It's Not About Federalism #2: Union-Busting
June 2, 2003

Welcome to the second installment of It's Not About Federalism. Today's topic is the intervention of Republican NLRB appointees, on behalf of business interests, to prevent states from deciding how their own public money should be spent.

California passed a law that requires companies receiving public funds not to use them to support or oppose their employees' unionization efforts. Private employers are free to use their own funds for anti-union (or pro-union) speech; they just can't use the public money. GOP members of the National Labor Relations Board voted to file an *amicus* brief against the California state law; because they form a majority of the Board, the NLRB will tell the Ninth Circuit that the California law is preempted by federal law. An article with additional details is attached.

On a related point, President Bush had previously signed an Executive Order prohibiting local governments receiving federal construction money from promoting pro-union Project Labor Agreements. The Supreme Court has said local governments are allowed by federal labor law to do this, but the Bush administration decided to take that power away. (The D.C. Circuit's opinion upholding the Executive Order is at http://pacer.cadc.uscourts.gov/common/opinions/200207/01-5436a.txt).

It's not about federalism; it's about union-busting.

It's Not About Federalism #3: Living Wage
June 10, 2003

Today's subject is the minimum wage, an area where conservatives' usual affinity for local control often yields to more prosaic interests. The latest example is Florida Gov. Jeb Bush, who recently signed a law prohibiting counties and municipalities from adopting any minimum wage above the floor set by federal law. The federal minimum wage statute expressly states that it does *not* preempt states and localities from requiring higher minimum wages in their jurisdictions. Florida, which has no state minimum wage, has thus passed a state law giving preemptive effect to a federal law that Congress intended not to have such an effect.

As the attached article reflects, Gov. Bush's action also has a security angle: the law will invalidate a Miami-Dade County ordinance requiring employers at the Miami airport to pay workers twice the federal minimum. It is now feared that the wages of some 2,000 security personnel may be cut in half. Gov. Bush has promised to seek legislation to carve the security workers out of the scope of the preemption.

It's not about federalism; it's about protecting profits.

(The attached article is online at http://www.miami.com/mld/miamiherald/6016050.htm)

It's Not About Federalism #4: Clean Air
June 11, 2003

File today's installment under Coming Attractions. On Monday, the Supreme Court agreed to hear *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, and the case will be argued in the fall.

The issue is whether the federal Clean Air Act preempts a California agency's regulations requiring operators of large fleets of vehicles in the Los Angeles area (e.g., taxi and bus companies and municipal sanitation departments) to purchase low-emission and alternative-fuel vehicles. An impressive array of industry groups--engine manufacturers, refiners and sellers of diesel fuel, car and truck manufacturers, automotive leasing companies, and others--unsuccessfully tried to persuade the Ninth Circuit that federal law should prohibit California from cleaning up fleets of large, dirty vehicles in the South Coast Basin. Now they will try again at the Supreme Court.

An excerpt from the district court's opinion explains why the health and lives of Californians may depend on the state's being able to implement its rules:

> The South Coast Air Basin ("the Basin"), which includes Los Angeles, San Bernardino, Riverside, and Orange Counties, experiences the most serious air quality problems in the nation, primarily due to motor vehicle pollution. It is the only air basin in the country classified by the United States Environmental Protection Agency as an extreme nonattainment area. On-road motor vehicles contribute more than one-half of the ozone precursors emitted in the Basin and are a principal source of toxic pollution.
>
> Emission of particulate matter from diesel vehicles and equipment is the most significant individual toxic air pollutant in the Basin, accounting for fully 71% of the air-borne cancer risk. The California Air Resources Board has formally designated particulate emissions from diesel-fueled vehicles as a Toxic Air Contaminant. Studies reveal that exposure to diesel exhaust increases the risk of developing lung cancer and other non-cancer adverse health effects. Diesel exhaust has also long been considered a probable human carcinogen by the National Institute of Occupational Safety and Health and by the International Agency for Research on Cancer.
>
> Diesel trucks and buses are also significant contributors to smog and fine particles, two pollutants that have serious public health impacts. On-road motor vehicles contribute more than half of all smog-forming hydrocarbons and oxides of nitrogen in the entire emissions inventory. More than 90% of the particles emitted from diesel engines are fine particles. Fine particles are particularly hazardous because they can bypass respiratory defense mechanisms and penetrate deeply into the lungs. The presence of high quantities of fine particles in the air has been shown to lead to higher mortality rates, greater occurrences and severity of asthma, cardiovascular disease, and potentially to a higher incidence of cancer.

(You will not be shocked to learn that the American Lung Association submitted a friend-of-the-court letter in support of the rules).

The lower courts concluded that the so-called Fleet Rules were not preempted because they did not affect what vehicles manufacturers were permitted to sell in California, but only required a specific group of purchasers to select from a subset of already-approved vehicles.

The district court's opinion, which the appellate court adopted as its own, is at 158 F. Supp. 2d 1107 (C.D. Cal. 2001).

It's Not About Federalism; It's About Selling Dirty Trucks.

It's Not About Federalism #5: Consumer and Health Care Rights
June 12, 2003

Today's installment is a double header in Congress, where conservative lawmakers are looking to knock state regulation of consumer and health care out of the ballpark. (This edition also brings me in as pinch hitter for J.J., while he is out of town).

Up to bat today is a debate on the House floor on legislation, H.R. 1115, to rewrite class action rules. The bill would force most large class action suits into federal courts away from state courts, which have traditionally been more sympathetic to consumers. According to a new study by Public Citizen, nearly 500 lobbyists have been registered to promote class-action legislation since 2000, a fact not disputed by industry: "Just about every industry group is on the bandwagon on this because every industry is affected," said Lawrence Fineran, the vice president for regulatory and competitive policy at the National Association of Manufacturers.

There's a kicker in the House bill that will delay justice for a range of shareholders and workers suing corporations like Enron that fleeced them during the bubble. The legislation applies retroactively and includes a provision granting mandatory appeals of class-action certification rulings, so a range of current lawsuits could be sent back to square one as corporate defendants seek to nullify class certifications that have already been granted in state lawsuits. See http://tinyurl.com/e5fj.

On deck is H.R. 660, a bill designed to allow smaller businesses to join in national "Association Health Plans" (AHPs), which would then be exempt from state regulation of health care. Given consistent conservative blocking of federal legislation to protect patients' rights, the end result would be millions of employees losing the protections they now have under state law, such as California's requirement for parity of treatment for mental and physical illness. The law was approved by the House Education and Workforce Committee today and will be moving towards floor debate in the House. http://eastbay.bizjournals.com/eastbay/stories/2003/05/26/story6.html

And it's not even guaranteed that all small businesses would be able to participate in AHPs. One study found that AHPs would reduce premiums an average of 10 percent for participants, but the premiums of the remaining small firms would jump by 26 percent. The bill's opponents, including the Blue Cross and Blue Shield Association, argue that association plans would just end up taking advantage of looser federal regulation and skim off the firms with the healthiest employees to keep their costs down. http://www.sunspot.net/business/investing/bal-insure0611,0,3164274.story?coll=bal-business-headlines

Arguments can always be made for uniform national regulation, but where the push to override state regulation comes from conservatives who usually espouse states' rights, it raises the suspicion that this is not about seeking the proper state-federal regulatory balance; it's about forum shopping for the most favorable legal venue for, or otherwise protecting, their business donors.

It's Not About Federalism; It's About Overturning Consumer and Health Care Rights

It's Not About Federalism #6: Inconsistency and Gay Rights
June 18, 2003

Are conservatives serious about federalism as a principle?

Not really, as libertarian legal advocate Clint Bolick pointed out in yesterday's Washington Post, making the point we agree with that conservatives, as well as liberals, readily drop "federalism" principles when more core values of rights and discrimination are at stake. See http://www.washingtonpost.com/wp-dyn/articles/A2879-2003Jun16.html. A perfect illustration is gay rights where the Supreme Court will soon decide whether Texas has the right to criminalize gay sex. Compare this to the case three years ago, where the Court decided that the New Jersey law banning discrimination by the Boy Scouts was overridden by the federal Constitution. In both cases, state law was being trumped by federal power, yet the lineup of advocates almost completely reverses. As Bolick notes: "Conservatives who agitate for "states' rights" strongly defend the authority of Texas to criminalize homosexual conduct. Yet they also support action by federal judges against the state of New Jersey when it seeks to prohibit discrimination aimed at avowedly gay scoutmasters. Liberals who champion the right of homosexuals to freely choose their partners on the basis of sexual orientation would deny to Boy Scouts the freedom to choose their own leaders on the same basis." Bolick himself represents a libertarian third position of supporting overturning both state laws in the name of individual liberty.

But what is fascinating and significant is that almost no legal advocates line up in the fourth possible configuration of defending both state laws in the name of federalism and states rights. This just emphasizes that "federalism" is really a thin intellectual reed, brandished rhetorically when it suits a particular political position, but otherwise shoved in the closet by conservatives when they have substantive issues at stake, such as attacking gay rights in the New Jersey case.

It's Not About Federalism; It's About Inconsistency and Gay Rights

It's Not About Federalism #7: Conservative Justices Expand Federal Power
June 25, 2003

* A case on insurance regulation in California involving Holocaust survivors
* A case on Internet filters at libraries
* Two cases on affirmative action in Michigan
* A question of whether arbitrators can decide class action lawsuits in South Carolina.

What do these decisions by the Supreme Court on Monday all have in common?

If Chief Justice Rehnquist had his way, federal power would trump state law in every one. Rehnquist was joined by Justice Kennedy in each case and by Justice O'Connor in all but the *Grutter* affirmative action decision. Justices Scalia and Thomas held slightly truer to their rhetorical vision of states rights, so the focus of the day on variations on states rights was one reason for an unusual deviation from the usual lineups of 5-4 splits. But monday showcased a nice collection of decisions to illustrate the point that the conservative Justices routinely trump state laws or individual rights with federal power when it suits their broader substantive views.

In the case of affirmative action, this reality of conservative ideology trumping "states rights" has been obvious for decades, as states and local governments have struggled with overcoming centuries of racism in designing affirmative action programs, only to have the Supreme Court repeatedly strike down their efforts with arbitrary and vague principles. (And since *Washington v. Davis* in 1976, there has been no similar judicial energy to strike down systematic local racism against blacks or other minority groups.) And yesterday's split decision has seemingly left states at the mercy of federal judicial whim with a decision that, in the words of Salon writer Joan Walsh, leaves legal affirmative action in the category of pornography—we'll know it when a federal judge sees it. *See* http://www.salon.com/opinion/feature/2003/06/24/affirmative_action/index.html.

In *American Insurance Association v. Garamendi,* the Court struck down a California state law seeking to protect victims of the Holocaust by forcing insurance companies to disclose their role as a condition of doing business in the state. Maintaining a "single voice" on foreign affairs is not an unreasonable position, but as the four dissenters noted in this case, the federal government had developed no such unified voice on the subject. As Justice Ginsburg argued:

"No executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA [the California law in question]. Absent a clear statement aimed at disclosure requirements by the 'one voice' to which courts properly defer in matters of foreign affairs, I would leave intact California's enactment."

Yet despite that absence of formal legal preemption, Rehnquist, Kennedy and O'Connor (here in a decision by Souter and joined by Breyer) voted to gut the California law in the name of federal monopoly power over issues effecting foreign relations in cases where there is even an inkling of differing strategies by federal diplomacy, whether the federal government has sought to bar state actions or not. De facto, this means that informal negotiations by the executive branch, with no formal law passed, can become an automatic veto on state government action to demand just international actions by multinational corporations. While few scholars would question the need for the federal government to prevent disruptive state action when needed, this decision is a dramatic statement of monopoly power in regulating multinational companies by the federal branch, and it is a problematic expansion of Presidential power to veto state action without having to pass either law or clear executive order.

Hostility to trial lawyers and pro-corporate principles trumped states rights in Monday's *Green Tree Financial Corp. v. Bazzle* case. At stake in the controversy was the broad and complex issue of how federal courts should interpret the Federal Arbitration Act as to when arbitration clauses should trump local legal proceedings. In the case, however, a ruling by the South Carolina Supreme Court and by the arbitrator chosen by both sides had each ruled that additional plaintiffs harmed by *Green Tree* could be added to the proceedings as a class action. The odd duo of Justice Stevens and Justice Thomas each took the strongest states rights position that, since the arbitration clause specified that South Carolina law would govern, the US Supreme Court should defer to the South Carolina top court. The three other liberal Justices, joined by Scalia, felt that a clearer ruling by an arbitrator, rather than the state court, should govern the contract interpretation.

But only Rehnquist, Kennedy and O'Connor declared, in dissent, that they could substitute their judgment for both the state Court and the arbitrator to definitely rule that class actions were disallowed, in complete contravention of South Carolina state law. This decision, given the silence of the contract on the issue and the clear statement of state law on the matter, is a rather breathtaking assertion of federal power by these conservative Court members.

Finally, there was the case upholding the federal law requiring local libraries to use Internet filtering software, *US v. the American Library Association,* on pain of being denied federal library funding. While the First Amendment aspects of the case were front and center, the case also involved the kinds of financial strings used to control local government that states rights conservatives usually deplore. Yet here, all five conservative Justices (joined by Breyer) upheld the use of federal financial inducements to restrict the provision of information by local government entities. Although the conservatives maintained that their ruling was based on a desire to allow public libraries themselves the freedom to control their own collections, it was left to a liberal Justice, in this case Justice Stevens, to note what the Court was doing was permitting Congress to require that libraries use filtering software to which the vast majority of libraries object, thus removing the ability of "local decisionmakers to tailor their responses to local problems."

What is striking in these Monday cases (and most cases touching on the state-federal divide of powers) is how consistently inconsistent both conservatives and progressives Justices are in these matters. On Monday, only Justice Stevens consistently took the side against federal power, yet no one, least of all Justice Stevens himself, would label his philosophy as driven by a states rights vision.

Instead, it's the core substantive values that divide judges ideologically that seem a far better map to these decisions, not the occasional bits of federalism rhetoric used to dress them.

It's Not About Federalism, It's about Values and Ideology.

It's Not About Federalism #8: Class Action "Fairness"
July 9, 2003

A federalism flip-flop opens today's installment of It's Not About Federalism. It comes from the Firestone/Ford Explorer rollover litigation, where plaintiffs' lawyers asked a federal court to hear the claims of all alleged victims in one national class action. The federal appeals court rejected this request, partly because so many states' laws would apply to individuals who had been injured in different states. The plaintiffs' lawyers then filed class actions in several state courts, and Ford and Firestone came back to federal court seeking an injunction against their doing so. Judge Easterbrook of the federal Seventh Circuit aptly characterized the parties' arguments:

"Plaintiffs' lawyers sought nationwide classes that depended on an implausible uniformity of both law and fact, grinding down all differences among the buyers and the products to make a mega-class manageable. Defendants replied by extolling the virtues of federalism and the wisdom of allowing each state a free hand to resolve these disputes. Once we disappointed the plaintiffs' ambitions, however, the litigants began to sing each other's songs. Today the plaintiffs celebrate federalism and trumpet the acumen of state judges in handling complex litigation, while defendants seek a uniform outcome, which would forbid any state court to entertain any class action of any kind concerning these products."

Ford's flirtation with federalism appears to be well and truly over. The automotive industry and other businesses are hewing to the "anti-federalist" line in supporting the Class Action Fairness Act, which is currently pending in Congress. The act would permit defendants to remove most class actions from state court to federal court, even when they are based on state laws on which the state courts are supposed to be the final arbiters, and irrespective of what procedural provisions each state has adopted for managing class actions.

But fear not: lest you think it a violation of the new states' rights ideology of the right to override states' choices about how to run their court systems, the U.S. Chamber of Commerce reassures us that "[t]he legislation complies with federalism principles in that it seeks to prevent the exact problems recognized by the founders when they decided to provide diversity jurisdiction to the federal courts." (Diversity jurisdiction refers to the power of federal courts to hear disputes between citizens of different states; defendants can already remove state cases to federal courts when there is "complete diversity," i.e., when all of the defendants are citizens of different states from all of the plaintiffs, and the new bill would extend this power to cases in which is not complete). This rationale does not, of course, apply to other "tort reform" proposals supported by business, such as imposing federal caps on damages in state-court personal injury and malpractice cases traditionally governed by state law. Meanwhile, consumer groups who oppose federal tort reform have become federalism champions; witness Public Citizen's charge that the Class Action Fairness Act "unnecessarily intrude[s] on state autonomy."

It's not about federalism; it's about making it harder to sue corporations.

On the Internet:

The 7th Circuit's decision is at http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=03-1379.pdf

The U.S. Chamber of Commerce's statement is at http://www.uschamber.com/government/testimony/020731s1712.htm

Public Citizen's statement is at: http://www.citizen.org/congress/civjus/class_action/articles.cfm?ID=9320

It's Not About Federalism #9: Conservatives Preempting State Power over Corporate Crime
July 11, 2003

With a name like the Securities Fraud Deterrence and Investor Restitution Act of 2003, given the Orwellian labelling of bills by the conservatives in the House, you know that H.R. 2179 approved by a House panel is bad news. See http://tinyurl.com/gnik for the New York Times story.

The federalism hypocrisy of conservatives just marches on with this bill. The core of the bill is a mandate that the Securities and Exchange Commission, rather than possessing concurrent enforcement powers with states to defend consumers from investment fraud by brokerage firms, would now have monopoly rulemaking power. Essentially, if the Bush administration wants to leave the analysts who lied to investors about Enron alone, the states would be powerless to defend against fraud. All of the work that New York Attorney General Elliot Spitzer did in uncovering fraud by Wall Street investment banks would have impossible with this bill in effect.

Even worse, what the bill also says is that if Wall Street passes a rule policing itself through the New York Stock Exchange, and the federal SEC has not passed a contrary rule, no state can enforce a tougher rule on behalf of consumer protection.

Essentially, this is preemption of state power by private dealmaking among corporations.

It's Not About Federalism, It's about Protecting Corporate Crime

It's Not About Federalism #10: The Death Penalty
July 24, 2003

The conservative *Economist* magazine recently complained that John Ashcroft's "reverence for central government is beginning to seem downright Democratic, if not Gallic." Chastising the former states' rights champion, the *Economist* said his "conversion into a centralizer is both hypocritical and short-sighted."

Puerto Rico's people seem to have reached the same conclusion, judging from their almost universal outrage at a federal death penalty trial currently proceeding there. Puerto Rico outlawed the death penalty in 1929, and its constitution states: "The right to life, liberty, and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist . . . ." Nonetheless, the Justice Department is going forward with the prosecution.

Puerto Rico's experience is not unusual. Attorney General Ashcroft has overruled local U.S. Attorneys' recommendations against seeking the death penalty at least 31 times, often imposing his will on the 12 states with no death penalty or others that have instituted a death penalty moratorium.

This would seem to be in some tension with "federalist" principles. In striking down a federal statute designed to aid rape victims, the states' right bloc on the Supreme Court said: "We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." But under Ashcroft, the federal government is *more* likely to seek the death penalty in states that have abolished it. Many crimes can be prosecuted under either state or federal law, and generally the feds will leave the job to the states unless the federal interest in the case is "more substantial" than the local interest. A Department of Justice

death penalty guideline used to say that a particular state's lack of a death penalty did not by itself justify federal prosecution. Ashcroft deleted the guideline.

Back to Puerto Rico, where citizens are seething. Governor Sila M. Calderón says she is "totally and absolutely against the death penalty because of moral and ethical reasons." Anabelle Rodriguez, Puerto Rico's Secretary of Justice (equivalent to a state attorney general) "wholeheartedly" supports the ban on the death penalty, saying "[i]t is reflective of our collective consciousness." In fact, the Puerto Rican government filed a friend-of-the-court brief supporting the accused murderers when they unsuccessfully appealed to the U.S. Supreme Court. Meanwhile, the former Vice President of the Puerto Rican Bar Association made a presentation about the case to the U.N. Decolonization Committee, saying: "It's not only a question of human rights, it's a question of self-determination." Territorial Senator Fernando Martín concurred, noting that Puerto Ricans cannot vote for Congress or the President: "It's not right for the U.S. to impose a law that Puerto Ricans had no hand in crafting."

The final insult to local feeling is the exclusion of most Puerto Ricans from the jury. Although proceedings in Puerto Rico's own court system are in Spanish, federal court jurors must be fluent in English, barring more than two-thirds of the population from service. Further, as in capital trials throughout the United States, the prosecution can exclude any juror who has moral objections to imposing the death penalty, a requirement that disqualifies most of the remaining one-third, particularly those who (like most Puerto Ricans) are Roman Catholic and who follow the Church's teaching that capital punishment is immoral. The jury is thus drawn from a pool that is wildly unrepresentative of the local population, a circumstance that in most other contexts would violate the Sixth Amendment.

It's not about federalism; it's about putting people to death.

On the Internet:

The *Economist* article: http://www.economist.com/displaystory.cfm?story_id=1748616

The First Circuit's opinion finding (contrary to the Puerto Rico federal trial court) that the federal death penalty applies in Puerto Rico: http://www.ca1.uscourts.gov/pdf.opinions/00-2088-01A.pdf

From the *New York Times*: http://www.commondreams.org/headlines03/0717-09.htm and http://www.nytimes.com/2003/07/20/weekinreview/20LIPT.html

From the *Washington Post*: http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A5450-2002Jun30¬Found=true

From the *Milwaukee Journal Sentinel*: http://www.jsonline.com/news/Metro/may03/143613.asp

From the *National Law Journal*: http://www.law.com/jsp/article.jsp?id=1058416409520

It's Not About Federalism #11: Predatory Lending
(and updates on the Death Penalty and Living Wage INAF installments)
August 11, 2003

Congressman Bob Ney is best known for ordering the House Restaurant to relabel french fries and french toast "freedom fries" and "freedom toast." But consumer advocates are more concerned by a bill Ney introduced to regulate so-called predatory loans.

Predatory loans are made to low-income (often elderly or minority) borrowers whose income may not be enough to repay the loans but who have enough equity in their homes to cover the loan amount. Lenders typically charge high up-front fees and require large balloon payments at the end of the loan term. Predatory loans lead to foreclosure much more frequently than other mortgages, causing borrowers to lose their homes.

Ney, a Republican first elected as part of the fiercely "federalist" Class of '94, calls his bill "the Responsible Lending Act." The bill would put some modest federal restrictions on predatory lending. As the *Wall Street Journal* explained, "If that seems a departure from the traditional Republican preference for state rather than federal oversight, advocates for those home buyers say there is a good reason: Such a bill would pre-empt tougher state regulations already on the books. . . . And liberal Democratic Rep. Barney Frank of Massachusetts—not usually a foe of federal action—says, 'I would frankly rather leave it to the states.'"

The Responsible Lending Act is not without Orwellian overtones. Its preemption provision, which is exceptionally broad in supplanting state law, is entitled "Coordination with State law." Not only would the bill prevent states and localities from regulating loans to private borrowers, it would prohibit them from refusing to do business with predatory lenders. In other words, state and local governments would not be allowed to consider an institution's lending practices in deciding how to raise, deposit, or spend their own money. Coordination indeed.

As we have seen in other contexts, advocates on both sides vacillate over which level of government ought to control the issue. Legislatures in six states have preempted municipalities from regulating predatory lending and declined to regulate it themselves. As a result, the American Financial Services Organization has not joined other industry groups in supporting the Ney bill, believing that industry should first try to get preemption at the state level without having to accept even the minimal regulation in the Responsible Lending Act. Apparently disagreeing with this strategy, Household International Inc., which recently settled a $500 million deceptive-lending suit brought by state governments, "figures prominently in a coalition of subprime lenders seeking action on Capitol Hill," according to the *Journal*.

Other states, including California and New York, have adopted anti-predatory lending laws at the state level. A number of cities, including Washington, D.C., Chicago, and Philadelphia, have passed local ordinances. But while their efforts have borne fruit in states and localities, consumer advocates would support federal regulation if they thought it had teeth. A coalition of consumer, civil rights, and labor groups wrote to House Banking Committee Chairman Michael Oxley: "We all recognize that changes in federal law are necessary to stop predatory lending across the nation, and we strongly endorse efforts to create meaningful federal law, which would address the real problem." The problem is that the Ney bill is not, in their view, "meaningful." Meanwhile, ten cities and the Rhode Island Senate have passed anti-preemption resolutions.

Though Ney's bill has languished in committee since it was introduced on Valentine's Day, the controversy over preemption came to a head in late July. The federal Office of the Comptroller of the Currency (OCC) ruled that Georgia's predatory lending law was preempted by the National Bank Act and

thus could not be applied to national banks. Shortly before OCC released the decision, Comptroller John Hawke told the Federalist Society's Financial Services & E-Commerce practice group: "The OCC will, of course, continue to defend the right of national banks to be free from state efforts to regulate their business . . . ."

Hawke cited a study suggesting that "subprime" borrowers in North Carolina have lost access to capital since that state passed the first statewide predatory lending law in the nation (though another study rebuts that conclusion). He also noted that after the Georgia law passed, Standard & Poor's and Moody's stopped rating securities backed by mortgage loans subject to the law. In short, states and localities might be well-meaning, but their laws actually harm the borrowers they seek to help by chasing lenders out of the market, and OCC would preempt those laws for the borrowers' own good.

William Brennan, director of the Home Defense Program of the Atlanta Legal Aid Society, begged to differ: "Where does this leave the victims of predatory lending? It leaves them in a vacuum," Brennan told the *Atlanta Journal & Constitution*.

It's not about federalism; it's about fleecing low-income home owners

On the Internet:

Text of Responsible Lending Act (H.R. 833), with links to information on bill's status: http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.833:

OCC's press release page, with links to the Georgia preemption order, the proposed rule on preemption, and "Q&A" documents about each: http://www.occ.treas.gov/03rellst.htm

Collected press coverage of the preemption issue: http://www.acorn.org/acorn10/predatorylending/ney/

Study concluding that North Carolina's predatory lending law has curtailed predatory practices while increasing credit available to subprime borrowers: http://www.mbaa.org/industry/reports/03/NC_AntiPredatoryLaw_Impact.pdf

The Mortgage Bankers Association of America's on-line Predatory Lending Resource Center: http://www.mbaa.org/resources/predlend/

Home page of Federalist Society's Financial Services & E-commerce practice group: http://www.fed-soc.org/Publications/practicegroupnewsletters/financialservices/financialservices.htm

Updates

Judging from e-mail and personal responses, many readers were particularly troubled by INAF #10. That installment reported on the Justice Department's decision to seek the death penalty for a crime committed in Puerto Rico, in spite of the Commonwealth's constitutional prohibition on the death penalty and Puerto Ricans' near-unanimous opposition to capital punishment. After INAF #10 went out, the jury acquitted both defendants of all charges, so the question of punishment never came up. Observers noted that even when defendants have been convicted, juries have opted for life imprisonment in 15 of the last 16 death penalty cases prosecuted by the Ashcroft Justice Department; the Attorney General has apparently not been terribly successful in bringing capital cases in over the objections of local U.S. Attorneys, sometimes in states without a death penalty. For more on the Puerto Rico case, see http://www.puertorico-herald.org/issues/2003/vol7n32/PRClashesUS-en.shtml

INAF #3 reported that the State of Florida, which has no minimum wage, had passed a law pre-empting municipalities and counties from adopting local living wage laws. Advocates (including the Brennan Center) have responded by gathering signatures to put an initiative on the state ballot. If passed, the initiative will establish a statewide minimum wage of $6.15 per hour, with automatic annual adjustments for inflation. More details are at http://www.brennancenter.org/presscenter/pressrelease_2003_0807.html

It's Not About Federalism #12: Financial Privacy
September 18, 2003

To paraphrase Ronald Reagan, "There they go again." In INAF #11, we detailed efforts by federal regulators and financial institutions to preempt state and local predatory lending laws. A similar cast of characters is now trying to do the same thing to state laws that prevent identity theft and protect the privacy of financial information.

The Fair Credit Reporting Act ("FCRA") has been around since 1970, but when new provisions were added in 1996, Congress acceded to industry requests and temporarily preempted stronger state laws to allow financial institutions to adjust to the new federal regime. That temporary preemption expires on January 1, 2004, and industry groups are lobbying Congress furiously (and, it appears, successfully) to make the preemption permanent.

The Partnership to Protect Consumer Credit ("PPCC"), an industry group, says that "[l]ocal privacy laws only work when local privacy issues are being addressed (e.g., peeping toms, school records, etc.)." The Bush Administration agrees. Secretary of the Treasury John Snow testified: "We want the sunset removed. We think it would be really devastating if the business community couldn't plan on the preemption staying in place."

On the other side are consumer advocates like Consumer Union, U.S. PIRG, and the Consumer Federation of America, as well as privacy advocates like the Electronic Privacy Information Center. The National Association of [State] Attorneys General also opposes renewing preemption, urging Congress to set "a national floor" and permit states "to fashion consumer protection laws uniquely suited to their circumstances." Privacy advocate Evan Hendricks told a Federalist Society panel last October that preemption would be acceptable if more meaningful privacy standards were put into FCRA itself: "If there is a good national law, the need for state law withers away. The states are not sitting around looking to get into the privacy field."

The House overwhelmingly passed a bill that would make FCRA's preemption permanent. Senate Banking Committee Chairman Richard Shelby (R-AL) has introduced a similar bill, although Senators Barbara Boxer and Dianne Feinstein (both D-CA) have written to Shelby urging him either to remove the preemption provision, to "grandfather" California's recently enacted law, or to raise the federal privacy standards to be nearly as stringent as California's (six other states have also adopted laws that are tougher than FCRA in anticipation of the expiration of the preemption provision). PPCC claims that California's law, which prohibits financial institutions from sharing credit information with affiliates without consumers' express consent, would "limit access to credit for millions of Californians, particularly among traditionally underserved populations."

The bill is expected to emerge from committee with the preemption intact, though Boxer, Feinstein, and others may attempt to amend it on the Senate floor. The Center for Responsive Politics, a campaign finance reform group, notes that members of the PPCC and the Financial Services Coordinating Council, another industry organization, have given Shelby more than $171,000 in the 2004 election cycle (Shelby is up for re-election next year). Other members of the committee, Democrat and Republican, have received more than $300,000 from the same sources.

We don't have the expertise to know whether consumers will be better off with federal preemption, as the PPCC claims, or without it, as all of the consumer advocacy groups contend (though we have our suspicions). But once again, ostensibly pro-states' rights conservatives are standing up for federal power, even when the states' attorneys general have asked them not to.

But we shouldn't judge them too harshly. Industry can be very persuasive. Among the 10 or more lobbyists hired by financial services companies and business groups to lobby specifically on FCRA is G. Stewart Hall, Shelby's former legislative director. After leaving Shelby's staff, Hall set up a lobbying firm, which he decided to call the Federalist Group—and if the Federalist Group says it's OK to override the sovereign states, who are we to argue?

It's not about federalism; it's about putting lenders ahead of borrowers

On the Internet:

PPPC's website: http://www.protectconsumercredit.org

The resolution of the National Association of Attorneys General: http://www.pirg.org/consumer/credit/resolution1.pdf

The Electronic Privacy Information Center's FCRA analysis: http://www.epic.org/privacy/fcra

The Consumer Federation of America's FCRA page, with links: http://www.consumerfed.org/backpage/creporting.html

The Center for Responsive Politics' page on industry contributions to Banking Committee members: http://www.capitaleye.org/inside.asp?ID=104

Transcript of panel discussion on FCRA at the Federalist Society's 4th annual Financial Services Conference on Oct. 11, 2002: http://www.fed-soc.org/Publications/Transcripts/finserv2.pdf

It's Not About Federalism #13: "Baby UI"
October 22, 2003

What do you get when the Bush Administration, in the name of giving states more "flexibility," takes away from states an option for using their own tax dollars? Another installment of It's Not About Federalism.

Four years ago, when states' Unemployment Compensation (UC) trust funds were fairly healthy, several states considered expanding the UC program to provide benefits, known as "Baby UI," to parents taking leave to care for newborn or newly adopted children. The Department of Labor (DOL), which must certify states' compliance with federal UC law, had told Vermont in 1997 that UC funds could not be used for that purpose. President Clinton, at the request of four other states, ordered DOL to reconsider in 1999. The following year, DOL authorized states, at their option, to provide Baby UI.

DOL defended its new rule in classically "federalist" terms. States could voluntarily participate in an "experiment" to test whether Baby UI promoted new parents' "long-term attachment to the work-force." DOL noted research suggesting that women who could take paid maternity leave stayed at work later into their pregnancies, returned to work sooner after giving birth, and were less likely to leave the workforce altogether than women who could not. The theme of encouraging state experimentation goes back to the origins of the UC program, when President Franklin Roosevelt said that federal law "should leave wide latitude to the States . . . as we deem varied experience necessary within particular provisions in unemployment compensation laws in order to conclude what types are most practicable in the country."

Fifteen states entertained Baby UI proposals in 2000, and 20 did so in 2001, but none adopted Baby UI. Nonetheless, in a new regulation it called the "Trust Fund Integrity Rule," DOL rescinded the Clinton-era rule. The main justification, as the name implied, was that most states could not afford to pay for Baby UI: after several years of high unemployment, fewer than half of the states had the recommended level of reserves in their UC trust funds. DOL also found that Baby UI was inconsistent with its historical interpretation of federal statutes as requiring UC recipients to be "able and available" to work. As the Society for Human Resource Management (SHRM) had argued, similarly to other employer groups who commented during both rulemakings, "Those who take leave for birth or adoption are not unemployed. Work is available to them, but they choose not to work."

Whatever the legal merit of DOL's "able and available" argument, its concern for the solvency of states' trust funds seems downright incoherent (as well as anti-"federalist"). The 2000 rule noted that DOL had never required states to maintain solvent trust funds, but urged states not to undertake Baby UI if they were in a "weak solvency position." When DOL proposed rescinding the rule, Baby UI's supporters argued that DOL should allow individual states whose trust funds were in good health to adopt Baby UI. DOL responded: "Even if the Department had authority to mandate a solvency standard, we believe it would be poor public policy to create a federal standard that would require states to deny specific types of benefits based on fund balances." This response, of course, conflicts with the principal reason given for rescinding Baby UI in the first place, namely to protect the integrity of "fund balances" by requiring states to deny a "specific type of benefit."

(This is not the only example of interesting logic in DOL's defense of its decision to override states' discretion. DOL contended that its action gave the states *more* flexibility to implement paid family leave programs, since states that use other sources of funding will not be subject to the rules of the UC program. Losing one option without gaining any new ones does not fall within any definition of "flexibility" with which we are familiar.)

As we have seen in other contexts, while ostensibly pro-states' rights conservatives supported this diminution of state power, liberals were quick to make "federalist" arguments for the substantive policy they favored. John Sweeney, President of the AFL-CIO, said the proposal to rescind Baby UI "reflects a profound mistrust of states to make wise choices in administering their unemployment insurance programs." The National Employment Law Project said: "Individual states are in a key position to evaluate the needs of the changing workforce and the UI system, including the critical role of working women and caregivers in today's society. . . . As the Social Security Board concluded when the unemployment system was first created, state eligibility rules should 'go further and adopt wider coverage' than the federal law in order to promote innovation and experimentation."

The "federalist" Bush Administration was not moved.

It's not about federalism; it's about leaving working parents behind.

On the Internet:

DOL's explanations of its reasons for adopting Baby UI and then repealing it can be found at http://www.gpoaccess.gov/fr/retrieve.html. For the notice adopting Baby UI, go to vol. 65, page 37210. The notice rescinding the rule is at vol. 68, page 58540.

The U.S. Chamber of Commerce's views on Baby UI and paid parental leave in general: http://www.uschamber.com/government/issues/labor/paidfmla.htm

National Partnership for Women and Families' comments on Baby UI: http://www.nationalpartnership.org/content.cfm?L1=8&L2=1.0&GuideID=54&ArticleID=1&CFID=2665820&CFTOKEN=60885251

National Employment Law Project's materials on Baby UI: http://www.nelp.org/ui/initiatives/family/index.cfm

Updates & tidbits

In INAF #11, we reported on the increasingly aggressive efforts of the financial industry to preempt states' and localities' efforts to rein in predatory lending. On October 6, the National Association of [State] Attorneys General sent a letter to the Office of the Comptroller of the Currency (OCC) criticizing OCC's proposal for further preemption as "one-sided and self serving." The letter, which was signed by the attorneys general of all 50 states and the Virgin Islands, as well as the Corporation Counsel of the District of Columbia, urged the federal government to work together with the states to ensure a fair credit marketplace: "This is not the time to devote energies to turf battles and empire building." Meanwhile, liberals continued to show that they can also talk the federalism talk. In a separate letter to OCC, 19 civil rights and consumer protection rallied to the defense of "the sovereignty of the states" in criticizing OCC's preemption proposal.

Last Sunday's *Los Angeles Times* reported on the trend in Congress to preempt state laws, citing examples like the proposed preemption of California's financial privacy law discussed in INAF #12. The article captured the role reversal caused by preemption of state laws on consumer rights, the environment, and other subjects near to liberals' hearts. Maxine Waters, a Democratic Congresswoman who represents South-Central Los Angeles and neighboring areas, said, "If anybody had told me that I would be on the floor of Congress arguing states' rights . . . I would have told them they are crazy." Meanwhile, Kit Bond, a Republican Senator from Missouri, explained his move to preempt California's rules limiting emissions

from non-road engines: "States' rights doesn't mean the right to hurt other states" by imposing rules costly to manufacturers.

To which the California Air Resources Board responded in language that could have come from INAF: Bond's preemption proposal "is not about unreasonable requirements to clean up lawn equipment or losing jobs, CARB said. 'It's about taking away states' rights, crippling state efforts to reduce air pollution, and harming the health of Americans,' the agency said in documents," according to BNA's Daily Environmental Report.

(The *L.A. Times* article is no longer available for free on the newspaper's website, but the *Boston Globe*'s reprint can be viewed at http://www.boston.com/news/nation/articles/2003/10/20/congress_flexes_muscle_on_state_laws/).

INAF Updates
November 16, 2003

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.

It's Not About Federalism #14: Gay Marriage
November 19, 2003

The first INAF Integrity Award goes to a man for whom, apparently, it *is* about federalism. Former Republican Congressman Bob Barr of Georgia—an opponent of same-sex marriage who authored the Defense of Marriage Act (DOMA)—has argued against a proposed constitutional amendment forbidding states from recognizing same-sex marriages, saying: "In the best conservative tradition, each state should make its own decision without federal government interference."

Among current members of Congress, however, it's the usual story, with conservative supporters of states-rights jurisprudence seeking to override states' choices and liberals discovering the sanctity of state sovereignty. Consider the Senators of the Judiciary Committee, the chief antagonists in the fight over President Bush's "federalist" nominees. At a subcommittee hearing on the proposed Federal Marriage Amendment (FMA), Sen. Feingold (D.-Wis.) said: "I do not believe that Congress should spend time on an issue that should be left to the states . . . ." Republican Sen. Cornyn of Texas, who convened the hearing, said: "It is rather extraordinary for some groups to suddenly assert the importance of states' rights—the same groups who have opposed some of President Bush's most exceptional judicial nominees precisely because of their support for states' rights." It is not clear whether Sen. Cornyn, who championed the Partial Birth Abortion Act and the Class Action Fairness Act to displace state law and take cases away from state courts, views himself as the pot or the kettle in this exchange.

Yesterday's Massachusetts decision striking down a ban on same-sex marriage triggered urgent calls to pass the FMA. The Family Research Council typified social conservatives' reaction, saying: "We must amend the Constitution if we are to stop a tyrannical judiciary from redefining marriage to the point of extinction." The FMA already has more than 90 sponsors in the House, including Chip Pickering (R.-Miss.), son of embattled Bush judicial nominee Charles Pickering. Judging from reaction among nominally "federalist" politicians, we can expect the FMA to be introduced in the Senate before long. House Majority Leader DeLay (R-Tex.) said Republicans "are pushing a constitutional amendment banning gay marriage," and Sen. Cornyn told the *Houston Chronicle* that he is now leaning more strongly toward supporting the FMA.

There is a plausible argument that requiring other states to recognize same-sex marriages solemnized in Massachusetts would violate those states' sovereignty. But DOMA was passed precisely to preclude a same-sex marriage in one state from binding other states. Barr contends: "As any good federalist should recognize, this law leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling." The Massachusetts court appealed to states-rights principles in defending its decision: "We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions . . . ."

"Federalist" defenses of the FMA have been more than a bit disingenuous. Sen. Cornyn warned his colleagues that courts are poised to "take the issue away from the states." But the prominent same-sex marriage cases have involved state courts deciding whether statutes passed by state legislatures are valid under state constitutions. Surely, calibrating the relationship among the branches of its own government is a core prerogative of a sovereign. And the states seem to be doing fine; Hawaiians and Alaskans responded to similar decisions by amending their state constitutions, while Vermonters chose to enact civil union legislation. The FMA would disempower state legislatures as well as courts by expressly precluding legislatures from passing laws giving same-sex couples "marital status or the legal incidents thereof." It would sweep away Vermont's legislatively adopted civil union law and dozens of local domestic part-

nership ordinances. Christian activist group Focus on the Family understands the objective perfectly: "The FMA protects marriage from redefinition by state legislatures and the courts."

Sen. Cornyn invited Gregory Coleman, a private lawyer who clerked for noted "federalists" Judge Edith Jones of the Fifth Circuit and Justice Clarence Thomas of the Supreme Court before serving as Solicitor General of Texas under then-Governor Bush, to defend the FMA at his subcommittee hearing. Coleman claimed that the FMA "simply does not raise federalism concerns" because it would have to be ratified by three-quarters of the states. But as Minnesota Law School Professor Dale Carpenter testified, a national definition of marriage would trample on the sovereignty of the other one-quarter of states: "[T]he people of some states [would] order the people of other states not to experiment with their own state family law."

For "federalists" who worry that Massachusetts will be able to force its own policy on other states, Carpenter's argument ought to be decisive. As Barr puts it: "[N]o state can impose its view of marriage on any other state."

It's not about federalism; it's about second-class citizenship*

*with apologies to Chief Justice Margaret Marshall of Massachusetts

<u>On the Internet</u>:

The text of DOMA: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:h3396enr.txt.pdf

The proposed FMA: http://thomas.loc.gov/cgi-bin/query/z?c108:H.J.RES.56:

Links to witnesses' testimony and members' statements at the Cornyn subcommittee hearing: http://judiciary.senate.gov/hearing.cfm?id=906

Bob Barr's op-ed: http://www.bobbarr.org/default.asp?pt=newsdescr&RI=441

Sen. Cornyn's "Dear Colleague" letter supporting the FMA: http://cornyn.senate.gov/091703domaletter.html

The Family Forum's "Judicial Tyranny" page: http://www.family.org/cforum/judicial_tyranny/faqs.cfm?pt=fma

"Marriage Protection Week" homepage, with links to sites of supporting organizations: http://www.marriageprotectionweek.com

Lambda Legal's Marriage Project resources page, with links to other organizations' sites: http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=9&class=11

It's Not About Federalism #15: Rebirth of a Euphemism
January 30, 2004

For those of use too young to remember the 1950s and 1960s, the civil rights leaders of that era have an almost mythic stature. And when giants like Dr. King strode the earth, they faced legendary enemies. Men like George Wallace and Orval Faubus, and organizations like the Mississippi Sovereignty Commission, used the talismanic phrase "states' rights" to give Jim Crow a veneer of intellectual and constitutional legitimacy.

Thus, schoolchildren in the 1970s and 1980s learned that "states' rights" was a euphemism for bigotry, and the phrase became as discredited then as the words "ethnic cleansing" would become in the 1990s.

The euphemism is back.

This week, the 11th Circuit Court of Appeals upheld Florida's ban on adoption by gays and lesbians. The lengthy opinion has nothing to do with so-called "federalism" issues, and the court has no occasion to discuss any of the doctrines of the "new federalism," such as sovereign immunity or the limits of congressional power. Instead, it deals with questions like whether the alleged rationale of the statute—that a household headed by opposite-sex, married parents is the optimal environment for children—is undermined by the facts that Florida lets single heterosexuals adopt and that there are 3000 children awaiting adoption in Florida with no prospect of finding enough married couples to take them all.

It is therefore curious to see how the court begins its 47-page analysis. The very first sentence of the opinion defines what the case is about: "In this appeal, we decide the states' rights issue of whether Florida Statute § 63.042(3), which prevents adoption by practicing homo-sexuals, is constitutional as enacted by the Florida legislature and subsequently enforced."

The "states' rights issue"? The court never explains this characterization. Which leaves us wondering: has "states' rights" regained enough respectability to give intellectual cover to raw bigotry? History may be repeating itself.

It's not about federalism: it's about states' rights.

On the Internet:

The Eleventh Circuit's opinion: http://caselaw.lp.findlaw.com/data2/circs/11th/0116723p.pdf.

It's Not About Federalism #16: Tribal Sovereign Immunity
March 1, 2004

Earlier today, the Supreme Court heard its latest state sovereign immunity case. This line of cases, which dates to 1996, says that even though state governments are bound by federal law, Congress cannot authorize individuals to sue states for damages when they violate federal law. The only exception—so far—is when Congress exercises its power to enforce the guarantees of the Fourteenth Amendment, such as due process and equal protection (though that has not stopped the Court from striking down civil rights laws like the Age Discrimination in Employment Act that try to make the states pay for employment discrimination).

Today's case, *Tennessee Student Assistance Corporation v. Hood*, will decide whether there is another exception for Congress's constitutional power "to establish uniform Laws on the subject of Bankruptcies throughout the United States." The smart money is on the states; of the six federal appeals courts to decide this question since the revolution of 1996, only one has ruled in favor of Congress. The Solicitor General, who usually intervenes to defend the constitutionality of federal statutes in the Supreme Court, declined to participate in *Hood*.

Krystal Energy Company v. Navajo Nation, decided in February by the Court of Appeals for the Ninth Circuit, makes an interesting counterpoint to *Hood*. The Ninth Circuit, interpreting the same section of the Bankruptcy Code involved in *Hood*, found that Indian tribes can be hailed into Bankruptcy Court against their will. Indian tribes, like states, are sovereigns of a sort, but *Krystal Energy* confirmed that they are second-class sovereigns in the eyes of the courts (this is not to criticize the Ninth Circuit panel, which merely restated well-established principles of Indian law that the Supreme Court has laid down over the centuries). The Navajo Nation did not even bother to raise a constitutional argument in *Krystal Energy*, because it would have been futile. How is it that the states have an almost slam-dunk winner where the tribes have a sure loser on sovereign immunity?

One might think that if either type of entity had ceded more sovereignty to the federal government, it would have been the states. After all, as the Supreme Court has repeatedly noted, "tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" The Constitution does not grant the federal government any greater power over Indian tribes than over states; the only power expressly granted is the right to regulate commerce with the tribes, and it is quite clear (or at least it has been for the last eight years) that the parallel power to regulate interstate commerce does not permit Congress to override states' sovereign immunity.

The federal government historically dealt with Indian tribes, unlike states, in a manner befitting true sovereigns: by treaty and war. The Court's earliest pronouncements on the subject described Indian tribes as "nations" and "independent political communities" distinct from the United States. Unlike states, tribal governments are not bound by the Fourteenth Amendment nor, by extension, by the Bill of Rights. Indeed, when the Fourteenth Amendment declared that all persons born in the United States are citizens of the United States and the state in which they reside, the Court held that this rule did not apply to Indians; while it was possible to be a citizen of both New York and the United States, one could not owe loyalty simultaneously to the Cherokee Nation and the United States. It was not until 1924 that all Indians, by Act of Congress, became U.S. citizens. Even then, some Indians objected because, in the words of Tuscarora Chief Clinton Rickard, "This was a violation of our sovereignty. Our citizenship was in our own nations."

It therefore seems a bit odd that states' sovereign immunity should be impervious even to explicit abrogation under a law that is indisputably within Congress's enumerated powers, while Congress can

revoke Indian tribes' sovereign immunity at will under a nontextual "plenary power" over Indian affairs. Yet not only is that the law, but the Court seems to think that even the flimsy sovereign immunity accorded to tribes goes too far. The *Kiowa Tribe* case of 1998, for example, noted: "Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident." The Court—in an opinion authored by Justice Kennedy and joined by three of the other four "federalist" justices—went on to say that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." These words must seem painfully ironic to the victims of state torts like employment discrimination and patent infringement who have been denied justice by the Court's state sovereign immunity jurisprudence.

(This area of law is replete with ironies. The 1996 case that announced the Court's new, robust immunity theory rejected a suit brought *by* a sovereign Indian tribe *against* a state and authorized by federal law. The presumably fortuitous list of states in which the state sovereign immunity cases have arisen is also quite interesting: Florida (*Seminole Tribe*, *Florida Prepaid*, and *Kimel*); Alabama (*Garrett*); and South Carolina (*Federal Maritime Commission*). Outside the Confederacy, only Maine (in *Alden*) has managed to push the immunity envelope. This Term, Tennessee, lagging the Deep South as it did in 1861, is trying to make up for lost time by pulling off a double: besides *Hood*, it is also asking the Court to rule in *Tennessee v. Lane* that Congress exceeded its Fourteenth Amendment powers in trying to abrogate sovereign immunity for states that violate Title II of the Americans with Disabilities Act.)

As Justice Kennedy wrote for the Federalist Five in *Alden*, sovereign immunity is needed to preserve the "dignity" of sovereign states. Some might question whether Florida really has more dignity than the Seminole Tribe, let alone whether Georgia has more dignity than the Cherokee Nation it sent on the genocidal Trail of Tears in spite of an explicit Supreme Court order to the contrary.

It's not about federalism; it's about the indignity of being an Indian tribe.

On the Internet:

Professor Mary Wood's "Crash Course in Indian Law":
http://comitia3.uoregon.edu/~outlines/2nd3rdYr/indianfroz.pdf

The University of Oklahoma College of Law's Native American Legal Resources page:
http://www.law.ou.edu/indian/

The Indian Law Resource Center's Sovereignty page: http://www.indianlaw.org/sovereignty.htm

The Sixth Circuit's *Hood* decision, now under Supreme Court review: http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=03a0038p.06

The Supreme Court's *Kiowa Tribe* decision:
http://supct.law.cornell.edu/supct/search/display.html?terms=Kiowa&url=/supct/html/96-1037.ZO.html

The Ninth Circuit's *Krystal Energy* decision:
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/870518214FB0104888256E35007B83BD/$file/0217047.pdf?openelement

It's Not About Federalism #17: Minimum Wage Preemption
March 25, 2004

Today's INAF installment celebrates popular entertainment's discovery of the "new federalism." Last night's episode of NBC's White House drama *The West Wing* featured two federal judges debating the 1995 *Lopez* decision, which struck down the Gun Free School Zones Act as being outside Congress's Commerce Clause power.

We never thought we would see Glenn Close asserting on prime time television, with the passion that she brought to *Fatal Attraction* and *Dangerous Liaisons*, that there was a sufficient nexus between school violence and the national economy to permit Congress to act under Article I of the Constitution. But there she was.

* * *

Back in the world of reality, conservative politicians continue to betray their supposed commitment to local control. Last June, INAF #3 reported on Florida's adoption of a law prohibiting any locality from adopting minimum wage legislation. Similar laws are on the books or under consideration in at least 15 states.

The latest battlegrounds are Wisconsin and Georgia. In both states, when cities began to consider living wage or minimum wage legislation, business interests successfully lobbied conservative state legislators to preempt the localities' proposals.

Responding to pressure from community and labor groups, Wisconsin Governor Jim Doyle last week vetoed a bill that would have preempted local minimum wage laws. Doyle had previously acted administratively to raise the statewide minimum wage from $5.15 to $6.50 per hour over two years. When Madison began considering a local minimum wage of $7.75 per hour, the legislature attempted to intervene. Thanks to Governor Doyle's veto, Wisconsin's statewide minimum wage will act as a floor, not a ceiling; municipalities will be free to require greater wages and benefits within their jurisdictions. (This is a marked contrast to Florida, where the state law is a ceiling but not a floor: the state has no minimum wage, but it preempts localities from adopting one on their own).

In Georgia, it was Atlanta's city government that triggered business groups' rush to the Capitol. Mayor Shirley Franklin appointed a commission in January to study the likely effects of a living wage ordinance. The commission was to hold public hearings and gather data on the costs and benefits of a living wage law. Anti-living wage lobbyists convinced the state legislature to preempt localities from passing living wage laws, using their usual argument that such laws cause unemployment and raise costs for city governments.

Of course, because they managed to pass the preemption law before Atlanta's commission could do its research, the empirical validity of that argument was not put to the test. Research by the Brennan Center and others suggests that such arguments are, generally speaking, unfounded (the Brennan Center has worked with other advocates in support of the proposed Madison and Atlanta legislation).

The Georgia bill is especially objectionable because it is aimed at a proposed living wage ordinance. While minimum wage laws require all employers in a city to pay their employees a specified minimum, living wage laws apply only to companies that have contracts with the city government. The Georgia legislature, in other words, forbade Atlanta from deciding how to spend its own money. When Governor Sonny Perdue signs the bill, as he is expected to do, Georgia will join Utah as the only states in

the Union where local taxpayers are forced to give public money to companies that don’t pay their workers enough to stay out of poverty.

*   *   *

This installment began on a lighthearted note, so why not end on one? The Supreme Court will decide several preemption cases this Term, but yesterday’s decision in *Nixon v. Missouri Municipal League* is in a category by itself: meta-preemption. The question, stated as simply as possible, was whether the Telecommunications Act requires the Federal Communications Commission to preempt state governments from preempting local governments from operating telecommunications facilities. Even for us devotees of the federalism wars, this was a mind-bender.

By the way, the Supreme Court’s answer, by an 8-1 vote, was no.

It’s not about federalism; it’s about poverty wages

On the Internet:

The Brennan Center report assessing the effects of living wage laws enacted since 1994: http://www.brennancenter.org/programs/living_wage/elmorereport.html

Governor Doyle’s veto message: http://www.wisgov.state.wi.us/docs/031604VetoMessage_AB633.pdf

Nixon v. Missouri Municipal League: http://laws.findlaw.com/us/000/02-1238.html

The *Lopez* case: http://laws.findlaw.com/us/514/549.html

Home page of *The West Wing*, with a link to video of Glenn Close talking about her guest role: “Just being here and doing this one episode has taught me about the Constitution.” http://www.nbc.com/The_West_Wing/index.html