



Statement of U.S. PIRG Consumer Program Director Ed Mierzwinski

From Privacy To Pollution To Predatory Lending, New Threats To Stronger State Consumer and Public Health Protections

March 2005

In January 2001, President-elect George W. Bush told a gathering of governors, “While I believe there’s a role for the federal government, it’s not to impose its will on states and local communities.” But on a growing number of issues, powerful special interests are persuading Congress and the Bush Administration to do just that. When it comes to consumer protection and the environment, the Congress and the Bush Administration no longer follow the conservative states’ rights principle. They talk the talk, but don’t walk the walk.

Instead, they take their lead from powerful corporate interests that seek to impose weak federal laws while simultaneously wiping out the states’ ability to pass stronger standards. Ideally, consumer and environmental advocates believe in a shared federalism—where federal laws and rules provide a base floor of protections, but states can and should do better. States are more nimble. They react more quickly to local conditions. Their legislatures are not subject to the special interest gridlock that Congress faces.

Recently, in the absence of strong action by Congress to protect consumers and the environment, states have rushed to fill the gap Congress has left, in a variety of areas ranging from enacting bills promoting cleaner cars to fighting predatory lenders to passing greater privacy protections. And while federal cops have been asleep at the wheel, state attorneys general and other regulators have stepped in to enforce both federal and state protections against securities fraudsters and others.

States have long been what the great Supreme Court Justice Louis Brandeis called “laboratories” of democracy. States, Brandeis said, can try innovative “social and economic experiments without risk to the rest of the country.” We are here today to tell you of some of those state success stories, and to tell you that all of them are unfairly at risk of federal preemption.

State leadership to protect consumers and the environment has played a critical role. Even when it is not in the thrall of special interests, Congress rarely acts positively to protect consumers or the environment, unless the states act first, or there has been a scandal, that is, a big scandal. Remember, even Enron wasn’t enough to pass corporate reform here in Washington, it took Enron and Worldcom.

We believe the examples we will provide of the success of novel state experiments will help to demonstrate that a marketplace of public policy ideas where there is only one seller, the federal government, is a marketplace that has suffered market failure.

Second, we hope to emulate another famous Brandeis recommendation—“sunlight is the best

disinfectant, and electric light the best policeman.” We hope by exposing the plans of the Bush Administration, the Congress and corporate special interests to greater scrutiny, that more Americans will begin to question the supposed wisdom of Congress and the Bush administration telling state legislatures and state attorneys general – “Sorry, your ideas and leadership are no longer needed.”

We are pleased to be joined by two of the nation’s leading experts on stronger state consumer and environmental protections.

Mike Calhoun is general counsel of the Center for Responsible Lending, in Durham, NC. When predatory lenders started ignoring weak federal lending laws, the Center led the fight to enact better laws in North Carolina and other states. Now, they are leading the fight to protect those laws from federal preemption.

Jennifer Bradley is director of the Federalism Project at Community Rights Counsel, a leading environmental litigation firm and think tank. She is also co-author of its 2004 book, Redefining Federalism.

After they speak, I will speak on privacy, then we will take your questions.

Two years ago, the driving force to enact credit and privacy reforms, including PIRG’s long-sought free credit report on request, wasn’t the identity theft epidemic. No, not at all, Congress had ignored identity theft for years. The real reason Congress passed identity theft legislation known as the FACT Act in 2003 was to achieve the industry goal of permanent preemption of most privacy and credit reporting laws. The bill did include some key consumer protections, but nearly all of them were based on previous state laws. Annual free credit reports? Already law in 7 states. Disclosure of credit scores? Law in California. Right to get records from businesses where an identity thief used your name? Law in 2 states. Limits on the number of digits of a credit card that could be printed on receipts? Law in numerous states.

But the price for those protections was high. Unacceptably high. Congress said no more state laws, ever, except in a few limited areas related to identity theft, because even Congress was afraid it hadn’t solved that problem.

This year, over a dozen states were considering greater identity theft protections, before Choicepoint admitted it had sold information on at least 145,000 consumers nationwide to an identity thief. Let’s be clear—Choicepoint wasn’t hacked. Choicepoint didn’t leave its magnetic tapes at the airport, like Bank of America says it probably did with tapes containing credit card records of U.S. Senators and other government officials. No, Choicepoint sold access to the mother lode of its 19 billion records to bad guys. You or me, if we want to get our own credit reports, are subjected to a third degree. Bad guys do it the easy way—they apply to become customers.

Records containing Social Security Numbers, full identifying information and other keys to your financial identity were included in what Choicepoint sold. And when you get this sort of access to a credit bureau or data broker database, you don’t need to input individual consumer names and look for “hits.” You get full browser capability to scroll and pick and choose.

How did we find out? We found out only because California had anticipated Choicepoint’s

problem after several smaller security breaches had exposed consumer or state employee records to thieves. After consumers in California were notified due to its security breach notification law, state Attorneys General around the country said “Choicepoint, you better help our citizens out, too, or else.”

Now, several states are considering security breach notification laws. Bills have passed at least one house in several states. Numerous states are also considering security freeze laws, which give consumers real control over their credit reports. Four states, California, Texas, Vermont and Louisiana have already passed freeze laws. If you freeze your own report, no one can use it to issue new credit.

But there is a real threat that Congress will pass weak security breach legislation and also preempt state laws. Perhaps it will be similar to a regulation issued this month by the federal bank regulators. That regulation gives discretion to the banks whose sloppy practices result in a security breach to decide whether notification is necessary.

The only way to protect consumers is to pass a security breach law that is so strong that companies will take strong steps to avoid being breached in the first place. If you make the law weak, and you then let the companies that blew it protecting your information decide whether to tell you, what do you think will happen?

We are encouraged that Senator Dianne Feinstein is talking about strengthening her breach bill and that she has eliminated many, but not yet all, of its limits on state authority. We hope Congress will enact a breach law that does not in any way preempt state law. If Congress does a good enough job, the states will not bother passing differing laws. But if Congress does an inadequate job, and also limits the states, it will be hard to get to Congress to respond to the next scandal.

The other part of the response to Choicepoint is to regulate it. Choicepoint and other data brokers collect and sell massive databases of personal information, just like credit bureaus do. But credit bureaus are regulated. Data brokers like Choicepoint have established an unregulated parallel universe where consumers have virtually no rights. That unacceptable regime will end if legislation proposed by Senator Bill Nelson (FL) and Rep. Ed Markey ((MA) becomes law. The Markey-Nelson proposal meets PIRG’s 3-part test. It is based on Fair Information Practices that require strong protections, it gives consumers the right to sue to protect themselves and it preserves state authority to do better.

Another major issue is financial privacy. The Ninth Circuit, U.S. Court of Appeals heard oral argument in the fall and could decide any day on the fate of financial privacy legislation, SB 1 (State Senator Jackie Speier) enacted in California in 2003 and upheld by a lower federal court. The issue before the court is whether the Gramm-Leach-Bliley Financial Services Act of 1999, one of the few recent pro-state financial privacy laws, allows states to apply stronger financial privacy laws to sharing of confidential information among corporate affiliates or only to sharing with third-parties. Every federal banking regulator, and disappointingly, even the Federal Trade Commission, signed a brief supporting the banks’ appeal.

Recently the Federal Trade Commission enacted a national Do-Not-Call list to protect consumer privacy. Where’d they get the idea? 40 state Do-not-call lists. The states are our first responders when rights and protections are at risk.

In conclusion, we hope we have given you some ideas about the ways state laws complement federal policy. As I said earlier, a marketplace of public policy ideas is no different than a marketplace of consumer products—when you have only one seller, you have a monopoly. A monopoly of ideas is a market failure that leads to bad public policy.

Efficient federal public policy is one that is balanced at the point where even though the states have the authority to act, they feel no need to do so. Since we cannot guarantee that we are ever at that optimum, setting federal law as a floor of protection as the default—without also preempting the states—allows us to retain the safety net of competition to guarantee the best public policy.

Thank you and we will take your questions.