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FEDERALISM

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The court held that the family-care provision of the Family and Medical Leave Act of 1993 allowed private suits against states by virtue of Congress' section 5 powers under the Fourteenth Amendment to prevent sex discrimination through broad prophylactic legislation.

**Question Presented:** Is the family-care provision of the Family and Medical Leave Act of 1993 a proper exercise of Congress's section 5 power of the Fourteenth Amendment, abrogating state immunity to suit under the Eleventh Amendment?

**William HIBBS, Plaintiff-Appellant, United States of America, Intervenor,**

**v.**

**HDM DEPARTMENT OF HUMAN RESOURCES; Charlotte CRAWFORD; Nikki FIRPO, Defendants-Appellees**

United States Court of Appeals
For the Ninth Circuit

Decided December 11, 2001

TASHIMA, Circuit Judge:

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**I. BACKGROUND**

[Hibbs worked for the Nevada Department of Human Resources, Welfare Division. When his wife became ill, he received 480 hours of unpaid leave to be used from May to December under the Family and Medical Leave Act. He received additional 380 hours of paid "catastrophic leave," which he was told would count against his FMLA leave. In November, Hibbs was informed he had no more leave time and had to report to work or face disciplinary action. In December, Hibbs faced dismissal and argued at his hearing that his FMLA leave should begin after his catastrophic leave expired. The hearing officer disagreed, and Hibbs was dismissed.

After a series of failed appeals, Hibbs brought suit in Federal Court. The district court granted summary judgment for the state on the grounds that Nevada had sovereign immunity under the Eleventh Amendment.]

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**III. DISCUSSION**

**A. Eleventh Amendment Immunity and the FMLA**

"Under the Eleventh Amendment, a state is immune from suit under state or federal
law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by the state." [... ]

Congress can abrogate state sovereign immunity if it both (1) unequivocally expresses its intent to do so, and (2) acts pursuant to a valid exercise of power. Seminole Tribe, 517 U.S. at 55 (citing Green v. Mansour, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985)). Congress cannot abrogate state sovereign immunity by means of its Article I powers. Id. at 72-73. It can, however, abrogate state sovereign immunity by means of its enforcement power under section 5 of the Fourteenth Amendment. Bd. of Trustees of the Univ. v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000).

There is no case law in our circuit on the validity under the Eleventh Amendment of private FMLA suits against the states.

[The court distinguished this case from other circuits' decisions, which had held that the FMLA was not a valid exercise of Congress' section 5 power. The court argued that because the provision at issue in this case provides for leave to care for a sick family member, it may be construed as an attempt to remedy gender discrimination.]

In Hibbs' case, the district court held that Nevada has not waived its Eleventh Amendment immunity. The court also held that the FMLA does not contain a sufficiently clear expression of congressional intent to abrogate Eleventh Amendment immunity, and that, in any case, the FMLA was not enacted pursuant to a valid exercise of the section 5 enforcement power. For the reasons given below, we conclude that the district court erred both in finding that congressional intent to abrogate is not sufficiently clear and in holding that the FMLA was not enacted pursuant to a valid exercise of Congress' section 5 power.

1. Waiver

[The court found that Nevada did not waive its immunity to private suits under the FMLA, because states cannot constructively waive their immunity.]

2. Express Congressional Intent to Abrogate

[The court held the FMLA has a sufficiently clear expression of congressional intent to abrogate state sovereign immunity. The language in the FMLA is the same as that in the Fair Labor Standards Act, which the Supreme Court held to be clearly expressed intent to abrogate.]

3. Valid Exercise of the Section 5 Power

a. Doctrinal Background

Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions" of the amendment. U.S. Const. amend. XIV, § 5. Valid section 5 legislation must be aimed at remedying or deterring violations of the Fourteenth Amendment's substantive provisions, but it "is not limited to mere legislative repetition of [the Supreme Court's] constitutional jurisprudence." Garrett, 121 S. Ct. at 963; see also Kimel, 528 U.S. at 81. Because "difficult and intractable problems often require powerful remedies," 528 U.S. at 89, 'Congress' power to 'enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a
somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," 528 U.S. at 81. See Garrett, 121 S. Ct. at 963.

In enacting such prophylactic legislation, however, Congress must not cross the line between "appropriate remedial legislation" and legislation that amounts to "substantive redefinition of the Fourteenth Amendment right at issue." Kimel, 528 U.S. at 81. The Supreme Court has policed this boundary by requiring that there be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. [...]

[... ] Here, intervenor United States has defended the constitutionality of the FMLA on the ground that it is aimed at remedying and preventing gender discrimination, and gender discrimination is subject to heightened scrutiny.

***

The post-Seminole Tribe case law from the circuit courts does little to clarify how the congruence and proportionality inquiry changes when the legislation is meant to remedy or prevent gender discrimination, rather than discrimination with respect to a nonsuspect classification. A number of circuits have held that the Equal Pay Act ("EPA") and Title IX of the Education Amendments of 1972 are valid section 5 legislation aimed at preventing gender discrimination, but the analysis in those cases is sparse and rests largely on the fact that the EPA and Title IX prohibit almost no conduct beyond what the Equal Protection Clause itself prohibits. [citations omitted] Those cases consequently do not explain how legislation that is meant to prevent gender discrimination, but that sweeps substantially more broadly than the Equal Protection Clause, should be analyzed under section 5. Only Kazmier, which held that the FMLA provision regarding leave to care for an ailing family member (i.e., § 2612(a)(1)(C)) is not valid section 5 legislation, provides a detailed analysis of the issue. See Kazmier, 225 F.3d at 524-27.

b. Scope of the Constitutional Right at Issue

The first step in the congruence and proportionality inquiry is "to identify with some precision the scope of the constitutional right at issue." Garrett, 121 S. Ct. at 963. The United States defends § 2612(a)(1)(C) on the ground that it is meant to remedy and prevent unconstitutional gender discrimination. The argument is supported by the text of the FMLA. See 29 U.S.C. § 2601(a)(5) ("Congress finds that ... due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men...."); id. § 2601(b)(4) ("It is the purpose of this Act ... to accomplish [the Act's previously described purposes ]in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis ....").

The United States argues that because women are regarded as having "the primary responsibility for family caretaking" (both for infants and for sick family members), employers commonly offer less caretaking leave to men than to
women. The United States further concludes that this kind of gender-discriminatory leave policy is harmful both to men -- because they are not given enough leave to care for their families -- and to women -- because reduced leave for men forces women to spend more time taking care of their families, and women's consequently greater needs for caretaking leave make them less attractive job candidates than men. Additionally, as we explain later, it appears that in enacting the FMLA Congress was also striving, in light of a long history of unconstitutional legislation mandating stereotypical family roles, to remedy the gender-discriminatory impact of employer policies that provide no family leave at all. The statute aims to remedy all these forms of discrimination by setting a gender-neutral minimum standard for the granting of caretaking leave. Cf. Laro, 259 F.3d at 12 (noting that the argument in support of a valid Eleventh Amendment waiver is stronger with respect to the parental and family-care leave provisions than it is with respect to personal medical leave).

State-sponsored gender discrimination is subject to "intermediate scrutiny" under the Equal Protection Clause. Such discrimination is thus unconstitutional unless it is substantially related to the achievement of an important governmental interest.

***

c. Section 5 and Heightened Scrutiny

[The court found that this section of the FMLA prohibited more state conduct than that which falls within the Equal Protection Clause. However, it was still a valid exercise of section 5 powers because Kimel established that some problems require broad prophylactic legislation. In determining whether such legislation was needed, the court did not read Garret to imply that support in the legislative record is required for the use of this power. Rather, legislative history is merely one means for determining whether an act of Congress has section 5 justification.]

For all of these reasons, we are persuaded that the FMLA should be treated differently from both the ADA and the ADEA because the FMLA is aimed at remedying gender discrimination, which is subject to heightened scrutiny. Because state-sponsored gender discrimination is presumptively unconstitutional, section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. That is, the burden is on the challenger of the legislation to prove that states have not engaged in a pattern of unconstitutional conduct.

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d. Legislative History and Discrimination in Granting Leave

Alternatively, we also hold that the legislative history of the FMLA contains substantial evidence of gender discrimination with respect to the granting of leave to state employees, and that it therefore justifies the enactment of the FMLA as a prophylactic measure.

***

We recognize that a weakness in this evidence as applied to Hibbs' case is that the BLS [Bureau of Labor Statistics] and Yale Bush Center studies deal only with parental leave, not with leave to care for a sick family member. They thus do not document a widespread pattern of precisely the kind of discrimination that § 2612(a)(1)(C) is intended to prevent. But the studies do nonetheless constitute
strong circumstantial evidence of state-sponsored gender discrimination in the granting of leave to care for a sick family member, because if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other.

** **

e. The FMLA As a Remedy for State Legislation Fostering Traditional Gender Roles

There is one more basis for concluding that the FMLA fits within Congress' Fourteenth Amendment authority: In providing for minimum levels of leave for employees to care for family members, Congress was acting against a background of state-imposed systemic barriers to women's equality in the workplace that, under recent constitutional doctrine, were undoubtedly unconstitutional. The FMLA can be understood as, in part, an appropriately limited scheme designed to undo the impact of that history of state-supported and mandated sex discrimination as it continues to affect private and public employment.

** **

(i) The Historical Record

[The court recounted the history of male and female roles in American society and the workplace. Discrimination against women took a variety of legislative forms, usually justified as “protecting” women. Because of the long record of this in judicial history, the court held it was not necessary for Congress to have noted this in the legislative history of the FMLA.]

(ii) A Remedy Needed

The FMLA's legislative history documents statistically the harmful and extant effects of stereotypical gender roles on women's participation in the workplace immediately prior to the Act's enactment. The evidence revealed that women still bore the brunt of domestic responsibilities in American society, and that this burden hindered women's participation in the paid workforce.

** **

(iii) The FMLA Remedy and the Historical Record

[The stated purpose of the FMLA was to minimize the potential for sex discrimination under the Fourteenth Amendment and to promote equal employment opportunities for women and men.

The court found that the provision of the FMLA granting unpaid leave for care of a family member met these goals for several reasons: (1) unpaid leave allowed women to participate in the workplace despite the needs of family members and despite the stereotypical assumption that men have a wife at home to handle such emergencies; (2) families could choose which family member would take care of the ill relative - women were not forced into the domestic role; (3) employers would not be tempted to avoid women employees out of any presumed higher need for personal leave.]

(iv) Congruence and Proportionality

The FMLA takes a modest step towards eliminating the negative impact of, and discrimination based upon, the stereotypical gender roles that have restricted women's opportunities in the workplace.
As recounted above, in enacting the FMLA, Congress appropriately sought to counteract the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public spheres. Additionally, Congress sought to deter future intentional discrimination against women based on those same stereotypes.

As to the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," Garrett, 121 S. Ct. at 963 (quoting City of Boerne, 521 U.S. at 520), congruence and proportionality of remedial legislation "must be judged with reference to the historical experience it reflects." City of Boerne, 521 U.S. at 525 (alterations in original omitted). Thus, we must view the FMLA against the continuing impact of nearly two centuries of systemic state sex discrimination in employment and related laws. In light of this "historical experience," the FMLA congruently and proportionately remedies the contemporary impact of such constitutional violations.

[The court gave several reasons why the remedies of the FMLA were congruent and proportionate: (1) the provision in question focuses only on balancing family-care leave, which was historically perceived as a woman's role; (2) a gender-neutral solution was required; (3) the intrusion into the policies of the employer were narrow, providing only for leave, not continuation of wages; (4) exceptions existed for employers in certain situations; and (5) provisions were built into the FMLA for evaluation and modification by Congress.]

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B. Ex Parte Young

[The court addressed the argument raised by Hibbs that he could file suit against the parties in their official capacities rather than against the state. The court found Hibbs did not fully develop his argument, and would not grant relief on these grounds.]

C. Procedural Due Process

[The court addressed Hibbs' argument that his termination violated procedural due process. The court found Hibbs received appropriate notice and a full opportunity to be heard. Hibbs had no procedural due process claim.]

IV. CONCLUSION

The district court erred both in concluding that congressional intent to abrogate state sovereign immunity is not sufficiently clear and in holding that Congress did not validly exercise its section 5 power when it gave state employees the right to sue their employers for violations of § 2612(a)(1)(C). Accordingly, the district court's grant of Defendants' motion for summary judgment on the FMLA claim is reversed. Because the district court's dismissal of Hibbs' state-law claims was dependent on its dismissal of the federal claims, we vacate the dismissal of the state-law claims as well, and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED.
While pressing to finish its current term this week, the Supreme Court today set the stage for resuming its battle over the boundary between state and federal authority when its next term begins in October.

The justices accepted an appeal filed by the State of Nevada in a major federalism case that challenges Congress's authority to require the states to give their employees unpaid leave to deal with family medical emergencies. The court took the case over the opposition of the Bush administration, which said that the provision of the Family and Medical Leave Act at issue was clearly within Congress's constitutional authority and that because few lower courts had addressed it, there was no need for the justices' intervention.

On the surface, the case appears little different from other recent federalism cases that have reached the court, including state challenges to the Age Discrimination in Employment Act and the Americans With Disabilities Act. In each of those cases, the Supreme Court ruled that Congress had lacked authority to breach the states' constitutional immunity from suits brought under those laws by their employees.

But the new case is in fact even more consequential than those important rulings, and a decision in favor of the states would cut closer to the core of Congress's authority to enforce the equal protection guarantee of the 14th Amendment. The reason is that the Family and Medical Leave Act, passed in 1993, was an effort by Congress to address lingering problems of sex discrimination in the workplace, where Congress found that the burden of taking care of sick family members fell disproportionately on women.

Under the Supreme Court's equal protection jurisprudence, age discrimination, which the court addressed in Kimel v. Florida Board of Regents in 2000, and disability discrimination, which it addressed last year in Board of Trustees of the University of Alabama v. Garrett, receive only minimal judicial scrutiny. That is, actions by government that treat people differently on the basis of age or disability are presumed to be rational and constitutional. Consequently, the court said in the Kimel and Garrett decisions, Congress overreached its authority to open the states to suit on that basis by their employees.

But along with racial discrimination, sex discrimination by government agencies is presumed to be unconstitutional under the court's equal protection doctrine, and discrimination of this type receives special judicial scrutiny. The court has held that Congress has special authority to breach the states' immunity when it attacks discrimination of this kind, by invoking its power under Section 5 of the 14th Amendment to enact "appropriate legislation" to enforce the amendment's equal protection guarantee.
So the new case, Nevada Department of Human Resources v. Hibbs, No. 01-1368, amounts to a direct challenge to the court's precedents on the relationship between state sovereign immunity and Congressional authority to make national rules aimed at eradicating sex discrimination and, arguably, race discrimination.

Solicitor General Theodore B. Olson emphasized that point in a brief trying to dissuade the court from taking the case. He told the justices that "resolution of this important constitutional question -- going to the heart of Congress's Section 5 power to enforce the rights of individuals long subjected to a well-documented history of unconstitutional discrimination and thus potentially implicating numerous other civil rights statutes -- should be undertaken only after due deliberation and thoroughgoing consideration by the lower courts."

That deliberation has not yet occurred, the solicitor general said. Only one federal appeals court, the United States Court of Appeals for the Fifth Circuit, in New Orleans, has cast doubt on the provision at issue in this case, the brief said.

The case began in 1997 as a dispute over the eligibility of a Nevada state worker, William Hibbs, to care for his ailing wife by taking the 12-week unpaid leave that the Family and Medical Leave Act makes available to care for a family member with a "serious health condition." Denied the leave, Mr. Hibbs sued the state, which then argued that it was immune from suit under the 11th Amendment, which generally bars suits against states in federal court.

In enacting the Family and Medical Leave Act, Congress had explicitly made the law applicable to the states as employers. But the Federal District Court in Reno, Nev., ruled in 1999 that the law was not a valid abrogation of the states' immunity.

Mr. Hibbs appealed to the United States Court of Appeals for the Ninth Circuit, in San Francisco, with the assistance of the federal government, which intervened in the case to defend application of the law. Last December, the Ninth Circuit overturned the district court and ruled that the suit could proceed. The state then appealed to the Supreme Court. The lawsuit itself remains pending, a fact that ordinarily would lead the Supreme Court to turn down an appeal, as Mr. Olson's brief stressed.

At issue in the case is what is known as the "family care" provision of the Family and Medical Leave Act, in contrast to the provision that grants individuals the right to 12 weeks of unpaid personal sick leave. Because individual illness does not fall disproportionately on men and women, this provision is not related to Congress's interest in eradicating sex discrimination, the government told the court. But the burden of caring for sick family members historically, and currently, falls disproportionately on women, Mr. Olson's brief said.

Alabama and 11 other states filed a brief urging the court to take the case. An unusually large array of lawyers for Mr. Hibbs is another signal of the case's significance.

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Federalism and the Supreme Court

State Legislatures

October 10, 2001

David G. Savage

When it comes to the Supreme Court, it's hard to tell how they'll decide issues concerning states.

In each annual term of the U.S. Supreme Court, the states win some big cases and lose a few, as well. But in recent years, some states have been winning regularly, while others have been on the losing end just as often.

Consider a tale of two states: Alabama and Massachusetts.

Alabama emerged as the winner in two of the just-completed term's major rulings. The first shielded states from being sued by their employees with disabilities (Alabama vs. Garrett), while the second bars civil rights lawsuits that allege the states are enforcing policies that have a "discriminatory effect" on racial minorities. Both were decided by the same 5-4 vote of the high court, with chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas siding with Alabama.

Meanwhile, Massachusetts was rebuffed in its effort to ban the advertising of cigarettes within 1,000 feet of schools and playgrounds. Its lawyers had argued that the states have broad power to protect the health of their citizens, especially children, from known dangers. They also noted that selling cigarettes to minors is illegal in every state, so Massachusetts authorities said they should be able to shield children from the lure of cigarette ads.

But the Supreme Court disagreed in another 5-4 ruling, and said the states have almost no authority to restrict the advertising and promotion of cigarettes, cigars or smokeless tobacco. The cigarette makers have a free speech right to advertise their products, the Court said, a decision that could also doom efforts to limit billboard advertising of beer, liquor or gambling. And beyond that, the federal law that sets the warning labels on cigarette packs "precludes states or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes," wrote Justice O'Connor. The five justices who sided with Alabama in the discrimination cases ruled against Massachusetts in the cigarette advertising case (Lorillard Tobacco Co. vs. Reilly, attorney general of Massachusetts).

A year ago, Massachusetts suffered a similar rebuff after its legislature voted to boycott companies that did business with the repressive military regime in Burma (Myanmar). These companies could continue to do business in the Bay State, but state agencies were barred from buying products or services from them. These corporate boycotts were widely used during the 1980s as a successful means to pressure South Africa to end its apartheid policies. In the 1990s, cities such
as New York, Los Angeles and Philadelphia adopted similar ordinances targeted at Burma. But the Supreme Court struck down the Massachusetts "Burma law" on the grounds that it infringed on the federal government's power to control international trade (Crosby vs. National Foreign Trade Council).

California, like Massachusetts, had adopted a law restricting tobacco advertising, but it too has had a losing record of late in the Supreme Court. Its voters adopted a state law that allows people who are seriously ill to obtain marijuana to ease their pain or nausea. Seven states, most of them in the West, have similar measures. But the Supreme Court sided with federal regulators and ruled the federal law allows no exceptions for the medical use of marijuana (United States vs. Oakland Cannabis Club).

ONE STATE TWO SIDES

Sometimes, state lawyers find themselves on opposite sides of the same case. Last year, the attorneys general from 38 states, including Massachusetts and California, filed a brief in the court in support of the Violence Against Women Act. This measure gives victims of rapes and other sexual assaults a right to sue their attackers for damages in federal court. Its proponents pointed out that cases of battered women or abused spouses often go unprosecuted in the criminal courts, and the states' attorneys said the federal law gave them another weapon in the fight against sexual violence. In the case that came before the high court, Virginia Tech freshman Christy Brzonkala had sued a football star for allegedly raping her in a dormitory room.

Standing alone, Alabama's attorney general William Pryor filed a brief opposing the law. He argued that it intruded on the state's turf and violated the principles of federalism. In the end, the Supreme Court sided with Pryor's argument by the same 5-4 vote and struck down the federal law as unconstitutional (United States vs. Morrison). In a wry dissent, Justice David H. Souter commented that the 'states will be forced to enjoy this new federalism whether they want it or not.'

The disability discrimination case from Alabama was the major federalism decision of the 2000-2001 term, and it extends the principle that Congress cannot subject the states to damage suits by its employees, except for constitutional violations. Until the mid-1990s, constitutional law scholars had assumed Congress has broad power to regulate "commerce" and that employment was a type of commercial arrangement. Therefore, employers who violated the rights of workers as set by Congress could be sued.

But the Supreme Court in a series of rulings has changed all that for the states and state employees. In 1996, the justices held that the heretofore obscure 11th Amendment gave the states a "sovereign immunity" from private commercial lawsuits that were authorized by Congress. The decision, in Seminole Tribe vs. Florida, blocked the tribes from hauling state officials into federal court over gaming disputes, but its reach went much further. For example, state employees who are not paid overtime as required by federal labor law cannot sue to obtain the money (Alden vs. Maine).

CIVIL RIGHTS RULINGS

Going beyond commerce, Congress has special powers under the 14th
Amendment to enforce civil rights, including against the states. The high court focused on that issue twice in the past two years and again shielded the states from federal claims. The first case, decided on Jan. 11, 2000, ruled that age discrimination was not outlawed by the 14th Amendment itself, and therefore, Congress could not subject state agencies to lawsuits for discriminating against their older workers. The 5-4 decision, in Kimel vs. Florida, threw out a bias claim filed by J. Daniel Kimel, a Florida State University physics professor, but the immunity rule affected the nearly 5 million state workers nationwide.

This year’s case from Alabama extended the rule to state employees who are blind, deaf or otherwise disabled. The Constitution may forbid the states from discriminating against people based on their race or sex, but it does not forbid discrimination based on a person’s disability, said Chief Justice Rehnquist. “States are not required to make special accommodations for the disabled ... They could quite hardheadedl--and perhaps hardheartedly--hold to job qualification requirements that do not make allowance for the disabled,” he said.

Because this kind of discrimination is not covered by the 14th Amendment, Congress cannot use its power to enforce the 14th Amendment as grounds for subjecting states to lawsuits under the Americans with Disabilities Act, Rehnquist reasoned. Patricia Garrett, a nursing supervisor at the University of Alabama Hospital, had sued for discrimination because she was demoted after being treated for breast cancer.

The second decision from Alabama limited the reach of the Civil Rights Act of 1964, and it too could have a wide impact. From the beginning, Justice Department lawyers had maintained the landmark law prohibited not only intentional discrimination by states, cities, schools or colleges, but also the use of policies that "have the effect of subjecting individuals to discrimination" because of their race, sex or national origin.

These so-called "disparate impact" claims have been many and controversial. The University of California at Berkeley was sued on this theory because the use of SAT scores was said to have a discriminatory effect on blacks and Hispanics. Advocates of "environmental justice" have also brought claims against state agencies alleging that they permitted the siting of waste treatment plants in low-income black neighborhoods. In the case that reached the high court, the Southern Poverty Law Center had sued Alabama on behalf of Martha Sandoval, a Spanish speaking resident, after the state became the first to offer its drivers’ exam in English only. She won in two lower federal courts, but the Supreme Court ruled the law never intended to allow such lawsuits in the first place.

"We hold that no such private right of action exists," Justice Scalia said, thereby sweeping aside all the lawsuits that challenge the "discriminatory effect" of state policies.

WHAT'S AHEAD

It is not clear where the Supreme Court will go next in the area of federalism. The justices have turned away claims from states seeking a shield from the Equal Pay Act or other sex discrimination charges. Unlike bias based on a person’s age or disability, the 14th Amendment does forbid sex discrimination, the Court has said. Therefore, by this logic, Congress
can subject states to damage suits for sex discrimination.

The justices have also not reconsidered Congress's nearly unlimited power to use federal funds as a means to force its will on the states. Some advocates of federalism have predicted this will be the next frontier in the court's campaign to rein in Washington's power over the states. But Justices Kennedy and O'Connor have said they are unwilling to make radical changes in the federal-state balance. And without their votes, Chief Justice Rehnquist lacks a majority to push ahead further.

In May, however, Rehnquist succeeded in mustering a 5-4 majority to shield states from having to pay some lawyers' fees. Congress has authorized judges to force states to pay the fees of lawyers who are the "prevailing party" in civil rights cases. This phrase has been interpreted broadly to include instances where a lawsuit was the "catalyst" for a state agency to change its policies. But Rehnquist rejected the catalyst theory and held lawyers are entitled to win fees in civil rights cases only if they win a final court order (Buchannon Board & Care Home vs. West Virginia). West Virginia had been sued by several elderly residents of group homes over a rule that required residents to be able to reach the fire escape on their own, but the Legislature repealed the rule after it became the subject of litigation.

LAND USE SETBACK

The states did not fare as well in the area of land use law. The justices revived a Rhode Island's landowner's claim against the state for having blocked him from building homes in a tidal area near the ocean. When Anthony Palazzolo bought his 20-acre parcel, most of it had already been designated as wetlands by Rhode Island's coastal management council. Nonetheless, when his development plans were rejected, Palazzolo sued for $3 million in compensation. His claim was filed under the 5th Amendment's guarantee that private property shall not "taken for public use without just compensation."

Until this year, most courts had said that buyers who purchased land that was subject to development restrictions cannot sue for compensation if their development plans are rejected later. But the Supreme Court overturned that shield for the government and said owners such as Palazzolo can seek compensation on the grounds that the development ban was extreme and unreasonable (Palazzolo vs. Rhode Island). Experts in land use law said the decision opens the courthouse door to more compensation claims, but they also doubted that many property owners would win in the end.

In the fall, the justices will take up a new property rights case that could have a broad impact. At issue is whether land use agencies can be forced to pay compensation for having imposed a temporary moratorium on development. If the answer is "yes," state and local planning agencies would have the threat of huge money claims hanging over them whenever they blocked a development, even temporarily. The case before the court began as a suit by landowners near Lake Tahoe, who were blocked from building vacation homes (Tahoe Sierra Preservation Council vs. Tahoe Regional Planning Agency).

The term's rulings on the 4th Amendment were decidedly mixed from the view of both law enforcement and civil libertarians. The justices rejected two
novel means of searching for illegal drugs. First, they struck down the use of narcotics checkpoints, saying too many innocent motorists would be stopped and searched (City of Indianapolis vs. Edmonds). And they rejected the use of thermal imagers that can scan homes from the street and spot those that might contain a hothouse for growing marijuana (Kyllo vs. United States). Justice Scalia said the 4th Amendment was intended to protect the privacy of homes from the prying eyes of law enforcement, including, he said, high-tech devices that can look inside a home.

But in a third case, the Supreme Court refused to limit police from arresting people for minor offenses committed in their presence. Lawyers for a Texas mother, who was arrested and taken to jail for not wearing a seat belt, had urged the high court to rule such arrests were "unreasonable seizures" (Atwater vs. City of Lago Vista).

Lawyers for the Colorado Republican Party also failed in their effort to knock down the federal limits on how much the parties can spend to promote their candidates. These limits go back to the post-Watergate era of the 1970s, but they were seen as vulnerable to a free speech challenge.

Five years ago, the high court struck down the limit on "independent expenditures" on a 7-2 vote, saying parties should be free to espouse their message. But in June, the Court reversed course a bit and upheld the limits on party spending that is "coordinated" with the candidate (FEC vs. Colorado Republicans). Speaking for the 5-4 majority, Justice Souter said these expenditures could be seen as disguised contributions to a candidate. Under current law, individuals can give $1,000 per election to a candidate for federal office, and $20,000 to a party. If the parties could spend unlimited amounts for their candidates, the parties could be "used as a funnel" for money flowing from rich doners to candidates, he said.

**ERISA'S REACH**

Meanwhile, the federal pension law, not state divorce law, was held to govern the proceeds of a divorced employee who dies without a will. David Egelhoff, who was employed by the Boeing Company, had listed his second wife Donna as the beneficiary of his life insurance and pension. But they were divorced in 1994, and he was killed shortly afterward in an automobile accident. Under Washington law, his children from his first marriage were entitled to the money, but the Court ruled that the federal Employee Retirement Income Security Act (ERISA) preempts the state law (Egelhoff vs. Egelhoff).

The reach of ERISA remains a source of legal dispute. In the fall, the Court will consider its reach again in a case involving HMOs. At least 38 states have set up independent review boards that are empowered to force HMOs to pay for treatments that are deemed medically necessary. But a U.S. appeals court in Texas ruled these state requirements are preempted by ERISA's exclusive control over the area of employee benefits. Other courts have come to the opposite conclusion and upheld the state boards. The justices will decide the issue in an Illinois case known as Rush Prudential HMO vs. Moran.

The fall session of the Court features two other issues sure to attract public attention. In a North Carolina case, the justices will decide whether executing a
mentally retarded defendant is cruel and unusual punishment (McCarver vs. North Carolina). And the justices will get another chance to rule on whether states can use tax money to provide vouchers to pay for children in parochial schools. Ohio created such a program for children in Cleveland, but a U.S. appeals court struck it down as unconstitutional. In its appeal in Zelman vs. Simmons-Harris, the state's lawyers are urging the justices to finally resolve the matter.

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When historians look back at the Rehnquist Court, they will undoubtedly say that its greatest changes in constitutional law were in the area of federalism. Over the past decade, particularly the last five years, the Supreme Court has dramatically limited the scope of Congress's powers and greatly expanded the protection of state sovereign immunity. All such recent Supreme Court cases have been 5-4 decisions, with the majority comprised of Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. The major cases in which such a trend is evident follow.

Limiting the Scope of the Commerce Power

From 1937 until 1995, no federal law was invalidated as exceeding the scope of Congress's commerce clause authority. But in the past several years, the Supreme Court has made it clear that the judiciary will enforce strict limits on Congress's power under this provision.

In United States v. Lopez, (1) the Supreme Court declared unconstitutional the Gun Free School Zone Act, a federal law that made it a crime to have a firearm within 1,000 feet of a school. The Court held that Congress can regulate under the commerce clause only in three circumstances: 1) the channels of interstate commerce; 2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and 3) activities that have a substantial effect on interstate commerce. The Court found that the federal law prohibiting guns near schools met none of these requirements and thus was unconstitutional.

In United States v. Morrison, (2) the Court declared unconstitutional the civil damages provision of the Violence Against Women Act. The provision created a federal cause of action for victims of gender-motivated violence. The United States government and the plaintiff, Christy Brzonkala, defended the law on the grounds that violence against women has a substantial effect on the national economy. The Supreme Court expressly rejected this argument as insufficient to sustain the law. Chief Justice Rehnquist emphasized that Congress was regulating non-economic activity that has been dealt with traditionally by state laws. Moreover, the Court stressed that no jurisdictional requirement in the statute necessitates proof of an effect on interstate commerce.

Unlike the law struck down in Lopez, Congress made detailed legislative findings about the economic impact of violence against women. The Supreme Court expressly found these findings to be inadequate to sustain the law under the commerce clause. The Court concluded, "We accordingly reject the argument that
Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregated effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."

Lopez and Morrison open the door to constitutional challenges to countless federal laws, especially those that regulate non-economic activities. Federal environmental laws, such as the Endangered Species Act, are likely to be challenged on the grounds that the law regulates conduct that does not involve the channels of interstate commerce, the instrumentalities of interstate commerce, or activities with a substantial economic effect. Similarly, federal gun laws, such as those prohibiting possession of a firearm while subject to a domestic violence protection order, are likely to be challenged.

Narrowing the Scope of Congress's Powers: Section Five of the Fourteenth Amendment

Section Five of the Fourteenth Amendment authorizes Congress to enact laws to enforce the Fourteenth Amendment. In City of Boerne v. Flores, the Court imposed a significant new limit on Congress's power under this provision. The Court held that Congress, under Section Five, may not expand the scope of rights or create new rights; Congress may only provide laws to prevent or remedy violations of rights recognized by the courts, and these laws must be narrowly tailored. In City of Boerne, the Court declared unconstitutional the Religious Freedom Restoration Act, which sought to enhance protection of the free exercise of religion. The Court, in an opinion by Justice Kennedy, ruled that Congress was impermissibly expanding the scope of rights and thus usurping the Court's authority to determine the content of religious freedoms. This dramatic new limit on federal powers puts the constitutionality of many federal civil rights laws in doubt.

The Expansion of Sovereign Immunity

Another key change in the law from the Rehnquist Court has been the Supreme Court's significant expansion in the scope of state sovereign immunity. In Alden v. Maine, the Court held that because of state sovereign immunity, a state government may not be sued in state court, even on a federal claim, without its consent. Additionally, in a series of cases, the Court has greatly limited the ability of Congress to authorize suits against state governments in federal courts.

In 1996, in Seminole Tribe v. Florida, the conservative majority of the Court held that Congress may authorize suits against states only pursuant to laws enacted under Section Five of the Fourteenth Amendment, which empowers Congress to adopt statutes to enforce that Amendment. As I described previously, in 1997, in City of Boerne v. Flores, the Court limited Congress's Section Five powers in preventing or remedying violations of rights recognized by the Supreme Court; Congress cannot expand the scope of rights or create new rights.

The combination of Seminole Tribe and City of Boerne already has had a devastating effect on many types of claims. In Florida Prepaid v. College Savings Bank, the Court declared unconstitutional the Religious Freedom Restoration Act, which sought to enhance protection of the free exercise of religion. The Court, in an opinion by Justice Kennedy, ruled that Congress was
that state governments may not be sued for violating the Age Discrimination in Employment Act. In University of Alabama v. Garrett, (11) in February 2001, the Court ruled that state governments may not be sued for employment discrimination in violation of Section One of the Americans with Disabilities Act. In each case, the Court, in a 5-4 decision, concluded that Congress was expanding the scope of rights and that the laws could not be justified as narrowly tailored to prevent or remedy constitutional violations.

These decisions mean that state governments cannot be sued when they violate federal law. How can the supremacy of federal law be ensured and vindicated if states can violate the Constitution or federal laws and are not held accountable?

At oral argument in Alden, the Solicitor General of the United States Seth Waxman quoted to the Court from the supremacy clause of Article VI, contending that suits against states are essential to ensure the supremacy of federal law. Justice Kennedy's response to this argument is astounding:

The constitutional privilege of a State to assert its sovereign immunity in its own court does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States, which shall be made in Pursuance thereof... shall be the supreme Law of the Land." U.S. Const., Art. VI. (12)

What, then, ensures that state governments will comply with federal law? Trust in the "good faith" of state governments. Is it possible to imagine that thirty or forty years ago, at the height of the Civil Rights movement, the Supreme Court would have issued such a statement—that state governments simply could be trusted to voluntarily comply with federal law? Justice Kennedy's words in Alden reflect both the Rehnquist Court's strong faith in state governments and its desire to limit federal legislative and judicial power.

Revival of the Tenth Amendment

A final aspect of the Rehnquist Court's federalism revival has been its use of the Tenth Amendment as a limit on federal power. In the first third of the twentieth century, the Supreme Court held that the Tenth Amendment reserves a zone of activities for exclusive state control. In Hammer v. Dagenhart, for example, the Court struck down a federal law prohibiting child labor on the grounds that it violated the Tenth Amendment. (13) After 1937, however, the Court rejected this view; no longer was the Tenth Amendment seen as a limit on federal power. It instead became a reminder that Congress could not act without express or implied constitutional authority.

Professor Laurence Tribe remarked that "[f]or almost four decades after 1937, the conventional wisdom was that federalism in general—and rights of states in particular—provided no judicially enforceable limits on congressional power." (14) In 1976, the Court appeared to revive federalism as a limit on
Congressional powers in National League of Cities v. Usery, where the Court invalidated a federal law that required state and local governments to pay their employees a minimum wage. (15) The Court, in an opinion by then Justice Rehnquist, held that Congress could not regulate states in areas of "traditional" or "integral" state responsibility. But nine years later, in Garcia v. San Antonio Metropolitan Transit Authority, the Court expressly overruled National League of Cities. (16) Justice Rehnquist, in a short dissent, said that he believed that his view would again triumph in the Court.

In two decisions, the Rehnquist Court has done just that and revived the Tenth Amendment as a constraint on Congress's authority. In New York v. United States, the Court—for only the second time in 55 years and for the first since the overruled National League of Cities decision—invalidated a federal law as violating the Tenth Amendment. (17) A federal law, the 1985 Low-Level Radioactive Waste Policy Amendments Act, (18) required states to provide for the safe disposal of radioactive wastes generated within their borders. The act provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive wastes received from other states. Additionally, and most controversially, to ensure effective state government action, the law provided that states would "take title" to any wastes within their borders that were not properly disposed of by January 1, 1996, and then would "be liable for all damages directly or indirectly incurred."

The Supreme Court ruled that Congress, pursuant to its authority under the commerce clause, could regulate the disposal of radioactive wastes. By a 6-3 margin, however, the Court held that the "take title" provision of the law is unconstitutional because it gives state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress." Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states. Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation. The Court concluded that it was "dear" that because of the Tenth Amendment, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." (19)

A few years later, in Printz v. United States, (20) the Court applied and extended New York v. United States. Printz involved a challenge to the federal Brady Handgun Violence Prevention Act. (21) The law required that the "chief law enforcement officer" of each local jurisdiction conduct background checks before issuing permits for firearms. The Court, in a 5-4 decision, found that the law violated the Tenth Amendment. Justice Scalia wrote for the majority and revived the phrase "dual sovereignty" to explain the structure of American government. The Court concluded that Congress violated the Tenth Amendment by compelling states to implement federal mandates.

These federalism decisions are the Rehnquist Court's most important changes in constitutional law. They are a dramatic departure from the approach that the Court had followed for the prior half-century.
Erwin Chemerinsky is [the] Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California.
Federalism's Benchmarks

The Washington Times

June 30, 2002

Terry Eastland

Last week the Supreme Court ended its current term by sustaining the constitutionality of an Ohio program using vouchers at church-related schools. The outcome could not confidently have been predicted, since the court is narrowly divided on church-state questions.

But what wasn't hard to guess was that the "conservative" position favoring the program that had been advanced by the Bush administration would be embraced by most if not all five of the "conservative" justices they being Chief Justice William Rehnquist and Associate Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas. [As it happened, all five voted to support the program.] The reason this prediction was easy to make is that the conservative justices have often supported conservative positions on church and state. The same is likely to occur when two other subjects that sharply divide the court race and abortion are brought before it. In such cases, you can anticipate that the Bush administration will advance a "conservative" position and that most if not all of the five conservatives will agree with it.

The model breaks down, however, when it comes to federalism, the last of the four big subjects often decided by the vote of single justice.

Consider the case handed down in late May pitting the South Carolina State Ports Authority against the Federal Maritime Commission. The issue was whether state sovereign immunity barred the commission from deciding a private complaint brought against the ports authority. The court, with the five conservatives constituting the majority, ruled in favor of South Carolina. It did so, having been told by the Bush administration to decide the case exactly opposite the way it did in favor of the commission. And lo, the administration's position was taken by the four dissenters Associate Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

Rarely does the administration strike out entirely with the conservatives and win the votes of only the liberals. But the South Carolina case didn't produce an odd voting pattern. The court divided exactly as it has in a series of federalism controversies dating back to 1995. Nor was the administration's position an exception to what it can be expected to advance in federalism cases. Bear in mind that the solicitor general's office represents a particular government - the federal government. If [in a given case] it can't defend the government in good conscience, someone else will be assigned the job. Rarely does that happen, however. It didn't in the South Carolina case, and it is hard to imagine many federalism cases down the road where it might.

The irony is that President Bush upon advice from the Justice Department, whose fourth-ranking officer is the
solicitor general is nominating judges likely to rule against the federal government in federalism cases. That is so in part because lower-court judges are obligated to follow what the Supreme Court says and it has said much in favor of the states. But it also is true that the administration is looking to appoint judges and justices whose approach to federalism is likely to resemble that articulated by the five conservative justices who now control the issue.

If you think the administration is of two minds on federalism, think again, for much depends on where one sits. Not long before he became a justice, Robert Jackson was solicitor general and took positions on executive power that changed once he was asked to decide cases. If the current solicitor general, Theodore Olson, were sitting on the Supreme Court, he probably would join the pro-federalism majority.

An additional irony is that President Bush says he wants judges who are "strict constructionists." But strict constructionism, if by that is meant adherence to the literal text of the Constitution, doesn't support the decision in the South Carolina case or the previous federalism cases. Nor does constitutional history. More persuasive are arguments grounded in the structure of the Constitution a point recognized by Justices Scalia and Thomas. Whether the president will advance a more sophisticated understanding of his judicial philosophy is doubtful, if only because no president in modern times has.

Be that as it may, it is good that federalism has friends in high judicial places. The Framers divided government in order to limit government and thus better secure liberty. But the federal government, biased as it is in favor of national power, naturally will tend to erase those divisions to the detriment of liberty. Difficult questions of interpretation duly noted, only the federal courts are in a position to enforce federalism. Led by the Supreme Court though not urged on by the Bush administration they are attempting to do just that.

[Terry Eastland is a columnist and former Reagan administration official.]

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Will the Court Reassert National Authority?

The New York Times

September 30, 2001

Linda Greenhouse

For the last decade, the court, under Chief Justice William H. Rehnquist, has engaged in a far-reaching reappraisal of the scope of Congressional authority and the balance of powers between the national government and the states. In case after case, the court, which begins its new term tomorrow, invoked broad theories of the sovereignty of the individual states and a limited view of Congress's authority -- creating a new federalism jurisprudence that has become the hallmark of the Rehnquist court. Not since the Supreme Court's resistance to the New Deal crumpled in the late 1930's has the court been so hostile to the exercise of federal power.

It is no coincidence that this federalism revival flourished in a post-cold-war atmosphere of tranquility, when it was easy to regard the federal government as superfluous at best. To many, it seemed a blundering and costly intruder into matters properly rooted at the state and local level. That attitude vanished three weeks ago, as suddenly and completely as the twin towers.

"Federalism was a luxury of peaceful times," said Walter E. Dellinger, who as the Clinton administration's acting solicitor general in 1997 fought a losing battle at the Supreme Court to preserve the Brady gun control law. The court ruled 5 to 4 that Congress had violated core principles of state sovereignty by requiring local law enforcement officials to conduct background checks of prospective gun purchasers.

To pick up that opinion today, a paean to the states as "independent and autonomous," in the words of Justice Antonin Scalia, is like unearthing an artifact from a bygone era. The majority opinion in Printz v. United States speaks from a consciousness far removed from a world in which a Republican president now proposes to give a new Homeland Security Agency authority over state and local as well as federal agencies engaged in domestic defense.

Reflecting on the Brady Act case, Mr. Dellinger said, "One of the things I thought then was that we wouldn't be so casually discarding the authority of the national government in this way if the cold war was still going on." He added he had the same reaction to another defeat that year, the court's rejection of presidential immunity in the Paula Corbin Jones case.

The Supreme Court's attachment to federalism and disaffection from it has often tracked changes in the nation's mood and circumstances. "Whenever you see a national emergency, federalism disappears," explained Robert C. Post, a law professor at the University of California at Berkeley who has examined the rise of nationalism during World War I. "In a national emergency, you give the national government the power to get done what needs to get done," he said.

Professor Post said the court has a "dialectical relationship with the mood of the country" -- at different times playing the role of leader, consolidator or
follower. "But when something intense, momentary and vivid sweeps the country in the middle of responding to a crisis, it takes a very strong-willed court to buck that."

Another scholar of the court, Prof. Sanford Levinson of the University of Texas Law School, said when the public turned to the federal government for solutions, federalism lost its "motive force," which was "a fundamental mistrust, a disdain for a national government that is seen as distant, probably corrupt and in any event as not reflecting the 'real America.' " Now, by contrast, "suddenly it becomes very, very important to trust national leadership," he added.

While both professors are critics of the court's federalism rulings, even strong supporters offer, if regretfully, a similar analysis. The events of Sept. 11 "struck at the heart of the federalism revival," said John O. McGinnis, a professor at the Benjamin N. Cardozo School of Law at Yeshiva University. "We all experience it as Americans," he continued. "It brings the country together, and federalism, whatever its intellectual claims, doesn't speak to that."

The court responds not only to the domestic mood but to the justices' perception of what message the court needs to send to the wider world, according to Mary L. Dudziak, a legal historian at the University of Southern California, who has proposed a foreign-policy-based explanation for the Supreme Court's shift on racial equality at the height of the cold war. In her book, "Cold War Civil Rights: Race and the Image of American Democracy," she asserts that the court's landmark desegregation decision, Brown v. Board of Education, can be seen as a reflection of the justices' belief that official racism at home was damaging the image of the United States and giving the Soviet Union ammunition in the worldwide struggle for dominance, an argument the federal government made in its brief to the court.

"As the ground shifts under us now, the justices can't take themselves out of their cultural moment," Professor Dudziak said. "Federalism jurisprudence might have felt anachronistic and quaint in an era of globalization, but after Sept. 11 it feels dangerous."

While there are cases on the court's docket for the new term that raise tangential federalism questions, none appear to provide raw material for a basic reappraisal. And, certainly, the justices are unlikely to repudiate what they have accomplished so far, said Michael S. Greve, director of the federalism project at the American Enterprise Institute, a conservative public policy organization. "It will be more subtle and nuanced, hard to trace," Mr. Greve said, predicting that the court will sidestep occasions to apply and extend the recent precedents. "It's too big not to have an effect," he said. "To sustain ancient constitutional doctrines at a time like this becomes impossible."

THE end of the federalism revolution raises another question: will the court follow another of its historical patterns and overcompensate in favor of the federal government, accepting the government's claims about the need to restrict individual liberties for the sake of national security.

In 1987, one of the court's great civil libertarians, Justice William J. Brennan Jr., offered a sober warning on this point that now sounds particularly timely. Brennan said America's record in protecting civil liberties in times of war was "shabby," in
part because the country had so little experience with threats to its security that it was not sufficiently practiced at sorting out real security risks and needs from exaggerated claims.

"The episodic nature of our security crises" left the country and its judges vulnerable to being "swept away by irrational passion" when the unaccustomed threat arrived, Brennan said. "A jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedom, and probes the limits of their compass."

It is a hard proposition: that only prolonged and intimate exposure to danger can develop the necessary wisdom to deal with it. By Brennan's measure, both the court and country are seriously out of practice. Both are now confronted by the end of a peaceful period that appeared, just days ago, to have no end in sight.

So often in recent years, this court has seemed to have its eye on the past. Now, with the nation, it has been abruptly propelled into an unappealing future where the search for the right balance between order and liberty may well present the Rehnquist court with its greatest test.

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The Supreme Court has not yet indicated how it will respond to September 11, but the judicial philosophy that the conservative majority had embraced before the Twin Towers fell seems hard to sustain in a new and anxious age. The conservatives had planted their flag on principles of federalism and states' rights; today both parties appreciate the need for a national response to international terror. The conservatives had displayed contempt for Congress as a policy-making body; today Congress enjoys renewed public respect. They had embraced a high-handed doctrine of judicial supremacy that asserted the exclusive ability of judges to decide complicated questions of national policy on topics ranging from crime to voting rights; today it is obvious to Republicans as well as Democrats that the enormous complexity of the challenges that face us--requiring elaborate coordination between federal, state, and local authorities--must be resolved by the president and Congress, rather than by the courts.

Although the Court as a whole hasn't had the opportunity to reconsider its direction, one justice recently offered a bold vision of how his colleagues might redefine their role in the post-September 11 world. At the end of October, Justice Stephen Breyer delivered the James Madison Lecture at New York University. In his lecture, entitled "Our Democratic Constitution," Justice Breyer referred only indirectly to September 11, noting that "trust in government has shown a remarkable rebound in response to last month's terrible tragedy." Far from being intentionally topical, the lecture represented his considered reflections about his own pragmatic approach to constitutional interpretation after nearly eight years on the bench. But in his insistence that courts should defer to Congress, in his transparency and candor, and above all, in his embrace of judicial modesty, Breyer offered a powerful case for the resurrection of a tradition of liberal judicial restraint that seems more relevant today than at any time since the New Deal.

* * *

If Holmes's contempt for idealistic visions of democracy came from his experience during the Civil War, Breyer's far sunnier view of legislatures came from his own upbringing in the Bay Area. His father was a lawyer for the San Francisco school board who emphasized the importance of participating in the political life of the city. And Breyer took this lesson to heart as chief counsel to the Judiciary Committee under Senator Ted Kennedy from 1979 to 1980, where he worked on airline deregulation and federal sentencing reform. Each morning Breyer would meet for breakfast with his Republican counterpart, the chief counsel for Senator Strom Thurmond, and that experience convinced him that when legislative staff meet, rather than being prisoners of
ideology, both sides are often trying to achieve practical results that will help the country. While recognizing that Congress wasn't perfect, Breyer concluded that it worked pretty well, and he left the job even more optimistic about the possibilities of bipartisan legislative cooperation than when he began.

Breyer's optimistic view of Congress is most apparent in his approach to federalism. Before September 11 the federalism debate had seemed eye-glazingly esoteric, as cases about the limits of Congress's authority focused on obscure questions, such as whether Congress had the power to protect red wolves that didn't cross state lines. After September 11, however, the question of whether there are limits to Congress's power to respond to health and environmental threats suddenly has dramatic practical consequences. For example, when they struck down part of the Brady gun control law in 1997, the five conservative justices held that Congress may not "commandeer" state officials by forcing them to run background checks on potential gun buyers to see whether they have criminal records. In a prescient dissenting opinion, Justice John Paul Stevens wrote that the "threat of an international terrorist, may require a national response before federal personnel can be made available to respond.... Is there anything [in the Constitution] that forbids the enlistment of state officials to make that response effective?" Expanding on Stevens's example after September 11, Breyer insists that by enlisting the participation of local and state officials to combat terrorism, Congress could "help both the cause of effective security coordination and the cause of federalism." By contrast, now that the Court has prohibited Congress from setting up cooperative schemes for law enforcement, the only alternative may be to create a cumbersome and inflexible federal enforcement bureaucracy. Ironically, because of the Brady bill case and others like it, the new Office of Homeland Security may find it harder to delegate regulatory power to state and local governments.

Or consider another challenge in the wake of September 11: Congress's ability to set up a regulatory scheme to respond to threats of biological weapons. Breyer notes that the regulation of toxic chemicals demands a level of expertise to which the federal government may have better access than state governments have. Federal regulators, he suggests, may be better equipped to decide complicated factual questions, delegating to state authorities questions of value, such as what level of risk is acceptable. But the Supreme Court's federalism decisions might prevent Congress from enlisting state and local officials to check compliance with federal minimum standards for biological safety. This sort of anti-federalism may have seemed quaint before the Twin Towers fell, but the possibility that the Court might hamper Congress from responding to a serious threat to public health is now no laughing matter.

* * *

During the past decade the case for judicial restraint has had little political resonance among liberals. In the Progressive and New Deal eras, conservative judicial activism provoked a backlash when judges struck down laws that had broad political constituencies. By contrast, the laws that the conservative justices struck down in the 1990s often seemed too obscure for anyone except scholars to care. Perhaps it took the
trauma of September 11 to remind all Americans, liberal as well as conservative, that national action is necessary in times of national emergency, and that the federal government needs broad discretion to respond to complicated international challenges. It's not yet obvious whether the conservative justices will follow the logic of their previous decisions and try to thwart the federal government's flexibility in a post-September 11 world. But if they do, Breyer's consistently modest view of judicial power will no longer seem like a historical artifact. It will be recognized as a national imperative.

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The court held that the Coast Guard’s decision, made in consultation with the National Boating Safety Advisory Council, to not require propeller guards impliedly preempted state common law tort claims against boat manufacturer’s who did not include such guards.

Question Presented: Does the Federal Boat Safety Act of 1971 preempt state common law causes of action based on a manufacturer’s failure to install propeller guards on boat engines?

Rex R. SPRIETSMA. Adm’r of the estate of Jeanne Sprietsma, Deceased, Appellant, v. MERCURY MARINE, a Division of Brunswick Corporation, Appellee.

Supreme Court of Illinois

Decided August 16, 2001

GARMAN, Justice:

The issue in this case is whether the Federal Boat Safety Act of 1971 (FBSA) (46 U.S.C. § 4301 et seq. (1994)) preempts state common law causes of action based on the manufacturer’s failure to install propeller guards on boat engines. In July 1995, while boating in Tennessee, plaintiffs decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the motor’s propeller blades. As a result, she suffered serious injuries that resulted in her death. The boat was equipped with a 115-horsepower outboard motor, which did not contain a propeller guard. The motor was designed, manufactured, and sold by Mercury Marine.

[Jeanne Sprietsma’s husband filed a wrongful-death suit. Mercury Marine filed a motion to dismiss because Sprietsma’s claims were expressly and impliedly preempted by the FBSA.]

A. The Federal Boat Safety Act of 1971

[Congress passed the FBSA to improve boating safety. Minimum safety standards were promulgated by the U.S. Coast Guard in consultation with the National Boating Safety Advisory Council (NBSAC). Propeller guards were specifically considered by the Coast Guard and NBSAC in 1988, and the resulting study found that greater problems and dangers would result from requiring the guards.]

B. Federal Preemption

Federal law can preempt state law under the supremacy clause in three circumstances: (1) where Congress has...
expressly preempted state action (express preemption); (2) where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from state realm (implied field preemption); or (3) where state action actually conflicts with federal law (implied conflict preemption). Cipollone, 505 U.S. at 516, 120 L. Ed. 2d at 422-23, 112 S. Ct. at 2617; English v General Electric Co, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74, 110 S. Ct. 2270, 2275 (1990). Our focus in this case will deal with express and implied conflict preemption.

The parties dispute whether our analysis should begin with a presumption that federal law does not preempt Spriestsma's common law tort claims against Mercury Marine. Spriestsma contends that there is a strong presumption against preemption here because federal preemption would displace state police powers that protect the health and safety of its citizens. Conversely, Mercury Marine argues that this case does not involve the historic police powers of the state but derives from federal maritime jurisdiction.

The United States Supreme Court has stated that "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." United States v Locke, 529 U.S. 89, 108, 146 L. Ed. 2d 69, 88, 120 S. Ct. 1135, 1147 (2000). However, an assumption of nonpreemption is triggered when the state regulates health and safety matters which have traditionally come within the jurisdiction of the state through its police powers. Medtronic, Inc v. Lohr, 518 U.S. 470, 474, 135 L. Ed. 2d 700, 709, 116 S. Ct. 2240, 2245 (1996). We recognize that Spriestsma's claim that Mercury Marine designed a defective motor by failing to install a propeller guard relates to health and safety concerns. However, the claim also encompasses maritime activity, which is traditionally within the realm of federal regulation. Chicago, Burlington & Quincy Railroad Co v. Railway Labor Executives Association, 406 U.S. 397, 401, 92 S. Ct. 1739, 1741 (1972) ("Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country"); Cipollone v Liggett Group, Inc., 505 U.S. 505, 120 L. Ed. 2d 401, 112 S. Ct. 2608, 2617 (1992).

Section 4301(a) states that the FBSA and its regulations apply "to a recreational vessel and associated equipment carried in the vessel on waters subject to the jurisdiction of the United States and, for a vessel owned in the United States, on the high seas." 46 U.S.C. § 4301(a) (1994). Furthermore, the FBSA's "general jurisdictional applicability is to vessels within the historic federal maritime jurisdiction." S. Rep. No. 92-248 (1971), reprinted in 1971 U.S.C.C.A.N. 1333, 1338. In deciding whether the claims in this case relate to federal maritime activity, we note that the United States Supreme Court has held that a collision between two pleasure boats on navigable waters had a sufficient nexus to traditional maritime activity to come within the admiralty jurisdiction of the federal courts. Foremost Insurance Co v Richardson, 457 U.S. 668, 674, 73 L. Ed. 2d 300, 306, 102 S. Ct. 2654, 2658 (1982). Thus, Spriestsma's claims bear upon an area historically regulated by the federal government. When "state laws * * * bear upon national and international maritime commerce, there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." Locke, 529 U.S. at 108, 146 L. Ed. 2d at 88-89, 120 S. Ct. at 1148. Although Spriestsma's claims bear upon state and federal concerns, we believe the federal concerns predominate in this case. Therefore, in deciding whether Spriestsma's claims are preempted by the

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FBSA, we will not apply a presumption against preemption.

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C. Express Preemption

Keeping in mind the preceding preemption principles, we first address whether the FBSA expressly preempts Sprietsma's common law tort claims against Mercury Marine. Because Congress has demonstrated its intent to preempt some aspects of state law under section 4306 (46 U.S.C. § 4306 (1994)), we must determine the scope of preemption under that provision by focusing on its text.

***

Section 4306 preempts state laws or regulations that are not identical to the regulations promulgated under the FBSA. Although the FBSA does not define "law or regulation," the phrase clearly indicates an intent to include common law claims. Cipollone, 505 U.S. at 522, 120 L. Ed. 2d at 426, 112 S. Ct. at 2620 (state law includes common law as well as statutes and regulations); Lewis v. Brunswick Corp., 107 F.3d 1494, 1501 (11th Cir. 1997) (language demonstrates intent to include common law claims); Farmer v. Brunswick Corp., 239 Ill. App. 3d at 885 at 891, 607 N.E.2d 562, 180 Ill. Dec. 493. We also note that both state and federal courts have held that the preemption provision of the FBSA expressly preempts common law tort claims. [citations omitted].

However, we must examine section 4306 in conjunction with the FBSA's savings clause provision of section 4311(g) (46 U.S.C. § 4311(g) (1994)), which states: "compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g) (1994). Although section 4306, the preemption provision, evinces Congress' intent to expressly preempt state laws or regulations not identical to those promulgated in the FBSA, this provision prevents us from finding express preemption.

***

[D. Implied Conflict Preemption]

The United States Supreme Court has found implied conflict preemption where it is "impossible for a private party to comply with both state and federal requirements" ( English, 496 U.S. at 79, 110 L. Ed. 2d at 74, 110 S. Ct. at 2275), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" ( Hines v. Davidowitz, 312 U.S. 52, 67-68, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404 (1941); see also Freightliner, 514 U.S. at 287, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487). Since it is not impossible for a manufacturer to comply with a state common law rule requiring propeller guards and the Coast Guard's decision not to require them, we will address whether a state common law tort claim based on failure to install the guards stands as an obstacle to the accomplishment of the purposes and objectives Congress sought to achieve in enacting the FBSA.

***

In contrast to Freightliner, where the lack of federal regulation was not the result of an affirmative decision not to regulate, here, the Coast Guard did make an affirmative decision to refrain from promulgating a propeller guard requirement.
In *Geier*, the Supreme Court determined whether Federal Motor Vehicle Safety Standard 208 (Safety Standard 208) preempted a common law tort action based on the failure to install a driver's side airbag. The Department of Transportation stated that the purpose of Safety Standard 208 was to provide auto manufacturers with a choice of whether or not to install airbags with a gradual phase-in of passive restraint devices. *Geier*, 529 U.S. at 878-79, 146 L. Ed. 2d at 930, 120 S. Ct. at 1924. Under an implied conflict preemption analysis, the Court stated that Geier's tort action depended upon her claim that auto manufacturers had a duty to install an airbag in her car when it was made. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 931-32, 120 S. Ct. at 1925. This alleged duty would have required other auto manufacturers to install airbags in similar cars rather than other safety restraint systems, such as automatic seatbelts or passive interiors. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925. This claim "would have presented an obstacle to the variety and mix of devices that the federal regulation sought *** [and] also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925. The Court thus concluded that Safety Standard 208 preempted Geier's tort claim because of the obstacle it presented to the accomplishment of federal objectives. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925.

Mercury Marine maintains that we should apply *Geier*'s ruling that Safety Standard 208 preempted conflicting state laws to this case in order to preempt Sprietsma's tort claim. Sprietsma, on the other hand, argues that there is no regulation by the Coast Guard with which his claim could conflict, only a decision not to prescribe a standard. According to Sprietsma, the absence of a regulation does not in itself constitute a regulation. See *Freightliner*, 514 U.S. at 286, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487. However, the Supreme Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." (Emphases omitted.) *Arkansas Electric Cooperative Corp. v Arkansas Public Service Comm'n*, 461 U.S. 375, 384, 76 L. Ed. 2d 1, 10, 103 S. Ct. 1905, 1912 (1983) *** The Supreme Court has also concluded that "where [the] failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray v Atlantic Richfield Co.*, 435 U.S. 151, 178, 55 L. Ed. 2d 179, 201, 98 S. Ct. 988, 1004-05 (1978), quoting *Bethlehem Steel Co. v New York State Labor Relations Board*, 330 U.S. 767, 774, 91 L. Ed. 1234, 1246, 67 S. Ct. 1026, 1030 (1947).

***

We believe that the Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA.
In considering the federal decisions on this matter, we find the Fifth Circuit's opinion in *Lady* persuasive and agree that: "where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Lady*, 228 F.3d at 615.

Furthermore, we are not persuaded by the two state court decisions that have held that federal law does not preempt state law in this type of case. See *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994); *And v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999). As these cases represent the minority view on this matter, we believe a finding of preemption is warranted here in order to continue the line of uniformity laid down by the federal courts that have found preemption under the FBSA. Therefore, based on the preceding analysis, we find that Sprietsma's common law tort claims are impliedly preempted by the FBSA.

* * *

For the foregoing reasons, we affirm the appellate court's judgment that the FBSA preempts Sprietsma's common law claims for failure to install propeller guards. [...]

HARRISON, Chief Justice, dissenting:

* * *

My colleagues go to enormous lengths to uphold a finding of preemption when they should be doing exactly the opposite. Preemption is disfavored. As our court has previously held, a presumption exists in every preemption case that Congress did not intend to supplant state law. *Schotters v. Schneider*, 173 Ill. 2d 375, 379, 219 Ill. Dec. 490, 671 N.E.2d 657 (1996).

In ascertaining congressional intent, our inquiry necessarily begins with an analysis of the language of the statute. *Schotters*, 173 Ill. 2d at 380. The language employed by Congress here could not be more clear. Section 4311(g) of the FBSA expressly provides:

"Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g) (1994).

If we are to give this provision its plain and ordinary meaning, as we must, Mercury Marine's compliance with the standard adopted by the Coast Guard, which was not to require propeller guards, clearly does not bar the common law tort claims asserted against it by Sprietsma in this case. Indeed, it is difficult to see how Congress' intention to preserve such tort claims could have been expressed any more explicitly.

* * *

While allowing common law tort claims to go forward may seem to create a tension with the Coast Guard's policy against propeller guards, that is a circumstance we must assume Congress considered when it adopted section 4311(g). If section 4311(g) ultimately proves unworkable when applied as written, that is a matter for Congress and not this court to remedy.

[...] I therefore dissent.
Boat Propeller Lawsuits to be Considered by U.S. Supreme Court

*Bloomberg News*

January 22, 2002

Greg Stohr

The U.S. Supreme Court will decide whether boat engine manufacturers can be sued when their propellers injure or kill people.

The justices will review a lower court's decision favoring Brunswick Corp., the world's largest maker of recreational boats and marine engines, in a fight with the husband of a woman killed in a 1995 accident in Tennessee.

Lower courts have disagreed about the legal impact of a decade-old Coast Guard decision not to require propeller guards on recreational vessels. Most judges who considered the issue have concluded that the Coast Guard's stance means accident victims can't sue. The issue is especially important for Brunswick, the subject of repeated propeller-related lawsuits in recent years. In 1998 Brunswick settled a suit raising the same issue just weeks before the Supreme Court was expected to rule on it.

The justices will hear arguments during their 2002-03 term, which begins in October and runs through the following June.

The case before the high court involves Jeanne Sprietsma, who died shortly after falling from a motorboat and being struck by the propeller blades. Her husband Rex sued Brunswick's Mercury Marine division, which made the outboard engine, in Illinois state court.

The Illinois Supreme Court threw out the suit, concluding it was pre-empted because it would conflict with Coast Guard policy.

The Coast Guard decided not to require propeller guards after studying the issue in the late 1980s and early 1990s. The agency concluded the devices would hamper boat performance and wouldn't necessarily improve safety because they would create other potential hazards.

Safety Hazards

"Its decision not to require them reflected not indifference, but a thorough analysis of the regulatory issues and a conclusion that they were technologically infeasible, economically unjustified and likely to increase safety hazards," Brunswick argued.

The Lake Forest, Illinois, company urged the nation's highest court not to get involved.

In his appeal, Sprietsma argued that a federal agency's decision not to regulate isn't enough to pre-empt suits under state law.

There is "no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common-law tort system," the appeal argued.

The Supreme Court in 2000 sided with business groups in an important product-
liability pre-emption case. In that case, a 5-4 court said a federal policy that phased in air bag requirements for cars shielded automakers from suits claiming they should have moved more quickly to install the lifesaving devices.

The case is Sprietsma v. Mercury Marine, 01-706.

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The Supreme Court Term That Was and the One That Will Be

*Federalist Outlook*

July/August 2002

Michael S. Greve

[...] The place where the spirit of federalism meets the fear of balkanization is federal preemption—that is, the question of when and to what extent federal law trumps contravening state law. Preemption will prove the central federalism question during the coming term—and beyond.

* * *

The most important preemption cases of the coming term arise over state tort law rather than state legislation. That reflects the fact that tort actions, not statutes, now generate the most serious state impositions on interstate commerce and on sister states. Nationwide class actions and arbitrary punitive damage awards, often in a handful of hellhole state court jurisdictions, provide the most familiar illustration. Even so, state tort cases rarely appear on the Supreme Court's docket; the general presumption is that tort law is the near exclusive province of the states. For the coming term, though, the Supreme Court has already agreed to decide no fewer than six tort cases.

- Two cases on the docket present statutory preemption questions. The more important of them, *Sprietsma v Mercury Marine*, concerns the question whether a manufacturer's failure to install a propeller guard for outboard motors is a product design defect for which the manufacturer may be held liable under state tort law. The defendants argue that the Federal Boat Safety Act, which grants the U.S. Coast Guard exclusive authority to establish boat safety standards, preempts such lawsuits. The plaintiffs argue that preemption requires an actual Coast Guard rule; the agency's mere decision not to require propeller guards should have no preclusive effect.

- *Ford Motor Co v McCauley* goes to the seemingly arcane but enormously important question of "diversity" jurisdiction in class actions—that is, the question whether class actions involving parties from different states are to be heard in state or federal court. Plaintiffs' lawyers prefer state courts, where parochial judges and juries have every incentive to maul out-of-state manufacturers. Corporate defendants prefer a more impartial federal forum. Diversity cases may be removed to federal court only if the amount in controversy for each member of a class exceeds $75,000. Trial lawyers argue that the amount should be determined by the plaintiff's expected benefit (which the lawyers can manipulate to keep the case in state court); the corporate defendants claim that the cost to the defendant, which may exceed the plaintiff's benefits, should also satisfy the federal amount-in-controversy requirement.
The Supreme Court will wade back into the out-of-control thicket of asbestos litigation. The justices have agreed to review a state court verdict, under the Federal Employers Liability Act, awarding $5.8 million in emotional distress damages to six retired railroad workers who showed neither asbestos-related symptoms nor a physical manifestation of their emotional injury (Norfolk & Western Railway Co v Ayers).

It is just possible that the outcome of those and the other tort cases on the Court's docket--including State Farm v Campbell, a $145 million punitive damage case from the Utah Supreme Court--will fail to indicate a clear direction. Still, the sheer number of cases cannot be a coincidence. It signals a judicial recognition that we have a federalism problem with torts and state court class actions. No kidding.

The Stakes

Three considerations render preemption, and in particular the federal preemption of state tort law, the most serious federalism issue on the horizon. First, plaintiffs' lawyers and state attorneys general constitute a serious threat to a functioning economy--more serious than state legislatures and far more serious than creative accountants. (The exploits of the attorneys general and the trial lawyers are technically legal.) Second, the Supreme Court's doctrines on the federal preemption of state law, including and especially tort law, are confused and incoherent. (No lawyer, judge, or legal scholar would contest the point.) Third, the doctrines--such as they are--are on a collision course with the rest of the Supreme Court's federalism, in spirit and in point of doctrine. Sooner or later, something will have to give, and preemption will be it.

Extant preemption law, for example, encompasses something called "implied preemption," meaning that the intent to preempt need not be stated explicitly. (The scope of implied preemption is a central issue in next term's Sprietsma v Mercury Marine.) We know, however, on the excellent authority of a slew of precedents, that Congress may not impose regulatory obligations under federal entitlement statutes unless those obligations are clearly stated in the law. The obligations may not be implied. Why then should Congress or federal agencies be allowed to preempt state regulation without a comparably clear statement?

The Supreme Court has never articulated a clear answer to that question. Waffling and indecision at this front, though, will eventually have fateful consequences. Were the Court's "clear statement" rule, as applied in entitlement cases, to spill over into preemption, almost no federal statute would preempt much of anything at all. That result will obtain whenever one or more of the Federalist Five conclude that state impositions on interstate commerce are the price we must pay for "states' rights" and, on those grounds, defect to the four regulation maximizers. (Justice O'Connor's defection in Rush Prudential illustrates the point.) And there you have it: the menace of federalism as a charter for commercial balkanization.

Averting that threat will ultimately require a set of preemption-related constitutional and interpretive doctrines that are consistent with the Supreme Court's federalism, without laying waste to interstate commerce in the process. In going about that daunting enterprise, the justices would greatly benefit from outside assistance--specifically, parties and lawyers
who present the right cases and the right arguments with consistency and force. Unfortunately, help may not be forthcoming.

**Helpless**

The importance of supply-side guidance is illustrated by the Court's coherent and principled entitlement jurisprudence. Among the reasons for that salutary development is the fact that those cases have a ready-made constituency—the states and in particular state attorneys general. The attorneys general are repeat players in case after case, and they coordinate their litigation activities (for example, through the National Association of Attorneys General). So the cases keep coming, and they tend to reach the Court in roughly the right order—one incremental step after another toward the well-defined federalism objective of state immunity against private lawsuits.

Preemption litigation presents an entirely different picture. Here, too, the states are repeat players. But they (and their trial lawyer clientele) will insist on their parochial advantages. Balkanization suits them just fine, and they will actively resist any move toward legal doctrines that forestall that result. Corporations, for their part, rarely look beyond the immediate case at hand and are in any event compelled to argue within the confines of the extant, confused law. To expect coordination and strategic sense from that quarter is to hope against evidence and logic.

The one institution that could provide guidance and a broader view is the U.S. Department of Justice—specifically, the Office of the Solicitor General. The solicitor general participates in every preemption case, and since those cases turn on the interpretation of federal statutes, his views are accorded special weight. Lo, the Bush administration has taken a somewhat consistent stand on federalism issues. Unfortunately, though, it is a shade to the left of Justice Souter.

In entitlement and sovereign immunity cases, the solicitor general's office has often taken a remarkably nationalist position. In *Gonzaga University v. Doe*, for example, the office pointedly distanced the administration from the states' brief and articulated a minimally federalist, plaintiff-friendly position that the Supreme Court held a decade ago—and has since modified, in a more state-friendly direction in case after case (including, as it turned out, in *Gonzaga University*). One might attribute that stance to the solicitor general's traditional duty and institutional inclination to defend federal supremacy and, to that end, to afford congressional statutes a broad sweep. But that fails to explain why the administration has, in preemption cases, defended an exceedingly narrow view of federal authority.

In *Rush Prudential* the administration's antipreemption position was too expansive even for Justice Souter, who wrote for the antipreemption Supreme Court majority in that case. The administration's brief in *Sprietsm* avows that the Coast Guard never intended to preempt design defect suits under state tort law and moves on to a preemption doctrine that amounts to a trial lawyers' bill of rights. A mealy-mouthed solicitor general brief in *PhRMA* conceded that the lower court "almost certainly" erred in finding the Maine Rx program consistent with the federal Medicaid statute—and still urged the Court to let the lower court's ruling stand. Now that the Court has agreed to hear the case—despite the administration's urging to deny review—the solicitor general may well disavow his
earlier qualms and endorse Maine Rx. (Call it an 8 on the prediction scale.) In the Kentucky "all willing provider" case, the administration's brief observes that the wisdom of such legislation "can certainly be debated" and urges "that the permissible scope and limits of state authority in this area be defined." Instead of assisting in that task, however, the brief proposes to unravel state authority from ERISA preemption.

While the administration will occasionally get a case right (for example, when the feds' own money, rather than the states' or corporate America's, is on the table), the administration has on the whole adopted litigation positions that promote nationalization and regulatory balkanization at the same time. No plausible reason explains why a probusiness administration would throw a case like Sprietsnu--of potentially enormous precedential value in a large number of regulatory contexts--to the trial lawyers. In other instances, a possible explanation can be found--outside the solicitor general's office, in White House policy.

To wage war against terrorism, the administration believes that it must avoid undue strife and challenges at the domestic front. That often means pacifying noisy constituencies, especially those that might swing closely contested states and districts. That is how we got an education "reform" written by Senator Edward Kennedy and the National Education Association, a farm bill of European proportions, and a steel tariff. Like John Wayne, the administration protects its back by sitting up against the wall--except it never shoots the evildoers who barge in through the barroom door. It buys them a drink.

Against that backdrop, the Justice Department's take on the health care and pharmaceutical cases makes sense. Powerful constituencies, including the states, holler for more benefits at lower costs. An insistence on the states' Medicaid obligations and on traditional preemption doctrines under ERISA would increase political pressure on Congress and on the administration to "do something" about prescription drug prices and HMOs. That would force the administration to underwrite yet another expensive program or else explain to the voters why the answer is no--at a political cost that is deemed intolerable. The path of least resistance is to let the rapacious interests run riot in the states. The solicitor general is just the guy to perform that maneuver--because he can and because nobody notices when he does.

That calculus would be irresponsible, even if nothing more than the small matter of the nation's health care system hung in the balance. Preemption, however, ultimately involves the larger question whether we really want to hand the trial lawyers--and the state judges and politicians they have bought and paid for--the keys to the national economy. The answer should be obvious. The solicitor general's office is no place to launch a federalism or any other revolution. Neither, however, need the tenth justice limp behind, let alone impede, the constitutional procession that may at long last be getting on its way. [...]
A man whose wife died in a boating accident is precluded by federal law from bringing a wrongful-death action against a boat motor manufacturer in state court, the Illinois Supreme Court decided Thursday.

The woman, Jeanne Spietsma, was riding in an 18-foot ski boat in Tennessee in July 1995, when she fell out of the boat and was struck by the propeller blades of a 115-horsepower outboard motor.

The motor was manufactured and sold by Mercury Marine, a division of the Brunswick Corp. She died as a result of the injuries.

Spietsma's husband sued Mercury Marine, alleging that the motor was defectively designed because it did not include propeller guards. Mercury Marine argued successfully before a Cook County trial judge and an appeals court panel that Rex R. Spietsma was barred from bringing an action in state court under the Federal Boat Safety Act of 1971.

In its decision Thursday, the high court also found that the federal law preempts Spietsma's common-law claims.

Justice Rita B. Garman wrote for the five-justice majority that the claims were impliedly preempted, because allowing the claim would stand "as an obstacle to the accomplishment of the purposes and objectives Congress sought to achieve in enacting the FBSA."

Under the act, Congress gave the Coast Guard the authority to make rules governing boat safety. In 1988, the year when the motor was manufactured, the Coast Guard considered whether to issue a rule requiring propeller guards.

The Coast Guard decided against issuing such a rule because the available data did not support the need for that regulation.

The majority on the high court relied on a 1983 U.S. Supreme Court case that stated "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 76 L.Ed.2d 1, 103 S.Ct. 1905 (1983).

The majority also emphasized that federal courts were unanimous in barring other propeller guard cases after finding the federal law preempted state actions.

"Uniformity of decision is an important consideration when state courts interpret federal statutes," Garman wrote for the majority.

"Uniformity is particularly important where, as here, the federal statute relates to a product that is inherently mobile and thus likely to move from state to state ... Boats also frequently navigate in lakes or
rivers that mark the boundary between two states. Thus, it is essential that a uniform body of law be developed," she wrote.

Chief Justice Moses W. Harrison II dissented. He claimed the majority's analysis gave too much deference to federal appeals courts and placed too high a priority on uniformity. "Uniformity is no virtue if it means being uniformly wrong," he wrote.

Harrison also claimed that the savings clause in the FBSA allowed claims like Sprietsma's to go forward in state courts. Similar cases were allowed to go forward in Texas and Missouri, he noted.

"Indeed, it is difficult to see how Congress' intention to preserve such tort claims could have been expressed any more explicitly," Harrison wrote.

Justice Robert R. Thomas took no part.


None of the attorneys could be reached immediately for comment Thursday afternoon.

The case is Rex R. Sprietsma v. Mercury Marine, No. 89492.

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A man seeking to sustain a state law design defect suit against the manufacturer of an outboard boat motor has received support from the U.S. Justice Department, the American Trial Lawyers Association and several state attorneys general in his attempt to have the U.S. Supreme Court rule that the action is not federally preempted by the Boating Safety Act of 1971. Sprietsma v. Mercury Marine et al., No. 01-706, amicus curiae briefs filed (U.S., 29-MAR-02).

In three separately filed amicus briefs, each argued that Rex R. Sprietsma should be allowed to pursue his common-law negligence suit against Mercury Marine and parent Brunswick Corp. in Illinois state court, rejecting the defendants' claim that the action is preempted because the authority to regulate outboard motor design rests with the U.S. Coast Guard.

Sprietsma filed suit claiming that his wife's death in a 1995 boating accident was largely due to the failure of Mercury Marine to include a propeller guard on the motor powering the pleasure boat from which she fell. Although the manufacturers successfully obtained an Illinois Supreme Court decision that the action was impliedly preempted by the Boating Safety Act of 1971, 46 U.S.C. Section 4301, Sprietsma succeeded in getting the U.S. Supreme Court to accept the question.

In his petition, Sprietsma said the high court had previously accepted the question in 1997 in a case that settled before a ruling was issued: Lewis v. Brunswick Corp., 522 U.S. 978 (1997).

As it did in Lewis, the Justice Department has again submitted an amicus brief in support of the plaintiff's position that the case should proceed because Sprietsma's claims are not preempted by either the BSA or the Coast Guard's 1990 decision not to promulgate a regulation requiring propeller guards. That sentiment was echoed in the amicus briefs entered on Sprietsma's behalf by ATLA and the attorneys general from 17 states, including California, Missouri and Hawaii.

In its brief, the Justice Department observed that while the BSA "categorically preempts state prescriptive laws and regulations establishing recreational vessel performance and safety standards unless [federally authorized] or identical to an existing federal standard," a saving clause permits common-law actions. That clause, the agency said, "makes clear that petitioner's suit is not foreclosed either by the act's express preemption provision or by principles of field preemption."

Sprietsma's suit is also not foreclosed by implied conflict preemption principles, the Justice Department said.

"The fact that the Coast Guard focused upon the issue and made a considered decision not to take regulatory action to require propeller guards in 1990 does not,
in and of itself, give rise to an inference that state law is preempted," the agency said.

It describes as "lacking merit" Mercury Marine's claims that the imposition of common-law damages liability here would be inconsistent with the Coast Guard's reasons for declining to adopt a propeller guard requirement after extensively researching the issue.

ATLA told the Supreme Court that "congressional intent to pre-empt state positive law or regulation does not ordinarily extend to preemption of product liability actions in the absence of a plain statement of intent to do so."

The state attorneys general added that the presumption against federal statutory preemption of state common-law claims plays a "critical federalism role in protecting the police powers of the states."

** * * *

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01-1229 Pierce County v. Guillen


The court found that Guillen had standing as the sovereignty of states is protected for the benefit of the people, not the state governments. The court held the state law at issue did not prevent release of the documents during pretrial discovery. It also held that the 1995 amendment to the federal statute prohibited the release of the same documents at any point, including pretrial discovery, and thus was unconstitutional because the amendment had no grounding in any Congressional power.

Questions Presented: (1) Does a federal statute that protects information collected in connection with federal highway safety programs from being brought out in discovery or trial a valid exercise of Congress' power? (2) Do private plaintiffs have standing to assert Tenth Amendment claims in the name of state's rights when the state itself accepts the Federal statute at issue.

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Ignacio GUILLEN, as legal guardian for Jennifer GUILLEN and Alma GUILLEN, minors; et al., Respondents, v. PIERCE COUNTY, a municipal corporation; et al., Petitioners.

Supreme Court of Washington

Decided September 13, 2001

BRIDGE, Justice:

* * *

FACTS

[Guillen's wife was killed in an automobile accident at an intersection that had been identified by the county as especially dangerous. The county filed for federal hazard elimination funds to fix the intersection, but the request was denied until after Guillen's accident.

Guillen requested access to documents recording the accident history of the intersection. His attorney made clear that they were seeking only documents containing facts, not official opinion about the safety of the intersection. The county denied the request on the grounds that the materials were privileged under 23 U.S.C. § 409 and state law.

Guillen appealed the decision, and filed a separate tort action against the County for negligence leading to his wife's death. The county again invoked federal and state law to declare the information privileged.

Another case before the court, Whitmer, had a similar fact pattern and was consolidated with the Guillen case.]

* * *
ANALYSIS

[The court first addressed the state law issue. It held that the accident reports were not subject to public disclosure solely on the basis of the state's Public Disclosure Act. The records were made confidential (with some exceptions) by state law. State law also precludes the use of these records as evidence at trial. However, the court held that there was no state law exempting these records from pretrial discovery - the time at which the records in this case were requested.]

**II**

Secondly, we examine petitioners' claim that the accident reports and other materials and data in Guillen and Whitmer were "compiled or collected" pursuant to 23 U.S.C. § 152 such that they would be covered by the federal privilege established by 23 U.S.C. § 409 as amended by Congress in 1995. The burden of showing that a privilege applies in any given situation rests entirely upon the entity asserting the privilege. *Calbom v. Knudtzon*, 65 Wn.2d 157, 396 P.2d 148 (1964).

[23 U.S.C. § 409 provides that data collected for improving roads which may utilize Federal funds for construction shall not be subject to discovery or used as evidence by state or federal courts for issues arising out of damages at such locations.]

Congress had required states to assess dangerous roads in written reports, with the unintended effect of providing ammunition for plaintiffs filing tort actions against local governments. Congress enacted § 409 in 1987 to remedy the situation. Courts construed this narrowly to apply only to reports created solely for the purpose of applying for federal funding. Congress amended § 409 in 1995 to prohibit the use of any raw data that might go into such a report. Most state courts have accepted Congress' amendment, though some have still sought to find ways around it.]

**II**

Based upon these sworn declarations in the record, the accident reports, photos, collision diagrams, and other related materials and "raw data" sought by the respondents in these consolidated cases would appear to be covered by § 409 as amended in 1995. We simply cannot accept the Court of Appeals' distinction in Guillen between collections of traffic and accident related materials and raw data "as held" by Pierce County's Public Works Department, a local government agency involved in "section 152 activity," and collections of traffic and accident related materials and raw data "as held" by Pierce County's Sheriff's Office, which the court presumed was in no way involved in "section 152 activity." 96 Wn. App. at 871. We find such a distinction unsound in principle and unworkable in practice.

**II**

Applying § 409 only to accident reports "as held" by one agency of a local government but not "as held" by another, and only to copies of a report but not to originals, is also unsound and unworkable given the fact that such legal distinctions are already being rendered meaningless by the electronic revolution underway.

**II**

Under the Court of Appeals' approach, * * * information technology would soon create a situation that the Court of
Appeals itself recognized as "absurd," namely, "giv[ing] the County carte blanche to render immune from discovery every accident report related to a public road within its territory[.]" Guilian, 96 Wn. App. at 872.

III

We consider whether the 1995 amendment to 23 U.S.C. § 409 is constitutional and thus enforceable in state and federal courts, a question requiring analysis of federal preemption of state law, private parties' standing to raise federalist challenges, and the limits of Congressional power.

(a) Express Preemption: There is a strong presumption against federal preemption of state police powers [...] Still, "that presumption can be overcome if Congress intends that the federal law preempt state law." All. Pure Chem. Co. v White, 127 Wn.2d 1, 5, 896 P.2d 697 (1995).

Here, Congress clearly intended that the § 409 privilege preempt state laws and court rules governing pretrial discovery and the admissibility of evidence at trial.

* * *

However, state law cannot be preempted by an unconstitutional federal law.

* * *

(b) Standing: We next consider the issue of standing. Several courts have recognized, explicitly or implicitly, that private parties have standing to challenge the constitutionality of federal laws on federalist grounds, even when not joined by a state government.

* * *

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

* * *

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. * * * [We therefore] hold that private respondents are not deprived of standing to challenge the constitutionality of a federal law on federalism grounds simply because state officials oppose the challenge.

(c) Enumerated Powers:

* * *

[The court recounted the history of the federalist system in the United States.]

While duly enacted federal legislation is presumed constitutional, that presumption can be rebutted "upon a plain showing that Congress has exceeded its constitutional bounds." United States v Morrison, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). We therefore evaluate whether Congress acted outside its enumerated powers when it amended 23 U.S.C. § 409 in 1995. The petitioners argue that Congress had the power to enact the 1995 amendment under the Spending Clause, the Commerce Clause, and the Necessary and Proper Clause.

(1) Spending Clause: The Spending Clause entitles Congress "to pay the debts and
provide for the common defense and general welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Over the years, Congress has often sought to influence state behavior by conditioning the receipt of federal funds upon behavioral changes. The United States Supreme Court has declared such a practice constitutional, see United States v. Butler, 297 U.S. 1, 66, 56 S. Ct. 312, 80 L. Ed. 477 (1936), provided Congress' conditions are "relevant" and "reasonably related" to a valid federal interest in a specific national project or program. South Dakota v. Dole, 483 U.S. 203, 208, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987).

***

[First,] the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . ." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." Massachusetts v. United States, 435 U.S. 444, 461[, 98 S. Ct. 1153, 1164, 55 L. Ed. 2d 403] (1978) (plurality opinion).

***

The petitioners rely on the Spending Clause as a source of congressional authority to enact 23 U.S.C. § 409. In Martindich, cited supra, 2001 Wash. LEXIS 622, *34, the Louisiana Court of Appeals applied the Dole Court's four-part test and concluded that § 409 was authorized under the Spending Clause:

A state's regulation of its court system is in our opinion as fundamental a function of its sovereignty as the normal exercise of its police power even in matters concerning the health and safety of its citizens. Congress' intrusion, in this instance, however, is constitutionally permissible because Louisiana's participation in the federal funding scheme is voluntary; because the improvement of state highways with federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S. Const. Art. I, § 8, cl. 1 ("spending power"); because it is clear that participation in the funding program requires acquiescence to the intrusion; and, finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. § 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds).

Martindich, 532 So. 2d at 438 (citing Dole, 483 U.S. at 207-08). The Martindich court, though, was asked to analyze Congress' power to enact 23 U.S.C. § 409 in its pre-1995 form, when by its own terms the privilege applied only to materials specifically "compiled," or created, pursuant to §§ 130, 144, and 152. The connection to a federal purpose was therefore clear: but-for the federal mandates, such materials would not exist. Here, by contrast, we must decide whether the Spending Clause authorizes Congress to bar state courts from permitting discovery of accident reports and other traffic and accident materials and data prepared for state and local purposes, simply because those publicly held materials are also "collected" and used for federal purposes. We conclude that it does not.

While the Spending Clause entitles Congress to offer states the option of accepting federal funds "with strings
attached"--even when those "strings" interfere with the basic functioning of state government, as they do here--the United States Supreme Court has made it clear that Congress may do so only if those "strings" are also firmly "attached" to a legitimate federal interest in a specific federal project or program. See Dole, 483 U.S. at 208. We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, among other reasons, pursuant to a federal statute for federal purposes.

(2) Commerce Clause:

[The court reviewed the evolution of the Commerce Clause doctrine in the Supreme Court. The court set forth the nexus requirement from United States v. Lopez, 514 U.S. 559 (1995), as granting Congress the power to regulate activities having a substantial relation to (i.e., a substantial effect on) interest commerce.]

***

Certainly, a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the "regulatory scheme when considered as a whole." Hodel, 452 U.S. at 329 n.17.

However, under Hodel, we must also determine whether the "challenged provisions are an integral part of the regulatory program." Id As discussed above, § 409 in its pre-1995 form was evidently designed to promote administrative candor in the application for, and implementation of, federal safety enhancement funds, Coniker, 695 N.Y.S.2d at 495; Robertson, 954 F.2d at 1435, and to prevent federal mandates "from providing an additional, virtually no-work tool, for direct use in private litigation." Light, 560 N.Y.S.2d at 965 (emphasis added). It is therefore entirely reasonable that the privilege should cover "reports," "surveys," "schedules," "lists" and "data" that would not exist but-for 23 U.S.C. §§ 130, 144, and 152. See Yarnell, 890 P.2d at 614. However, we fail to see how those vital federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created, such as collision photographs, traffic counts, citizen complaint letters, and "raw data" relating to the history of a local traffic intersection. Such a broad privilege lacks the requisite nexus to § 409's raison d'être and cannot reasonably be characterized as an "integral part" of the Federal-aid highway system's regulation. Hodel, 452 U.S. at 328 n.17.

***

[(3) Necessary and Proper Clause: ]

Pierce County claims that Congress had the power to amend § 409 as it did in 1995, "because, in order to encourage states to identify roads in need of Hazard Elimination funds, it deemed it necessary to protect raw data collected or compiled in making that evaluation from being used against municipalities in highway accident litigation." Pierce County's Suppl. Br. (Guillen) at 12. But while the federal government enjoys authority to require state courts to enforce a federal privilege protecting materials that would not have been created but-for federal mandates such as those in §§ 130, 144, and 152, we
conclude that it was neither "necessary" nor "proper" for Congress in 1995 to extend that privilege to traffic and accident materials and raw data created and collected for state and local purposes, simply because they are also collected and used for federal purposes.

Unconstitutional Violation of State Sovereignty: While Congress was authorized under its enumerated powers to enact 23 U.S.C. § 409 in its pre-1995 form, we find that its 1995 amendment of that statute cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government. Absent a valid and compelling federal interest, which petitioners have not identified here, Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and "raw data" created and held by state and local governments and essential to the proper adjudication of claims brought under state and local law, simply because such collections also serve federal purposes.

* * *

We therefore hold that the federal privilege created by § 409 lawfully applies only to "reports," "surveys," "schedules," "lists," and "data" that are originally "compiled"—i.e., created, composed, recorded—for the specific purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title, or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

CONCLUSION

While RCW 46.52.080 bars Guillen from securing public disclosure of accident reports prepared by persons involved in prior accidents at the same intersection, the statute does not prohibit their pretrial discovery. Moreover, only publicly held materials and data that were originally created for the identification, evaluation, planning, or development of federally funded safety enhancement projects under 23 U.S.C. §§ 130, 144, or 152 are lawfully privileged under 23 U.S.C. § 409, and thus also exempt from public disclosure under RCW 42.17.310(). Because the record contains insufficient facts to apply this standard to all of the disputed items, we vacate the lower courts' rulings and remand for supplementation of the record and further proceedings not inconsistent with this opinion.

MADSEN, Justice; concurring:

Privileges are the exception, not the rule, and therefore, they are "not lightly created nor expansively construed, for they are in derogation of the search for the truth." United States v Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Today our court sidesteps this admonition and construes 23 U.S.C. § 409 in a sweeping manner, far beyond that intended and, most importantly, dictated by Congress. While I concur in the result of the majority, I do so only because the majority, not entirely comfortable with its own result, determined that its own interpretation of § 409 exceeds Congress' authority under the Tenth Amendment, and therefore, refused to enforce its own expansive interpretation.

* * *
In 1995, Congress added the term "collected" to § 409, thus making inadmissible in court, those materials "compiled or collected" for purposes of § 152. Congress was clear in its intent regarding this amendment:

This section amends section 409 of title 23 to clarify that data "collected" for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.

This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data.


I agree with the majority that this amendment was intended to make a "change" in § 409. Majority at 22; See Home Indem Ca v McClean Motors, Inc., 77 Wn.2d 1, 3, 459 P.2d 389 (1969). However, I disagree with the majority as to the import of that change. Under the majority's holding, original police reports prepared for purposes unrelated to § 152, become privileged, even in the hands of the party that created them, once they have been "collected" by any entity for purposes of § 152. Majority at 22. Contrary to the majority's assertions, this was not the result intended by Congress, nor is it a holding dictated by any decisional law.

By preventing a litigant from gaining access to information that has been "collected" for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program, which is the obvious goal of § 409. However, if, as the majority suggests, Congress has prevented a litigant from having access to original reports from their original sources, prepared for purposes unrelated to securing federal funding, then a litigant would be in a far worse position than if the State did not participate in the funding program. I do not believe that was the result intended by Congress, nor do I believe it is dictated by the language of § 409.

A narrow construction of § 409 is also supported by several rules of statutory interpretation. The first is that there is a strong presumption against federal preemption, requiring a showing that this is "the clear and manifest purpose of Congress." Rice v Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). Second, privileges are to be narrowly construed, as they stand in

*[The concurrence asserted that the purpose of § 409 was to encourage candid evaluation of highway safety hazards without giving civil plaintiffs the benefit of federally required documentation for any litigation. The concurrence argued that the 1995 amendment was aimed at unduly narrow court rulings that limited § 409 specifically to materials already in reports, not even extending the privilege to materials collected in preparation of filing an application. The plaintiffs in these cases were not seeking information or reports from their original sources.]*

***

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Finally, this Court should be mindful that "where a statute is susceptible of more than one interpretation, some of which may render it unconstitutional, the court will adopt a construction which sustains the statute's constitutionality, if at all possible." State ex rel. Faulk v CSG Job Cr., 117 Wn.2d 493, 500, 816 P.2d 725 (1991). The majority holds that Congress does not have the authority, as a result of the Tenth Amendment, to enact a provision as sweeping as the majority believes § 409 and its subsequent amendment were intended to be.

* * *

Because the record before this Court does not permit us to accurately determine whether the disputed documents would be privileged under the correct interpretation of § 409, like the majority, I would remand for further proceedings.
Supreme Court to Clarify Privacy Rights in Wash State Case

Associated Press

April 29, 2002

Gina Holland

The Supreme Court said Monday it will decide whether states can keep secret information about traffic accidents collected as part of a federal highway safety law.

[The] Justices will decide if a county in Washington state has to turn over records to families suing over serious accidents.

The ruling, expected next year, will affect governments in every state and determine if officials have to admit they knew an intersection might be dangerous. The records are being sought mainly as part of lawsuits over wrecks.

The Washington Supreme Court had said a federal law allowing the withholding of records is unconstitutional. The Supreme Court blocked the ruling earlier this year, until it could look at arguments from all sides.

Lawyers for Pierce County, Wash., said if the state ruling is not overturned, "the state's federal funding for elimination of roadway hazards and its citizens' safety both (will be) jeopardized, and bedrock principles of federalism dangerously undermined."

A dozen states, including Washington, argued that they need to be able to know that information collected about dangerous intersections will not be later used in lawsuits against them. If they don't, they may not gather the information, the court was told.

Information required by the Federal Highway Act "has spawned a kind of tort litigation against states that is enabled almost solely by this data," Washington Attorney General Christine Gregoire told the Supreme Court in a separate filing.

The case involves two car accidents at different busy intersections in Pierce County, which is home to Tacoma. In one of the accidents, a woman was killed, and two sisters suffered brain injuries in the second.

Pierce County refused to release information on the intersections, as part of lawsuits over the wrecks, and said the federal law allowed them to withhold information on traffic accidents and complaints about the intersections.

The county had identified the fatal accident site as a dangerous intersection but had been turned down for federal funds to improve it. Funding was approved three weeks after the 1996 wreck.

Besides Washington, the other states urging the court to take the case were Alaska, Florida, Hawai‘i, Indiana, Louisiana, Ohio, Oregon, Nebraska, Nevada, Vermont, and West Virginia.

Lawyers who want the information told the Supreme Court that some of the contested information was collected under state laws. They also said Washington
voters have approved broad disclosure of government documents.

"This court need not concern itself with the wisdom of Washington state's policies of governmental liability and full disclosure of public records," the lawyers told the court in a filing.

The case is Pierce County v. Guillen, 01-1229.

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The state is asking the U.S. Supreme Court to consider a challenge of the Louisiana Supreme Court's controversial interpretation of a federal law that has stirred up a legal firestorm.

The law under scrutiny is aimed at limiting the use of government-compiled safety information for plaintiffs who sue the state in accident cases involving highways, railroads and bridges.

Government officials contend the statute, Title 23, Section 409 of the U.S. Code, was intended to allow candid administrative evaluations of traffic safety problems in federally required programs. Personal injury attorneys argue that the law shields state governments and railway companies from liability by preventing discovery of damaging information.

In November, the Louisiana Supreme Court, ruling on appeals from Livingston and Calcasieu parishes, concluded that the law prevents the state from having to provide its conclusive studies and reports on safety problems, but that raw data used in those reports had to be released to plaintiffs. The court's ruling was made in what is commonly referred to in legal circles as the Wiedeman case, named after one of the Livingston Parish plaintiffs.

The state Supreme Court decided that accident reports, traffic counts and other raw data collected by DOTD are admissible. The court determined that plaintiffs' attorneys cannot obtain or use survey results identifying hazardous railroad crossings, bridges and highways, nor can they get information about recommended improvements and applications for federal funds for bridge rehabilitation and "other compilations made for developing highway safety construction projects which would utilize federal aid funds."

State attorneys are appealing that decision to the U.S. Supreme Court.

Baton Rouge attorney Ronald Seale, an assistant attorney general who filed the writ with the U.S. Supreme Court earlier this month on the state's behalf, said he isn't sure when the high court will decide if it will consider the case. The high court has the option of not considering the case, allowing the state Supreme Court's decision to remain intact.

Seale believes the state Supreme Court erred by allowing plaintiffs access to raw data. In other states where the federal law was challenged, courts determined that the data was off-limits, he said.

"We believe the great majority of the cases look to the front end," he said. He said the state contends that data are off limits if gathered by DOTD to comply with the requirements to conduct safety surveys under federal mandates.

Plaintiffs' attorneys Tim Breaux of Lafayette and Leonard Davis of New Orleans learned about the workings of 23 USC 409 during efforts to get information from the state in a lawsuit filed on behalf
of an Acadian Ambulance Service emergency medical technician, Pat Landry.

While speeding to an emergency call in November 1988, the ambulance Landry was riding in ran into the path of a Union Pacific train in rural Acadia Parish. The plaintiff's attorneys contended that vegetation growing along the track obscured motorists' view of an oncoming train.

After the suit was filed, Landry's attorneys tried to get information from the state and railroad company through the routine legal process of discovery, asking for a number of items, including accident rates at the crossing, and records of grass cutting at the site. The state and railroad company refused.

"The answer I got: 409," Davis recalled. "It's just a cavalier attitude: We're the government, and we don't have to give you anything.

"Just think, if we never knew Pintos exploded, Ford would still be selling Pintos," he said.

Davis had to appeal lower courts' decisions to the state Supreme Court, which agreed that the material should be accessible to the plaintiff, based on a previous ruling of Martinolich vs. Southern Pacific.

The issue of whether the data could be used in trial was not before the court in the Landry case, however. That came later in the Wiedeman case, which also expanded what plaintiffs could obtain from the state.

Breaux said the federal law frustrates attorneys, but more importantly it also has the potential of preventing their clients from getting justice.

"People lose sight that those who are injured are our fellow human beings," Breaux said. "What you're up against there is this bureaucracy hiding behind 409. It's just not fair."

"Go look at my client and tell me he's not entitled to know about that crossing," Breaux said.

Breaux said his client suffered massive head injuries and he is classified as an incomplete paraplegic with no chance of ever walking again. He has lost the use of his left arm, is legally blind and was able to stop using a feeding tube only after getting into a New Orleans rehabilitation center last year, according to Breaux, who is amazed that Landry didn't die from the injuries.

"How he survived I'll never know," Breaux said.

Landry's attorneys settled with the railroad company recently for $11 million. A settlement with the state is pending.

Charles Soileau, a Rayne attorney who defends the state in highway and railroad litigation, said 23 USC 409 was enacted after highway departments in several states complained that the federally required studies imposed on states to receive federal highway funds opened the door to litigation.

"They said, 'Look, if you're going to mandate that we do these studies, we don't want to be hit over the head with them,' " he said.

"It's designed to promote an earnest effort to locate hazards," he said. "It's designed to create an atmosphere where the state can freely go in and make an honest assessment."
Soileau said the law has been under attack in 11 other states.

"To me, from reading decisions from the other 11 jurisdictions, the state Supreme Court's ruling is an anomaly," he said. "It is certainly the least restrictive interpretation I have seen."

Lafayette attorney Barry Sallinger became acquainted with the federal law during a trial involving an accident in downtown St. Martinville. He represented a plaintiff involved in an accident at the intersection of Bridge and Main streets, also two state highways, that killed one teen-age boy and injured three girls in 1989.

The plaintiffs contend the intersection is unsafe because of limited visibility. Plaintiffs' attorneys went through the discovery process to obtain information to support their arguments, getting much of what they wanted from DOTD, but at trial the state's attorneys asked the court to prevent the use of the DOTD data, based on 23 USC 409.

"It was like an ambush," Sallinger recalled. "They knew about (the federal law) at least a year and a half before our case, and they never brought it up."

"What they're doing is using a federal statute to limit liability," he said.

The state sought to prevent the plaintiffs from using police reports of accidents occurring at the intersection, as well as traffic counts. And the state also tried to prevent introduction of a letter from former state Sen. Oswald Decuir of New Iberia to the DOTD asking for investigation of the intersection for possible improvements. Decuir wrote in the letter, 18 months before the accident, that numerous accidents have occurred at the site.

State District Judge Paul deMahy determined that the intersection is not unreasonably dangerous. The 3rd Circuit Court of Appeal disagreed, and determined that the state is liable for a third of the plaintiffs' damages. The case is now on appeal to the state Supreme Court.

Plaintiff HMOs and a non-profit association argued that Ky. Rev. Stat. Ann. §§ 304.17A-110(3) and 304.17A-171(1)-(8) (1995) should be found preempted by the Employee Retirement Income Security Act of 1974 (ERISA) and sought injunctive relief from their enforcement. The court affirmed the district's judgment that the state statutes met the common sense test in that the laws regulated insurance, and therefore were saved from federal preemption.

Question Presented: Whether Kentucky's "any willing provider" law, which requires each health maintenance organization (HMO) in the State to make available to its subscribers the services of any medical provider in its geographical region that agrees to the terms and conditions offered by the HMO, is saved from preemption as a law that "regulates insurance" under ERISA Section 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A)?

KENTUCKY ASSOCIATION OF HEALTH PLANS, INC.; Advantage Care, Inc.; Aetna Health Plans of Ohio, Inc.; Choicecare Health Plans, Inc.; FHP of Ohio, Inc.; HMPK, Inc.; HPLAN, Inc.; Humana Health Plan, Inc., Plaintiffs-Appellants,

v.

George Nichols, III, in his official capacity as COMMISSIONER OF THE KENTUCKY DEPARTMENT OF INSURANCE, Defendant-Appellee.

United States Court of Appeals
For the Sixth Circuit

Decided September 7, 2000

HOLSCHUH, District Judge.

* * *

I. The State Statutes

In 1994, the Kentucky General Assembly enacted the Kentucky Health Care Reform Act (the "Act"). The Act contained an "Any Willing Provider" provision that stated: "Health care benefit plans shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and is willing to meet the terms and conditions for participation established by the health benefit plan." Ky. Rev. Stat. Ann. § 304.17A-110(3) (Banks-Baldwin 1995). [... ]

In April of 1997, [seven health maintenance organizations (HMOs)] filed suit in the Eastern District of Kentucky, requesting that § 304.17A-110(3) and § 304.17A-171 (for convenience we will collectively refer to § 304.17A-110(3) and § 304.17A-171(2) as Kentucky's "AWP" laws) be declared, among other things, preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a). Plaintiffs moved for
partial summary judgment on the issue and Commissioner Nichols cross-moved for partial summary judgment as well. The district court determined that while the Kentucky AWP laws were related to employee benefit plans under ERISA § 514(a), they regulated the business of insurance and therefore fell under the saving clause of § 514(b), 29 U.S.C. § 1144(b)(2)(A). The court thus granted partial summary judgment in favor of Commissioner Nichols and determined its order to be final and appealable. This appeal followed.

II. Preemption

We are required by this appeal to define the boundaries of preemption under ERISA § 514(a) and (b), 29 U.S.C. § 1144(a) and (b). Section 514(a), the preemption provision, reads:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title (emphasis added).

Section 514(b)(2)(A), the "savings" provision, reads:

Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

Section 514(b)(2)(B), the "deemer" provision, reads:

Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

The federal courts have addressed the scope of ERISA's preemption of State law on numerous occasions; however, the wording of the Act combined with the obvious federalism concerns involved have made it difficult to discern clear boundaries. Many courts, including the Supreme Court, have commented on the vexingly broad and ambiguous nature of the provisions. [...]
The district court in the case at bar relied on the Supreme Court's decision in Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 828 n.2, 100 L. Ed. 2d 836, 108 S. Ct. 2182 (1988) in determining whether Kentucky's AWP statutes referred to an ERISA plan. The district court first observed that under Kentucky's statute, "health benefit plans" were defined to include, among other things, "a self-insured plan or plan provided by a multiple employer welfare arrangement, to the extent permitted by ERISA." Based on this language, the court concluded that "it is clear that the AWP statutes 'refer to' ERISA employee benefit plans."

While the fact that the Kentucky statutes "refer to" ERISA employee benefit plans is enough to potentially preempt them on that basis alone, their "connection with" such plans offers an alternative basis for such preemption. [...]

Using the Supreme Court's "connection with" analysis, the district court in the case at bar determined that Kentucky's AWP laws had a connection with ERISA plans. The court found that while the law did not operate directly on ERISA plans, it effectively required benefit plans to purchase benefits of a certain structure, thereby bearing indirectly but substantially on all insured plans. As a result, the court concluded that the AWP statutes did more than just indirectly affect the cost of ERISA plans; the AWP statutes mandated benefit structures.

[We agree. The] district court in this case was correct in finding that former § 304.17A-110(3) (now § 304.17A-270) and present § 304.17A-171 were both "connected with" ERISA covered plans. They not only affect the benefits available by increasing the potential providers, they directly affect the administration of the plans.

The Kentucky statutes in question meet both prongs of the "relation to" analysis and thus are preempted, unless found to be statutes that regulate insurance under the savings clause of § 514(b) (2)(A).

III. Insurance Savings Clause

Having concluded that Kentucky's AWP laws relate to ERISA covered employee benefit plans, and are thus within the scope of ERISA's preemption provision, the Court must then determine whether the laws fall within ERISA's savings clause. The savings clause states that, "except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities. " ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). [...]

The Supreme Court has endeavored to provide guidance on what it means to "regulate insurance." [...] Specifically, in determining whether Kentucky's AWP laws are saved from preemption by ERISA § 514(b)(2)(A), one must first ask whether as a matter of common sense they regulate insurance, and then look to the McCarran-Ferguson factors as checking points or guideposts to aid the analysis. These factors are "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the
insurance industry." (internal citations omitted).

***

The Kentucky Act meets the common sense test in that it clearly does regulate insurance. The fact that it includes within its reach HMOs as well as traditional insurance companies does not take it out of the realm of insurance regulation. [...] 

***

The Kentucky AWP laws deal directly with the relationship between insurers and insureds under health benefit plans. They affect restrictions by the insurers on the number of health care providers available to the insureds under such plans; they increase benefits to the insureds by giving them greater freedom to choose health care providers under the plans; and they are aimed at regulating this insurance relationship. They are part of a comprehensive subtitle of Kentucky's insurance code regulating health benefit plans, and they are, in our view, clearly laws which, in a common sense view of the matter, "regulate insurance" and thus are saved from preemption.

Consideration of the three McCarran-Ferguson factors used in the second step of the analysis as "checking points" or "guideposts" does not require a different result. First, although certainly a debatable issue, we [think... ] that the first factor "transferring or spreading the policyholder's risk" is satisfied:

[The provision under the Kentucky statutes in question enabling access to providers who are willing to meet the network's terms and conditions is a benefit that spreads the cost component of risk among all the insureds. Plaintiffs rely on Group Life and Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979) to demonstrate that the first factor is not present in this case. In Royal Drug, the issue centered on the financial agreement between the insurance provider and participating pharmacies, an arrangement which would not directly concern policyholders. In contrast, in the case at bar, policyholders would be concerned with limitations on their choice of provider. The Kentucky statutes regulate the relationship between the insurance company and its policyholders and, therefore, are laws regulating the business of insurance and the Kentucky AWP laws.]

***

The second McCarran-Ferguson factor is, in our view, unquestionably present in this case. The ability of an insured to select a physician of his or her choice to treat a medical condition covered by the insurance is an integral part of the policy relationship between the insurer and the insured. [...] 

***

In Plaintiffs' view, the second factor is not satisfied because the AWP provisions leave the contract terms between the insurer and the insured unaltered, the medical risks remain the same, and even if an insured's provider decides to join the insured's network, the medical coverage remains the same. While it is admittedly true that the AWP laws do not change the substantive terms of the insurance coverage, it is not necessary that the statutes do this before they can be found to be statutes regulating insurance. Kentucky's AWP laws do, however, directly impact the insurer-insured relationship because they affect restrictions on the network of providers
available for treatment under the plan and they directly affect the administration of the plan. [...]

We also conclude that the third factor the statute's limitations to entities within the insurance industry - is satisfied. For reasons stated earlier, we believe that entities such as HMOs and self-insurers are engaged in the business of insurance along with the more widely recognized and more traditional commercial insurance companies, and that entities acting solely as plan administrators and not as "health insurers" are not within the scope of the statute. [...]

IV. Conclusion

With respect to Kentucky's AWP statute, Kentucky Revised Statutes Annotated § 304.17A-270 (Banks-Baldwin 1999), and Kentucky's chiropractic AWP statute, Kentucky Revised Statutes Annotated § 304.17A-171(2) (Banks-Baldwin 1999), the judgment of the district court is affirmed. [...]

KENNEDY, Circuit Judge, dissenting:

I write separately with respect to Part III of the majority's opinion to dissent from the majority's conclusion that Ky. Rev. Stat. Ann. §§ 304.17A-270 and 304.17A-171(2) (Banks-Baldwin 1995) fall within ERISA's insurance savings clause. I believe that Kentucky's any willing provider laws have little to do with insurance and are not saved from preemption by ERISA's Insurance Savings Clause as they do not regulate insurance as a matter of common sense and fail all three of the McCarran-Ferguson factors.

I. Insurance Savings Clause

[... ] I conclude that the Kentucky AWP laws do not meet the common sense test because they are directed at the contracts between benefit plans and third parties, rather than being specifically directed at the insurance industry. [Citation omitted.] The laws do not change the relationship between the insurer and insureds, as the same medical conditions are covered after the AWP laws as were insured before the passage of these provisions. The underwriting of risk, the traditional earmark of insurance, see Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211-12, 99 S. Ct. 1067, 1073-74, 59 L. Ed. 2d 261 (1979), is in no way affected. Insureds are not free to attend the provider of their choice, as the AWP laws merely require employee benefit plans to accept previously excluded doctors that are qualified, willing to join the plan, and agree to abide by its terms.

Contrary to the majority's assertions, I believe it is also apparent that Kentucky's AWP laws clearly target more than just members of the insurance industry. By their terms, Kentucky's AWP laws apply to non-ERISA covered self-insured plans by defining health benefit plans to include "a self-insured plan . . . to the extent permitted by ERISA." §§ 304.17A-100(4)(a) and 304.17A-170(1). This definition includes self-insured plans not regulated by ERISA, such as government plans and church plans, which ERISA excludes from its coverage. See 29 U.S.C. § 1003 (b). The result is that these self-insured plans, which, as a matter of common sense ought to be considered as operating outside the insurance industry, are subject to Kentucky's AWP laws. [Citation omitted.]
Significantly, the AWP provisions also apply to third parties that a self-insured ERISA plan hires to administer its plan benefits. [...] 

** * * *

Although HMOs, HSCs, and Insurance Companies may accept risk in some situations, as third party administrators they would merely be contracting to handle paperwork and plan administration for a self-insured ERISA plan. While handling such administrative duties, however, these entities would be forced by Kentucky's AWP laws to accept any willing provider into the plan, even though they were not underwriting any risk. The only risk underwritten is that accepted by the ERISA self-insured plan, which under the "deemer clause" of ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), cannot be treated as an insurance company for the purposes of state regulation. See FMC Corp. v. Holliday, 498 U.S. 52, 61, 111 S. Ct. 403, 409, 112 L. Ed. 2d 356 (1990); Texas Pharmacy Ass'n, 105 F.3d at 1039. The common sense conclusion that can be drawn from the AWP statute's coverage of entities clearly operating outside of the business of insurance is that the statute is concerned generally with regulating provider access to networks rather than specifically regulating the business of insurance. [Citation omitted.]

** * * *

[...] The McCarran-Ferguson factors only serve to reinforce my conclusion that Kentucky's AWP laws are not saved from preemption by ERISA § 514(b). [...] I begin by considering whether Kentucky's AWP laws have the effect of transferring or spreading policyholder risk.

Appellees argue, and the majority agrees, that the district court was correct in finding that Kentucky's AWP laws spread policyholder risk. [...] 

** * * *

I disagree with the district court's attenuated risk spreading analysis[...] Rather than shifting risk from policyholders to insurers, Kentucky's AWP statutes merely prohibit benefit plans from excluding qualified providers who want to join the plan's provider network and are able to meet the plan's requirements. The risk assumed by the benefit plan under its policy, that the policyholder will require medical treatment, remains unaltered. The statute's passage in no way alters the terms of the policyholder's policies. The only contracts affected are those between the benefit plan and the providers already in the plan network. [...] 

** * * *

While doctors who meet the plans qualifications may independently decide to join the plan and the plan must accept them, many doctors may not meet the plan's qualifications or may have no desire to join that particular plan. [...] The result is that although Kentucky's AWP laws make it marginally more likely that a policyholder's benefit plan network will contain their preferred doctor, they will still be restricted to the doctors in their benefit plan network regardless of the membership or nonmembership of their preferred doctor.

** * * *

Similarly, Kentucky's AWP laws have almost no effect on the policyholder risk that insurers must underwrite. Like Blue Shield's unchanged obligation to cover a
policyholder's prescriptions after entering into the pharmacy agreements, Kentucky insurers must cover the same medical procedures after the AWP law as they would have to if the AWP provision had not been enacted. [...] 

* * *

[...] The critical issue with respect to the risk spreading prong, as well as whether the law regulates insurance as a matter of common sense, is whether or not the law is related to the risks underwritten by the insurer. * * * Because Kentucky's AWP laws seek to merely regulate the "business of insurers" by dictating how they structure their provider networks, irrespective of the risks they underwrite, they should not qualify for savings clause protection.

* * *

Moving to the second McCarran-Ferguson factor, I consider whether Kentucky's AWP laws affect an integral part of the policy relationship between the insurer and insured. The majority asserts that the district court was correct in finding that Kentucky's AWP laws dictate a substantive term of the contract between the insurer and insured and are thus an integral part of this relationship. As support for this proposition, the majority again cites Stuart Circle, which concluded that because Virginia's AWP law affected treatment and cost (through the same attenuated manner in which the court concluded risk was spread) it was integral to the insurer-insured relationship. 995 F.2d 500 at 503.

Again I find Stuart Circle unconvincing. The effect of Kentucky's AWP laws center on the insurer-provider relationship. The terms of the insurer-insured relationship are only affected in a very indirect manner, making it difficult to see the AWP laws as integral to that relationship. [Citations omitted.]

[...] Kentucky's AWP provisions leave the contract terms between the insurer and insured unaltered. [...] Kentucky's AWP laws do not force the insurer to offer a benefit to insureds that was not available before the law. Rather, Kentucky's AWP laws merely force insurers to potentially make additional contractual arrangements with providers they might otherwise exclude. The medical conditions covered remain unaffected and the insureds are still limited to the plan's network of providers. Therefore, I must conclude that Kentucky's AWP law is not integral to the insured-insurer relationship.

Finally, I consider whether the Kentucky AWP laws are limited to entities within the insurance industry. As discussed under the common sense test, I do not believe this to be the case. The law not only regulates entities that fall outside the traditional definition of insurer, it also extends to include entities in no way involved in underwriting risks. In fact, a review of the statute shows that while it may affect the way that some insurance companies run their business, it has nothing to do with the underwriting of risk, the traditional earmark of insurance. See Royal Drug, 440 U.S. at 211-12, 99 S. Ct. at 1073-74. Accordingly, I believe that Kentucky's AWP laws fail the third prong of the McCarran-Ferguson test as well.

In sum, I am forced to conclude that §§ 304.17A-110(3) and 304.17A-171(2), Kentucky's AWP laws, are not saved from preemption as laws that regulate the business of insurance, because under ERISA § 514(b), they fail to meet not only the common sense test, but also all of the McCarran-Ferguson factors. While federalism concerns prohibit federal
courts from lightly preempting acts of a state legislature, I agree with the Eighth Circuit's observation in Prudential Ins. Co. that, "it is for Congress, not the courts, to reassess ERISA in light of modern insurance practices and the national debate over health care." Prudential Ins. Co., 154 F.3d at 829-30.
In Kentucky Association of Health Plans, Inc. v. Nichols, the U.S. Court of Appeals for the Sixth Circuit held that (1) any willing provider (AWP) provisions were both connected with, and had reference to, an employee benefit plan and, therefore, were potentially subject to preemption under ERISA as state laws relating to an ERISA plan, but (2) the provisions sought to regulate insurance and, therefore, came within the savings clause of ERISA's preemption provision. Respondents--seven health maintenance organizations (HMOs) licensed in Kentucky and a non-profit association organized to promote business interests of HMO members--filed this action against the Commissioner of the Kentucky Department of Insurance arguing that Kentucky Revised Statutes Annotated [subsections] 304.17A-171(1)-(8) (Banks-Baldwin 1995) should be found preempted by the Employee Retirement Income Security Act of 1974 (ERISA).

In 1994, the Kentucky legislature enacted the Kentucky Health Care Reform Act containing an "any willing provider" provision that prohibited health benefit plans from discriminating against any provider located within the plan's geographic area. The legislature later added a provision regulating the interaction between health benefit plans and chiropractors and requiring chiropractic benefits. The Sixth Circuit considered whether the Kentucky statute related to employee benefit plans covered under ERISA. The court employed a two-part test to do so, considering if the statute has (1) a connection with or (2) a reference to such plan. The court reasoned that Kentucky's AWP statute relates to ERISA plans because the statute references an ERISA plan and singles it out for different treatment by excluding self-insured ERISA plans from its coverage. The Kentucky statute sought to include self-insured ERISA plans and multiple employer welfare arrangements, only to the extent permitted by ERISA.

The court concluded that, in order to determine whether the normal presumption against preemption has been overcome, it is necessary to go beyond the text and difficulty of defining [sections] 514(a)'s key term. Rather, the court looks to the objectives of the ERISA statute as a guide to what Congress intended for state law. ERISA attempts to avoid a plethora of regulation and permit a "nationally uniform administration of employee benefit plans". The Kentucky statute meets the "in connection with" standard because the AWP plan required benefit plans to purchase benefits of a certain structure and specifically prohibits health organizations from offering networks with limited chiropractic providers. The statutes affected benefits because the number of potential providers increased and directly affected the administration of the plans. Therefore, the statute affected
and mandated the structure of all insured plans.

However, the Court held that the statute fell within [sections] 514(b)(2)(A), the ERISA savings clause, therefore saving the statute from preemption. This clause serves as an exception to preemption by saving state laws that relate to ERISA plans as long as they regulate insurance. The Court begins its analysis by determining the meaning of the "regulate insurance" phrase in the savings clause. First, the Court asks, from a "common sense view of matter," whether the contested provision regulates insurance and, second, considers three factors to determine whether regulation fits within the business of insurance as used in McCarran Ferguson Act. These three factors are (1) whether the practice has effect of transferring or spreading a policyholder's risk; (2) whether the practice is integral part of the policy relationship between insurer and insured; and (3) whether the practice is limited to entities within the insurance industry. While these three factors must be weighed, they are not determinative.

The Kentucky Act meets the common sense test because it clearly regulates insurance even though it reaches HMO's and traditional insurance companies. HMOs just happen to provide medical services directly. The fact that the Kentucky statute reaches self-insurers who are not protected by ERISA's deemer clause does not mean it cannot be characterized as a statute regulating entities engaged in business of health insurance.

The statute meets the first factor of the McCarran-Ferguson test. It transfers or spreads the policyholder's risk because the policyholders in Kentucky benefit from increased availability of providers. The ability of a policyholder to choose a physician to treat a medical condition covered by insurance is an integral part of the policy relationship between insurer and insured, thus meeting the second prong. HMOs and self-insurers are engaged in the insurance business along with traditional insurance companies, thereby satisfying the third factor of the McCarran-Ferguson test.

The Appeals Court upholds the AWP statute and chiropractic statute. The district court, however, did not discuss additional requirements dealing with chiropractors and health benefit plans. The Court, therefore, remands this case to the district court for consideration of these issues of preemption by ERISA.

The effect of this ruling is that the standard definition of the "business of insurance" is to be abandoned. Some health law attorneys do not understand how a self-insured plan can be insurance because the critical element of insurance, the transfer of risk, never occurs. They worry that health plans will be vulnerable to having forced open-ended networks. But on a positive note, AWP laws can apply to commercial insurers in states governed by the ruling circuits.

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The Supreme Court today added two important cases on health care to the docket for its next term, including a closely watched case from Maine on the state's effort to force drug manufacturers to reduce their prices to Maine residents.

Both new cases reflect efforts by state governments to move ahead with health care policy in the absence of action by Congress. The second case is a challenge to a Kentucky law, similar to laws on the books in half the states, that requires managed care plans to accept any doctor who meets their qualifications and who wants to join.

* * *

Last October, the justices sought the Bush administration's views on the case. The administration took until May 31 to respond with a brief urging the Supreme Court to deny the industry's appeal.

The brief's fine print, however, may have led the justices to take a hard look at the appeal. The First Circuit's conclusion that the Maine law did not conflict with the Medicaid law "may well have been incorrect," the brief said, while nonetheless urging the justices to sidestep the case because of the preliminary nature of the ruling and the absence of conflicting decisions.

By contrast, the administration did urge the court to grant a second health care case today, a challenge by the managed care industry to Kentucky's "any willing provider" law, which gives any qualified doctor the right to become a participating provider in a health plan.

Doctors have lobbied for such laws, which have been passed by 25 states, as protection against dismissal by health care plans for recommending too many treatments or complaining about conditions.

But health plans have strenuously resisted the laws on the ground that a limited pool of doctors is essential to holding down the costs of managed care, because the doctors' willingness to offer discounts depends on a big enough patient load for doctors to earn an acceptable income.

Challenges to the laws around the country have been based on a 1974 federal law, the Employee Retirement Income Security Act, known as E[RISA]. E[RISA] pre-empts state laws that "relate to" employee benefit plans, except for state laws regulating insurance. So the question on the validity of the "any willing provider" laws, to which federal courts around the country have given different answers, is whether the laws fall within a state's regulation of insurance.

In this case, Kentucky Association of Health Plans v. Miller, No. 00-1471, the United States Court of Appeals for the Sixth Circuit, in Cincinnati, held that laws like Kentucky's were "clearly laws which, in a common-sense view of the matter, regulate insurance."

The Supreme Court deferred action on the case for more than a year while deciding a related question raised by
another managed care case on the docket. The question in that case, Rush Prudential H.M.O. v. Moran, was the validity under E[RISA] of state laws requiring outside review of a health plan's refusal to authorize a particular treatment. The court ruled on June 20 that such laws were an aspect of insurance regulation and were not pre-empted by E[RISA].

The plaintiffs in the Kentucky case filed a supplemental brief this week saying that the Rush Prudential decision did not really answer the insurance question in their case. The question in the Rush Prudential case concerned a health plan's relationship with its patients, the brief said, while the Kentucky case involved a health plan's relationship with its doctors -- less directly related to the concept of insurance, the brief said.

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Court Backs Patient Appeals in Battle Over HMO Coverage

The Wall Street Journal

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Sarah Lueck, Robert S. Greenberger and Rhonda Rundle

The Supreme Court decided that states can challenge health-maintenance organizations’ coverage decisions, affirming a potent weapon for consumers while roiling the debate in Congress over whether to pass a federal "Patients’ Bill of Rights."

Forty-two states and the District of Columbia have set up independent review boards to which patients can appeal when HMOs deny coverage for certain procedures and treatments. Such avenues of appeal, set up in recent years in response to patient complaints, aren't widely used by consumers, but patients' advocates predicted the court ruling could change that. These advocates plan to use the ruling to press for a federal patients' rights bill that would establish minimum standards for state review boards and provide other consumer protections.

The issue before the high court was whether the state laws setting up such boards are pre-empted by the federal Employee Retirement Income Security Act (ERISA) of 1974. The state laws typically force HMOs tosubmit to what is in effect a second-opinion process, which gives patients who prevail a major advantage in federal court if health-care providers continue to deny coverage. The issue stemmed from a 1995 case in which Debra Moran, then a 24-year-old Chicag-area speech pathologist, spent nearly $95,000 of her own money for reconstructive surgery that her HMO, Rush Prudential HMO Inc., which was acquired by WellPoint Health Networks Inc. in 2000, refused to cover.

Over the objections of the HMO industry and employer groups, the Supreme Court upheld the power of the states in a 5-4 decision issued by Justice David Souter and backed by the court’s more-moderate wing. The decision applies to up to 70 million people whose employers buy private health insurance. Unaffected by the decision are another 60 million people whose employers, mainly large corporations, are self-insured and therefore exempt from state insurance laws. Most Americans with health insurance are covered through their workplaces.

Private health plans and companies that provide health insurance to employees complained that forcing HMOs to contend with a patchwork of state review processes will drive up costs and prompt some employers to consider abolishing their insurance plans. "Employees in different states covered by the same health contract could have far different rights depending on where they live," said Paul Dennett, a vice president at the American Benefits Council, which represents employers.

"The great danger is that with costs already skyrocketing, employers navigating varying state laws may be forced to reconsider whether they will offer health insurance for their employees," added Donald Young, president of the Health
Insurance Association of America, a trade association.

Patients' rights advocates, medical associations and state health officials applauded the decision as a victory, albeit a narrow one. "This decision validates every state that has passed independent review laws protecting patient's rights," said Donald J. Palmisano, president-elect of the American Medical Association, which filed a brief backing the patient in the case.

Stocks of the nation's largest managed care companies slipped after the high-court ruling. In 4 p.m. New York Stock Exchange composite trading, WellPoint Health Networks shares sank $1.93 to $84.27, Aetna Inc. was off 29 cents at $51.47, Cigna Corp. was down $1.43 at $99.25 and UnitedHealth Group Inc. dropped $1.16 to $96.14.

"We inherited this case when we acquired Rush Prudential in 2000," said a spokesman for WellPoint Health Networks, Thousand Oaks, Calif. "We have a history of supporting independent review in our company and we will continue to do so."

When consumer groups began pushing external review systems in the mid-1990s, such systems were opposed by most health plans. But as consumer outcry against abuses spread, more and more health plans embraced the idea as a way to placate critics and, more importantly, to avoid lawsuits. State review boards have only accepted a few thousand cases in the several years since such boards came into vogue, overturning or modifying plan decisions about half the time.

Daniel Zingale, director of California's department of managed care, said the review boards also serve to prevent abuses. "Thousands of people have been able to get a quicker resolution of their problem because HMOs know that the independent review is looming over them," he said.

The court's decision puts employer groups and insurers in a quandary as they continue fighting a tough federal patients' bill of rights, now stalled in Congress. On the one hand, they argued in the Supreme Court that they preferred uniformity. The patients' bill of rights would afford the most likely vehicle for imposing uniformity on the system. But that's a risky option, because the bill's biggest advocates favor tough standards and greater access to other avenues of appeal, including the courts.

Patients' rights advocates favor federal action. They say the state appeal process is too complicated and too little-known to be of much help. And in the eight states that lack external review boards, patients "will get no benefit from state hearing rights," says Ron Pollack, president of consumer-advocacy group Families USA. "They will still need to appeal to their HMOs, and the HMOs will continue to act as the judge, jury and prosecutor of those appeals." Moreover, because the decision doesn't apply to employees whose companies are self-insured, "it's a complete crapshoot for workers," said Sara Rosenbaum, a law professor at George Washington University's School of Public Health.

Both chambers of Congress have passed competing patients' rights bills, with the Republican-controlled House favoring a more industry-friendly bill backed by the White House and the Democratic Senate favoring a tough bill sponsored by Sen. John McCain (R., Ariz.) and Sen. Edward
Kennedy (D., Mass.). Negotiations on the bill, which would make it easier for patients to sue their health plans, have broken down, mainly over limits on damages patients could receive if they sue. State review systems "are no substitute for strong, federal action," said Sen. Kennedy.

"If the proponents of an expansive 'Patients' Bill of Rights' think that today's decision will induce employers to seek enactment of a federal patients' rights bill, they are sorely mistaken," responded American Benefits Council President James A. Klein.

In the Supreme Court case, Ms. Moran said she started in 1995 experiencing relentless pain and weakness in her right hand and shoulder. Various treatments and conventional surgery approved by her HMO provided no relief. Ms. Moran then underwent microreconstructive surgery in February 1998, paying $94,841.27 of her own money for the procedure and post-operative care. "By July, after a lot of physical therapy, I was water-skiing," Ms. Moran said.

Ms. Moran had sought an independent review of her case under Illinois law. The case eventually moved to federal court, which ruled in the HMO's favor. But the U.S. Court of Appeals in Chicago reversed that ruling in October 2000, and the Supreme Court upheld that decision yesterday. Ms. Moran said yesterday that she was paid by the HMO after the U.S. Appeals court ruling -- but she has kept the money in the bank, awaiting the Supreme Court's decision.

At issue before the Supreme Court was what sorts of benefits E[RISA] covers. The law states that all disputes over employee benefits must be handled by federal courts, following a single national procedure. So states, for example, couldn't set up boards to judge pension disputes. But health insurance is a trickier question -- it is clearly an employee benefit, but it is also insurance. E[RISA] says state laws that regulate certain kinds of businesses -- insurance, banking or securities -- are "saved" from the E[RISA] pre-emption. The question for the court was: Is an HMO an insurer? Justice Souter said that a thorough reading of the legislative history of the E[RISA] law clearly shows Congress recognized that HMOs operate partly like insurance companies.

Peter Landers contributed to this article.

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The court found that the department is required by state law to pay for a foster child’s care regardless of whether it is the representative payee or not. The department only serves as representative payee of the child’s social security benefits so that the state will be reimbursed for its costs. Thus, the court held that the Department is acting in violation of federal law prohibiting confiscation of such benefits.

**Question Presented:** Does a state agency acting as the representative payee appointed to receive the Social Security benefits of the state’s foster children violate 42 U.S.C. 407(a) of the Social Security Act when the agency uses the benefits to pay for the costs of children in foster care?

We hold DSHS as a representative payee violates 407(a) of the Act when it applies Social Security benefits to the current maintenance needs of foster children for whom it acts as representative payee. Given this disposition we find it unnecessary to consider the due process and equal protection claims. We remand for further proceedings, including further consideration of the reasonable attorney fee award.

**FACTS**

[The Department of Social and Health Services (DSHS) provided care to all children who needed it. The DSHS...}
attempted to recover the costs of caring for the child from the natural parents. If unable to do so, the DSHS was allowed by state law to reimburse itself from other funds in its possession, such as Social Security Benefits of the child. The DSHS could obtain the Social Security benefits of a child in foster care by applying to become the representative payee.

DSHS provided the current maintenance for a child in foster care by paying the foster parent a fixed amount. Special expenditures (such as computers, summer camps, etc.) were also authorized by DSHS. If the maintenance for a child could not be covered solely by that child's Social Security benefits, the payment would be supplemented by other funds.

Children who did not receive similar Social Security benefits, or whose benefits went to another payee, were still eligible for and received state-supported foster care. They also received funding for special expenditures, if the money was available in the budget.

In this case, a DSHS employee tried to remove Keffeler's grandmother and guardian removed as representative payee. Keffeler's case eventually became a class action suit, though the DSHS asserted this was the only time such an action was taken.

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The gravamen of the class action is that DSHS's actions violate the antialienation provision of 42 U.S.C. 407(a) where DSHS, as representative payee, uses a foster child's Social Security benefits to reimburse the state for the costs of foster care. The class also presents several constitutional causes of action. First, the class alleges DSHS has acted irrationally, invidiously, and arbitrarily and capriciously in violation of 42 U.S.C. 1983. Second, the class alleges DSHS's actions violate the due process clauses of the Washington Constitution and the Fourteenth Amendment. Third, the class alleges the state discriminates against the class members 'by subjecting them to a lower standard of living than children who are not so situated.' Finally, the class alleges the state 'maliciously, recklessly and wantonly is invading federally protected funds for its own improper advantage, to the detriment of Plaintiff and all other foster children's financial and emotional well-being.' CP at 13-14.

In its prayer for relief, the class seeks (i) a permanent injunction enjoining DSHS from using Social Security payments to offset the cost of foster care; (ii) reimbursement to class members of all Social Security payments used by DSHS for reimbursement; and (iii) an award of attorney's fees.

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The trial court held DSHS's use of Social Security benefits to reimburse the cost of foster care violates 42 U.S.C. 407(a), and DSHS violates procedural due process by failing to provide notice, beyond that required by federal law and regulation, of the 'intended result' of the appointment of DSHS as representative payee. The trial court did not address the class' remaining constitutional arguments, nor did it specifically conclude DSHS was liable for civil rights violations under 42 U.S.C. 1983.

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ANALYSIS

A. DSHS's actions as representative payee violated 42 U.S.C. 407(a).

Simply put, if DSHS is appointed representative payee for a foster child it will confiscate the child's SSI money to benefit the state. However, if anyone else
is appointed, the state will bear the cost of foster care, and the child's SSI will be available to benefit the child in addition to the state-funded foster care program. The issue is whether this confiscation violates federal law. For the reasons which follow we believe it does.

DSHS admits it would probably not even apply to be a representative payee if it could not rely on the child's SSI benefits to reimburse the cost of care. By the same token, DSHS admittedly cannot actively seek reimbursement from benefits paid to private representative payees because Congress specifically protects Social Security benefits from transfer, assignment, execution, levy, attachment, garnishment, or other legal process under 42 U.S.C. 407(a). Thus, DSHS receives reimbursement for foster care only if it serves as a representative payee, and it only serves as representative payee so it can confiscate the child's money.

This scheme stands in stark contrast to 20 C.F.R. 404.2021 which expressly provides, 'Our primary concern is to select the payee who will best serve the beneficiary's interest.' (Emphasis added.) Obviously the child is better off with any payee other than the state because DSHS must provide foster care under state law regardless of whether it receives a reimbursement. DSHS's self-prioritization is extremely disquieting in the face of a regulatory mandate that we consider these disenfranchised children before enriching government coffers.

1. DSHS as a creditor

Whether DSHS acts as a creditor when it reimburses itself for foster care costs out of the foster children's Social Security Administration (SSA) entitlements is the crucial question. If DSHS's reimbursement scheme is that of a creditor, the antiattachment provisions of 407(a) apply and DSHS's cost recovery policy runs afoul of a federal statute which preempts state law under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, cl. 2.

[The court examined the rulings in a series of related cases. The Supreme Court said a state's efforts to obtain reimbursement from a welfare recipient by taking his Social Security disability benefit was barred by 407. Philpott v Essex County Welfare Board, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973). Nor could a state reimburse itself for incarcerating inmates from the inmates' Social Security benefits. Benett v Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988). The Ninth Circuit held that states could not reimburse themselves by taking Social Security benefits from mental health patients committed to state hospitals. Brinkman v Rahm, 878 F.2d 263 (9th Cir. 1989); Crawford v Gould, 56 F.3d 1162 (9th Cir. 1995).]

These cases evince an expansive interpretation of the protections of 407. The thrust of the case law is that Social Security benefits are, for all intents and purposes, beyond the reach of the state, however clever or subtle its attempt to seize them. Philpott and the cases in its

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1 [Some footnotes have been omitted; the remaining footnotes have been renumbered - Ed.] The federal code provides, in pertinent part, The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.42 U.S.C. 407(a). This section was made applicable to Title XVI benefits by 42 U.S.C. 1383(d)(1).
line, including *Crawford*, are on point and persuasive.

The state claims *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991) justifies DSHS's position, particularly because DSHS acts as a representative payee under 42 U.S.C. 405(j) for the foster children in this case. In *King* the State of Missouri, as representative payee, received SSA benefits due involuntarily committed mental patients and reimbursed itself for the care and maintenance costs expended out of public funds for the patients. The patients argued the state's application to become the patient's representative payee to accept the patients' SSA benefits violated the 'other legal process' provision of 407(a). However the *King* court disagreed, noting the illogic of presuming 407(a) would outlaw a procedure (applying to become representative payee) expressly authorized by 405(j).

* * *

In light of *King* and the fact that DSHS enjoys the status of representative payee (for most) of the foster children under 405(j) and 20 C.F.R. 404.2001(a), the significance of the state's representative payee status requires further discussion.2

The *King* plaintiffs challenged the state's procedure for applying to become representative payee, arguing that procedure (incident to which the state seized the mental health patient's SSA benefits) violated 407(a) as 'other legal process.' However here it is not DSHS's procedure to apply to become the foster children's representative payee that is under attack; rather it is DSHS's practice of reimbursing itself from the foster children's SSA benefits once it becomes representative payee.

The difference is subtle, but the distinction is crucial. There is nothing ipso facto wrong with DSHS applying to become the representative payee for certain foster children, as 405(j) and the SSA's accompanying regulations explicitly contemplate. We may even agree the representative payee application is not 'other legal process.' But it is equally clear the reimbursement process is 'other legal process[.]'

* * *

The state also claims C.G.A., 824 P.2d 1364 supports its position. But C.G.A. only said the state may apply to become a representative payee. C.G.A., 824 P.2d at 1366. The court did not hold the state could reimburse itself but deferred that determination to the Social Security agency under the doctrine of primary jurisdiction. *Id.* at 1370. Like *King*, C.G.A. stands for no more than the uncontested proposition DSHS may apply to become a representative payee.

DSHS reimbursement is barred by 407(a) because despite DSHS's status as representative payee it performs the role of creditor when it takes the foster child's SSA entitlement to reimburse itself for moneys spent on the child.

* * *

Furthermore, the bare logic of reimbursement also implies a creditor-debtor relationship. If the Legislature and DSHS did not hold the costs of foster care were somehow 'owed' back to the taxpayers, it would not claim the right of DSHS to 'reimburse' itself on the taxpayer's behalf.

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2 Apparently DSHS is not the representative payee for Danny Keffeler, the class representative. Keffeler's grandmother apparently remained his representative payee, despite DSHS's zealous efforts to remove her. [... ]
DSHS's representative payee status further undercuts the legality of its reimbursement process because a representative payee is charged under SSA regulation, 20 C.F.R. 404.2035, with the responsibility to '[u]se the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary.' Id. 404.2035(a) (emphasis added). We seriously doubt using the SSA benefits to reimburse the state for its public assistance expenditure is in all cases, or even some, 'in the best interests of the beneficiary.'

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B. The trial court award of attorney fees is not sufficiently specific.

[The court found that neither the parties nor the trial court adequately expressed the grounds for the award of attorney fees to the plaintiff. The award must rest upon statutory or equitable grounds.]

***

CONCLUSION

We therefore hold DSHS violated 407(a) of the Act when acting as the representative payee under 405(j) of the Act by reimbursing itself for foster care payments, contrary to the Supremacy Clause of the United States Constitution. We therefore affirm the trial court's result, remanding for further appropriate proceedings consistent with this opinion. The class shall recover its statutory costs on appeal without prejudice to a further award of reasonable attorney fees to be determined on remand.

ALEXANDER, C.J., and SMITH, JOHNSON, and MADSEN, JJ., concur.

BRIDGE, Justice, concurring in part, dissenting in part:

I agree with the majority that the Washington State Department of Social and Health Services (DSHS) impermissibly used social security funds to reimburse itself for past due foster care payments. However, the majority goes too far in concluding that any use of social security funds by DSHS violates the antiattachment rule. Under a fair reading of the controlling federal statute and regulatory authority, DSHS is entitled to use the funds to pay for current maintenance costs, provided that any special needs of the children are satisfied first.

[The dissent argued that federal law allowed DSHS to become custodian as long as it was not compensated out of the funds in question. State law similarly allowed DSHS only to spend the fund on the personal needs of the child or to reimburse the state for funds spent on the child.

The mere fact that DSHS may have been a creditor would not prevent it being named as a representative payee. The decision of the Social Security Administration that the DSHS acceptable to serve as representative payee should have been controlling. The issue revolved instead around the conflict between the role of DSHS as creditor and as representative payee.]

***

Specifically, a representative payee has a responsibility to '[u]se the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary.' 20 C.F.R.
Current maintenance, including the cost of food, shelter, clothing, medical care, and personal comfort items, is deemed to be for the use and benefit of the beneficiary. 20 C.F.R. 416.640(a).

**

[The four cases cited by the majority to argue that the DSHS may not use the funds for current maintenance] are readily distinguished from the DSHS practice at issue here. Critically, none of the cited federal cases involve the expenditure of social security benefits by a state that was designated as a representative payee. In fact, the class certified in *Brinkman* specifically excluded patients for whom the state served as representative payee. *Brinkman*, 878 F.2d at 264. As explained above, under federal regulations a representative payee has considerable authority to spend the funds entrusted to its control, provided the expenditures are for the best interests of the beneficiary. 20 C.F.R. 416.635(a).

Thus, the issue as I see it is not whether DSHS may spend the funds for current maintenance, provided it gives priority to special needs of the foster children, but whether it may use those funds to reimburse itself for past maintenance or for its own administrative services, such as mileage reimbursements for social workers. The fact that DSHS in the context of reimbursing itself for past care of the beneficiary puts its need for reimbursement ahead of the needs of the foster children further demonstrates the fundamental conflict between its roles as representative payee and creditor.

**

DSHS receives the payments not on its own behalf, but on behalf of the beneficiaries, and is not permitted to assign pending (i.e., future) payments to the reimbursement of its expenditures on behalf of the foster children. Where an agency puts reimbursement to itself ahead of the best interests of the child, ignoring the policy expressed in the federal regulations to prioritize the child's special needs, it effectively transfers the payments to its own use. This transfer from the state in its role as representative payee to the state in its role as guardian of the public purse is contrary to 407(a). Where the agency pursues that policy to the extent of double reimbursement, the conflict of interest is egregious.

To the extent that RCW 74.20A.010 encourages the state to 'sweep' a child's benefits into the treasury to repay past-due foster care, I agree with the majority that the statute is incompatible with 405(j), which forbids any 'substantial conflict of interest' between the payee. **

* It is also incompatible with 407(a), which prevents transfer of the benefits. Under the Supremacy Clause of the United States Constitution, federal law takes precedence. Thus, any use of social security funds for purposes other than current care and maintenance is unlawful, as is giving priority to maintenance over the children's special needs.

Remedies

**

I would remand this matter to the trial court with directions to modify the injunction to prevent DSHS from using social security payments to reimburse the costs of past due foster care or other expenses not directly related to current maintenance, and to require DSHS give special needs a higher priority than current maintenance.
Dan Keffeler graduates from college next week.

He survived the tragic death of his mother, forced separation from his brothers and sister, and at least seven foster homes before becoming a student-athlete at Central Washington University.

"My whole life has taught me to survive," said Keffeler, 23. "I'm good at it. Sometimes I had to be real good at it."

Aside from a good brain and a tough will to live, Keffeler became a foster care success story, his lawyers say, because he had a little extra financial help from his late mother's Social Security payments.

The U.S. Supreme Court on Tuesday accepted for review a class-action suit on behalf of Keffeler and 1,500 other foster children who get Social Security payments, either as orphans or for a disability.

Unlike Keffeler, few of those 1,500 foster children see those Social Security checks, which range in size from $250 to $545 per month.

Most of those payments, a total of $7 million per year are taken by Washington's Department of Social and Health Services, to reimburse itself for foster care.

Keffeler's lawyers say that practice robs foster children of extra help, stripping them of savings that could be used to go to college.

The Washington State Supreme Court ruled in Keffeler's favor last year, prompting an appeal by the state.

State lawyers say taking the payments is a legal way of defraying foster care costs.

Both sides agree the case is about money.

Should the Supreme Court rule for Keffeler, the DSHS would lose $7 million of its $134 million annual budget to provide foster care to 10,000 children.

It also would be forced to repay up to $80 million to children whose payments have been collected for the past 20 years, a potential budget hit that has DSHS sweating.

The Supreme Court's decision, expected by next June, could have wider consequences.

Every state in the nation has some way of collecting those payments; 26 states and several large child welfare groups have filed "friend of the court" briefs supporting the DSHS.
Florida officials estimated the cost of repaying Social Security at several hundred million dollars.

Social Security payments to children, Washington officials say, are intended to provide food and shelter, so collecting the payments is justified.

"We do spend money on the special needs of these children," said Tammi Erickson, a DSHS official who oversees the Social Security payments.

"It's both fiscally prudent—we tap as many of the federal funding sources as we can—but it's also a good thing for the children."

But Kefferler's lawyers, Richard Price and Rodney Reinhold, say taking Social Security payments from children is little more than stealing from society's most vulnerable.

"This practice is simply a way for the state to balance its budget," Price said. "We're lightening our tax burden with kids who have the least."

Although the Social Security payments are intended to provide "extra items" for "special needs," a 1998 federal audit found that fewer than 5 percent of children getting the payments received any extra help.

One girl, receiving Social Security for both a parent's death and a disability, got $49,597 while in foster care, yet no money was spent to provide her with special help, according to the audit.

The DSHS doesn't have guidelines about how the money should be spent, Price said. Nor does it tell foster children getting Social Security they're eligible for "extra items."

If children or their caseworkers knew of that eligibility, they'd likely be tapping the Social Security payments, Reinhold said.

"The only thing that keeps this program going is ignorance," he said.

There are conflicting federal rules regarding Social Security payments to children in foster care, said Bill Collins, a senior assistant attorney general working on the case.

One law allows the appointment of a payee, to disburse Social Security payments to cover a child's living costs. The DSHS routinely steps in to have itself appointed as payee.

The second bars those payments from being garnisheed. That law is intended to shield children from having to pay their parents' debts, Collins said.

Kefferler's grandmother, Wanda Pierce, saw it differently. Kefferler's mother, a laborer at an Omak mill, died in a car accident in 1990, when her son was 12.

Pierce, unable to care for Kefferler herself, was appointed as guardian to oversee her grandson's Social Security benefits as he entered foster care.

Over the next four years, the DSHS twice tried to get Kefferler's payments, and filed a creditor's claim to recover the money.

Reinhold, a family friend, stepped in. He soon realized the DSHS routinely took Social Security payments, and filed the class-action suit.
Keffeler kept his payments because of the suit, using the money to buy cleats and a Mazda RX-7 to get back and forth from sports practices and work.

The money also paid for college applications, and gave him a nest egg of support while he played linebacker and fullback for Central's football team.

"I'm not saying that every kid is going to turn out great if they get this money," said Keffeler, who is working at a Yakima athletic club. "I do believe the kids with ambition and desire to move on with their lives, it would be a great tool for them."

Reinhold agrees. "If you look at this from the taxpayer's perspective, they'll get way more by Danny graduating from college than collecting these payments."

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Supreme Court to Consider System for Taking Foster Childrens' Benefits

The Associated Press

May 28, 2002

Gina Holland

The Supreme Court said Tuesday it would decide if states can control the federal benefits of orphaned and abused children.

Justices will review Washington state's practice of applying for benefits on behalf of foster children, then using the money to reimburse foster parents for things like food and clothing.

The ruling, likely sometime next year, will have far-reaching implications because every state has a system of collecting Social Security payments on behalf of children in state custody, the court was told.

Justices will look at a technical question involving Washington state's mechanism for inserting themselves as the money collectors for children, then deciding how to use it. But the more basic issue is: Are poor children in state care being shortchanged or helped by the intervention?

The case was brought over benefits of a foster child whose mother was killed in a car crash. As the guardian of his estate, his grandmother, Wanda Pierce, received the benefits and put them in a college fund.

The state sought to get the money, and she filed a class action lawsuit.

One of Pierce's lawyers, Teresa Wynn Roseborough, told the court that the money belongs to the children, not the government, and that states do not always use the cash in youths' best interest.

Roseborough urged the court not to use the Washington system to address the issue, calling it a "muddled mess."

On the other side were two dozen states and a group of children's advocates who want the court to make clear that states can continue the practice.

The case turns on whether the state youth department acts as a creditor, billing children for their care then using the Social Security benefits to pay the bills. Federal law protects Social Security from creditors.

There are more than a half million children in foster care in America, and about 25 percent of those are disabled and may be eligible for Social Security, the court was told.

Groups including the Children's Defense Fund and Catholic Charities told the court that states are "the last line of defense for children in foster care." If states aren't allowed to seek benefits for children "it is likely that no one will," the groups said in a filing.

If the Washington state foster children win, states could be required to pay back the money. In Florida alone, that could be hundreds of millions of dollars, Attorney General Robert A. Butterworth told the
court. Nationwide, it could cost billions, he said in court papers.

In addition to Florida, urging the court to take the case were Alaska, Colorado, Delaware, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wyoming.

Washington State has about 10,000 children in foster care, and about 1,500 of them receive benefits under Social Security either because they are disabled or they are entitled to benefits of their deceased parents.

The state social services agency handles the paperwork for benefits.

The state Supreme Court ruled last year that the system was illegal.

"However worthy cost recovery might be, DSHS cannot violate federal law at the expense of foster children to accomplish it," Washington Supreme Court Justice Richard Sanders wrote for the majority in the 5-3 ruling.

Pierce's dispute with the state dates back to 1990. The state never took over the benefits for her grandson, Danny Keffeler, and he went on to attend college with the money she saved.

The case is Washington State Department of Social and Health Services v. Guardianship of Danny Keffeler, 01-1420.

In finding the Maine prescription drug statute constitutional, the court held that the state act did not preempt the federal Medicaid program because plaintiff did not show that Medicaid recipients would be harmed by the price regulation of prescription drugs. Also, the court concluded that the regulation did not violate the Commerce Clause because it did not have an extraterritorial reach, it was not discriminatory, and it did not excessively burden interstate commerce through regulation of a legitimate state interest.

Question Presented: Whether a Maine statute providing for affordable prescription drugs (1) is preempted by the Supremacy Clause and federal Medicare laws or (2) violates the dormant Commerce Clause by reaching beyond the state, discriminating against interstate commerce or incidentally affecting interstate commerce?

BOWNES, Senior Circuit Judge.

In this case, we consider whether a Maine statute providing for affordable prescription drugs can survive facial constitutional challenges. On October 26, 2000, the district court issued a preliminary injunction preventing the implementation of the statute on the ground that it is preempted by the Supremacy Clause and violates the dormant Commerce Clause. We reverse.

I. BACKGROUND

On May 11, 2000, the Governor of Maine signed into law an Act to Establish Fairer Pricing for Prescription Drugs, 2000 Me. Legis. Ch. 786 (S.P. 1026) (L.D. 2599) (the "Act"), which establishes the "Maine Rx Program" (the "Program"). The statute was enacted because of the Maine Legislature's concern that many Maine citizens who were not Medicaid recipients could not afford necessary prescription drugs. It is predicated on the economic reality that volume buying of prescription drugs by Medicaid administrators, insurance companies and health maintenance organizations ("HMOs") resulted in substantially lower prices for these entities than for individual purchasers. A minority staff report for the United States House Committee on Government Reform and Oversight found that the average retail price for
individual elderly purchasers was 86 percent higher than the price charged to the federal government and other favored customers, such as HMOs.

The Program is open to all State residents, and allows enrollees to purchase prescription drugs from participating Maine pharmacies at a discounted price. The discount offered by the pharmacies is reimbursed by the State out of a dedicated fund created with the money raised from "rebate payments" collected from participating drug manufacturers. Me. Rev. Stat. Ann. tit. 22, § 2681. The obligation to pay the "rebate" is triggered by the retail sale of the manufacturer's drugs to a Program enrollee through a participating pharmacy.

The Act directs the Commissioner of Maine's Department of Health Services to negotiate rebate agreements with manufacturers... and to use his or her "best efforts" to obtain an initial rebate in the same amount [as the rebate amount calculated under the federal Medicaid Rebate Program.] Me. Rev. Stat. Ann. tit. 22, § 2681(4)(A)-(C) [...]

In order to create an incentive for manufacturers to enter rebate agreements with the Commissioner, the Act provides that names of manufacturers who do not enter into agreements be released to health care providers and the public. Id. § 2681(7). More importantly, the drugs of all noncompliant manufacturers are required to be subject, "as permitted by law," to the "prior authorization requirements" in the State Medicaid program. Id. § 2681(7). When subjected to prior authorization, a drug may not be dispensed to a Medicaid beneficiary without the approval of the State Medicaid administrator.

The plaintiff-appellee, Pharmaceutical Research & Manufacturers of America ("PhRMA"), brought an action in the United States District Court in the District of Maine against defendant-appellants Commissioner of the Maine Department of Human Services and the Maine Attorney General, challenging the constitutionality of the Act. PhRMA claimed that the Act violated the dormant Commerce Clause and was preempted by the federal Medicaid statute under the Supremacy Clause, and moved for a preliminary injunction to prevent the implementation of the Act.

The district court issued the preliminary injunction and found the Act unconstitutional on the two asserted grounds. First, the district court held that the Act had an impermissible extraterritorial reach by regulating the revenues out-of-state pharmaceutical manufacturers receive when selling to out-of-state pharmaceutical distributors, thereby violating the dormant Commerce Clause. As to those distributors located in the State of Maine, the district court held that the Act was preempted under the Supremacy Clause because it conflicted with the federal Medicaid program.

II. DISCUSSION

A. Standard of Review

"The criteria for the grant of a preliminary injunction are the familiar four: likelihood of success, risk of irreparable harm, the balance of equities and the public interest." [citations omitted.]

The district court concluded that PhRMA's likelihood of success on the merits of most of its constitutional challenges was "overwhelming." Accordingly, it dealt only cursorily with the remaining preliminary injunction
factors. Our review also focuses on PhRMA's likelihood of success on the merits of its challenges under the Supremacy Clause and the Commerce Clause. See Weaver v. Henderson, 984 F.2d 11, 12 (1st Cir. 1993) (stating that the "sine qua non" of preliminary injunction analysis is whether plaintiff is likely to succeed on merits of claim).

B. Standing

The initial question we face is whether PhRMA has prudential standing to challenge the prior authorization provision of the Act. PhRMA contends that Maine's standing argument was not briefed to the district court, and therefore was waived. We assume, without deciding, that Maine may assert this standing challenge on appeal, and hold that PhRMA falls within the relevant "zone of interest." PhRMA has not asserted an action to enforce rights under the Medicaid statute, however, but rather a preemption-based challenge under the Supremacy Clause. In this type of action, it is the interests protected by the Supremacy Clause, not by the preempting statute, that are at issue. St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands, 218 F.3d 232, 241 (3d Cir. 2000)...

Thus, regardless of whether the Medicaid statute's relevant provisions were designed to benefit PhRMA, PhRMA can invoke the statute's preemptive force. Cf. Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997) (concluding that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate federal law).

Given that PhRMA has prudential standing grounded in the Supremacy Clause, we think it may fairly assert the rights of Medicaid recipients for purposes of this action. Where a party has established a concrete injury in fact, and otherwise has standing to challenge the lawfulness of the statute, it is "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [its] constitutional challenge fail and the statute [] remain in force." [Citations omitted.]

C. Preemption

Having decided that PhRMA has standing to challenge the Maine Act on preemption grounds, we now turn to the merits of that argument. The district court addressed preemption only with regard to the Act's regulation of sales to in-state distributors, after concluding that such regulation would not be barred by the Commerce Clause. It held that the prior authorization review requirement of the Act, Me. Rev. Stat. Ann. tit. 22, § 2681(7), conflicted with the purposes of the Medicaid program such that the requirement was invalid under the Supremacy Clause. If we affirm the district court's preemption holding, it would invalidate the Act as to all distributors, not just those who operate in Maine, and would obviate the need to address the Commerce Clause. Therefore, we analyze the issue of preemption first.¹

¹ An amicus curiae brief offers another basis for federal preemption: Edwin D. Schindler, Major Stockholder and Patent Attorney, argues that the Maine Act is preempted by federal patent law. Because these issues were raised for the first time on appeal by an amicus, not by a party, we do not consider them. Am. Fed'n of Gov't Employees, Local 3936 v. Fed. Labor Relations Auth., 239
Under the Supremacy Clause, a federal law may expressly or impliedly preempt state law. U.S. Const. art. VI, cl. 2 (stating that federal law "shall be the supreme law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). As the parties agree, only "implied conflict preemption" is at issue here...

* * *

To determine whether the state regulation is consistent with the federal statute, we examine the "structure and purpose of the [federal] statute as a whole." Gade, 505 U.S. at 98. The primary purpose of Medicaid is to enable states to provide medical services to those whose "income and resources are insufficient to meet the costs of necessary medical services . . . ." 42 U.S.C. § 1396 (2000). Congress expressly intended that the provision of medical services be administered by the state "in a manner consistent with simplicity of administration and the best interests of the recipients." Id. § 1396a(a)(19).

We perceive no conflict between the Maine Act and Medicaid's structure and purpose...

Moreover, as set forth in the affidavit of Kevin Concannon, Commissioner of the Maine Department of Human Services, Maine has proposed administrative rules governing prior authorization aimed at ensuring that Medicaid recipients will have access to needed medications...

* * *

PhRMA contends that prior authorization, however implemented, necessarily interferes with the delivery of Medicaid services by placing an administrative burden on physicians and patients...

This argument is unpersuasive. First, we are not convinced that the Medicaid statute is concerned with the motivation behind imposing prior authorization, as long as the 24-hour response and the 72-hour drug-supply requirements, 42 U.S.C. § 1396r-8(d)(5), are satisfied...

Moreover, even assuming that this inquiry into the underlying objectives of the Act is appropriate, we disagree that the Act serves no purpose related to Medicaid. The purposes of the Medicaid statute, read broadly, are consonant with the purposes of the Maine Rx Program. First, the Maine Rx Program furthers Medicaid's aim of providing medical services to those whose "income and resources are insufficient to meet the costs of necessary medical services," 42 U.S.C. § 1396, even if the individuals covered by the Maine Rx Program are not poor enough to qualify for Medicaid. Second, there is some evidence in the record that by making prescription drugs more accessible to the uninsured, Maine may reduce Medicaid expenditures...

Thus, we disagree with the district court's statement that "If Maine can use its authority over Medicaid authorization to leverage drug manufacturer rebates for the benefit of uninsured citizens, then it can just as easily put the rebates into a state program for highway and bridge construction or school funding." Neither highway construction nor school funding relate in any way to the purposes of providing medical services to the needy, see 42 U.S.C. § 1396, or of cost-effective
administration of the Medicaid program, see id. § 1396a(a)(30)(A) (state plans must assure that payments are consistent with, inter alia, efficiency and economy).

PhRMA further contends that the Maine Rx Program will necessarily harm Medicaid recipients by impeding access to their doctors' first-choice medications...

Because this is a facial challenge to a statute, PhRMA has a difficult burden of showing that Medicaid recipients will be harmed by the Maine Rx Program. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)...

* * *

Since both sides agree that the prior authorization requirement is the "hammer" or "force" that coerces manufacturers to enter into the Program, the possibility that first-choice drugs will not be readily approved where second-choice inferior alternatives exist concerns us. The possibility that the administrative implications of the prior authorization requirement will affect the quality of medical care for Medicaid recipients in more subtle ways, i.e. through inconveniencing prescribing physicians, also concerns us. Dr. Howell's affidavit, however, is controverted by the affidavits of other qualified individuals. We simply cannot say on this record that the Act conflicts with Medicaid's requirement that state Medicaid plans assure that care will be provided in a manner consistent with the recipients' best interests. 42 U.S.C. § 1396a(a)(19).

This decision is without prejudice to PhRMA's right to renew its preemption challenge after implementation of the Act, should there be evidence that Medicaid recipients are harmed by the prior authorization requirement "as applied." [Citations omitted.]

D. Dormant Commerce Clause

Holding that the Maine Act is not preempted by the Medicaid statute, we next consider whether it violates the dormant Commerce Clause. The Constitution provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. Const. art. I, § 8, cl. 3. The constitutional provision affirmatively granting Congress the authority to legislate in the area of interstate commerce "has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted. . . .'" [Citations omitted.] This negative command, known as the dormant Commerce Clause, prohibits states from acting in a manner that burdens the flow of interstate commerce. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179-80, 131 L. Ed. 2d 261, 115 S. Ct. 1331 (1995); Healy v. Beer Inst., 491 U.S. 324, 326 n.1, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989).

The restriction imposed on states by the dormant Commerce Clause is not absolute, and "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." Maine v. Taylor, 477 U.S. 131, 138, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986) (internal quotation marks omitted). The prohibitions imposed upon state
regulation by the dormant Commerce Clause have fallen into several identifiable categories. To determine whether a statute violates the dormant Commerce Clause, we apply one of several levels of analysis, depending on the effect and reach of the legislation.

First, a state statute is a per se violation of the Commerce Clause when it has an "extraterritorial reach." Healy, 491 U.S. at 336. "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." Id...

Second, if a state statute discriminates against interstate commerce, we apply strict scrutiny. It will be scrutinized under a "virtually per se invalid rule," which means that the statute will be invalid unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or., 511 U.S. 93, 100-01, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994) (alteration and internal quotation marks omitted)...

Third, a lower standard of scrutiny is applied when the state statute regulates evenhandedly and has only incidental effects on interstate commerce. In this situation, a balancing test is applied. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)...

PhRMA contends that the Maine Act is an impermissible exercise in extraterritorial regulation and, therefore, is per se violative of the dormant Commerce Clause. It argues that the Act necessarily regulates the transaction that occurs between the manufacturer and the distributor outside the borders of Maine.

* * *

Maine [] argues that the Act evenhandedly regulates in-state conduct that only has an incidental effect on interstate commerce. Maine contends that we should apply the lower level of scrutiny, use the Pike balancing test, and find that the local benefits of the Maine Rx Program outweigh the incidental burden on interstate commerce.

The Maine Act represents a novel legislative approach to one of the serious problems of our time, one that resists easy analysis. We address each of the potentially applicable dormant Commerce Clause prohibitions to determine the appropriate analysis and level of scrutiny.

1. Per Se Invalidity: Extraterritorial Reach

A state may not pass laws that have the "practical effect of regulating commerce occurring wholly outside that State's borders . . ." Healy, 491 U.S. at 332. When evaluating the practical effect of the statute, the court should consider the statute itself, and "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." Id. at 336.

PhRMA relies on three cases to support its argument that the Maine Act is per se invalid because it regulates conduct beyond the borders of Maine. The cases cited, however, are inapposite to the facial construction of the Maine Act. PhRMA construes these cases as standing for the proposition that, "a state may not dictate the terms on which buyers and sellers do
business outside of the state." See, e.g., Healy, 491 U.S. at 338; Brown-Forman, 476 U.S. at 583-84. This is partially correct but does not reflect the entire picture. The cases on which PhRMA relies, however, involve price control, price affirmation or price tying schemes. See Healy, 491 U.S. at 326; Brown-Forman, 476 U.S. at 575-76; Baldwin v. G.A.F. Seelig, 294 U.S. 511, 519, 79 L. Ed. 1032, 55 S. Ct. 497 (1935) ("Seelig"). The statutes in these cases involved regulating the prices charged in the home state and those charged in other states in order to benefit the buyers and sellers in the home state, resulting in a direct burden on the buyers and sellers in the other states.

***

The Maine Act is different from these statutes. Unlike these price affirmation and price control statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices. There is nothing within the Act that requires the rebate to be a certain amount dependent on the price of prescription drugs in other states. The Act merely says that the Commissioner of the Maine Department of Human Services shall use "best efforts to obtain an initial rebate amount equal to or greater than the rebate calculated under the Medicaid program . . . ." Me. Rev. Stat. Ann. tit. 22, § 2681(4)(B). Furthermore, unlike Brown-Forman and Seelig, the Maine Act does not impose direct controls on a transaction that occurs wholly out-of-state.

PhRMA argues strenuously that the effect of the Act will be to regulate the transaction that occurs between the manufacturer and the wholesaler -- a transaction that occurs entirely out of state. It argues that as a result of the rebate provision, manufacturers will lose a portion of their profits otherwise obtained from distributors. Admittedly, it is possible that the rebate provisions of the statute may decrease the profits of manufacturers. Simply because the manufacturers' profits might be negatively affected by the Maine Act, however, does not necessarily mean that the Maine Act is regulating those profits.

The Act does not regulate the transaction between manufacturers and wholesalers. It provides for a negotiated rebate agreement between "[a] drug manufacturer or labeler that sells prescription drugs in [Maine] through the elderly low-cost drug program . . . or any other publicly supported pharmaceutical assistance program . . . ." Me. Rev. Stat. Ann. tit. 22, § 2681(3). The rebate program is voluntary and either the manufacturer or the State may withdraw at any time with sixty days' notice. The Act directs the commissioner to "use the commissioner's best efforts" to negotiate the amount of the rebate required from the manufacturer. Id. § 2681(4)(B). We note that the commissioner's "best efforts" may become coercive or otherwise inappropriate, but we cannot say so on this facial challenge...

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2. Strict Level of Scrutiny: Discriminatory Statute

A statute enacted for a discriminatory purpose is subject to strict scrutiny. See Bacchus Imports, Ltd., 468 U.S. at 270. Under this strict scrutiny analysis, a statute violates the Commerce Clause unless the state can show that the statute serves a legitimate local purpose that is unrelated
to economic protectionism and that the same purpose could not be achieved by nondiscriminatory means. Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979). PhRMA does not contend, nor did the district court find, that the Maine Act discriminates on its face or in its effects. Therefore, we need not discuss it further.

3. Low Level of Scrutiny: Pike Balancing Test

When a state statute regulates evenhandedly and has only incidental effects on interstate commerce, that statute will be upheld unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142.

***

The Maine Act is neither an impermissible extraterritorial reach nor is it discriminatory; rather, it regulates evenhandedly and only has incidental effects on interstate commerce. Therefore, we apply this lower level of scrutiny, known as the Pike balancing test.

The district court found the Maine Act to be per se invalid, and therefore never determined whether it survives the Pike balancing test...

Applying the Pike balancing test to the Maine Act, we consider: (1) the nature of the putative local benefits advanced by the statute; (2) the burden the statute places on interstate commerce; and (3) whether the burden is "clearly excessive" as compared to the putative local benefits. See Pike, 397 U.S. at 142.

Arguably, the only burden imposed on interstate commerce by the Maine Act is its possible effects on the profits of the individual manufacturers. As the Third Circuit stated, however, "the fact that a law may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." Instructional Sys., 35 F.3d at 827 (quoting Ford Motor Co. v. Ins. Comm'r, 874 F.2d 926, 943 (3d Cir. 1989))...

We next consider the local benefits of the Act, which we find to be substantial. The Maine Rx Program will potentially provide prescription drugs to Maine citizens who could not otherwise afford them. The Maine Legislature has decided that without the Maine Rx Program, needy Maine citizens will continue to be deprived of necessary medical care because of rising prescription drug costs. When measuring manufacturers' possible loss of profits against the increased access to prescription drugs for Maine citizens, the local benefits appear to outweigh the burden on interstate commerce. At the very least, the burden on interstate commerce is not "clearly excessive" as compared to the local benefits.

It is necessary to recognize the difficulty in foreseeing what events actually will occur from the enforcement of this Act, which admittedly makes the Pike balancing test more challenging to apply. We are forced to balance the possible effects, instead of the actual effects of the statute in action. For now, it is enough to say that the Act survives the facial challenge under the dormant Commerce Clause.

E. Remaining Preliminary Injunction Factors

Having concluded that PhRMA is not likely to succeed on the merits of its constitutional challenges, we need not delve into the three remaining preliminary
injunction factors (risk of irreparable harm, the balance of equities and the public interest)...

III. CONCLUSION

In this facial challenge, we perceive no conflict between the Maine Act and the Medicaid statute that would result in federal preemption. The Act sets forth prior authorization procedures that are consistent with those explicitly permitted by Medicaid. PhRMA has not established at this point that the administrative burden imposed by prior authorization will likely harm Medicaid recipients. In the absence of such evidence, we cannot conclude that the Act violates the Supremacy Clause.

Nor does the Act offend the dormant Commerce Clause. It is not an extraterritorial regulation on interstate commerce because it does not regulate conduct occurring outside the state, but only regulates in-state activities. Moreover, from a facial standpoint, the local benefits of the Act appear to outweigh any incidental burden on interstate commerce. For the reasons stated, the Maine Act survives the facial dormant Commerce Clause challenge.

This is a close case but we do not think that, under the applicable law, the State of Maine should be prohibited from putting the Act into play...

The decision of the district court is REVERSED and the temporary injunction is VACATED.

Concurring Opinion omitted
High Court to Rule on Maine Curbs on Drug Cost

*The Boston Globe*

June 29, 2002

Lyle Denniston

The Supreme Court agreed yesterday to rule on the legality of the Maine RX Program, a case that presents a significant test of states' power to drive down prescription drug prices.

The justices, hinting that they have set a priority on settling key questions of state authority to control the escalating cost of medicines, brushed aside a suggestion by the Bush administration that it was premature for the court to get involved.

The fate of Maine's program is of wide interest, with 27 other states considering adopting a similar approach to cutting drug costs, especially for elderly and low-income patients. A number of states are considering other methods of reducing drug costs, including filing lawsuits against pharmaceutical companies to challenge their pricing practices. High prescription prices have become a major political issue in Maine and Massachusetts this year. In Maine, the Democratic challenger for the US Senate is Chellie Pingree, who helped develop the Maine RX Program and is making prescription drug insurance coverage a key issue in her campaign against Senator Susan Collins, a Republican incumbent. In Massachusetts, Democratic gubernatorial candidate Steven Grossman is pressing for the state to adopt a program similar to Maine's.

Drug manufacturers have been fighting Maine RX since it was adopted in 2000. The program has never gone into effect because court orders have delayed implementation while drug companies pursue a court challenge based on federal law and the interstate commerce clause of the Constitution.

"This is a case that has national significance, with other states watching and waiting," said Attorney General G. Steven Rowe of Maine. He said that while Maine officials had hoped that the court would pass up the case and allow Maine RX to go into effect, "we look forward to the court agreeing that this is constitutional."

Maine RX potentially would affect about 325,000 people who do not have insurance coverage for drugs, out of Maine's overall population of about 1.25 million. There is no income or age limit on who would get benefits. About 225,000 of those 325,000 people are eligible to participate in another drug price discount program that Maine has been operating for the past year, with federal approval.

Kevin Concannon, Maine's human services commissioner, said the alternative program was prepared when Maine RX was stalled in the courts. It is open to single individuals with incomes no higher than $26,000 and couples with incomes up to $36,000. Discounts are subsidized by state funds.

So far, 114,000 persons have begun obtaining discount drugs under that alternative program, with the discounts averaging between 20 percent and 25 percent, Concannon said. Drug
manufacturers have also challenged the alternative, but the courts have allowed it to continue as the case proceeds.

Under the Maine RX program, drug manufacturers are induced, by means they say are coercive, to subsidize retail price discounts to state residents.

All Maine residents may buy drugs at discounts, with the drugstore reimbursed from a state fund gathered entirely from rebates by the manufacturers. Any company whose drugs are sold at retail in Maine is urged to join the program and provide rebates.

The state publishes the names of drug companies who do not join the program and requires them to get prior approval from state officials before they sell their drugs for use by patients covered by Medicaid, the federal-state program for the poor. The burden of getting prior approvals discourages doctors from prescribing those companies' drugs.

A federal judge struck down Maine RX, saying that it conflicted with federal Medicaid law by providing benefits to people whose incomes exceed 200 percent of the poverty line and violated the Constitution by reaching outside Maine's borders to regulate the business of pharmaceutical companies.

But the US Court of Appeals for the First Circuit, based in Boston, ruled last year that the law violates neither federal law nor the Constitution, although the court left open the possibility that drug makers could return to court with new challenges after the law goes into operation.

The appeals court said the Maine law "represents a novel legislative approach to one of the serious problems of our time, one that resists easy analysis."

The Pharmaceutical Research & Manufacturers of America, a trade group, appealed the ruling to the Supreme Court, where the case has been pending for 11 months. The justices delayed action until they could receive the advice of the Bush administration on whether to hear the case. Last month, the administration suggested that the court bypass the case.

Justice Department lawyers told the court that the legal dispute was still in a preliminary stage and that officials at the Department of Health and Human Services were monitoring state programs to push drug prices lower to see whether they conform with Medicaid regulations.

The federal lawyers said the department "should be permitted to use the existing administrative process to develop principled distinctions" between what states may do to attack high drug prices and what they may not do without violating federal law.

The federal government, the lawyers said, "is exploring several avenues for making prescription drugs more available to low-income individuals, including seniors, who are not Medicaid-eligible."

But the Supreme Court took its first opportunity to act on the case after receiving the Justice Department's advice, voting to hear the drug companies' appeal. The case will come up for a hearing next winter and is likely to be decided by early next summer.

In their appeal, the drug manufacturers told the court that 27 states are considering model legislation that is nearly identical to Maine RX and that more than 40 states are considering price-related drug legislation.
"Expanded access to prescription drugs is at the top of the national policy agenda, and the political and media debates fuel state initiatives," the companies said.

But, they contended, "the states may not in the meantime balkanize the national economy by regulating manufacturers' sales outside their borders or leverage authority under the Medicaid statute to serve non-Medicaid populations."

The justices agreed to hear that appeal in one of the final orders closing out the court's term. The next term opens Oct. 7.

** * * *

Sue Kirchoff and Susan Milligan of the Globe staff contributed to this report.

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Court Backs Maine Drug Price Curbs; Ruling Would Allow Controls If Pharmaceutical Firms Don't Give Discounts

The Washington Post

May 18, 2001

Ceci Connolly

A federal appeals court has cleared the way for the state of Maine to impose price controls on prescription drugs if pharmaceutical companies refuse to provide a discount for thousands of uninsured residents.

The decision by the 1st U.S. Circuit Court of Appeals in Boston on Wednesday came in a landmark case that could pave the way for other states to experiment with new techniques for curbing escalating drug costs.

"We're waking up a sleeping giant," said Kevin Concannon, commissioner of the Maine Department of Human Services.

Under Maine's law, the state would leverage its buying clout -- $210 million in Medicaid drug purchases -- to negotiate discounted prices for the 325,000 residents who do not have private health insurance and are not covered by Medicaid. If the drugmakers refused, the state could begin imposing price caps in 2003. The effort in Maine is part of a larger trend by states and insurers to put a clamp on the fastest-growing piece of the nation's health care economy. Last year, prescription drug spending rose almost 19 percent, and for most states pharmaceuticals are consuming ever larger portions of their budgets.

"In many states, the cost of prescription drugs exceeds what they spend on hospitals," said Trish Riley, head of the National Academy for State Health Policy.

She described the debate over drug costs as "one of the hottest issues in state legislatures" today.

In Florida, for example, officials said they aim to trim $210 million from the state's Medicaid budget by extracting refunds from the major pharmaceutical companies. California, Wisconsin and New York have drug pricing bills pending, while Maryland is seeking a federal waiver to sell medication to retirees at the lower Medicaid rates, according to the research company StateScape.

"What the decision means is that the court system is looking favorably upon states having the right and ability to control the costs of pharmaceuticals," said Del. Michael E. Busch (D-Anne Arundel), primary author of the Maryland legislation. "This is very good news for states and for those who are looking for a more affordable way to purchase prescription drugs."

Arguing that Maine's program was unconstitutional, the pharmaceutical industry and its allies warned that moving toward price caps would make access to the highest-quality drugs more difficult and hinder future drug development. A lawyer for Pharmaceutical Research and Manufacturers of America, which brought the initial suit, said the trade group is considering further appeals.

The Maine law, enacted nearly a year ago, was born out of concern for poor senior
citizens who trekked over the border to Canada to buy their medications, said Concannon.

Participation in the Maine Rx program would be voluntary. After filling out a one-page application, participants would receive a card entitling them to discounts of between 10 percent and 30 percent, he said. Pharmacies would be reimbursed by the state for those discounts.

In support of the pharmaceutical industry, lawyers for the Washington Legal Foundation said the case was similar to current skirmishes in the music industry over patent rights.

"Coming up with a product, whether it be a new drug or a hit song, takes a huge investment," said the chief counsel Richard Samp. "When you consider that the average drug costs $500 million to bring to market, you need to allow the pricing to include the cost of development, not only of that drug but the many that don't make it to market."

Opponents argued the Maine legislation violated laws regulating interstate commerce.

"If Maine can lower prices for its consumers, other states may want to do the same thing for their consumers," said Samp, who supported the drug industry suit. "But that's the problem. You can't protect your state citizens to the detriment of other states' citizens. The issue of pharmaceutical prices needs to be addressed on a national level."

But the three-judge panel, in its 75-page ruling, praised Maine for tackling a vexing problem in a creative way.

"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," the opinion concludes, quoting Justice Louis Brandeis.

Last month, the Maryland General Assembly approved a prescription drug plan that requires state health officials to ask federal authorities to allow the state to sell drugs to Medicare recipients at the discounted price now available only to those who receive Medicaid.

Under the plan, the state would provide an additional subsidy for seniors who make less than 175 percent of the federal poverty level, reducing the cost of a $110 prescription, for example, to about $65.

Christine Gerhardt, director of the Maryland health department's Beneficiary Services Administration, said yesterday's ruling "is good news for us and for our clients," and could improve the chances that Maryland's request will be approved.

Staff writer Lori Montgomery contributed to this report.

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The Election and Why It Counts,
A Special Report: Prescriptions Drugs, More to Issue than Meets Eye,
Proposals Offer Little for Poor or Uninsured Who Aren’t Elderly

Newsday

October 29, 2000

Christian Murray

SHE TRUDGES ALONG the sidewalk after leaving Walgreens pharmacy wearing a long green cardigan over her pants. In her hand, she holds a bag containing a $90 prescription.

Anita Rosen, a senior citizen from Forest Hills, is paying about $300 a month for six or seven drugs that control, among other things, her high-blood pressure and cholesterol. "Sometimes I skip taking a prescription. I just can't afford it," she said.

Rosen's problem is a serious one-and one shared by 11.5 million Americans who rely solely for their health care coverage on Medicare, which won't pay for most prescriptions. And with the rapidly growing number of seniors nationwide and skyrocketing drug prices, the issue of helping the elderly pay for medications has become a key battleground in the presidential campaign. But little has been mentioned in the national debate about another serious gap in prescription drug coverage: the 44 million Americans under 65 who lack health insurance and the 9 million who don't have drug coverage.

They, too, are bearing the brunt of drug prices, which have risen 60 percent since 1991, from an average of $23.68 to $37.38 per prescription, according to the Kaiser Family Foundation, a Washington-based health research group.

Many of the uninsured are less able to afford prescription drugs than seniors, even though seniors do, on average, take more prescription drugs. About 6.9 million seniors have incomes below 200 percent of the federal poverty rate-about $17,000 for a single person and $22,000 per couple. This compares with nearly 24.6 million uninsured under 65 who fall into the same category, including approximately 8 million children. Although most of these children are eligible for state medical support-since their parents earn less than 200 percent of the poverty level-they have fallen through the cracks.

Like Rosen, Nan Rosenblume, 55, an uninsured woman from Floral Park, has to pay a large amount for her drugs, which include several mood-stabilizing drugs. Her doctor at a nearby clinic provides her with sample packets of drugs such as Zoloft, which goes for about $2 a pill. However, she still has to pay for many other drugs herself, usually out of money she earns from temp jobs.

Rosenblume is not hopeful about any assistance from either the federal or state government. She has already sought Medicaid but was turned away because she earns too much.

So, why is much of the focus on seniors?

"It strictly comes down to the demographics of who votes," said Robert
Blendon, a professor of health policy and political analysis at the Harvard School of Public Health in Cambridge, Mass. The elderly are "concerned and they vote," he said, adding that "the uninsured are not a coherent political force; they are not swing voters."

"People also feel that seniors are their moms and dads," Blendon said. Most people, he added, can't envisage what it is like to be uninsured, so it is not a hot-button issue.

But there are a number of misconceptions about the 44 million Americans under 65 who are uninsured, according to a study by the Kaiser Foundation. A popular view is that the uninsured don't work. Yet three-quarters of the uninsured are in families where at least one person is working full time, and many are low-paid workers, the study showed.

Analysts also say employees who work for small firms or in transient types of jobs are more likely to be uninsured.

Take Adele Zane, a jazz vocalist from Boerum Hill in Brooklyn who has sung in popular places such as Birdland and the Iridium Jazz Club. She has spent much of her musical career supporting herself through temporary jobs, which have, for the most part, failed to provide her with health insurance.

"I come from a nice middle-class family, I'm educated, I have just chosen an artistic path for a career," she said, adding how expensive health insurance is for people who can't get insurance through their work.

At times, Zane said, not having insurance makes her feel like she is on the fringe of society. "I have a friend who once went to a clinic and sat there for hours," she said. "They treated her like garbage."

Zane had health insurance at her last job but was told it would cost $382.75 a month to keep the coverage going. Zane is still unsure whether to get coverage or spend what limited money she has on promoting her music career.

The cost of insurance for an individual ranges between $230 and $400 a month in the New York-Long Island area, said John Kaegi, a senior vice president of marketing for Vytra Health Plans in Melville. For families, it ranges from $500 to $700 per month, he added.

Yet the focus of the public debates and political campaigns has been on seniors. And many seniors are not short of money until they reach 75 years old or older. For instance, the median income for 65- to 69-year-olds in New York City and on Long Island is $33,609, according to data provided by Claritas, a San Diego research firm. The median income for 75- to 79-year-olds drops to $20,519.

Yet both presidential candidates are proposing prescription drug plans that offer substantially more aid to seniors than to the under-65 uninsured.

Vice President Al Gore's proposal offers prescription drug coverage for nearly 40 million seniors on Medicare immediately—no matter their income or wealth. For the prescription drug benefit, seniors would pay a premium of a little more than $20 a month, said Alan Sager, a professor of health services at Boston University School of Public Health.

George W. Bush's plan would provide states with grants to cover low-income seniors over the next four years, and then all seniors would have the choice of being
part of a Medicare that would include a
drug benefit or joining a government-
subsidized private insurance plan, Sager
said. The private insurance plans would
cover not only prescription drugs but all
the medical needs of people over 65, he
added.

Gore plans to fork out $380 billion over
10 years on Medicare-related programs ($
338 billion of which would be on the drug
plan), while Bush would send out $200
billion over the same period ($158 billion
on drugs), according to Kenneth Thorpe,
a professor of health policy at Emory
University in Atlanta. Gore also plans to
put $360 billion in the Medicare fund-to
be used for either Medicare or retiring the
national debt, he added.

In contrast, Gore has slated $157 billion
for the uninsured and Bush $135 billion-
which would focus mainly on expanding
programs-not on prescription drugs,
Thorpe said.

Statistics do show that the older people
are, the more prescriptions they are likely
to need. According to the Kaiser
Foundation, a woman 75 or older needs
11.7 prescriptions (including refills) per
year. A 45- to 54-year-old woman needs
5.6 per year.

While both the Republican and
Democratic Parties are crunching out
numbers on how to provide prescriptions
for the over-65 age group, the carrots
being offered to the uninsured are limited.

Both parties provide some tax relief here
and there for the uninsured and propose
ways of persuading companies to offer
their employees insurance. But such
proposals are nowhere near as
comprehensive as the Medicare
prescription drug benefits.

In fact, some industry observers are
concerned that the Medicare drug
packages could actually hurt the
uninsured. Their argument is that drug
companies would jack up the prices even
higher on the uninsured, to make up for
the lost revenue once seniors signed on to
a government- or HMO-run drug plan.
The government and HMOs are able to
buy drugs in bulk and negotiate lower
drug prices, thereby cutting pharmaceutical
profits.

For example, the low drug prices
negotiated by foreign countries on behalf
of their citizens has contributed to the
higher prices charged in the United States,
said John Freeman of the Center for
Policy Alternatives, a liberal advocacy
group in Washington. For many
medications, uninsured U.S. residents
shell out twice as much as overseas
consumers do.

One state looking to help both seniors
and the uninsured pay for drugs is Maine,
which passed a law in August that will see
the state negotiate drug prices on behalf
of all its residents who don't have drug
coverage.

"We see constituents in coffee shops, and
all of us have heard about working parents
trying to get antibiotics for their child," said Chellie Pingree, the Senate majority
leader who was the driving force behind
the bill. She said Maine wanted to help the
elderly and poor alike.

Currently, over half a million Maine
residents without drug coverage are
shopping one by one and are paying top
dollar. By pooling the purchases on a state
level, Maine sees itself much like an
HMO, Pingree said, which, through its
large customer base, can negotiate drug
prices between 30 percent and 40 percent
off the full market price.
Maine said if drug companies refuse to take part in the negotiations, it will impose price controls based on what other Western countries pay and the lower prices the federal government gets in covering U.S. veterans.

"Our aim is to get 30 percent to 40 percent off the price of prescriptions," Pingree said. So far, other states are expressing interest in similar proposals, she said. Vermont is a strong proponent for such a bill, she said, with Pennsylvania, Minnesota and New York also expressing an interest, she added.

In New York, Sen. John Marchi (R-Staten Island) has introduced a number of bills trying to get the price of prescription drugs down for all. In 1999, he introduced a bill that said pharmaceutical companies could sell their drugs only at the lowest rate in which they are offered the world over.

So far, according to Marchi's counsel, David Jaffe, 17 Republicans in the state Senate, which consists of 61 members, have sponsored it. In the House there is a companion bill that has approximately 40 sponsors. The House has 150 members.

Jaffe said the focus of the federal government on helping just seniors is wrong. "If you look at the income levels around, many seniors are not in the lowest levels of income," he said. "Why should a poor parent of a newborn not have coverage?"

Marchi has also introduced a bulk-purchasing type bill like Maine's.

New York State will be indirectly helping the poor pay for prescription drugs by expanding its health insurance coverage. Under a new program called Family Health Plus which goes into effect Jan. 1, adults with children who make less than 120 percent of the poverty level ($20,460 for a family of four) will now be eligible for health coverage. Adults without children who earn less than $8,350 will also be eligible.

New York State also has announced plans to increase the income levels for seniors who want to join its prescription drug program. Starting in 2001, a senior earning up to $35,000 and a couple making less than $50,000 can join the program.

The Pharmaceutical Research and Manufacturers of America, the Washington-based trade group for the drug companies, is trying to put up a roadblock for Maine-like proposals. The group alleges the state law is violating interstate commerce laws as well as federal Medicaid law.

But Kevin Concannon, commissioner of the Maine Department of Human Services in Augusta, said the state should be able to shake off these claims.

The pharmaceutical group said Maine-type laws that try to control drug prices stifle new developments. The controls lead to a decrease in profits, resulting in less funding for research and development and fewer breakthrough drugs.

Jeff Trewhitt, a spokesman for the group, said the perceived drug price issue "is a Medicare problem," adding that "this is a national problem that needs a national solution."

Staff Writer Robert Fresco contributed to this story.

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