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EDITORIAL OBSERVER

What Ever Happened to (the Good Kind of) States' Rights?

By ADAM COHEN

In February, the day after his infamous encounter at Washington's Mayflower Hotel, Eliot Spitzer, then the governor of New York, published a remarkable opinion piece in *The Washington Post*.

He wrote that several years earlier, state attorneys general noticed a spike in predatory lending that the federal government was doing nothing about. When the states tried to rein in abusive mortgage lenders, the Bush administration finally did something. The Office of the Comptroller of the Currency issued rules nullifying state predatory lending laws over the objection of all 50 state banking superintendents.

The clampdown, which paved the way for the subprime mortgage crisis, was done by "pre-emption," a little-understood doctrine that allows the federal government to wipe away state laws. The Constitution's supremacy clause says federal law can trump state law. But the federal rule should be a floor, not a ceiling. It should set a minimum level of rights, not stop states from doing more to protect their citizens.

For years, the federal government used pre-emption in this way. Civil rights acts swept away discrimination at the state level, and workplace safety laws upgraded conditions in factories and mines. Conservatives opposed many of these federal laws on the principle that they were trampling on "states' rights."

Since the conservative ascendancy in Washington, many of these same people have stopped praising states' rights and have begun burying them — not to protect citizens' rights, but to take them away. The Bush administration and its Congressional allies have helped their friends in industry by enacting weak environmental, health and consumer regulations — and arguing that they wipe out more robust state protections.

The 2003 Medicare law was a disturbing case in point. It blocked states from regulating most abuse by private Medicare insurance plans — an area the administration is not properly policing. The National Association of Insurance Commissioners, which represents insurance regulators in all 50 states, has protested that its members no longer have the authority they need to protect sick, elderly consumers.

The Associated Press recently reported that the administration has quietly rewritten more than 50 proposed or adopted federal regulations to make it more difficult for consumers to sue makers of unsafe food, drugs and other dangerous products. The federal standard for head restraints in automobiles had language expressly saying it did not pre-empt state-court lawsuits — but it was taken out. Manufacturers are more likely to make unsafe products if they know a customer who is injured or killed cannot sue.

One of the bitterest pre-emption battles has been over chemical plant safety. A terrorist strike on a big chemical plant could injure or kill hundreds or even thousands of Americans. The chemical industry has succeeded, however, in blocking mandatory federal safety requirements. When New Jersey imposed its own reasonable rules, the industry and the administration went into overdrive, fighting fiercely — so far, unsuccessfully — to pass a federal law pre-empting New Jersey's safety requirements.

The administration has used other powers to pre-empt sound state laws. Last year, the Environmental Protection Agency blocked California from curbing greenhouse-gas emissions from new cars and trucks by denying it a waiver that was once granted routinely — a move Gov. Arnold Schwarzenegger called “unconscionable.”

Most of this has happened outside the public spotlight, but there is one case that has been grabbing attention. The actor Dennis Quaid and his wife are suing the maker of the blood thinner heparin after their newborn twins were mistakenly given large doses at a hospital. The Quaid's argue that confusing packaging was at fault, but the drug company that makes heparin is saying that once the Food and Drug Administration approved its packaging, lawsuits like the Quaid's were blocked.

Most Americans may not know about the supremacy clause, but they do seem to understand that they are increasingly vulnerable. Weeks before the 2006 elections shifted control of Congress from the Republicans to the Democrats, 79 percent of respondents in an Opinion Research poll said big business had too much influence over the Bush administration. As Democrats and Republicans contemplate what kind of “change” voters are looking for now, they can start with the idea that both the federal and state government need to do a better job of protecting their citizens.

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