AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Federalism

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

Since the 1980s, states and localities have become increasingly active on foreign policy issues. In Perpich v. Department of Defense *(1990), the Supreme Court turned away an effort by the Minnesota governor to prevent National Guard units from that state from being deployed on training missions in Honduras during the Reagan administration. More common have been largely symbolic resolutions, ranging from the declarations of cities as "nuclear-free zones" during the heightened Cold War tensions of the Reagan years to pronouncements against the war in Iraq. Perhaps the most meaningful was the widespread movement in the 1980s to impose economic sanctions against South Africa for its racial apartheid policies. In particular, over 150 states and localities refused to buy goods and services from companies doing business in South Africa (or, in some cases, that did not adhere to anti-apartheid policies when doing business there) before the U.S. government adopted a national policy of economic sanctions. The sanction policy was viewed as so successful in the South Africa case that similar policies were soon urged against many other countries, including Burma. The military government of Burma had been accused of human rights violations in the 1990s, and Massachusetts and several cities adopted sanctions against it.*

The Massachusetts law provoked the European Union to file a complaint with the World Trade Organization charging the United States with violating newly adopted international trade rules on government procurement policies. The United States had been active in negotiating that provision of the trade rules and during those negotiations had sought and received a letter from several governors (including the governor of Massachusetts) pledging voluntary compliance with that provision of the trade treaty.[1]The National Foreign Trade Council, a trade group representing both American and foreign companies, filed suit in federal district court arguing that the Massachusetts law was an unconstitutional infringement on congressional authority. The district court agreed that the state law infringed on federal power over foreign affairs. The state appealed, and the circuit court affirmed, broadening the grounds to include a claim that federal sanctions implicitly preempted state sanctions under the commerce clause. The Supreme Court unanimously affirmed the circuit court, striking down the state law. Despite its invalidation, however, the Massachusetts law may have served its primary purpose: drawing federal attention to the Burma issue. As you read the Justice Souter's opinion for the Court, consider whether the focus is on subject matter that the state and federal governments are trying to influence or the tools that they using to influence policy.

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.

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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.

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A fundamental principle of the Constitution is that Congress has the power to preempt state law. . . . Even without an express provision for preemption, we have found that state law must yield to a

[1] See also, John M. Kline, "Continuing Controversies Over State and Local Foreign Policy Sanctions in the United States," *Publius* 29 (1999): 111.

congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. . . . And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. . . . We will find preemption where it is impossible for a private 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:

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. . . [W]e 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 towards Burma.

First, Congress clearly intended the federal act to provide the President with flexible and effective authority over economic sanctions against Burma. . . .

This express investiture of the President with statutory authority to act for the United States in imposing sanctions with respect to the government of Burma, augmented by the flexibility to respond to change by suspending sanctions in the interest of national security, recalls Justice Jackson's observation in *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952), . . . : "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." . . . Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here. 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. . . . [T]he 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. . . . Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. . . .

Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. . . The[] detailed provisions show that Congress's calibrated Burma policy is a deliberate effort "to steer a middle path." . . .

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. . . . It restricts all contracts between the State and companies doing business in Burma, . . . except when purchasing medical supplies and other essentials (or when short of comparable bids). . . . 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. . . .

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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." . . . Congress called for Presidential cooperation with members of ASEAN and other countries in developing such a strategy, .

. . directed the President to encourage a dialogue between the government of Burma and the democratic opposition, . . . and required him to report to the Congress on the progress of his diplomatic efforts. . . . As with Congress's explicit delegation to the President of power over economic sanctions, Congress's express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government . . . in harmony with the President's own constitutional powers. . . . This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action.

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. . . . A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict. . . . The State's inference of congressional intent is unwarranted here, therefore, simply because the silence of Congress is ambiguous. Since we never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter.

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