Federal Voiding of State and Local Protections for Human Health and the Environment

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Today's advocates of protecting human health and the environment are focusing their efforts largely on the states, where they believe progressive action on a wide range of issues can best be achieved. Many view the Republican-controlled federal government as a lost cause. However, the federal government is much more dangerous than that. It has the capacity and, unfortunately, now has the will to void all that progressives might achieve in the states, and is ignored by advocates at their peril.

Under the Supremacy Clause of Article VI of the U.S. Constitution, federal laws constitute the supreme law of the United States. This means that in any area in which Congress has the power to make law, Congress can "preempt" (i.e., void) any state law it chooses. More and more, Congress is electing to do just that. A recent House investigative report prepared for Rep. Henry A. Waxman (D. CA) documents the extent of recent federal efforts to preempt state laws.[1] According to this report, in the last five years, the House and Senate have voted 57 times to preempt state laws and regulations, resulting in enactment of 27 preemptive laws. The number of state and local laws that have been preempted was not determined with certainty, but is estimated to be in the hundreds if not thousands. Just six of the 27 enacted federal laws overturned at least 92 state laws.

This Republican campaign is of stunning breadth and intrusiveness. The investigative report discerns four broad goals: usurpation of state choices on social policy and family issues; preventing state protection of health, safety and the environment; overriding state consumer protection laws; and seizing power from state courts. Moreover, this campaign reveals the wide gulf between the "states rights" rhetoric of Republican leaders, including President Bush, and their real social and pro-business agenda. The preemptive effect of some of this legislation is reaching new heights of federal disregard for state and local authority. Indeed, some of these laws represent the assertion of federal power to void entire areas of state law, even where the federal government has made no substantive determinations relating to the voided state laws. This form of preemption could be used to wipe away all progressive state and local programs, including those implementing the precautionary principle, environmental justice, alternatives and cumulative effects analyses and other emerging approaches to protecting human health and the environment.

One particular bill is instructive. H.R. 4167, "The National Uniformity for Food Act of 2005" passed the House on March 8, 2006 and on May 25 was introduced in very similar

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form into the U.S. Senate as S. 3128, where it is pending in the Health, Education and Labor Committee.[2] The bill's ostensible purpose is to amend the Federal Food, Drug and Cosmetic Act (the "FFDCA") to provide for "uniform food safety and food warning requirements." No hearings to establish any need for this bill were held in the House, though the Senate may hold hearings before voting on the bill in the summer of 2006.

Opposition to this legislation, being led by California Senators Feinstein and Boxer, now centers on the ability of activists in each state to persuade its Senators to oppose it. Opponents of this bill include the Attorneys General of 39 states, the Association of Food and Drug Officials, the National Conference of State Legislatures, the National Association of State Departments of Agriculture, numerous consumer and public interest groups, dozens of newspapers and even the California Governor, Republican Arnold Schwarzenegger. Their primary reason: massive preemption of state food safety laws. As the 39 Attorneys General put it:

> "Indeed, under this bill, states would be forbidden from adopting their own policies, even if the federal government had not acted in a particular area or adopted a particular warning. Important consumer warnings dealing with mercury in fish, arsenic in drinking water and lead in cans are just a few examples of states food labeling requirements that would be eviscerated by this bill."[3]

The preemptive and deregulatory effect of H.R. 4167 is wrapped in a clever disguise, which allows its proponents to delude the public and provides cover for politicians supporting it. Let's see how it works. First, there is a so-called "uniformity" provision. This provision provides (with some exceptions) that no state may impose or maintain a food safety or food warning requirement, unless it is identical to a requirement imposed by the FDA.[4] Proponents of the legislation, food businesses all, sell it by claiming that this uniformity is necessary because state laws now result in a "confusing and erratic patchwork" of requirements (though they have never cited a single instance of such inconsistent requirements).[5]

Similar "uniformity" provisions can be found in various federal laws, and may be appropriate in some circumstances. For example, uniformity is imposed on labeling of prescription drugs approved by the FDA and on labeling of pesticides approved by the EPA, so that the states may not impose their own separate labeling requirements in these areas. Most of the federal environmental laws do not require uniformity, however, and the states are commonly free to impose their own stricter laws as long as they do not make compliance with both the state and federal requirements impossible or frustrate the intent of the federal laws.

But here is the kicker. Even as amended by H.R. 4167, under the FFDCA the FDA has no obligation to regulate all food safety or labeling (though it has the power to do so). Indeed, the nation's food safety programs are and have historically been run primarily not by FDA but by the states, which perform over 80% of the nation's food safety work.[6] And H.R. 4167 gives the already overburdened FDA no new resources to do any more

food regulation than it already does. It is crucial to recognize that this is very unlike the legal regimes governing prescription drug or pesticide labels, because in those cases all such labels must be approved by FDA and EPA, respectively.

It is this combination of (1) the uniformity provision and (2) the lack of obligation for FDA to act that creates such a devastating effect. The result is that all existing and future state food safety and warning requirements (with some exceptions) would be voided unless they are specifically required by FDA, whether or not FDA acts, studies the issue or makes any determination at all. At least 200 state food safety laws would be voided by H.R. 4167.[7] The "uniformity" this law would achieve is, in many areas, the uniform absence of food safety laws.[8]

The larger lesson of this legislation is: a uniformity provision coupled with lack of federal obligation to act is a highly deregulatory device. With such legislation, the federal government is not simply making a particular determination of how to address a certain problem and then imposing uniformity on the states. Instead, the federal government is determining that an entire field may not be regulated by the states even though the federal government is not requiring itself to act in that field at all.

The potential implications of this type of legislation, extended to other fields of progressive activism, should be obvious to all. Effectively resisting systematic federal evisceration of all the progressive work being done on the state and local level will require extensive cooperation between national, state and local groups. These groups no longer have the luxury of competition, for we can see plainly that the states may function as "laboratories of democracy" only at the pleasure of the federal government.

NOTES

[1] "Congressional Preemption of State Laws and Regulations," prepared for Rep. Henry A. Waxman by the United States House of Representatives Committee on Government Reform – Minority Staff Special Investigations Division (June 2006), available at: http://www.democrats.reform.house.gov/story.asp?ID=1062&Issue=Congressional+Preemption+of+State+Laws

[2] Substantial information about this bill can be found on the website of Rep. Henry A. Waxman: http://www.henrywaxman.house.gov/issues/health/food_safety_hr_4167.htm

[3] March 1, 2006 letter to Congress from the National Association of Attorneys General, available at: http://www.henrywaxman.house.gov/issues/health/food_safety_hr_4167_letters_opposition.htm

[4] For example, H.R. 4167 proposes new FFDCA Section 403B(a)(1) relating to warnings:

> "[Unless a state petitions for an exemption] no State . . . may. . . establish or continue in effect . . . any notification requirement for a food that provides for a warning concerning the safety of the food . . . unless such notification has been prescribed under the authority of this Act and the State . . . notification requirement is identical to the notification requirement prescribed under the authority of this Act."

[5] See website of National Uniformity for Food Coalition (http://www.uniformityforfood.org).

[6] See March 1, 2006 NAAG letter (cited in note 3).

[7] "Shredding the Food Safety Net, A Partial Review of 200 State Food Safety and Labeling Laws Congress is Poised to Effectively Kill with H.R. 4167," prepared by the Center for Science In The Public Interest and the Natural Resources Defense Council (March 2006), available at: http://www.cspinet.org/new/200604242.html

[8] The food companies generally deny that H.R. 4167 would preempt state laws where the FDA has failed to act. They point to a provision of the law that gives states a limited opportunity to petition FDA in order to save their otherwise voided laws. These petition provisions, however, place substantial financial and legal burdens on the states and are procedurally and legally complex. As the 39 Attorneys General put it, the petition process is "slow, expensive and uncertain" and "would create a new federal bureaucracy dedicated to evaluating, judging and even invalidating state and local laws" (see March 2, 2006 NAAG letter cited at note 3). This is no substitute for the traditional power of the states to take action on their own to protect their citizens.