

BACKGROUND

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The Energy Efficiency Free Market Act: A Step Toward Real Energy Efficiency

Katie Tubb, Nicolas D. Loris, and Paul J. Larkin, Jr.

Abstract

The federal government mandates energy efficiency of Americans' cars, trucks, appliances, and buildings. Under the 1975 Energy Policy and Conservation Act (EPCA), the Department of Energy now regulates some 60 common appliances, such as ceiling fans, battery chargers, washers and dryers, microwaves, ovens, and refrigerators. Such micromanagement controls and reduces choices for American families and businesses, has little to no environmental impact, benefits the rich at the expense of the poor, and encourages corporate welfare. H.R. 4504, the Energy Efficiency Free Market Act, revokes the Department of Energy's authority to regulate household appliances under the EPCA and leaves in place a measure pre-empting state regulations. While reasonable people can disagree about the role of federal pre-emption to protect freedom, H.R. 4504 takes a good step forward to unwind the federal government's micromanagement of Americans' individual energy decisions.

The federal government has embarked on a troubling regulatory path, with the goal of making energy use and lifestyle choices on behalf of American families and businesses. Since the 1970s, Congress has empowered agencies to micromanage Americans' energy use and override personal preferences through energy-efficiency mandates. With ever-shifting goals to forestall ostensibly imminent resource exhaustion, stimulate economic recovery, or reduce global warming, the regulations are as unnecessary today as they were four decades ago.

More recently, from 2004 to 2014, the Department of Energy (DOE) released 40 energy-efficiency standards and updates for con-

KEY POINTS

- The Energy Efficiency Free Market Act eliminates the DOE's authority to set energy-efficiency standards for consumer and commercial appliances.
- Efficiency mandates reduce choice by prioritizing products that meet the DOE's definition of "efficient." They hinder innovation and encourage corporate welfare for politically preferred products and companies.
- The regulatory costs exceed the benefits. The costs are shouldered by lower-income families to the benefit of upper-income families, given the unrealistic way that the DOE calculates the costs and benefits.
- The free market rewards efficiency. Entrepreneurs, technological advancements, and consumer demand for efficiency have led Americans to nearly 60 percent more energy efficiency over the past half century, long before federal regulations were in place.
- Congress should build on H.R. 4504 to eliminate all mandatory efficiency regulations and subsidies and allow states to experiment with efficiency regulations during a 10-year window.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3144>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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sumer and commercial appliances alone.¹ The DOE's scope is only expanding: It forecast progress on 25 pending energy-efficiency rules through 2016.² Ultimately, these energy-efficiency regulations reduce choices, and often increase upfront costs, in return for dubious savings.

The Energy Efficiency Free Market Act (H.R. 4504), introduced by Representative Michael Burgess (R-TX), begins to unwind some of the federal government's intervention into Americans' energy choices.³ The bill repeals the energy conservation standards set in the Energy Policy and Conservation Act (EPCA), but leaves in a provision that preempts states from setting their own efficiency standards out of concern that the most rigorous state efficiency mandate would become the de facto national standard.

Congress should realize that the economy does not need government mandates, rebate programs, or spending initiatives to make businesses and homeowners more energy efficient. Consumers will make those choices by themselves, and the government should not override their choices by nudging them toward the government's preferred outcome. While reasonable people can disagree on the role of federal pre-emption to protect freedom, a middle ground approach would give states a 10-year window to experiment with state efficiency regulations. Ultimately, Congress should eliminate all existing federal efficiency regulations for appliances, vehicles, and buildings.

The Energy Policy and Conservation Act

The Energy Policy and Conservation Act of 1975 authorizes the Department of Energy to regulate the energy and water-use efficiency for 19 original categories of consumer and commercial appliances, which are to be reviewed at least every six years.⁴ As a response to the Arab oil embargo, the Ford Administration placed a priority on reducing energy use, which included efficiency mandates. The Reagan Administration expanded Washington's authority with the National Appliance Energy Conservation Act of 1987, setting minimum efficiency standards for many household appliances. Presidents George H. W. Bush and George W. Bush amended and expanded upon the DOE's authority in the Energy Policy Act of 1992 and Energy Policy Act of 2005, respectively.

The list of covered products by the DOE has since grown to 60, including refrigerators, air conditioners, furnaces, televisions, showerheads, ovens, toilets, lightbulbs, and whatever the Energy Secretary determines or is petitioned to test.⁵ The only requirements for a product to be covered are a determination that product labeling is "unlikely to be sufficient" for maximum energy savings, that standards are technologically feasible, and that "per-household energy use [for a product]...is likely to exceed 100 kilowatt hours."⁶ This is roughly equivalent to using a water heater for a week or a freezer for a month.⁷

1. Sofie Miller, "Whose Benefits Are They, Anyway? Examining the Benefits of Energy Efficiency Rules 2007-2014," George Washington University Regulatory Studies Center *Working Paper*, September 2, 2015, p. 9, https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Examining-Energy-Efficiency-Standards_SMiller-9-2015.pdf (accessed June 6, 2016).
2. Office of Information and Regulatory Affairs, Office of Management and Budget, "Unified Agenda: Department of Energy," Fall 2015, http://www.reginfo.gov/public/do/eAgendaMain.jsessionid=469884DBC60C124DDC6FC5EDA6481B05?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1900 (accessed June 6, 2016). Also in 2016, the DOE has already finalized five commercial and residential standards. U.S. Department of Energy, "Energy Conservation Standards Activities," Report to Congress, February 2016, p. 2, <http://energy.gov/sites/prod/files/2016/02/f29/2016%20February%20Report%20to%20Congress.pdf> (accessed June 6, 2016).
3. Energy Efficiency Free Market Act, H.R. 4504, 114th Cong. 2nd Sess., 2016.
4. Energy Conservation and Production Act of 1975, Public Law 94-163.
5. Department of Energy, Office of Energy Efficiency and Renewable Energy, "Appliance and Equipment Standards Program," <http://energy.gov/eere/buildings/appliance-and-equipment-standards-program> (accessed June 6, 2016). See also Department of Energy, Office of Energy Efficiency and Renewable Energy, "Current Rulemakings and Notices," <http://energy.gov/eere/buildings/current-rulemakings-and-notices> (accessed June 6, 2016).
6. Department of Energy, Office of Energy Efficiency and Renewable Energy, "Determinations and Coverage Rulemakings," <http://energy.gov/eere/buildings/determinations-and-coverage-rulemakings> (accessed June 6, 2016). See also 42 U.S. Code §6292(b), pp. 5411-5414, <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap77-subchapIII-partA.pdf> (accessed June 21, 2016).
7. Warren Rural Electric Cooperative Corporation, "What Uses Watts in Your Home," <http://www.wrecc.com/what-uses-watts-in-your-home/> (accessed June 6, 2016).

Problems with the DOE's Energy-Efficiency Standards

Touted as a way for families and businesses to save money, stimulate economic growth, and combat global warming,⁸ energy-efficiency regulations have several glaring problems.

1. Energy-Efficiency Regulations Reduce Choices. The DOE presumes that consumers should make purchasing decisions based on energy efficiency. Regulations prioritize efficiency over other preferences that customers and businesses might have—such as safety, size, performance, and cost. Prior to regulation, Americans were not lacking in energy-efficient appliances. The DOE itself recognizes that energy-efficient models were available to consumers before regulations required them.⁹ DOE regulations have simply removed other options (ones that perhaps prioritize features like longevity or noise reduction even at the cost of some efficiency, for instance) that do not meet the DOE's energy-efficiency threshold.

In fact, Americans *do* value energy efficiency. Environmental Protection Agency (EPA) surveys of the voluntary ENERGY STAR program show that consumers consider energy efficiency in their purchasing decisions. ENERGY STAR is a voluntary program for identifying energy-efficient products and practices.¹⁰ According to the 2015 EPA survey, "Among all households, 46 percent knowingly purchased an ENERGY STAR-labeled product in the past 12 months."¹¹ The fact that nearly half of Americans purposefully bought an ENERGY STAR appliance demonstrates that they value energy efficiency. The fact that more than half of American households did *not* buy an ENERGY STAR appliance indicates that families have other preferences, too. A voluntary program should *remain* voluntary, not lay the foundation for future mandates or subsidies.

2. Efficiency Regulations: Less About Reducing Emissions, More About Controlling Peoples' Choices.

Regardless of one's opinion on greenhouse gases and their effect on climate, efficiency regulations are a grossly inefficient way to reduce emissions. The DOE's projected environmental benefits to Americans from reducing greenhouse gas emissions total a paltry 1 percent of all benefits projected from efficiency regulations. The other environmental benefits (10 percent) come from global benefits of reducing carbon dioxide and ultimately do not come close to outweighing costs. Americans then bear all the costs and enjoy only a minority of any environmental benefits.¹²

The vast majority (88 percent) of the DOE's forecasted benefits are private benefits to the purchaser. In other words, not only do these regulations not meet a public need or create benefits to the general public health or welfare,¹³ but the DOE is also essentially trying to protect people from themselves and make "better" decisions for them by limiting their options to "acceptable" ones.

3. Savings Are on the Backs of the Poor, Not the Rich. Too often, the DOE's regulations burden the poor, who are disproportionately affected by regulations that increase the cost of energy. The DOE energy-efficiency regulations in particular are likely paid for by middle-income and low-income families to the benefit of upper-income families, given the unrealistic way that the DOE calculates the costs and benefits.

The costs and benefits of these rules vary significantly depending on which "discount rate" the DOE uses in its analysis. Discount rates attempt to capture how people value present costs versus future savings. (In other words, it is the DOE's attempt to assume what Americans value when buying an appliance—

8. For example, the Obama Administration has leaned on energy-efficiency standards as a contribution to its emissions-reduction promise to the United Nations. United States Intended Nationally Determined Contribution to the U.N. Framework Convention on Climate Change, March 31, 2015, <http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> (accessed June 6, 2016). Council on Environmental Quality, "Recovery Through Retrofit," The White House, October 2009, https://www.whitehouse.gov/assets/documents/Recovery_Through_Retrofit_Final_Report.pdf (accessed June 6, 2016).

9. Miller, "Whose Benefits Are They, Anyway?" p. 18.

10. ENERGY STAR, "About ENERGY STAR," <https://www.energystar.gov/about> (accessed June 6, 2016).

11. U.S. Environmental Protection Agency, Office of Air and Radiation, "National Awareness of ENERGY STAR for 2015: Analysis of CEE Household Survey," 2015, <https://www.energystar.gov/awareness> (accessed June 6, 2016).

12. Miller, "Whose Benefits Are They, Anyway?" pp. 13-14.

13. *Ibid.*, p. 7.

lower upfront costs or greater long-term savings.) The DOE's analysis of energy-efficiency costs and benefits are far too static and monochromatic. As the DOE currently uses discount rates, the costs and benefits of its energy-efficiency regulations do not reflect actual consumer behavior, but best describe the benefits to households making \$160,844 or more (those that can absorb higher costs up front in anticipation of future savings).¹⁴ In reality, energy-efficiency costs and benefits vary widely depending on income, education, and race.¹⁵ If the DOE is wrong about how Americans make purchasing decisions, then energy-efficiency regulations are reducing choices and burdening middle-income and low-income Americans with billions of dollars in costs.¹⁶

When government policies artificially drive energy prices higher, poor families are burdened with even more difficult choices than they already had to make. According to a 2011 National Energy Assistance Directors' Association poll of low-income families, 24 percent went without food for a day, and 37 percent forwent medical and dental coverage to pay higher energy bills. Nearly one in five had a family member who became sick because the home was too cold.¹⁷ The upfront costs of a more expensive lightbulb or appliance may not heavily impact a wealthy or middle-income family's budget, but the real-world implications of regulations that increase energy costs and take choices away are nothing to scoff at or dismiss.

4. Mandates Hinder the Creative Process of Efficiency Innovation. Mandates also hamper the very goal of energy-efficiency improvements.

Announcing the Energy Efficiency Free Market Act, Representative Burgess explained that “[w]hen the government sets the efficiency standard for a product, that often becomes the ceiling. I have long been a firm believer in energy efficiency; however, when the market drives the standard, there’s no limit to how fast and how aggressive manufacturers will be when consumers demand more efficient and better made products.”¹⁸ Efficiency standards also tend to drive up the sticker prices of new appliances and therefore encourage consumers to hold on to older appliances instead of upgrading to more efficient models.¹⁹

5. Estimated Savings Are Misleading. Costs exceed benefits by over \$7.3 billion a year when the private and international benefits of the DOE's recent energy-efficiency regulations are excluded.²⁰ Benefits from meeting a public good constitute a relatively paltry \$3.2 billion. This means that Americans are essentially *paying* to have their choices restricted. Other problems with efficiency spending include questions about the cost of the upfront investment, the payback horizons, overstated energy savings, and predictions of future energy prices.

Another issue which misleads on the benefits of the regulations is the monetization of global warming benefits, specifically the social cost of carbon (SCC). The EPA uses three statistical models, known as integrated assessment models, to estimate the value of the SCC, defined as the economic damage that one ton of carbon dioxide emitted today will cause over the next 300 years. However, these models arbitrarily derive a value for the SCC. Subjecting

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14. Sofie Miller, “One Discount Rate Fits All? The Regressive Effects of DOE’s Energy Efficiency Rule,” *Policy Perspectives*, Vol. 22 (2015), pp. 45-46, <http://www.policy-perspectives.org/article/view/15110> (accessed June 6, 2016). For example, consumers benefit in only two of the five discount rates applied for the costs and benefits of a furnace fan efficiency rule; in the all other cases consumers pay more. Those two described upper-income families best, while the other three better described median-income and low-income families and field studies of actual consumer behavior in making similar purchases.
 15. “Therefore, a result of [energy efficiency] standards is to place an implicit tax on...the less well off. Thus efficiency standards can have an adverse income distribution effect.” Miller, “One Discount Rate Fits All?” pp. 43-44, (quoting Jerry Hausman).
 16. Miller, “Whose Benefits Are They, Anyway?” p. 24.
 17. National Energy Assistance Directors’ Association, “2011 National Energy Assistance Survey Summary Report,” October 2011, <http://neada.org/wp-content/uploads/2013/10/final-neada-2011-summary-report.pdf> (accessed June 6, 2016).
 18. News release, “Burgess Introduces Bill to Promote American Free Market Innovation,” Office of Congressman Michael Burgess, February 11, 2016, <http://burgess.house.gov/news/documentsingle.aspx?DocumentID=397912> (accessed June 6, 2016).
 19. ConsumerReports.org, “Higher Prices Prevent Some Consumers from Going Green,” September 24, 2012, <http://news.consumerreports.org/home/2012/09/higher-prices-prevent-some-consumers-from-going-green.html> (accessed June 6, 2016).
 20. For the 25 regulations where cost-benefit analysis was available between 2007 and 2014. Miller, “Whose Benefits Are They, Anyway?” p. 12. Private benefits do not meet a public good and ultimately restrict choices. International benefits, such as from reducing greenhouse gas emissions, are those for which Americans pay but from which they do not benefit.

the models to reasonable inputs for climate sensitivity and discount rates dramatically lowers the estimated SCC.²¹ Artificially increasing the estimates boosts the projected benefits of climate-related regulations in agency cost-benefit analyses, such as energy-efficiency regulations.

Furthermore, there are cases when the government's mandates plainly do not save consumers money. The DOE's final rule for dishwashers shows that almost 20 percent of households experience a net cost because of the new standards, and almost 65 percent see no net savings at all.²² The DOE assumed in a proposed rule on washing machines that American households used washers 392 times per year, more than seven times per week; the Mercatus Center calculated that only those families who use a washer *at least* 300 times a year would recover the higher upfront costs.²³

Businesses also have to count the cost of energy-efficiency investments. When the DOE mandates efficiency, businesses must choose to absorb costs or pass them on to consumers, whether in price or in quality. Manufacturers will also reject about half of the voluntary energy-efficiency projects recommended by engineering analyses because of unaccounted physical costs, opportunity costs, lack of staff, inconvenience to personnel, or suspected risk of equipment problems.²⁴

6. Energy-Efficiency Initiatives Are Too Often About Corporate Welfare. It quickly becomes evident that the goals of many energy policies are less about energy efficiency or greenhouse gas emissions than about propping up certain politi-

cally preferred companies and products. For example, President Obama's Executive Order 13693 to incentivize the reduction of greenhouse gases prioritizes energy supplied from specific types of technology, such as carbon capture and sequestration, small modular nuclear reactors, thermal energy, electric and E-85 vehicles, and public transit.²⁵ In other instances, the DOE has moved forward with standards in spite of the Department of Justice's concerns over their anti-competitive effects.²⁶

In fact, "regulatory decisions are too often made on the basis of an incomplete record—one that reflects the views of the agency and of those [special interests] who have a parochial interest in the outcome, but that contains little input from the public at large."²⁷ Whether for an energy-efficient dishwasher or the weatherization of a home and installation of more efficient windows, companies lobby for regulations and subsidies that most benefit *them*, often squeezing out competition from smaller companies. If these products save as much as the companies (and governments) advertise, they should not be subsidized by the taxpayer.

The Free Market Is Energy Efficient

The free market rewards efficiency without government intervention. Supply, demand, competition, and the powerful incentive for families and businesses to get the biggest bang for their buck all work together to drive down prices, get better performance, and provide greater efficiency.

Though the DOE's regulations presume otherwise, the private sector has an interest in making

21. Kevin D. Dayaratna and David W. Kreutzer, "Unfounded FUND: Yet Another EPA Model Not Ready for the Big Game," Heritage Foundation *Backgrounder* No. 2897, April 29, 2014, <http://www.heritage.org/research/reports/2014/04/unfounded-fund-yet-another-epa-model-not-ready-for-the-big-game>.
22. David Kreutzer, "Why It's the Government's Fault Your Dishwasher Cycle is 2 or 3 Hours Long," *The Daily Signal*, July 12, 2015, <http://dailysignal.com/2015/07/12/why-its-the-governments-fault-your-dishwasher-cycle-is-2-or-3-hours-long/>. See also Sofie Miller, "Direct Final Rule: Energy Conservation Standards for Residential Dishwashers," Public Interest Comment, to the Department of Energy, September 14, 2012, http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/DOE_EERE_2011_BT_STD_0060.pdf (accessed June 6, 2016).
23. Dudley, "Addendum to Public Interest Comment," p. 4.
24. Hunt Allcott and Michael Greenstone, "Is There an Energy Efficiency Gap?" *Journal of Economic Perspectives*, Vol. 26, No. 1 (Winter 2012), pp. 3-28.
25. The President, "Executive Order 13693—Planning for Federal Sustainability in the Next Decade," *Federal Register*, Vol. 80, No. 57, March 25, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-03-25/pdf/2015-07016.pdf> (accessed June 6, 2016).
26. Sofie Miller, "Public Interest Comment on the Department of Energy's Regulatory Burden FRI: 'Reducing Regulatory Burden,'" Docket No. 2014-15644, The George Washington University Regulatory Studies Center, June 18, 2014, p. 7, https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/image/RSC_PIC-DOE-Regulatory-Burden-RFI-SMiller.pdf (accessed June 8, 2016).
27. Dudley, "Addendum to Public Interest Comment," p. 1.

energy-efficiency investments. For example, the freight and long-haul transportation industry highly values fuel efficiency. Nearly 3 million heavy-duty trucks carry approximately 70 percent of America's freight, consuming more than 52 billion gallons in fuel, and spending more than \$143 billion in diesel costs.²⁸ The industry operates on razor-thin margins and plans its driving routes down to the tenth of a mile to save on fuel costs. Companies are driven to invest in innovative technologies or alternative fuel to lower costs as a matter of their bottom line.

Likewise, businesses respond to demand for energy-efficient products. Household refrigerators, as big household energy consumers, are a good example. The DOE points to refrigerator-efficiency regulations as a success story:

The Standards Program has driven remarkable gains in the energy efficiency of household appliances and equipment, resulting in large energy bill savings. For example, today, the typical new refrigerator uses one-quarter the energy than in 1973—despite offering 20% more storage capacity and being available at half the retail cost.²⁹

The first federal efficiency standard regulating refrigerators, however, did not go into effect until 1990.³⁰ Refrigerator manufacturers were improving refrigerator energy use and design for nearly two decades before the government got involved.

In a free market, manufacturers both large and small are driven to provide consumers with better products at lower costs, leading to dramatic improvements in energy consumption per dollar of gross domestic product. Thanks to entrepreneurs, technological advances, and consumer desires,

Americans have become almost 60 percent more energy efficient over the past half century.³¹

Even if energy prices are high and resource exhaustion is on the horizon, forced conservation from the federal government is not the solution. Prices play a critical role in the market by efficiently allocating resources to their highest-valued use. Higher or lower prices will change the lifestyle choices that people make and the investments businesses make. An extended period of high gasoline prices would be an incentive for people to purchase more fuel-efficient cars, regardless of fuel-efficiency standards. Similarly, businesses may invest in more energy-efficient equipment.

Is Federal Pre-emption Necessary?

The remaining question is what to do about the section in the EPCA that pre-empts state energy-efficiency standards.³² The Burgess bill would eliminate the DOE's authority to define those standards, but would leave in place the act's pre-emption of state standards.³³ The effect would be to prevent both the federal government and the states from selecting their own energy-efficiency standards, and leave that task to consumers, who would make their decisions in the market. The pre-emption question therefore reduces to whether the federal government should allow states or consumers to make energy-efficiency decisions.

Reasonable people can disagree about how that question should be answered. Each option is preferable to the current federal regulatory scheme, for the reasons explained above, and each alternative has something to say for itself. Returning to the states the authority to regulate appliances sold within their borders enables state legislatures (or

28. American Trucking Association, "Reports, Trends & Statistics," http://www.trucking.org/News_and_Information_Reports_Energy.aspx (accessed March 10, 2016).

29. U.S. Department of Energy Building Technologies Office, "Saving Energy and Money with Appliance and Equipment Standards in the United States," February 2016, <http://energy.gov/sites/prod/files/2016/02/f29/Appliance%20Standards%20Fact%20Sheet%20-%202017-2016.pdf> (accessed June 6, 2016).

30. Appliance Standards Awareness Project, "Refrigerators and Freezers," <http://www.appliance-standards.org/product/refrigerators-and-freezers> (accessed June 6, 2016).

31. U.S. Energy Information Administration, "U.S. Energy Intensity Projected to Continue Its Steady Decline Through 2040," March 1, 2013, <http://www.eia.gov/todayinenergy/detail.cfm?id=10191> (accessed June 6, 2016).

32. 42 U.S.C. § 6297 (2012). The act pre-empts any "State regulation," which is defined as "a law, regulation, or other requirement of a State or its political subdivisions. With respect to showerheads, faucets, water closets, and urinals, such term shall also mean a law, regulation, or other requirement of a river basin commission that has jurisdiction within a State." 42 U.S.C. § 6297(a)(2)(A).

33. Energy Efficiency Free Market Act, §2(f).

their designees) to balance energy efficiency, safety, usability, and cost concerns, while devolving that authority to the public enables each person to decide for himself or herself where those competing factors come to rest.

But there are some complicating factors. In theory, lifting the pre-emption component of the EPCA would enable each state to decide which energy-efficiency standards should apply to products sold within its borders. Maine could adopt one set of standards or none at all, while California could select another. Residents of the Pine Tree State and the Golden State could each enjoy the energy, cost, and other benefits they choose without trespassing on the ability of their counterparts to make different decisions.

In fact, states have set efficiency standards for products not covered by the DOE. One example is commercial hot-food holding cabinets used in hospitals and schools. Though the DOE has ENERGY STAR labels for certain hot-food holding cabinets, the agency is not required to set mandatory standards.³⁴ California, Connecticut, Maryland, New Hampshire, Oregon, Rhode Island, and Washington, and the District of Columbia have set standards.³⁵ Other states have not capitulated to those states' standards, and companies offer a wide range of hot-food holding cabinets in those markets today.³⁶ Furthermore, many states had regulations for products that were later pre-empted by the federal government's standards when President George W. Bush signed the Energy Policy Act of 2005 and Energy Independence and Security Act of 2007.³⁷ Before the federal government pre-empted state standards, businesses did not simply meet the standards of the strictest state requirements. A variety of state efficiency-compliant appliances and non-compli-

ant-appliances existed. In a world without federal pre-emption and a patchwork of state regulation, different suppliers could meet consumer demand.

Conversely, there are two scenarios in which eliminating federal pre-emption could be problematic for the marketplace and consumers.

In the first scenario, a small number of states, perhaps even just one—California is the likely suspect—would adopt laws that would become the national standard for some items. Several federal constitutional restrictions cabin a state's exercise of its sovereign power to enforce its laws to in-state conduct or out-of-state conduct with a direct in-state effect. For example, the Commerce Clause expressly empowers Congress to regulate interstate commerce³⁸ and also impliedly limits the states' regulatory power over that subject under the "Dormant Commerce Clause."³⁹ The result is that each state enjoys jurisdiction to regulate within its confines, but not beyond.

That rule, however, would not keep some state laws from establishing a de facto national standard. Some goods might be expensive to manufacture and sold only by a few companies. Those firms could find it more efficient to build only one product than a series of them, and so would need to meet the most stringent state standard to be able to sell in all of them. That would be particularly true if California is the most restrictive state, given its large population. The result would be to eliminate as a practical matter the authority returned to the states to set their own standards, because one state would set the standard for all 50.

That outcome would worsen the situation that states and the public face today. Voters in each state can affect Congress's decision because they can elect Senators and Representatives who reflect their

34. Appliance Standards Awareness Project, "Hot Food Holding Cabinets," <http://www.appliance-standards.org/node/6793> (accessed June 6, 2016).

35. *Ibid.*

36. See, for instance, Webstaurant Store, "Holding Cabinets," 2016, <http://www.webstaurantstore.com/14087/holding-cabinets.html?gclid=CJritpCu0swCFQ5bhgodr1ACtQ> (accessed June 6, 2016).

37. American Council for an Energy-Efficient Economy, "Appliance Standards Summary," July 2015, <http://database.aceee.org/state/appliance-standards-summary> (accessed June 6, 2016).

38. U.S. Const. Art. I, § 8, cl. 3 ("Congress shall have power...[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes[.]").

39. See, for instance, *McBurney v. Young*, 133 S. Ct. 1709, 1719 (2013). Other constitutional provisions also limit a state's authority to regulate extraterritorial conduct: the Due Process Clause; the Full Faith and Credit Clause; and the Privileges and Immunities Clause of Article IV, Section 2, along with the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. See, for instance, Paul J. Larkin Jr., "The Original Understanding of 'Property' in the Constitution," *Marquette Law Review*, Vol. 100 (forthcoming 2016).

views, but voters cannot affect the decisions of other state assemblies by voting to oust legislators who vote in favor of the new one-state-imposed national standard. To that extent, devolving authority to the states could injure the interests of voters in 49 of them.

The second potential problem is that allowing each state legislature to determine the energy-efficiency standards in its own state would enable each state to favor devices manufactured locally in order to benefit in-state businesses, residents, and, most importantly, voters. The prospect that states will engage in “home cooking” is hardly a new one. States engaged in just such economic warfare under the Articles of Confederation, and the Framers empowered Congress to regulate interstate commerce in order to prevent a reoccurrence of that conflict.⁴⁰ The Commerce Clause expressly empowers Congress to regulate interstate and foreign commerce and, as the Supreme Court has construed it, implicitly forbids the states from discriminating against or burdening interstate commerce.⁴¹ The federal courts would likely hold discriminatory or burdensome state energy-efficiency laws unconstitutional.

Further, leaving the EPCA’s pre-emption measure in place, as the Burgess bill does, would not prevent states from subsidizing or incentivizing the use of energy-efficient products by businesses and residents (that is, a *voluntary* efficiency standard) or from electing to mandate renewable energy standards, misguided as those policies are.

There may be a middle ground. Congress could keep the current pre-emption section in place, while granting the states a 10-year period to experiment with state efficiency regulations. That would enable Congress to learn how the states will respond to their new regulatory freedom. Congress could achieve that result by suspending the pre-emption section in the EPCA for 10 years beginning on the date that the Burgess bill—or anything similar—is signed into law. After that period has expired, the pre-emption section of the EPCA would come back into effect unless Congress repealed it in the meantime.

Structuring a pre-emption section in that way is unorthodox, but not impossible. The existing pre-emption section in the EPCA already has just such a structured approach. Subsection (a)(1) of Section 6297, Title 42 pre-empts state regulations “[e]ffective on March 17, 1987.” A different component of that statute, subsection (b), operates as an interim measure. Like subsection (a)(1), subsection (b) is “[e]ffective on March 17, 1987,” but it allows certain state regulations to remain lawful if they were adopted before certain dates (specified in subsections (b) (1)-(7)) for a period “ending on the effective date of an energy conservation standard” adopted by the federal government. Congress could follow a similar direction here. It could add a new subsection (h) to the statute to render its pre-emptive effect inoperative for a 10-year term following the signing of a revision to Section 6297. If the states do not abuse their authority during that time, Congress could repeal the pre-emption provision (and the new subsection (h)) in its entirety.

Regulated Efficiency Means Less Efficiency

Federal efficiency mandates too often assume either that all Americans use energy the same way, or that the government knows better how Americans should use energy. The Energy Efficiency Free Market Act takes an important step in the right direction by allowing free enterprise to drive energy efficiency. Congress should build on this act to eliminate all mandatory efficiency regulations and subsidies—for vehicles, appliances, and buildings. Doing so will appropriately reduce the role of the federal government and increase the freedom of choice for all American families, individuals, and businesses.

—*Katie Tubb is a Policy Analyst, and Nicolas D. Loris is Herbert and Joyce Morgan Fellow, in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom and Opportunity, and Paul J. Larkin, Jr. is Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies, at The Heritage Foundation.*

40. See, for example, *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

41. See, for instance, *Or. Waste Sys., Inc. v. Or. Dep’t of Env’t Quality*, 511 U.S. 93, 99 (1994).