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Empowering States When It Matters

A DIFFERENT APPROACH TO PREEMPTION*

*Erwin Chemerinsky**

I. INTRODUCTION

When historians look back at the Rehnquist Court, undoubtedly they will say that its most significant impact on the law has been with regard to federalism. In the last decade, the Court has limited the scope of Congress's power under the Commerce Clause and Section Five of the Fourteenth Amendment;¹ revived the Tenth Amendment as a constraint on federal power;² and greatly expanded the scope of state sovereign immunity.³

One would expect that a Court concerned with federalism and states' rights also would be narrowing the scope of federal preemption of state laws. Narrowing the

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² See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zone Act as exceeding the scope of Congress's commerce power); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil damages provision in the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as exceeding the scope of Congress's Section Five powers).

³ See, e.g., *New York v. United States*, 505 U.S. 144 (1992) (invalidating provisions of the Low-Level Radioactive Waste Act as violating the Tenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating the Brady Handgun Control Act as violating the Tenth Amendment).

⁴ See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (limiting Congress's power to authorize suits against state governments).

circumstances of federal preemption leaves more room for state and local governments to act. The Court has done quite the opposite, though. Over the last several years, the Supreme Court repeatedly has found preemption of important state laws, and done so when federal law was silent about preemption or even when it explicitly preserved state laws.

For example, in *Geier v. American Honda Motor Co.*,⁴ the Court found preemption of a state products liability common law cause of action notwithstanding a statutory provision that expressly provided that “[c]ompliance with” a federal safety standard did “not exempt any person from any liability under the common law.”⁵ In *Lorillard Tobacco Co. v. Reilly*,⁶ the Court found that federal law preempted state regulation of outdoor billboards and signs in stores advertising cigarettes. In *Crosby v. National Foreign Trade Council*,⁷ the Court invalidated a Massachusetts law that restricted the ability of the state and its agency to purchase goods and services from companies that did business with Burma. Most recently, in *American Insurance Association v. Garamendi*, the Supreme Court found preemption of a California law requiring that insurance companies doing business in that state disclose Holocaust-era insurance policies.⁸ The Court invalidated the California statute despite the absence of any federal law expressing an intent to preempt state law, basing its holding on the murky “dormant foreign affairs power of the President.”

At the very least, these and other cases like them are inconsistent with the Supreme Court’s oft-stated presumption against preemption. One illustrative example of the statement appears in *Medtronic, Inc. v. Lohr*:

[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which 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

⁴ 529 U.S. 861 (2000). For a more detailed discussion of *Geier*, see *infra* text accompanying notes 17-21.

⁵ *Id.* at 868 (quoting 15 U.S.C. § 1397(k) (1988)).

⁶ 533 U.S. 525 (2001). For a more detailed discussion of *Lorillard*, see *infra* text accompanying notes 22-28.

⁷ 530 U.S. 363 (2000). For a more detailed discussion of *Crosby*, see *infra* text accompanying notes 29-31.

⁸ 539 U.S. 396 (2003). For a more detailed discussion of *American Insurance*, see *infra* text accompanying notes 32-42.

be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁹

Contrary to this statement and its homage to the presumption against preemption, this Article will argue that the recent Supreme Court preemption cases clearly put the presumption in favor of preemption.¹⁰

More profoundly, the Court’s recent decisions finding preemption expose the political content of its federalism rulings. The Court has eagerly found preemption of state laws regulating business, such as tobacco companies, the auto industry, and insurance companies. On the other hand, most of the Supreme Court’s federalism decisions invalidating federal laws have struck down civil rights laws – such as the Violence Against Women Act, the Religious Freedom Restoration Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Comparing the Court’s preemption rulings with its decisions limiting Congress’s powers under the Commerce Clause and Section Five of the Fourteenth Amendment reveals that what animates the Rehnquist Court is not a concern for states’ rights and federalism. Rather, the Court is hiding its value choices to limit civil rights laws and to protect business from regulation in decisions that seem to be about very specific doctrines of constitutional law, such as the scope of the commerce power and the circumstances of preemption.

This paper is divided into four additional parts. Part II describes the broad view of preemption reflected in the Supreme Court’s recent decisions. Part III explains why these decisions are undesirable, and Part IV offers a different approach to federalism. Part V briefly concludes. My broad thesis is that federalism should be reconceptualized as being about empowering government at all levels, rather than limiting power. The genius of having multiple levels of government is there are several different actors to advance rights and liberties. From this perspective, congressional authority under the Commerce Clause and Section Five of the Fourteenth Amendment should be broadly interpreted, as it was from 1937 until the 1990s. Correspondingly, preemption of

⁹ *Medtronic, Inc. v. Lohr*, 518 U.S. 468, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)).

¹⁰ For an argument against the presumption against preemption, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000).

state and local laws should be narrowed. My specific thesis in the arena of preemption is that courts should find preemption only if a law expressly preempts state and local action or if there is a direct conflict between federal and state law. From this perspective, the Supreme Court's recent preemption cases are wrong in invalidating desirable state and local laws creating liability for injured consumers, protecting children from tobacco advertisements, and requiring insurance companies to disclose their Holocaust-era policies.

Obviously, a full exposition and defense of my federalism-as-empowerment thesis is beyond the scope of this paper. But I do want to argue that such a radically different approach to federalism would mean a dramatic change for the better in the area of preemption analysis. States' rights are not an end in themselves. They are a means to the crucial objectives of advancing freedom and enriching the lives of those in the United States. Unfortunately, the Supreme Court's decisions limiting federal power in the area of civil rights and invalidating desirable state laws based on preemption have had exactly the opposite effects.

II. THE DENIAL OF STATES' CHOICES: THE COURT'S BROAD VIEW OF PREEMPTION

Article VI of the Constitution contains the Supremacy Clause, which provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. When a state law conflicts with federal law, the federal law controls and the state law bows under the principle of federal supremacy.¹¹ As the Supreme Court declared: "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."¹² In *Gade v. National Solid Waste*

¹¹ See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (deriving preemption from the supremacy clause); but see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829 (1992) (arguing that only some preemption should be based on the supremacy clause).

¹² *Gade*, 505 U.S. at 1084 (internal quotations and citations omitted). In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), Chief Justice John Marshall said: "[A]cts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress . . . is

Management Association, the Court summarized the tests for preemption:

Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹³

The Supreme Court has recognized that these categories are often difficult to apply. The Court once remarked that there is not "an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."¹⁴ In the vast majority of cases in which a court must decide whether state law is rendered invalid by related federal law, the federal law itself is ambiguous as to whether it precludes state and local law. Therefore, a choice must be made as to whether federal law should be presumed to preempt state law.

The Supreme Court correctly has said that concerns about federalism and state authority justify a presumption against preemption. The Court has observed: "Congress . . . should manifest its intention [to preempt state and local laws] clearly. . . . The exercise of federal supremacy is not lightly to be presumed."¹⁵ Recently, the Court emphasized that states

supreme; and the law of State, though enacted in the exercise of powers not controverted, must yield to it."

¹³ 505 U.S. at 98 (internal quotations and citations omitted). In an earlier case, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Supreme Court identified three situations where preemption could be found:

First, the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it Second, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject Third, [where] enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program.

Id. at 502-505 (internal quotations and citations omitted).

¹⁴ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁵ *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (citation omitted).

"are independent sovereigns in our federal system" and therefore there is a presumption against finding preemption.¹⁶

The Supreme Court's recent preemption decisions are striking because they are so at odds with the Court's insistence on deference to the states in Commerce Clause and state sovereign immunity cases. To illustrate, I want to briefly describe several recent cases and how they put the presumption in favor of preemption. In this section, my focus is descriptive, focusing on how the Court has placed the presumption in favor of preemption; the normative criticism of this approach and these rulings is in Part III.

A. *Geier v. American Honda Motor Co., Inc.*¹⁷

Alexis Geier bought a 1987 model Honda Accord. She was seriously injured when the car crashed into a tree. She sued, claiming that the absence of airbags was a design defect that was responsible for her injuries. The Department of Transportation had promulgated rules pursuant to the National Traffic and Motor Vehicle Safety Act for 1987 automobiles. The regulations required that cars have passive restraint systems and gave manufacturers choices as to how to comply; one choice was to install airbags, another choice was to install the lap and shoulder belts that were in Geier's car. The defendant argued that Geier's suit was preempted by federal law because it built the car in compliance with the federal safety requirements.

The problem with this regulatory framework is that the National Traffic and Motor Vehicle Safety Act, which was the basis for the Department of Transportation regulations, had a savings clause to the effect that nothing within the law was meant to preempt any other cause of action that might exist. The law expressly said that "[c]ompliance with" a federal safety standard does "not exempt any person from any liability under the common law."¹⁸ Geier argued that this provision prevented a finding of federal preemption.

The Supreme Court rejected Geier's argument and found federal preemption notwithstanding the savings clause. Justice Breyer, writing for the majority, said that this was not

¹⁶ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)).

¹⁷ 529 U.S. 861 (2000).

¹⁸ *Id.* at 867 (quoting 15 U.S.C. § 1397(k) (1988)).

a situation of express preemption, but instead conflict preemption.¹⁹ The Court found that allowing state liability for cars made in compliance with the federal safety standard would conflict with the federal law. Justice Breyer said that the savings clause did not foreclose preemption because there was no indication that Congress wanted to permit lawsuits when cars were made in compliance with the Department of Transportation's safety regulations.²⁰

The only way to make sense of the case is to see it as putting a presumption in favor of preemption.²¹ The federal statute expressly said that it did not preempt state law tort suits. Thus, there was no conflict between Geier's state cause of action and any provision of the relevant federal law. Yet the Court nonetheless ruled in favor Honda and deemed a state tort action to be preempted.

B. Lorillard Tobacco Co. v. Reilly²²

In this case, the Court invalidated a Massachusetts law that prohibited outdoor advertising for cigarettes, such as billboards, within 1,000 feet of a playground or school.²³ The Supreme Court relied on the language of a federal law adopted in 1969 that proscribes any "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes."²⁴ The Court reviewed the history of federal regulation of cigarette advertising and concluded:

In the 1969 amendments, Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional

¹⁹ *Id.* at 869-70.

²⁰ *Id.*

²¹ The dissent by Justice Stevens forcefully makes this point. See *id.* at 907 (Stevens, J., dissenting); see also Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 *BYU J. PUB. L.* 1 (2002).

²² 533 U.S. 525 (2001).

²³ The Court found that the Massachusetts law was preempted in its regulation of advertising of cigarettes. As for the regulation of advertising of cigars and smokeless tobacco, which are not the subject of federal regulation, the Court found that the law violated the First Amendment.

²⁴ *Lorillard*, 533 U.S. at 537 (quoting Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1334(b)).

targeted regulation of cigarette advertising, it vested that authority in the FTC.²⁵

Justice Stevens, in a dissenting opinion, argued that the state law was not preempted because it regulated the location and not the content of cigarette advertisements.²⁶ The majority, however, rejected this distinction and declared

But the content/location distinction cannot be squared with the language of the pre-emption provision, which reaches all "requirements" and "prohibitions" "imposed under State law." A distinction between the content of advertising and the location of advertising in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic media, but not elsewhere.²⁷

Again, this case can be understood only if it is seen as putting a presumption in favor of preemption.²⁸ The federal law was designed to limit cigarette advertising so as to protect children. The federal preemption provision was meant to keep states from adopting conflicting requirements for warning labels on cigarette packages. There is nothing in the law which says or implies that *all* state regulation of cigarette advertising is preempted by federal law. Indeed, the Massachusetts law advances the goals of the federal statute by protecting children from tobacco ads. The federal statute has nothing to do with whether there can be billboards near schools or whether ads in stores need to be a certain level above the floor. These, as the dissent points out, go entirely to placement, an issue not addressed by the federal law. Nonetheless, the Court protected the tobacco industry and invalidated the Massachusetts statute.

C. Crosby v. National Foreign Trade Council²⁹

Massachusetts adopted a law that prohibited the state and its agencies from purchasing goods or services from companies that do business with Burma (Myanmar). The state adopted this law because of human rights violations in that nation. The Supreme Court unanimously found that federal

²⁵ *Id.* at 547-48.

²⁶ *Id.* at 592-94 (Stevens, J., dissenting).

²⁷ *Id.* at 548-49.

²⁸ My focus here is only the preemption issue and not whether the Massachusetts law violates the First Amendment.

²⁹ 530 U.S. 363 (2000).

law preempted the state law. Justice Souter, writing for the Court, explained that Congress had enacted a sanctions law against Burma. He found that this preempted states from imposing their own sanctions.

Justice Souter rejected the State's argument that its policy furthered the federal objective of imposing sanctions on a nation that violated basic norms of human rights. Justice Souter wrote: "The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions. The fact of a common end hardly neutralizes conflicting means."³⁰ Justice Souter said that the existence of the state law

undermines the President's capacity . . . for effective diplomacy. 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.³¹

The decision, though unanimous, again must be seen as putting a presumption in favor of preemption. Congress had not expressed or implied any intent to preempt states from imposing sanctions and the state law was not inconsistent with the federal law. There was no conflict between the Massachusetts law and anything done by the President. The state was simply choosing how it would spend its taxpayers' money and whom it would do business with. Likewise, many state and local governments adopted similar laws refusing to contract with companies doing business in South Africa at the time of apartheid. Nonetheless, the Court found preemption.

D. American Insurance Association v. Garamendi³²

California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA) required any insurer doing business in the state to disclose information about all policies that company sold in Europe between 1920 and 1945. As Justice Ginsburg noted in her dissent:

For insurance policies issued in Germany and other countries under Nazi control, historical evidence bears out, the combined forces of the

³⁰ *Id.* at 379.

³¹ *Id.* at 380.

³² 539 U.S. 396 (2003).

German Government and the insurance industry engaged in larcenous takings of gigantic proportions. For example, insurance policies covered many of the Jewish homes and businesses destroyed in the state-sponsored pogrom known as Kristallnacht. By order of the Nazi regime, claims arising out of the officially enabled destruction were made payable not to the insured parties, but to the State. In what one historian called a 'charade concocted by insurers and ministerial officials,' insurers satisfied property loss claims by paying the State only a fraction of their full value.³³

Despite some efforts by the federal government, insurance companies had been largely successful in stonewalling and not disclosing their Holocaust-era policies. To remedy this, and to protect its many residents who are Holocaust survivors or their descendants, California enacted a law that declared that "[i]nsurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims [is] disclosed to the state."³⁴ The Act required insurance companies doing business in California to disclose information concerning insurance policies they or their affiliates sold in Europe between 1920 and 1945, and directed California's Insurance Commissioner to store the information in a publicly accessible "Holocaust Era Insurance Registry."³⁵ The Commissioner was further directed to suspend the license of any insurer that failed to comply with the Act's reporting requirements.³⁶ These measures, the Act declared, are "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary."³⁷

The Supreme Court, in a five-to-four decision, found that the California law was preempted by federal law. The Court said that the statute interfered with the President's conduct of the nation's foreign policy and was therefore preempted. The Court focused on executive agreements that the President had negotiated with Germany, France, and

³³ *Id.* at 430-31 (Ginsburg, J., dissenting) (citations omitted).

³⁴ *Id.* at 434 (Ginsburg, J., dissenting) (quoting Holocaust Victim Insurance Relief Act of 1999, CALIF. INS. CODE § 13801(e)).

³⁵ *Id.* (Ginsburg, J., dissenting) (citing CALIF. INS. CODE § 13803).

³⁶ *Id.* (Ginsburg, J., dissenting) (citing CALIF. INS. CODE § 13806).

³⁷ 539 U.S. at 434 (Ginsburg, J., dissenting) (quoting CALIF. INS. CODE § 13801(f)).

Austria.³⁸ However, the problem with this argument is that the California law did not conflict with any executive agreement and as Justice Souter, writing for the majority, admitted, "petitioners and the United States as amicus curiae both have to acknowledge that the agreements include no preemption clause."³⁹

The Court relied on its prior decision in *Zschernig v. Miller*, which created a dormant foreign affairs power of the President.⁴⁰ In *Zschernig*, the Court declared unconstitutional an Oregon probate statute that prohibited inheritance by a nonresident alien, absent showings that the foreign heir would take the property "without confiscation" by his home country and that American citizens would enjoy reciprocal rights of inheritance there. As Justice Souter explained in his majority opinion in *American Insurance*, the Court in *Zschernig* found "that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict."⁴¹

Even though no later decision had relied on *Zschernig*, the Court said that the case provided a basis for invalidating California's law. The Court stressed that the California disclosure statute limited what the President might do in some hypothetical future negotiations. Moreover, Justice Souter said:

If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.⁴²

At the very least, one can understand *Garamendi* as creating an enormous presumption in favor of federal preemption of state laws in cases where state law has international implications. In the absence of any express preemption or any conflict with federal law, the Court nonetheless found preemption simply because the California statute was seen as touching on an issue of foreign policy. The California law, of course, regulated businesses operating within

³⁸ *Id.* at 408.

³⁹ *Id.* at 417.

⁴⁰ 389 U.S. 429 (1968).

⁴¹ *American Insurance*, 539 U.S. at 418.

⁴² *Id.* at 425.

its borders and did not directly deal with foreign nations. Nonetheless, the Court found that a broad "dormant foreign affairs power" of the President was sufficient to preclude the state law protecting California's residents. It is hard to imagine a stronger presumption in favor of preemption.

III. WHAT'S WRONG WITH THE COURT'S APPROACH TO PREEMPTION?

The prior section attempted to show that many important recent preemption cases conflict with the Supreme Court's oft-stated principle that federalism requires a presumption against preemption. The decisions, of course, also seem inconsistent with a Court committed to protecting states' rights and federalism. In each case, the Court invalidated a significant choice of a state government.

Yet this does not go far enough from a normative perspective in explaining why the Court was wrong in these cases. The underlying question must be, why have a presumption against preemption?⁴³ The answer must begin with an assessment of why federalism and concern about states matter. Ironically, the Supreme Court decisions and academic writings defending the use of federalism to invalidate federal laws provide the best explanation of these values and show why the recent preemption decisions are undesirable.

The Supreme Court has identified many values of federalism. For example, it often is emphasized that states are closer to the people and thus more likely to be responsive to public needs and concerns. Professor David Shapiro clearly summarizes this argument when he writes: "[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized."⁴⁴

Also, the Court has often spoken of the need to protect federalism so that states can serve as laboratories for experimentation. Justice Brandeis apparently first articulated this idea when he declared:

⁴³ For an argument against the presumption against preemption, see Viet Dinh, *supra* note 10.

⁴⁴ DAVID SHAPIRO FEDERALISM: A DIALOGUE 91-92 (1995).

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment might be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.⁴⁵

More recent federalism decisions, too, have invoked this notion. Justice Powell, dissenting in *Garcia v. San Antonio Metropolitan Transit Authority*, lamented that "the Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as 'laboratories.'"⁴⁶ Likewise, Justice O'Connor, dissenting in *Federal Energy Regulatory Commission v. Mississippi*, stated that the "Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 [s]tates serve as laboratories for the development of new social, economic, and political ideas."⁴⁷

Another frequently advanced justification for federalism is that the division of power between federal and state governments advances liberty. For example, Chief Justice Rehnquist wrote: "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'"⁴⁸ Similarly, Justice Scalia declared: "The separation of the two spheres is one of the Constitution's protections of liberty."⁴⁹ Justice O'Connor likewise wrote: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."⁵⁰

Although the relationship between these values and the Supreme Court's decisions invalidating federal laws can be questioned,⁵¹ these considerations offer clear reasons for having

⁴⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁶ 469 U.S. 528, 567-68 n.13 (Powell, J., dissenting).

⁴⁷ *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 787-88 (1982) (O'Connor, J., dissenting).

⁴⁸ *United States v. Lopez*, 514 U.S. 549, 552 (1995).

⁴⁹ *Printz v. United States*, 521 U.S. 898, 921 (1997).

⁵⁰ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

⁵¹ See Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911 (2002); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995).

a presumption against preemption. Preempting state laws limits the ability of states to make choices that are responsive to their residents' desires, to experiment, and to advance liberty and freedom within their boundaries. Simply put, a broad vision of inferred preemption invalidates beneficial state laws.

This can be seen by looking at the cases described in Part II. In *Geier*, a state choice to allow injured citizens to recover was preempted, notwithstanding a federal law expressly preserving state causes of action. The benefits of liability, in terms of compensating injured people and deterring harmful products, are lost. In *Lorillard*, the Court preempted a state law intended to protect children from tobacco advertising. Putting aside the First Amendment issue and focusing just on preemption, there can be no doubt that decreasing cigarette consumption among children is a compelling state interest. The Supreme Court frustrated the ability of states to respond to the desire of their residents to restrict cigarette advertising to children and stopped states from experimenting with new ways of accomplishing this. In *Crosby*, the Court denied Massachusetts the ability to decide how it wanted to spend its taxpayers' money. The state law in *Crosby* provided that the state would not contract with companies doing business in Burma. The state was not making foreign policy for the United States, but rather a choice as to how Massachusetts dollars would be spent. In *Garamendi*, the Court denied California the ability to help its many residents who were survivors of the Holocaust or descendants of survivors. The state was frustrated in its regulation of businesses within California, a traditional prerogative of state governments. Also, the country lost the benefit of seeing how California's experiment with this type of regulation would work.

To be clear, I am not arguing that Congress lacked the authority to preempt state laws in these areas. Rather, my point is that in each of these cases desirable state laws were lost because of the Court's abandoning the presumption against preemption. The laws were desirable because of what they sought to achieve: protecting injured consumers, decreasing tobacco consumption among children, protecting human rights, and protecting Holocaust survivors. The state laws also were desirable in terms of the underlying values of federalism, which the presumption in favor of preemption compromised in each case.

It is striking that in each of these four recent cases the Supreme Court ruled in favor of business interests and against state regulations. The four cases ruled, respectively, in favor of the automobile industry, cigarette manufacturers, companies doing business in Burma, and insurance companies. When these cases are juxtaposed with the Supreme Court's federalism decisions limiting federal power from the last decade, a clear hierarchy of the Rehnquist Court's values becomes clear. Two principles explain the vast majority of these rulings:⁵²

- 1) If there is a state challenge to a federal civil rights law, the state wins and the federal interests lose.⁵³
- 2) If there is a business challenge to a state regulatory law, the state loses.

As to the first point, many of the Supreme Court's decisions limiting congressional power in the name of federalism have invalidated laws expanding civil rights. For example, in *United States v. Morrison*,⁵⁴ the Court struck down the civil damages provision of the Violence Against Women Act, a law that allowed women to sue under federal law for gender-motivated violence, as exceeding the scope of Congress's powers under the Commerce Clause. In *City of Boerne v. Flores*,⁵⁵ the Court struck down the Religious Freedom Restoration Act, which sought by statute to expand religious freedom to what previously had been protected under the Constitution. In *Kimel v. Florida Board of Regents*,⁵⁶ and in *Board of Trustees of the University of Alabama v. Garrett*,⁵⁷ the Court said that states could not be sued for employment discrimination against the elderly under the Age Discrimination in Employment Act or against people with disabilities under Title I of the Americans with Disabilities Act.⁵⁸ It is striking that in each of these cases,

⁵² See David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

⁵³ See *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Cedar Rapids Cmty. Sch. Dist. v. Garrett*, 526 U.S. 66 (1999); but see *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

⁵⁴ 529 U.S. 598 (2000).

⁵⁵ 521 U.S. 507 (1997).

⁵⁶ 528 U.S. 62 (2000).

⁵⁷ 531 U.S. 356 (2001).

⁵⁸ However, it should be noted that in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court held that state governments may be

the Court limited Congress's powers to enforce and expand the protection of civil rights.

This comparison undermines the view that concern for states' rights or the application of a neutral methodology animate the Rehnquist Court's decisions limiting federal power. Instead, the decisions reflect traditional conservative value choices to limit civil rights and to protect business. The preemption cases show us that this Emperor really has no clothes; federalism is used, as it has been so often throughout American history, to cloak politicized substantive value choices in a seemingly more neutral and palatable garb.

IV. A DIFFERENT VIEW OF FEDERALISM AND PREEMPTION

For much of American history, and especially in recent years, courts and scholars have discussed federalism primarily in terms of limiting federal power so as to protect state sovereignty. For example, during the first third of this century, dual federalism was entirely about restricting the authority of Congress by narrowly defining its powers under Article I and by reserving a zone of activities to the states.⁵⁹ Under the Burger Court, federalism was used to restrict federal court authority, such as the invocation of "Our Federalism" in *Younger v. Harris*, which held that federal courts must abstain from decisions that would interfere with ongoing state court proceedings.⁶⁰ Most recently, in the 1990s, in cases such as *New York v. United States*,⁶¹ *United States v. Lopez*,⁶² and *Seminole Tribe of Florida v. Florida*,⁶³ the Court has invoked federalism

sued for violating the family leave provisions of the Family and Medical Leave Act, and in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), the Court ruled that state governments may be sued under Title II of the Americans with Disabilities Act when the fundamental right of access to the courts is implicated.

⁵⁹ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hammer v. Dagenhart* (The Child Labor Case), 247 U.S. 251 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (invalidating federal laws as exceeding the scope of Congress' commerce clause authority or as violating the Tenth Amendment).

⁶⁰ 401 U.S. 37 (1971). See also *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (using federalism as a basis for precluding federal court review of the constitutionality of state taxes); *Rizzo v. Goode*, 423 U.S. 362 (1976) (using federalism as a basis for precluding federal court review of systematic police abuse).

⁶¹ 505 U.S. 144 (1992) (declaring unconstitutional a federal law as violating the Tenth Amendment because it coerced state legislative and regulatory activity).

⁶² 514 U.S. 549 (1995) (declaring unconstitutional the federal Gun Free School Zones Act as exceeding the scope of Congress' commerce clause authority).

⁶³ 517 U.S. 44 (1996) (holding that Congress may not override the Eleventh Amendment except if acting under section 5 of the Fourteenth Amendment and that

to protect states from federal laws and federal courts. The preemption decisions are also about limiting power, although the traditional dynamic is reversed. As described in the first part of this paper, the Supreme Court's preemption decisions have used federalism as a limit on state power and as explained in Part II, the limits have frustrated desirable state policy choices. As argued above, these rulings undermine the underlying values of federalism.

There is another, dramatically different way of looking at federalism: seeing its function as empowering government, not merely imposing limits. As we enter the twenty-first century, American government faces, and will continue to face, enormous social problems with which it must deal. In this regard, federalism can make a crucial difference. The value of having multiple levels of government lies in having many institutions capable of acting to solve social problems. From this perspective, federalism should be viewed as not being about limits on any level of government, but empowering each to act to solve difficult social issues.⁶⁴

Seeing federalism as furthering empowerment would mean broadly defining the scope of federal powers under the Commerce Clause and Section Five of the Fourteenth Amendment, as the Supreme Court did between 1937 and the 1990s. The Tenth Amendment would not be regarded as a limit on Congress, except as a reminder that Congress could legislate only if it had express or implied powers.⁶⁵ Sovereign immunity would be abolished as a limit on the ability to enforce federal laws against state governments.⁶⁶ Defending all of this is, of course, beyond the scope of this paper.

However, my specific focus here is on preemption and what federalism as empowerment would mean in this particular regard. A key way of empowering state and local governments is by lessening the circumstances under which there is preemption by federal law. I propose that preemption should be found only in two circumstances: where a federal law expressly preempts state law, and where federal and state law

state officers may not be sued pursuant to federal laws that contain a comprehensive enforcement mechanism).

⁶⁴ For an argument that this conception of federalism is in accord with the design of the Constitution and is historically supported, see Deborah J. Merritt, *Federalism as Empowerment*, 47 U. FLA. L. REV. 541 (1995).

⁶⁵ *United States v. Darby*, 12 U.S. 100 (1941).

⁶⁶ I defend this proposition in Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

are mutually exclusive. This would preserve the ability of Congress to preempt state law whenever it deemed that to be in the nation's interest. It also would preserve the supremacy of federal law by ensuring that any conflict between the levels of government would be resolved in favor of federal power. But it would dramatically limit the ability of federal courts to find preemption based on inferences concerning congressional intent or because of a dormant power of the federal government. This approach to preemption would have produced the opposite results in *Geier*, *Lorillard*, *Crosby*, and *Garamendi*.

For example, in *Geier*, there was not only no express preemption or conflict with federal law, but a federal statutory provision expressly preserving state law claims. In *Lorillard*, too, there was nothing in the federal law that limited the ability of states to regulate the location of tobacco advertisements and no conflict between the Massachusetts law and federal law. In *Crosby* and *Garamendi*, the federal government certainly could act to prevent such state laws; but it never did. No federal statute expressly limited the ability of states to decide the businesses they would contract with or to require insurance companies to disclose information. Nor do these requirements conflict with any federal statute. A narrower view of preemption, as I urge, would have found preemption in none of these cases.

This, of course, would not resolve all preemption issues. As evidenced by the countless cases concerning ERISA preemption,⁶⁷ even explicit preemption provisions require interpretation as to their scope and application. Similarly, the issue of whether a state law conflicts with a federal law is often disputed and the determination depends on how the purpose of each is conceptualized. But limiting preemption in this way would go a long way toward empowering state and local governments to have more authority to reflect the choices of their residents, to experiment, and most important, to advance liberty and freedom.

An important example of this is the events surrounding the decision in *ACLU of New Jersey v. County of Hudson*.⁶⁸

⁶⁷ For a discussion of this issue, see Chemerinsky, *Does Federalism Advance Liberty?*, *supra* note 51; Erwin Chemerinsky, *Against Sovereign Immunity*, *supra* note 66; Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997).

⁶⁸ 799 A.2d 629 (2002).

After September 11, 2001, the federal government detained a large number of individuals, many in state prisons and jails. Many were held in New Jersey's prisons. Although the federal government refused to disclose the number held or their identities, the American Civil Liberties Union sued under New Jersey law to gain information. Specifically, it sued counties, who held detainees for the Immigration and Naturalization Service (INS) in their jails, to disclose information on detainees pursuant to New Jersey's Right-to-Know Law and Jailkeeper's Law. The Jailkeeper's law, which is meant to prevent secret detentions, provides:

The keeper of every jail or other penal or reformatory institution supported by public moneys of any county or municipality, shall keep a book provided by the board of freeholders in the county where the institution shall be, in which he shall set forth the date of entry, date of discharge, the description, age, birthplace and such other information as he may be able to obtain as to the inmates committed to his care, which book shall be exposed in a conspicuous place in the institution and shall be open to public inspection.⁶⁹

The Superior Court ruled in favor of the plaintiffs. But the General Counsel of the Immigration and Naturalization Service (INS) directed the county jails to refuse to answer such requests for information. Also, the United States intervened in the litigation. The INS promulgated a new regulation directing state and local authorities to keep secret information concerning detainees, even when state or local law requires disclosure.⁷⁰

The New Jersey Court of Appeals then found that this regulation preempted New Jersey laws and required that information concerning the detainees be kept secret. The New Jersey court found that the new regulation was within the scope of Congress's powers: "[W]e conclude that the regulation was promulgated within the scope of the Commissioner's delegated authority. The judgment of the Commissioner that information concerning INS detainees should not be divulged falls well within the discretion afforded him by the INA [Immigration and Nationality Act]."⁷¹ The court concluded that New Jersey law was preempted by federal law:

⁶⁹ N.J. STAT. ANN. § 30:8-16 (West 2002).

⁷⁰ Interim Rule, *Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities*, 67 Fed. Reg. 19,508 (Apr. 22, 2002), as confirmed at 68 Fed. Reg. 4364 (Jan. 29, 2003) (codified at 8 C.F.R. § 236.6).

⁷¹ 799 A.2d at 650.

The issues before us do not concern merely the ministerial functioning of State officials under State law, or the State's choice to house federal prisoners. Rather, they involve the nature and scope of information that must be made available to the public concerning INS detainees. The power to regulate matters relating to immigration and naturalization resides exclusively in the federal government. The State simply has no constitutionally recognized role in this area. Thus, while the State possesses sovereign authority over the operation of its jails, it may not operate them, in respect of INS detainees, in any way that derogates the federal government's exclusive and expressed interest in regulating aliens.⁷²

What is troubling about this ruling is that preemption was found even though no federal statute expressly or implicitly preempted state law. Moreover, the New Jersey court admitted that there was no conflict between federal law and state law. Nonetheless, preemption was found. A narrower view of preemption, such as I argue for, would have come to an opposite conclusion. If Congress wants to preempt such state laws, it may do so. But until then, states should be accorded the power to act. Rejecting preemption would have better served the goals of federalism: advancing liberty, preventing a power – secret detentions – that runs the risk of tyrannical government action, and allowing states to be laboratories for experimentation.

V. CONCLUSION

Federalism is often misdefined as synonymous with states' rights. A better view of federalism conceives of its purpose as the proper allocation of authority between the federal and state governments. The structure of government is not an end in itself, but rather a means to the end of effective government that minimizes the possibility of tyrannical rule, provides for the related goal of greater accountability, and sets the stage for vigorous experimentation. The Supreme Court's federalism decisions of the last decade – both those limiting Congress's powers and finding preemption of state law – are unrelated to, and indeed inconsistent with, the underlying values of federalism.

In this Article, I have focused on the Supreme Court's preemption decisions and argued that they conflict with the presumption against preemption and that they have frustrated desirable social policy. I argue for an alternative vision that

⁷² *Id.* at 654.

would greatly narrow preemption and focus instead on empowering government at all levels to deal with social problems.

Power, of course, can be used for good or for ill. States might use their greater authority not to protect consumers and advance individual freedom, but for more pernicious objectives. Empowering government can be bad. But I do not argue for unlimited state power; Congress still could preempt state actions and courts, of course, could invalidate laws that conflict with the Constitution and federal law. At the same time, desirable federal laws advancing freedom – such as the Violence Against Women Act and the Religious Freedom Restoration Act – would be preserved. Simply put, it is time to replace a formalistic view of “federalism as limits” with a functional approach to federalism as a means of empowerment.

