

# *Crosby* as Foreign Relations Law

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## I. INTRODUCTION

Reactions to the Supreme Court's unanimous decision in *Crosby v. National Foreign Trade Council*,<sup>1</sup> which held that federal legislation preempted Massachusetts' restrictions on public purchases from companies doing business with Burma, have been fairly typical for high-stakes litigation: the victorious plaintiffs, eager to vindicate their prosecution of a highly controversial test case, emphasized the decision's value as precedent for future cases,<sup>2</sup> while Massachusetts' supporters, looking for

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1. 120 S. Ct. 2288 (2000). Justice Scalia, joined by Justice Thomas, wrote a separate concurrence that differed principally on methodological grounds. *Id.* at 2302; *see infra* at text accompanying notes 5, 98.

2. Daniel O'Flaherty, vice president of the National Foreign Trade Council (NFTC), conceded the public relations hazards of siding with the Burmese government, but explained that "we were testing the principle of subfederal units' to influence foreign policy." James Risen, *Trade Ruling Is Victory for Oil Giant*, N.Y. TIMES, June 20, 2000, at A23. Frank Kittridge, the NFTC's president, claimed that "the Supreme Court's decision . . . reaffirms the federal government's predominant role in foreign policy and should help put an end to state and local efforts to make foreign policy." USA Engage, *Supreme Court Rules Massachusetts Burma Law Unconstitutional*, June

latitude to address other human rights pariahs, instead stressed *Crosby's* narrow compass.<sup>3</sup> What's more striking are the pains the decision took to minimize its own import, so much so as to obscure why the Court granted certiorari in the first place. The First Circuit had also enjoined the Massachusetts law on the grounds that it interfered with the federal government's foreign affairs power and the dormant Foreign Commerce Clause,<sup>4</sup> giving the Supreme Court the chance to resolve the important question of when, if ever, state foreign-relations activities are constitutional. By affirming solely on Burma-specific preemption grounds, however, the Court unanimously collapsed on the narrowest and least universal basis for its result – elaborating to such an extent on the particular legislative context as to provoke Justice Scalia's objection that the majority was wasting space.<sup>5</sup> Early academic commentary, understandably, claims that *Crosby* had little or no significance beyond Burma<sup>6</sup> – or, as a subsequent case put it, was limited to circumstances in

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19, 2000 <<http://www.usaengage.org/supremecourt.html>>; see also Don Finefrock, *Supreme Court Ruling on Massachusetts Law Kills Florida County's Cuba Policy*, MIAMI HERALD, June 21, 2000 (reporting views of attorneys for Miami-Dade County that *Crosby* "spelled the end of the local policy" prohibiting the use of public funds in business with Cuba).

3. Thomas Barnico, the Assistant Attorney General for Massachusetts who represented the state in the Supreme Court, commented that:

[*Crosby* is narrow] in that it refers specifically to the federal action regarding Burma in 1996. The companies sought a ruling that would have been far broader, which would have denied to the states and cities an opportunity ever to act in this way. By limiting its decision to pre-emption, and pre-emption that concerns only the 1996 act as to Burma, the court has left open very broad questions about whether state and local governments can ever act in this way, particularly where Congress has not acted . . . In the future, if Congress has not acted as to a particular foreign country, this decision would say nothing about whether states and city governments can act first.

*Morning Edition: Thomas Barnico, Massachusetts Assistant Attorney General, on Supreme Court Ruling that States Are Not Permitted To Set Their Own Foreign Policy* (National Public Radio, June 20, 2000); see also *Burma Thanks the Court*, WASHINGTON POST, June 25, 2000, at B6 ("The Court's decision is mercifully narrow . . . States should still be able to enact laws, as Massachusetts did, that may then push Congress itself to act.").

4. *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000). The district court, ironically, found preemption the only ground that was *not* convincing. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 287, 293 (D. Mass. 1998), *aff'd sub nom. National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000).

5. *Crosby*, 120 S. Ct. at 2304 (Scalia, J., concurring) (calculating that if unnecessary references to legislative statements were omitted, the majority opinion might be one-tenth shorter).

6. See, e.g., Jack Goldsmith, *State Foreign Policies After the Burma Case* (visited Oct. 29, 2000) <[http://writ.news.findlaw.com/commentary/20000626\\_goldsmith.html](http://writ.news.findlaw.com/commentary/20000626_goldsmith.html)> (asserting that "[t]he decision . . . has no implications for state foreign relations beyond state laws regulating transactions with Burma"). Peter Spiro has substantially agreed, observing that "*Crosby* does not dictate the limits of state and local action in other foreign policy contexts," while noting that the Court's rationale is similar to that invoked in constitutional arguments for an exclusive federal role. Peter Spiro, *U.S. Supreme Court Knocks Down State Burma Law* (June 2000)

which a state law "directly conflicted with a specific federal act and was preempted by Congress's specific delegation of power to the President."<sup>7</sup>

Without underestimating Burma's importance, this limited holding would be an incidental accomplishment for a case that raised much broader issues – and which wound up, almost in spite of itself, as the first Supreme Court argument to grapple with globalization, and its first decision mentioning the World Trade Organization (WTO). But *Crosby* means more for U.S. foreign relations law than early appraisals would suggest. As this Comment explains, the Court's opinion displays a constitutionally-premised sensitivity to international comity, and to the President's foreign relations powers, in a way that illuminates contemporary disputes about their proper function. At the same time, its preemption analysis demonstrates the dangers of focusing exclusively on statutory questions, as well as the threat posed by the Court's underlying commitment to avoiding constitutional questions that crucially define the practice of foreign relations.

## II. CROSBY IN CONTEXT

*Crosby* concerned a Massachusetts state law, enacted in June 1996, that precluded state purchases from companies "doing business" with Burma, subject to certain exceptions.<sup>8</sup> The Massachusetts law, nearly a carbon copy of its legislation targeting apartheid-era South Africa,<sup>9</sup> gave the state a bit of a head start over the federal government, but Congress and the executive branch had already been considering sanctions for some time, and three months later enacted a comprehensive

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<<http://asil.org/insigh46.htm>>; see also Linda Greenhouse, *Justices Overturn State Law on Myanmar*, N.Y. TIMES, June 20, 2000, at A23 ("[O]nce you get outside the Burma context, this decision is of limited utility in trying to bat back state and local efforts to make foreign policy.") (quoting Professor Spiro); Mark B. Rees, *Supreme Court Strikes Down Massachusetts Law on Narrow Grounds*, INT'L L. NEWS, Fall 2000, at 16 ("Rather than serve as a landmark in the jurisprudence of foreign affairs and the constitution, *Crosby v. NFTC* exemplifies what has been characterized as this Court's guiding philosophy of 'judicial minimalism.'"); *The Supreme Court, 1999 Term – Leading Cases*, 114 HARV. L. REV. 179, 349, 353-54 (2000) ("The Supreme Court's decision in *Crosby*, because of its narrow reliance upon preemption, did not adequately settle the important constitutional questions the First Circuit had raised – specifically, whether foreign affairs are indeed an exceptionally centralized realm of politics.").

7. *Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 457, 473 (S.D.N.Y. Sept. 7, 2000).

8. See MASS. GEN. LAWS ANN. ch. 7, §§ 22G, 22H, 22I (West 1998).

9. The law's drafters adapted a South Africa sanctions law by simply substituting the word "Burma" for "South Africa." Carey Goldberg, *After Defeat, Campaigner for 'Free Burma' Begins Anew*, N.Y. TIMES, June 24, 2000, at A6.

federal measure – one conspicuously omitting any reference to existing state and local measures.<sup>10</sup>

Even beforehand, the Massachusetts law raised obvious, if unresolved, issues of foreign relations federalism. The orthodox approach had relegated state activities touching on foreign relations to a constitutional nether world. A long line of Supreme Court dicta<sup>11</sup> and academic commentary<sup>12</sup> attributed to the federal government a monopoly on foreign relations, but without the firm basis in text or precedent that might have established a self-enforcing principle. In fact, the national government tolerated considerable state and local deviance, in the form of regulations, resolutions, and economic and diplomatic relations.<sup>13</sup> Still,

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10. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1997). Post-*Crosby* commentary frequently credits Massachusetts for having "push[ed] Congress itself to act," see, e.g., *Burma Thanks the Court*, *supra* note 3, at B06, but the politics were considerably more complicated than that suggests. Both governments acted on the heels of a particularly repressive crackdown by the Burmese government. See, e.g., Seth Mydans, *Burmese Crackdown May be Tactical Victory for Opposition*, N.Y. TIMES, May 25, 1996, at 4; *Hearings before the Senate Committee on Banking, Housing And Urban Affairs* (1996) (testimony of Kent Wiedemann, Deputy Assistant Secretary of State, Bureau of East Asian and Pacific Affairs). Federal legislation also progressed because the Senate yielded to Clinton administration demands for flexibility and, as noted below, because the administration's effort at a multilateral approach was essentially failing. The absence of any mention of Massachusetts' law during congressional debates surely undermines the argument that it was pivotal.

11. See *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941):

The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . [T]he interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. . . .

See also *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the State . . . does not exist."); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1221 n.331 (2000) [hereinafter Swaine, *Negotiating Federalism*] (citing additional cases).

12. See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1632 (1997) [hereinafter Goldsmith, *Federal Courts*] (noting "a remarkable consensus about the legitimacy of the federal common law of foreign relations"); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 832-33 (1989) ("The consensus today is that the central Government alone may directly exercise power in foreign affairs. Most current controversy about the foreign affairs power concerns its distribution among the federal branches, not whether it resides in the nation rather than the states."); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996) ("At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states 'do not exist'").

13. For valuable overviews, see EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* (1998); JOHN M. KLINE, *STATE GOVERNMENT INFLUENCE IN U.S. INTERNATIONAL ECONOMIC POLICY* (1983); John M. Kline, *Continuing Controversies over State and Local Foreign Policy Sanctions in the United States*, 29 PUBLIUS 111,

on occasion – most notably, in *Zschernig v. Miller*<sup>14</sup> – a court would conclude that a particular state activity interfered intolerably with federal prerogatives. A strong case might be made for the unconstitutionality of the Massachusetts legislation under this standard, though *Zschernig* was notoriously unclear as to whether foreign effects by themselves were sufficient to resolve a state law's constitutionality.<sup>15</sup>

A second approach, which I have argued hews more closely to constitutional text, case law, and political practices, considers state and local activities touching on foreign relations unconstitutional only to the extent that they interfere with the "dormant treaty power"—the Treaty Clause's implied preemption of state bargaining with foreign powers.<sup>16</sup> Under this approach, states are free to declaim on matters of foreign relations, enact Buy American laws, or tax multinationals, regardless of the hue and cry from foreign nations, so long as they do not conflict with federal enactments (such as statutes or treaties) or appear contingent in fact upon the behavior of foreign powers. Even state bargaining is permissible to the extent consistent with the treaty power's externality and collective action rationales – say, were a state entering into a simple purchase agreement with a foreign country, or a municipality forging a sister city relationship – or where Congress or the President deems it unobjectionable.<sup>17</sup> The Massachusetts law, however, would be regarded as an unconstitutional attempt to treat with the Burmese government, since maintaining the law was unambiguously contingent on the continuation of the existing government and its repressive policies.<sup>18</sup>

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111 (Spring 1999); Dennis James Palumbo, *The States and American Foreign Relations* (1960) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (tracing long history of state activities touching on foreign relations).

14. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968); see also *Estate of Kraemer v. Kraemer*, 81 Cal. Rptr. 287, 294 (Ct. App. 1969) (holding unconstitutional provisions of the California probate code that conditioned the inheritance of real property on foreign reciprocity); *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800, 806 (Ct. App. 1969) (holding unconstitutional California's "Buy American" statute primarily because of its potential overseas effects); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (invalidating an Illinois statute excluding South African coins from state tax exemptions available to other foreign coins).

15. See Swaine, *Negotiating Federalism*, *supra* note 11, at 1143-45.

16. See U.S. CONST. art. II, § 2, cl. 2 (conferring the treaty power on the President and the Senate); *id.* at art. I, § 10, cl. 1 (prohibiting states from entering into any treaty, alliance, or confederation); *Holmes v. Jennison*, 39 U.S. 540 (1840); see also Swaine, *Negotiating Federalism*, *supra* note 11, *passim*.

17. This test is spelled out at greater length in Swaine, *Negotiating Federalism*, *supra* note 11, at 1254-78.

18. See Swaine, *Negotiating Federalism*, *supra* note 11, at 1273. Massachusetts was also engaged in other foreign bargaining. The sponsor of the Massachusetts legislation, Representative Byron Rushing, reportedly offered to amend the law if the European Union agreed to adopt

A third, revisionist approach considers permissible all state activities touching on foreign relations, barring conflict with explicit constitutional prohibitions (such as unambiguous attempts by states to enter into formal treaties), principles forged in the domestic context (for example, the dormant Commerce Clause), or preemption by federal enactments.<sup>19</sup> Something like this approach was suggested in *Barclays Bank PLC v. Franchise Tax Board*,<sup>20</sup> which appeared to consider federal legislation as the only relevant federal authority.<sup>21</sup> Not content to rest on *Barclays Bank*, or even to attack the exaggerated pedigree of the federal monopoly orthodoxy, revisionists make important arguments against any dormant foreign relations preemption: first, that the judiciary is ill-equipped to evaluate state activities based on their foreign-policy effects; second, that Congress, not the courts (or, ordinarily, the President), is entrusted with any residual constitutional responsibility for determining the appropriate responsibilities of the federal and state governments; and third, that federal enactments, particularly statutes, suffice to regulate any disruptive state activities. Revisionists find their approach increasingly commended by globalization, which has further eroded distinctions between domestic and foreign affairs and the related assignments of authority to the state and federal governments, as well as exposed states to the disciplining force of direct retaliation.<sup>22</sup>

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harsher sanctions in exchange, but that gambit was unsuccessful. See Michael Lelyveld, *Unprecedented Intervention by EU in Bay State*, J. COM., Sept. 25, 1998, at 1A.

Consistent with this approach, the U.S. District Court for the Southern District of New York recently differentiated objections to the application of New York's Human Rights Law to the Permanent Mission of Saudi Arabia to the United Nations on the grounds that it "is a statute of general application that does not . . . attempt to structure a relationship between New York, its residents, and any other country." *Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F.Supp. 457, 473 (S.D.N.Y. Sept. 7, 2000).

19. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 860-70 (1997); Goldsmith, *Federal Courts*, *supra* note 12, *passim*; Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1410-24 (1999); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 20-27 (1995).

20. 512 U.S. 298, 303 (1994) (holding that the Constitution permits application of California's corporate franchise tax to a multinational banking enterprise).

21. *Id.* at 329 ("Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit state-mandated worldwide combined reporting."). *Barclays Bank* may also be read as having permitted de facto delegation from Congress to the states. See Swaine, *Negotiating Federalism*, *supra* note 11, at 1277 (citing *Barclays Bank*, 512 U.S. at 324-27). Doing so depends on the significance placed on congressional attention, and the ability of Congress to act informally. *But cf.* *Camps Newfound/Owattona, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (objecting to "legislation by default") (citing *INS v. Chadha*, 462 U.S. 919, 951-59 (1983)).

22. This argument is given particular emphasis by Peter Spiro, who contends that dormant foreign relations preemption was once sound, but is now – or will shortly be – outmoded. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1226 (1999); Peter J. Spiro,

Whatever the relative merits of these approaches, the orthodoxy lost ground to the revisionists in *Barclays Bank*, and at first blush *Crosby* appears to continue that trend. The Court directly addressed the foreign affairs power and dormant Foreign Commerce Clause issues only in noting that it was unnecessary to reach them given its conclusion that the Massachusetts law had been preempted.<sup>23</sup> The Court even declined to address whether the foreign relations context altered the normal presumption against preemption, having concluded that under any standard the state law would pose a sufficient obstacle to achieving congressional objectives.<sup>24</sup> The result seems to vindicate the revisionist perception that positive political enactments – principally legislation – are appropriate measures of the federal (and national) interest, and a sufficient means of avoiding state interference with it.

In any event, the Court regarded the decisive preemption question as straightforward. First, by giving the President authority to lift sanctions upon finding that Burma had made appreciable progress, ban new investment by U.S. persons in the event that matters worsened, and waive sanctions if they became inconsistent with national security interests, Congress intended to afford the President "flexible and effective authority over economic sanctions against Burma" – while Massachusetts' sanctions were immediate and permanent, thereby reducing the President's economic and diplomatic leverage. Second, although Congress attempted "to steer a middle path" by imposing some sanctions and refraining from others,<sup>25</sup> the state law penalized types of business activities and classes of companies that Congress had exempted. Third, while Congress exhorted the President to take a "comprehensive, multilateral strategy" toward Burma,<sup>26</sup> state law complicated those discussions and made it difficult for the President "to speak for the nation with one voice in dealing with other governments."<sup>27</sup>

The Court's own voice, it would appear, was confined to the subject of Burma, and there to the issue of preemption – better, some may have felt, than to have tested the Court's willingness to champion internationalism over the sovereign interests of the American states. But the

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*New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 20 (1997); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 123 (1994).

23. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2294 n. 8 (2000) (citing *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)).

24. *Id.* at 2294 n.8.

25. *Id.* at 2297 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941)).

26. *Id.* at 2298 (quoting Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1997)).

27. *Id.* at 2298.

Court's preemption analysis revealed constitutional preconceptions as well, and not all were hostile to federal and international interests.

### III. CROSBY AND FOREIGN EFFECTS

Notwithstanding the Justices' quixotic attempts at judicial diplomacy,<sup>28</sup> the Rehnquist Court has tended to place little stock in international comity.<sup>29</sup> In some cases, like *Barclays Bank*, the Court has found foreign protests irrelevant to the construction of federal law;<sup>30</sup> in others, like *Breard*, it has upheld the rights of states to disregard foreign invo-

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28. While on a trip to Brussels in 1998, for example, Justices O'Connor, Ginsburg, and Breyer indicated that they would be receptive toward employing European Community law. EUR. REP., July 11, 1998; see also Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 710-11 (1998) (describing interest by Justices O'Connor and Breyer in applying EC law). But on a more recent foray to the American Bar Association's annual convention, Justice Kennedy responded to accusations that the Supreme Court ignored European courts—and thereby contributed to the "insularity of the American legal system"—by unabashedly *defending* insularity, advertent to the possibility that citing European decisions might "risk losing the allegiance of the [American] people." Kennedy noted American jurists' uncertainty as to the precise issues undergirding foreign decisions, profound differences between Europe and the U.S. federal system, and faith that European decisions would eventually evolve to resemble those of American courts. Tony Mauro, *Supreme Court Justices on the Defensive in London*, AM. LAW., July 31, 2000 <<http://www.law.com>>.

In practice, in any case, attempts to invoke European law have not been warmly received. Compare, e.g., *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (adverting to European Community directives in arguing for consistency with federalism) with *Printz*, 521 U.S. at 921 n.11 ("We think such comparative analysis inappropriate . . . . The factis that our federalism is not Europe's").

29. Cf. Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458 (1998) (describing Court's lack of receptiveness toward international law).

30. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324-29 (1994) (concluding that foreign government protests against California tax, reflected in diplomatic notes and threats of retaliation, were irrelevant where Congress had implicitly permitted tax to be sustained); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993) (refusing to withhold federal jurisdiction over Sherman Act claims on international comity grounds where it was possible to conform both to U.S. and British law, even where U.K. government argued that U.S. antitrust liability was inconsistent with permissive British insurance scheme); *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (dismissing significance of objections by foreign governments to the legality of abducting their nationals). Contrast, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963) (holding that federal courts had the authority to enjoin the National Labor Relations Board from ordering an election for the representation of foreign seamen aboard vessels under foreign flags, where the Board policy "aroused vigorous protests from foreign governments and created international problems for our government"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (rejecting place of injury as determinate choice-of-law principle under Jones Act on grounds that "such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations").

cations of international law, and compounded the offense by failing to defer to the Court's international peers.<sup>31</sup>

Measured by this standard, *Crosby* may seem refreshingly sensitive to foreign concerns. To be sure, the Court's preemption analysis contrasted uncomfortably with more limited concern for conflict in the international setting. Justice Souter's majority opinion in *Hartford Fire* employed a narrow and unorthodox interpretation of the "true conflicts" warranting consideration of international comity, which he considered was not even implicated "where a person subject to regulation by two states can comply with the laws of both."<sup>32</sup> In *Crosby*, in striking contrast, Justice Souter observed that "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,"<sup>33</sup> and found "imminent" conflict "when 'two separate remedies are brought to bear on the same activity.'"<sup>34</sup> The unmistakable impression was that courts should guard zealously against conflicts with national regulatory objectives, but that the same degree of tension with regulations enforced by the federal government's foreign counterparts would not even present an issue worth considering.

Yet in evaluating whether the Massachusetts law conflicted with the President's statutory assignment to develop a comprehensive multilateral strategy, the Court attached weight to protests filed with the State Department by Japan, the European Union, and the Association of Southeast Asian Nations (ASEAN), and further emphasized the formal complaints by the EU and Japan before the WTO. To the Court, these disputes, coupled with the opinion of executive branch officials, were "competent and direct evidence of the frustration of congressional objectives by the state Act," at least where Congress had not specifically

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31. *Breard v. Greene*, 523 U.S. 371 (1998); see Jonathan Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666 *et seq.* (1998); see also *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999) (per curiam) (declining to entertain motions by German government for leave to file a bill of complaint and for preliminary injunction against the United States and the governor of Arizona, seeking to enforce ex parte order by the International Court of Justice to prevent scheduled execution of state prisoner). *But cf.* *Zschemig v. Miller*, 389 U.S. 429, 434-35 (1968) (holding unconstitutional an Oregon statute having "more than 'some incidental or indirect effect in foreign countries'" and "great potential for disruption or embarrassment" exceeding that "of a diplomatic bagatelle") (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

32. *Hartford Fire Ins. Co.*, 509 U.S. at 799 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e).

33. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2298 (2000).

34. *Id.* at 2298 (quoting *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986) (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953))).

disregarded them.<sup>35</sup> Where Congress was of a diplomatic bent, then, it licensed the Court itself to show greater respect for foreign governments, and international tribunals, than had recently been its practice.

The Court's attempt to attribute its shift to Congress is somewhat misleading, and merits comment. *Crosby* derived the imperative of multilateralism from section 570(c) of the federal act, which directed the President to "seek to develop . . . a comprehensive, multilateral strategy" toward Burma, "in coordination with members of ASEAN and other countries having major trading and investment interests in Burma," including the aim of promoting "a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma."<sup>36</sup> But the statute's political antecedents and overall approach suggest that multilateralism was less fundamental to its operation, and certainly less preclusive, than the Court surmised. The Clinton administration and Congress finally agreed to act largely out of a perception that multilateral efforts had already failed, leaving little downside to more forward American initiatives.<sup>37</sup> Certainly Congress's decision to impose sanctions *before* the President would have any chance to lift them, let alone to pursue his charge under § 570(c), suggests that it perceived no inherent conflict between an initial salvo of sanctions and a multilateral strategy – or, one might have surmised, between preexisting state sanctions and a multilateral strategy.<sup>38</sup>

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35. *Id.* at 2301.

36. Omnibus Consolidated Appropriations Act, 1997, 110 Stat 3009, 167-168.

37. See *EU Fails to Impose Sanctions on Burma*, EUR. REP., July 17, 1996; Michael Richardson, *U.S. Steps Up Pressure as Burma Holds Its Ground*, INT'L HERALD TRIBUNE, July 24, 1996 (noting continuing resistance by ASEAN countries to U.S. campaign for sanctions); Wayne Woodlief, *Burma Bill May Gain Votes for Weld*, BOSTON HERALD, June 13, 1996, at 35 (reporting that Senator Kerry supported pursuit by Clinton administration of multilateral approach, but would within weeks support congressional legislation in the event that continued to fail).

In its support of congressional legislation, which the Court duly cited, 120 S. Ct. at 2295 n.9, the executive branch did not emphasize its multilateral aspects, but instead described it as compatible with the administration's existing unilateral measures. See 142 CONG. REC. 19219 (1996) (letter from Barbara Larkin, Assistant Secretary of State for Legislative Affairs, to Senator William Cohen). Officials also characterized the congressionally imposed sanctions as unilateral. See *Lott Bipartisan Task Force on Sanctions*

(Sept. 8, 1998) (testimony of Stuart E. Eizenstat, Under Secretary of State for Economic and Business and Agricultural Affairs) <[http://www.state.gov/www/policy\\_remarks/1998/980908\\_eizen\\_sanctions.htm](http://www.state.gov/www/policy_remarks/1998/980908_eizen_sanctions.htm)>; Stuart E. Eizenstat, *Sanctions: Mend'Em, Don't End'Em, Letter to the Editor*, FOREIGN AFF., May/June 1999, at 154 [hereinafter Eizenstat, *Letter to the Editor*]; see also *infra* note 41.

38. This point was sufficient to convince the district court to reject the preemption claim. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998) ("This [preemption] argument is not persuasive, because the federal statute actually provides for unilateral sanctions against Myanmar."), *aff'd sub nom.* *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom.* *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000).

In any event, the President's ability "to devise a comprehensive, multilateral strategy"<sup>39</sup> seems reasonably distinct from whether foreign governments abreacted to the Massachusetts law, just as one might separate the character of the congressional initiative from how its after-the-fact multilateralism was received abroad. Quelling foreign concerns about the U.S. approach(es) can simply be part of multilateral discussions, just as accepting accolades for the U.S. strategy might be – and certainly bracing for foreign complaints can be part of the President's development of a multilateral approach. To be sure, it would be relatively difficult for the President to override unpreempted state sanctions, given the lack of a waiver provision comparable to that in the federal scheme.<sup>40</sup> But perhaps Congress anticipated that further legislation might be necessary to advance its cause and the contrary supposition, that multilateralism consists of persuading others to follow an unalterable U.S. template, would certainly have diminished the Court's concerns.<sup>41</sup>

One may also question *Crosby's* fidelity to congressional intent in its appreciation of which foreign voices were relevant to multilateralism – which, in other words, belonged to the Court's "international community."<sup>42</sup> The Court understandably downplayed the adverse reactions of Burma and the other ASEAN countries to the state sanctions,<sup>43</sup> rather

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39. *Crosby*, 120 S. Ct. at 2300.

40. Having said that, the heightened need for Congress to afford the President authority to waive federal sanctions – for which he would otherwise have to rely on the thinnest of inherent authority, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring) – might also explain its relatively cavalier approach to state sanctions, which it might have anticipated could be more easily trumped by the President in the event they interfered.

41. U.S. officials recognized that foreign simulation of the U.S. approach would not be multilateral in the ordinary sense. See *Subcomm. On Trade of the House Committee on Ways and Means* (Oct. 23, 1997) (testimony of Stuart E. Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs) <[http://www.house.gov/ways\\_means/trade/105cong/10-23-97/1023eize.htm](http://www.house.gov/ways_means/trade/105cong/10-23-97/1023eize.htm)> [hereinafter Eizenstat, *Testimony* (Oct. 23, 1997)] (citing federal sanctions on Burma as an "example[] of unilateral sanctions which have been effective or which have served as an encouragement to others to take action."); Stuart E. Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs, and Rick Newcomb, Director, Office of Foreign Assets Control, Treasury Department, *Press Briefing on Economic Sanctions* (Apr. 28, 1999) <[http://www.state.gov/www/policy\\_remarks/1999/9990428\\_eizenstat\\_sanctions.htm](http://www.state.gov/www/policy_remarks/1999/9990428_eizenstat_sanctions.htm)> (citing Burma as example of "where we have unilateral sanctions but that in turn encouraged the European Union to impose its own unilateral sanctions, even though they're multilateral in the sense of being under UN auspices"). That is not to say, however, that multilateral efforts, or even the principle of multilateralism, are strictly inconsistent with this sort of hegemony. See, e.g., Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in *MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM* 125 (John Gerard Ruggie ed., 1993).

42. *Crosby*, 120 S. Ct. at 2298.

43. *But see id.* at 2298 (citing congressional call to cooperate with "members of ASEAN and other countries"); *id.* at 2299 (citing weakening of President "not only in dealing with the Burmese regime"); *id.* at 2299 (citing, among others, diplomatic protests of ASEAN).

than privileging the most ironic form of "heckler's veto."<sup>44</sup> But Congress also expressly called for encouraging a dialogue between the Burmese government and its opposition, and that opposition was widely understood to favor all measures for discouraging foreign investment – including, presumably, state sanctions.<sup>45</sup> Other voices in the international community, moreover, regarded the Massachusetts law favorably – including the European Parliament (which opposed the Commission's decision to commence WTO proceedings)<sup>46</sup> and a wide range of non-governmental organizations<sup>47</sup> – and the executive branch seemed to consider such players to be part of the relevant international community,<sup>48</sup> yet they were of no interest to the Court.

The Court's distinctive appreciation of multilateralism is more than just an imperfect exercise in statutory construction. To a degree, the decision validates revisionist doubts about constitutional tests entailing similar judicial inquiries into foreign effects,<sup>49</sup> doubts which I tend to share.<sup>50</sup> But doing away with judicial review is not the only answer. By presuming interference with federal treaty functions for certain types of state activities, the dormant treaty power principle would also obviate the need to take the pulse of foreign governments; within this paradigm, indeed, foreign wailing and gnashing is assumed to be entirely consis-

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44. Cf. Brief for the United States as Amicus Curiae Supporting Respondent at 18, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (Nos. 92-1384 & 92-1839) ("Threats of retaliation by foreign governments, however, cannot be sufficient in themselves to render a state tax invalid. Such a legal rule would in essence give foreign governments a 'heckler's veto' over state taxing authorities.").

45. Aung San Suu Kyi, a leader of Burmese opposition and a Nobel laureate, explicitly supported economic sanctions without apparent concern for the level of government involved. See, e.g., *Burmese Dissident Urges Western Sanctions to Oust Military*, N.Y. TIMES, July 19, 1996, at A4.

46. See European Parliament, Resolution of Sept. 17, 1998 (Nos. B4-0820, 0825, 0832 and 0849/98), 1998 O.J. (C 313) 181, ¶ 4 ("[c]riticis[ing] . . . the Commission decision to insist on a conflict resolution panel within WTO over the law of the US State of Massachusetts, which set a pricing penalty on purchases of goods by state authorities from companies that do business with Burma"). Within the Community legal order, however, the Commission, subject to the agreement of the Council of Ministers, was wholly competent to commence those proceedings, and parliamentary opinion was formally irrelevant. Council Regulation 3286/94 of 22 December 1994 Laying Down Community Procedures in the Field of the Common Commercial Policy, 1994 O.J. (L 349) 71.

47. Supporters included the AFL-CIO, the International Labor Rights Fund, and a wide variety of international and domestic environmental and consumer groups, in addition to purely domestic interests – not to mention a number of states and localities. See Harrison Institute for Public Law, Georgetown University Law Center, Support for Massachusetts on Appeal of the Burma Law Decision (Feb. 18, 1999) (on file with author).

48. See *infra* note 77.

49. See *supra* text accompanying notes 19-21.

50. See Swaine, *Negotiating Federalism*, *supra* note 11, at 1150-61.

tent with the President's exercise of constitutional prerogatives in the national interest.<sup>51</sup>

*Crosby's* emphasis on multilateralism is also consistent with the dormant treaty power in less obvious ways. State diplomacy is problematic not just because of its potential for interfering with the President's preferred multilateral tack (which, after all, the states may simulate or even assist, as Massachusetts contended),<sup>52</sup> but also because the states are themselves incapable of comprehensive multilateralism: by and large, they still lack the international standing to participate in most multilateral discourse and to resolve differences through binding international agreements.<sup>53</sup> Their participation, in consequence, is much more likely to be unilateral, coercive, and antagonistic. As explained in the next section, the Court's emphasis on multilateral interactions solely with "foreign powers," classically understood, rather than the full range of parties participating in modern international affairs, bespeaks a constitutional solicitude toward the President's constitutional authority over formal foreign relations.

#### IV. CROSBY AND EXECUTIVE RESPONSIBILITY FOR FOREIGN AFFAIRS

The majority opinion in *Crosby* cited foreign protests not for their own sake, but as relevant to the President's ability to discharge his statutory duties,<sup>54</sup> and toward that end emphasized executive branch statements that the Massachusetts law "has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing the objectives assigned by Congress."<sup>55</sup> In *Barclays Bank*, the Court had given such representations the back of its hand. But *Crosby* distinguished that as an instance in which Congress had "taken specific actions rejecting the positions both of foreign governments . . . and the Executive" by failing to outlaw controversial state tax practices.<sup>56</sup>

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51. Cf. William S. Dodge, *Extraterritoriality and Conflict of Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 152-67 (1998) (arguing that unilateralism may induce foreign cooperation).

52. See *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2298 (2000).

53. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. g & note 9 (1987). In February 1998, a State Department observer attended consultations between EU, United Kingdom, and Massachusetts officials, but the EU was at pains to characterize the meetings as something other than negotiations. See Robert S. Greenberger, *States, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners*, WALL ST. J., Apr. 1, 1998, at A20.

54. *Crosby*, 120 S. Ct. at 2299-2301.

55. *Id.* at 2300.

56. *Id.* at 2300-01 (citing *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324-29 (1994)).

As previously noted, *Crosby* professed to avoid any constitutional basis for its decision, other than the Supremacy Clause. But in two of three bases the Court proffered for preemption, it went out of its way to explain that the power at stake was constitutional, and presidential, in origin. In discussing the tension between the rigid Massachusetts law and the federal act's flexibility, for example, the Court invoked not only Justice Jackson's view that a President's authority is greatest when congressional delegation supplements "all that he possesses in his own right,"<sup>57</sup> but also Jackson's observation that "the President's power in the area of foreign relations is least restricted by Congress"<sup>58</sup> – and further cited *Curtiss-Wright*, the bête noire of those defending congressional prerogatives.<sup>59</sup>

The constitutional component to the multilateralism argument was still clearer. In stressing that "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,"<sup>60</sup> the Court also noted that such authority was "in harmony with the President's own constitutional powers," citing the treaty power and the powers to appoint and receive ambassadors.<sup>61</sup> The Court further invoked the President's constitutional authority in alluding to *Dames & Moore v. Regan*, which bespoke a healthy respect for the President's authority to settle claims,<sup>62</sup> and in referring to the "foreign powers" that are the objects of the treaty power.<sup>63</sup> The Court even acknowledged, it seemed, that Congress's mandate for multilateralism provided the President with no authority (and, for that matter, no enforceable constraint) other than that already conferred by the Constitu-

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57. *Id.* at 2295 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

58. *Id.* (citing *Youngstown*, 343 U.S. at 635–36 n.2 (Jackson, J., concurring), and *United States v. Curtiss-Wright*, 299 U.S. 304 (1936)).

59. *Id.* (citing *Curtiss-Wright*, 299 U.S. 304).

60. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2298 (2000) (citing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

61. *Id.* at 2298 (citing U.S. CONST., Art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls"); § 3 ("[The President] shall receive Ambassadors and other public Ministers")).

62. *Id.* at 2296 (citing *Dames & Moore*, 453 U.S. 654, 673–74 (1981)). In *Dames & Moore*, to be sure, the President employed blocking orders afforded by Congress, see 453 U.S. at 673–74, but the Court also relied on congressional acquiescence in a (possibly) independent presidential authority to settle claims, *id.* at 678–83, 688, notwithstanding contrary indications in IEEPA and other statutory schemes.

63. See *supra* section II; *Crosby*, 120 S. Ct. at 2301 (citing "statements of foreign powers").

tion, observing that the federal act was both a "clear mandate" *and* an "invocation of exclusive national power."<sup>64</sup>

The difficulty lies in assessing when that exclusive national power, be it statutory or otherwise, has been frustrated – which in turn involves the delicate question of how to square judicial intervention with respect for the relevant political branches. In this regard, too, the Court was more accommodating of the executive branch than was previously its practice.<sup>65</sup> Although the Court dutifully acknowledged both congressional and executive-branch competence on foreign policy,<sup>66</sup> *Crosby* was relatively respectful of the President's role – certainly as compared to *Barclays Bank*, which dismissed executive-branch objections to California's tax as irrelevant once Congress, "the preeminent speaker," had passed within shouting distance.<sup>67</sup> The Court differentiated between the legal judgments of the executive, to which it would not "unquestionably" defer on preemption questions, and the practical assessment by officials of real-world difficulties occasioned by the state law. As to the latter, the Court confessed, the judiciary is far less competent than the political branches to "determin[e] precisely when foreign nations will be offended by particular acts"<sup>68</sup> or to perceive the "nuances" of U.S. foreign policy.<sup>69</sup> The resulting deference to the executive branch was not only more generous than in *Barclays Bank*, but also exceeded that in *Zscher-nig v. Miller*, where the Court essentially decided to evaluate foreign policy by itself.<sup>70</sup>

The trick with deference, of course, lies in knowing when to stop, particularly given its predicate that judges are inexpert at assessing the relevant evidence. *Crosby* winds up being a cautionary tale. Consistent with its minimalist approach, the Court provided little guidance on the sorts of evidence that might substantiate a conflict, besides concluding that "[i]n this case, repeated representations by the executive branch supported by formal diplomatic protests and concrete disputes are more than sufficient" to demonstrate interference with congressional objec-

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64. *Id.* at 2298 (emphasis added).

65. See Swaine, *Negotiating Federalism*, *supra* note 11, at 1154-56 (discussing lack of deference to executive branch in existing case law).

66. *Crosby*, 120 S. Ct. at 2301 (quoting *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 196 (1983), and *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 289, 327 (1994)).

67. See *Barclays Bank*, 512 U.S. at 329; see *infra* text accompanying note 96 (describing how Congress's endorsement of California tax, and rejection of executive-branch objections, was inferred by Court, and contrasting *Crosby*).

68. *Crosby*, 120 S. Ct. at 2301 (quoting *Container Corp. of America*, 463 U.S. at 194).

69. *Id.* at 2301 (quoting *Container Corp. of America*, 463 U.S. at 196).

70. 389 U.S. 429, 443 (1968) (Stewart, J., concurring).

tives.<sup>71</sup> The most tangible effect was the WTO proceedings initiated by the EU and Japan, which the Court observed had "embroil[ed] the National Government for some time now."<sup>72</sup>

The Court properly avoided prejudging the merits of the WTO proceedings,<sup>73</sup> but was then left with the difficult task of translating diffuse evidence of political conflict into something legally relevant; in attempting to do so, it ignored evidence suggesting a considerably more nuanced (if not Janus-faced) official position on the Massachusetts law and its legality. The United States was not, after all, legally bound to defend Massachusetts before the WTO<sup>74</sup> – particularly not if it perceived that the state was violating federal law as well – and it initially declined to take any clear position,<sup>75</sup> beyond cautioning the EU to let it first deal with the matter internally.<sup>76</sup> When this failed, however, the U.S. Trade Representative not only expressed "regret" at the WTO consultations, but also flung back the European Parliament's opposition to WTO proceedings and Member State encouragement of similar state sanctions.<sup>77</sup> The Secretary of State also reported that she and the President "recognize[d] the authority of state and local officials to determine their own investment and procurement policies, and the right – indeed their responsibility – to take moral considerations into account as they do so."<sup>78</sup> These officials indicated that states and localities might work

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71. *Crosby*, 120 S. Ct. at 2301.

72. *Id.* at 2300.

73. *See id.* at 2299 & n.19.

74. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, § 102(b)(1)(C)(iii) (1994), *codified as amended* at 19 U.S.C. § 3512(b)(1)(C). The U.S. Trade Representative is, however, required to consult with the state concerning the dispute.

75. WTO Trade Policy Review Body, Trade Policy Review: United States, Addendum to the Minutes of the Nov. 11-12, 1996 meeting, WT/TPR/M/16/Add.1 (97-1119), (Mar. 19, 1997) <<http://www.wto.org/wto/ddf/ep/public.html>> (stating, in response to question from European Community, that "[w]e have been consulting with state officials about the law and its implementation. We are also considering the extent to which the law is consistent with the requirements of the GPA [Government Procurement Agency].").

76. *See* Nancy Dunne, *Massachusetts' Burma Law Row Flares*, FIN. TIMES, June 14, 1997, at 4 (quoting June 5, 1997, letter from U.S. Trade Representative Charlene Barshefsky to Sir Leon Brittan, EU Trade Commissioner, arguing that "[i]nitiating WTO dispute settlement proceedings at this time . . . would frustrate our efforts in Massachusetts to reach a satisfactory conclusion").

77. Office of the U.S. Trade Representative, Press Release 97-58 (June 20, 1997) <<http://www.ustr.gov/releases/1997/06/97-58.pdf>>; *see also* Rita Hayes, Deputy U.S. Trade Representative, U.S. Representative to the World Trade Organization in Geneva, *U.S. Statement on Massachusetts Burma Law*, USIS WASHINGTON FILE, (Oct. 20, 1998) <<http://www.usis-australia.gov/hyper/WF981021/epf303.htm>> (citing support for Massachusetts' position from the European Parliament and the International Federation of Chemical, Energy, Mine and General Workers' Unions).

78. Letter from Madeline Albright, Secretary of State, to Colleagues and Friends, (Apr. 17, 1998), Joint Appendix at 196-97, *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474); *see also* Eizenstat, *Testimony* (Oct. 23, 1997), *supra* note 41 ("We are work-

together with the executive branch to ensure coordinated and lawful policies, and predicted that all concerned, including Massachusetts, could "reach a mutually satisfactory resolution."<sup>79</sup> Prior to September 1998, when the EU finally elected to ask for a dispute resolution panel, it was not clear whether it would press the matter, or what the U.S. reaction would be.<sup>80</sup>

Unless one dismisses this all as posturing (and assumes that it were possible to discern a more accurate account), it raises a credible argument that foreign conflicts were not an inevitable byproduct of the Massachusetts law, but were instead the result of a U.S. decision to take up the state's defense – perhaps based on a belief that Massachusetts was within its rights – and overreactions by Europe and Japan.<sup>81</sup> In any event, these were not the sounds of officials convinced that Massachusetts was undermining a congressionally dictated objective, and few if any of the statements cited by the Court support that proposition either.<sup>82</sup> *Crosby* suggested that the Solicitor General "continue[d] to advance" the theory that state sanctions conflicted with congressional objectives,<sup>83</sup> but that theory was still nascent, and it was even unclear up until the merits stage in the Supreme Court whether the United States would side with or against Massachusetts.<sup>84</sup>

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ing with Massachusetts, and with other state and local governments which have implemented or are considering the imposition of various sanctions measures, to try to ensure that they are designed so that they do not conflict with our international obligations and work to advance rather than retard progress toward meeting our foreign policy objectives.").

79. See Office of the U.S. Trade Representative, *supra* note 77. Secretary of State Albright, speaking more generally, urged state and localities to work "in partnership" with the State Department to ensure compliance with international obligations and to maintain a consistent voice in foreign policy. Albright, *supra* note 77.

80. See Michael S. Lelyveld, *U.S. Vows to Defend Sanctions by State*, J. COM., Sept. 11, 1998, at 3A; see also Michael S. Lelyveld, *Anti-Sanctions Forces Win Key Vote*, J. COM., Aug. 1, 1998, at 1A (noting failure of House bill designed to protect Massachusetts from suit to enforce WTO panel decisions, and noting uncertainty surrounding whether the federal government would seek to force compliance by Massachusetts, despite pledges by U.S.T.R. spokesperson that the federal government would defend Massachusetts before the WTO).

81. Drawing such a distinction would, of course, be fraught with peril: not only would it be difficult for courts to distinguish between genuine and manufactured executive branch expressions, but any such distinction would risk privileging unexamined foreign reactions. See *supra* text accompanying note 44 (describing problem of the "heckler's veto").

82. The only remarks directly alluding to the federal statute opined that the Massachusetts law was "very different." See Alan P. Larson, Assistant Secretary of State, State and Local Sanctions: Remarks to the Council of State Governments (Dec. 8, 1998) (on file with author). It is noteworthy that those remarks were delivered over six months after the initiation of the lawsuit against Massachusetts, and that over a year passed before the executive branch officials again took that position. See also *infra* note 87 (describing other executive branch testimony).

83. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2300 & n. 22 (2000).

84. Michael S. Lelyveld, *Clinton Refrains from Intervening in Myanmar Case*, J. COM., Mar. 11, 1999, at 3A; see also Fred Hiatt, *Boston's Stand on Human Rights*, WASH. POST, Aug. 25,

The Court's reductionist appraisal of this hubbub is again supportive in some respects of foreign-relations revisionism. Revisionists are skeptical not only of the quality of judicial judgments in their own right, but also of the legitimacy and authority of the executive branch guidance submitted to them.<sup>85</sup> The Burma controversy also casts further doubt on any orthodox fiction that the federal government could, even left to its own devices, manage to maintain "one voice" in foreign affairs. The diversity of subjects, actors, and interests in modern global affairs means that even "sovereign" actors need to maintain multiple (and sometimes conflicting) networks and dialogues, particularly where domestic and international law point in different directions.<sup>86</sup> Deciding when to insist on a single voice, it may be argued, is a task best left to Congress.

But if *Crosby* is troubling for the administration of any "one voice" orthodoxy, it almost equally bedevils any revisionist preference for statutory analysis. The Court's difficulties in *Crosby*, after all, lay in evaluating alleged conflicts between state activities and congressional (not constitutional) objectives, and there is no reason to think that such inquiries are ordinarily any easier in kind. The two may in fact be difficult to distinguish: the President's actual objectives in any particular situation are invariably independent to some degree of congressional stipulation – a host of solutions, for example, might be both multilateral and generally conducive to Burmese democracy and human rights – and even Congress likely expects that pursuit of those objectives will accord with the President's broader constitutional responsibility for promoting the national interest. In *Crosby* itself, the senior executive officials cited by the Court made little or no mention of statutory objectives, but instead tended to couch their objections to state interference in terms of conflict with the President's constitutional responsibility for foreign policy. To the extent these objections implicated the Supremacy Clause, they related to the potential for violating international, not domestic, enactments.<sup>87</sup>

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1997, at A19; Michael S. Lelyveld, *U.S. May Defend, Oppose State's Sanctions Law*, J. COM., Feb. 3, 1999, at 3A; Dierdre Shesgreen, *Can States Set Trade Policy?*, LEGAL TIMES, Aug. 17, 1998, at 4. For criticism of the U.S. reluctance to intervene, see Edward T. Swaine, *The Triumph of Local Politics?*, 93 AM. SOC'Y INT'L L. PROC. 247, 248 (1999).

85. See, e.g., Goldsmith, *Federal Courts*, *supra* note 12, at 1709-10.

86. See Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 446 (1997); Goldsmith, *Federal Courts*, *supra* note 12, at 1688; Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183.

87. See *Crosby*, 120 S. Ct. at 2300 & nn.21, 22 (citing authority). The testimony of then-Under Secretary of State Eizenstat cautioned that "[i]t is the Executive Branch of the U.S. Government which is charged with conducting the nation's foreign policy, in consultation

Following the revisionists in deferring almost exclusively to Congress would also be inconsistent with *Crosby's* apparent respect for executive authority. While purposefully stopping short of delimiting state authority respecting foreign affairs, the Court also deliberately transcended the statutory mission designated by Congress by invoking "the very capacity of the President to speak with one voice in dealing with other governments."<sup>88</sup> To the Court, it was self-evident 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."<sup>89</sup> Congress clearly possessed the authority to eliminate any such enclave,<sup>90</sup> but the Court considered it equally beyond controversy that the mere ability to override state law did not suffice to protect the exclusive national power.

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with the U.S. Congress, not states and municipalities. We should have only one foreign policy at a time." Eizenstat, *Testimony* (Oct. 23, 1997), *supra* note 41. See also *Role of Sanctions in U.S. National Security Policy: Hearings before the Senate Foreign Relations Comm.* (July 1, 1999) (testimony of Stuart E. Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs) <[http://www.state.gov/www/policy\\_remarks/1999/990701\\_eizen\\_sanctions.html](http://www.state.gov/www/policy_remarks/1999/990701_eizen_sanctions.html)> (explaining that the authority of state and local governments to impose economic sanctions "is ultimately an issue for the court to decide . . . [b]ut again, we think it has to be exercised within the context of the ultimate constitutional responsibility of the executive branch and of the United States to exercise foreign policy"); *Hearing Before the Cal. Assembly Comm. on Int'l Trade and Dev.*, 1997-98 Reg. Sess. 9 (Oct. 28, 1997), Joint Appendix at 131, 135-37; *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474) (statement of Deputy Assistant Secretary of State David Marchick arguing that state and local sanctions measures "can impede the President's and Secretary of State's conduct of foreign policy," create conflict with allies, and violate international treaties and agreements, and citing and WTO action relating to Burma as having distracted U.S. and European attention from focusing on Burma itself); *Maryland House of Delegates, Comm. on Commerce and Government Matters* (March 25, 1998) (testimony of Deputy Assistant Secretary of State David Marchick), Joint Appendix at 160, 164-66; *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (No. 99-474); accord Eizenstat, *Letter to the Editor*, *supra* note 37, at 155 (citing Clinton Administration concern with state sanctions, and noting that "although Congress clearly has a role to play, the President is the sole custodian of the implementation of foreign policy and must be given the opportunity to speak for the nation as a whole").

This potential for confusion surely undermines the Court's attempt to differentiate between deference to executive branch officials on legal questions, which the Court would not "unquestioningly" extend, and those officials' "competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement." *Crosby*, 120 S. Ct. at 2301. Evidence of conflict or encroachment will tend to be predicated upon an underlying theory of entitlement. Unless executive branch testimony is highly specific, and properly interpreted, deferring on a question of practical impact may in involve accepting a particular legal theory as well.

88. *Crosby*, 120 S. Ct. at 2298.

89. *Id.* at 2299.

90. *Id.* at 2294 n.7 ("The State concedes, as it must, that in addressing the subject of the federal Act, Congress has the power to preempt the state statute.").

Finally, revisionism is hardly the only solution. A narrower constitutional principle, like the dormant treaty power, might presumptively proscribe certain state conduct without requiring executive submission or other specific protest, instead relying on a backdrop of executive-branch constitutional authority. Such a principle, likewise, does not depend on the fiction that one voice can be maintained in all matters of foreign affairs, but instead insists that only one authority – the President – engage in the more defined role of bargaining with foreign powers.

Insisting on the pertinence of executive authority is not, it turns out, as radical as it may seem. Those favoring the orthodox federal monopoly, or the narrower prohibition on state bargaining with foreign powers, ordinarily concede Congress's general authority to license state foreign-relations activities, just like it may consent to foreign compacts or agreements other than treaties.<sup>91</sup> The constitutional question, instead, is what rules ought govern in the *absence* of congressional intervention: a constitutional prohibition, given executive-branch prerogatives, or a more permissive approach, one respecting the presumptive authority of state governments. When Congress does act, as it did toward Burma, the answer to this constitutional question remains pertinent, informing how the judiciary approaches the statute – and, as *Crosby* cautions, how Congress regards the judiciary.

#### V. CROSBY AND CONGRESSIONAL RESPONSIBILITY FOR FEDERAL AFFAIRS

This constitutional subtext to *Crosby* – its extra-statutory solicitude for formal diplomatic interaction with foreign powers, and for the President's presumptively exclusive ability to engage in it – is, after all, only subtext: the Court's explicit basis for decision was statutory, and so limited to the Burma legislation. Even so, *Crosby's* approach to statutory construction may have profound implications for the future of state foreign-relations conduct. Here, too, the Court disclaimed any interest in painting with broad strokes. Contrasting its decision earlier in the term in *United States v. Locke*, which held that the normal presumption against preemption was inappropriate in matters of national and international maritime commerce,<sup>92</sup> the Court held that the clarity of the conflict between the Massachusetts and federal legislation allowed it to

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91. See U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from "enter[ing] into any Treaty, Alliance, or Confederation"); *id.* art. I, § 10, cl. 1 (allowing states to enter into an "Agreement or Compact" with a foreign power, if so permitted by Congress). There are limits to this authority, of course, but they may pose no more of a constraint than those on any assertion of authority by Congress – for example, its inability to nominate and appoint ambassadors on its own behalf.

92. 120 S. Ct. 1135, 1147-48 (2000).

"leave for another day a consideration in this context of a presumption against preemption."<sup>93</sup>

The Court's coyness preserves its right to upset some future statutory scheme based on a hitherto undisclosed ground rule. But *Crosby* also contains seeds of two biases that may signal difficulty for states interested in foreign affairs. The first, already forecast, may be an inclination to read statutes as consistent with executive branch constitutional prerogatives, such as the unfettered authority to negotiate with foreign powers on the nation's behalf.<sup>94</sup> The precise scope of any such presumption, not a complete stranger to foreign affairs,<sup>95</sup> may now have to await a purely constitutional decision, and then another statutory matter in its wake, to the eventual surprise of both Congress and the states.

The Court's treatment of legislative history may also have effected a kind of presumption. The Court summarily rejected Massachusetts' argument that Congress's failure expressly to preempt its law demonstrated implicit permission, stressing that Congress may have been relying on the courts to detect and resolve any inconsistency between federal and state law.<sup>96</sup> This agnosticism is deeply at odds with *Barclays Bank*, which concluded that silence in the face of discrepant state law connoted congressional acceptance (and, correspondingly, rejection of foreign and executive branch objections).<sup>97</sup> Equally striking, as Justice Scalia noted in his concurrence, the majority's view that "the silence of Congress may be ambiguous" was inconsistent with its argument that Congress's failure to enact variant schemes resembling the Massachusetts law meant that state law was preempted.<sup>98</sup> The result, all told, is

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93. *Crosby*, 120 S. Ct. at 2294 n.8.

94. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (describing *McCulloch* as "declin[ing] to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations") (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)).

95. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 606, 617 (1992) (citing, for example, *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986)).

96. *Crosby*, 120 S. Ct. at 2302.

97. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994). The Court's answer did not contrast (as it could have) the relatively thin evidence of congressional consideration as compared to *Barclays Bank*.

98. *Crosby*, 120 S. Ct. at 2303 (Scalia, J., concurring); compare *id.* at 2302 (noting ambiguity of congressional silence), with *id.* at 2296 n.11, 2297 n.13, 2301 n.23 (discussing legislative history). Justice Scalia did not go so far, however, as to endorse the approach he thought the Court had betrayed. Cf. *Johnson v. Santa Clara*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (concluding that congressional inaction may result from any number of reasons: "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice").

one to inspire caution. *Crosby* has been read as encouraging lobbyists for the states and human rights to focus on securing exemptions from federal sanctions legislation.<sup>99</sup> Should their efforts fall short, however, *Crosby* also suggests that the fact of that failure may be cited against them and in favor of preemption.

A de facto presumption of preemption would accomplish some part of what a constitutionally-premised bar on state diplomacy might, by encouraging the collective, national formulation of foreign policy, even as to the desirability of exemptions for state policies. Yet a preemption-based analysis, shorn of a clearer constitutional premise, would have a distinctive side effect. Executive branch officials, and an increasing proportion of Congress, have come to agree with America's trading partners that its penchant for unilateral sanctions is often counterproductive. Sanctions often have an extraterritorial effect on parties other than the target, and when they do not, may simply permit investment substitution from other countries lacking in restrictions. Multilateral support, in consequence, is increasingly seen as a prerequisite for American sanctions.<sup>100</sup>

Left to its statutory basis, *Crosby* perversely invites the opposite strategy. If Congress desires to maintain federal control of a particular topic for foreign diplomacy, it is asked to choose between establishing an affirmative, identifiable federal policy with preemptive effect, on the one hand, and the rarely palatable option of passing legislation with the sole purpose of snuffing out state activities, on the other.<sup>101</sup> One may regard the core of this dilemma, the idea that the federal government must make policy in order to prevent state policy-making, as one of those conundrums routine to a federal society, at least in one in which

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99. See Morning Edition, *supra* note 3 ("[I]n the future, when questions of human rights arise in Congress, state and local governments will be asking Congress to include some kind of savings clause in legislation that would permit state and local governments to continue to act in this way"); Goldberg, *supra* note 9; Greenhouse, *supra* note 6.

100. See, e.g., Richard N. Haas, *Conclusion: Lessons and Recommendations*, in ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY 197-211 (Richard N. Haas ed., 1998) (concluding that "[u]nilateral sanctions are rarely effective" and that multilateral support should normally be regarded as a prerequisite, and that "[s]anctions fatigue" may diminish marginal effectiveness of both unilateral and multilateral sanctions); *Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means* (May 27, 1999) (statement of Sidney Weintraub) <<http://www.csis.org/hill/ts990527.html>>; David R. Moran, *No Panacea: Analyzing Sanctions Before Imposition*, 27 STETSON L. REV. 1403 (1998) (citing studies). But see Jesse Helms, *What Sanctions Epidemic?*, FOREIGN AFF., Jan./Feb. 1999, at 2 (arguing that unilateral sanctions are both sparingly used and effective).

101. This is likely to be particularly unappealing when the states are championing human rights, even if the federal government perceives that there may be better, if inchoate, means of promoting them. See Swaine, *Negotiating Federalism*, *supra* note 11, at 1246-54 & n.433.

the judiciary minds its own business. It gives pause, however, to consider the serious impact this has on the possibilities for multilateralism, the apparent objective behind the legislation at issue in *Crosby* itself. If Congress is routinely forced to choose between establishing a federal program, solely barring state policies, and tolerating state interference, it may find it impossible to achieve the state of repose most conducive to international policy coordination. Securing that state of repose, I argue in the final section, requires the Court's own construction of the Constitution.

## VI. CONCLUSION: THE CONSTITUTION AS A LAST RESORT

*Crosby's* crux lies not in its reading of the federal Burma law or its approach to preemption, but rather in its prudential approach to rendering decisions – evidenced by its terse invocation of Justice Brandeis's famous caution in *Ashwander v. TVA* against unnecessarily resolving constitutional questions.<sup>102</sup> The reasons for electing this approach deserved greater elaboration.<sup>103</sup> The most common rationale involves the respect owed by courts to the coordinate branches, particularly in the corollary that courts should construe a statute so as to avoid potential conflict with the Constitution.<sup>104</sup> That corollary itself is plainly inapposite in *Crosby* – given that the propriety of the federal statute was not in

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102. See *Crosby*, 120 S. Ct. at 2294 n. 8 (citing *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). The Court's citation suggests that it intended the general principle, but the most pertinent of the many rules catalogued by Brandeis was that as between two possible grounds for decision, courts should prefer the non-constitutional ground. *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").

103. It is clear from Justice Brandeis's opinion that he viewed the doctrine as a prudential one, not one dictated by the Constitution, see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 648-49 (1992), a view consistent with its subsequent application. See *id.*; see, e.g., *Escambia County, Florida v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"). But see, e.g., *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 14-15 (1993) (Blackmun, J., dissenting) (describing principle as a "'corollary' to the Article III case or controversy requirement . . . grounded in basic principles regarding the institution of judicial review and this Court's proper role in our federal system") (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 570 (1947)).

104. See *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("This canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations."); accord *id.* at 223-24 (O'Connor, J., dissenting); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (given that members of Congress are bound by and swear an oath to the Constitution, the Court will not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it"). But see, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (criticizing *Ashwander* approach to statutory construction as no less intrusive than judicial review of constitutionality).

question<sup>105</sup> – and respect for Congress seems only remotely relevant to any more general notion of constitutional avoidance. Avoiding deciding on the basis of a constitutional ground that is facially consistent with a federal legislative scheme involves little in the way of deference, unless one imagines that the political branches insist on top billing for their efforts.<sup>106</sup>

Avoidance is also commended by the need for self-restraint in exercising the "delicate" and "final" function of judicial review, caution animated by many of the same concerns for avoiding encroachment on the political branches.<sup>107</sup> But those arguments are far less persuasive in the context of a "dormant" constitutional authority,<sup>108</sup> and a less self-obsessed respect for the separation of powers might have warranted embracing the constitutional questions posed by *Crosby*. In failing to address directly the foreign affairs power question with which it was properly presented – on one of the few occasions it has had to clarify the confusion wrought by *Zschernig* – the Court essentially confirmed the impression that Congress was the more certain vehicle for resolving federal-state foreign policy conflicts. As previously noted, there were also strong hints of executive authority, and the time may yet come when the Court is forced to clarify that authority's preemptive effect (or, for that matter, the preemptive effect of the dormant Commerce Clause, or that of the Senate's responsibilities under the Treaty Clause). In the interim, though, the President may be forgiven for concluding that statutory preemption is a far safer course, and for taking pains to avoid litigating a case solely on the basis of dormant constitutional authority. In *Crosby*, the Court might have affirmed the President's authority without diminishing that of Congress or the Senate,<sup>109</sup> and its failure to resolve

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105. Nor, obviously, did the Court purport to read the Massachusetts statute so as to avoid conflict with federal law.

106. By the same token, though, such occasions avoid the criticism that the *Ashwander* approach undermines the best interpretation of congressional language. Although Professor Schauer rightly finds all of Brandeis' principles mingled within the notion that courts should construe statutes so as to avoid constitutional questions, *see* Schauer, *supra* note 104, at 72, his criticisms fail adequately to distinguish the lesser-included principle of choosing between (unrelated) statutory and constitutional questions.

107. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1035-55 (1994) (reviewing horizontal justifications for avoiding constitutional questions). As Professor Kloppenberg's discussion reflects, not everyone agrees that the judiciary's function is to duck constitutional questions. *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

108. As previously noted, neither the monopoly orthodoxy nor the dormant treaty power would begrudge the federal government the ability to alter the states' role via positive law.

109. It would have been wholly unnecessary in *Crosby* to determine the outer limits of the President's treaty authority in the event of a clash with the Senate, or to reconcile the treaty power with Congress's control over foreign commerce.

the question entailed a shift of power from the President to Congress – acquiescence that the Court may eventually consider probative of constitutional meaning.<sup>110</sup>

Federalism concerns might be the clearer argument for avoidance,<sup>111</sup> but here too matters are less clear than they might seem. To be sure, confirming the monopoly orthodoxy or a dormant treaty power would leave less authority in the first instance to the states, and the Court's rule instead places the burden on the federal government to intervene.<sup>112</sup> One may wonder, though, whether such an approach really avoids prejudging the point at issue.<sup>113</sup> If, for example, the Constitution precludes state bargaining with foreign powers absent federal permission, the fundamental objective of the principle may be lost if courts are unwilling to enforce it without waiting for political intervention. Constitutional forbearance may, in other words, inflict constitutional harm, and not just in the sense of leaving interesting questions undecided.

*Crosby* reminds us, therefore, that the warrant for judicial minimalism "is not separable from an evaluation of the underlying substantive controversies"<sup>114</sup> or, for that matter, from its institutional context. This

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110. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (explaining that "long-continued . . . practice raise[s] presumption [of congressional consent]").

111. See *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 193 (1909) (affirming injunctive relief against state officials on basis of state law, rather than federal constitution); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) (courts presented with pendant state-law claims may resolve cases on that basis, and "usually should do so in order to avoid federal constitutional questions"); cf. *Kloppenber*, *supra* note 107, at 1025-27, 1055-65 (considering *Pullman* abstention and the adequate and independent state grounds doctrines as species of *Ashwander's* "last resort" rule).

112. Even here, the traditional reasoning, developed in cases preferring state-law grounds for decision, is not wholly applicable to circumstances where *either* basis for decision is federal. See *Pennhurst*, 465 U.S. at 163 (Stevens, J., dissenting) (arguing that state-law grounds are commonly preferred because they reserve greater decision-making autonomy to the states, which might revise the rules in question); *id.* at 162 (Stevens, J., dissenting) (citing desire to avoid duplicative litigation in many jurisdictions, as well as avoiding unnecessary decision of constitutional questions); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 571 (1947) (same).

It is possible, of course, that the Court might have vindicated the states had it reached the constitutional question, and thereby disadvantaged them in refraining from doing so. Just so, avoiding constitutional questions does not really benefit Congress where courts would have vindicated its authority. But the assumption in the latter case, at least, appears to be that constitutional adjudication's potential downside for political authorities is greater than in its potential benefits, an assumption that is particularly compelling given the now-prevalent assumption of virtually plenary congressional power.

113. As indicated above, *Crosby* also reinforces the suspicion that the Court is never very good at avoiding the Constitution, given the sprinkling throughout the opinion of holdings and dicta regarding the respective powers of the states and the federal government.

114. Cass R. Sunstein, *The Supreme Court, 1995 Term – Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 30 (1996).

deserves special attention in the foreign relations context. Invoking *Ashwander* lets the political branches (and the states) operate unfettered by the judiciary's interpretation of the Constitution – creating lacunae, in other words, for independent lawmaking.<sup>115</sup> But these lacunae, and this independence, are not so easily maintained in the international sphere. Passages in *Crosby* demonstrate the Court's understanding that U.S. foreign relations law is forged in part by the interaction between the political branches and foreign powers, and that the effectiveness of this interaction in securing U.S. objectives may be influenced by the political branches' domestic authority. What the Court fails to acknowledge is the degree to which uncertainty over those prerogatives can equally affect outcomes, and – crucially – how international law and policy will continue to be forged even in the absence of effective U.S. participation. Foreign powers will undoubtedly continue to devote energies to Capitol Hill, and the statehouses, as well as to formal diplomatic channels. And where those audiences do not converge, and their authority is obscure, other nations can and should take the lead in establishing international norms that may touch on U.S. interests. It may be hoped that the Court will recognize that diplomacy is as delicate and, potentially, final, as its own authority, and see fit to overcome *Crosby's* reticence by conforming U.S. foreign relations law more clearly to the Constitution's dictates.

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115. To be sure, the invitation to state lawmaking is not so great as if the Court had ruled in their favor, particularly given the (waning) shadow cast by *Zschernig*. But it is abundantly clear that the states are not substantially deterred by the uncertainty. *But see The Supreme Court, 1999 Term – Leading Cases, supra* note 6, at 354-59 (assuming that lingering doubts will deter subnational legislation touching on foreign affairs).