The Trump Administration and its allies are attacking state climate laws with challenges based on preemption, arguing that federal law trumps state powers. A new Supreme Court ruling signals that the Court respects state prerogatives and isn't willing to find preemption without a clear basis in a federal statute. Although the facts of the case are remote from environmental law, the Court's attitude toward preemption has broader relevance.

The preemption claim in the Supreme Court case, Hencely v. Fluor Corp seemed plausible. For one thing, the events took place on a U.S. military base in Iraq during active hostilities. Fluor was a military contractor operating on the base. Allegedly due to Fluor's negligence, it violated its contract by hiring a local man with Taliban ties as an employee and letting him wander around the base armed with explosives. Hencely, an Army sergeant, was severely injured when he heroically took down the terrorist. Thus, the case had multiple federal links: it was on federal land, involved the conduct of a federal contractor, and featured a soldier injured in the line of duty. You might have expected the Court to hold that federal law was controlling. Yet the Court allowed Sgt. Hencely to sue Fluor for damages under South Carolina state law. Even though the case was permeated with federal interests, the six-Justice majority fountd no basis for preemption.

General federal interests, the Court said, were not enough. "Instead," the Court said, "the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." The government had failed to identify a specific statutory or constitutional provision that barred the application of state law.

Admittedly, the Court said, "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law' fashioned by federal courts in the absence of congressional action." The Court added, however, that it "has emphasized the narrowness of this doctrine," which will rarely apply when "litigation is purely between private parties and does not touch the rights and duties of the United States." Moreover, even when a "uniquely federal interest" is present, this does not end the analysis. "Instead, this Court's precedents require a significant conflict . . . between an identifiable federal policy or interest and the operation of state law."

Thus, if it wants to argue that state climate laws are preempted, the Trump Administration will generally need to point to some specific federal statute that

precludes state regulation. Its only alternative will be to identify some uniquely federal interest, show that this fits within the "narrow area" where courts have fashioned their own federal rules, and then show that the issue touches the federal government's own prerogatives. This will be difficult in the areas of environment and energy where congressional statutes are rife and federal courts need not play an independent lawmaking function. Arguments based on merely on the inappropriateness of state regulation or the strength of the national interest involved in an issue are not going to be enough.

It's worth noting that, as in many preemption cases, the lineup didn't follow ideological lines. Two very conservative Justices (Thomas and Gorsuch) joined a moderate conservative (Barrett) and the three liberals in the majority. In fact, Thomas wrote the opinion. The dissent was written by another very conservative Justice (Alito) and joined by two moderate conservatives (Roberts and Kavanaugh).

Ever preemption case is unique, involving its own constellation of federal statutes, government interests, and precedents. Certainly, *Hencely* does not guarantee state victories in preemption disputes involving climate change or renewable energy. However, given the strong federal elements present in *Hencely*, the fact that the Court did not find state law preempted I'm that case is a very good sign.