AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURE OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Federalism/Preemption

**Kansas v. Garcia, 149 S. Ct. 791** (2020)

*Kansas arrested and tried Ramiro Garcia for identity theft after Garcia used another person’s social security number when filing out is I-9, W-4, and K-4 forms he needed to gain employment at a Kansas restaurant. The I-9 form is a federal document that all employees must file out, attesting that they are eligible to work in the United States. The W-4 form is federal document used for federal tax-withholding. Garcia claimed the Kansas identify theft law as applied to him was preempted by the Immigration Reform and Control Act [IRCA]. The crucial provision of that measure declares that I–9 forms and “any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of” federal immigration law. Garcia was convicted at trial, but that conviction was reversed by the Kansas Supreme Court. Kansas appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States reversed by a 5-4 vote. Justice Samuel Alito’s majority opinion ruled that Kansas identity theft laws were not preempted by federal immigration law. Past precedent establishes three forms of preemption, express preemption, field (or implied) preemption, and conflict preemption. Why does Justice Alito reject all three forms of preemption? Which form of preemption does Justice Breyer’s dissent think most relevant here? Who has the better of the argument? Is Breyer correct that failure to apply preemption will permit states to police the employment of illegal aliens, given that they must submit I-9 and the state equivalent of the K-4 when they apply for jobs? Is Alito correct when he points out that preemption in this case might subvert almost all state criminal laws? Why does Justice Thomas reject implied preemption? Is his constitutional analysis sound?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I8d20cf795d3c11eabf0f8b3df1233a01) delivered the opinion of the Court.

. . . .

The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute “the supreme Law of the Land.” Art. VI, cl. 2. The Clause provides “a rule of decision” for determining whether federal or state law applies in a particular situation.  If federal law “imposes restrictions or confers rights on private actors” and “a state law confers rights or imposes restrictions that conflict with the federal law,” “the federal law takes precedence and the state law is preempted.”

. . . .

In some cases, a federal statute may expressly preempt state law. But it has long been established that preemption may also occur by virtue of restrictions or rights that are inferred from statutory law..

. . . . [The Immigration Reform and Control Act (IRCA)] contains a provision that expressly preempts state law, but it is plainly inapplicable here. That provision applies only to the imposition of criminal or civil liability on *employers*and those who receive a fee for recruiting or referring prospective employees.  It does not mention state or local laws that impose criminal or civil sanctions on employees or applicants for employment.

The Kansas Supreme Court thought that the prosecutions in these cases ran afoul of [federal law] because the charges were based on respondents’ use in their W–4's and K–4's of the same false Social Security numbers that they also inserted on their I–9's. Taken at face value, this theory would mean that no information placed on an I–9— including an employee's name, residence address, date of birth, telephone number, and e-mail address—could ever be used by any entity or person for any reason.

This interpretation is flatly contrary to standard English usage. . . . . Suppose that John used his e-mail address five years ago to purchase a pair of shoes and that the vendor has that address in its files. Suppose that John now sends an e-mail to Mary and that Mary sends an e-mail reply. No one would say that Mary has used information contained in the files of the shoe vendor. . . . Accordingly, the mere fact that an I–9 contains an item of information, such as a name or address, does not mean that information “contained in” the I–9 is used whenever that name or address is later employed.

. . . .

Apparently recognizing this, respondents turn to [the provision of federal law] which prohibits use of the federal employment verification system “for law enforcement purposes other than” enforcement of Immigration Reform and Control Act. This argument fails because it rests on a misunderstanding of the meaning of the federal “employment verification system.” The sole function of that system is to establish that an employee is not barred from working in this country due to alienage. . . . The federal employment verification system does not include things that an employee must or may do to satisfy requirements unrelated to work authorization. And completing tax-withholding documents plays no part in the process of determining whether a person is authorized to work. Instead, those documents are part of the apparatus used to enforce federal and state income tax laws.

. . . .

In order to determine whether Congress has implicitly ousted the States from regulating in a particular field, we must first identify the field in which this is said to have occurred. In their merits brief in this Court, respondents’ primary submission is that IRCA preempts “the field of fraud on the federal employment verification system,” but this argument fails because, as already explained, the submission of tax withholding forms is not part of that system. . . . The submission of taxwithholding forms is *fundamentally unrelated* to the federal employment verification system because, as explained, those forms serve entirely different functions. The employment verification system is designed to prevent the employment of unauthorized aliens, whereas tax-withholding forms help to enforce income tax laws. And using another person's Social Security number on tax forms threatens harm that has no connection with immigration law.

. . . . Respondents suggest that federal law precludes their prosecutions because both the Kansas identity-theft statute and the Kansas false-information statute require proof that the accused engaged in the prohibited conduct for the purpose of getting a “benefit.” Their argument is as follows. Since the benefit alleged by the prosecution in these cases was getting a job, and since the employment verification system concerns authorization to work, the theory of respondents’ prosecutions is related to that system.

This argument conflates the benefit that results from complying with the federal employment verification system (verifying authorization to work in the United States) with the benefit of actually getting a job. Submitting W–4's and K–4's helped respondents get jobs, but this did not in any way assist them in showing that they were authorized to work in this country. Thus, respondents’ “relating to” argument must be rejected, as must the even broader definitions of the putatively preempted field advanced by respondents at earlier points in this litigation.

. . . .

We likewise see no ground for holding that the Kansas statutes at issue conflict with federal law. It is certainly possible to comply with both IRCA and the Kansas statutes, and respondents do not suggest otherwise. They instead maintain that the Kansas statutes, as applied in their prosecutions, stand as “an obstacle to the accomplishment and execution of the full purposes” of IRCA—one of which is purportedly that the initiation of any legal action against an unauthorized alien for using a false identity in applying for employment should rest exclusively within the prosecutorial discretion of federal authorities. Respondents analogize these cases to our holding in *Arizona v. United States* (2012), that a state law making it a crime for an unauthorized alien to obtain employment conflicted with IRCA, which does not criminalize that conduct—but respondents’ analogy is unsound. In [*Arizona*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027964008&pubNum=0000780&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Court inferred that Congress had made a considered decision that it was inadvisable to criminalize the conduct in question. In effect, the Court concluded that IRCA implicitly conferred a right to be free of criminal (as opposed to civil) penalties for working illegally, and thus a state law making it a crime to engage in that conduct conflicted with this federal right.

Nothing similar is involved here. In enacting IRCA, Congress did not decide that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution. On the contrary, federal law makes it a crime to use fraudulent information on a W–4.

The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption. From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today. In recent times, the reach of federal criminal law has expanded, and there are now many instances in which a prosecution for a particular course of conduct could be brought by either federal or state prosecutors. Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap. Indeed, in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests.

. . . .

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I8d20cf795d3c11eabf0f8b3df1233a01), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I8d20cf795d3c11eabf0f8b3df1233a01) joins, concurring.

The founding generation treated conflicts between federal and state laws as implied repeals.  Then, as now, courts disfavored repeals by implication. To overcome this disfavor, legislatures included *non obstante* clauses in statutes. Courts understood *non obstante* provisions to mean that, “[r]ather than straining the new statute in order to harmonize it with prior law, [they] were supposed to give the new statute its natural meaning and to let the chips fall where they may.”

The Founders included a *non obstante* provision in the Supremacy Clause. It directs that “the Judges in every State shall be bound” by the “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, ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” If we interpret the Supremacy Clause as the founding generation did, our task is straightforward. We must use the accepted methods of interpretation to ascertain whether the ordinary meaning of federal and state law “directly conflict.”  “[F]ederal law pre-empts state law only if the two are in logical contradiction.”

The doctrine of “purposes and objectives” pre-emption impermissibly rests on judicial guesswork about “broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law.”  I therefore cannot apply “purposes and objectives” pre-emption doctrine, as it is contrary to the Supremacy Clause.

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I8d20cf795d3c11eabf0f8b3df1233a01), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I8d20cf795d3c11eabf0f8b3df1233a01), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I8d20cf795d3c11eabf0f8b3df1233a01), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I8d20cf795d3c11eabf0f8b3df1233a01) join, concurring in part and dissenting in part.

I agree with the majority that nothing in the Immigration Reform and Control Act of 1986 (IRCA) expressly preempts Kansas’ criminal laws as they were applied in the prosecutions at issue here. But I do not agree with the majority's conclusion about implied preemption.

When we confront a question of implied preemption, the words of the statute are especially unlikely to determine the answer by themselves. Nonetheless, in my view, IRCA's text, together with its structure, context, and purpose, make it “ ‘clear and manifest’ ” that Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization.  That is to say, the Act reserves to the Federal Government—and thus takes from the States—the power to prosecute people for misrepresenting material information in an effort to convince their employer that they are authorized to work in this country.

The Act creates what we have called “a comprehensive scheme” to “comba[t] the employment of illegal aliens.”  To that end, the statute's text sets forth highly detailed requirements. . . . . Our precedent demonstrates that IRCA impliedly preempts state laws that trench on Congress’ detailed and delicate design. In [*Arizona*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027964008&pubNum=0000780&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. United States* (2012), we invalidated a state law that made it a crime for an unauthorized alien to work.  In reaching that conclusion, we acknowledged that the Act's employer-related sections contain an express preemption provision, while the employee-related provisions do not.  Even so, the Act's employee-related provisions retained, through implication, preemptive force.

Congress, we explained, “made a deliberate choice not to impose criminal penalties on aliens who” merely “seek, or engage in, unauthorized employment. The Act puts combating the employment of unauthorized aliens at the forefront of federal immigration policy. . . . We ultimately held in [*Arizona*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027964008&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))that the States thus may not make criminal what Congress did not, for any such state law “would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.”  Given that “obstacle to the regulatory system Congress chose,” we concluded that the state law at issue conflicted with the federal Act and was therefore preempted.

State laws that police fraud committed to demonstrate federal work authorization are similarly preempted. Even though IRCA criminalizes that conduct, the Act makes clear that only the Federal Government may prosecute people for misrepresenting their federal work-authorization status. . . .

. . . . [T]he Act takes from the States the most direct means of policing work-authorization fraud. It prohibits States from using for that purpose both the I–9 and the federal employment verification system more generally. Those two provisions strongly suggest that the Act occupies the field of policing fraud committed to demonstrate federal work authorization. Otherwise, their express prohibitions would not constrain the States in any meaningful way. States could evade the Act simply by creating their own work-authorization form with the same requirements as the I–9, requiring employees to submit that form at the same time as the I–9, and prosecuting employees who make misrepresentations on the state form. No one contends that the States may do *that*.

. . . . IRCA's intricate procedures and penalties create a comprehensive and unified system to keep track of who is authorized to work within the Nation's borders. This too shows that criminal enforcement falls to the Federal Government alone.

Nor does it matter that the state statutes invalidated in [*Arizona*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027964008&pubNum=0000780&originatingDoc=I8d20cf795d3c11eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) had expressly targeted aliens. In preemption cases, we must consider not just what a state law says, but also what it does.  For this reason, even generally applicable and facially neutral state laws may be preempted when applied in a particular factual context in a particular way. And here, Kansas applied its criminal laws to do what IRCA reserves to the Federal Government alone—police fraud committed to demonstrate federal work authorization. That is true even though Kansas prosecuted respondents based on their tax-withholding forms, rather than their I–9s.

. . . .

By permitting these prosecutions, the majority opens a colossal loophole. Starting a new job almost always involves filling out tax-withholding forms alongside an I–9. So unless they want to give themselves away, people hoping to hide their federal work-authorization status from their employer will put the same false information on their tax-withholding forms as they do on their I–9. To let the States prosecute such people for the former is, in practical effect, to let the States police the latter. And policing the latter is what the Act expressly forbids.

. . . .