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W(H)ITHER *ZSCHERNIG*?

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WHEN the Court granted certiorari in what became *Crosby v. National Foreign Trade Council*,[1] many expected a major constitutional ruling. Court watchers anticipated the Court's first foray into the dormant foreign affairs power since its decision in *Zschernig v. Miller*,[2] the only case so far in which the Court has struck down a state statute on the ground that it interferes with the national government's exclusive power to conduct foreign relations.[3] The plaintiffs in *Crosby* challenged Massachusetts' law subjecting companies that do business with the military regime in Burma to certain disadvantages in the government procurement process.[4] The district court struck down the law on the basis of the dormant foreign affairs power.[5] Although the Court of Appeals affirmed on two additional grounds,[6] most observers assumed that the Court had granted certiorari to address the dormant foreign affairs doctrine for the first time since *Zschernig*, and perhaps to repudiate it.

Both the soundness and the scope of the *Zschernig* doctrine have long been a matter of considerable debate.[7] In recent years, however, the idea that some state laws are invalid because they interfere with the federal government's unexercised power to conduct foreign relations has come under intensified academic attack.[8] Some of these critiques are part of a

* Professor of Law, Georgetown University Law Center. I am grateful for comments received from James Anaya, Curtis Bradley, Viet Dinh, Steven Goldberg, Michael Gottesman, Vicki Jackson, Naomi Mezey, Michael, Seidman, Robert Stumberg, Mark Tushnet and the participants in faculty workshops at the University of Arizona and Georgetown, and for the research assistance of Marye Cherry and Peter Klason.

1. 530 U.S. 363 (2000).

2. 389 U.S. 429 (1968).

3. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 825 (1989).

4. *See* MASS. GEN. LAWS ANN. ch. 7, §§ 22G-22M (West 1997) [hereinafter Massachusetts Burma Law] (restricting authority of its agencies to purchase goods or services from companies doing business with Burma); *Crosby*, 530 U.S. at 370.

5. *See Baker*, 26 F. Supp. 2d at 289 (holding that "Massachusetts Burma Law impermissibly infringes on the federal government's power to regulate foreign affairs").

6. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

7. *See, e.g.*, *Zschernig*, 389 U.S. at 457-62 (Harlan, J., concurring in the result); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 239 & n.51 (1972); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 164 (2d ed. 1996) [hereinafter HENKIN (2d ed.)]; Frederick L. Kirgis, Zschernig v. Miller *and the* Breard *Matter*, 92 AM. J. INT'L L. 704, 705 (1992); Bilder, *supra* note 3, at 821, 825-26 (1989).

8. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1664 (1997) [hereinafter Goldsmith, *Federal Courts*]; Michael D. Ramsey,

broader attack on foreign affairs "exceptionalism:" the idea that cases raising foreign affairs issues should be resolved under different principles than purely domestic cases.[9] The critique of foreign affairs exceptionalism is, in turn, a part of a broader revisionist challenge to prevailing doctrine in the area of foreign affairs law. Revisionist commentators thought that the Court had pulled the rug out from under *Zschernig* in *Barclays Bank PLC v. Franchise Tax Board*,[10] in which it all but eliminated the "one-voice" prong of the dormant Foreign Commerce Clause doctrine.[11] Many thought that the other shoe would drop in *Crosby*.

Though the other shoe did not drop, critics of *Zschernig* and foreign affairs exceptionalism have found much to like in the decision. The Court in *Crosby* expressly declined to address either the dormant foreign affairs power or the dormant Foreign Commerce Clause issues. It held instead that the Massachusetts Burma Law was invalid because it was preempted by a federal law imposing sanctions on Burma,[12] a law enacted three months after the Massachusetts law.[13] More importantly, the Court purported to strike down the Massachusetts law through the application of "settled . . . preemption doctrine."[14] The Court held that the Massachusetts law was preempted because it stands as "an obstacle to the accomplishment of Congress's full objectives under the federal Act."[15]

Most commentary on *Crosby* has stressed the narrow scope of the holding.[16] *Zschernig*'s critics have praised the Court's decision to rest its invali-

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The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism, 75 NOTRE DAME L. REV. 341, 343 (1999); *see also* Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN J. INT'L L. 1, 1 (2001); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1223 (1999); *cf.* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1127 (2000) (criticizing broad dormant foreign relations power, but defending somewhat narrower dormant treaty power).

9. *See* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104-07 (1999) (coining phrase "foreign affairs exceptionalism").

10. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 324 (1994).

11. *See* Goldsmith, *Federal Courts*, *supra* note 8, at 1705; Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1426 (1999) [hereinafter Goldsmith, *New Formalism*]; see also Spiro, *supra* note 8, at 1266; Robert Stumberg, *Sovereignty By Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491, 523-25 (1998).

12. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000).

13. *See* Foreign Operations, Export Financing, and Related Programs Appropriation Act, 1996, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 to 3009-167 (1997) (enacted by the Omnibus Consolidated Appropriations Act, 1996, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009-121 to 3009-172) (1997)) [hereinafter the "Federal Burma law"].

14. *See Crosby*, 530 U.S. at 388.

15. *See id.* at 373 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

16. *See* Brannon P. Denning & Jack H. McCall, *International Decisions:* Crosby v. National Foreign Trade Council, 94 AM. J. INT'L L. 750, 753 (2000) ("Probably the most commented-upon aspect of the Crosby decision to date is the very narrow ground on which the case was decided by the Supreme Court, in stark contrast to

dation of the Massachusetts law on "ordinary" preemption rules, a resolution in keeping with their critique of foreign affairs exceptionalism.[17] One commentator has gone so far as to suggest that, "[b]ecause the Court carefully avoided any ruling on dormant or field preemption grounds, [*Crosby*] has no implications for state international relations activities beyond state laws regulating transactions with Burma."[18] The Court itself indicated that it regarded its asserted grounds of decision in *Crosby* to be narrower than the grounds it declined to reach. It purported to be following Justice Brandeis' admonition in *Ashwander v. TVA*[19] that constitutional issues should be avoided where a statutory basis is available for disposing of a case.[20]

I argue here that a declaration of victory by the critics of the dormant foreign affairs doctrine would be premature. Notwithstanding the Court's citation of *Ashwander*, the actual grounds of the decision in *Crosby* were in no meaningful sense less "constitutional" in nature than a decision based on the dormant foreign affairs power would have been. Moreover, even though the Court said that its decision was based on a straightforward application of "settled . . . implied preemption doctrine,"[21] the Court's preemption analysis was anything but ordinary. Indeed, *Crosby*'s version of preemption analysis is subject to the same sorts of objections that *Zschernig*'s critics have directed at the dormant foreign affairs doctrine. Moreover, if the case were taken as a model for deciding issues of preemption in purely domestic cases, it would be anything but narrow. The decision would be narrow only if its approach to preemption were confined to suits implicating foreign relations. But then the decision would be exceptionalist, and the Court's holding would begin to resemble a decision on dormant foreign affairs grounds. Indeed, I suggest here that *Crosby*'s approach to preemption was so extraordinary that it would have yielded the same conclusion with respect to the Massachusetts Burma Law even if

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the broader foreign affairs and Commerce Clause grounds utilized by both lower courts."). *But cf.* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 215 ("When Crosby was announced, it was heralded by some as the death knell for state international relations activities.") [hereinafter Goldsmith, *Statutory Foreign Affairs*]; Edward T. Swaine, Crosby *as Foreign Relations Law*, 41 VA. J. INT'L L. 481, 481-82 (2001) (noting that victorious plaintiffs "emphasized the decision's value as precedent," while supporters of Massachusetts "stressed *Crosby*'s narrow compass").

17. *See* Goldsmith, *Statutory Foreign Affairs*, *supra* note 16, at 177, 178.

18. *Id.* at 215; *see also* Jack Goldsmith, *State Foreign Affairs After the Burma Case*, ("[The Court] carefully avoided any suggestion that state foreign affairs activities are invalid in the absence of some preemptive action by Congress. The decision therefore has no implications for state foreign relations activities beyond state laws regulating transactions with Burma."), *at* http://writ.news.findlaw.com/commentary/20000626_goldsmith.html (last visited Mar. 18, 2001).

19. 297 U.S. 288, 346-47 (1936).

20. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000) (citing Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

21. *Id.* at 386-87.

there had been no Federal Burma Law. *Crosby* thus offers little cause for celebration to the critics of dormant foreign affairs doctrine.

Part I of this Article describes the *Zschernig* decision and explains how the lower courts in *Crosby* relied on it in striking down the Massachusetts Burma Law. Although the Supreme Court in *Crosby* avoided that seemingly constitutional issue in favor of a purportedly subconstitutional preemption holding, Part II of this Article argues that there is less of a difference than may at first appear between a holding based on the dormant foreign affairs doctrine and one based on obstacle preemption. Both are subconstitutional in all relevant respects, and obstacle preemption is in any event vulnerable to the same criticisms that have been leveled at the dormant foreign affairs doctrine. Part III argues that *Crosby* perpetuates foreign affairs exceptionalism. Part III(A) contrasts the *Crosby* decision with the Court's recent constitutional federalism decisions and speculates that the implications of the latter cases may have been overlooked in *Crosby* because the case was perceived primarily as a foreign affairs case. Part III(B) looks more closely at the reasons the Court gave in *Crosby* to justify its preemption holding and argues that they were so extraordinarily conducive to a finding of preemption that they would have yielded the invalidation of the Massachusetts Burma Law even if there had been no Federal Burma Law. Part IV considers the recent academic critiques of the *Zschernig* doctrine and concludes that they justify at most a modest reformulation, but not the abandonment, of the dormant foreign affairs doctrine. I suggest that the *Crosby* decision would have rested on sounder, and narrower, grounds if the Court had interpreted *Zschernig* to stand for the proposition that state laws are invalid if they single out a state or a group of states, or their nationals or those who deal with them, for unfavorable treatment.

I. BACKGROUND

As noted above, *Zschernig* has so far been the only case in which the U.S. Supreme Court has struck down a state law on dormant foreign affairs power grounds—that is, on the ground that the state law interferes unduly with the federal government's exclusive power to conduct foreign relations. This section briefly discusses the facts and reasoning of *Zschernig* and how the lower courts in *Crosby* relied on the case to strike down the Massachusetts Burma Law.

Zschernig was a resident and national of what was at the time East Germany. He stood to inherit some property from a relative in Oregon but for an Oregon statute that provided that nonresident aliens could inherit property only if three requirements were satisfied: (a) U.S. citizens had a reciprocal right to inherit property located in the country of the alien's nationality, (b) U.S. citizens had a right to receive payment in the United States of funds from estates in that country, and (c) citizens of that

country had a right to receive the proceeds of Oregon estates without confiscation.

The Oregon courts in *Zschernig* followed *Clark v. Allen*.[22] In that case, the U.S. Supreme Court had interpreted a treaty between the United States and Germany to preempt a California law that conditioned inheritance by foreign nationals on the recognition of reciprocal inheritance rights by the foreign nation—but only with respect to real property.[23] Because the treaty did not apply to personal property, the Court in *Clark* considered whether the state law was invalid as "an extension of state power into the field of foreign affairs, which is exclusively reserved to the Federal Government."[24] The Court rejected the latter argument as "far-fetched."[25] The Court noted that "[w]hat California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."[26] The Oregon Supreme Court accordingly held that Zschernig could take the realty pursuant to the treaty, but that his right to take the personalty was governed by the Oregon statute.[27] Finding that the conditions set forth in the Oregon law were not satisfied, the court held that Zschernig could not take the personalty.[28]

With only Justice White dissenting,[29] the Supreme Court reversed. Justice Harlan would have overruled *Clark* insofar as it held that the treaty with Germany applied only to realty.[30] He would have struck down the Oregon statute as preempted by the treaty. Justices Stewart and Brennan, on the other hand, would have overruled *Clark*'s dormant foreign affairs power holding.[31] The majority, in an opinion by Justice Douglas, adhered to *Clark*'s interpretation of the treaty but distinguished its dormant foreign affairs power holding. The Court said that it had held in *Clark* "that a *general* reciprocity clause did not on its face intrude on the federal domain."[32] This case was different because of the manner in which statutes such as Oregon's were being applied. The Court stated: "At the time *Clark v. Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched

22. 331 U.S. 503 (1947).

23. *Clark*, 331 U.S. at 516.

24. *Id.*

25. *Id.* at 517.

26. *Id.*

27. 412 P.2d 781 (Or. 1966).

28. *Zschernig*, 412 P.2d at 791.

29. *See* Zschernig v. Miller, 389 U.S. 429, 462 (1968).

30. *Id.* at 451-57. Justice Harlan disavowed the majority's dormant foreign affairs power analysis. *Id.* at 457-62.

31. *Id.* at 441-43.

32. *Id.* at 432 (emphasis supplied).

inquiries into the type of governments that obtain in particular foreign nations . . . ."[33] The Court further noted that:

> As we read the decisions that followed in the wake of *Clark v. Allen*, we find that they radiate some of the attitudes of the "cold war," where the search is for the "democracy quotient" of a regime as opposed to Marxist theory. . . . And this has led to minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied the right to receive . . . ."[34]

The Court went on to state: "That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark v. Allen*."[35] The Court accordingly invalidated the Oregon statute, noting that a state "is [not] permitted to establish its own foreign policy."[36]

The scope of the dormant foreign affairs power recognized in *Zschernig* has long been a matter of uncertainty. But the district court in *Crosby* had little trouble concluding that the Massachusetts Burma Law fell squarely within the prohibited zone. The Massachusetts law prohibited state agencies from contracting with companies doing business with Burma except when the procurement is essential and there is no other bid or offer, when the bid pertains to certain medical supplies, or when there is no "comparable low bid or offer," defined as an offer equal to or less than ten percent above the lowest bid from a company doing business with Burma.[37] The district court concluded that the law "has more than an 'indirect or incidental effect in foreign countries,' and a 'great potential for disruption and embarrassment. '"[38] The legislative history of the statute made clear what was apparent from its face: that it was designed to influence Burma's domestic policies and hence constituted an effort by Massachusetts to conduct its own foreign policy.[39] The law thus fell in the core of the zone prohibited to the states by *Zschernig*. The Court distinguished Buy-America laws on the ground that they do not single out a particular state for distinct treatment.[40]

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33. *Id.* at 433-34.

34. *Id.* at 435.

35. *Id.* at 436.

36. *Id.* at 441.

37. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 46 (1st Cir. 1999).

38. Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 291 (D. Mass. 1998).

39. The Court relied in particular on a statement by the bill's sponsor, Rep. Rushing, to the effect that, "if you're going to engage in foreign policy, you have to be able to identify a goal that you will know when it is realized. . . . The identifiable goal is, free democratic elections in Burma." *Id.* at 291.

40. *Id.* at 292.

The First Circuit, too, found it unnecessary to grapple with any tough questions about the outer limits of the dormant foreign affairs power. After a thorough discussion of *Zschernig* and lower court decisions applying it, the court concluded that, "by targeting a foreign country, monitoring investment in that country, and attempting to limit private interactions with that country, [the Massachusetts Burma Law] goes far beyond the limits of permissible regulation under *Zschernig*."[41] Like the district court, the First Circuit distinguished lower court decisions on the ground that the laws involved in those cases "treated all foreign states in the same fashion," and thus, unlike the Massachusetts law, "did not single out or evaluate any particular foreign state."[42] Thus, while acknowledging the controversy over the scope of *Zschernig*, the court of appeals, like the district court, appears to have regarded the case as falling within the uncontroversial core of the zone prohibited the states by *Zschernig*, a zone that includes at a minimum state laws that single out particular foreign states for unfavorable treatment.

The plaintiffs in *Crosby* also challenged the Massachusetts law as invalid under the dormant Foreign Commerce Clause and as being preempted by the Federal Burma Law. Because of its holding that the statute was invalid under the dormant foreign affairs power, the district court found it unnecessary to decide whether the statute fell within the market participant exception to the dormant Foreign Commerce Clause, as the state had argued. On the other hand, the court went out of its way to reject the plaintiffs' preemption argument. Noting that the burden of establishing implied preemption is "particularly heavy," the court concluded that "[t]he evidence does not establish sufficient actual conflict for this court to find [such] preemption."[43] The court of appeals found the Massachusetts law invalid on both dormant Foreign Commerce Clause grounds and on preemption grounds, in addition to dormant foreign affairs grounds. With respect to preemption, the Court said that the district court had applied the wrong standard. The burden of establishing implied preemption is heavy, according to the court of appeals, only where "the subject matter of the law in question is an area traditionally occupied by the states."[44] But "[p]reemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs."[45]

The U.S. Supreme Court reached only the preemption claim. Citing Justice Brandeis' admonition in *Ashwander* that constitutional issues should be reached only when necessary, the Court stated in a footnote that it was expressing no view on the Massachusetts law's validity under the

41. *Natsios*, 181 F.3d at 41.

42. *Id.* at 42; *see also id.* at 49 (distinguishing *Barclays Bank* on the ground that it "did not involve a state law that targeted any foreign nation or nations").

43. *Baker*, 26 F. Supp. 2d at 293.

44. *Natsios*, 181 F.3d at 94-95.

45. *Id.*

dormant foreign affairs power or the dormant Foreign Commerce Clause.[46] The Court also found it unnecessary to determine whether a less demanding preemption standard applied because the Massachusetts law touched on foreign affairs.[47] While acknowledging that Congress' intent on the question of preemption was "ambiguous,"[48] the Court held that the Massachusetts law was invalid because it posed an obstacle to the achievement of Congress' full purposes in enacting the Federal Burma Law.[49] The Court thus purported to find the Massachusetts law invalid under "settled" principles of implied preemption.[50]

II. *ZSCHERNIG* AND *CROSBY*: MORE ALIKE THAN DIFFERENT

When the Court cited *Ashwander* as support for avoiding the dormant foreign affairs issue and deciding the case on preemption grounds, it suggested that a holding based on the former ground would have been of constitutional dimension, while a holding based on the latter ground would have been statutory. The suggested dichotomy is oversimplified and inapt. There are varieties of constitutional doctrines and there are varieties of approaches to preemption. Though it has constitutional underpinnings, the dormant foreign affairs doctrine is in fact, for most relevant purposes, a subconstitutional doctrine akin to federal common law. As has often been noted, there is no bright line between federal common law and "mere" statutory interpretation.[51]

Preemption doctrine, for its part, might be understood as "mere" statutory interpretation.[52] But because its basis is a constitutional provision, the Supremacy Clause,[53] it is often described as a constitutional issue.[54] The general approaches the Court employs to resolve preemption issues are more properly regarded as interpretations of the Supremacy Clause than as statutory interpretation.[55] Moreover, there are a variety of brands

46. Crosby v Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000).

47. *See id.* ("We leave for another day a consideration in this context of a presumption against preemption.").

48. *Id.* at 388.

49. *Id.* at 373.

50. *Id.* at 388.

51. *See* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 755 (4th ed., 1996); Goldsmith, *Federal Courts*, *supra* note 8, at 1688.

52. See 2 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1177 (3d ed. 2000) ("Perhaps, the most fundamental point to remember is that preemption analysis is, or at least should be, a matter of precise statutory construction . . . ."); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (noting that, in preemption cases, "the task for the Court is . . . the task of statutory construction").

53. U.S. CONST. art. VI, cl. 1.

54. *See, e.g.*, Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 134-35 (1963). This perhaps explains why Professor Tribe addresses the subject in his treatise on American Constitutional Law.

55. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 278-90 (2000).

of preemption analysis, just as there are many approaches to statutory interpretation. The Court in *Crosby* employed a branch of preemption doctrine under which state law can be displaced in the absence of any intent of Congress either to displace state law or to enact a policy in conflict with the displaced state law. This brand of preemption is, or should be, no less controversial than federal common law.

A. Zschernig *as Federal Common Law*

In *Ashwander*, Justice Brandeis said that courts faced with both a constitutional ground for a decision and a statutory one should decide the case on statutory grounds.[56] He was, of course, concerned about the momentous nature of constitutional decisions. Such decisions frustrate the wishes of a majority in a way that, if erroneous, can be corrected only by constitutional amendment or by Supreme Court reconsideration of its original holding. By contrast, if the Court renders an erroneous statutory decision, its mistake can be corrected through the enactment of a statute.[57]

If this is the reason to prefer a non-constitutional basis of decision, then the dormant foreign affairs doctrine should qualify as a non-constitutional doctrine. Like decisions based on the dormant Commerce Clause, decisions based on the dormant foreign affairs power are revisable by Congress.[58] Thus, had the Court decided that the Massachusetts Burma Law was invalid because it interfered with the political branches' conduct of

56. *See* Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (stating that Court will resolve issue on non-constitutional grounds if possible).

57. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 235 (1997); Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see also infra* note 82.

58. *See* HENKIN (2d ed.), *supra* note 7, at 164-65; Bilder, *supra* note 3, at 826; Delahunty, *supra* note 8, at 42; Goldsmith, *Federal Courts*, *supra* note 8, at 1664 (describing *Zschernig* doctrine as federal common law); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1080 (1967). Although the Supreme Court has never had occasion to consider whether the federal government by statute may validate state laws that would otherwise be invalid under dormant foreign affairs doctrine, the conclusion that it may do so seems to follow from the doctrine's rationale. Under this doctrine, state laws are invalid because they intrude on the federal government's exclusive power to conduct foreign relations. A federal statute permitting states to "interfere" with foreign relations would appear to be a valid exercise of this exclusive power. The closely related dormant Commerce Clause doctrine is understood to be revisable by Congress, see *infra*, as is the even-more-closely related dormant Foreign Commerce Clause doctrine. *See* Delahunty, *supra* note 8, at 38. *Cf.* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 330 (1994) (relying on Congress' failure to preempt law such as California's in concluding that law is not invalid under dormant Foreign Commerce Clause). It is true that the Court in *Zschernig* struck down the Oregon statute notwithstanding the Executive branch's representation that the statute did not interfere with its ability to conduct foreign relations. *See* Zschernig v. Miller, 389 U.S. 429, 435 (1968). But a statute passed by Congress and signed by the President obviously stands on a different footing than a representation to the Court by the Executive branch. *See* HENKIN (2d ed.), *supra* note 7, at 164-65.

foreign affairs, Congress could have nullified that holding simply by passing a statute expressly approving the Massachusetts Law. In other words, it would take exactly the same thing (a statute) to correct a decision erroneously striking down the Massachusetts law on dormant foreign affairs grounds as a decision erroneously striking down the Massachusetts law on ordinary preemption grounds. On this score, there appears to be no reason to prefer one ground of decision to the other.

The difference between the two grounds of decision is that, in the one case, a state law is struck down without any prior action by Congress, while in the other case, the state law is struck down because it is deemed to be in conflict with some statute passed by Congress. In other words, in the first case, a state law is struck down in the face of congressional silence or inaction, whereas in the second case the statute is struck down because of congressional action. But, as will soon become apparent, things are not quite that simple. As discussed further below, *Crosby* itself struck down the Massachusetts Burma Law in the face of congressional silence on the question of preemption.[59]

The centrality of congressional silence to the question of the legitimacy of dormant foreign affairs doctrine is illuminated by an examination of the debate among the Justices about the legitimacy of dormant Commerce Clause jurisprudence. Like dormant foreign affairs doctrine, dormant Commerce Clause doctrine requires the invalidation of state laws in the absence of a specific constitutional provision making such laws unconstitutional and in the absence of a statute rendering the state law invalid. The text of the Constitution gives Congress the power to regulate interstate commerce, but it does not purport to invalidate any state laws of its own force.[60] Yet the Court has long interpreted the Clause to invalidate state laws that discriminate against or otherwise unduly burden interstate commerce.

Chief Justice Rehnquist and Justices Scalia and Thomas have at various times called into question the very idea of a dormant Commerce

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In a footnote in his treatise, Professor Tribe expresses the view that "Congress [may] not ratify a state's intrusion into foreign affairs." 1 TRIBE, *supra* note 52, at 1246 n.45. His only support for that proposition, however, is Justice Stewart's concurring opinion in *Zschernig* declining to defer to the Executive branch's amicus brief on the ground that resolution of this issue "cannot vary from day to day with the shifting winds at the State Department." *Zschernig*, 389 U.S. at 443. It does not follow, of course, that the doctrine is not revisable *by Congress*. To be sure, a doctrine under which even Congress and the President through statute may not authorize state laws that interfere with foreign relations is conceivable. But the critics of *Zschernig* have not so understood the dormant foreign affairs doctrine, and the defense of the doctrine I offer here is a defense of a doctrine under which Congress may affirmatively authorize state laws that would otherwise run afoul of the doctrine.

59. For a discussion of congressional silence on the issue of federal preemption in the Federal Burma Law, see *infra* Part II(B).

60. *See* U.S. CONST. art. I, § 8, cl. 3.

Clause.[61] They have argued that the Clause was never intended to license judicial invalidation of state laws without prior action by Congress.[62] Against this attack, the other Justices have noted that, even if it were true that the Clause was never intended to have a self-executing aspect, it would not be necessary to change the Court's approach.[63] That is because Congress "unquestionably has the power to repudiate" the whole course of the Supreme Court's dormant Commerce Clause jurisprudence.[64] In other words, even if that jurisprudence were not otherwise supported by constitutional text or history, Congress' failure to repudiate it would legitimize it. On this view, when the courts invalidate a state law under the dormant Commerce Clause, they are doing so pursuant to an implicit delegation of power by Congress. It is as if Congress had passed a law to the effect that state statutes that discriminate against interstate or foreign commerce, or impose an undue burden on such commerce, shall be preempted. The Court's articulation and enforcement pursuant to such a statute of a federal common law identical in content to its current dormant Commerce Clause jurisprudence would be no more problematic than its development of a federal common law of labor-management relations pursuant to an implicit delegation in section 301 of the Taft-Hartley Act,[65] or even its development of a federal common law of trade regulation pursuant to the Sherman Act.[66] Striking down state laws pursuant to such a delegation would be the equivalent of striking them down on preemption grounds.

The dissenting Justices respond that congressional silence cannot be equated with congressional delegation. They argue that treating silence as delegation would run afoul of the bicameralism and presentment require-

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61. *See* Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 202-03 (1990) (Scalia, J., concurring); Tyler Pipe Ind., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part).

62. *See, e.g., Am. Trucking Ass'ns*, 486 U.S. at 202 (Scalia, J., dissenting).

63. *See Camps Newfound/Owatonna*, 520 U.S. at 571.

64. *See id.* at 572.

65. Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 (1994); *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957) (holding federal common law is to be applied to suits under LMRA). It is no accident that the author of *Lincoln Mills* was the author of *Zschernig*.

66. Federal antitrust law has been likened by many to federal common law because of the tenuous link such law has with the Sherman Act's text. *See, e.g.*, Frank H. Easterbrook, *Statute's Domain*, 50 U. CHI. L. REV. 533, 544 (1983); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44-45 (1985); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 269; Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist Perspective"*, 83 NW. U. L. REV. 761, 789 (1989). *But cf.* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 289 (1990) (arguing Sherman Act does not delegate common law authority to courts).

ments, as construed in *INS v. Chadha*.[67] This echoes a frequent criticism of the dormant foreign affairs power, and more generally of federal common law. The Constitution sets up a demanding procedure for the displacement of state law by federal statute, thus placing the burden of inertia on the federal government. It purposely sets up a procedure—requiring the affirmative votes of a majority of two Houses plus the President, or two-thirds of both Houses without the President—that tilts the scales in favor of the States.[68] The process is designed to ensure that the interests of the States are represented, and that any displacement of state law is done by the politically accountable branches. When the Court engages in federal common law-making, or strikes down a state law on the basis of the dormant foreign affairs power, it circumvents these political safeguards of federalism.[69]

Notwithstanding *Chadha*, however, the Court continues to rely on congressional activity short of legislation, and even on congressional silence, in deciding whether state law is displaced. In *Dames & Moore v. Regan*,[70] for example, the Court upheld a sole executive agreement that suspended private claims against Iran because, *inter alia*, Congress had failed to object to it.[71] Indeed, *Crosby* itself shows the Court's willingness to rely on congressional activity falling short of the bicameralism and presentment requirements, and even congressional silence. As discussed in greater detail below, the Court in *Crosby* struck down the Massachusetts Burma Law in the face of congressional silence on the question of preemption.[72] Additionally, in seeming violation of the bicameralism requirement, the Court relied on statements by the Executive branch objecting in various ways to the Massachusetts law.[73] This seemed to depart from the Court's approach to such statements in *Barclays Bank*, in which the Court said: "Executive branch communications that express federal policy but lack the force of law cannot render [a state law] unconstitutional."[74]

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67. *Camps Newfound/Owatonna*, 520 U.S. at 617 (Thomas, J., dissenting); *see* INS v. Chadha, 462 U.S. 919, 920 (1983) (noting that Framers intended bicameralism and presentment requirements to serve essential constitutional functions in regulating powers of federal government).

68. *See* U.S. CONST. art I, § 7, cl. 3.

69. For a critique of federal common law along these lines, see Merrill, *supra* note 66, at 19-24. For a similar critique of dormant foreign affairs doctrine, see Goldsmith, *Federal Courts*, *supra* note 8, at 1693-95.

70. 453 U.S. 654 (1981).

71. *See Dames & Moore*, 453 U.S. at 687 (noting that "Congress has not disapproved of the action taken" by President); *id.* at 688 (noting that "Congress acquiesced in the President's action").

72. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (referring to "ambiguous" "silence" on question of preemption).

73. *See id.* at 385-86.

74. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 330 (1994).

The Court in *Crosby* also departed from *Barclays Bank* by taking account of foreign government protests.[75] In explaining this apparent shift, the *Crosby* Court distinguished *Barclays Bank* as a case in which "Congress had taken specific actions rejecting the positions both of foreign governments and the Executive," whereas, "[h]ere, however, Congress has done nothing to render such evidence beside the point."[76] Congress' "specific action" that was relevant in the *Barclays Bank* case was evidence that "Congress had focused its attention on this issue, but has refrained from exercising its authority to prohibit" the challenged state laws.[77] The Court thus appears to have equated congressional silence with approval, at least when Congress has focused on the issue.[78]

These cases may just show that the Court remains willing to rely on congressional silence in the foreign affairs area, but that is an explanation that can hardly please critics of foreign affairs exceptionalism. In any event, *Chadha* has not prevented the Court from taking account of congressional inaction even in the purely domestic sphere. For example, in construing statutes, the Court often treats Congress' failure to modify an otherwise questionable judicial interpretation as legitimizing that interpretation.[79] It is true that a minority of Justices (the same Justices who are critical of the dormant Commerce Clause doctrine) object to this practice.[80] But even these Justices accept the doctrine of stare decisis,[81] and they acknowledge that this doctrine operates most strongly in cases of statutory interpretation.[82] The well-established distinction between constitutional and non-constitutional decisions for purposes of stare decisis has been justified on the ground that judicial errors in interpreting statutes

75. *See Crosby*, 530 U.S. at 385-86.

76. *Id.* at 385.

77. *See Barclays Bank*, 512 U.S. at 329. Justice Scalia criticized this reliance as inconsistent with the Court's later acknowledgment that silence can be ambiguous. *See Crosby*, 530 U.S. at 377-78 & n.13.

78. Somewhat inconsistently, the Court in *Crosby* rebuffed the state's argument that Congress' failure to include an express preemption provision in the Federal Burma Law, despite its awareness of the Massachusetts law, should be construed as acquiescence. The Court described this congressional silence as ambiguous. *See Crosby*, 530 U.S. at 388. The significance of the Court's willingness to find the state law preempted in the face of such congressional ambiguity is discussed further below.

79. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 628-29 & n.7 (1987).

80. *See id.* at 671-72 (Scalia, J., dissenting) (arguing that inference of congressional intent should not be drawn from failure to enact legislation).

81. *See* United States v. Lopez, 514 U.S. 549, 601 & n.8 (1995) (Thomas, J., concurring) (suggesting acceptance of stare decisis); ANTONIN SCALIA, A MATTER OF INTERPRETATION 138-39 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

82. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) ("That policy [stare decisis] is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."); *see also* Dickerson v. United States, 530 U.S. 428, 442 (2000); State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997); Payne v. Tennessee, 501 U.S. 808, 828 (1991).

can be corrected by Congress, whereas judicial errors on constitutional questions are more difficult to correct.[83] To this extent, therefore, all of the Justices are willing to treat Congress' failure to correct an otherwise questionable decision on a nonconstitutional issue as legitimating that decision.[84]

Indeed, the Justices who object to the Court's reliance on congressional silence do not urge a wholesale rejection of dormant Commerce Clause doctrine; they argue merely that the doctrine should not be expanded. Because of the doctrine's pedigree, they would continue to adhere to some version of the doctrine as a matter of stare decisis.[85] For the same reason, the argument that dormant foreign affairs doctrine is unsupported by constitutional text or original intent[86] does not necessarily warrant the doctrine's repudiation. Because of the doctrine's subconstitutional status, the doctrine is entitled to the same strong presumption of continuity as the Court's decisions construing statutes.[87] Even if wrong as an original matter, therefore, the doctrine should be repudiated only for very strong reasons of the sort needed to repudiate erroneous statutory interpretation. As discussed in Part IV below, the reasons offered by the critics of dormant foreign affairs doctrine fall short. In the next section, I argue that *Crosby* itself comes very close to reaffirming the doctrine. Indeed, I exaggerate only slightly when I say that *Crosby* is a dormant foreign affairs case in disguise.

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83. *See, e.g., Agostini*, 521 U.S. at 235.

84. The doctrine of stare decisis has bite, of course, only when it causes a judge to adhere to a decision that he regards as otherwise questionable.

85. *See* Camps Newfound/Owatonna Inc. v. Town of Harrison, 520 U.S. 564, 609-10 (1997) (Thomas, J., dissenting); GMC v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring). I agree that a doctrine that owes its life to the principle of stare decisis does not deserve to be expanded. *See* Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 88 (1998).

86. *See* Ramsey *supra* note 8, at 347-48 (arguing that dormant foreign affairs doctrine is unsupported by text or original intent). *But cf.* Swaine, *supra* note 8, at 1150 (arguing that Framers intended a "dormant treaty power").

87. It might be objected here that I (and Justice Stevens) have made the mistake of inferring a congressional power to reject these dormant doctrines wholesale from authorities that at most support the proposition that Congress may resurrect particular state laws. Because we are both defending these doctrines against critics who do not even believe the doctrines exist, however, perhaps the more relevant point is that, if the doctrines did not in fact exist, Congress surely would have the power to create them by statute. *See supra* text accompanying notes 65-66. Our point is that the courts are entitled to act as if Congress had created the doctrines because its failure even to attempt to repudiate them despite a plausible claim that it possesses the power to do so warrants an inference that Congress acquiesces in them. This is a reasonable inference given that the doctrines relieve Congress of the significant burden of monitoring state laws without depriving them of the ultimate power to approve such laws. In any event, *Zschernig* is, at a minimum, entitled to the benefit of the version of stare decisis the Court applies in constitutional cases.

B. Crosby *as Federal Common Law*

As noted above, those who criticize the dormant foreign affairs doctrine and other forms of federal common law regard it as less legitimate than ordinary preemption because, in the case of preemption, the policy determinations are traceable to Congress, whereas in the other cases, Congress has not spoken.[88] It is no answer, in their view, that Congress is free to overrule the Court in all three cases. The Constitution's provisions setting forth the procedures for enacting legislation impose numerous obstacles to the displacement of state law, chief among them the bicameralism and presentment requirements.[89] These requirements protect state prerogatives because the states are represented in the legislative process.[90] At the same time, they assure that the federal lawmaking branches will be accountable for any federal decision to displace state law.[91] When the courts decide to displace state law on the basis of federal common law, the safeguards of the bicameralism and presentment requirements are circumvented and no political actors can easily be held accountable for the displacement.

If that is the reason to prefer ordinary preemption to the dormant foreign affairs doctrine, then *Crosby* should not please the critics of the latter doctrine. The foregoing critique of federal common law supplies a reason to prefer express or conflict preemption. When Congress expressly states, for example, that state laws imposing sanctions on Burma are preempted, then its members can be held accountable for displacing state law imposing sanctions on Burma. Similarly, when Congress enacts a law providing that persons shall have the right to do business in Burma, its members can be held accountable for that policy and the resulting displacement of conflicting state law. But Congress did neither when it passed the Federal Burma Law. The Court found the Massachusetts Burma Law to be preempted on the basis of the branch of preemption doctrine known as "obstacle" preemption, under which state laws are sometimes impliedly preempted.[92] This brand of preemption suffers from the same flaws that the critics of federal common law ascribe to the latter doctrine.[93]

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88. *See* Goldsmith, *Federal Courts*, *supra* note 8, at 1687; Ramsey, *supra* note 8, at 376 n.13; Goldsmith, *Statutory Foreign Affairs*, *supra* note 16, at 215; *see also Camps Newfound/Owatonna*, 520 U.S. at 617 (citing INS v. Chadha, 462 U.S. 919, 951-59 (1983)) (arguing that legislative silence ignores constitutional requirements of bicameralism and presentment).

89. *See* U.S. CONST. art. I, § 7, cl. 2 (setting forth legislative procedures).

90. *See* Merrill, *supra* note 66, at 16 (noting that "states are represented in Congress and are thus able to block expansion initiatives").

91. *See id.* at 24-27 (stressing electoral accountability).

92. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 380-85 (2000).

93. For critiques of obstacle preemption along these lines, see Nelson, *supra* note 55, at 278-90. For a defense of the presumption against preemption along the same lines, see Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1427-30 (2001). *See also* 1 TRIBE, *supra* note 52, at 1175-76.

Massachusetts argued in *Crosby* that Congress had intended to leave the Massachusetts law in force because it was aware of its existence yet did not declare it preempted.[94] The Court in *Crosby* recognized that Congress had been silent on the preemption issue, but declined to interpret that silence as acquiescence because, in its view, the silence was "ambiguous."[95] Thus, in the Court's own description, the Massachusetts law was held preempted with only ambiguous silence on the part of Congress on the precise question.

Because Congress was silent on the preemption question, no member of Congress was held accountable for the preemption of the Massachusetts Burma Law when the law was passed. Indeed, before *Crosby* was decided, most commentators, including those who believed that the Massachusetts law was invalid, had concluded that the Massachusetts law was not invalid because of congressional preemption.[96] It is true that the Court's decision in *Crosby* makes it clear now that the Court thinks that Congress is to be blamed (or credited) for preempting the Massachusetts law. But the fact that nothing in the federal law indicates that the state law is preempted means that members of Congress can escape accountability simply by arguing (quite plausibly) that the Court misinterpreted the statute.[97] At most, Congress can be blamed for failing to reinstate the Massachusetts law after the *Crosby* decision, but the same would be true had the decision rested on dormant foreign affairs grounds instead of preemption.

The Court speculated that Congress may well have considered it unnecessary to address the preemption issue because it was confident that the courts would find the state law preempted under "settled" principles

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94. *See Crosby*, 530 U.S. at 386-87.

95. *See id.* at 387-88.

96. *See* Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307, 322 n.81 (1999); Spiro, *supra* note 8, at 1254 (noting that Congress had "no institutional position" on the issue); Swaine, *supra* note 8, at 1156-59; *see also* Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 293 (D. Mass. 1998); *cf.* Laurence H. Tribe, Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 Upon State and Local Measures, Cong. Rec. S. 12,535 (Sept. 15, 1986). *But see* Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443, 471-78 (1998) (pre-*Crosby* article arguing invalidity of Massachusetts Burma Law because of preemption); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175 (1997) (same).

97. Such an argument has been made by the Chief Counsel of the House International Affairs Committee at the time the Federal Burma Law was enacted, who has stated that, "[t]he idea that the sponsors of the federal legislation to sanction Burma intended to preempt states from adopting parallel and complementary legislation is just preposterous." Audio tape: Panel on International Law and the Work of Federal and State Governments, held by American Society of International Law (April 4-7, 2001) (International Video Corporation, Sterling, VA) (statement of Stephen Rademaker, Chief Counsel, House Committee on International Relations).

of implied preemption.[98] Whether preemption principles were "settled" in a way that rendered the state law invalid without an express preemption provision is debatable, to put it mildly.[99] More importantly for present purposes, if Congress did reason as the Court speculates, then it appears to have been trying to *escape* accountability for its actions. The reasons given by the Court for concluding that the Massachusetts law posed an obstacle to the achievement of Congress' full purposes may well have led many members of Congress to prefer that the Massachusetts law not stand. If so, and if Congress did form an intent to preempt state laws such as Massachusetts', as the Court suggested in *Crosby*, then the likely reason Congress relied on "implied" preemption doctrine rather than express preemption was the perceived political unpopularity of preempting such human rights sanctions. The political theory that underlies the accountability critique of the dormant foreign affairs doctrine would condemn a preemption holding in such circumstances. The desire of Congress to escape accountability reflects a lack of popular support for preempting the Massachusetts law, and, in a democracy, a measure that lacks the popular support necessary to get enacted is not law. If members of Congress wanted the courts to hold the statute invalid on the basis of well established "implied" preemption law but were unwilling to vote for an express preemption provision, then they were seeking to escape the accountability that the critics of federal common law regard as central to democratic legitimacy.

In sum, those who regard accountability as the touchstone of preemption doctrine and value the political safeguards of federalism should object as much to the variety of implied preemption involved in *Crosby* as to federal common law or dormant foreign affairs doctrine. In both cases, state law is being displaced in the face of congressional silence, and it is difficult to hold anyone accountable for silence. Finding preemption on the basis of ambiguous silence circumvents the political safeguards of federalism. As Professor Tribe writes in his treatise, "to give state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect state interests."[100]

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98. *See Crosby*, 530 U.S. at 387-88.

99. Most commentators regarded the preemption doctrine to be in disarray. *See* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 588 (1997); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 700-01 (1991); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 2-3 (1995). Those who did think preemption law was clear believed that the Court had established a strong presumption *against* preemption. *See, e.g.*, Ronald Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMM. 311, 312 (1988); Denning & McCall, supra note 96, at 322; Ernest Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs*, 69 GEO. WASH. L. REV. 139, 173 (2001).

100. 1 TRIBE, *supra* note 52, at 1176 (citing Garcia v. San Antonio Metro. Transit Auth., 467 U.S. 528 (1985)). Tribe made the same point in the second edition of his treatise, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 480 (2d

If Congress did indeed think that such state laws posed an intolerable obstacle to the achievement of its full purposes, the more likely explanation for its decision to remain silent was its confidence that the statute would be found invalid because of the well-established law *concerning the dormant foreign affairs doctrine.* If so, then the Federal Burma Law implicitly approves of dormant foreign affairs doctrine. Of course, critics of the doctrine who stress accountability would not be satisfied with such silent approval. For the reasons just discussed, however, they should be just as unsatisfied with the Court's decision that the Massachusetts Burma Law was preempted in the face of ambiguous silence from Congress. In any event, the possibility that Congress may have relied on *Zschernig* in assuming that state laws such as Massachusetts' were invalid is a strong reason to retain some version of the *Zschernig* doctrine on stare decisis grounds.[101]

The final alternative, of course, is that Congress did not mean to preempt the Massachusetts law, or others similar to it.[102] In other words, Congress may have expected the President to do his best to bring about democracy in Burma within the constraints imposed by state laws that he might prefer did not exist. The Court cited no convincing reason to attribute to Congress intent to remove inconvenient state laws.[103] The reality, of course, is that Congress, as an institution, cannot be expected to have had a unitary intent on this question. Some members of Congress may have had no intent at all on the issue. Some might have preferred to retain the state laws, while others might have preferred to remove the obstacles. It is likely that the Federal Burma Law reflects a compromise between those who wanted to do more to promote democracy in Burma and those who wanted to do less, or between those who wanted to give the

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ed. 1988), where he added a footnote explaining why the federal law imposing sanctions on South Africa should not be understood to preempt state and local sanctions. *See id.* at 480 n.12. Massachusetts argued in *Crosby* that a congressional intent to preempt state Burma sanctions should not be read into the federal Burma law because most commentators and courts had regarded the federal sanctions against South Africa not to preempt state sanctions against that country. The Court rejected that argument on the ground that *it* had never addressed the preemptive effect of the federal law imposing sanctions on South Africa. *Crosby,* 530 U.S. at 388. This invocation of its own supremacy in interpreting federal statutes missed the point, however. Even an interpretation of the statute by less exalted interpreters, such as Professor Tribe, *see supra* note 96, might be probative of whether *Congress regarded* the Federal Burma Law as preemptive of state sanctions.

101. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 34-35 (1989) (Scalia, J., concurring in part and dissenting in part) (urging adherence to *Hans v. Louisiana* because of "the difficulty of changing, or even clearly identifying, the intervening law that has been based" on *Hans,* and observing that "it is impossible to say how many extant statutes would have included an explicit preclusion of suits against states if it had not been thought that such suits were automatically barred" by *Hans*), *overruled by* Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996).

102. *See supra* note 97 (discussing statement of Stephen Rademaker).

103. *See Crosby,* 530 U.S. at 388 (noting congressional silence about state sanctions).

President more flexibility in achieving democracy in Burma and those who wanted to give him less.

The Court's increasing reluctance to interpret statutes so as to advance Congress' perceived purposes reflects its recognition that Congress usually lacks a unitary purpose, and that statutes generally reflect either a decision to go so far and no further in achieving a given end, or a lack of political will to go further. This recognition seems to underlie the Court's increasingly stringent approach to implying private rights of action under federal statutes. In *J.I. Case Co. v. Borak*,[104] the Court adopted an approach to this question reminiscent of its approach to preemption in *Crosby*: a private right of action would be implied if it would promote compliance with the statute and in that way advance Congress' purpose in enacting the statute.[105] Justice Powell's dissent in *Cannon v. University of Chicago*[106] argued that Congress' failure to include a private right of action simply may have reflected the desire that the statutory purpose be achieved by certain means and not others, or to some extent and no further.[107] This view prevails today to the point that "many cases view the question of implied remedies . . . as one exclusively of legislative intent demonstrated in text or legislative history [an approach] that ordinarily leads to a finding of no implication."[108] As Judge Posner has observed, the movement towards a rule against implied causes of action "parallels the shift in scholarly thinking about legislation from a rather naïve faith in the public-interest character of most legislation to a more realistic understanding of the importance of interest groups in the legislative process . . . . [I]f the statute is just the result of a clash of interest groups, adding remedies to those expressly provided in the statute may upset the compromise."[109]

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104. 377 U.S. 426 (1964).

105. *See J.I. Case*, 377 U.S. at 433 (noting that it is court's duty to effectuate congressional purpose).

106. 441 U.S. 677 (1979).

107. *See Cannon*, 441 U.S. at 740 (Powell, J., dissenting); *see also* Thompson v. Thompson, 484 U.S. 174, 191 (1988) (Scalia, J., concurring); Guardians Ass'n v. Civil Serv. Comm. of N.Y., 463 U.S. 582, 610 n.2 (1983) (Powell, J., concurring); FALLON ET AL., *supra* note 51, at 842 (discussing implication of private rights of action); Frank H. Easterbrook, *The Supreme Court, 1993 Term: Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 45-51 (1984) (discussing interest groups and private rights of action).

108. *See* FALLON ET AL., *supra* note 51, at 840. *But cf. Thompson*, 484 U.S. at 179 ("Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action.").

109. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 271-72 (1985), *cited in* Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 901, n.237 (1996) (recognizing view of legislation as logrolling).

In the preemption area, the same insight has led the Court to move in a similar direction,[110] and to apply in many cases a presumption against preemption.[111] Although the Court in *Crosby* purported to be reserving the question whether the presumption is applicable in a case such as this, its approach to preemption simply cannot be reconciled with any such presumption. It is apparent that the Court viewed this as a case warranting a less rigorous application of preemption doctrine than is evident in its other preemption decisions.[112] Below, I argue that the Court's approach to preemption in *Crosby* was so conducive to the displacement of state law that it would have yielded the conclusion that the Massachusetts law was preempted even if there had been no Federal Burma Law. The Court's holding would have been narrower if the Court had decided the case on the basis of the dormant foreign affairs power. Indeed, the decision is best understood as a sort of dormant foreign affairs decision. In the absence of direct evidence that Congress intended to preempt the Massachusetts law, the real work in this case was performed by the factors that led the Court to apply the presumption against preemption less rigorously. One need not look far below the surface of the opinion to see that the Court's unusually receptive approach to preemption is attributable to the foreign affairs aspects of the case.

III. *CROSBY*'S EXCEPTIONALISM

Critics of dormant foreign affairs doctrine frequently criticize this doctrine's sharp differentiation between domestic and foreign affairs.[113] Such foreign affairs exceptionalism is both untenable and indefensible. With globalization, they argue, the distinction between foreign affairs and domestic affairs becomes increasingly difficult to maintain.[114] In any event, the Constitution does not require that foreign affairs be treated differently than domestic affairs.[115] The same general approaches should apply to both. Because dormant foreign affairs doctrine rests ultimately on such a distinction, it should be rejected. I consider the merits of this

110. *See* KENNETH STARR ET AL., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE OF THE AMERICAN BAR ASSOCIATION 34-39 (1991); Nelson, *supra* note 62, at 265-90 (criticizing obstacle preemption on these grounds). *But cf. infra* note 229(discussing *Geier*).

111. *See* Rotunda, *supra* note 99, at 311-12 (examining presumption against preemption); *see also* Clark, *supra* note 93, at 1427-30.

112. *See* Young, *supra* note 99, at 173; *cf.* United States v. Locke, 529 U.S. 89, 108 (2000) ("As *Rice* indicates, an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

113. *See, e.g.*, Goldsmith, *Federal Courts*, *supra* note 8, at 1670-71; Young, *supra* note 99, at 175-76 (2001).

114. *See, e.g.*, Goldsmith, *Federal Courts*, *supra* note 8, at 1670; Goldsmith, *Statutory Foreign Affairs*, *supra* note 16, 203; Spiro, *supra* note 8, at 1223; Young, *supra* note 99, at 175.

115. *See, e.g.*, Ramsey, *supra* note 8, at 343.

argument for rejecting *Zschernig* in Part IV. In this Part, I consider whether *Crosby* lends support to the critics of foreign affairs exceptionalism.

On the surface, the *Crosby* decision appears to move in the direction urged by such critics. The Court pointedly declined to address the dormant foreign affairs and dormant Foreign Commerce Clause arguments on which the lower courts had primarily rested.[116] Instead, it purported to decide the case on the basis of "settled" preemption doctrine.[117] Indeed, it denied that it was treating this case differently even to the extent of denying the state the benefit of a presumption against preemption.[118] By avoiding the doctrines that treat foreign affairs differently from domestic affairs, and relying instead on "settled" preemption rules that apply equally in purely domestic cases, the Court seemed to be signaling its aversion to foreign affairs exceptionalism.

A closer look reveals a different picture. First, the Court's interpretation of the Federal Burma Law as precluding Massachusetts from following a procurement policy that similarly-situated private actors are perfectly free to adopt cuts distinctly against the grain of the Court's recent decisions on constitutional federalism. These latter decisions, indeed, suggest that the Federal Burma Law, as construed by the Court, may be unconstitutional. Perhaps the Court does not regard these federalism principles to be applicable in the foreign affairs area. Or perhaps the foreign affairs aspects of the case blinded the Court to this tension with its federalism cases. Either way, the Court is, at least subconsciously, continuing to treat foreign affairs cases differently from those it perceives as primarily domestic.

Second, even leaving aside the apparent conflict with the Court's constitutional federalism decisions, and notwithstanding the Court's denial of distinct treatment, *Crosby* reflects a brand of preemption analysis that is far from ordinary. The Court applies the "obstacle" preemption standard as loosely as it did in *Crosby* only when the states have legislated in an area of uniquely federal interest. *Crosby* is such a case because it involves foreign affairs.

A. Crosby *and Constitutional Federalism*

One surprising aspect of the Court's decision was its cavalier dismissal of Massachusetts' argument that its law was valid because it concerned how the state would spend its own money. In its response to the plaintiffs' dormant Foreign Commerce Clause claim, Massachusetts pitched this ar-

116. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000).

117. *See id.* at 388.

118. *See id.* at 374 n.8 (reserving question of applicability of presumption against preemption).

gument under the rubric of the "market-participant" exception.[119] The parties debated whether Massachusetts' conduct fell within that exception, and whether the exception applied at all to dormant foreign commerce and dormant foreign affairs claims.[120] While the applicability of the market-participant exception to the dormant Foreign Commerce Clause was perhaps debatable,[121] the fact that Massachusetts was merely deciding how to spend its own money seemed relevant as well to the preemption claim, albeit in a distinct way.

The Court dismissed the market participation argument in a brief footnote, citing *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*[122] for the proposition that the mere fact that the Massachusetts Burma Law was an exercise of the state's spending power does not exempt the statute from preemption analysis.[123] Even if it did not *exempt* the Massachusetts law from preemption analysis, however, the fact that Massachusetts was establishing a policy for the expenditure of state funds in purchasing goods and services was surely *relevant* to the preemption analysis. The Court neglected to consider this possibility.

Under preemption analysis, the ultimate question is whether, in light of the purposes Congress was seeking to advance, it can be inferred that Congress would not have wanted the state statute to stand.[124] The Court in *Crosby* concluded that the Massachusetts Burma Law posed an obstacle to the full achievement of Congress' purposes.[125] But this conclusion is in tension, to say the least, with the fact that the federal statute does not purport to prohibit private companies or individuals from doing precisely what the State of Massachusetts sought to do. Mobil Oil Company and Bill Gates are perfectly free, as far as the Federal Burma Law is concerned, to establish a policy identical to the one established by Massachusetts to determine from whom it would procure its goods and services. They may even do so expressly for the purpose of promoting democracy in

119. *See* Brief for Petitioners at 25-36, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (No. 99-474) (arguing Burma law is not regulation).

120. *Compare id.* at 25-29 (applying market participation to both dormant Foreign Commerce Clause and foreign affairs claims), *with* Brief for Respondents at 36-42, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (No. 99-474) (arguing that Commonwealth is "market regulator").

121. *See* Denning & McCall, *supra* note 96, at 311 (discussing applicability of market participant exception to Massachusetts Burma Law).

122. 475 U.S. 282 (1986).

123. *See Crosby*, 530 U.S. at 374 n.7.

124. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 494 (1996) (recognizing that congressional purpose is touchstone in preemption cases); Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992) (same); Gade v. Nat'l Solid Waste Mgt. Ass'n, 505 U.S. 88, 96 (1992) (same); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137-38 (1990) (same); *Gould*, 475 U.S. at 290 (same); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) (same); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (same). *See generally* Nelson, *supra* note 55, at 276-77 & n.167.

125. *See Crosby*, 530 U.S. at 366 (stating that Burma law frustrates federal statutory objectives).

Burma.[126] The Massachusetts Burma Law interferes with the achievement of the full purposes of the Federal Burma Law in no qualitatively different way than does the identical policy by Mobil Oil or Bill Gates. If Congress opted to allow the latter to establish such policies, then it seems difficult to conclude that the states' identical policy poses an intolerable obstacle to the accomplishment of Congress' purposes.

Indeed, the Courts' recent constitutional federalism decisions suggest that the Federal Burma Law, as the Court construed it, may be unconstitutional. In *New York v. United States*,[127] the Court held that Congress lacks the power to impose on states the obligation to enact or administer a federal regulatory scheme.[128] This is the so-called anti-commandeering rule. The Court distinguished *Garcia v. San Antonio Metropolitan Transit Authority*[129] on the ground that the latter case involved a federal statute that imposed on states the same obligations it imposed on similarly-situated private parties.[130] The Court thus seemed to establish a safe harbor for federal statutes that impose on states the same obligations as on private individuals, exempting such statutes from the anti-commandeering rule. In *United States v. Printz*,[131] the Court suggested that even federal statutes that subject states and private individuals to the same regulations might be invalid under some circumstances.[132] Some lower courts read these decisions as calling into question any federal statute that imposes regulations only on states, or otherwise subjects states to different regulations than private individuals.[133] In *Reno v. Condon*,[134] the Court expressly left open the question whether a federal law that regulates only states is invalid for that reason.[135] This is the so-called requirement of general applicability.

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126. Although the directors of a private company who act for purely altruistic reasons, ignoring the economic interests of their shareholders, might be violating their fiduciary duty, it is widely recognized that altruism may be good for business in the long term and thus consistent with the business judgment rule. *See* Viet D. Dinh, *Codetermination and Corporate Governance in a Multinational Business Enterprise*, 24 J. CORP. L. 975, 984 n.70 (1999). To the extent the business judgment rule would pose an obstacle to such altruism, however, it would do so as a matter of state law, fully alterable by the state itself.

127. 505 U.S. 144 (1992).

128. *See New York*, 505 U.S. at 160-61.

129. 469 U.S. 528 (1985).

130. *See New York*, 505 U.S. at 160.

131. 521 U.S. 898 (1997).

132. *See Printz*, 521 U.S. at 932 n.17.

133. *See* Condon v. Reno, 155 F.3d 453, 461 (4th Cir. 1998) (stating that Congress may only subject states to legislation also applicable to private parties), *rev'd*, 528 U.S. 141 (2000). *But see* Travis v. Reno, 163 F.3d 1000, 1006 (7th Cir. 1998) (noting that Fourth Circuit, not Supreme Court, created requirement of general applicability).

134. 528 U.S. 141 (2000).

135. *See Condon*, 528 U.S. at 151. If the Court ultimately rejects the requirement of general applicability, then presumably a federal law that subjects states to distinct treatment would be invalid in the same circumstances as a law that is gen-

The Court may well decide that there is no requirement of general applicability when Congress regulates conduct that only states engage in, at least if Congress imposes on the states regulations of a negative character. But a decision rendered the Term before *Crosby* was handed down suggests that, where Congress regulates conduct in which both states and private parties engage, Congress may not subject states to more onerous regulations than private parties. In *College Savings Bank v. Florida Prepaid Postsecondary Education Board*,[136] the Court rejected the "consent" theory for finding waiver of Eleventh Amendment immunity that the Court had articulated in *Parden v. Terminal Railway of the Alabama State Docks Department*.[137] The Court had held in *Parden* that, where states engage in activities that can be regulated by Congress, Congress might condition the states' continued participation in such activities on their waiver of Eleventh Amendment immunity.[138] The theory was that, if Congress could have forbidden the states from engaging in the activity altogether, it can take the lesser step of permitting the states to engage in such activity only if they waive their immunity.[139]

The Court in *College Savings Bank* overruled *Parden*.[140] Exactly which aspects of the reasoning of the *Parden* case the Court rejected is not entirely clear. One possibility is that it rejected the idea that the greater power to prohibit state conduct entirely includes the lesser power of conditioning the state's ability to engage in such conduct on its waiver of immunity. That this is what the Court held is suggested by its emphasis on the need for a state's waiver of immunity to be voluntary, and its suggestion that Congress coerces the waiver when it makes such waiver a condition of the state's ability to engage in "otherwise lawful activity."[141] In this view, an "otherwise lawful activity" is an activity that states may lawfully engage in but for a statute purporting to prohibit them from engaging in the activity unless they waive their immunity. *College Savings Bank* might thus be read to hold that, even if Congress may prohibit the state from engaging in certain activity altogether, it may not condition a state's ability to engage in such conduct on its waiver of immunity.

This interpretation is highly problematic, however, as it potentially places states in a disadvantageous position. Faced with a choice between permitting states to engage in such activity with their sovereign immunity intact and prohibiting the states from engaging in the activity altogether,

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erally applicable. What exactly the test is after *Reno* is a matter of considerable uncertainty.

136. 527 U.S. 666 (1999).

137. 377 U.S. 184 (1964), *overruled by* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Bd., 527 U.S. 666 (1999).

138. *See* Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184, 196-97 (1964), *overruled by* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Bd., 527 U.S. 666 (1999).

139. *See id.* at 192.

140. *See Coll. Savings Bank*, 527 U.S. at 660 (expressly overruling *Parden*).

141. *Id.* at 687.

Congress may well opt for the latter. If it does, then the proffered interpretation of *College Savings Bank* would make states worse off: the states may prefer to purchase permission to engage in the activity with their sovereign immunity, but *College Savings Bank*, so interpreted, would deny them this option.

Professors Berman, Reese and Young have offered an alternative interpretation of *College Savings Bank* that would avoid this problem. They would read *College Savings Bank* as distinguishing between a condition imposed purely as a penalty for a state's failure to waive immunity and a condition that Congress sincerely regarded as a reasonable second-best solution to the problem it faced, given that the preferred solution (abrogation of immunity) was unavailable.[142] The former sort of condition would be invalid while the latter would be valid. They apply their theory to test the validity of a bill that has been introduced by Senator Leahy to address the Court's invalidation of Congress' abrogation of state sovereign immunity in the patent laws. The Leahy Bill provides, *inter alia*, that states are ineligible to obtain patents for their inventions unless they waive their immunity from patent suits.[143] Under the theory of Professors Berman, Reese and Young, this provision would be invalid if state ineligibility for patents were imposed purely as a penalty for failure to waive immunity—that is, if Congress would not really want states that refuse to waive their immunity to be ineligible for patents.[144] They acknowledge the difficulty of ascertaining congressional intent on such a counterfactual, but they argue that one can infer what Congress would have wanted from an analysis of whether Congress "would . . . actually have a reason for denying federal intellectual property protection from recalcitrant states other than to induce other states to play along."[145] In the view of Professors Berman, Reese and Young, the Leahy Bill may be valid under their test because denying states patent rights enjoyed by private parties may be a reasonable mechanism for leveling the playing field between states and private parties who engage in similar conduct.

It is impossible to do justice here to the subtle and elaborately defended argument of Professors Berman, Reese and Young. I merely raise some concerns. First, their suggestion that leveling the playing field between states and private parties would be a valid federal policy runs squarely against the Court's reasoning in *College Savings Bank*, where the Court said that "'[e]venhandedness' between individuals and States is not to be expected: 'The constitutional role of the States sets them apart from

142. *See* Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How Not To)*, 79 TEX. L. REV. 1037, 1157-58 (2001).

143. S. 1835, 106th Cong. (1999).

144. *See* Berman, Reese & Young, *supra* note 142, at 1157.

145. *Id.* at 1158. That they view this as a basis for inferring congressional intent is indicated at *id.* at 1159.

other employers and defendants.'"[146] Second, the distinction between a condition imposed as a penalty and a condition that Congress sincerely regards as a second-best solution to the problem at hand finds little support in the *College Savings Bank* opinion. Professors Berman, Reese and Young emphasize that the Court in that case distinguished voluntary from coerced waivers,[147] but this distinction does not correspond to the distinction between a penalty and a second-best solution. In the federalism context, the Court typically distinguishes between coercion and mere pressure or encouragement,[148] a test that seems to depend on the extent to which the state's will is likely to be overborne. The characteristics that distinguish a penalty from a second-best solution do not appear to correspond to those that distinguish coercion from mere encouragement. Congress may well have a valid reason for insisting on a condition under the Berman/Reese/Young theory, yet the condition might still be impossible as a practical matter for the states to refuse.[149] Professors Berman, Reese and Young correctly note that there is little in the concept of coercion to justify the Court's conclusion that "exclusion of the State from otherwise lawful activity" automatically passes the point where pressure turns into compulsion.[150] But their alternative seems similarly unrelated to the concept of voluntariness.

The Court's analysis in *College Savings Bank* seems more compatible with an alternative test. On this alternative view, the Court did not reject the idea that the greater power to prohibit states from engaging in a given activity includes the lesser power to condition the state's ability to engage in the activity on its waiver of sovereign immunity. Rather, the Court found the principle inapplicable because Congress lacked the power to prohibit states from engaging in the activity at issue in the case. "Greater-power-includes-the-lesser" arguments have played a central role in other federalism decisions, which the Court did not purport to disturb in *College Savings Bank.*[151] Moreover, the Court in College Savings Bank explicitly distinguished congressional attempts to purchase waiver pursuant to the Spending Clause, as well as the conditioning of approval of an inter-state

146. *See Coll. Savings Bank*, 527 U.S. at 685-86 (quoting Welch v. Tex. Dept. of Highway & Pub. Transp., 483 U.S. 468 (1987)).

147. *See* Berman, Reese & Young, *supra* note 142, at 1169.

148. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992); South Dakota v. Dole, 483 U.S. 203 (1987).

149. *Cf.*, Carlos Manuel Vázquez, Breard, Printz *and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1337 (1998) (discussing validity as conditional preemption of statute prohibiting states from arresting aliens unless they agree to give them notification required by Vienna Convention on Consular Relations; such prohibition seems necessary and proper means of complying with international obligations imposed by Convention, yet the condition is one that states would have difficulty refusing).

150. *See* Berman, Reese & Young, *supra* note 142, at 1169.

151. *See, e.g., New York*, 505 U.S. at 174.

compact on waiver of immunity.[152] In both cases, the Court said, the pressure on the states to waive immunity was exerted through the withholding of a "gratuity."[153] These aspects of the Court's analysis suggests that the Court was rejecting *Parden*'s first premise, not its second—that the Court was saying, in other words, that Congress lacked the power to prohibit the states from engaging in the activity it was (conditionally) prohibiting them from engaging in.

One version of this argument is that Congress lacks the power to impose any obligations on the states; if the Constitution itself does not prohibit states from engaging in a given activity, then states are constitutionally entitled to engage in it.[154] This version is implausibly broad, however. Even under the regime of *National League of Cities v. Usery*,[155] since rejected as too restrictive of federal power,[156] Congress had the power to impose obligations on the states in certain areas. A more limited version is more plausible: States are constitutionally entitled to engage in any activity in which private parties are free to engage. Congress lacks the power to prohibit the states from engaging in such activity unless it also prohibits private parties from engaging in the activity, and for this reasons it lacks the power to condition the states' ability to engage in such activity on their waiver of immunity. On this view, "otherwise lawful activity" is activity that may lawfully be engaged in by private parties. That this is what the Court held is suggested by the Court's statement that "even-handedness between individuals and States is not to be expected."[157] The upshot of this interpretation of *College Savings Bank*, after all, is that states are constitutionally entitled to engage in any conduct that private persons are entitled to engage in, but, unlike private parties, they are constitutionally entitled to sovereign immunity. The Court's recognition that states enjoy this constitutionally-protected advantage strongly suggests that Congress may not impose *greater* burdens on the states than on private individuals performing the identical activities.

College Savings Bank thus appears to dovetail with the *New York/Printz/Condon* line of cases to establish, as a constitutional matter, a sort of market-participant exception to preemption doctrine. As discussed above, the Court in *Crosby* construed the Federal Burma Law to prohibit states from adopting a policy on procurement of goods and services that similarly-

152. *See* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Bd., 527 U.S. 666, 686-87 (1999).

153. *Id.*

154. *Cf. Constitutional Law—State Sovereign Immunity—Seventh Circuit Holds that States Waive Sovereign Immunity by Arbitrating Interconnection Agreements Under the Telecommunications Act of 1996*, 144 HARV. L. REV. 1819, 1819 (2001) (interpreting *College Savings Bank* this way).

155. 426 U.S. 833, 835 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 467 U.S. 528 (1985).

156. *Garcia*, 467 U.S. at 528.

157. *Coll. Savings Bank*, 527 U.S. at 685.

situated private parties were perfectly free to adopt. This may well be unconstitutional.

Whether *College Savings Bank* replaced *Parden* with this test or some other is of course highly debatable. The decision raises more questions than it answers. More generally, the line between the invalid commandeering of the states and valid preemption of state law is in need of greater clarification.[158] This is not the place to attempt to resolve these questions. I discuss these cases here only to suggest that it is noteworthy that the Court in *Crosby* did not even allude to them. Even if *College Savings Bank* were not amenable to the reading I outline above, other cases clearly highlighted the potential constitutional problems with a federal law that singles out the states for regulation, and *Condon* expressly left open the constitutionality of such laws. The relevance of this line of cases to the statutory interpretation cases was made clear to the Court in the state's brief, as well as an amicus brief.[159] That the Court did not see the need to refer to these issues even in passing may suggest that it did not believe these principles of constitutional federalism to be applicable in the foreign relations area.[160]

An alternative explanation is that the Court simply overlooked the connection between the issues involved in *Crosby* and its recent commandeering and sovereign immunity decisions. Either alternative is nearly as consistent with foreign affairs exceptionalism as an explicit reliance on dormant foreign affairs doctrine would have been. The view that constitutional federalism principles do not apply in the foreign affairs area is one of the key complaints of the critics of foreign affairs exceptionalism.[161] If

158. For a discussion of the relationship between these two concepts, see Vázquez, *supra* note 149, at 1344-50.

159. *See* Brief of Petitioners at 16-17, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (arguing that "[s]elective purchasing laws are in their essence local measures resembling private boycotts, and the Court should not presume that Congress intended to impose greater limits on state and local governments than on private persons" (citing, inter alia, *New York v. United States*, 505 U.S. 144, 177-78 (1992), for the proposition that "generally applicable federal laws do not present same issues of federalism as laws that single out the States")); *see also* Amicus Brief of the Members of Congress in Support of Petitioners and for Reversal at 19-22, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (2000 WL 27691); Brief of Amicus Curiae Earthrights International Supporting the Appeal of Defendants/Appellants Laskey and Anderson Urging Reversal at 9, Nat'l Foreign Trade Council v. Laskey, No. 98-2304 (1st Cir. Feb. 5, 1999) ("The Tenth Amendment . . . frowns upon laws that seek to regulate States without applying identical restrictions to private parties."). The Court in *Crosby* indicated that the respondents had conceded that Congress had the power to preempt the Massachusetts Burma Law. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 n.7 (2000). But to concede that Congress has the power to preempt the Massachusetts Burma Law is not to concede that it may do so in a law that singles out the states for regulation.

160. *Cf.* Mark Tushnet, *Globalism and Federalism in a Post-*Printz *World*, 36 TULSA L.J. 11, 21 (2000).

161. *See, e.g.*, Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

the Court overlooked the connection between this case and its federalism jurisprudence, it likely did so because it viewed Crosby as a "foreign affairs" case rather than a "federalism" case. Of course, it was both. The Court's apparent neglect of the federalism aspects of the case suggests that, if only subconsciously, the Court continues to treat federalism issues distinctly in cases in which foreign affairs considerations predominate.

B. Crosby's *Exceptional Approach to Preemption*

As discussed above, Congress was silent on the question of preempting state sanctions against Burma.[162] The Court nevertheless found that the Federal Burma Law preempted such state laws under "settled" principles of implied preemption.[163] The Court applied the "obstacle preemption" branch of preemption jurisprudence and concluded that the Massachusetts law was preempted because it posed an obstacle to the achievement of Congress' full purposes and objectives in enacting the Federal Burma Law. Contrary to the Court's suggestion in *Crosby*, however, the Court's approach to preemption in that case was far from ordinary.

"Obstacle" preemption is sometimes regarded as a branch of "conflict" preemption, which is typically distinguished from "express" preemption.[164] In the absence of express preemption, state statutes will be regarded as preempted if they conflict with federal law.[165] One way state and federal law can conflict is if it is physically impossible for persons to comply with both. Some have suggested that this is the only circumstance in which the Court should find a conflict warranting preemption.[166] These commentators regard obstacle preemption as different from conflict preemption (and object to it). Other commentators, however, treat "physical impossibility" as just one of "two ways to determine whether a state law is preempted because 'it actually conflicts with federal law.'"[167] The second way state law might "actually conflict[ ]" with federal law is "where state law stands as an obstacle to the accomplishment of the full

162. For further discussion of congressional silence on the Massachusetts Burma Law, see *supra* notes 88-100 and accompanying text.

163. *See Crosby*, 530 U.S. at 387-88.

164. *See* Nelson, *supra* note 55, at 226-28.

165. *See id.* at 227-28.

166. *See id.* at 230-31 & n.23 (citing commentators taking this position). This formulation is too narrow. Clearly, the Massachusetts law would conflict with a federal law that gave private parties a right to deal with Burma to the extent not prohibited by federal law, even though technically such a federal law would not expressly preempt any state laws, and even though private parties can technically comply with both. Perhaps these commentators would regard this as an example of express preemption because the express creation of a "right" to deal with Burma could have no other purpose than to displace state laws that deny or burden the right. Because there is no reference in this hypothetical federal law to state laws being preempted, however, I would regard this as an example of conflict preemption.

167. *See* Rotunda, *supra* note 99, at 317.

purposes and objectives of Congress."[168] These latter commentators, however, read the Court's pre-*Crosby* decisions as reflecting "the extreme reluctance of the modern Court to find preemption."[169] This extreme reluctance was nowhere in evidence in *Crosby*, where the Court found the state law to be preempted with nary a trace of actual conflict.

The Court's mode of analysis in finding that the Massachusetts Burma Law posed an obstacle to the achievement of Congress' full purposes and objectives was, indeed, so conducive to a finding of preemption that it would have yielded the same result even if there had been no Federal Burma Law. The reasons the Court gave for objecting to the Massachusetts Burma Law would have been equally compelling in light of the delegation of foreign affairs power to the President in the Constitution itself and in other, more general federal statutes. The Court described three ways in which the Massachusetts law posed an obstacle to the achievement of Congress' purposes. I discuss these here in a different order than the Court did.

1. *The Breadth of Massachusetts' Sanctions*

One respect in which the Massachusetts law conflicted with the federal law, according to the Court, was that the former imposed sanctions on a broader range of conduct than the latter.[170] "Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range."[171] "Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force."[172]

It is of course true that the federal law reflects a decision by Congress to impose sanctions on Burma only to a limited extent. Thus, the sanctions not prohibited by the Federal Burma Law are permitted *as far as federal law is concerned.* The Court, however, offered no evidence that Congress intended to prohibit the states from imposing more stringent sanctions as a matter of state law.[173] On this question, Congress was

168. *Id.* at 317; *see also* Nelson, *supra* note 55, at 228 & n.14.

169. *See* Rotunda, *supra* note 99, at 317. *But cf. infra* note 229 (discussing possible departures from presumption in the purely domestic context).

170. *See id.* at 378-79. In the remainder of this Part, I shall follow the Court in characterizing the Massachusetts law as one imposing sanctions on certain entities doing business with Burma. I express no view on whether a state's procurement decisions should be subject to invalidation under the *Zschernig* doctrine. See also infra note 313 (reserving question whether state procurement policies qualify as "sanctions" for *Zschernig* purposes).

171. *Id.* at 377.

172. *Id.* at 380.

173. In addition to noting the differences in scope between the two laws, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 378-80 (2000), the Court cited statements from the legislative history that indicated that Congress acted deliberately in limiting the federal sanctions to a narrower range. *See Crosby*, 530 U.S. at 378 n.13. As Justice Scalia noted in his concurring opinion, it is unsurprising that Congress acted deliberately in limiting the federal sanctions as it did. *See id.* at

"silent."[174] The Court appears to have inferred such intent merely from the fact that Congress decided not to go as far as Massachusetts had gone. But, as the Court said in *Florida Lime & Avocado Growers, Inc. v. Paul*,[175] "this difference poses, rather than disposes of the [preemption] problem."[176] If the federal law had forbidden all of the conduct that triggered the Massachusetts sanctions, there would have been no case to adjudicate. If the mere fact that the federal law prohibited a narrower range of conduct were enough to warrant preemption, then federal law on a given subject would always preempt state law when it did not render it superfluous.[177] Cases too numerous to mention show that a federal law that goes only so far does not ipso facto preempt state laws that go further.[178]

Moreover, if the fact that the sanctions imposed by federal law applied to a narrower range of conduct than those imposed by Massachusetts presented a conflict worthy of preemption, then the Massachusetts law would, a fortiori, have been preempted if there had been *no* federal law imposing sanctions on Burma. If the Massachusetts law conflicted with the federal law imposing sanctions on Burma because it imposed sanctions on a broader range of conduct, then it would have conflicted *even more* with a federal statutory regime imposing *no* sanctions on Burma. A rule under which state sanctions against a given country are preempted whenever the federal government has failed to impose sanctions on that country, however, would be a species of dormant foreign affairs preemption.

It is of course true that the absence of a law imposing sanctions on a country might just reflect Congress' failure to focus its attention on that country. Preemption in such circumstances could not be based on a "calibration of force" theory. Still, the Court's analysis would appear to warrant preemption when Congress has focused its attention on a particular country and opted not to impose sanctions. The alternative would be to say that, if Congress determines that federal sanctions are unwarranted, the state sanctions stand unless Congress affirmatively enacts a law pre-

389. That, however, does not imply that they meant to preclude the states from going further.

174. *See id.* at 388.

175. 373 U.S. 132 (1963).

176. *Fla. Lime & Avocado Growers*, 373 U.S. at 141.

177. *Cf.* STARR, *supra* note 110, at 36 ("If every state law affecting one of the many interests reconciled by a particular federal statute were preempted under a delicate balance theory, there would seem to be little if any room for state regulatory authority.").

178. For example, Congress' enactment of a statute imposing a substantive standard of conduct in a given field, but not providing for a private right of action, is commonly understood to leave available state rights of action for the enforcement of the federal standard. See, for example, *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), which was unanimous on this point. *But cf.* STARR, *supra* note 110, at 27-29 (describing, and criticizing, holding of International Paper Co. v. Ouellette, 479 U.S. 481 (1987), which takes an approach reminiscent of this part of *Crosby*).

empting the state sanctions.[179] Such a rule would be highly anomalous: it would mean that, where Congress decides that some sanctions are warranted, state sanctions can be impliedly preempted, but where Congress decides that *no* sanctions are warranted—a position that departs further from the state policy—state sanctions stand unless *expressly* preempted. Of course, there are *Chadha* problems with finding state sanctions preempted by Congress' decision not to act, but, as discussed in Part II, similar problems have not deterred the Court from taking congressional inaction into account in other contexts.

In any event, the best way to avoid the *Chadha* problems would be to adopt a blanket rule against state sanctions. If preemption is warranted when Congress has focused its attention on a given country and decided to impose less stringent sanctions or no sanctions at all, then state sanctions should be preempted when Congress has failed to focus its attention on a given country. Congress' failure to give any attention to a particular regime presumably reflects its view at some level that the problems posed by such a regime are not sufficiently grave to warrant its attention. A state law imposing stringent sanctions would seem to be in greater conflict with this implicit judgment than with a federal law imposing less stringent sanctions on the same country. If the discrepancy between the federal and state policies warranted preemption in the latter case, then the greater discrepancy between the two policies warrants preemption in the former case a fortiori.

Of course, the federal government's decision not to impose federal sanctions may reflect its acquiescence in the state sanctions. With no indication that Congress objected to the state sanctions, the federal government's decision to enact sanctions that are narrower in scope than existing state sanctions is just as consistent with acquiescence in the continued existence of broader state sanctions. This just shows that, to the extent the Court relied on this factor, it did not rely on congressional intent, either actual or fairly imputed.

In sum, the Court's reliance on the comparative breadth of the Massachusetts sanctions suggests either of two possible approaches to preemption of state sanctions. The first possibility is that the nonexistence of federal sanctions would be similarly probative of preemption. This would represent the adoption of a species of foreign affairs preemption. The second possibility is that the imposition of federal sanctions that are less stringent than the state sanctions would be probative of preemption, but the absence of a federal law imposing sanctions would not be. Even if the Court adopted this second approach, its approach to preemption in the context of state sanctions against foreign states would diverge sharply from its approach in other contexts, where a similar discrepancy between state and federal law poses the preemption question but does not help answer

179. *See* Swaine, *supra* note 16, at 504.

it.[180] To that extent, at least, *Crosby* perpetuates foreign affairs exceptionalism.[181]

2. *Presidential Flexibility*

In the Court's view, the Massachusetts Burma Law also posed an obstacle to the achievement of Congress' intention to "provide the President with flexible and effective authority over economic sanctions against Burma."[182] The Massachusetts Burma Law was in conflict with the Federal Burma Law because the latter conferred "as much discretion to exercise economic leverage against Burma . . . as our law will admit."[183]

This portion of the Court's analysis is in substantial tension with its reasoning in the portion of the opinion just discussed. There, the Court stressed the narrowness of the sanctions authorized by Congress, at least as compared with those imposed by Massachusetts. If Congress in fact *constrained* the President's flexibility to deal with the Burma problem when it enacted the Federal Burma Law, then the Court's focus on presidential flexibility suggests that the Massachusetts Burma Law would have been preempted, a fortiori, in the absence of the Federal Burma Law. In any event, a congressional intent to enhance the President's flexibility in dealing with the Burma problem does not justify an inference that Congress intended to preempt state sanctions. The Court's reasoning in this portion of its opinion is based on the same logical fallacy that critics of the dormant foreign affairs doctrine ascribe to the defenders of that doctrine.

As the Court recognized in the part of the opinion relying on Congress' calibration of force, the Federal Burma Law actually placed significant limits on the President's flexibility in dealing with Burma. The federal law made the imposition of sanctions on Burma mandatory under certain circumstances, and it specified the factors the President must take into account in determining whether to impose other sanctions and to lift the sanctions imposed.[184] Moreover, the federal law limited the sorts of

180. *See* Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 141 (1963).

181. Professor Anaya has suggested to me that a finding of preemption on the ground that federal sanctions apply to a narrower range of conduct would not necessarily reflect the application of a more lenient preemption standard. It might reflect instead the belief that the inference that Congress intended to preempt more stringent state laws is stronger with respect to sanctions against other countries than with respect to purely domestic matters. If the inference were indeed stronger in the former case than in the latter, however, the reason would appear to be that state intrusion into foreign affairs has long been held to be invalid in the absence of congressional consent. To give effect to a presumption that the imposition of less stringent federal sanctions preempts more stringent state sanctions thus seems tantamount to giving continuing effect to a doctrine of dormant foreign affairs preemption.

182. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 (2000).

183. *Id.* at 375-76.

184. *See* Foreign Operations, Export Financing and Related Appropriation Act, Pub. L. No. 104-208, 1996, § 370(a), 110 Stat. 3009-116 (1997) (specifying factors President must consider in removing sanctions).

sanctions that the President could impose.[185] It is difficult to describe the effect of the Burma law as enhancing the President's discretion in dealing with Burma. Even without the Burma law, the President had the power to address the human rights problem in Burma pursuant to other, more general laws. Under the International Emergency Economic Powers Act (IEEPA), the President has the power to impose certain sanctions on countries that pose a national emergency.[186] That IEEPA would have supported the imposition of some sanctions on Burma is shown by the fact that the President relied on that statute in actually imposing the federal Burma sanctions.[187] As construed by the courts, IEEPA appears to provide ample authority for imposing the sanctions authorized by the Federal Burma Law.[188]

Just as Congress intended to give the President substantial flexibility when it passed the Federal Burma Law, Congress intended to give the President great flexibility to deal with international emergencies when it enacted IEEPA.[189] IEEPA often has been employed to impose sanctions on regimes that engage in serious human rights violations.[190] Thus, if the Massachusetts law was preempted because it conflicted with the President's flexibility to deal with the situation in Burma, then a similar law imposing sanctions on, say, Nigeria, likely would have to be regarded as preempted because it conflicts with the President's flexibility in dealing with international emergencies generally.[191]

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185. *See id.* (limiting range of sanctions).

186. *See* 50 U.S.C. § 1701, et seq. (1994) (permitting President to regulate or prohibit "(i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the importing or exporting of currency or securities"; and giving the President great flexibility in dealing with "transactions involving, any property in which any foreign country or a national thereof has any interest").

187. Exec. Order No. 13,047, 62 Fed. Reg. 28301 (May 20, 1997) ("By the authority vested in me as President by the Constitution and the laws of the United States, including . . . the International Emergency Economic Powers Act . . . .").

188. Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1238, 1240-42 (1987).

189. *See* H.R. REP. NO. 95-459, at 10 (1977) ("These new authorities should be sufficiently broad and flexible."); Carter, *supra* note 188, at 1232.

190. *See* Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 7, 1999) (imposing sanctions on Taliban regime in Afghanistan); Exec. Order No. 12,775, 56 Fed. Reg. 50,641, (Oct. 7, 1991), *revoked by* Exec. Order No. 12,932, 59 Fed. Reg. 52,403 (Oct. 14, 1994) (imposing sanctions on Haiti); Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 15, 1979) (imposing sanctions on Iran); Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 3, 1990) (imposing sanctions on Iraq); *see also* Carter, *supra* note 188, at 1239 ("It is unlikely that the courts will step in to limit resort to IEEPA.").

191. Alameda County, Berkley and Oakland, California, and Amherst and Cambridge, Massachusetts, have all passed sanctions legislation targeting Nigeria. *See* Organization for International Investment, *State and Municipal Sanctions Report*, at http://www.ofii.org/issues/sanction.cfm (last visited Jan. 18, 2001) (cataloguing local legislative efforts and sanctions).

The President's flexibility was constrained by the Federal Burma Law in at least one other important respect. In the absence of the latter law, the President would have had the flexibility *not* to impose sanctions on Burma. The Federal Burma Law required the President to impose sanctions under certain circumstances, thus limiting his discretion to determine that Burma does not warrant the imposition of sanctions, or that the imposition of sanctions would do more harm than good.[192] Perhaps most significantly, the Federal Burma Law limits presidential discretion by requiring the President to focus his attention on Burma in preference to other foreign relations matters he might consider more pressing.[193] If the Massachusetts law posed an obstacle to congressionally conferred presidential flexibility, then it would have been preempted by federal statutes such as IEEPA even if Congress had not enacted a Federal Burma Law.

We may take the point a step further. The sort of relationship between state and federal law that the Court found sufficient to require the invalidation of the Massachusetts Burma Law arguably would have been present *in the absence of any federal statute.* The Constitution itself confers on the President significant responsibilities in the area of foreign relations that do not depend on a congressional grant.[194] The Constitution explicitly grants him the responsibility of conducting or negotiating treaties,[195] receiving ambassadors,[196] and the like. The courts have recognized even greater presidential powers in this area.[197] They have gone so far as to

192. Federal Burma Law, § 570(a), 110 Stat. 3009-166 ("Until such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government, the following sanctions shall be imposed . . . .").

Although President Clinton did not object to the imposition of sanctions against Burma, President Reagan did not regard the similar sanctions law enacted with respect to South Africa as an enhancement of his flexibility. The Reagan administration preferred to follow a policy of constructive engagement; Congress enacted the sanctions law to force his hand. *See* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 444-49 (1990). The Federal Burma Law similarly forces the hand of a President who might prefer to follow a different policy.

193. *See, e.g.*, § 570(a), 110 Stat. at 3009-166 ("The President shall seek to develop . . . a comprehensive, multilateral strategy to . . . improve human rights practices . . . .").

194. *See generally* HENKIN (2d ed.), *supra* note 7, at 31-62.

195. The President has the power to make treaties, with the advice and consent of the Senate. U.S. CONST. art. II, sect. 3, cl. 2. On the President's power to negotiate treaties, see Swaine, *supra* note 8, at 59, which makes the case for a "dormant treaty power," under which laws, such as the Massachusetts Burma Law, are preempted because they interfere with the President's exclusive power to negotiate treaties. *See id.* at 1274.

196. U.S. CONST. art. II, § 3. This power is understood to encompass the related power to recognize foreign governments (or not to), which in turn has been understood to encompass the power to enter into certain agreements with foreign states without the Senate's consent. *See, e.g.*, United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942). *See generally* HENKIN (2d ed.), *supra* note 7, at 37-38.

197. On the President's unenumerated foreign affairs power, see generally HENKIN (2d ed.), *supra* note 7, at 35-45.

describe the President as the "sole organ" of the nation with respect to foreign affairs.[198] Under the *Crosby* Court's understanding of the sort of relationship between state and federal law that can result in preemption, we would apparently have to conclude that the Massachusetts law was preempted by *the Constitution's* allocation of discretion to the President in the area of foreign affairs. That, however, is precisely the rationale behind dormant foreign affairs preemption (at least in part). Critics of that doctrine have argued that the best case for the doctrine rests on the view that state foreign affairs activity frequently poses an obstacle to the President's performance of the powers and duties conferred on him by the Constitution.[199]

It is true that the scope of the President's exclusive powers in the area of foreign affairs is disputed, and that the Court in *Crosby* was careful not to take a position on the breadth of the President's exclusive powers in this area.[200] It emphasized that the President's power in this case was at its zenith because he was acting pursuant to congressional delegation.[201] Thus, it might be objected that my suggestion that the Court implicitly endorsed the dormant foreign affairs doctrine assumes a proposition that the Court took care not to embrace. But I do not suggest that the Court implicitly endorsed the dormant foreign affairs doctrine by accepting a broad view of the President's exclusive power in this area. Critics of dormant foreign affairs doctrine do not deny that the Constitution gives the President great discretion in the area of foreign affairs. Instead, they argue that *it does not follow* that the Constitution frees the President from the constraints imposed by otherwise valid state laws.[202] The *Crosby* Court appears to have concluded that a grant of significant power to the President in the area of foreign affairs *does* implicitly free the President of such constraints. Recall that the Court in *Crosby* conceded that Congress had been silent on the question of whether state laws that present an obstacle to congressionally conferred flexibility were preempted.[203] The Court held that the federal Burma law swept the obstacle away because it gave the President great flexibility.[204] My point is that the Court's logic in *Crosby*,

198. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (describing presidential powers).

199. *See* Ramsey, *supra* note 8, at 391-401. Ramsey appears to regard the doctrine as one under which state laws are preempted insofar as they conflict with substantive foreign policy decisions made by the President. For a critique of Ramsey's argument, see *infra* Part IV(B).

200. The Court did, however, cite *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), for the proposition that the President's constitutional power "is least restricted by Congress" in the foreign relations area. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375 (2000).

201. *See Crosby*, 530 U.S. at 374.

202. *See, e.g.*, Ramsey, *supra* note 8, at 392.

203. *See Crosby*, 530 U.S. at 388.

204. *See id.* at 387-88 (relying on congressional delegation of discretion to strike down statute).

inferring preemption from a grant of flexibility to the President, involved the same sort of analytic leap that the critics of the dormant foreign affairs doctrine claim the defenders of that doctrine unjustifiably make. The Court's mode of reasoning in *Crosby* leads to the conclusion that state laws that pose a similar obstacle to *constitutionally*-conferred flexibility (a flexibility that is indeed broader in some respects than that conferred by the Federal Burma Law) are similarly swept away by the Constitution. If so, then the Court in *Crosby* implicitly endorsed the dormant foreign affairs doctrine.

As noted in Part II, the Court cited no direct evidence that Congress meant to preempt state sanctions; it noted that Congress was "silent" on that question.[205] That Congress gave the President certain powers—even if many and broad—does not mean that it intended to give him other powers (such as the power to disregard state sanctions), much less that it intended to sweep away state sanctions itself. As the Court has recognized in other contexts, the enumeration of certain powers is generally thought to presuppose something not enumerated.[206] The conclusion that laws (whether constitutional or statutory) granting the President great flexibility to achieve certain ends, without more, preempt state laws that might get in the way of such ends is thus unwarranted. Ascription of intent to preempt state laws requires more direct evidence of a conflict between the state and federal laws.

The closest the Court came in *Crosby* to identifying an actual conflict between the Massachusetts Burma Law and the Federal Burma Law had less to do with the great flexibility the federal law conferred on the President than with the power it gave the President to escape the shackles the federal law placed on him. After noting that the federal law required the President to impose sanctions under certain circumstances and gave him the discretion to impose limited sanctions in additional cases, the Court noted that the federal law gave the President the power "'to waive, temporarily or permanently, any sanction [under the federal act] . . . if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.'"[207] The Court seemed to think the Massachusetts Burma Law was in particular conflict with this aspect of the Federal Burma Law. The Court stressed that the Massachusetts sanctions are "immediate . . . and perpetual, there being no termination provision . . . ."[208] "This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy . . . ."[209] The Court regarded it as "unlikely that Con-

205. *See id.* at 388.

206. *See* United States v. Lopez, 514 U.S. 549, 566 (1995) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

207. *See Crosby*, 530 U.S. at 369-70 (citing § 570(e), 110 Stat. at 3009-167).

208. *Id.* at 376-77.

209. *Id.*

gress intended both to enable the President to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the President's judgment of what national security requires."[210]

It would indeed be odd if the President had the power to waive the federal sanctions but not the state sanctions. It is also true that the Federal Burma Law gives the President in express terms the power to waive only the federal sanctions.[211] But it is not clear that the President would lack the authority to waive state sanctions independently of the Federal Burma Law. For example, the President would appear to have the authority to displace state and local sanctions pursuant to an agreement entered into with Burma in connection with a resumption of full diplomatic relations.[212] Even if the President lacked the power to waive state sanctions apart from the Federal Burma Law, however, a more narrowly tailored response to this problem would have been to interpret the Federal Burma Law to confer this authority implicitly. It is true that the federal statute was silent with respect to this presidential authority. But it was equally silent with respect to the preemption question. If the lack of a presidential power to waive state sanctions was the problem, then holding the state statute preempted immediately and in its entirety was an overbroad remedy.

To put the matter differently: if preemption was warranted by this conflict, the only aspect of the state law that should have been "displaced" was the absence of a provision giving the President the power to waive the state sanctions. If the lack of a presidential power to waive the state sanctions was the problem, then the problem would be cured if the state amended the statute to give the President the power to waive the sanctions.[213] Presumably, the state would prefer to give the President that power than to have the statute preempted immediately and in its entirety. The problem with the state statute was thus the absence of a provision authorizing the President to waive the sanctions. If this conflict warranted

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210. *Id.* at 376 n.10.

211. *See* Federal Burma Law, § 570(e), 110 Stat. at 3009-167 (establishing presidential waiver authority).

212. *See* United States v. Pink, 315 U.S. 203, 230-31 (1941); United States v. Belmont, 301 U.S. 324, 331 (1937).

213. This part of the Court's opinion suggests that a state law imposing more stringent sanctions on Burma would not be invalid if the state law explicitly gave the President the power to waive the state sanctions. *See* Robert Stumberg, *Preemption and Human Rights: Local Options after* Crosby v. NFTC, 32 LAW & POL'Y INT'L BUS. 109, 145 (2000). To be sure, it seems strange to say that a state can give the President power to displace state law in the foreign affairs area, and in fact I do not think that the state statute would be upheld if it did provide the President such powers. But, if I am right, then the Court's preemption holding does not really rest on this point. The anomaly produced by the fact that Congress gave the President the power to waive federal but not state sanctions probably resulted from Congress' assumption that state sanctions were invalid under the dormant foreign affairs doctrine.

preemption, then the only aspect of the statute that should have been deemed preempted was its omission of a presidential waiver power. A federal statute would "preempt" a state statute's omission of a power by providing the power itself.

It is true that the President might prefer not to have to bother with the monitoring of state statutes, and he might also prefer not to have to take the political heat for preempting state human rights sanctions, but that takes us back to the question of what entitles the President to be free of such burdens. There is nothing in the grant of presidential flexibility to indicate that Congress intended the flexibility to extend so far. To conclude that the Constitution frees him of such burdens is to accept a dormant foreign affairs power. Similarly, Congress might have neglected to include a power to waive state sanctions because it assumed such sanctions were invalid under the dormant foreign affairs doctrine. But this would be a reason to strike the statute down on dormant foreign affairs grounds, not preemption.[214]

3. *Congress' Desire for a Multilateral Solution*

The Court's third reason for holding the Massachusetts Burma Law preempted was that it was "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.'"[215] If the Court meant that Congress had *instructed* the President to pursue a multilateral strategy, then this aspect of the Federal Burma Law represents a further limit on the President's discretion. If Congress merely *empowered* the President to pursue such a strategy, then this aspect of the law seems superfluous, as the President clearly has the power to pursue multilateral strategies to address such situations under IEEPA and directly under the Constitution. Indeed, the presidential power to negotiate treaties is the power to address international problems in a multilateral fashion.[216] If anything, it

214. This is yet another example of how Congress may have relied on the existence of the dormant foreign affairs doctrine when it enacted the Federal Burma Law, and thus it is another reason to adhere to that doctrine on stare decisis grounds.

215. *See Crosby*, 530 U.S. at 380 (quoting § 570(c), 110 Stat. at 30009-166).

216. The Federal Burma Law's reference to a "multilateral" response to the Burma problem might not be superfluous if it were construed as advance authorization of international agreements on Burma, eliminating the need for subsequent approval of such agreements by the Congress or the Senate. But arguably the President already had the power to make such agreements without subsequent approval. *See supra* notes 196, 212 and accompanying text. In any event, as discussed above, the grant of this power does not warrant an inference that the federal statute itself preempted state laws. The discussion in the preceding subsection applies fully here. At most, the grant of such power warrants an inference that the federal statute implicitly grants the President the power to preempt state laws through international agreements (something he may in fact have had the power to do in the absence of the statute).

is the President's power to act unilaterally that stands on weaker ground. Even if the statute enhanced the President's ability to achieve a multilateral solution to the Burma problem, such enhancement does not warrant an inference that the statute preempts state law of its own force. The points made above with respect to Congress' grant of flexibility to the President apply equally to the Court's reliance on Congress' preference for a multilateral solution. That Congress preferred a multilateral solution does not mean that it was willing to pay any cost to achieve such a solution.[217]

This third factor was nevertheless important to the Court's analysis because it provided the vehicle for consideration of the protests that had been raised by third countries to the Massachusetts Burma Law.[218] The Court's reliance on these protests was a particularly interesting feature of its opinion because those complaints related to an alleged violation of the Agreement on Government Procurement (AGP).[219] If the Massachusetts Burma Law conflicted with any federal law, it conflicted most sharply with the AGP.[220] The Court did not invalidate the Massachusetts law on this ground, however, because Congress, in implementing this agreement, had specified that any challenges to state laws as violations of WTO agreements could be entertained in U.S. courts only at the behest of the federal government.[221] Massachusetts argued in *Crosby* that, given the foreign states' lack of standing to challenge state laws as violating the AGP, those states'

217. I am reminded here of a comment by Professor Andrew Koppelman about the Supreme Court's opinion in *Bush v. Gore*, 531 U.S. 98 (2000). In refusing to remand the case to the Florida courts for further recounts, the U.S. Supreme Court relied on the Florida statute establishing a December 12 cut-off date, as interpreted by the Florida Supreme Court. *See Bush*, 531 U.S. at 111. Professor Koppelman criticized the Court's reasoning, noting that "the Florida court did not even say that meeting the date was of overriding importance, only that it was a goal favored by the legislature. To infer that the goal overrides all else is to collapse the distinction between a want and an overriding want. It is to say that, when I tell you I'd like a glass of water, I am thereby implying that I would kill my children to get it." Posting of Andrew Koppelman, akoppelman@nwu.edu, to conlawprof@listserv.ucla.edu (Dec. 13, 2000) (copy on file with author). The Supreme Court appears to have committed the same sort of analytical error in *Crosby*.

218. *See Crosby*, 530 U.S. at 382-83 (discussing protests by U.S. trading partners).

219. Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4(b), LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, *available at* http://www.wto.org/english/docs_e/gpr-94.pdf(1994); *see Crosby*, 530 U.S. at 383 (explaining that complaints by European Union and Japan were based on "certain provisions of the [AGP]") (citing H.R. DOC. NO. 103-316, at 1719 (1994)).

220. On the compatibility of state selective purchasing laws with the AGP, see generally Christopher McCrudden, *A Framework for Discussion of the Legality of 'Selective Purchasing' Laws Under the WTO Government Procurement Agreement*, 2 J. INT'L ECON. L. 3 (1999). Note, however, that if my analysis in Part III (A) is correct, the AGP may be unconstitutional.

221. *See* Uruguay Round Agreements Act, 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1) (1994).

unadjudicated claims that the law violated the AGP should not be relied upon in holding the statute preempted.[222]

The Court dismissed this argument in a footnote on the dubious ground that this was not a case seeking to challenge the state law on the basis of the AGP, but rather a challenge to the state law on the basis of the Federal Burma Law.[223] The Court overlooked the ways in which the AGP might be relevant to the preemption issue. The AGP, after all, was a federal law that directly addressed the validity of state procurement laws, and did so in a way that apparently prohibited laws such as Massachusetts'. Yet Congress had provided that any state laws claimed to be invalid on this ground could be nullified only through judicial action initiated by the Executive branch. Is it likely that, when Congress later passed a law prohibiting private parties from doing business with Burma in certain circumstances, it meant to nullify state laws already prohibited by the AGP? If so, is it likely that Congress intended to permit private parties to challenge such laws in court? And, given that Congress burdened the Executive branch with the responsibility to monitor state procurement laws to ensure compliance with the AGP, is it likely that Congress intended to free the Executive branch from the obstacles such laws might pose to its efforts to promote democracy in Burma?[224]

Whatever the answers to the foregoing questions, the Court's willingness to take foreign protests concerning the AGP into account in preemption analysis produces an ironic result. Congress obviously denied private parties and foreign countries standing to challenge state laws as violating the AGP in order to protect the states.[225] In light of the Court's decision in *Crosby*, however, the states may be worse off because of this provision.

222. *See* Brief for Petitioners at 45-46, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (No. 99-474) (arguing that foreign complaints should be ignored).

223. *See Crosby*, 530 U.S. at 386 n.24 (rejecting state's argument).

224. *Cf.* Delahunty, *supra* note 8, at 45 ("Congress' policy of sheltering state procurement laws from preemption challenges establishes that reviewing courts should be averse to finding that Congress, in other legislation, has affirmatively preempted them."). To the extent Delahunty argues further that Congress affirmatively authorized state procurement laws that violate the AGP (at least in the absence of preemptive action by the President), he goes too far. *See id.* at 42 ("Congress [has] in fact authorized such state action here."). *But cf. id.* at 43 (stating that AGP, as implemented, "notionally" preempts conflicting state law). The fact that the Uruguay Round Agreements Act denies private parties standing to obtain relief against states that violate the AGP does not mean that the Act relieves the states of having to comply with the AGP. The President does not control the preemptive effect of the AGP. State statutes that conflict with the AGP are in theory preempted by the AGP, whether or not the President brings suit, and when the President does bring suit, the courts will declare them preempted by the AGP, not by the President. Indeed, the courts may well disagree with the President and hold that state law is not preempted. *See* 19 U.S.C. § 3512(b)(2)(B)(ii) (1994) ("[T]he United States shall have the burden of proving that the law that is the subject of the action . . . is inconsistent with the agreement in question.").

225. *See* Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 MINN. J. GLOBAL TRADE 45, 69 (1998).

Without this provision, the Court in *Crosby* presumably could have determined whether the Massachusetts Burma Law was consistent with the AGP. Conceivably, it might have concluded that the Massachusetts law did not violate that agreement.[226] (Even if the Massachusetts law would not have been found valid, other state laws might well be.) Had the state law been found compatible with the AGP, presumably foreign protests would deserve no weight. Because of the provision denying standing to private parties and foreign states, however, the court lacks the authority to address the merits of that controversy.[227] Yet, under *Crosby*, a state law can be held preempted on the basis of untested and potentially unmeritorious claims of conflict with the AGP.

The Court's reliance on these foreign protests is noteworthy as well in that it reflects the Court's continuing exceptionalism in the foreign affairs area. The Court in *Crosby* distinguished *Barclays Bank*, in which it had previously rejected reliance on foreign protests in determining whether a state law is invalid under the dormant Foreign Commerce Clause:

> [In *Barclays Bank*,] [w]e found the reactions of foreign powers . . . irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions . . . of foreign governments . . . . Here, however, Congress has done nothing to render such evidence beside the point.[228]

In other words, if Congress has specifically rejected the position of the foreign government protesters, then such protests are irrelevant, but in the face of congressional silence, those protests should be given weight in the preemption analysis. If the complaints of foreign countries are a basis for finding state laws to be preempted in the face of congressional silence, then the resulting doctrine closely approximates the dormant foreign affairs doctrine. That doctrine, after all, stands for the proposition that certain state laws are so likely to be found offensive to foreign states that they should be invalidated lest the insult to the foreign state adversely affect the nation's ability to maintain harmonious foreign relations. In any case involving such a statute, it would not be surprising to find foreign state objections to the relevant state law. To permit preemption decisions to be influenced by such complaints would be to retain a degree of foreign affairs exceptionalism, as one is unlikely to find foreign state complaints in a purely domestic preemption case (almost by definition).

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226. *See* McCrudden, *supra* note 220, at 3.

227. Thus, the Court made clear in *Crosby* that it was expressing no opinion on the merits of the foreign states' claims. *See Crosby*, 530 U.S. at 373 (declining comment on merits of claim).

228. *Id.*

4. *Summary*

The Court's willingness to find that the state law was preempted in *Crosby* in the absence of compelling evidence of a conflict with the provisions of the federal law is in sharp contrast with its reluctance to find preemption in similar domestic cases.[229] The Court's lax approach to

229. *See* Young, *supra* note 99, at 172-73; Denning & McCall, *supra* note 16, at 755. *See generally* Rotunda, *supra* note 99(noting trend away from preemption). Since Professor Rotunda wrote, commentators have detected a retreat from this reluctance to find preemption. They cite in particular another preemption decision of the 1999 Term, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). *See, e.g.*, Michael Gottesman, *The New Federalism and the New Preemption: Diverging Paths* (forthcoming 2002). But, although the Court did rely on obstacle preemption in that case, its preemption holding was supported by far more direct evidence than in *Crosby* of a conflict between federal and state law. The Court in *Geier* found that a federal regulation providing for a gradual phase-in of a requirement that cars be equipped with airbags preempted a state tort law imposing an immediate requirement that cars be so equipped. *See Geier*, 529 U.S. at 882. The agency had opted for a phase-in period in order to encourage experimentation by automobile manufacturers with respect to safety mechanisms. *Id.* at 901. By requiring that all cars be equipped with one such mechanism immediately, the state law directly frustrated the purpose of the federal regulation. There was accordingly "clear evidence of a conflict" between state and federal law. *Id.* at 885. The dissenters disputed both the majority's assessment of the agency's purpose in opting for a gradual phase-in, see *id.* at 903-04, and its description of the nature of the state law, see *id.* at 903 n.18. My point here, though, is that *if* the regulation was designed as it was for the purpose of encouraging experimentation by manufacturers, then it was reasonable to read the regulation as imposing both a floor and a ceiling; and *if* the state law imposed a duty to adopt a single approach, then it imposed a floor that was higher than the federal ceiling. In light of the majority's conclusions about the purpose of the regulation and the nature of the state law, therefore, the conflict was clear and palpable. By contrast, a general purpose on Congress' part to give the President a high degree of flexibility in achieving democracy in Burma tells us nothing about the more specific question whether Congress intended to give the President the flexibility to preempt state laws that imposed sanctions on conduct not prohibited by the federal statute. Neither does it tell us that Congress intended to sweep away those state laws itself.

Critics and defenders of the *Geier* decision alike have said that the Court applied a looser approach to preemption than in prior cases. *See The Supreme Court—Leading Cases*, 114 HARV. L. REV. 339, 349 (2000) (approving of decision); Gottesman, *supra* (disapproving of decision). Defenders of the decision have argued that this approach was justified because of the need for uniform rules to govern tort actions relating to products that move easily in interstate commerce. *See Leading Cases*, *supra*, at 348-49. If the *Geier* approach to obstacle preemption applies solely in this context, then its unusually receptive approach to preemption may be justified for reasons very similar to those offered here to explain the result in *Crosby*. In both cases, the receptive approach to preemption may be explained because of the uniquely federal interests involved, which in both cases is reflected in the judicial recognition of a closely related dormant federal legislative power (the dormant Commerce Clause in *Geier* and the dormant foreign affairs power in *Crosby*). On the other hand, if *Geier* represents a broad shift towards a looser preemption standard in the domestic sphere, then *Crosby* may be less "exceptionalist" than I have indicated in the text. In that event, the Court's approach to preemption in *both* the domestic and foreign spheres would be vulnerable to the criticisms articulated in this section. *Cf.* Nelson, *supra* note 55, at 225 (criticizing obstacle preemption on similar grounds). In any event, even the receptive approach to preemption

obstacle preemption in *Crosby* was not entirely unprecedented, however. The Court took a similar approach in *Hines v. Davidowitz*,[230] the decision to which the Court itself traced the concept of obstacle preemption in *Crosby*.[231] *Crosby* and *Hines* illustrate how closely the Court's willingness to infer preemption corresponds to the extent to which the case implicates foreign affairs. The bulk of the Court's opinion in *Hines* was devoted to the proposition that the responsibility for conducting foreign affairs is allocated by the Constitution to the federal government, and that states accordingly have little if any role to play in this sphere.[232] In concluding that a state law regulating immigration was preempted by the federal regulatory scheme in immigration, despite the lack of any direct conflict between the federal and state laws, the Court relied significantly on these background principles.[233] Indeed, the Court's willingness in *Hines* to find state laws preempted in the face of congressional silence on the preemption issue and in the absence of any palpable conflict between state and federal law has led some commentators to treat *Hines* as a dormant foreign affairs power case.[234] The Court's heavy reliance on *Hines* in *Crosby* is hardly indicative of any desire to decide the case on the basis of the "settled . . . implied preemption doctrine" that the Court applies in purely domestic cases.

The relationship between *Crosby* and the dormant foreign affairs doctrine is illuminated by the Court's decision in *Boyle v. United Technologies Corp.*[235] As noted above, the dormant foreign affairs doctrine shares important attributes of federal common law. In discussing the relationship between preemption and federal common law in *Boyle*, the Court stressed that there is no sharp line between the two concepts.[236] Both doctrines result in the displacement of state law because of a conflict with federal law. In the case of federal common law, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates 'in a field which the States have traditionally oc-

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evident in *Geier* does not appear to be nearly as receptive as the approach employed in *Crosby*. If the Court's recent preemption decisions in the domestic context are problematic, the *Crosby* decision is even more problematic.

It is noteworthy, in any event, that *Geier* was a 5-4 decision, with a stinging dissent decrying the "freewheeling" and "potentially boundless" nature of the majority's application of obstacle preemption, *see* 529 U.S. at 906, 907, while the even-more-freewheeling approach to obstacle preemption in *Crosby* did not generate a single dissent. The point of Justice Scalia's concurring opinion, joined by Justice Thomas, was to stress that the case for upholding the Massachusetts Burma Law was *even more obvious* than the majority believed.

230. 312 U.S. 52 (1941).

231. *Crosby*, 530 U.S. at 373.

232. *See Hines*, 312 U.S. at 62-65 (emphasizing federal supremacy in foreign affairs).

233. *See id.* at 74 (finding state law cannot be enforced).

234. *See, e.g.*, Denning & McCall, *supra* note 96, at 319-20.

235. 487 U.S. 500 (1988).

236. *See Boyle*, 487 U.S. at 504.

cupied.' Or, to put the point differently, the fact that the area in question *is* one of uniquely federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can."[237] The Court here dropped a footnote explaining that "the distinctive federal interest in a particular field [has long been] used as a significant factor giving broad preemptive effect to federal legislation in that field."[238] There followed a lengthy quotation from *Hines* about the uniquely federal interest in foreign affairs and the relevance of this fact for preemption doctrine.[239]

Boyle thus shows that there is no single approach to preemption; the applicable approach depends on the subject matter involved.[240] Where the federal government has regulated in any area traditionally regulated by the states, then one approach to preemption applies, under which preemption can occur only in the event of a severe conflict. But where the states have legislated in an area of uniquely federal interest, state law can be preempted even though the conflict with federal law is far less discernable. *Hines* and *Boyle* affirm that foreign affairs is an area of uniquely federal interest demanding exceptional treatment when it comes to the preemption of state law, and *Crosby* establishes that it remains an area of uniquely federal interest justifying preemption even in the face of ambiguous congressional silence.[241]

Finally, *Boyle* establishes that preemption doctrine builds in not only exceptionalism, but also dormancy. At the far end of the preemption spectrum recognized in *Boyle* stood what is generally regarded as federal common law, under which state law is displaced by "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."[242] Just as state law addressing the defenses of federal contractors was displaced in *Boyle* in the absence of any statute reflecting a congressional intent to displace such

237. *Id.* at 508.

238. *Id.* at 508 n.4.

239. *See id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 66-71 (1941)).

240. It does not depend solely on this factor, but this is one important factor. *See generally* Dinh, *supra* note 52, at 2103-07.

241. My argument here echoes Ernest Young's observation that *Crosby* reflects a milder version of the same sort of exceptionalism evident in dormant foreign affairs cases. *See* Young, *supra* note 99, at 140-141. Jack Goldsmith responds to Young by observing that the Court in *Crosby* was faced with a conflict between the presumption against preemption and the "*Hines* canon favoring preemption for foreign relations statutes," and "declined to rely on either." Goldsmith, *New Formalism*, *supra* note 11, at 216 n.159. Goldsmith thus recognizes that foreign affairs exceptionalism was built into pre-Crosby preemption doctrine. Although it is true that the Court in *Crosby* did not identify a special preemption canon for foreign relations cases, it did invoke *Hines* at several points. *See* 530 U.S. at 372-74, 377-78, 380, 388. On the significance of the Court's refusal to acknowledge that it was applying a more lenient preemption standard, see *infra* text accompanying note 244.

242. *See* FALLON ET AL., *supra* note 51, at 756.

law, the Massachusetts Burma Law was found preempted in *Crosby* in the absence of any federal statute reflecting a congressional intent to displace laws of that type. The only question after *Crosby* concerns the scope of *Crosby*'s dormant preemption rule: In the face of congressional silence on the preemption question, are state laws imposing sanctions on a given country preempted only when Congress enacts a statute imposing parallel but narrower sanctions on the same country, or are they also preempted by federal statutes or constitutional provisions giving the President broad power to address foreign emergencies and conduct the nation's foreign relations, or more broadly by the constitutional provisions that give the federal government, and not the states, the responsibility for the conduct of foreign affairs?

IV. W(H)ITHER *ZSCHERNIG*?

In Part II, I considered whether the *Zschernig* doctrine has in fact withered away, as some critics maintain.[243] I concluded that *Crosby* is virtually a dormant foreign affairs case in disguise. While I have been very critical of the decision, my criticism has been directed not so much to the Court's implicit reaffirmation of the dormant foreign affairs doctrine, but to its attempt to disguise that affirmation. Jack Goldsmith may be correct when he notes that, if the Court in *Crosby* did attempt to disguise its exercise of foreign affairs exceptionalism, this effort would itself be significant because it would suggest that "the Court believes that the judicial foreign relations effects test is sufficiently illegitimate that it requires masking."[244] For obvious reasons, however, judicial deception of this kind is unacceptable. The Court will eventually have to decide whether to reject, embrace, or refine the *Zschernig* doctrine. In this Part, I consider whether the *Zschernig* doctrine deserves to wither.

The critics of the *Zschernig* doctrine have raised some valid concerns. I generally share their aversion to foreign affairs exceptionalism.[245] The concerns they raise, however, do not justify the doctrine's abandonment. Like some of the revisionists' other proposals, their call for a repudiation of dormant foreign affairs doctrine would throw the baby out with the bathwater.[246]

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243. *See, e.g.*, Delahunty, *supra* note 8, at 54 ("As precedent, *Zschernig* is either irrelevant or dead.").

244. Goldsmith, *New Formalism*, *supra* 11, at 221. Goldsmith notes, however, that he thinks "there is no basis in the [Crosby] opinion" for thinking that the Court was engaged in an exercise of foreign affairs exceptionalism. *Id.*

245. Indeed, I have been critical of revisionist approaches to the doctrine of "non-self-executing" treaties that seek to draw a sharp distinction between the Constitution's mechanisms for enforcing treaties and its mechanisms for enforcing other forms of federal law. *See* Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2198 n.178 (1999).

246. I have a similar reaction to the revisionists' call for a repudiation of the enforcement of customary international law as federal common law because some commentators and international organizations have made exaggerated claims

The critiques of *Zschernig* fall into three broad categories. The first consists of textual or originalist critiques. The thrust of these critiques is that the Framers' express inclusion of specific disabilities of the states in the foreign affairs area makes it highly unlikely that they intended to prohibit the states more broadly from interfering with the federal government's unexercised power to conduct the nation's foreign relations. The second category consists of what I shall call structural or policy arguments. Several distinct arguments fall in this category. The first admits that excluding the states from interfering with foreign relations made sense at an earlier point in our history, but argues that the exclusion is no longer necessary because foreign states now have the ability to retaliate against individual states of the Union, and, in any event, the stakes of such interference are much lower now that the Cold War is over. The second seeks to rebut the claim that state foreign affairs activity serves no useful purpose by arguing that permitting the states to conduct foreign relations unless preempted by statute protects Congress' prerogatives in the foreign affairs area from usurpation by the President. The final category consists of what I shall call functional critiques. These include critiques based on the difficulty of distinguishing foreign from domestic affairs in this age of globalization, and the impropriety of assigning foreign policy judgments to judges unsuited to the task.

I shall consider these critiques in turn. I conclude that the textual/originalist critiques are of limited significance with respect to an established subconstitutional doctrine such as this one; I reject the critiques based on structure or policy; and I conclude that the functionalist critiques warrant at best a reformulation of the doctrine, but not its abandonment.

A. *Textual and Originalist Critiques*

The textual argument against the dormant foreign affairs doctrine is simple but compelling: The Constitution includes a number of provisions that expressly prohibit the states from engaging in certain activities relating to foreign affairs. These are found in Article I, section 10, which provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation [or] grant Letters of Marque or Reprisal,"[247] or, "without the consent of Congress, lay any duty of Tonnage, keep Troops, or ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power or engage in War, unless actually invaded, or in such imminent danger as will not admit of delay."[248] The inclusion

about what the customary international law of human rights requires. *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. 816, 818 (1997) [hereinafter, Bradley & Goldsmith, *Customary International Law*]. I would urge instead that the exaggerated claims be rejected.

247. U.S. CONST. art. I, § 10, cl. 1.

248. U.S. CONST. art. I, § 10, cl. 3.

of these express disabilities in the constitutional text suggests that the Framers did not intend to require congressional permission for other state activities that might touch on foreign affairs.[249]

Similar textual problems bedevil the Constitution's affirmative grants of power to the federal government, however.[250] Such textual embarrassments led Justice Sutherland, writing for the Court in *United States v. Curtiss-Wright Export Corp.*, to conclude that the powers of the federal government in the foreign affairs area were not conferred by the Constitution, but instead passed to the national government with independence.[251] Justice Sutherland's history has been disputed,[252] but his conclusion that the federal government possesses an unenumerated foreign affairs power nevertheless prevails today.[253]

Textual scruples regarding an unenumerated general exclusion of states from foreign affairs have led some commentators to defend an exclusion of the states from activity more directly tied to specific grants of power. Edward Swaine, for example, has defended what he calls the dormant treaty power, under which states are excluded from negotiating treaties with foreign nations either explicitly or implicitly.[254] The dormant federal power that he defends is expansive enough to condemn the Massachusetts Burma Law.[255] This reformulation and slight narrowing of *Zschernig* relieves the textual problem only slightly, however. Rather than reading a dormant feature into an unenumerated power, he would read one into an enumerated power. That the Constitution does not in terms prohibit state negotiations of treaties remains a problem. Indeed, as Professor Henkin notes, because the Constitution permits agreements between states and foreign states with the consent of Congress, it implies that states have the power to negotiate such agreements, for otherwise they would have no agreements to present to Congress for its consent.[256]

Scholars have also debated whether there is evidence apart from the constitutional text that the Founding generation, or succeeding ones, contemplated a dormant foreign affairs power. *Zschernig*'s defenders empha-

249. *See* Ramsey, *supra* note 8, at 371; Thomas Barnico, *The Road from Burma: State Boycotts After* Crosby v. National Foreign Trade Council, 19 B.U. INT'L L.J. 89, 106-07 (2001); Bradley & Goldsmith, *Customary International Law*, *supra* note 246, at 862-63.

250. *See generally* HENKIN (2d ed.), *supra* note 7, at 35-45, 64-69.

251. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

252. *See* HENKIN (2d ed.), *supra* note 7, at 19-20; Charles Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 1 (1973); David Levitan, *The Foreign Relations Power: An Analysis of Justice Sutherland's Theory*, 55 YALE L.J. 467, 475 (1946).

253. *See* HENKIN (2d ed.), *supra* note 7, at 20. *But see* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231 (2001) (defending text-based theory of Executive's foreign affairs power).

254. *See* Swaine, *supra* note 8, at 1254-55, 1261-64.

255. *See id.* at 1273.

256. *See* HENKIN (2d ed.), *supra* note 7, at 156.

size the Founders' intent to design a government that would not be subject to the problems that states had created for the Confederation through their parochial foreign affairs activities during the critical period.[257] They cite general statements showing that the Founders intended to entrust the foreign affairs power to the federal government and not the states, such as Madison's oft-quoted statement that "if we are to be one nation in any respect, it clearly ought to be in respect to other nations."[258] *Zschernig*'s critics respond that the Founders addressed the problem that existed under the Articles of Confederation by specifically excluding states from certain activities relating to foreign affairs and by giving the federal government the power to preempt state law through the enactment of statutes.[259] They note that the general statements on which the doctrine's defenders rely sought to explain the affirmative grants of power to the federal government, not to affirm the existence of a self-executing exclusion beyond those expressed in Article I, § 10.[260] The critics have cited incidents subsequent to the Founding that seem inconsistent with a dormant foreign affairs power,[261] while the defenders have countered with incidents supporting the doctrine,[262] and by reminding us that "few norms . . . are perfectly enforced."[263]

The textual and historical debate is interesting but not ultimately determinative. Even the most diehard of originalists concede that, in constitutional interpretation, the original intent must often give way to stare decisis concerns.[264] And, as noted above, the Justices agree that stare decisis plays an even stronger role in nonconstitutional cases.[265] For the reasons discussed above, the doctrine of dormant foreign affairs preemption, like the dormant Commerce Clause doctrine, should be treated as subconstitutional for this purpose. It is true that the dormant foreign affairs doctrine lacks the long pedigree of the dormant Commerce Clause doctrine.[266] *Zschernig* is so far the only case to hold a state law preempted solely on this ground.[267] But *Zschernig* did not spring full-grown from the

257. *See, e.g.*, Brannon P. Denning & Jack H. McCall, *States' Rights and Foreign Policy: Some Things Should Be Left To Washington*, 79 FOREIGN AFF. 9, 12-13 (2000).

258. *See* THE FEDERALIST NO. 42 (Alexander Hamilton), *quoted in* Denning & McCall, *supra* note 257, at 12.

259. *See, e.g.*, Ramsey, *supra* note 8, at 368.

260. *See id.*

261. *See id.*

262. *See, e.g.*, Spiro, *supra* note 8, at 1228-41.

263. *See id.* at 1241.

264. *See supra* note 81.

265. *See supra* notes 57, 82; *see also* Toff E. Freed, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?*, 57 OHIO ST. L.J. 1767, 1776 (1996) ("Stare decisis concerns are at their zenith in decisions involving property and contract rights regulated by statutes.").

266. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. 299, 304 (1851) (laying foundation for dormant Commerce Clause).

267. *See* Carol E. Head, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L.

head of Justice Douglas. The decision was close to unanimous, and two of the Justices would have gone further than Justice Douglas.[268] Indeed, as one critic of dormant foreign affairs doctrine notes, *Zschernig* "rel[ied] on a matter of common sense supported by almost a century of decisions repeating that common sense as dicta."[269]

Stare decisis promotes stability and predictability in the law. The possibility that Congress may have relied on the existence of a judicial precedent in enacting laws in related areas is usually considered a strong reason to adhere to even an erroneous constitutional decision. Although it is difficult to measure precisely the extent to which Congress has relied on a decision, the discussion in Parts II and III suggested a variety of ways in which Congress may have relied on the existence of the dormant foreign affairs doctrine. Indeed, much of what the Court in *Crosby* took as evidence of an implicit intent to preempt state laws such as Massachusetts' is more likely evidence that Congress assumed the invalidity of the Massachusetts law on dormant foreign affairs grounds. The claim that the original decision was insufficiently supported by constitutional text or evidence of the Framers' intent, or was erroneous when rendered for other reasons, is thus insufficient to justify its repudiation. Stare decisis principles demand that the repudiation of this doctrine be supported by strong reasons of a structural or functional sort.

B. *Critiques Based on Structure and Policy*

The critiques based on constitutional structure and policy take a variety of forms. They typically begin by conceding the force of the structural argument in favor of dormant foreign affairs preemption.[270] Some critics then proceed to argue that the structural premises that once justified the doctrine no longer hold, and that state foreign affairs activity is in any event tolerable today because the stakes have fallen significantly with the waning of the Cold War.[271] Others maintain that a constitutional doctrine that lacks support in positive originalist sources should be adopted only if its absence would be irrational, and they argue that a no-dormant-foreign-

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REV. 123, 138 (2000) ("The Supreme Court has only once struck down a state law for impermissibly interfering with the federal government's dormant power over foreign affairs.").

268. *See* Zschernig v. Miller, 389 U.S. 429, 441-443 (1968) (Stewart, J., concurring, joined by Brennan, J.).

269. *See* Ramsey, *supra* note 8, at 357; *see also* Spiro, *supra* note 8, at 1246 (reviewing *Zschernig*'s doctrinal pedigree). *See generally* Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (giving underpinnings of doctrine); Chy Lung v. Freeman, 92 U.S. 275, 279-80 (1875) (supporting development of doctrine); Goldsmith, *Federal Courts*, *supra* note 8, at 1641-64 (reviewing history and reasoning behind federal common law of foreign relations); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 135-45 (1994).

270. *See* Spiro, *supra* note 8, at 1246-59; Ramsey, *supra* note 8, at 365-73.

271. *See* Spiro, *supra* note 8, at 1259-70.

affairs-preemption regime serves a rational purpose.[272] Others argue simply that dormant foreign affairs preemption is bad because it makes it more difficult to exert pressure on foreign regimes that violate human rights. Before responding to these arguments, I briefly outline the affirmative structural case for dormant foreign affairs preemption.

The structural case for dormant foreign affairs preemption is well encapsulated in Hamilton's dictum that "the peace of the WHOLE ought not to be left at the disposal of a PART."[273] Under international law, the nation is responsible for violations of international law by any of its parts. For this and related reasons, any conduct by states that offends foreign nations is likely to result in retaliation against the nation as a whole.[274] The decision whether to take action that is likely to offend foreign states would, if left to the states, be "consistently distorted [by] significant externalities."[275] While the benefits of such action would accrue to the state, the costs of the action—meaning the risk of retaliation—would be spread among the fifty states. "[S]tate-level actors, because they do not shoulder the consequences of their actions, will not take into account those consequences in the decision-making balance."[276] Only the national government is structured in such a way as to gauge accurately the costs and benefits to the nation of action likely to offend foreign nations.[277]

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272. *See* Ramsey, *supra* note 8, at 379.

273. *See* THE FEDERALIST NO. 80 (Alexander Hamilton).

274. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1297-98 (1996).

275. *See* Spiro, *supra* note 8, at 1247.

276. *Id.* Spiro adds: "These externalities will also tend to create information deficiencies; because the states will not shoulder the consequences of their conduct, they have less incentive to understand what those consequences will be. Indeed, a standard lament of state-level foreign policy activity is that it is based on insufficient expertise." *Id.*

277. For a vivid reminder of the imbalance to which Spiro refers, consider Governor James Gilmore's decision to execute Angel Breard in defiance of an order of the International Court of Justice and in the face of the Secretary of State's communication to him that compliance with the order was important to the safety of U.S. citizens traveling abroad. Gilmore explained that, "as Governor of Virginia my first duty is to ensure that those who reside within [Virginia's] borders . . . may conduct their lives free from the fear of crime." Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard at 2 (Apr. 14, 1998). Presumably, this interest of the citizens of Virginia outweighed, in the Governor's calculation, the interest of U.S. citizens traveling abroad, most of whom are presumably not citizens of Virginia. For a discussion of this incident, see generally Carlos Manuel Vázquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM.J. INT'L L. 683, 683-84 (1998) [hereinafter Vázquez, Breard *and Federal Power*]. Professor Kirgis has suggested that the Breard execution may have violated the *Zschernig* doctrine. *See* Kirgis, *supra* note 7, at 707. I have made the more limited argument that, contrary to the claim of the Solicitor General, the political branches of the federal government had the power to require Virginia to comply with the ICJ's order. *See* Vázquez, Breard *and Federal Power*, *supra*, at 683.

Of course, dormant foreign affairs preemption is not the only way to address this problem. The Framers plainly regarded this as one of the most severe problems with the regime of the Articles of Confederation, and the principal way they addressed it in the Constitution was by giving the federal government the power to make treaties and to legislate in the foreign relations area, by making the resulting treaties and statutes the supreme law of the land, and by expressly prohibiting certain activities by the states. The critics of dormant foreign affairs preemption argue that these steps are enough to protect us against the feared negative externalities.[278]

A structural defense of the *Zschernig* doctrine thus requires an explanation of why we cannot depend on the political branches to monitor state activity that might be offensive to foreign nations and to enact legislation to preempt such activity. The best argument relies on the key insight of the federalist critics of federal common law: The federal legislative process was deliberately made onerous in order to protect the prerogatives of the states.[279] The affirmative votes of two Houses of Congress plus the President are required, or a supermajority of both Houses without the President. The well-known political safeguards of federalism bias the legislative process in favor of the states. The Constitution in this respect sacrifices efficiency in the service of other values.[280] The obstacles the Constitution places in the way of legislative action to protect the states, however, make it difficult for the political branches to respond to state activity that offends foreign nations with the dispatch that would be necessary to prevent the feared adverse consequences. Because the stakes are so high in the foreign affairs area, direct judicial intervention in these situations is warranted.[281] Because this is not an area in which the states have any legitimate role to play, to permit the pro-state bias of the legislative process to operate in this context would be inappropriate.[282]

Peter Spiro recognizes—indeed, he affirmatively argues—that these considerations once provided a powerful justification for the *Zschernig* doctrine. However, he believes that the premises of the argument no longer hold, and that the doctrine should accordingly be abandoned. He argues

278. *See* Ramsey, *supra* note 8, at 370.

279. See *supra* text accompanying notes 67-69, 88-91.

280. *See* INS v. Chadha, 462 U.S. 919, 920 (1983).

281. *See, e.g.*, Spiro, *supra* note 8, at 1239; Ramsey, *supra* note 8, at 371 & n.122.

282. In addition to the "notorious difficulties of overcoming legislative inertia," Spiro notes that "the typical case will, almost by definition, pit foreign interests against domestic ones" and the foreign interests "are deprived of one of the most effective tools of influence, namely money and votes." Spiro, *supra* note 8, at 1253. *But cf.* Delahunty, *supra* note 8, at 48 (noting that foreign interests are represented by domestic proxies, such as importers). In my view, the problem is not so much that foreign interests are not represented, but that one of the most important domestic interests in these cases, the interest in harmonious international relations, is of the diffuse sort that tends to lose out in the political process. *See infra* note 351 and accompanying text.

that, because foreign states are now able to target their retaliation against individual states, foreign affairs activity by the parts no longer threatens the whole.[283] He offers as examples of targeted retaliation the steps taken by Mexico and Japan against California in retaliation for that state's laws concerning the treatment of immigrants and the taxing of foreign corporations, and steps taken by Europe and Canada against Texas to retaliate against its application of the death penalty.[284]

I am not persuaded. First, while considerations such as these might arguably justify *congressional* repudiation of dormant foreign affairs doctrine, courts seem particularly ill-suited to assess the significance of the developments Spiro describes, or indeed to making the factual determinations on which he bases his critique.[285] In any event, three instances of targeted retaliation seem an insufficient basis on which to discard the *Zschernig* doctrine, especially in the light of counter-examples offered by others.[286] Moreover, even if foreign states are able to limit their retaliation to the offending state, they still have the discretion under international law and practice to direct their retaliation more broadly, and they surely will do so if they deem it more effective. Spiro argues that states can be expected to target their retaliation to the offending state because targeted retaliation will achieve their goals more effectively.[287] The counterexamples show either that this is not always the case or that foreign states have not yet learned that lesson.

Finally, and perhaps most importantly, it would appear to be in the nation's interest to *resist* this trend. The Founders felt strongly that the nation would be better off if foreign states dealt with the United States as a unit.[288] Spiro has not shown why it would be in the nation's interest now for foreign states to deal with us separately. Indeed, his analysis suggests that it would not be. Spiro asserts that compliance with international-law norms would probably improve if his proposal were adopted because, being a powerful nation with a large market, the United States today can often get away with violating such norms. Individual states would be more responsive to attempts to discipline them.[289] This suggests that it may be in the interest of the international community for the United States to disband, but it fails to explain what's in it for the United States. Analo-

283. *See* Spiro, *supra* note 8, at 1261.

284. *See id.* at 1261-64.

285. Spiro's argument thus places him at odds with the critics of the dormant foreign affairs doctrine who stress the incapacity of judges to make foreign policy judgments. *See infra* Part IV(C). I share Spiro's view that the dormant foreign affairs doctrine does not in fact license foreign policy making by judges. *See* Spiro, *supra* note 8, at 1260. Spiro's basis for urging a judicial rejection of the doctrine, however, relies on foreign policy judgments that appear to me to be inappropriate for judges.

286. *See, e.g.*, Denning & McCall, *supra* note 257, at 12-13.

287. *See* Spiro, *supra* note 8, at 1267.

288. *See* Clark, *supra* note 274, at 1297.

289. *See* Spiro, *supra* note 8, at 1267-68.

gously, it may well be in the interest of consumers and competitors for Microsoft to be broken up, but Microsoft certainly does not believe a breakup is in its interest. Spiro forthrightly acknowledges that his proposal has the tendency to produce the disintegration of the Union.[290] He has not made the case that such disintegration would be good for the United States.

Spiro also argues that dormant foreign affairs doctrine is unnecessary today because, with the waning of the Cold War, the stakes of international friction are significantly lower than they were when *Zschernig* was decided.[291] Again, I have concerns about the propriety of judges (or academics) revising a constitutional default rule based on their perception of a diminution of the potential dangers of international friction. The issue should be left to the political branches. For what it is worth, this academic does not share Spiro's belief that the stakes are significantly lower today. Spiro's evaluation of the risks of international friction may have seemed reasonable when he made it in the winter of 1999. In the fall of 2001, it seems difficult to maintain that "the imperative of national defense" has "dissipate[d]" to the point where "[o]ne might question whether . . . vulnerability should concern us"[292] or that "survival is no longer so clearly at stake in foreign relations decision making."[293]

Michael Ramsey advances a different sort of structural critique of dormant foreign affairs doctrine. He acknowledges that the Framers wanted to place the ultimate responsibility for foreign affairs in the national government,[294] but he denies that they went so far as to disable the states from acting in the area in ways that do not conflict with the express prohibitions in the Constitution or with foreign policy affirmatively set by the political branches by legislation. He recognizes that it might have been better for the Framers to have adopted some sort of dormant foreign policy preemption,[295] but he argues that doctrines cannot be read into

290. He observes that, "[t]o the extent we no longer consider ourselves a nation in respect to other nations, perhaps we no longer need a strong bond of nationhood, or perhaps any bond at all." Spiro, *supra* note 8, at 1227.

291. *See id.* at 1223-24; *see also* Goldsmith, *Federal Courts*, *supra* note 8, at 1412.

292. *See* Spiro, *supra* note 8, at 1275.

293. *See id.* at 1223-24. I do not mean to endorse here the claim of some scholars that the events of September 11, 2001, will inevitably require a general revision of federalism doctrine in a nationalist direction. *Compare* Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001 at WK14, *with* Ernest Young, *The Balance of Federalism in Unbalanced Times: Should the Supreme Court Reconsider Its Federalism Precedents in Light of the War on Terrorism?*, *available at* http://writ.news.findlaw.com/commentary/20011010_young.html (last visited Nov. 1, 2001); Marci Hamilton, *Federalism and September 11: Why the Tragedy Should Convince Congress to Concentrate on Truly National Topics*, *available at* http://writ.news.findlaw.com/hamilton/20011025.html (last visited Nov. 1, 2001). I merely argue that these events call into question any effort to revise the federalism doctrine based on a perception that the risks of international friction are significantly lower today than during the Cold War.

294. *See* Ramsey, *supra* note 8, at 370.

295. *See id.* at 371.

the Constitution unless the absence of the doctrine would be "so fundamentally irrational that it could not have been the understanding of the constitutional generation."[296] He goes on to offer a rationale for permitting states to legislate in ways that intrude upon foreign policy as long as they have not been prohibited from doing so by statute. In his view, a no-dormant-foreign-affairs-preemption regime serves the rational purpose of protecting Congress' role in foreign policy-making from usurpation by the President.

Ramsey's structural defense of a no-dormant-preemption rule is based on what appears to me to be a misunderstanding of the dormant foreign affairs doctrine. Ramsey regards the doctrine as invalidating state laws that conflict or otherwise interfere with *substantive* foreign policies of the United States. When a substantive foreign policy has been made through the normal legislative process, dormant foreign affairs preemption is unnecessary because there will be actual, affirmative preemption.[297] Thus, Ramsey concludes that the significance of the dormant foreign policy doctrine (as he calls it) lies in its invalidation of state laws that interfere with foreign policies made by the President alone.[298] He concludes that a no-dormant-preemption rule serves the rational purpose of protecting Congress' prerogatives in the foreign affairs area from usurpation by the President.[299] He emphasizes that he does not claim that a no-dormant-preemption rule would be better, only that it would be rational.[300] Because a rational basis for the rule exists, the constitutional structure does not "*compel*" the dormant foreign affairs preemption doctrine.[301]

I disagree. First, as Ramsey appears to recognize, his structural argument depends ultimately on his textual and historical arguments. If the Constitution grants the President the power to make preemptive foreign policy without Congress, then his structural argument collapses. Thus, Ramsey goes on to offer textual and historical arguments for concluding that, while the Constitution does grant the President some independent powers in the foreign affairs area, it does not grant him an independent power to preempt state law.[302] Be that as it may, Ramsey's defense of a no-dormant-preemption rule ultimately fails because it is based on a subtle but critical misconception about the *Zschernig* doctrine. The doctrine does not invalidate state laws that interfere with substantive foreign policies of the United States. It invalidates state laws that threaten one particular foreign relations interest of the United States: its interest in harmonious international relations. The *Zschernig* doctrine presumes that the nation has such an interest, and it reflects the ideas that (a) this national interest

296. *See id.*
297. *See id.* at 376.
298. *See id.*
299. *See id.* at 378-79.
300. *See id.* at 378.
301. *See id.* (emphasis in original).
302. *See id.* at 403-29.

should prevail unless it is outweighed by countervailing national interests, and (b) the decision about whether countervailing national interests outweigh the interest in harmonious international relations must be made by the national political branches. In the absence of a decision by those branches to take or authorize threats to our international relations, the courts are entrusted to protect the national interest in harmonious international relations by invalidating state laws that pose a significant threat to such relations.[303]

So understood, the dormant foreign affairs doctrine (as I call it) takes no position on the scope of the President's independent powers in the foreign relations area. The limits on the President's powers, whatever they might be, can be enforced by the courts quite independently of the dormant foreign affairs doctrine.[304] There is no need to give a role to the states in enforcing those limits. Indeed, if the courts are ill-suited for foreign policy judgments,[305] the states are even more so. Without a rational explanation for permitting the states to engage in activity that significantly threatens the nation's international relations, Ramsey is left without a basis for rejecting dormant foreign affairs preemption, a doctrine that flows

303. To support his understanding of the *Zschernig* doctrine, Ramsey quotes the Court's statement that "[state] regulations must give way if they impair the effective exercise of the nation's foreign policy." *Zschernig*, 389 U.S. at 440, *quoted in* Ramsey, *supra* note 8, at 376. But the Court did not say here that state laws are invalid whenever they conflict with particular substantive foreign policies of the national government. In context, the Court clearly meant that such state laws impair the nation's ability to conduct its foreign policy effectively simply by producing international friction. *See Zschernig*, 389 U.S. at 440 (stating that Oregon's law "affects foreign relations in a persistent and subtle way"); *id.* at 441 (expressing concern about state laws that "disturb foreign relations"); *id.* (stating that Oregon law "has a direct impact upon foreign relations and may well adversely affect the power of the federal government to deal with [foreign relations] problems"). Indeed, the Oregon law was probably in sync with the general policy of the federal government at the time towards communist regimes, which was by no means friendly.

At one point, Ramsey suggests that partial toleration of the regime in Burma counts as a Presidential policy, see Ramsey, *supra* note 8, at 399 n. 214, albeit one that, in his view, states need not defer to (as it is merely a Presidential policy). If Presidential inaction counts as a presidential policy of toleration, then presumably congressional inaction would count as a congressional policy of toleration. If he would require the conflicting policies of the states to yield to such a policy, then he has in effect embraced the view of the dormant foreign affairs doctrine I defend in the text. What he would call a congressional policy of toleration, I would call a constitutional policy valuing international harmony in the absence of the articulation of a contrary policy by the federal political branches. My formulation has the advantage of describing the facts more accurately (it is not necessarily true that congressional inaction reflects a congressional policy of toleration), and avoids the related *Chadha* problems.

304. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding Algiers Accords on narrow grounds); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (invalidating President Truman's seizure of steel mills during Korean War). Thus, it is not true that "removing the states from foreign affairs broadens Presidential power." Ramsey, *supra* note 8, at 378-79.

305. *See infra* Part IV(C) (considering this argument).

from the "undeniable" premise that "[f]oreign policy is perhaps the definitive national issue."[306]

Finally, critics of the dormant foreign affairs doctrine argue that the doctrine has the unfortunate result of squelching state activity that can help improve human rights conditions in foreign countries.[307] In their solicitude for human rights abroad, critics of *Zschernig* on the right are joined by human rights activists and critics of global trade on the left, who have criticized the dormant foreign affairs doctrine on similar grounds.[308] If disabling states from imposing economic sanctions against oppressive foreign regimes would indeed retard the progress of human rights in such countries, I would agree that this would be unfortunate.[309] I note, however, that the interpretation of *Zschernig* I suggest here would not necessarily preclude states from taking purely expressive action to denounce foreign human rights violations.[310] Nor would it necessarily even condemn the sanctions struck down by the Court in *Crosby* itself, which conceivably might have been upheld under a market-participant exception, which may well be constitutionally required under current precedents.[311] On the other hand, the Massachusetts sanctions may have been illegal quite apart from either the Federal Burma Law or the dormant foreign affairs power, albeit under a statute that the plaintiff lacked standing to invoke.[312] If so, the claim that the dormant foreign affairs power hinders the progress of human rights in this context rings hollow; it does only if the states are willing to violate solemn treaty commitments and the federal government lacks the will to require compliance.

In any event, the concern over human rights in Burma that I share with the critics of dormant foreign affairs preemption is beside the point.

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306. Ramsey, *supra* note 8, at 371.

307. *See* Goldsmith, *Federal Courts*, *supra* note 8, at 1638 (critiquing doctrine as interfering with legitimate state objectives); Curtis A. Bradley & Jack L. Goldsmith, *Human Rights on the Eve of the Next Century: U.N. Human Rights Standards & U.S. Law: The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 368-69 (1997).

308. *See* Spiro, *supra* note 8, at 1259; Stumberg, *supra* note 213, at 117.

309. Compare the South Africa sanctions with the sanctions that have been in place against Cuba for forty-odd years. *See* GARY C. HUFBAUER, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 92-93 (2d ed. 1990) (comparing effectiveness of sanctions).

310. *See generally* Matthew Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1 (1999) (examining strength of federal power over foreign affairs in speech context). Even purely expressive activity condemning human rights violations abroad can have detrimental effects on our foreign relations, however. *See* Paul Glastris, *Armenia's History, Turkey's Dilemma*, WASH. POST, Mar. 11, 2001, at B01 (describing Turkey's anger over proposed resolution condemning genocide committed against Armenians). Moreover, *Zschernig* itself seemed primarily concerned about the problems caused by the purely expressive aspects of the Oregon law at issue in that case.

311. For further discussion, see *supra* Part III(A).

312. For further discussion, see *supra* Part III(B)(3).

Whether human rights would be advanced in places like Burma by laws such as that enacted by Massachusetts and, if so, at what cost to the nation's other foreign and domestic policy goals are quintessentially political questions which the critics of dormant foreign affairs preemption quite rightly argue should be made by Congress and not the courts. The Supreme Court in *Crosby* may have been correct in concluding that Congress implicitly made that judgment. It did not make that judgment when it decided to impose federal sanctions on Burma, but it may have implicitly made the judgment by failing to repudiate the dormant foreign affairs doctrine, and by legislating in this area in apparent reliance on the continued existence of that doctrine. In any event, the Court has articulated a sound constitutional default rule under which harmonious international relations prevail unless the federal political branches affirmatively determine otherwise.

C. *Functional Critiques*

Critics of *Zschernig* have also raised a variety of what I shall call functional critiques of the doctrine. They have argued that, in the light of globalization, a doctrine that depends on drawing a sharp line between domestic and foreign affairs is untenable. They have argued as well that judges lack the institutional capacity to make the sorts of foreign policy judgments that the dormant foreign affairs doctrine requires of them. They argue further that the dormant foreign affairs doctrine runs counter to the Court's turn to formalism in foreign relations law and to the political branches' increasing toleration of, and indeed deference to, foreign affairs activity by the states. I conclude that these critiques require, at most, a reformulation of dormant foreign affairs doctrine. I propose that the Court reformulate the *Zschernig* doctrine in a way that makes *Zschernig*'s vague "forbidden line" brighter. The Court should begin by holding that state sanctions that single out foreign states (or their citizens or those who do business with them) for unfavorable treatment are categorically forbidden unless affirmatively authorized by Congress.[313]

Zschernig's critics argue that the dormant foreign affairs doctrine is untenable because globalization makes it impossible to draw a line between domestic and foreign affairs.[314] In the light of globalization, they

313. *I express no opinion here about whether a procurement policy such as Massachusetts' should count as "sanctions" for purposes of this rule. I suggested in Part III(A) that it may be unconstitutional for Congress to impose greater burdens on the states than on private individuals performing like activities. If the Zschernig* rule I propose above were based directly on the Constitution, this constitutional limit would appear to be inapplicable. However, to the extent the rule is based on implicit congressional acquiescence in the *Zschernig* decision, the constitutional problem discussed in Part III(A) might arise.

314. *See* Young, *supra* note 99, at 177; Goldsmith, *Federal Courts*, *supra* note 8, at 1670-80. *Cf.* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 651 (2000) (noting distinction between foreign and domestic is increasingly unclear).

argue, a doctrine that bars the states from interfering in foreign affairs would sweep too broadly and invalidate too much traditional state regulation.[315] These arguments would support the rejection of a doctrine under which states were forbidden to legislate in a manner that affected foreign affairs, for it is true that practically anything that states (or, for that matter, large corporations) do has an effect on foreign affairs. But, although some courts have articulated the dormant foreign affairs doctrine in such broad terms,[316] this broad interpretation of *Zschernig* has never enjoyed widespread support. State law has traditionally governed matters that have a significant effect on foreign affairs, such as choice of law and enforcement of foreign judgments, and the courts have continued to regard such matters as governed by state law despite *Zschernig*.[317] Although scholars have argued forcefully that some such matters should be governed by federal common law,[318] the courts have yet to follow this advice. *Zschernig* has in fact been applied cautiously by most courts.[319]

Another argument against the dormant foreign affairs doctrine relies on the notion that courts are ill-suited to make determinations or judgments about foreign policy.[320] Such judgments, it is argued, should be

315. *See* Goldsmith, *New Formalism*, *supra* note 11, at 1413 (recognizing effects of doctrine may sweep into other areas).

316. *See* Tayyari v. N.M. State Univ., 495 F. Supp. 1365, 1376 (D.N.M. 1980); N.Y. Times Co. v. City of N.Y. Comm'n on Human Rights, 361 N.E.2d 963, 968 (N.Y. 1977) (plurality opinion).

317. *See* GARY BORN, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS 14, 938-39 (3d ed. 1996).

318. *See e.g.*, Daniel C.K. Chow, *Limiting* Erie *in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 211-14 (1988).

319. *See, e.g.*, Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739 (9th Cir. 2001), *petition for cert. filed sub nom.* Am. Ins. Ass'n v. Low, 70 U.S.L.W. 3026 (U.S. June 26, 2001) (No. 00-1926). The bête noire of *Zschernig*'s detractors did not even rely on *Zschernig*. *Zschernig*'s critics love to hate *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (1997). *See* Goldsmith, *Federal Courts*, *supra* note 8, at 1695-98; Ramsey, *supra* note 8, at 362; *see also* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994). The courts in those cases upheld the removal to federal court of tort actions brought by aliens against companies operating abroad on the ground that the cases raised "issues of international relations [that] are incorporated into federal common law." *Sequihua*, 847 F. Supp. at 63; *see also Torres*, 113 F.3d at 543 (relying on *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986)). The holdings of these cases are problematic because, even if it were true that the cases raised issues of federal common law, it is highly doubtful the plaintiffs' suits "arose under" those principles within the meaning of the general federal question statutes. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 154 (1908) (articulating well-pleaded complaint rule). *Cf.* Carlos M. Vázquez, Comment, Verlinden B.V. v. Federal Bank of Nigeria*: Federal Jurisdiction Over Cases Between Aliens and Foreign States*, 82 COLUM. L. REV. 1057, 1070-74 (1982) (arguing that cases raising *Zschernig* and *Sabbatino* issues "arise under" federal law within the meaning of Art. III of Constitution, but not necessarily within meaning of federal question statutes). Badly reasoned decisions that did not even rely on *Zschernig* are hardly a compelling basis for rejecting that decision.

320. *See* Bilder, *supra* note 3, at 830; Goldsmith, *Federal Courts*, *supra* note 8, at 1668 (stating that judges may be incapable of deciding foreign relation); John C.

made by the political branches, meaning Congress and/or the President. Again, the premise has some force, but it does not follow that the dormant foreign affairs doctrine must be rejected. The dormant foreign affairs doctrine does not license the courts to make foreign policy; rather, it requires them to ensure that only the national political branches conduct foreign policy.[321]

Of course, if the dormant foreign affairs doctrine does not invalidate all state activity that has an effect on foreign affairs, but only those state activities that have an unduly adverse effect on foreign policy, then it arguably does require the courts to make a sort of foreign policy judgment: they must determine the extent to which a particular state activity has an effect on foreign relations and whether that interference is excessive (under whatever standard). It may be true that the courts are ill-equipped to make such determinations. But the courts' incapacity for making foreign policy judgments is not of a constitutional dimension. I do not understand the critics to be arguing that a *federal statute* invalidating state laws that unduly interfere with the federal government's conduct of foreign affairs could not constitutionally be enforced in the courts. The problem, if there is one, is that the courts have been invalidating such statutes without prior authorization by Congress. But, as already noted, the stare decisis doctrine tells us that Congress' failure to repudiate the dormant foreign affairs doctrine may be tantamount to authorization. If courts are indeed ill-suited to such judgments, this may warrant the conclusion that *Zschernig* was wrongly decided, but it does not follow that it should be overruled. The existence of *Zschernig* has made it unnecessary for Congress to enact a general "foreign affairs preemption" statute.

The problem is not so much that the courts are worse than the legislature at making such judgments,[322] but that, given the open-ended nature of the inquiry, vesting the judiciary with such authority undermines the rule of law values of certainty, predictability and consistent treatment of like cases. Both problems would be mitigated by a move towards a formalist approach to the dormant foreign affairs power. Such a move would be

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Yoo, *Federal Courts As Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 764-69 (1997).

321. *See* Spiro, *supra* note 8, at 1256.

322. I stress that my argument here concerns competence as opposed to legitimacy. I am assuming for purposes of this analysis that there is a national interest in harmonious international relations based either on the Constitution or on stare decisis that would legitimate judicial involvement but for concerns about the competence of judges to make judgments about foreign relations. Thus, while the legislature clearly possesses greater legitimacy in making these judgments (a superiority that is manifested in the recognition that Congress may permit state activity that would otherwise be preempted by the *Zschernig* doctrine), it is not clear that the courts are institutionally less competent than Congress at detecting and responding to state activity that poses a threat to harmonious international relations. *See* Spiro, *supra* note 8, at 1255 (noting that "forces that distort political-branch decision making in these controversies" and opining that judges "seem . . . institutionally competent to decide such cases").

in keeping with the trend in the Court's jurisprudence both inside and outside the foreign relations area.[323] Formalism entails a greater reliance on formal categories and a disdain for balancing tests. The categorical approach leads to the adoption of potentially over- or under- inclusive rules, but such over- or under-inclusiveness is thought to be necessary because of the courts' incapacity for engaging in case-by-case judgments and the instability or unpredictability of a case-by-case approach. A doctrine invalidating state laws that unduly interfere with foreign affairs, and thus requiring a case-by-case assessment of the foreign relations impact of a particular state law, would be in tension with the recent turn to formalism. But a rule invalidating a particular *category* of state law that the Court concludes is especially likely to cause foreign relations problems, such as state laws that impose sanctions on particular foreign countries, would be fully consistent with it and would diminish the opportunities for the lower courts to engage in foreign policy judgments. Of course, in non-sanctions cases, the lower courts would still have to consider in the first instance whether a particular category of state law is likely to cause severe foreign relations problems in the long term. But, if the Court were to embrace the categorical approach suggested here, the relevant inquiry would be about a general category of state laws, and would not turn on the particular circumstances that gave rise to the case at hand (although of course those facts might be instructive). A lower court's conclusion that a given category of state law is preempted would be more likely to reach the Supreme Court, and would also be more likely to capture the attention of Congress, which can revise the decision if it wishes.

Critics of the dormant foreign affairs doctrine cite the Supreme Court's recent decisions reflecting greater formalism in the foreign affairs area as evidence that the Court shares the critics' view that courts are ill-suited to foreign affairs judgments of the sort the doctrine makes relevant.[324] While this may be true, a wholesale rejection of the doctrine does not follow. Indeed, these cases show that formalism does not entail judicial obliviousness to potential foreign relations problems. For example, in *EEOC v. Arabian American Oil Co.*,[325] the Court reaffirmed the presumption against extraterritoriality, the justification for which is the desire to avoid conflicts with foreign nations.[326] *Aramco* has been criticized as sweeping too broadly,[327] but that is characteristic of formalist approaches. By rejecting the case-by-case approaches that predominate in modern choice of

323. *See* Goldsmith, *New Formalism*, *supra* note 11, at 1424 (noting shift from Cold War approach to current, more formalistic approach).

324. *See id.* at 1424.

325. 499 U.S. 244 (1991) [hereinafter *Aramco*].

326. *See Arabian Am. Oil*, 499 U.S. at 248 ("It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.").

327. *See* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 202-03.

law, the Court revealed its aversion to case-by-case judgments in this area. But, in this case, formalism resulted in a rule that *overprotects* the interest in harmonious foreign relations.[328] The Court might similarly approve of a doctrine invalidating all state sanctions against foreign countries, even if this overprotects the undoubted federal interest in harmonious foreign relations.[329]

A move to a formalist version of dormant foreign affairs preemption finds a precedent in the shift in the Court's approach to the act of state doctrine between *Banco Nacional de Cuba v. Sabbatino*[330] and *W.S. Kirkpatrick Co. v. Environmental Tectonics, Corp.*[331] The act of state doctrine is, indeed, a close cousin of the dormant foreign affairs doctrine.[332] It is a federal common law rule that requires the courts to give effect to the acts of foreign governments even if they might otherwise be questioned as illegal or contrary to public policy.[333] As explained in *Sabbatino*, the doctrine has its basis in the separation of powers; it serves to protect the political branches' conduct of foreign relations from interference by the courts.[334] But, as formulated in *Sabbatino*, the doctrine required courts to determine whether refusing to give effect to certain acts of foreign states would be perceived as an insult by those states and thus interfere unduly with our foreign relations.[335] Like the *Zschernig* doctrine, the act of state doctrine has been controversial, and scholars have vociferously called for its abandonment.[336] Critics argued that courts were ill-suited to make the kinds of judgments the doctrine called for, judgments about the extent to which certain acts would offend foreign states.[337] As with the *Zschernig* doctrine,

328. To be sure, other decisions opt for categorical rules that underprotect this interest. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). Whether either or both of these decisions were decided correctly is beside the point. I mention them merely to show that formalism does not necessarily require rejection of a dormant foreign affairs doctrine.

329. If the Court were to replace the current standard with a series of bright-line rules, the formal approach could well underprotect the interest in harmonious foreign relations by leaving gaps. The Court might opt instead to supplement the categorical rules with an open-ended catch-all standard. While doing so threatens to vitiate the benefits of the move to a more formal approach, the Court could minimize this problem by reserving the catch-all standard for egregious cases.

330. 376 U.S. 398 (1964).

331. 493 U.S. 400 (1990).

332. *See* Goldsmith, *Federal Courts*, *supra* note 8, at 1630 (noting that *Sabbatino* and *Zschernig* "involved the exercise of functionally identical judicial lawmaking powers").

333. *See Sabbatino*, 376 U.S. at 422.

334. *Id.* at 423.

335. *See* F. & H.R. Farman-Farmaian Eng'rs Consulting Firm v. Harza Eng'g Co., 882 F.2d 281, 287 (7th Cir. 1989) ("For an American court to say to Iran, 'We won't pay any attention to your seizure of the Consulting Firm without compensation to the owners, because it's the sort of act that is abhorrent to Americans,' would be a slap in the face of the Iranian regime.").

336. *See, e.g.*, Michael Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986).

337. *See id.* at 376-84.

some lower courts applied the doctrine broadly.[338] For example, some courts held that the doctrine barred courts from adjudicating a case if doing so would entail a questioning of a foreign state's motivations.[339] In *Kirkpatrick,* the Court addressed these concerns by modifying the doctrine rather than abandoning it. The Court self-consciously adopted a formalist approach. It rejected the idea that the "policies underlying the doctrine" were "a doctrine unto themselves," requiring a case-by-case examination of the likelihood that a foreign state would be offended.[340] Instead, it read *Sabbatino* as having relied on the relevant policies in order to articulate a general rule that could be applied across a range of cases with little need for individualized foreign policy judgments.[341]

The Court in *Crosby* could have similarly struck down the Massachusetts Burma Law on the basis of an interpretation of *Zschernig* as barring state laws that single out one or a group of foreign states (or their citizens or those who deal with them) for unfavorable treatment. Such an interpretation would have comported comfortably with the reasoning of the Court in *Zschernig,* and it seems to capture the Justices' central concern in that case.[342] Interpreting *Zschernig* to condemn all laws that single out particular foreign states or groups of foreign states for unfavorable treatment would also distinguishes virtually all of the Supreme Court cases cited by *Zschernig*'s critics as counter-examples, as such cases involved state laws that treated all aliens equally badly.[343] This interpretation would have avoided the need for a case-by-case assessment of the way particular state laws have been implemented or whether such laws are likely to cause offense, or whether that matters in a particular instance. Such a basis for invalidating the Massachusetts law, moreover, would have been narrower

338. *See* Susan Morrison, *The Act of State Doctrine and the Demise of International Comity,* 2 IND. INT'L & COMP. L. REV. 311, 326 (1991) (discussing lower court application of doctrine).

339. *See* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 453 (2d Cir. 1987) (holding adjudication barred if state's motives are questioned); Clayco Petroleum v. Occidental Petroleum, 712 F.2d 404, 407 (9th Cir. 1983) (same).

340. W.S. Kirkpatrick Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 409 (1990).

341. *See id.* at 406-09.

342. Both of the lower courts in *Crosby* relied heavily on the "singling-out" feature of the Massachusetts Burma Law. *See supra* text accompanying notes 38-40. Their emphasis of this feature is consistent with the Court's statement in *Zschernig* that laws that have only "some incidental or indirect effect in foreign countries" remained valid. *See* Zschernig v. Miller, 389 U.S. 429, 433 (1968). It is true that the Oregon law at issue in *Zschernig* did not single out any particular foreign state or group of foreign states, but the Court in *Zschernig* invalidated the law because it had been applied by the courts in a way that singled out communist states for disfavorable treatment. *See id.* at 440.

343. *Cf.* Chirac v. Chirac, 15 U.S. 259, 269 (1817) (involving 1780 Act of Maryland entitled "An act to declare and ascertain the privileges of the subjects of France residing within this state," but singling French citizens out for *more* favorable treatment).

than the rationale given by the Court as it would have had no implications for preemption doctrine in other contexts.

Critics of the dormant foreign affairs doctrine also claim that the political branches have already revealed their disapproval of the doctrine's premise that state activity impinging on foreign relations should be invalid. They argue that Congress' approach in the last decades to resolving conflicts between foreign affairs and the interests of states demonstrates its desire that the latter take precedence.[344] As noted above, when Congress implemented the AGP, as well as the other World Trade Organization agreements, it specifically provided that state laws could not be challenged on the basis of these agreements except by the United States.[345] Indeed, the federal government made the substantive obligations of these agreements applicable only to the states that agreed to be bound by them.[346] Similarly, in ratifying human rights treaties in the past few decades, Congress has routinely included in such treaties a "federalism" understanding. The understanding attached to the International Covenant on the Elimination of All Forms of Racial Discrimination is illustrative:

> The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.[347]

The exact meaning and effect of this understanding is a matter of some uncertainty,[348] but the understanding does appear to reflect deference to state interests. The federalism understandings have been accompanied by declarations to the effect that the treaties are not to be regarded as self-executing. Although the meaning and effect of these declarations is also disputed,[349] they seem to reflect a preference for non-judicial enforcement of these treaties. Together, these provisions may be read to reflect the political branches' wish to preserve state autonomy even in the area of

344. *See* Delahunty, *supra* note 8, at 47; Stumberg, *supra* note 11, at 524.

345. 19 U.S.C. § 3512(c)(1) (1994). *See generally* Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 MINN. J. GLOBAL TRADE 45, 63-72 (1998).

346. *See* Tiefer, *supra* note 345, at 62.

347. S. EXEC. REP. NO. 103-29, at 25 (1994).

348. *Compare* Vázquez, *supra* note 149, at 1355-58 (understanding appears to mean that national government will not exercise legislative power it possesses), *with* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 455-56 (2000) (understanding notifies parties of constitutional limits of federal legislative power).

349. *Compare* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 220 (1999) (arguing that declarations only purport to deny private rights of action), *with* Bradley & Goldsmith, *supra* note 348, at 401 (arguing that declarations make covenant judicially unenforceable).

foreign affairs, particularly when it comes to attempts by private parties and foreign governments to challenge state action in court. *Zschernig*'s critics argue that these provisions rebut any inference that Congress acquiesces in the judicial invalidation of state laws that, in the view of the courts, unduly interfere with the national government's conduct of foreign affairs.

To the contrary, these provisions illustrate that the states have been remarkably successful at protecting their interests through the political process, even in the area of foreign affairs. Indeed, the states can arguably be expected to be more successful in the foreign affairs realm than in the purely domestic realm, as the interests that compete most directly with the states' are usually defended by entities that are not represented in Congress.[350] Of course, the nation as a whole has an interest in harmonious international relations, but this is the sort of diffuse interest that tends to lose out in the political process.[351] In any event, the critics' claims that these provisions show a congressional intent to permit state foreign affairs activity in other areas suffers from the same analytical flaw that the critics ascribe to the defenders of *Zschernig*. Congress' approval of state foreign affairs activity in these statutes shows that Congress authorized state foreign affairs activity to the extent permitted by these provisions but not further. The fact that Congress had the power to go further and did not is, indeed, one of the reasons for retaining the dormant foreign affairs doctrine. The states' success in protecting their interests in this context is, if anything, a reason not to be too concerned about the judicial articulation of a dormant foreign affairs doctrine along the lines sketched above. It suggests that the states are perfectly capable of making their preferences felt and achieving the reversal in the political process of any judicial decision holding a class of state laws preempted as likely to interfere unduly with foreign relations.

V. CONCLUSION

I have argued here that, contrary to the claims of some critics of *Zschernig*, *Crosby* does not portend the withering of the dormant foreign affairs doctrine. Indeed, it is only a slight exaggeration to say that *Crosby* is a dormant foreign affairs case in disguise. The approach to obstacle preemption employed by the Court in *Crosby* is subject to the same objections that critics of federal common law have directed at that doctrine. If the Massachusetts Burma Law posed an obstacle to the achievement of the full purposes of the Federal Burma Law, then it similarly posed an obstacle to achievement of the goals of the Constitution itself. At a minimum, and

350. *See* Spiro, *supra* note 8, at 1253-54.

351. This, of course, is standard public choice theory. *See, e.g.*, Carol M. Rose, *Property As the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 342 (1998) ("People with relatively narrow but intense interests can capture the political process from those with wide but diffuse interests." (citation omitted)).

contrary to the Court's protestations, the outcome in *Crosby* seems explicable only through the application of a presumption that state statutes in the foreign affairs area are preempted by federal statutes on the same subject. If so, then *Zschernig* has at most been transformed into a clear statement rule, requiring Congress to say so explicitly if it wants state laws in the foreign affairs area to remain in force. *Crosby* would have rested on sounder, and narrower, grounds had the Court interpreted *Zschernig* to bar state laws that single out a state or group of states for unfavorable treatment. Such laws are the opposite of laws that have but an indirect or incidental effect on foreign nations. They directly contravene *Zschernig*'s affirmation that states may not conduct their own foreign policies.[352]

352. *See supra* text accompanying note 34.