://www.sec.gov/litigation/admin/3375232.txt>.
- <sup>17</sup> Doug Kravets, "Judge Ok's part of local banking privacy ordinances." *Associated Press*. July 29, 2003.
- <sup>18</sup> United States Treasury Secretary John W. Snow, Remarks Advocating the Renewal of the Fair Credit Reporting Act. June 30, 2003. Available at <http://www.ustreas.gov/press/releases/js515.htm>. Also see the Statement of Administration Policy on HR 2622, September 10, 2003.
- <sup>19</sup> Congressional Research Service memo, dated August 7, 2003. Available at <http://www.privacyrights.org/ar/HR2622CRS.pdf>.
- <sup>20</sup> Its sister agency in charge of regulating savings institutions, the Office of Thrift Supervision (OTS), also has preempted numerous state predatory lending laws. Most legal experts, however, contend that Congress gave OTS the statutory authority to do so.
- <sup>21</sup> Office of the Comptroller of the Currency, Notice of Proposed Rulemaking. Docket No. 03-16, RIN 1557-AC73. Available at <http://www.occ.treas.gov/nprm.pdf>.
- <sup>22</sup> Office of the Comptroller of the Currency, Notice of Proposed Rulemaking. Docket No. 03-16, RIN 1557-AC73. Available at <http://www.occ.treas.gov/nprm.pdf>.
- <sup>23</sup> Bureau of Land Management press release, August 7, 2003. Available at [http://www.blm.gov/nhp/news/releases/pages/2003/pr030807\\_EPCA.htm](http://www.blm.gov/nhp/news/releases/pages/2003/pr030807_EPCA.htm).
- <sup>24</sup> Federal Register: June 11, 2003 (Volume 68, Number 112). "Coastal Zone Management Act Federal Consistency Regulations." 68 FR 34851-34874.

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<sup>25</sup> Congresswoman Lois Capps, press release, August 22, 2003. Available at [http://www.house.gov/apps/list/press/ca23\\_capps/pr030822czma.html](http://www.house.gov/apps/list/press/ca23_capps/pr030822czma.html).

<sup>26</sup> Letter from the Secretary of Energy to Senator Pete Domenici regarding H.R. 6. September 10, 2003.

<sup>27</sup> Alliance for Energy & Economic Growth website, [www.youenergyfuture.org](http://www.youenergyfuture.org). See, for example, the July 22, 2003 letter to the U.S. Senate at [www.youenergyfuture.org/pdf/AEEG%20LTR%20-%20Senate.pdf](http://www.youenergyfuture.org/pdf/AEEG%20LTR%20-%20Senate.pdf) and AEEG's position paper on a renewable energy standard at [www.youenergyfuture.org/docs/POSITION%20PAPER%20-%20RPS.pdf](http://www.youenergyfuture.org/docs/POSITION%20PAPER%20-%20RPS.pdf).

<sup>28</sup> Letter from the Secretary of Energy to Senator Pete Domenici regarding H.R. 6. September 10, 2003.

<sup>29</sup> National Governors Association, "Comprehensive National Energy and Electricity Policy." Available at [www.nga.org/nga/legislativeUpdate/1,1169,C\\_POLICY\\_POSITION^D\\_2445,00.html](http://www.nga.org/nga/legislativeUpdate/1,1169,C_POLICY_POSITION^D_2445,00.html).