


5-15-2001

Federalism and Preemption in October Term 1999

Jonathan D. Varat

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>

 Part of the [Administrative Law Commons](#), [Business Organizations Law Commons](#), [Constitutional Law Commons](#), [Law and Politics Commons](#), [Legislation Commons](#), [President/Executive Department Commons](#), [State and Local Government Law Commons](#), [Torts Commons](#), and the [Transportation Law Commons](#)

Recommended Citation

Jonathan D. Varat *Federalism and Preemption in October Term 1999*, 28 Pepp. L. Rev. Iss. 3 (2001)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol28/iss3/8>

This Symposium is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact josias.bartram@pepperdine.edu, anna.speth@pepperdine.edu.

Federalism and Preemption in October Term 1999

Jonathan D. Varat*

Relying on national prerogatives and policies in order to ward off state taxes, state regulations, and potential state common-law liability, business litigants found an unusually receptive ear at the Supreme Court this past Term.¹ A staple of the Court's ongoing work is management of the balance of federal and state power in our complex and sophisticated federal structure of government, especially in the context of regulation of commercial enterprises that often seek to avoid federal or state control by claiming that whichever level of government seeks to impose such control lacks authority under the Constitution to do so, because only the other level possesses the requisite power. This year was no exception, although my commentary is limited primarily to the validity of state laws challenged as inconsistent with federal power itself or particular exercises of federal power.

In one case that relied in large part on unexercised federal power to regulate interstate commerce, *Hunt-Wesson, Inc. v. Franchise Tax Board*,² the Court unanimously struck down a California tax provision that the Justices believed unreasonably limited the interest expense deduction otherwise available to multi-state corporations properly subject to tax on the proportionate share of their overall income attributable to California activity.³ The deduction limit was crafted in such a way that it effectively imposed an impermissible tax on income that the multi-state corporation earned in other states through unrelated business transactions that had no connection with California.⁴ Justice Breyer's opinion applied earlier cases in accordance with their generous spirit of assuring that no state may tax income deriving from interstate activity beyond what may properly and proportionately be attributed to the taxing state and the in-state values of the enterprise.⁵ He concluded that California's failure to allocate interest expense deductions reasonably "to the income that the expense generates . . . constitutes impermissible taxation of income outside its jurisdictional reach" and "therefore violates the Due Process and Commerce Clauses of the Constitution."⁶

*. Dean and Professor of Law, University of California, Los Angeles School of Law.

1. In a parallel development, the tobacco industry also managed to ward off regulation by the federal Food and Drug Administration, which was held to lack statutory authority from Congress to regulate tobacco products. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

2. 528 U.S. 458 (2000).

3. *Id.* at 460.

4. *Id.* at 461.

5. *Id.* at 463-64.

6. *Id.* at 468.

Protection of our national economic and political union against the disabling effects of potentially multiple burdens of taxation imposed by different states on the same interstate activity, and protection against risks of damage to harmony among the states implicated by state attempts to exercise extraterritorial power in other states, are policies powerfully embraced by the Court that tend to make it vigilant about enforcing the constitutional limits on state power imposed by the commerce clause when those interests seem threatened, even fairly remotely.⁷ These high national stakes undoubtedly account for both the Court's unanimity and its care in sorting through the real impact of such often highly technical tax schemes.

The Court did not strike out in any new direction with the *Hunt-Wesson* decision. As important as the principles implemented by it are, the case represents no departure from precedent and, to understate the matter, no quantum leap in expanding what had gone before. More grist for the analytic mill and more instances of common ground, fault lines, and unexplored territory can be found in the Term's preemption decisions, all of which also went against state power—a fact that at least invites reflection in the context of a Court that, of late, has been particularly solicitous of state power and particularly stingy about federal power. In four cases that asked the Justices to resolve whether certain federal laws, statutory and administrative, preempted state legislation or the application of state common law, the Court ruled in favor of preemption in each one, thereby removing any obligation to comply with the challenged state law and confining the regulatory compliance obligations of the business challengers to those stemming from the preemptive federal law.⁸

The Supremacy Clause of Article VI of the Constitution requires that state law yield to the extent it is inconsistent with valid federal law.⁹ Assuming Congress has acted within its constitutional authority—an assumption all the Justices apparently made in this Term's preemption decisions—the ultimate touchstone in resolving claims of preemption is whether Congress intended to allow or disallow the challenged state act. Interpretive judgment is always required, of course, both to ascertain what Congress intended and whether state law is inconsistent with what Congress intended. Therein lies the room for many factors—attitude, predisposition, judicial role definition, policy, and other sorts of potentially lurking constitutional questions—to enter into the exercise of that interpretive judgment and, hence, ample room for disagreement.

If the federal legislation contains an explicit provision preempting certain kinds of state law, or an explicit provision disclaiming preemption of certain kinds of state law, or both (as sometimes happens), the Court still faces the interpretive

7. *Id.* at 466.

8. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

9. *See* U.S. CONST. Art. VI, cl. 2.

task of defining the category of state laws preempted, saved from preemption, or both.¹⁰ If the federal legislation does not address the preemption question explicitly, or if it does so only within a limited realm that leaves other areas of potential preemption unaddressed, the Court goes on to consider whether Congress nonetheless intended, by implication, to preempt some set of state laws.¹¹ Ascertaining what Congress has implied when it has not expressed itself explicitly tends to be a more difficult task, however, that opens up interesting debates and disagreements about the proper sources of implication and the applicability of interpretive presumptions that favor or disfavor preemption in differing contexts.

To borrow and paraphrase an insight from a famous observation of Oliver Wendell Holmes about the very different matter of implying conditions in contracts (fully conscious that the analogy is hardly complete, but believing that it does have something useful to offer):

You always can imply a [congressional intent to preempt state law]. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.¹²

In one of its unanimous preemption decisions this Term,¹³ the Court, per Justice Souter, explicated its current understanding this way:

Even without an express provision for preemption, we have found that a state law must yield to a congressional Act in at least two circumstances. When Congress intends to “occupy the field,” state law in that area is preempted And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute We will find preemption where it is impossible for a private

10. See generally *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982).

11. *Id.*

12. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

13. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

party to comply with both state and federal law . . . and where “under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” . . . What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: “For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.”¹⁴

The Court also recognized, as it had done before, that “field preemption” might be understood as a species of “conflict preemption,” which itself consists of both impossibility-of-compliance conflict and frustration-of-purpose conflict.¹⁵ Together, these guidelines for implying preemptive congressional intent, to which the Justices unanimously subscribed at least in this instance, represent the current general framework of preemption analysis. The specific ways in which they are applied, and the variables that enter into their application, tell us a good deal more about how readily different members of the Court find or do not find preemptive intent.

The United States either became a party or participated *amicus curiae* in all four of this Term’s preemption cases, though the position of the federal government and the position of the affected businesses were arrayed against state authority in only three of them.¹⁶ That simple statement of who was aligned on which side of each controversy obviously does not tell the whole tale, and would not even if the cases reflected some united litigating position of the federal government and the business parties. Rather, the opinions in these cases highlighted the degree to which the Court’s process of discerning congressional intent is a multi-dimensional process, inevitably requiring aids to interpretation because legislative text is so often inconclusive and because additional evidence of the preemptive intent of Congress is ambiguous or severely lacking.

Like the dormant commerce clause decision in *Hunt-Wesson*, two of the preemption decisions were also unanimous, although, intriguingly, each found it

14. *Id.* at 372-73 (internal citations omitted).

15. *Id.* at 372 n.6.

16. The exception was in *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), where the Federal Highway Administration, contrary to an earlier position, now took a stance *against* preemption of a state tort law claim by its own regulations—a new and different stance that the Court felt “contradict[ed] the agency’s own previous construction that this Court adopted as authoritative in” *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). *Shanklin*, 529 U.S. at 356.

unnecessary to decide what are likely to be more contentious questions in future cases. The first, *United States v. Locke*, addressed regulations adopted by the State of Washington to prevent oil spills from tankers plying its waters.¹⁷ Notwithstanding provisions of the intervening Oil Pollution Act of 1990 (OPA),¹⁸ which explicitly preserved some state authority, *Locke* reaffirmed the Court's earlier decision in *Ray v. Atlantic Richfield Co.*¹⁹ and held that the federal Ports and Waterways Safety Act of 1972 (PWSA)²⁰ preempted state regulations purporting to establish separate standards for tanker crew training, English language proficiency, navigation watch, and marine casualty incident reporting.²¹ OPA's text and "the established federal-state balance in matters of maritime commerce" preserved separate state authority in the areas of liability and compensation for oil spills, but did not enlarge state authority in the area of design, operation, and staffing of oil tankers that was controlled by the PWSA.²²

The second, *Crosby v. National Foreign Trade Council*—coming from a state on the other coast—held that a Massachusetts statute which limited the power of state agencies to buy goods or services from companies doing business with Burma was preempted by a subsequently enacted federal statute imposing mandatory and conditional federal sanctions on Burma.²³ The state law was thought to be fundamentally at odds with the means Congress had embraced to achieve its diplomatic objectives—delegating "effective discretion to the President to control economic sanctions against Burma," limiting "sanctions solely to United States persons and new investment," and directing "the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma."²⁴

Although the states fared no better in the other two preemption cases, the federal-state conflicts were quite different in character, and the Justices were more divided. Both involved federal preemption of state tort law causes of action, rather than state statutes. *Norfolk Southern Railway Co. v. Shanklin*, a state common law wrongful death tort action brought by the widow of a man driving a truck who was struck and killed by a train at a grade crossing, was premised on the alleged failure of the railroad to maintain adequate warning devices.²⁵ A seven-Justice majority

17. 529 U.S. 89 (2000).

18. Oil Pollution Act (OPA) of 1990, 33 U.S.C. §§ 2701-61 (2001).

19. 435 U.S. 151 (1978).

20. Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-32(a) (2001).

21. *Locke*, 529 U.S. at 116. The Court also remanded for the district court or circuit court to determine whether or not some state regulations, such as a watch requirement in times of restricted visibility, were preempted or not under the guidelines the Court adopted. *Id.*

22. *Id.* at 106.

23. 530 U.S. 363, 388 (2000).

24. *Id.* at 373-74.

25. 529 U.S. 344, 347 (2000).

of the Supreme Court found the tort claim preempted by the Federal Railroad Safety Act of 1970,²⁶ as implemented through the Federal Highway Administration's regulation governing warning devices at railroad grade crossings installed using federal funds, because the signs at the crossing where the accident occurred fully complied with federal standards at the time of the accident.²⁷

The most closely divided preemption case of the Term, *Geier v. American Honda Motor Co., Inc.*,²⁸ similarly held a state common law tort action to recover for injuries sustained in an auto accident, this time based on a car manufacturer's failure to provide an airbag, preempted by the 1984 version of a Federal Motor Vehicle Safety Standard²⁹ adopted by the federal Department of Transportation pursuant to the National Traffic and Motor Vehicle Safety Act of 1966.³⁰ Justice Breyer's majority opinion first determined that the Act's express preemption provision did not explicitly preempt the lawsuit.³¹ He then concluded, on the other hand, that another section of the Act—providing that compliance with a federal safety standard “does not exempt any person from any liability under common law”—did not go so far as to preserve all state-law tort actions, including those that conflict with federal standards.³² Finally, addressing “whether a common-law ‘no airbag’ action . . . actually conflicts with” the federal standard,³³ the majority held that, unlike a rigid rule of state tort law imposing a duty to install an airbag on the decedent's 1987 Honda Accord, the federal standard deliberately allowed manufacturers a choice among different passive restraint mechanisms and deliberately sought a gradual phasing in of passive restraints, so that the tort claim, if allowed, would have obstructed the “means-related federal objectives.”³⁴

These four preemption decisions represent well the current status of preemption doctrine and the many dimensions that come into play when the Court is asked to decide whether and where federal authority has left room for state policy influence. In none of these cases was any question raised about the *power* of Congress to preempt the challenged state law—only about whether Congress had in fact exercised a conceded power to preempt. Within that context, a number of instructive propositions or premises seem to underlie these decisions. Some questions about their implications for the fabric of federal-state relations more generally yearn for articulation, and a variety of unresolved issues, both about preemption and about other related constitutional matters, invite speculation about future developments in this branch of federalism jurisprudence.

26. Federal Railroad Safety Act (FRSA) of 1970, 49 U.S.C. §§ 20101-53 (2001).

27. *Id.*

28. 529 U.S. 861 (2000).

29. Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (2001).

30. *Id.* at 862-68. See National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101-69 (2001).

31. *Geier*, 529 U.S. at 868.

32. *Id.* at 868-69.

33. *Id.* at 874.

34. *Id.* at 881-82.

THE USE OF DEFAULT RULES IN DEFINING AND APPLYING PREEMPTION
DOCTRINE: OF HISTORY AND TRADITION, FEDERALISM, AND THE
SEPARATION OF POWERS

Understandings of what matters traditionally or historically have fallen within the ambit of state or federal power appear to play an influential, but not determinative, role in sorting out the proper respective spheres of federal and state authority. In the contentious arena of federalism-based constitutional limitations recently imposed by the Court on Congress' power to regulate non-commercial local activity that nonetheless affects interstate commerce, the majority has placed some reliance on the fact that Congress seeks to regulate subjects that traditionally or historically have been the province of state law.³⁵ In the preemption context, when it is admitted that Congress has constitutional power to regulate, preemption issues are more likely to be resolved in favor of federal displacement of state law when the subject matter historically has been of federal concern, and more likely to be resolved in favor of finding room for state law that is not directly in conflict with federal law, narrowly construed, when the subject matter historically has been of state concern. An interesting question is whether, in some circumstances at least, this Term's decisions may suggest a weakening of the nonpreemption assumption (in the interest of less regulation of business generally). Thus, in *Locke*,³⁶ the Washington oil spill regulation case, Justice Kennedy's opinion reasoned that the classic "assumption" of nonpreemption set forth in *Rice v. Santa Fe Elevator Corp.*³⁷—that when Congress has legislated "in a field which the States have traditionally occupied[,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"—is "not triggered when the State regulates in an area where there has been a history of significant federal presence."³⁸ Thus, because Congress has regulated national and international maritime commerce from the earliest days of the Republic, there was "no

35. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress lacks constitutional power under the Commerce Clause to make gun possession in local school zones a federal crime); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress may not federalize gender-motivated crimes of violence under either its power to regulate interstate commerce or its power to enforce the equality provisions of the Fourteenth Amendment).

36. *United States v. Locke*, 529 U.S. 89 (2000).

37. 331 U.S. 218, 230 (1947).

38. *Locke*, 529 U.S. at 90.

beginning assumption that concurrent regulation by the States is a valid exercise of its police powers.”³⁹

One might have predicted that the Court in *Crosby v. National Foreign Trade Council* also would have put aside the assumption of nonpreemption—and perhaps even have embraced an assumption favoring preemption—when it evaluated the validity of Massachusetts’ Burma sanctions law, which sought to influence the human rights behavior of a foreign government and thus touched on a subject of prime federal concern—foreign relations.⁴⁰ Whether in practice the unanimity of the Justices reflects such an approach or not, Justice Souter’s opinion for the Court left “for another day a consideration in this context of a presumption against preemption[.]” because even if such a presumption were appropriate, the state Act “presents a sufficient obstacle to the full accomplishment of Congress’s objectives under the federal Act to find it preempted.”⁴¹ Finding the state sanctions law in conflict with the purposes of the federal sanctions law also obviated the need for the Court “to speak to field preemption as a separate issue” or to address “the foreign affairs power or the dormant Foreign Commerce Clause”—matters that may be of future import.⁴²

Both preemption decisions prohibiting the application of state tort law potentially bumped up against the presumption of nonpreemption because tort regimes are traditionally, and overwhelmingly, the subject of state law. In *Norfolk Southern Railway Co. v. Shanklin*, however, no mention was made of the presumption, even though Justice Ginsburg in dissent, joined by Justice Stevens, would have allowed the state tort claim to proceed.⁴³ Rather, the fight in that case focused on whether general approval by the Federal Highway Administration of a state project to install warning devices at railroad crossings using federal funds automatically and completely displaced state law evaluations of the adequacy of the warning devices with federal measures of adequacy, or only established *minimum* federal standards of adequacy, which state law was free to supplement under the terms of the federal agency regulations.⁴⁴ The language of the regulations, the statements of the Court in its earlier *Easterwood* decision,⁴⁵ and the effect of the agency’s decision to change from supporting to opposing

39. *Id.* at 108.

40. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-86 (2000).

41. *Id.* at 374 n.8. Perhaps Justice Souter, who tends to be a strong adherent of the presumption against preemption, *see, e.g.*, *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 114-22 (1992) (Souter, J., dissenting) (arguing that, in the absence of any clear expression of Congressional intent to preempt, state acts were not preempted where compliance with federal law does not render obedience to state law impossible), did not want to cast any doubt at all on the presumption, or its applicability in different contexts, unless doing so—even in a limited context—would be absolutely necessary.

42. *Crosby*, 530 U.S. at 374 n.8.

43. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 360-61 (2000) (Ginsburg, J., dissenting).

44. *Id.* at 347-49.

45. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

preemption of such tort claims were the principal articulated dividing elements between majority and dissent—not any presumption against preemption.⁴⁶

The five-to-four decision in *Geier v. American Honda Motor Co.*, on the other hand, revealed the Court to be divided sharply on the applicability of the presumption of nonpreemption and its effect on interpretation of both the express preemption provision and the express saving-from-preemption provision, as well as on the assessment of whether a state no-airbag tort claim conflicted with the objectives of the federal DOT's Safety Standard.⁴⁷ The dissent by Justice Stevens, joined by Justices Souter, Thomas, and Ginsburg, found the majority's decision to be an "unprecedented extension of the doctrine of pre-emption,"⁴⁸ in derogation of state sovereign authority in an area historically within state police power, by allowing federal judges to limit the application of state tort law based, not on the intent of Congress or the text of administrative regulations adopted pursuant to congressional authorization, but on federal judge-made rules stemming from federal agency commentary and the history of agency regulation.⁴⁹

These dissenters perceived no threat to the objectives of the federal Safety Standard from the state tort suit, because they did not find the Safety Standard's approaches of gradualism and acceptance of flexibility among alternative passive restraint systems of independent importance to the agency, apart from the Standard's overall objective of reducing injury and death to vehicle occupants, with which they believed a tort law airbag requirement would have been consistent.⁵⁰ They would have construed the Act and its express saving provision to impose a "special burden on a party relying on an arguable implicit conflict with a temporary regulatory policy—rather than a conflict with congressional policy or with the text of any regulation—to demonstrate that a common-law claim has been pre-empted."⁵¹ They thought "the presumption against preemption should control" because it is "rooted in the concept of federalism" and has several "signal virtues":⁵² (1) it leaves it to Congress, which is better suited than the Judiciary, to strike the appropriate state/federal balance; (2) it makes Congress accountable when striking the balance by requiring it to speak clearly and thereby give the States adequate notice and appropriate political opportunity to defend state interests in the national political process; (3) it "prevents federal judges from

46. See *Shanklin*, 529 U.S. at 352-61.

47. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). See Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (2001).

48. *Geier*, 529 U.S. at 886 (Stevens, J., dissenting).

49. *Id.* at 887 (Stevens, J., dissenting).

50. *Id.* at 892-94 (Stevens, J., dissenting).

51. *Id.* at 898-99 (Stevens, J., dissenting).

52. *Id.* at 906 (Stevens, J., dissenting).

running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict preemption based on frustration of purposes”;⁵³ and (4) it is even more important to apply to administrative agencies, which are not designed to represent the interests of states in the way that Congress is, and thus should be required to be specific about any intent to preempt state law through the formal notice-and-comment rule-making process, so that States again will have an adequate opportunity to participate in the presentation of state interests before a preemption decision displacing historic state authority is made.⁵⁴ Given the presumption against preemption, and the absence of any indication of an intent to preempt the state tort claim in the text of either the federal statute or the federal regulation, the dissenters disagreed “with the Court’s unprecedented use of inferences from regulatory history and commentary as a basis for implied pre-emption.”⁵⁵

For its part, the majority rejected any notion “that the pre-emption provision, the saving provision, or both together, create some kind of ‘special burden’ beyond that inherent in ordinary preemption principles [that] would specially disfavor pre-emption here.”⁵⁶ The text of the provisions did not support that result, wrote Justice Breyer, and adopting a special burden disfavoring preemption for cases involving frustration-of-purpose conflict preemption would create unnecessary practical difficulties and new complexities, requiring a new distinction between impossibility-of-compliance conflict cases and frustration-of-purpose conflict cases that is unwarranted, given that both were forms of implied preemption.⁵⁷ Justice Breyer thought that the special burden requirement and the requirement of a formal agency statement of preemptive intent, both urged by the dissent as prerequisites for finding an implied conflict, reflected the dissent’s general doubts about the wisdom of the doctrine of frustration-of-purpose conflict preemption, which the majority did not share.⁵⁸ Although the majority ultimately found the Safety Standard’s language and the contemporaneous agency explanation of it clear enough to demonstrate that the tort claim would obstruct the Standard’s objective of “gradually developing [a] mix of alternative passive restraint devices for safety-related reasons”⁵⁹—with no indication that the majority had discarded the presumption against nonpreemption in the process—Justice Breyer also defended the majority’s placing some weight on the agency’s view that the tort suit in

53. *Id.* (Stevens, J., dissenting).

54. *Id.* at 908 (Stevens, J., dissenting).

55. *Id.* at 912-13 (Stevens, J., dissenting).

56. *Id.* at 871.

57. *Id.* at 870-74.

58. *Id.* at 872.

59. *Id.* at 886.

question would frustrate the Standard's objectives, at least given the agency's expertise and the consistency of that view over time.⁶⁰

How deep the fault lines in the *Geier* decision go is as yet unclear, but the opinions do seem to reveal divides within the Court about (a) the strength of adherence to the presumption against preemption in areas historically the province of the states; (b) as a corollary—and of potentially major importance—the strength of adherence to the doctrine of frustration-of-purpose conflict preemption; (c) the degree of willingness to rely on federal agency views of the preemptive intent of its own regulations; and (d) the level of transparency of agency process upon which the Court will insist in order to enable the states to have their say in preventing preemption before it happens.

VARIATIONS ON THE THEME OF STRATEGIC MANAGEMENT OF THE
FEDERAL-STATE BALANCE: OF DUAL AND SINGLE REGULATION AND
DIFFERENT ALIGNMENTS OF JUSTICES IN PREEMPTION CHALLENGES
THAN IN CHALLENGES TO THE SCOPE OF CONGRESSIONAL POWER

When a case presents a question of the primacy of state or federal power, there is more to predicting the stance of individual members of the Court than asking about each what his or her general predisposition is towards the salience of the general roles of state and nation in our federalist structure. Not only is context important, but so are cross-cutting predispositions, such as—to take just one—whether more or less regulation of business and other private conduct by whatever level of government seeks to impose the regulation is perceived to be desirable. Because federal preemption of state law eliminates one source of regulation, just as rulings that Congress or the states lack constitutional power to regulate a particular field or subject do, those Justices inclined to curtail congressional power under the Constitution may not be inclined, when congressional power is clear, to interpret the preemptive intent of Congress narrowly in favor of preserving concurrent, or dual, state regulation. Last Term's preemption and related decisions suggest a number of alternative, combined approaches that undercut the accuracy of any simplistic dichotomy between state-power and federal-power orientations.

Specifically, the views of each Justice on two separate questions—the proper scope of national power under the Constitution and the relative importance of the presumption against preemption when that power is exercised—reveal some

60. *Id.* at 882-83. As noted earlier, by contrast, the Court declined to defer to federal agency views of preemption in *Shanklin*, where the agency's views of preemption had changed over time.

interesting alliances and some instructive possibilities about strategies employed in addressing the federal/state balance. This assessment also may clarify why the preemption decisions appear to exhibit a greater willingness to find federal preemption of state law than one might expect of this Court. Most illuminating is a comparison of the five-to-four split in the *Geier v. American Honda Motor Co., Inc.*⁶¹ preemption case with the different five-to-four split in the *United States v. Morrison*⁶² and *United States v. Lopez*⁶³ decisions, holding that Congress is without constitutional power to make gender-motivated violence or local gun possession federal crimes, respectively.⁶⁴

Four interesting groupings emerge from this comparison. Only one Justice—Justice Breyer—favors both maximum constitutional power in Congress and maximum readings of federal preemptive intent when that power is exercised. At least in this respect, he might be described as the most nationalist of the Justices.

Four Justices—Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Scalia—favor restricting the constitutional power of Congress, but seem inclined to find federal preemptive intent readily. To some this may seem inconsistent with a general disposition of these Justices to favor state authority. In the preemption cases, however, it is not a case of federal *or* state regulation, but whether there will be state regulation *in addition* to federal regulation. Under those circumstances, what might be at work are both a general disposition to curtail federal authority and a general disposition to favor deregulation of the private sector, even if the deregulation disposition comes at the expense of state regulatory power.

Only one Justice—Justice Thomas—appears to favor both restricting congressional power under the Constitution and limiting the preemptive effects of federal law on residual state power. At least in these respects, he might be described as the most consistently state-power-oriented member of the Court.

The three remaining Justices—Justices Stevens, Souter and Ginsburg—define a fourth combination that favors maximum congressional power, but also a presumption that it has not been exercised to limit state power unless Congress makes such intent very clear. This group appears to favor a combination of flexibility and political accountability for congressional acts that would deprive the states of regulatory power. To put it another way, these Justices seem to subscribe to a strategy of managing the federal/state balance that gives Congress the power to nationalize policy uniformly, if it believes that is appropriate, but assumes that, in cases of any doubt, Congress does not want to do so, because it would thereby limit state variation and experimentation.

On a related and at least partially confirming note, the Court unanimously decided in *Jones v. United States*,⁶⁵ on the same day that it issued its opinion in

61. 529 U.S. 861 (2000).

62. 529 U.S. 598 (2000).

63. 514 U.S. 549 (1995).

64. See *supra* note 16 and accompanying text.

65. 529 U.S. 848 (2000).

Geier,⁶⁶ that as a matter of statutory interpretation, the federal arson statute, which applies to “any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce[,]” does not cover arson of an owner-occupied residence not used for any commercial purpose.⁶⁷ Justice Ginsburg’s majority opinion engaged in standard textual interpretation, but also drew support from the proposition that federal statutes should be interpreted to avoid raising constitutional questions—in this case, whether extending the federal arson statute to cover arson of non-commercial dwellings would exceed Congress’ power to regulate interstate commerce in light of *Lopez*.⁶⁸ Moreover, since “arson is a paradigmatic common-law state crime[,]” it was appropriate to invoke the more general proposition that “‘unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance’ in the prosecution of crimes.”⁶⁹

Justice Stevens concurred, joined by Justice Thomas, “to emphasize the kinship between our well-established presumption against federal preemption of state law, and our reluctance to ‘believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this.’”⁷⁰ Of course, the “kinship” is hardly that of identical twins. The preemption issue asks whether state law is to be displaced by federal, whereas the issue of whether the federal statute covers the local crime asks whether there will be federal jurisdiction *in addition to* any state criminal jurisdiction. For the group of Justices disposed to limit federal authority except when finding preemption will limit state regulation with no enlargement of federal regulation, embracing a narrow interpretation of federal authority that has no effect on state authority should be attractive. In that sense, although there may be a kinship along the lines that Justice Stevens articulated for the group of Justices who favor the presumption of nonpreemption, there is little kinship between the preemption question and the scope of coverage question for the other group, whose common objective might well be to limit dual regulation by finding preemption more readily to cut down on state regulation and by interpreting the scope of federal coverage narrowly to cut down on federal regulation when preemption is not at stake. Starting with separate, somewhat opposing premises, therefore, these eight Justices are likely to join in cases like *Jones*. A general reluctance to assume the harshness of “making a federal crime out of it” only adds to the mix and could well bring Justice Breyer

66. 529 U.S. 861 (2000).

67. *Jones*, 529 U.S. at 850 (quoting 18 U.S.C. § 844(i)).

68. *Id.* at 858.

69. *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

70. *Id.* at 859 (Stevens, J., concurring) (quoting *United States v. Altobella*, 442 F.2d 310, 316 (7th Cir. 1971)) (internal citation omitted).

into the fold. It may even be that general resistance to federalization of previously local crimes is widely felt among the Justices in a way that is not as true of federalizing common law civil claims; but one perhaps should not entirely ignore the different starting points the Justices have before they come together in cases like *Jones*.

FOREIGN AFFAIRS, PREEMPTION AND (NON-REGULATORY) STATE FISCAL AUTONOMY

Perhaps the most interesting question left open among this series of cases is the tension between federal foreign affairs authority and state desires to withhold from disapproved foreign regimes financial support emanating from state coffers. Are there subterranean fault lines lying beneath the surface of unanimity in *Crosby* that may fragment the common, and seemingly-solid, ground on which the Justices stood when the permissibility of other state and local sanctions laws aimed at expressing disapproval of the behavior of foreign governments are brought before the Court again, as they almost surely will be? If so, of what sort and severity? By relying on preemption—the inconsistency of the Massachusetts sanctions statute with the federal sanctions statute—and by declining to address whether the state law was inconsistent with the mere existence of either the nation’s foreign affairs power or its power to regulate foreign commerce, the Court left open not only the possibility that different state sanctions laws might survive constitutional challenge on any of these bases, but also whether variations in federal sanctions legislation might create more room for state and local sanctions laws to operate.

Had the Court struck down the Massachusetts law as unconstitutional without relying on federal legislation, it is likely—though not certain, depending on the basis and strength of the foreign affairs or foreign commerce clause ruling, as well as on how active Congress chooses to be in preempting local sanctions law—that fewer, if any, local sanctions laws aimed at other foreign governments (or even Myanmar, if Congress modifies its current legislation) could have survived than will be able to survive preemption challenges under relevant federal statutes that may vary from the federal statute applied in *Crosby*. As it turned out, basing *Crosby* on preemption leaves a multitude of questions unanswered—undoubtedly one of the objectives the Justices had in mind. Yet there are some propositions and statements set forth in the opinion that suggest at least doctrinal trouble.

The Court remarked in a footnote that the “State concedes, *as it must*, that in addressing the subject of the federal Act, Congress has the power to preempt the state statute.”⁷¹ This statement appears to assume that there is no constitutional claim on the part of the state to resist federal interference with this particular

71. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.7 (2000) (emphasis added).

exercise of the state's spending power. Did the Court commit itself to an even broader position? Here is what it immediately went on to say in the same footnote:

We add that we have already rejected the argument that a State's "statutory scheme . . . escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." In *Gould*, we found that a Wisconsin statute debarring repeat violators of the National Labor Relations Act . . . from contracting with the State was preempted because the state statute's additional enforcement mechanism conflicted with the federal Act. . . . The fact that the State "ha[d] chosen to use its spending power rather than its police power" did not reduce the potential for conflict with the federal statute.⁷²

Did the Court intend that *no* exercise of state spending power at odds with otherwise valid federal legislation can claim constitutional immunity from federal control, or only that no exercise of state "spending" power that is effectively an exercise of state "regulatory" power can claim such immunity?

In *Gould*, the Court said that it agreed with a lower court that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services,' . . . ; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation."⁷³ In *Crosby*, the Court neither cited that conclusion nor indicated whether it believed the state sanctions law also was "tantamount to regulation." Recall, however, that the Massachusetts statute generally limits state procurement from companies doing business with Burma.⁷⁴ Because of the financial pressure imposed on those companies *as an instrument* of imposing pressure on a foreign government, it is certainly arguable that Massachusetts sought to "regulate" those companies rather than just to choose not to provide financial support to the foreign government. As for *Gould*, which involved a ban on direct state purchasing from the repeat NLRA violators, there was little explanation of exactly why the Court concluded that the ban was tantamount to regulation, but the Court did describe the state scheme as a "supplemental sanction for violations of the NLRA,"⁷⁵ and a "punitive"⁷⁶ one at that, suggesting perhaps that what made it regulatory was its purpose and effect

72. *Id.* (internal citation omitted).

73. Wis. Dep't of Indus. Labor and Human Rel. v. *Gould*, 475 U.S. 282, 289 (1986).

74. *Crosby*, 530 U.S. at 366-67.

75. *Gould*, 475 U.S. at 288.

76. *Id.* at 288 n.5.

of enforcing the federal regulatory regime, rather than a more independent spending decision.

Might exercises of state spending power that are not arguably regulatory still claim constitutional immunity from federal regulation as an instance of sovereign fiscal autonomy regarding how to spend state revenues? State and local sanctions laws that directly withdraw or initially refuse to make financial investments in a foreign nation without interrupting relationships between intermediaries and that foreign nation might be understood not as regulatory but as “proprietary,” in which case they might have a stronger claim to fiscal constitutional immunity, even from attempts by Congress to preempt them.

Although the motive for divestment is political in the ideological sense, and thus different than simply selling stock or withdrawing financial support for purely economic reasons, a state’s claim to fiscal autonomy in choosing not to invest state tax revenues outside its jurisdiction or beyond its own residents often has been upheld under the “market participant” exception to the limits imposed under the dormant interstate commerce clause.⁷⁷ The Court has not yet decided, and that is still true after *Crosby*, whether the “market participant” exception is available to states at all under the dormant *foreign* commerce clause, although as part of the Court’s general view that “state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny” than state restrictions burdening interstate commerce are,⁷⁸ the Court has seemed to suggest that at least it would be likely to restrict any “market participant” exception it might recognize under the foreign commerce clause more narrowly than that it is prepared to permit under the interstate commerce clause.⁷⁹ But there still is a choice to be made between a narrow exception and no exception—and that has significant implications for the validity of the kind of state and local sanctions policies that involve direct investment or divestment decisions.

It could be, of course, that any exercise of state spending power whose *purpose* is not simply to serve the residents of the state using their tax revenues, but to influence the political behavior of other governments—foreign or even domestic—might be considered an exercise of regulatory power, regardless of whether the influence is exercised through direct spending decisions or spending that involves third parties exerting pressure. Or it could be that an exercise of state spending power of whatever sort that targets particular foreign countries (or particular sister states) for pressure might be deemed more regulatory or otherwise intolerable than those that categorically disadvantage foreign countries as a group (Buy-American or Buy-in-state statutes). Or it could be that lines might be drawn between those state spending policies whose purpose is to influence foreign behavior but are likely to have little practical impact in doing so and similar

77. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1088-95 (3d Ed. 2000).

78. *S. Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

79. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980).

spending policies that threaten to have substantial practical impact. Moreover, it is even possible that the level of complaints from allies and global organizations, much less our own State Department, about local sanctions policies (which seemed to play an important role in the decision in *Crosby*) might figure into the Court's calculus of permissibility of even the most direct exercises of state spending power.

Still, I continue to believe that states and localities should have some constitutional freedom to decline to use their own (not federal) revenues to make a statement in support of human rights, even abroad, so long as they do not sweep unwilling partners into their efforts.⁸⁰ It remains difficult to accept the notion that Congress might mandate that state funds be invested in foreign regimes whose policies the States oppose, even if the federal taxes raised from the same taxpayers are so used; or that Congress might, "in order to stimulate foreign trade, demand that states provide subsidies to local businesses that trade with other nations"⁸¹; or that Congress could forbid the States from using state tax revenues to criticize the behavior of foreign regimes, such as by paying for billboards decrying the human rights record of Myanmar.⁸²

All this is to say that, although the fiscal autonomy of the states and their subdivisions may be severely limited in the interest (admittedly powerful) of having our foreign policy effectively be conducted by national representatives who can speak with one voice, that autonomy ought to be recognized as having some claim of constitutional stature—even against broad federal attempts to preempt every state spending decision that is motivated by objection to the policies of particular foreign governments. Ranking high among the affirmative reasons to work to preserve some residuum of state fiscal self-determination are the value of capturing the benefits of federalism's creative tension between a multiplicity of state perspectives and the strong, uniform voice of the national government in

80. Jonathan D. Varat, *State Actions on Divestiture Will Survive*, L.A. TIMES, Sept. 19, 1986, § B, at 5, col. 1 (addressing whether federal legislation would, or could, preempt local sanctions against South African Apartheid).

81. *Id.*

82. One can imagine arguments that these forms of state fiscal autonomy might be preserved without adopting a more general limitation on federal authority. For example, at least in theory, one could distinguish (although in practice it might be hard to define and enforce the distinction on a principled basis) between Congress compelling affirmative investment of state funds for the benefit of foreign regimes or trade, on the one hand, and directing states not to disinvest in foreign regimes or trade as a targeted means of registering displeasure, on the other. An argument that preserved state power to use state funds to pay for messages criticizing foreign governments might also be made based on guarantees of freedom of speech, without necessitating reliance on any constitutional recognition of state fiscal autonomy. The former argument would narrow considerably, but not eliminate, the ability of a state to deploy its spending authority in an attempt to influence the actions of foreign governments—an ability that would be eliminated if the Court ultimately were to rule that the very attempt to exert such influence, regardless of the means employed, exceeded state power or the terms of federal legislation interpreted expansively.

foreign affairs, and the exercise of domestic, tension-releasing local democratic self-governance it would permit. In any event, at least before finding such state laws preempted, the Court ought to insist on higher levels of absolute clarity of congressional intent to preempt than it otherwise might seek, the more invasive of state fiscal autonomy preemption would be.⁸³ Absent federal action, moreover, and all else being equal, the more direct and strictly limited an exercise of state spending power is and the more it represents a democratically chosen communal spending policy, the less it should be held restricted by the dormant interstate or foreign commerce clause.

Later in his opinion in *Crosby*, Justice Souter wrote the following in support of the conclusion that the Massachusetts law conflicted “with the President’s intended authority to speak for the United States among the world’s nations in developing a ‘comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.’ § 570(c)”.⁸⁴

It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.⁸⁵

The strength and scope of these statements might suggest that the Court was foreshadowing adoption of a firm position that very little, if any, state law at odds with federal foreign policy decisions will be tolerated, despite the disclaimer that the Court was not addressing “any general consideration of limits of state action affecting foreign affairs.”⁸⁶ Even the most minor of state sanctions irritants in conducting foreign policy negotiations might be expected to fall if national foreign policy officials must be able at all times to have as bargaining chips “access to the entire national economy without exception” even for state expenditures, and if there is absolutely no room for “inconsistent political tactics.”⁸⁷

Yet it would probably be a mistake to read too much into the tone of this passage. The statements and the tone were not adopted in the absence of federal legislation, but only in the context of preemption by a federal law in which

83. Varat, *supra* note 80.

84. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366 (2000).

85. *Id.* at 366-67.

86. *Id.* at 366.

87. *Id.* at 366-67.

Congress sought to direct the President's foreign policy initiatives in a fashion that gave him extended flexibility and authority. Absent such legislation, absent such clear legislation, or absent such expressly authorizing legislation, the Court still might be willing to follow a more tolerant approach to state sanctions laws aimed at the human rights or other objectionable policies of foreign governments.

The observation about the President's need to be able to bargain for the benefits of access to the entire national economy without exception if he is to possess "maximum power to persuade" does not go so far as to say that the Constitution—or perhaps even the statute—demands that he have that "maximum power," however desirable that might be. Were the Court to hold, as a result of federal statutes, and even more dramatically in their absence, that the states could not interfere with the President's maximum ability to negotiate with foreign governments entirely unhindered by state and local actions that deviated at all from his approach, there might be an end to the use of state fiscal autonomy to withdraw support from unpopular foreign governments. Unless any state purpose to influence conduct of a foreign government was thought to be enough to invalidate a state sanctions law, regardless of the mode of influence employed, and regardless of how little impact that influence might have, there should remain some room for at least direct investment or divestment sanctions policies to operate.

What if, however, a state divestment policy were to have such a potentially large impact that the President's efforts to deal with the foreign regime through other forms of influence and negotiation were undermined? State employee retirement funds, such as those in California, are of such sizable amounts that millions, perhaps billions of dollars could become unavailable to a foreign government by virtue of state, rather than federal decisions, if left unchecked.⁸⁸ Whatever the form of the exercise of sovereign state spending authority, perhaps any constitutional immunity it might otherwise possess needs to be tempered to permit Congress to assure that it not severely undermine federal foreign policy positions and initiatives. Again, however, that is not the same as entirely removing any fiscal policy discretion from the states in this sphere. Nor does it answer the question whether the states would retain their authority in the absence of federal legislation, leaving the burden of acting to curtail undue state impacts on foreign affairs to congressional, not judicial, oversight.

88. See Jock O'Connell, *Is California Seeking to Fashion Its Own Foreign Policy?*, L.A. TIMES, August 20, 2000, § M, at 6 (noting how the possibility of implementing California State Treasurer Phil Angelides' guidelines poses a "novel challenge to the federal government's Constitutional prerogatives in foreign relations").

Crosby's unanimity came in the context of federal legislation that was explicit, detailed, and fortifying of presidential authority. Suppose a number of possible variations, however. There might be less clear inconsistency between congressional objectives and state methods in the allegedly preempting legislation. There might be ambiguity in the text and mixed evidence in the legislative history of the federal legislation about Congress's preemptive intent.⁸⁹ There might be a claim of preemption where Congress is silent or where it bolsters and directs presidential authority less strongly and clearly, but where the President through the State Department has issued allegedly preempting regulations pursuant to more generalized congressional authorizing statutes or pursuant to claims of inherent executive authority in the realm of foreign affairs. There might be silence on the part of both Congress and the President until the President argued in favor of limits on state sanctions policy in the course of litigation, or not even then. *Crosby* does not speak directly to these variations and does not provide many clues about how the Court might approach them, but it does offer a couple of propositions that might be relevant to some of them.

First, Justice Souter placed some reliance on protests against the Massachusetts law by allies and trading partners of the United States and on the consistent representations of the Executive Branch "that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress."⁹⁰ Disclaiming unquestioning deference to the legal judgment of the Executive regarding preemption, the Court nonetheless found these sources "competent and direct evidence of the frustration of congressional objectives by the state Act"⁹¹ and distinguished another precedent⁹² where it had "found the reactions of foreign powers and the opinions of the Executive irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions" of both.⁹³ Absent affirmative evidence of contradictory congressional views on preemption, therefore, the Court does seem prepared to pay attention to consistently maintained views of the Executive Branch and supporting statements of foreign governmental entities in the global economy leaning in the direction of preemptive intent.

89. Although the Court was unanimous in its conclusion in *Crosby*, Justice Scalia, joined by Justice Thomas, concurred only in the judgment because of objections to the majority's extended references to the statements of the federal statute's sponsors and other excerpts from legislative history, all of which supported the Court's interpretation of the statute's text. Justice Scalia found those references unnecessary, because the Court's conclusions were "perfectly obvious on the face of the statute" or "from the record." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. at 371-72 (Scalia, J., concurring). In circumstances where those conclusions were not perfectly obvious from statutory text, reliance on inferences that might be drawn from legislative history might well be a contested point in general and, among those who would look to legislative history, might be found to be of uncertain import in any event.

90. *Id.* at 368.

91. *Id.* at 369.

92. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 327-29 (1994).

93. *Crosby*, 530 U.S. at 369.

Second, the Court rejected the State's argument that the repeated failure of Congress explicitly to preempt state and local sanctions laws justified a conclusion of nonpreemption, especially since "various authorities[,]""⁹⁴ including the Maryland Court of Appeals in a noteworthy case that the Supreme Court did not review,⁹⁵ thought many such measures directed at South Africa more than a decade ago were *not* preempted. Finding the silence of Congress in this respect ambiguous, Justice Souter commented that "[s]ince we never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter."⁹⁶ This passage at least suggests that the Court was not reaching out to rule against state sanctions laws in contexts where the peculiarities of the state law and the peculiarities of the allegedly preempting federal law differed from those evaluated for consistency in *Crosby*.

The Court's noncommittal stance on the validity of state and local sanctions against South Africa during the apartheid era merely emphasizes the range of future possibilities the Court has not yet foreclosed. It would be prudent to be aware of the many variables that may enter into the resolution of future conflicts between state laws sanctioning foreign governments and the many possible alignments of views of Congress, the President, and foreign governmental entities on their validity.

CONCLUSION

In the interstices of preemption doctrine and decisions applying it lie issues of great moment regarding the proper balance of federal and state power and how best to interpret and accommodate the respective views of Congress and the Executive Branch. Preemption is, in a sense, a microcosm of federalism and separation of powers debates, implicating attitudes about default rules that must choose between favoring federal or state authority, judicial, congressional, or administrative dominance in managing the proper federal-state balance, and dual or single regulation. Last Term's preemption decisions contain elements of all of these in kaleidoscopic nuance.

94. *Id.* at 370.

95. *Bd. of Trustees v. Mayor and City Council of Baltimore*, 562 A.2d 720, 744-49 (Md. Ct. App. 1989), *cert. denied subnom.*, *Lubman v. Mayor and City Council of Balt.*, 493 U.S. 1093 (1990).

96. *Crosby*, 530 U.S. at 370.

PROFESSOR ERWIN CHEMERINSKY'S RESPONSE

PROFESSOR CHEMERINSKY: It's been an amazing day, but it's been a really long day too, so I'll try to be brief. Dean Varat has done an excellent job of illuminating relationships between the Supreme Court decisions limiting federal power and those dealing with preemption. I want to make three points about that relationship. First, the Supreme Court's preemption decisions are inconsistent with a desire to protect state sovereignty and state choice. One would think that a Court that's concerned about protecting state prerogatives would want a very narrow preemption doctrine. After all, one way to free up state choice would be limit the preemptive effect of federal laws. That's not at all what the Supreme Court has done with regard to preemption, as Dean Varat's description just showed us.

Let me focus on two of the cases he talked about. The first was *Geier v. America Honda Motor Co., Inc.*¹ Alexis Geier bought an 1987 model Honda Accord. She got in an auto accident. The car crashed into a tree, and she was seriously injured. She sued Honda for negligence and for products liability under state tort law. Well, it turns out the 1987 model Honda Accord was made under 1987 safety standards promulgated by the Department of Transportation. Those safety standards required that all cars have passive restraint systems, and they gave automobile manufacturers three choices as to what to install. One was air bags, and in fact Geier's claim was had her car had air bags, she wouldn't have been so seriously injured. A second option that car manufacturers had was lap and shoulder belts. That's what her car had. So Honda argued that her state-tort law claim was preempted because it had complied with the federal safety standards.

However, the 1987 Department of Transportation safety standards were promulgated under authority passed by Congress in a 1986 statute. That statute had an Express Savings Clause. That clause said that nothing in this statute is meant to exempt from liability any claim that exists under the common law. Hard to imagine Congress being clearer with regard to the Savings Clause. "Nothing in this statute is meant preempt any common law liability." Now when we talk about what's traditionally been a state function, certainly tort liability, including products liability and negligence, has always been left to the states. Congress has said it doesn't want this statute in any way to preempt any of that. So you would think that a Court that's really concerned about protecting state prerogatives would say no preemption, but that's not what the Court says. Justice Breyer, writing for the five-person majority, reads the Savings Clause very narrowly.

I must admit I found this part of Justice Breyer's opinion almost incomprehensible, reading it over and over and trying to figure out why this Express Clause is not sufficient. In essence, he said Congress wasn't sufficiently specific. Congress didn't say that if the car manufacturer

1. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000).

complied with one of the safety mechanisms, it could still be sued for not having another one. The problem with that interpretation is that the Department of Transportation didn't promulgate the safety standards until a year later. How could Congress have ever known to be that specific?

Let me use a second example here. It's the *Crosby v. National Foreign Trade Council*² that Dean Varat talked about so eloquently, especially at the end of his remarks. Now the Supreme Court characterizes the state law here as being inconsistent with federal statutes that impose sanctions on Burma. I think there's another way to conceptualize what the state of Massachusetts was doing here. The State of Massachusetts was deciding how it wanted to spend state funds and taxpayer money. And the state here was saying "we don't want to do business with companies that are doing business in Burma, because we don't want any of our state money even indirectly going to support this government that's committing human rights' violations." In this sense, it wasn't Massachusetts imposing sanctions on the country of Burma. It wasn't Massachusetts developing its own foreign policy. Massachusetts was a state deciding where it wanted its money to go.

Many cities develop policies saying they didn't want to do business with companies that were doing business in South Africa at the time of apartheid. And I would say the same thing there, that was the prerogative of the city in deciding how it wanted to spend its money—who it, as a government, wanted to do business with. And yet, the Supreme Court didn't give deference to the state here. Instead the Supreme Court, nine-to-nothing, found preemption. So I find it very difficult to reconcile the preemption decisions of the Court with the desire to protect state sovereignty and state prerogatives.

That leads me to my second point. Why the inconsistency on the Supreme Court? I have a couple of thoughts here. One is there is an over-arching consistency, in the sense that what the Supreme Court is doing in both areas, that reflects a Court that defers to no one. In response to a question in the very first session, I said I think the dominant characteristic of this Court is that it's a Court that doesn't defer to anyone. I think people chuckled, but my hope is that having listened to the description of the cases today, you see that illustrated over and over again. It doesn't defer to Congress. The Rehnquist Court declares federal laws unconstitutional at a much faster rate than the Burger Court or the Warren Court. When you think of cases like *Morrison*³ or *Playboy Enterprises*,⁴ the Court gave little deference to Congress as a fact finder. It's not a Court that defers to federal agencies, see, for example, *Brown and Williamson v. FDA*⁵ that Professor Kmiec talked about.

2. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

3. *United States v. Morrison*, 529 U.S. 598 (2000).

4. *YoungBear v. Playboy Enterprises, Inc.*, 525 U.S. 1125 (2000).

5. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

It's not a court that defers to state courts and state legislatures. Think of *Dale v. Boy Scouts*.⁶ I think here, with regard to state legislatures and the *Crosby* case, and state courts and the *Honda* case, when you look at the Court's decisions with regard to federal power or preemption, it's all about the Supreme Court deciding with little deference.

I think there's another thing that explains the inconsistency—something even more profound, and that's that the Supreme Court's federalism decisions aren't really about protecting state government. Instead they're about a conservative desire to limit federal power. Throughout American history, conservatives have used federalism as an argument against exercises of federal power. Federalism was used as an argument against abolition, as an argument against reconstruction, as an argument against new-deal programs, as an argument against desegregation. I don't think in these instances that the real concern of the conservatives was protecting states as states. Though the argument was presented in terms of states' rights, I think federalism instead was an argument being advanced to try to achieve the substantive goal of defeating exercises of federal power.

Think back to the *Lochner*⁷ era and how the Supreme Court used federalism there. If Congress tried to create minimum-wage law or child labor law, it would be struck down on federalism grounds, and there would be eloquent words from the Supreme Court about the need to limit federal power to protect the states. But as states tried to adopt minimum-wage laws or maximum-hour laws, they would then have their laws struck down on grounds of substantive due process. So you have to wonder how much was the Court really concerned about states' rights in those federalism cases, or how much again was federalism just the mechanism the Court used to achieve its conservative desire to limit government power. And I think that's what's going on here with regard to the federalism cases. You have five Justices, the majority of the Court, who very much want to limit federal power, limit the scope of the commerce power, limit the scope of section 5 power, and revive the Tenth Amendment, because of a traditional conservative concern about federal power, but I don't think it's about a genuine concern about state prerogatives.

Well, that leaves the third and final point I want to make. Is there an alternative vision of federalism? Is there an alternative vision about the proper relationships for doctrines concerning the scope of federal power and preemption? And I would suggest there is. And that's to re-conceptualize

6. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

7. *Lochner v. New York*, 198 U.S. 45 (1905).

federalism as being not about limits but instead as being about empowerment. Traditionally, whenever we talked about federalism, we've always thought of it as being about limits. During the *Lochner* era, again in the 1990's, and today, we see federalism as limiting the scope of Congress's power. We're talking here about federalism, in terms of preemption limiting state power.

But there is another conception of federalism—to see it as being about empowering all levels of government to deal with social problems. This is based on the Court's idea that the genius of having multiple levels of government is having multiple levels to deal with social problems. That is, if one level of government fails to deal effectively with social problems, then we'll have another level of government to deal with it. Take the issue of violence against women. If state governments are failing to effectively deal with violence against women, then it's desirable to be a federal government able to adopt a Violence Against Women Act to deal with the problem. Or take car safety. It's desirable to have both federal safety standards and state tort liability to maximize the possibility of safe cars so as to protect drivers and passengers. In this sense, these regulations would be a very different approach to both limits on federal power and preemption. From this perspective, we shouldn't regard federalism as limiting federal power. Instead, we should expand so we can find the scope of federal power.

I would prefer we have a very broad Commerce Clause. In this sense, I disagree with both Professor Kmiec and Dean Sullivan. I think Congress' findings that violence against women costs the American economy billions of dollars a year is enough to show a substantial effect on interstate commerce. At the same time, I think there should be a broad definition of Congress' power under section 5 with spending authority as well. Correspondingly, I believe there should be a very narrow preemption doctrine to empower state and local governments to deal with social problems. And so I believe the Court was wrong to find preemption in *Geier* and was wrong to find preemption in *Crosby*. Now I'm attempting to, at this point, elaborate for you my theory of federalism as empowerment rather than limits. I'm working on a project in this regard, and it's tempting to share my thoughts, but it's really late right now, everyone's really tired. I think what I'll simply say is to consider it as an alternative way of dealing with the relationship between the limits on federal power on one hand and preemption on the other. And all I'll say is the program is titled "The Most Extraordinary Term." It's really been a most extraordinary day. I just want to thank Professor Kmiec for including me as part of this amazing day.

PROFESSOR KMIEC: David Pike of the Los Angeles Daily Journal has the final question.

MR. PIKE: In view of the late hour, I'll just ask one quick question here. One of the things I learned during the *Crosby* case was that California is the home to all of these sanctions, resolutions, and ordinances. It seems like every city

in California has one or maybe many, especially Northern California and Los Angeles as well. Anyway, I'm just wondering if I could ask you to try the crystal ball and come up with an ordinance that you think the Court would approve of in terms of sanctions. I know you mentioned spending power as opposed to regulatory power, but can you come up with one that you think the Court would approve of?

DEAN VARAT: The predictive question is hard, and because it is getting close to the dinner hour, I'm not interested in eating glass. But I will suggest one that I think possibly could survive the Court's review. And of course, it depends on what Congress does in response. I'm actually not quite willing to go as far as Professor Chemerinsky. I don't think it's a good idea to actually sweep in other parties, and I wouldn't make distinctions between divestment and investment, although I understand that in other areas we've had decisions that distinguish between removing books from libraries and not putting them in there in the first place, and one could draw distinctions like that. But I wouldn't draw that distinction in this context. I would suggest that divestment or investment of states' monies with the purpose, perfectly fine in my view, of expressing some displeasure with the behavior of foreign government ought to be able to survive as an exercise of state autonomy.

Let me just say one thing about that; there is a part of the decision in *Crosby* where Justice Souter writes that the President's power really ought to extend to the ability to have as a bargaining chip with foreign governments, especially if we're doing multi-lateral negotiations, every aspect of the national economy, without worrying about willy-nilly inconsistent political tactics. That's very strong language that I think is too strong, frankly. I think it completely denigrates the possibility that we could have local communities as sites for community self-governance, if you will, even if they're just making their own statements with their own money so that we can have some competing notions of what ought to happen. I think that's frankly too much. The notion of inconsistent political tactics seems to me hardly inconsistent with federalism. We can go too far with the notion that the nation has to speak with one voice, and that voice can never have any irritating notes of discord along the way. Surely I don't think we're going to shut down the ability of people to complain in the states about what the national government is doing, and that's going to be irritating sometimes to foreign governments as well. So there's some line drawing that has to be done, I think, in that regard.

And when you talk about state pension funds, we are talking about millions and millions, in fact, in some cases, even billions of dollars. There probably could come a point where the impact is so large that, I suspect, I

might be inclined to allow some intervention. But if Congress hasn't acted, I certainly wouldn't. If Congress has acted, I certainly would at least read their intent quite narrowly.

PROFESSOR KMIEC: If I might just conclude. Erwin mentioned federalism and its empowering capacity. Despite being cast by the local media in Los Angeles in the role of point-counterpoint, Erwin and I, in this particular case, are in entire agreement, and I think this perhaps typifies the effort that has gone on here the entire day. What this discussion has been about has been the search for constitutional principle, authentic and genuine principles of interpretation, trying as much as we can to shed the political origins of our ideas and our aspirations.

With regard to federalism in particular, I served in the Department of Justice when the anti-apartheid provisions at the state and local government level were being enacted, and the issue of their constitutionality fell to me for evaluation. What position would the federal government take? As the head of the office of legal counsel, I offered the opinion that basically said, "well, if we're going to be consistent in our search for a federalist principle, we should recognize the legitimacy of these state and local governments to make their own independent spending decisions with regard to the money they're spending." That is the position we took, much to the consternation of the State Department, and even, I would say, the normal constituency that the President would like to call upon as his own. And one of the things that I think Dean Varat so very carefully outlined in the paper was this tension between being consistent with regard to federalism as opposed to just merely seeking a libertarian outcome that would be pro-business or pro-industry or deregulatory, and that is one small example, but an important example, of how it is important to keep principle separate from the political or partisan objective.

There is a very special person in the room at the moment, and I want to introduce him. When I first started teaching some twenty-five years ago, I was wandering about the splendid Notre Dame library and came across the proceedings of symposia that took place immediately after WWII, as people desperately searched for a philosophy that might help the world regain its bearings after its brutal confrontation with Stalin and Hitler. There, I saw the original papers of Edward Corwin, the original papers of Roscoe Pound, the original papers of Clarence Manion, and the original papers of Karl Llewellyn, all of whom came to conferences at Notre Dame in the late 1940's and 50's at that moment of recovery to address that question. And it planted a seed in my mind that some day it would be wonderful to be among people that intellectually tall and that great of purpose, in one room again. I thank you for being here this afternoon. I think we did it one more time. And the person who deserves every bit of that kind applause, is the person to whom this symposium is dedicated, the seventh President of Pepperdine University,

Andrew K. Benton.

MR. BENTON: I appreciate having just a few moments at the end of what I know has been a stimulating day. I've heard bits and pieces of it, and I am so honored. The University is honored by your presence today, and so I thank you.

I begin with an admission against interest on this, my inaugural day. I never set out to be a university president. That was never my plan. I did want to go to law school, and I thought that some day that I would be a practicing attorney and probably a judge in my home town. That's what I wanted to do, and that was born largely from my experiences in the late '60s and early '70s with all the civil unrest and the difficulty over Vietnam and conflict. And it seemed to me that the judicial system brought order to what was sometimes madness. Sometimes they contributed a little madness of their own, but by and large, it was the judicial process that brought order to that madness. And so I wanted to go to school, and I was appealed to by a great quote from Daniel Webster that "[j]ustice, sir, is the great interest of man on earth."⁸ It is a ligament which holds civilized beings and civilized nations together. And that has always appealed to me, and I wanted to be involved in the process by which my life would deal with ligaments.

However, I have now found myself in the business of higher education, and I find myself surrounded by the esoterics of higher education, and I have a hard time sometimes getting excited about the prosody of current studies of metaphor in Mameluke poetry or the distinctions in inter-animations and politics and rhetoric poetic split as embodied in the history and historiography of nineteenth century composition and rhetoric. Or even believe it or not, I have a hard time getting excited about studies in the erotic bird phenomenology and literature.

Law does not have the luxury of research in a vacuum. Law breathes, and it breathes in resolving the issues between state and federal rights, and it breathes in the abortion nettle, and it breathes in the conflict and the struggle in manners of school vouchers and school prayer policy. And I know you've talked about those issues and many more today. And even our Supreme Court does not have the privilege of remaining above the fray. But then, when was a case or controversy regarding the Constitution a matter of mere esoterics?

Professor Kmiec mentioned Karl Llewellyn just a moment ago, and before I started my own law studies many years ago, I read a book by Karl

8. Daniel Webster, *On Mr. Justice Story* (1845), in *FAMILIAR QUOTATIONS*, at 300 (John Bartlett ed., 10th ed. 1919).

Llewellyn entitled *The Bramble Bush*,⁹ his lectures to first-year law students at Columbia. And I recall the little poem in the beginning of that book. "There was a man in our town and he was wondrous wise: he jumped into a BRAMBLE BUSH and scratched out both his eyes—and when he saw that he was blind, with all his might and main he jumped into another one and scratched them in again."¹⁰ And I've always thought that was a fitting description to describe the study of law with my own students. So I talk with them about how lawyers and judges jump into the bramble bush, and just when they think that all is lost, they find principles and precepts to lead themselves out.

At Pepperdine University we are involved in our own tension between ardently-held positions. We are an institution founded on faith by George Pepperdine, who had very high ideals for us, and we struggle with that in relation with our own high standards and wanting rigor in the law and in all studies that are conducted here. And we hold both to high expectations, and today that is a primary responsibility of mine.

Our founder, only 63 years ago charged us with preparing students for lives of service, purpose, and usefulness, and for educating not only the heart, but the mind, which is a broad and deep proposition. And in what can only be described as presidential activism at Pepperdine University in recent years, we have tried to move beyond that broad proposition and become not only good, but *really good* if we can be. And so this symposium, the genius of Doug Kmiec, his influence, and his persuasive abilities gives us what I believe is a very, very fine day for this University, and so I thank you for that.

Let me return to the reason that I chose the law, not history, which is my other love. I have a favorite scene from the movie *Amistad*.¹¹ Some of you may remember lawyer Baldwin's reaction when he hears the story of how Cinque fought a lion away from the village in which he lived. He looked at Cinque and said, "You are a brave man," to which Cinque replied, "I'm not a brave man. I'm a lucky man."¹² I share this with you because the ligaments in our society should not have to be brave or lucky to receive fairness or justice. You, at a gathering like this and in the work that you do, help ensure that. So, as I began, you honor us with your presence today and your participation. This is an uncommon gathering of scholars at an uncommon time in this nation and at an uncommon time at this University as we prepare for the future. I am simply here to say thank you.

9. KARL LLEWELLYN, *THE BRAMBLE BUSH* iii (1981).

10. *Id.*

11. *AMISTAD* (DreamWorks Pictures 1997).

12. *Id.*