

It's Not About Federalism Updates

With the year-end recess approaching, Congress has continued with several initiatives discussed in previous INAF installments (even with a timeout for the “Justice for Judges” talkathon, which might have been a good opportunity for the Senate to address states’ rights jurisprudence—assuming any of the Senators is sufficiently stimulated by the Eleventh Amendment to stay awake for a 3 a.m. discussion of the *Ex Parte Young* doctrine).

1. INAF #11 addressed efforts to preempt local and state laws targeting predatory lending. As we reported, the federal Office of the Comptroller of the Currency had taken a controversial position that such laws are already preempted as applied to national banks. Now, Rep. Sue Kelly (R-N.Y.), who chairs the Subcommittee on Oversight and Investigations of the House Financial Services Committee, has said she is “just not sure that the OCC has followed our congressional mandates” and would like to hold hearings on whether the OCC’s recent rulings have stretched National Banking Act preemption beyond what Congress intended. Considering that the Chairman of the Financial Services Committee is Bob Ney (R-Ohio), sponsor of the super-preemptive Responsible Lending Act of 2003 (which hasn’t yet emerged from committee), we have our doubts about whether Rep. Kelly’s inquiry will lead anywhere, but we wish her luck.

2. INAF #12 reported on a bill to make permanent the Fair Credit Reporting Act’s temporary preemption of state laws addressing financial privacy and identity theft. The bill has now passed both houses of Congress. As we reported, the bill will wipe out California’s newly enacted law restricting the sharing of information among affiliated companies. California’s two Senators, Dianne Feinstein and Barbara Boxer, unsuccessfully offered an amendment to make federal standards roughly equivalent to California’s. The bill has been sent to a conference committee, whence it will emerge as the Fair and Accurate Credit Transactions Act of 2003 to be signed by President Bush.

Editorial comment from California’s major newspapers was exemplified by a *San Francisco Chronicle* editorial that began with the headline “Senate Steamrolls Privacy” and ended with the sentence: “It was a shameful day in Washington.” Editorialists in other states concurred and seemed to be particularly troubled by the fact that Senator Robert Bennett of Utah, characterized by the *St. Louis Post-Dispatch* as having “carried water for the credit reporting industry when the bill was in his committee,” was the beneficiary of a fundraiser organized by Equifax three days after the committee’s action. The fundraiser netted Bennett at least \$25,000.

3. The “tidbits” section of INAF #13 reported possible preemption of state regulation of emissions from small non-road engines, mainly lawnmowers and gardening equipment. The Senate recently approved an amendment to the fiscal 2004 veterans and housing spending bill, sponsored by Kit Bond of Missouri, that will preempt state law. Senator Feinstein once again fought in vain to save California regulations that will be preempted under Bond’s amendment. Veterans and housing? Though we pledge diligently to follow Congress’s states’ rights agenda, there are some mysteries we will never be able to explain.