**Constitutional Law I**

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**Spring 2025**

**Supplemental Reading #8: Preemption**

**1. U.S. Constitution, Article VI, clause 2.**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

During the 1990s, a repressive military regime came to power in the nation of Burma (now called Myanmar). In 1996, Massachusetts passed a law barring state entities from buying goods or services from companies doing business with Burma. Subsequently, the U.S. Congress imposed mandatory and conditional sanctions on Burma. The National Foreign Trade Council, which had several members affected by the state Act, filed suit against state officials in federal court, claiming (among other things) that the federal act preempted the state act. The District Court permanently enjoined the state act’s enforcement, and the First Circuit affirmed. The U.S. Supreme Court unanimously affirmed. Justice Souter delivered the opinion of the Court:

The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business with Burma, is invalid under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is.

In June 1996, Massachusetts adopted “An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar),”.... The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a “restricted purchase list” of those doing business with Burma.

In September 1996, three months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. The federal Act has ... three substantive [parts].

First, it imposes three sanctions directly on Burma. It bans all aid to the Burmese Government except for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. . . . These restrictions are to remain in effect “[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government.”

Second, the federal Act authorizes the President to impose further sanctions subject to certain conditions. He may prohibit “United States persons” from “new investment” in Burma. . .

Third, the statute directs the President to work to develop “a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.”. . .

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Art. VI, cl. 2; Gibbons v. Ogden, 9 Wheat. 1, 211 (1824).... Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to “occupy the field,” state law in that area is preempted. [California v. ARC America Corp., 490 U.S. 93, 101 (1989)]. 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 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. . . .

Applying this standard, we see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act. We find that the state law undermines the intended purpose and “natural effect” of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma.

First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions ... it authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma. It invested the President with the further power to ban new investment by United States persons, dependent only on specific Presidential findings of repression in Burma. And, most significantly, Congress empowered the President “to waive, temporarily or permanently, any sanction [under the federal Act] ... if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.” . . .

. . . . The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.

And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. As will be seen, the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach. But the point here is that the state sanctions are immediate, see 1996 Mass. Acts 239, ch. 130, § 3 (restricting all contracts after law's effective date);. . . and perpetual, there being no termination provision. . . . This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. In Dames & Moore v. Regan, 453 U.S. 654 (1981), we used the metaphor of the bargaining chip to describe the President's control of funds valuable to a hostile country. . .; here, the state Act reduces the value of the chips created by the federal statute. It thus stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. The federal Act confines its reach to United States persons, imposes limited immediate sanctions, places only a conditional ban on a carefully defined area of “new investment,” and pointedly exempts contracts to sell or purchase goods, services, or technology. These detailed provisions show that Congress's calibrated Burma policy is a deliberate effort to steer a middle path.”[FN]

[FN: The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view. Most importantly, the federal Act, as passed, replaced the original proposed section of H.R. 3540, which barred “any investment in Burma” by a United States national without exception or limitation. . . .]

The State has set a different course, and its statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions. While the state Act differs from the federal in relying entirely on indirect economic leverage through third parties with Burmese connections, it otherwise stands in clear contrast to the congressional scheme in the scope of subject matter addressed. It restricts all contracts between the State and companies doing business in Burma . . . It is specific in targeting contracts to provide financial services, and general goods and services, to the Government of Burma, and thus prohibits contracts between the State and United States persons for goods, services, or technology, even though those transactions are explicitly exempted from the ambit of new investment prohibition when the President exercises his discretionary authority to impose sanctions under the federal Act.

As with the subject of business meant to be affected, so with the class of companies doing it: the state Act's generality stands at odds with the federal discreteness. The Massachusetts law directly and indirectly imposes costs on all companies that do any business in Burma, . . . The state Act thus penalizes companies with pre-existing affiliates or investments, all of which lie beyond the reach of the federal Act's restrictions on “new investment” in Burmese economic development. The state Act, moreover, imposes restrictions on foreign companies as well as domestic, whereas the federal Act limits its reach to United States persons.

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. See Brief for Petitioners 21-22. The fact of a common end hardly neutralizes conflicting means, see Gade v. National Solid Wastes Management Assn., 505 U.S. 88, 103 (1992), and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ. . . . Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.

[FN: The State's reliance on CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 82-83 (1987), for the proposition that “[w]here the state law furthers the purpose of the federal law, the Court should not find conflict” is misplaced. In CTS Corp., we found that an Indiana state securities law “further[ed] the federal policy of investor protection,” but we also examined whether the state law conflicted with federal law “[i]n implementing its goal.” Identity of ends does not end our analysis of preemption.]

Finally, the state Act is at odds 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.” . . . Again, the state Act undermines the President's capacity, in this instance 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. 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. When such exceptions do qualify his capacity to present a coherent position on behalf of the national economy, he is weakened, of course, not only in dealing with the Burmese regime, but in working together with other nations in hopes of reaching common policy and “comprehensive” strategy.

Justice Scalia, joined by Justice Thomas, concurred in the result, arguing that preemption was clear from the face of the statute and thus did not require the majority’s recourse to legislative history. [Note: most of the legislative history is set forth in footnotes omitted from the excerpt above].

**3. Gade v. National Solid Wastes Management Assn., 505 U.S. 88 (1992)**

Pursuant to authority contained in the federal Occupational Safety and Health Act of 1970 (OSH Act), the Occupational Safety and Health Administration (OSHA) promulgated regulations implementing a requirement of the Superfund Amendments and Reauthorization Act of 1986 (SARA) that standards be set for the initial and routine training of workers who handle hazardous wastes. Subsequently, Illinois enacted two acts requiring the licensing of workers at certain hazardous waste facilities. Claiming, among other things, that the acts were pre-empted by the OSH Act and OSHA regulations, the National Solid Wastes Management Association, an association of businesses involved in hazardous waste management, sought injunctive relief against Gade, director of the state environmental protection agency, to prevent enforcement of the state acts. The District Court held that the state acts were not pre-empted because they protected public safety in addition to promoting job safety. The Court of Appeals reversed in part, holding that the OSH Act pre-empts all state law that “constitutes, in a direct, clear and substantial way, regulation of worker health and safety,” unless the Secretary of Labor has explicitly approved the law pursuant to § 18 of the OSH Act.

The U.S. Supreme Court affirmed without a majority opinion. Justice O’Connor wrote a plurality opinion joined by Chief Justice Rehnquist, Justice White and Justice Scalia:

The OSH Act authorizes the Secretary of Labor to promulgate federal occupational safety and health standards. ...

In response to this congressional directive, [the Secretary, through OSHA] . . . promulgated regulations. . . requir[ing], among other things, that workers engaged in an activity that may expose them to hazardous wastes receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the supervision of a trained supervisor. ...

In 1988, ... the State of Illinois enacted the licensing acts at issue here. . . . Both licensing acts require a license applicant to provide a certified record of at least 40 hours of training under an approved program conducted within Illinois, to pass a written examination, and to complete an annual refresher course of at least eight hours of instruction. In addition, applicants for a hazardous waste crane operator's license must submit “a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours...

The respondent in this case, National Solid Wastes Management Association (Association), is a national trade association of businesses that remove, transport, dispose, and handle waste material, including hazardous waste. The Association's members are subject to the OSH Act and OSHA regulations, and are therefore required to train, qualify, and certify their hazardous waste remediation workers. For hazardous waste operations conducted in Illinois, certain of the workers employed by the Association's members are also required to obtain licenses pursuant to the Illinois licensing acts. Thus, for example, some of the Association's members must ensure that their employees receive not only the 3 days of field experience required for certification under the OSHA regulations, but also the 500 days of experience (4,000 hours) required for licensing under the state statutes. ...

. . . [I]n § 18(b) of the Act, [Congress] gave the States the option of pre-empting federal regulation entirely. That section provides:

“Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.

“Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary under the OSH Act] shall submit a State plan for the development of such standards and their enforcement.”

About half the States have received the Secretary's approval for their own state plans as described in this provision. . . . Illinois is not among them.

In the decision below, the Court of Appeals held that § 18(b) [of the OSH Act] “unquestionably” pre-empts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained the Secretary [of Labor]'s approval for its own plan. ... [S]o do we.

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. . .

Our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole. Looking to the provisions of the whole law, and to its object and policy, . . . we hold that nonapproved state regulation of occupational safety and health issues or which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act. The design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards.

The principal indication that Congress intended to pre-empt state law is § 18(b)'s statement that a State “shall” submit a plan if it wishes to “assume responsibility” for “development and enforcement ... of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.” The unavoidable implication of this provision is that a State may not enforce its own occupational safety and health standards without obtaining the Secretary's approval, and petitioner concedes that § 18(b) would require an approved plan if Illinois wanted to “assume responsibility” for the regulation of occupational safety and health within the State. Petitioner contends, however, that an approved plan is necessary only if the State wishes completely to replace the federal regulations, not merely to supplement them. . . .

Petitioner's interpretation of § 18(b) might be plausible were we to interpret that provision in isolation, but it simply is not tenable in light of the OSH Act's surrounding provisions. . . . The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation; a State may develop an occupational safety and health program tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations.

Cutting against petitioner's interpretation of § 18(b) is the language of § 18(a), which saves from pre-emption any state law regulating an occupational safety and health issue with respect to which no federal standard is in effect. ... [T]he natural implication of this provision is that state laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard. ....

Our understanding of the implications of § 18(b) is likewise bolstered by § 18(c) of the Act, which sets forth the conditions that must be satisfied before the Secretary can approve a plan submitted by a State under subsection (b). State standards that affect interstate commerce will be approved only if they “are required by compelling local conditions” and “do not unduly burden interstate commerce.” If a State could supplement federal regulations without undergoing the § 18(b) approval process, then the protections that § 18(c) offers to interstate commerce would easily be undercut. It would make little sense to impose such a condition on state programs intended to supplant federal regulation and not those that merely supplement it: The burden on interstate commerce remains the same.

. . . .

Looking at the provisions of § 18 as a whole, we conclude that the OSH Act precludes any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved pursuant to § 18(b). Our review of the Act persuades us that Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation. It thus established a system of uniform federal occupational health and safety standards . . . . To allow a State selectively to “supplement” certain federal regulations with ostensibly nonconflicting standards would be inconsistent with this federal scheme of establishing uniform federal standards, on the one hand, and encouraging States to assume full responsibility for development and enforcement of their own OSH programs, on the other.

We cannot accept petitioner's argument that the OSH Act does not pre-empt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety. In determining whether state law stands as an obstacle to the full implementation of a federal law, it is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal. ... The OSH Act does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways in which it can do so. If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor, as described in § 18 of the Act.

Justice Kennedy concurred in the judgment, finding the state law preempted by the express provisions of the OSH Act, rather than by an implication of the statute’s purpose. Justice Souter, joined by Justices Blackmun, Stevens and Thomas, dissented:

The Court holds today that § 18 of the Occupational Safety and Health Act of 1970 (Act), pre-empts state regulation of any occupational safety or health issue as to which there is a federal standard, whether or not the state regulation conflicts with the federal standard in the sense that enforcement of one would preclude application of the other. With respect, I dissent. In light of our rule that federal pre-emption of state law is only to be found in a clear congressional purpose to supplant exercises of the States' traditional police powers, the text of the Act fails to support the Court's conclusion.

Our cases recognize federal pre-emption of state law in three variants: express pre-emption, field pre-emption, and conflict pre-emption. Express pre-emption requires “explicit pre-emptive language.”. . . . Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law. . . . Finally, there is conflict pre-emption in either of two senses. The first is found when compliance with both state and federal law is impossible, the second when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The plurality today finds pre-emption of this last sort, discerning a conflict between any state legislation on a given issue as to which a federal standard is in effect, and a congressional purpose “to subject employers and employees to only one set of regulations.” Thus, under the plurality's reading, any regulation on an issue as to which a federal standard has been promulgated has been pre-empted. . . . [T]he key is congressional intent, and I find the language of the statute insufficient to demonstrate an intent to pre-empt state law in this way.

Analysis begins with the presumption that “Congress did not intend to displace state law.” Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e.g.,* U.S. Const., Art. I, “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.” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has ‘unmistakably ... ordained,’ Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. ... Subject to this principle, the enquiry into the possibly pre-emptive effect of federal legislation is an exercise of statutory construction. If the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.

[Justice Souter next engaged in close statutory analysis and concluded that no provision of the OSH act specifically precluded concurrent state regulation]

In sum, our rule is that the traditional police powers of the State survive unless Congress has made a purpose to pre-empt them clear. The Act does not, in so many words, pre-empt all state regulation of issues on which federal standards have been promulgated, and ... [e]ach provision can be read consistently with the others without any implication of pre-emptive intent. . . . They are in fact just as consistent with a purpose and objective to permit overlapping state and federal regulation as with one to guarantee that employers and employees would be subjected to only one regulatory regime. Restriction to one such regime by precluding supplemental state regulation might or might not be desirable. But in the absence of any clear expression of congressional intent to pre-empt, I can only conclude that, as long as compliance with federally promulgated standards does not render obedience to Illinois' regulations impossible, the enforcement of the state law is not prohibited by the Supremacy Clause.

**Questions to consider:**

1. Why does the Court seem to think that *Crosby* is an easy case and *Gade* is a hard case? Is that the right way to look at these cases? What arguments would you make in *Crosby* on behalf of the state to make the state’s position appear stronger?

2. Both cases refer to the idea of “field” preemption, but neither finds it presented by the facts and neither discusses it at length. What might be an example of an area that is “field preempted”?

3. What are the federalism implications of preemption doctrine? Note that Justice Souter’s dissent in *Gade* refers to a presumption against preemption. Why should there be such a presumption?

4. The Court in *Crosby* refers to and distinguishes *CTS Corp. v. Dynamics Corp. of America*. In *CTS Corp*. the Court upheld a provision of state securities regulation against a preemption challenge. In general, the federal government broadly regulates the sale of securities in the United States through the Securities and Exchange Commission (SEC). States, however, also have broad regulations of securities sales, including through their so-called “Blue Sky laws” (apparently so named because they ensure that securities are backed by something more than “blue sky”). As in *CTS Corp.,* most state securities laws have survived preemption challenges. Does that seem odd? Why might you expect state securities laws to be preempted? Why do you think the Court has found otherwise?