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## Time for a New Approach? Federalism and Foreign Affairs After "Crosby v. National Foreign Trade Council"

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# Time for a New Approach? Federalism and Foreign Affairs After *Crosby v. National Foreign Trade Council*

## ABSTRACT

*On June 19, 2000, in Crosby v. National Foreign Trade Council—a much-anticipated decision involving the intersection of federalism and foreign relations—the U.S. Supreme Court struck down a Massachusetts law restricting state purchases from companies doing business in Burma. Crosby represents the Court's first consideration not only of local selective purchasing laws but, more importantly, its first consideration of the sort of subnational sanctions first developed by state and local governments during the anti-apartheid campaign of the 1980's. Thus, Crosby may pose an obstacle to human rights activism by local governments using economic sanctions to punish perceived human-rights offenders.*

*Because the Court's decision in Crosby was based on narrow, non-constitutional grounds, however, it probably will not stand as the final word on foreign policymaking by state and local actors. Indeed, the question of the extent to which the Constitution constrains local foreign policymaking remains unresolved, and the debate over this issue continues unabated. This debate has resulted in the formation of two camps: the majority, or conventional, view and the minority, or revisionist, view.*

*Adopting the arguments of the revisionist camp, this Note contributes to the debate by proposing a new approach to balance re-emergent federalism concerns against the need for a unified and consistent national foreign policy. As long as the Supreme Court continues to endorse a legitimate role for the states in domestic affairs, pressure will mount from commentators, local governments, and activists for the Court likewise to return to an understanding of foreign affairs that is closer to that which prevailed during the founding and first century of U.S. history. Furthermore, globalization and the growing ability of nations to target their retaliation against subnational actors have greatly weakened the functional argument for abrogating states' rights in the field of foreign affairs.*

*Given these trends, this Note argues that despite the setback of Crosby, it seems only a matter of time until the tide*

turns, and courts and commentators endorse a framework of foreign affairs law analysis more closely resembling that which prevailed in the United States for much of its history.

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### I. INTRODUCTION

On June 19, 2000, in a much-anticipated decision involving the intersection of federalism and foreign relations, the U.S. Supreme Court struck down a Massachusetts law restricting state purchases from companies doing business in Burma.<sup>1</sup> *Crosby v. National*

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

*Foreign Trade Council* represents the Supreme Court's first consideration of the sort of subnational sanctions developed by state and local governments during the anti-apartheid campaign of the 1980s.<sup>2</sup> Because it invalidated a state law imposing sanctions on a foreign nation, "the Court's ruling represents a significant setback for human rights activism on that model."<sup>3</sup>

Yet, because the Court's decision in *Crosby* was based on narrow, non-constitutional grounds, commentators have not viewed it as the final word on foreign policymaking by state and local actors.<sup>4</sup> Indeed, as one frequent commentator on foreign affairs law has observed, "the broader question of constitutional constraints on state and local foreign policymaking comes away from *Crosby* largely untouched."<sup>5</sup> It is no surprise, then, that commentators believe that the debate over how federalism principles should apply in the realm of foreign relations will continue unabated.<sup>6</sup> This debate has resulted in the formation of two camps: the majority, or conventional, view and the minority, or revisionist, view.

Adopting the arguments of the revisionist camp, this Note attempts to contribute to this debate by proposing a new approach to balancing federalism concerns against the need for a unified and consistent national foreign policy.

## II. BACKGROUND

### A. *The Massachusetts Law*

Massachusetts enacted the law invalidated by *Crosby* in 1996.<sup>7</sup> The law prohibited state agencies, in most instances, from buying goods or services from anyone doing business with the Union of Myanmar (Burma).<sup>8</sup> The law included domestic and foreign corporations and broadly defined "doing business."<sup>9</sup> In this respect, the law was similar to divestment laws passed by state and local

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2. Peter J. Spiro, *U.S. Supreme Court Knocks Down State Burma Law*, ASIL INSIGHTS (June 2000), at <http://www.asil.org/insights/insigh46.htm>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. MASS. GEN. LAWS ch. 7, §§ 22G-M (1996) (repealed 2000).

8. *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 289 (D. Mass. 1998).

9. MASS. GEN. LAWS ch. 7, §§ 22G-M.

governments in the United States during the 1980s as a way to oppose South Africa's apartheid regime.<sup>10</sup>

The procurement sanctions statute authorized the Massachusetts Operational Services Division (OSD) to establish a "restricted purchase list" of companies "doing business with Burma" as defined in the statute.<sup>11</sup> Once OSD made a preliminary finding that a company was doing business with Burma, the company was placed on the restricted list, unless it was able to refute the finding.<sup>12</sup> Under the Massachusetts law, the Commonwealth could buy services or goods from a "restricted purchase list" company only when: (1) the procurement was essential and the restriction would eliminate the only bid or offer;<sup>13</sup> (2) the Commonwealth was purchasing certain medical supplies;<sup>14</sup> or (3) there was no "comparable low bid or offer" by an unrestricted bidder.<sup>15</sup> In bidding situations, the statute precluded a restricted list company from winning a bid with the Commonwealth unless its offer was at least ten percent lower than the lowest bid by an unrestricted company.<sup>16</sup>

Massachusetts passed the bill—known locally as the "Burma law"—after Aung San Suu Kyi, the Nobel-prize-winning leader of Burma's democratic opposition, implored foreign companies not to do business with Burma's ruling junta.<sup>17</sup> The Massachusetts legislature "obliged her by dusting off an old anti-apartheid sanctions bill, changing the words 'South Africa' to 'Burma' . . . and passing it."<sup>18</sup>

### B. *Similar State and Local Laws*

According to one study, the federal, state, and local governments of the United States have imposed 142 unilateral sanctions on forty-one countries since 1993.<sup>19</sup> According to another study commissioned by the National Association of Manufacturers (NAM), sanctioned countries represent 2.3 billion potential consumers of U.S. goods and

10. Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 343 (1999).

11. *Baker*, 26 F. Supp. 2d at 289; MASS. GEN. LAWS ch. 7, §§ 22G-M.

12. MASS. GEN. LAWS ch. 7, §§ 22G-M.

13. *Id.* § 22H(b).

14. *Id.* § 22I.

15. *Id.* § 22H(d).

16. *Baker*, 26 F. Supp. 2d at 289.

17. *A State's Foreign Policy: The Mass that Roared*, ECONOMIST, Feb. 8, 1997, at 32 [hereinafter *The Mass that Roared*].

18. *Id.*

19. *Going Slow on Embargoes*, Editorial, DENV. ROCKY MTN. NEWS, Aug. 11, 1997, at 39A.

services and \$790 billion worth of export markets, or ten percent of the world's total.<sup>20</sup>

Human rights activists and government officials modeled their campaign to mobilize state and local governments in the campaign against Burma on laws aimed at South Africa's apartheid regime; some 130 cities and twenty-eight states in the mid-1980s passed such legislation, much of the legislation similar to the Massachusetts enactment.<sup>21</sup> Recently, more than a dozen cities and counties, including New York City and Berkeley, California, have followed Massachusetts and adopted sanctions to prohibit government agencies from buying goods and services from companies doing business in Burma, China, and Nigeria.<sup>22</sup> California, Connecticut, New Jersey, New York, North Carolina, Rhode Island, and Texas all considered similar sanctions at the state level before ultimately rejecting them.<sup>23</sup>

Among the state and local governments that joined Massachusetts' campaign against Burma by passing or considering "selective purchasing ordinances" were the cities of Berkeley, New York, Oakland, and San Francisco, as well as the governments of smaller towns, such as Madison, Wisconsin.<sup>24</sup> To date, more than a dozen cities have passed anti-Burma legislation.<sup>25</sup>

One consistent feature of these sanctions is that "they go beyond barring the political entity itself from dealing with the targeted country to imposing the dreaded secondary boycott on companies that do business in the targeted country."<sup>26</sup> All of these local initiatives "employ immediate economic disengagement as a punitive measure against the oppressive regime in Rangoon."<sup>27</sup> As discussed below,

20. NATIONAL ASSOCIATION OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES, 1993-1996 (1997).

21. Leon T. Hadar, *U.S. Sanctions Against Burma: A Failure on All Fronts*, CATO Trade Policy Analysis No. 1 (Mar. 26, 1998), at <http://www.free-trade.org/pubs/pas/tpa-001.html>; see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1638 (1997).

22. Hadar, *supra* note 21.

23. *Id.*

24. The story of one city's decision to sanction companies doing business in Burma illustrates the moralistic and sometimes quixotic nature of many of these laws. The Los Angeles City Council passed a selective purchasing law similar to Massachusetts over a month and a half *after* the federal district court in Massachusetts ruled that such measures violated the Constitution. Ignoring this ruling, the Los Angeles Council voted unanimously on December 16 to ban companies that do business in Burma from bidding for city contracts. Jim Lobe, *Los Angeles Votes Burma Sanctions Despite Court Ruling*, ECONET (Dec. 16, 1992), at [http://www.igc.org/igc/en/hg/burma\\_sanctions.html](http://www.igc.org/igc/en/hg/burma_sanctions.html).

25. Hadar, *supra* note 21.

26. David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties With Burma*, 30 VAND. J. TRANSNAT'L L. 175, 177 (1997).

27. *Id.*

this feature raises questions concerning the states' invocation of the market participant exception to the dormant commerce clause. The National Foreign Trade Council's (NFTC) challenge to the Massachusetts law in *Crosby v. National Foreign Trade Council* is particularly important because it represents the only legal challenge to selective purchasing laws.<sup>28</sup>

### C. Domestic Opposition to the Laws

While opponents of economic sanctions are critical of the efficacy of sanctions imposed by the federal government, they are especially troubled by the questionable constitutionality of state and local trade curbs aimed at foreign countries and companies, such as Massachusetts' Burma law.<sup>29</sup> To such critics, local action in matters that touch on foreign affairs represents the replacement of the old, unified conduct of U.S. foreign policy with an interest group-based foreign policy that permits small but vocal activist groups to impose their political agendas on U.S. foreign policy.<sup>30</sup> Or, as one journalist has stated, "trying to monitor the foreign policy of 50 states and 7,284 municipalities is, to put it mildly, a nightmare for companies and national governments alike."<sup>31</sup>

U.S. businesses opposed the passage of state and local sanctions against Burma and other nations on economic grounds.<sup>32</sup> Apple Computer, for example, eliminated its operations in Burma in October 1996, citing the threat to its business posed by Massachusetts' adoption of the sanctions law.<sup>33</sup> Eastman Kodak and Hewlett-Packard likewise cited the law as the reason for their decisions to divest Burmese holdings.<sup>34</sup>

### D. International Protests Against the State and Local Laws

Massachusetts' "blacklist" also included major Japanese and European firms, including Guinness, Nissan, Siemens, Sony, and

28. Farhan Haq, *Massachusetts Defends Sanctions Laws*, INTER PRESS SERVICE (July 29, 1998), at [http://www.oneworld.org/ips2/jul98/18\\_22\\_067.html](http://www.oneworld.org/ips2/jul98/18_22_067.html).

29. Hadar, *supra* note 21 (criticizing the fact that "Massachusetts and more than a dozen counties and cities, including New York City and Berkeley, California, have already adopted sanctions that bar government purchases from companies that do business in China, Burma, and Nigeria" and that "California, Texas, New York, New Jersey, North Carolina, Connecticut, and Rhode Island all considered similar sanctions before rejecting or tabling them").

30. *Id.*

31. Kevin Whitelaw, *The Very Long Arm of the Law: Is the World Ready for 7,284 Secretaries of State?*, U.S. NEWS & WORLD REPORT, Oct. 14, 1996, at 57.

32. Tom Mintier, *U.S. businesses criticize Burma sanctions*, CNN INTERACTIVE (Apr. 24, 1997), at <http://www.cnn.com/WORLD/9704/24/burma/index.html>.

33. *Id.*

34. *Id.*

Toyota.<sup>35</sup> After its passage, the law provoked protests from Japan and the European Union, both of which challenged the measure in the World Trade Organization as a violation of U.S. obligations under the WTO Agreement on Government Procurement.<sup>36</sup> Among other complaints, these governments raised the issue that by passing its selective procurement law, Massachusetts violated the General Procurement Agreement, an international accord signed by Massachusetts and thirty-eight other U.S. states.<sup>37</sup> According to the terms of the agreement, procurement contracts must be based solely on economic criteria.<sup>38</sup>

Although the WTO case was put on hold while U.S. courts adjudicated the constitutionality of the law—and was then withdrawn after the Supreme Court invalidated the law—commentators expected at the time the EU and Japan filed their complaints that those nations would “take the United States to task” if the law were upheld.<sup>39</sup>

### E. Federal Sanctions Against Burma

#### 1. Congressional Action

Before noting the specific provisions of the federal government’s anti-Burma sanctions, it bears mentioning that, according to numerous commentators, “unilateral sanctions are now the tool of choice for U.S. foreign policy.”<sup>40</sup> The government’s use of unilateral sanctions as a foreign policy tool has proliferated greatly since the demise of the Soviet Union, becoming “a central trend in U.S. foreign policy in the post-Cold War era.”<sup>41</sup> Since 1918, the United States has imposed unilateral economic sanctions against other nations over 115 times.<sup>42</sup> Sixty-one of those sanctions were imposed during the Clinton administration.<sup>43</sup> Even more remarkably, over seventy-five countries, constituting over two-thirds of the world’s population, are

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35. *The Mass that Roared*, *supra* note 17, at 32.

36. Haq, *supra* note 28.

37. *Id.*

38. *Id.*

39. Missy Ryan, *10 Sovereignty Issues Now Before the WTO*, 31 NAT’L J. 3384 (1999), available at <http://nationaljournal.com/members/news/1999/11/1119nj3.htm>.

40. James Finch et al., *With a Broad Brush: The Federal Revolution of Sanctions Against Burma*, 22 HAMLINE J. PUB. L. & POL’Y 323, 336 (1999); see, e.g., Hadar, *supra* note 21; Bruce Bartlett, *Trade Sanctions Normally Don’t Work*, DETROIT NEWS, Mar. 19, 1997, at A18.

41. Hadar, *supra* note 21.

42. Finch et al., *supra* note 40, at 336.

43. *Id.*



now subject to unilateral economic sanctions imposed by the federal government.<sup>44</sup>

In 1990, Congress passed the Customs and Trade Act, which enabled the President to impose new sanctions against Burma.<sup>45</sup> Then-President Bush, however, declined to act on the authorization.<sup>46</sup>

Due to the growing outcry against the treatment of Burmese citizens, in September 1996—three months after Massachusetts enacted its law—Congress passed a statute imposing federal sanctions against Burma.<sup>47</sup> The law authorized the President to ban all new investment by U.S. companies in Burma and directed him to develop a comprehensive, multilateral strategy to help restore democracy in Burma.<sup>48</sup> This amendment authorized the President to prohibit new investment in Burma, unless he found that imposing such a ban would be contrary to U.S. interests.<sup>49</sup>

## 2. Executive Action

On May 20, 1997, “in response to the Burmese Government’s large scale repression of and violence against the Democratic opposition,” President Clinton issued Executive Order 13,047, declaring a national emergency with respect to Burma.<sup>50</sup> The order took effect the following day and banned most new U.S. investment in Burma.<sup>51</sup> The order did, however, exempt from the prohibition the sale or purchase of goods or services to or from Burma, if the transaction did not result in an equity interest in a Burmese enterprise for the U.S. citizen.<sup>52</sup>

Despite variations in implementation, the Congressional measure and the President’s Executive Order of May 1997 share a basic prohibition on U.S. investment in Burma—the ban on “new investment” by a “United States person” after May 21, 1997, where such activity is “undertaken pursuant to an agreement . . . with the Government of Burma or a nongovernmental entity in Burma.”<sup>53</sup> To be subject to the ban on investment in Burma, such an agreement

44. *Id.* at 336-37.

45. Hadar, *supra* note 21.

46. *Id.*

47. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to -167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-128, § 101(c), 110 Stat. 3009-121 to -172).

48. *Id.* § 570(b).

49. *Id.*

50. Exec. Order No. 13,047, 3 C.F.R. 202 (1997), *reprinted in* 50 U.S.C.A. § 1701 app., 219-21 (2000).

51. *Id.*

52. *Id.*

53. *Id.*

also must include the following: (1) entering into a contract that includes the economic development of resources located in Burma; (2) entering into a contract providing for the general supervision and guarantee of another person's performance of a contract to develop resources located in Burma; (3) buying an ownership share in the economic development of Burmese resources; and (4) entering into a contract to participate in royalties, earnings, or profits from the economic development of Burmese resources, without regard to the form of participation.<sup>54</sup>

#### F. *Opposition to Federal Sanctions Against Burma*

Opponents of unilateral economic sanctions by the United States against Burma argue that such sanctions antagonize U.S. allies, impair U.S. economic interests, and ultimately are ineffective.<sup>55</sup> Opponents also criticize both the federal law and the Executive Order, together with its subsequently propounded regulations, for failing to explain how the sanctions will improve human rights in Burma.<sup>56</sup> These critics further argue that the sanctions remove the President's flexibility in dealing with the Burmese government, since the administration may not remove the sanctions, once implemented, without Congressional approval.<sup>57</sup>

More dramatically, opponents of the sanctions argue that prohibiting investment in Burma has pushed Burma into the arms of China.<sup>58</sup> The Chinese government is interested in bringing Burma into its political orbit because of Burma's strategic location near the Bay of Bengal.<sup>59</sup> Proponents of the view that Burma is rapidly developing closer ties with China as the West isolates it note China's construction of radar bases on Burma's two islands in the Indian Ocean.<sup>60</sup> Indeed, some U.S. allies oppose isolating Burma because they fear that the policy will aid China's attempt to enlist it as a military ally.<sup>61</sup>

Observers most concerned with the sanctions' effects on U.S. interests add that the cumulative result has been virtually to eliminate U.S. influence in Burma, particularly on such issues as human rights and narcotics control. These critics contend that the U.S. government's<sup>62</sup> advice—often a moderating influence in

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54. *Id.*

55. Finch et al., *supra* note 40, at 326; *see also* Hadar *supra* note 21.

56. Finch et al., *supra* note 40, at 337.

57. *Id.* at 338.

58. *Id.* at 337.

59. *Id.*; *see also* Hadar, *supra* note 21.

60. Peter W. Rodman, *The Burma Dilemma*, WASH. POST, May 29, 1997, at A23.

61. *Id.*

62. Finch et al., *supra* note 40, at 338.

developing countries—has been largely ignored in Burma since the federal government imposed sanctions.<sup>63</sup>

Not surprisingly, NAM strongly criticized the Executive Order implementing the sanctions, as well as the congressional enactment that authorized it.<sup>64</sup> After Congress enacted federal sanctions against Burma, the Association of Southeast Asian Nations (ASEAN) rejected the law's proposal for economic sanctions against Burma to punish its ruling junta, insisting that ASEAN's policy of "constructive engagement" with Burma would encourage the country to relax its repression of pro-democracy activists.<sup>65</sup> No doubt, NAM's criticism of the Burmese sanctions was motivated by studies like the one conducted by a presidential commission in 1985, which estimated that the United States was losing \$4.7 billion in exports annually from such controls.<sup>66</sup> Another study, done in 1994 by the Council on Competitiveness, considered eight cases of trade sanctions; the study found a loss of six billion dollars in sales annually, resulting in the elimination of as many as 125,000 export-related jobs.<sup>67</sup>

At best, observers estimate that sanctions have worked only about one-third of the time since World War I.<sup>68</sup> The impact of sanctions has declined since 1990, although they remain popular foreign policy tools among politicians and the public.<sup>69</sup> These dual features—ineffectiveness and popularity—have led one business lobbyist to refer to unilateral U.S. sanctions as "chicken soup diplomacy."<sup>70</sup> Nevertheless, while many critics of the federal sanctions have challenged their efficacy, none have questioned their constitutionality.

### III. THE FEDERAL COURTS' ANALYSIS OF U.S. FOREIGN AFFAIRS JURISPRUDENCE IN THE *NATIONAL FOREIGN TRADE COUNCIL* CASE

In May 1998, the NFTC, an industry association of almost six hundred U.S. companies engaged in foreign trade, challenged the Massachusetts law, arguing that it was an unconstitutional and preempted by the federal statute and Executive Order imposing

63. *Id.*

64. Mintier, *supra* note 32.

65. *Asian forum rejects Burma sanctions*, CNN INTERACTIVE (July 23, 1996), at <http://www.cnn.com/WORLD/9607/23/burma/index.html>.

66. Bruce Bartlett, *Trade Sanctions Normally Don't Work*, DETROIT NEWS, Mar. 19, 1997, at A11.

67. *Id.*

68. Dick Kirschten, *Economic Sanctions: Speaking Loudly But Carrying Only a Small Stick*, 29 NAT'L J. 14 (1997).

69. *Id.*

70. *Id.* (quoting William C. Lane, chief lobbyist for Caterpillar, Inc.).

sanctions on Burma.<sup>71</sup> At the time the NFTC filed the lawsuit, its President alleged that the Massachusetts law “directly intrudes on the exclusive power of the national government to determine foreign policy, discriminates against companies engaged in foreign commerce, and conflicts with the policies and objectives of the federal statute imposing sanctions on [Burma].”<sup>72</sup> The NFTC predicted that the lawsuit would be an important test of the constitutionality of state and local sanctions.<sup>73</sup>

In November 1998, the Chief Judge of the U.S. District Court for Massachusetts struck down the Massachusetts law as unconstitutional, on the grounds that it impermissibly infringed on the federal government’s power to regulate foreign affairs.<sup>74</sup> The District Court invalidated the Massachusetts law on two grounds: (1) the Constitution grants the federal government exclusive authority over foreign affairs; and (2) the Massachusetts law impermissibly burdened U.S. foreign relations.<sup>75</sup> In support of the first proposition, the court cited the existence of numerous constitutional provisions evidencing the Framers’ intent to vest plenary power over foreign affairs in the federal government.<sup>76</sup> The District Court also noted the Supreme Court’s consistent recognition of the exclusive role of the federal government in foreign affairs.<sup>77</sup>

In support of its finding that the Massachusetts law impermissibly burdened U.S. foreign relations, the court cited *Zschernig v. Miller*<sup>78</sup> for the proposition that a law having more than an indirect or incidental effect in foreign countries and a great potential for disruption or embarrassment will be found to

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71. Haq, *supra* note 28 (quoting NFTC President Frank Kittredge).

72. *Id.*

73. *Id.*

74. *Nat’l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998). The NFTC saluted the ruling, claiming that “our system of government was not designed to allow the 50 states and hundreds of municipalities to conduct their own individual foreign policies.” *USA: Judge Strikes Down Burma Sanctions*, AP WIRE (Nov. 8, 1998), available at <http://www.corpwatch.org/trac/corner/worldnews/other/231.html> (quoting NFTC President Frank Kittredge).

75. *Baker*, 26 F. Supp. 2d at 290.

76. *Id.* (citing U.S. CONST. art. I, § 8, cls. 1, 3 (giving Congress sole authority to provide for the common defense), U.S. CONST. art. II, § 2, cl. 2 (authorizing the President to make treaties and appoint ambassadors), and U.S. CONST. art. I, § 10, cls. 1-3 (prohibiting the states from making treaties, entering into agreements with other countries, or imposing duties on imports and exports)).

77. *Id.*; see, e.g., *United States v. Pink*, 315 U.S. 203, 233 (1942) (stating that “power over external affairs is not shared by the States; it is vested in the national government exclusively”); see also *United States v. Belmont*, 301 U.S. 324, 331 (1937) (noting that “[c]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states”).

78. *Zschernig v. Miller*, 389 U.S. 429 (1968).

unconstitutionally impinge on the federal government's exclusive authority to regulate foreign affairs.<sup>79</sup>

On appeal, the First Circuit affirmed the District Court's invalidation of the Massachusetts law as a violation of the exclusivity doctrine and a burden on federal conduct of foreign affairs.<sup>80</sup> In addition, the First Circuit also found that the Massachusetts law violated both the dormant Foreign Commerce Clause and the more general dormant foreign affairs power, in accord with the Supreme Court's 1968 decision in *Zschernig v. Miller*.<sup>81</sup> *Zschernig* stands for the proposition that state laws are unconstitutional, insofar as they pose more than an incidental or indirect effect on foreign relations, even in the absence of any federal law or policy on the issue.<sup>82</sup>

Last June, the Supreme Court affirmed the invalidation of Massachusetts' Burma law.<sup>83</sup> However, Justice Souter based his opinion for a unanimous Court on the reasoning that the state measure was preempted by the federal sanctions regime—and thus abstained from examining the full array of constitutional issues.<sup>84</sup> The Court declined “to speak to field preemption as a separate issue . . . or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause.”<sup>85</sup>

The Court held that Massachusetts' law undermined three elements of the federal Burma sanctions regime,<sup>86</sup> stating that any state law that creates an obstacle to executing Congress' objectives is preempted.<sup>87</sup> First, the Court found that the state law undermined the flexibility, authority, and discretion expressly afforded the President by Congress in the statute imposing sanctions.<sup>88</sup> This “plenitude of Executive authority” was dispositive of the preemption issue for the Court: the “fullness” of the authority granted the President by Congress “shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to [state laws].”<sup>89</sup>

79. *Baker*, 26 F. Supp. 2d at 290-91 (citing *Zschernig*, 389 U.S. at 434-35).

80. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (affirming *Baker*, 26 F. Supp. 2d 287).

81. *Zschernig*, 389 U.S. at 441; *Natsios*, 181 F.3d at 76-77.

82. *Zschernig*, 389 U.S. at 441 (holding that “even in the absence of a treaty, a State's policy may disturb foreign relations . . .”).

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

84. *Id.* at 373.

85. *Id.* at 374.

86. *Id.* at 373.

87. *Id.* at 372.

88. *Id.* at 373-74.

89. *Id.* at 376.

Second, Justice Souter outlined substantive differences between the state and federal approaches.<sup>90</sup> Federal sanctions banned only new investment in Burma, while the state law penalized pre-existing operations.<sup>91</sup> Furthermore, the federal ban targeted only U.S. companies, while the state law extended to foreign businesses as well.<sup>92</sup> To the Court, these differences were not neutralized by the fact that the state and federal sanctions shared the same goals, or by the possibility of complying with both sets of restrictions.<sup>93</sup>

Finally, the opinion found the state law at odds with Congress' intent that the President undertake multilateral efforts to bring democracy to Burma.<sup>94</sup> On this score, Justice Souter highlighted evidence that state measures such as the Massachusetts law had in fact proved a distraction to international efforts on the Burma front.<sup>95</sup>

Because the Court based its decision on Congressional intent, *Crosby* does not explore the limits of state and local action in other foreign policy contexts. The Court carefully refused to speculate on how it would have ruled on the anti-apartheid divestment measures passed by many states in the 1980s.<sup>96</sup> In the face of the Court's failure to confront directly all the constitutional issues present in *Crosby*, the debate over how federalism principles should apply in the realm of foreign relations is unlikely to subside.

#### IV. U.S. FOREIGN RELATIONS AND FEDERALISM

##### A. *Foreign Affairs Exceptionalism: The Orthodox View*

The legal analysis of U.S. foreign relations has historically differed from the analysis of domestic law.<sup>97</sup> Early analysts of the Constitution insisted that the Framers intended national uniformity in dealing with international issues.<sup>98</sup> This helps to explain why foreign affairs law appears immune to the resurgence of federalism in the courts.<sup>99</sup> Indeed, as scholars, attorneys, and judges have rethought—some would say rediscovered—the role of federalism in

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90. *Id.* at 373-74.

91. *Id.* at 374.

92. *Id.* at 379.

93. *Id.* at 376.

94. *Id.* at 380.

95. *Id.* at 384-85.

96. *Id.* at 387.

97. Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

98. Harold G. Maier, *Preemption of State Law: A Recommend Analysis*, 83 AM. J. INT'L. L. 832 (1989).

99. Goldsmith, *supra* note 21, at 1617.

the U.S. legal system, the gap between the constitutional analysis of domestic laws and foreign affairs laws has remained greatest on issues of federalism.<sup>100</sup>

In recent years, the Supreme Court has reexamined the relationship between Congress and the states in a variety of contexts and reinvigorated federalism by constraining or invalidating Congressional actions as an intrusion on state power.<sup>101</sup> Despite this spate of new thinking on federalism, however, the Court's emerging concern with rediscovering state rights through analysis of text and original intent has not spilled over into an equally probing inquiry into state rights in areas touching upon foreign affairs. Nevertheless, this discrepancy is not entirely surprising, given that most legal scholars are accustomed to thinking about U.S. federalism and states' roles largely in domestic terms.<sup>102</sup>

Thus, despite the reemergence of federalism as a valid and even guiding legal principle, few have challenged the proposition that states have little or no role to play on the international stage.<sup>103</sup> One commentator has termed this "the exclusivity principle, under which the federal government alone enjoys the capacity to conduct the nation's foreign relations."<sup>104</sup> Others refer to the belief that foreign affairs is exclusively the province of the federal government as the orthodox view.<sup>105</sup> Regardless of its label, this notion has come to dominate U.S. foreign policy jurisprudence since the early years of the twentieth century, with the Supreme Court and most commentators finding state and local laws to be unconstitutional if

100. Spiro, *supra* note 97, at 1224.

101. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1100 (1999); *see, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as an unconstitutional expansion of congressional power under § 5 of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not require the states to administer a federal regulatory program); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Commerce Clause did not support federal legislation criminalizing knowing possession of a firearm in a school zone); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress does not possess the power under the Constitution to compel a state to dispose of radioactive waste generated within its borders).

102. Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1441-42 (1994).

103. Spiro, *supra* note 97, at 1224. According to at least one prominent historian of foreign affairs jurisprudence, the distinction between domestic constitutional analysis and foreign affairs law has long existed: "Federalism . . . appeared irrelevant to the conduct of foreign affairs even before it began to be a wasting force in American life generally—before we became one nation economically, and moved toward welfare government disregarding state lines, before the power of the States was theirs only by grace of Congress and by political realities rather than constitutional compulsion." LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 228 (1972).

104. Spiro, *supra* note 97, at 1224.

105. Goldsmith, *supra* note 21, at 1617.

they impede the federal government's ability to conduct foreign policy.<sup>106</sup>

A justification for the exclusivity principle commonly invoked by orthodox commentators on foreign affairs law is the purported need for the United States to "speak with one voice" in foreign relations.<sup>107</sup> As this adage indicates, the rule is justified as much by functional concerns as by purely legal arguments; without constraints on state power, individual states will be free to conduct their own foreign policies, which may result in adverse consequences for all.<sup>108</sup>

Adhering to the orthodox view, the Supreme Court has consistently protected the role assigned to the federal government in the area of foreign affairs as an exclusive one.<sup>109</sup> Indeed, on every major question involving federalism and foreign affairs between 1900 and World War II, the Court ultimately resolved the issue in favor of the Executive as the nation's principal foreign policymaker.<sup>110</sup>

This trend has continued to the present, with only one recent sign that the revival of federalism may affect foreign affairs.<sup>111</sup> That sign came in 1998, when the Supreme Court denied a stay of execution to Angel Breard, a Paraguayan citizen executed by the Commonwealth of Virginia.<sup>112</sup> The Court denied the stay even though Virginia had failed to provide Breard with consular notice, as required by the Vienna Convention on Consular Relations,<sup>113</sup> and even though the International Court of Justice issued a nonbinding order to the United States to delay the execution.<sup>114</sup> Interestingly, in *Breard*, the Departments of State and Justice issued amicus briefs agreeing with Virginia that the federal government lacked any

106. Ramsey, *supra* note 10, at 342 (citing Lewis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984)).

107. See generally Martin S. Flaherty, *Are We to be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999) (criticizing the argument that states should not be preempted entirely from acting in ways that implicate foreign affairs).

108. Spiro, *supra* note 97, at 1225.

109. *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 290 (D. Mass. 1998); see, e.g., *United States v. Pink*, 315 U.S. 203, 233 (1942) (holding that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively"); see also *United States v. Belmont*, 301 U.S. 324, 331 (1937) (stating that "[c]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states").

110. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999).

111. Bradley, *supra* note 101, at 1101.

112. *Breard v. Greene*, 523 U.S. 371, 372-75 (1998).

113. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 293-94.

114. *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States)*, 1998 I.C.J. 99 (Interim Protection Order of Apr. 9), *reprinted in* 37 I.L.M. 810, 819 (1998).



constitutional power to interfere in Virginia's decision to exercise its core police power of execution.<sup>115</sup> Nevertheless, the Court was not swayed by the federal government's acquiescence in Virginia's action.<sup>116</sup>

### B. *The Revisionist View*

Despite its ascendancy, some commentators have criticized the exclusivity principle.<sup>117</sup> In particular, scholars have questioned the principle's rationale in light of the dramatic changes that have occurred in international politics during the last ten years.<sup>118</sup> Proponents of this argument concede that the Cold War raised the stakes of international diplomacy too high to allow states to undermine the federal government's direction of U.S. foreign relations.<sup>119</sup> However, given the end of the Cold War, the demise of the Soviet Union, and the increasing extent to which a global economy and global communications blur the line between foreign and domestic affairs, revisionists argue that it may be time to reevaluate American foreign affairs law.<sup>120</sup> They propose a new framework, in which states assume the status of demi-sovereigns under international law.<sup>121</sup> The call for a re-examination of the relationship among the federal, state, and local governments on matters of international affairs is only likely to increase, as globalization makes separating domestic and foreign spheres for purposes of federalism analysis more difficult.<sup>122</sup>

Although the exclusivity principle is firmly embedded in the orthodox view of U.S. foreign affairs law, its basis in the Constitution is uncertain.<sup>123</sup> The orthodox view draws much of its strength from a functional argument in support of federal exclusivity in foreign affairs. The need for uniformity in foreign affairs is so great, the argument runs, that it "seems overwhelmingly to mitigate against a constitutional regime permitting innumerable local jurisdictions to chart their own cacophony of conflicting policies."<sup>124</sup>

This functional argument finds its legal justification in the vague confidence that there must be a broad constitutional principle that

115. Bradley, *supra* note 101, at 1101.

116. *Id.*

117. Spiro, *supra* note 97, at 1225 (citing *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298 (1994)).

118. Spiro, *supra* note 97, at 1225; see generally Goldsmith *supra* note 21.

119. Spiro, *supra* note 97, at 1241 (noting that the Cold War "brought about the high mark of federal exclusivity . . .").

120. Bradley, *supra* note 101, at 1089.

121. Spiro, *supra* note 97, at 1225.

122. Friedman, *supra* note 102, at 1442.

123. *Id.* at 1466-71.

124. Ramsey, *supra* note 10, at 344.

makes foreign policy exclusively a national preserve.<sup>125</sup> This view is not without support from the Framers. In particular, adherents frequently cite James Madison's famous dictum in this regard: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations."<sup>126</sup>

The revisionist foreign affairs jurisprudence challenges the functional rationale of the federal exclusivity principle.<sup>127</sup> It also questions the central premise underlying foreign relations law, arguing that "the Constitution's assignment of foreign relations powers to the federal government entails a self-executing exclusion of state authority."<sup>128</sup> Indeed, the most radical revisionists contend that there is no generalized, non-Article VI preemption of state action in foreign policy matters.<sup>129</sup> They further argue that under the original understanding of the Constitution, state laws interfering with federal foreign policy should stand despite the interference, unless preempted in the ordinary constitutional manner.<sup>130</sup>

Most conflicts between federalism and foreign affairs arise when a state's exercise of authority clearly allocated and reserved to it under the Tenth Amendment affects U.S. foreign affairs.<sup>131</sup> This fact makes it especially important to distinguish between exclusive federal power and plenary federal power.<sup>132</sup> The Constitution establishes plenary federal power over foreign affairs by five means. Under Article I, section 8, clauses 1 and 3 of the Constitution, Congress possesses sole authority to provide for the common defense and regulate commerce with foreign nations.<sup>133</sup> Article II, section 2, clause 2 authorizes the President to make treaties and appoint ambassadors.<sup>134</sup> Article I, section 10, clauses 1 through 3 prohibit the states from executing treaties, entering into agreements with other countries, or imposing duties on imports and exports.<sup>135</sup> Article VI, section 1, clause 2 establishes the supremacy of these federal enactments over state laws,<sup>136</sup> and Article III extends the federal judicial power to cases involving these federal enactments and to other transnational controversies.<sup>137</sup> Together, these provisions give

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125. *Id.* (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889)).

126. THE FEDERALIST No. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987).

127. *Id.*

128. Goldsmith, *supra* note 21, at 1641-42.

129. Ramsey, *supra* note 10, at 346.

130. *Id.*

131. Maier, *supra* note 98, at 833.

132. Goldsmith, *supra* note 21, at 1619.

133. U.S. CONST. art. I, § 8, cls. 1, 3.

134. *Id.* art. II, § 2, cl. 2.

135. *Id.* art. I, § 10, cls. 1-3.

136. *Id.* art. VI, § 1, cl. 2.

137. *Id.* art. III.

the federal government comprehensive power to conduct foreign relations without interference from the states.<sup>138</sup>

### C. Foreign Affairs Jurisprudence: The First One Hundred Years

The principles governing foreign relations jurisprudence were not always so clearly in favor of forcing states to vacate the diplomatic arena and leave the federal government as the sole U.S. participant on the world stage.<sup>139</sup> As late as the turn of the century, foreign policy jurisprudence was based on three primary assumptions, all of which may appear odd by today's standards.<sup>140</sup> Most notably, courts treated the exercise of foreign relations powers as a constitutional exercise, controlled by the enumerated and reserved powers provided in the Constitution.<sup>141</sup> Also striking in earlier jurisprudence was the then-dominant view that, although the Constitution specifically conferred the treaty power on the federal government and prohibited the states from entering into treaties, the exercise of any foreign relations powers by the federal government nevertheless needed to respect the reserved powers of the states—powers reserved to them as sovereigns by the Constitution.<sup>142</sup>

The third principle that informed foreign policy jurisprudence prior to twentieth century was the belief that the principal means to enter into international agreements was the treaty-making process.<sup>143</sup> As mentioned earlier in the description of the federal government's plenary powers to make foreign policy, the Constitution delineates the treaty-making process,<sup>144</sup> distributes the responsibility for making treaties between the President and the Senate,<sup>145</sup> and forbids the states from engaging in separate treaty-making.<sup>146</sup> Taken together, these assumptions

produced what can be called a 'treaty-centered' consciousness in the orthodox regime of constitutional foreign relations jurisprudence at the turn of the twentieth century. Courts and commentators assumed that most international agreements would be treaties, that most agreements

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138. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840) (explaining that "one of the main objects of the Constitution [was] to make us, as far as regarded our foreign relations, one people, and one nation").

139. Goldsmith, *supra* note 21, at 1622. Indeed, "contrary to the suggestions of many courts and scholars, there was no judicially enforceable, self-executing federal foreign relations power for the first 175 years of our constitutional history." *Id.*

140. White, *supra* note 110, at 8.

141. *Id.* at 8-9.

142. *Id.* at 9.

143. *Id.*

144. U.S. CONST. art. I, § 8, cls. 1-3.

145. *Id.* art. II, § 2, cl. 2.

146. *Id.* art. I, § 10, cl. 1.

would be entered into by the federal government, and that all agreements would be subject to the limitations of the Constitution.<sup>147</sup>

Because foreign affairs jurisprudence operated under these three assumptions, constitutional analysis of foreign affairs cases was similar to that of domestic police power cases.<sup>148</sup>

While this reasoning may seem simplistic today, it functioned well prior to the development of the enormous foreign policymaking apparatus at the disposal of the President, which includes the creation or tremendous growth of such executive branch agencies as the Department of State, Department of Commerce, Central Intelligence Agency, and National Security Agency. The separation-of-powers paradigm embraced by foreign policy jurisprudence at the turn of the century anticipated that the federal government's conduct of foreign relations powers would be easily characterized, because that jurisprudence presupposed that treaties, initiated by the President and ratified by the Senate, and tariff legislation, initiated by Congress, would compose essentially the entire spectrum of U.S. foreign policy.<sup>149</sup>

This paradigm provided considerable room for states to operate in matters implicating foreign relations. Indeed, throughout the nineteenth century, states "engaged in a series of legislative efforts that were unmistakably the province of foreign affairs."<sup>150</sup> These efforts included criminal extradition, immigration regulation, and retaliation against foreign nations for restricting domestic corporations' opportunity to do business in sanctioned nations.<sup>151</sup> The considerable power wielded by states over matters that involved foreign affairs but did not infringe upon the federal government's plenary powers led one historian of U.S. foreign affairs jurisprudence to conclude that:

Orthodox late nineteenth-century constitutional jurisprudence took for granted that the exercise of even enumerated federal powers would take place against a backdrop of state reserved powers. This meant that considerable room existed for the potential exercise of state power in areas, including foreign affairs, where the national government had been granted, but did not exercise, plenary power. And not only did states exercise foreign relations powers, late nineteenth- and early twentieth-century courts and commentators viewed the exercise of national foreign affairs powers as raising the same specter of potential encroachment into the residuum of reserved state power that was raised by the exercise of national powers in domestic cases. Orthodox

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147. White, *supra* note 110, at 9.

148. *Id.*

149. *Id.* at 12.

150. *Id.* at 23.

151. *Id.*

constitutional foreign relations jurisprudence was characterized by a highly developed reserved-powers-centered consciousness.<sup>152</sup>

Despite its domination of U.S. foreign affairs jurisprudence for the first one hundred years of U.S. history, this separation-of-powers paradigm came under stress as the nation's presence on the world stage grew. It was abandoned completely in the transformation of foreign affairs jurisprudence that occurred early in this century.<sup>153</sup>

#### D. *Foreign Affairs Jurisprudence in The American Century*<sup>154</sup>

The transformation of U.S. foreign affairs law that occurred during the early part of the twentieth century represented a significant departure from the orthodox view that prevailed in the nineteenth century.<sup>155</sup> The themes that characterized nineteenth century U.S. foreign affairs jurisprudence—the perception of foreign affairs as a constitutional exercise, governed by enumerated and reserved powers, an emphasis on the treaty-making process, and a healthy respect for the reserved powers of the states under the Tenth Amendment—were abandoned in the twentieth century, giving rise to a new, orthodox view of foreign affairs.<sup>156</sup> Three themes dominate the orthodox view of foreign affairs law in the twentieth century: (1) Presidential preeminence in foreign affairs; (2) the irrelevance of federalism restraints on federal government foreign affairs powers, sometimes known as foreign affairs exceptionalism; and (3) judicial lawmaking to protect federal prerogatives in foreign affairs.<sup>157</sup>

The elevation of the Executive to a dominant position in the conduct of U.S. foreign affairs was endorsed most famously in *United States v. Curtiss-Wright Export Corp.*<sup>158</sup> In *Curtiss-Wright*, the Supreme Court upheld the constitutionality of a Congressional resolution authorizing the President to place a ban on the sale of

152. *Id.* at 21-22.

153. *See id.* at 11.

154. The term "American Century" was coined by Henry Luce, founding publisher of *Life* magazine and influential political commentator and activist. *See* MICHAEL BARONE, *OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN* 158 (1990).

155. Bradley, *supra* note 101, at 1090 (noting that "Ted White has given us an illuminating account of the transformation in American foreign affairs law that occurred during the early parts of the twentieth century"); *see generally* White, *supra* note 110. *But c.f.* Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999) (arguing that the orthodox view that developed during the twentieth century was not, in fact, a radical break from the nineteenth century orthodox view).

156. Bradley, *supra* note 101, at 1091 (describing this as "the twentieth-century view of American foreign affairs law").

157. *Id.*

158. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *see* Bradley, *supra* note 101, at 1091.

arms by U.S. companies to countries engaged in conflict in Central America.<sup>159</sup> The Court rejected the nondelegation argument raised by the resolution's opponents, reasoning that "as the sole organ of the federal government in the field of foreign relations," the President requires special flexibility and discretion in guiding U.S. foreign affairs.<sup>160</sup> More significantly, the Court also expressed the view that in some instances, the federal government's power over the nation's foreign affairs does not depend on affirmative grants of power from the Constitution; rather, they are derived from the notion that these powers passed to the nation as a whole on its founding, "as a member of the family of nations."<sup>161</sup> *Curtiss-Wright* is particularly important because it represents the first time that the Supreme Court endorsed the proposition that a general foreign affairs power resided in the federal government.<sup>162</sup>

For orthodox students of foreign affairs jurisprudence, the revisionist view poses a particular threat to the President's predominant role in charting the diplomatic course of the United States, since it strips him of some Executive prerogatives that have accreted through the years.<sup>163</sup> Thus, "when the Supreme Court speaks of non-Article VI preemption of state activities that 'impair the effective exercise of the Nation's foreign policy,' it means the *President's* foreign policy—because, of course, state activities impairing congressional foreign policy or treaty-based foreign policy would be preempted by Article VI."<sup>164</sup>

A second component of the twentieth century orthodox view is the apparent irrelevance of federalism to foreign affairs.<sup>165</sup> The idea that state action is preempted by foreign affairs does not depend on textual arguments, because the absence of state power in the field predates the adoption of the Constitution. Instead, it is based on the proposition that, since the colonization of the United States, the citizens of the states acted as one in matters of foreign affairs.<sup>166</sup>

Under this analysis, any state statute that has more than an incidental or indirect effect on foreign countries is preempted by the powers of the federal government.<sup>167</sup> Significantly, the federal

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159. *Curtiss-Wright*, 299 U.S. at 320.

160. *Id.* at 320; see Bradley, *supra* note 101, at 1091-92.

161. *Curtiss-Wright*, 299 U.S. at 318.

162. Maier, *supra* note 98, at 832.

163. See generally Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295 (criticizing the injection of federalism analysis into foreign affairs jurisprudence).

164. Ramsey, *supra* note 10, at 347 (quoting *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)) (emphasis in original).

165. Bradley, *supra* note 101, at 1093.

166. Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 508-09 (1987).

167. *Id.* at 509.

government need not exercise its powers in foreign affairs for a court to preempt state laws:

The Court has located principles teaching 'that the Constitution itself excludes such state intrusions even when the federal branches have not acted.' This 'dormant' foreign policy power requires a court to determine the likely effect on foreign policy that a state statute will have. These determinations, however, must be made without reference to any particular federal statement on the matter, whether it be a treaty, federal statute, or executive proclamation. With no text from which to glean federal intention to preempt, a court must resort to a balancing of state interests against the impact of the state law on foreign affairs concerns—a test not unlike that used in the dormant commerce clause cases.<sup>168</sup>

An early but famous example of this view is the Supreme Court's decision in *Missouri v. Holland*,<sup>169</sup> in which the Court implicitly endorsed the idea that Congress' treaty power is not subject to federalism limitations.<sup>170</sup> This line of reasoning is in keeping with the preemption doctrine that dominates modern foreign affairs jurisprudence.

More recently, in *Zschernig v. Miller*,<sup>171</sup> the Supreme Court invalidated a state law that unquestionably would be constitutional in a purely domestic context. In *Zschernig*, the Court struck down a state statute because the Court believed it had a direct impact upon foreign relations and might adversely affect the power of the federal government to conduct foreign policy<sup>172</sup>—this despite the fact that both political branches of the federal government supported the law as a valid exercise of state police power.<sup>173</sup> Moreover, the Court cited no showing of an adverse effect on relations with East Germany, the nation with whom U.S. foreign policy ostensibly might suffer as a result of the state action.<sup>174</sup> *Zschernig* represents the Supreme Court's last major pronouncement on federal preemption of state law based on structural analysis, at least in the province of foreign affairs.<sup>175</sup>

The third major component of the twentieth century orthodox view is the notion that courts should not only review legislative actions but also make law when necessary to protect the national government's prerogative in foreign affairs.<sup>176</sup> The justification for this notion is that since "the nation must speak with one voice, not

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168. *Id.*

169. *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920).

170. Bradley, *supra* note 101, at 1093-94.

171. *Zschernig v. Miller*, 389 U.S. 429 (1968).

172. *Id.* at 441.

173. Bradley, *supra* note 101, at 1095.

174. Maier, *supra* note 98, at 836.

175. *Id.*

176. Bradley, *supra* note 101, at 1095.

fifty . . . judge-made federal foreign relations law constitutes that voice until the federal political branches say otherwise.”<sup>177</sup>

The main case supporting the conventional view of the role of the federal judiciary in foreign affairs is *Banco Nacional de Cuba v. Sabbatino*, in which the Court held that federal common law incorporates customary international law (CIL) and, thus, that international law trumps state law.<sup>178</sup> Orthodox adherents regard CIL as self-executing federal common law, which courts may apply without Congressional approval or enactment.

This conception is essentially as follows. Foreign affairs is a category distinct from domestic affairs. Although the Constitution limits federal power in domestic affairs, federal power is plenary and exclusive with respect to foreign affairs. This exclusive federal foreign affairs power encompasses the interpretation and application of CIL. If the federal political branches have not embodied CIL in a federal treaty or statute, the judicial arm of the federal government should interpret and apply CIL as a matter of federal common law, subject only to subsequent federal political branch revision. Federal courts have thus applied CIL without political branch authorization . . .<sup>179</sup>

In *Sabbatino*, the Court relied on a structural analysis of the Constitution to find that state authority may be preempted by the federal exclusivity principle even when the state action does not actually interfere with the national conduct of foreign affairs.<sup>180</sup> *Sabbatino's* is important because it represents the Court's clear recognition that the judiciary, in exercising its federal common law powers, need not demonstrate actual state interference with federal decision making or conflict with existing national policy; instead, courts may rely upon the logic of the constitutional structure to resolve matters of national-state conflict in foreign affairs.<sup>181</sup>

*Sabbatino* and *Zschernig* marked a significant break with prior law.<sup>182</sup> Nevertheless, since those decisions, scholars as well as lower courts have embraced with enthusiasm the idea of a judge-made, federal common law of foreign relations.<sup>183</sup>

This doctrine of a federal common law of foreign relations also has been applied under the auspices of the dormant Foreign Commerce Clause.<sup>184</sup> Preemption analysis under the dormant Foreign Commerce Clause involves an anti-discrimination determination similar to that made in preemption analysis under the

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177. Goldsmith, *supra* note 21, at 1621.

178. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964).

179. Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2261 (1998).

180. Maier, *supra* note 98, at 835-36.

181. *Id.*

182. Goldsmith, *supra* note 21, at 1649.

183. *Id.* at 1632.

184. *Id.* at 1637.



dormant domestic Commerce Clause: the court asks whether the state act facially discriminates against foreign commerce or has substantial discriminatory effects.<sup>185</sup>

In its application to state laws that intersect with foreign affairs, however, the dormant Commerce Clause analysis "imposes an additional, and independent, prohibition: the state . . . must not prevent the federal government from speaking with 'one voice' in foreign relations."<sup>186</sup> Functionally, this one-voice test is identical to the dormant foreign relations preemption analysis; courts must analyze the extent to which state law will offend foreign nations and provoke retaliation.<sup>187</sup>

The functional arguments for granting the federal government exclusive control over foreign affairs and completely preempting state and local action in that arena under the dormant Foreign Commerce Clause analysis include the following. First, the national interest in achieving foreign relations objectives requires that other nations perceive U.S. foreign policy as unified and coherent.<sup>188</sup> State and local action, especially if inconsistent with the federal administration's foreign policy, may thus undermine the conduct of U.S. foreign relations and the credibility of the federal government's negotiating posture by conveying the appearance of disagreement or incoherence among the different levels of government.<sup>189</sup>

Second, state and local activities may interfere with national foreign relations by antagonizing or injuring foreign nations, their citizens, or their economic interests.<sup>190</sup> According to this view, it is inappropriate and irresponsible for states and localities to adopt policies that may harm the interests of their fellow states or the nation as a whole.<sup>191</sup> Thus, as with the federal exclusivity principle, the validity of a state's law turns on a court's assessment of its implications for U.S. foreign relations.<sup>192</sup>

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185. *Id.* (citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979)).

186. Goldsmith, *supra* note 21, at 1637.

187. *Id.*

188. Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 827 (1989).

189. *Id.*

190. *Id.*

191. *Id.*

192. Goldsmith, *supra* note 21, at 1637.

V. DETERMINING WHETHER STATE ACTIONS VIOLATE THE  
CONSTITUTIONAL PROVISIONS GOVERNING FOREIGN AFFAIRS: TOWARD  
A NEW FRAMEWORK OF ANALYSIS

According to Professor Harold Maier, a noted commentator in the field:

The principle of federalism echoes a fundamental principle of democracy: that governmental decisions made at the local level are more likely to reflect the will of the people most directly affected by them. As long as the United States continues to exist as a federal nation, decisions in cases involving possible state intrusion into foreign affairs must continue to strike an appropriate balance between preservation of the values of local self-government and the need for national uniformity in matters of international affairs.<sup>193</sup>

Despite the recent spate of federalism decisions, however, it is difficult to glean principles from U.S. foreign affairs jurisprudence that instruct concerned observers how to strike the appropriate balance—where, in other words, to draw the line between permissible and unconstitutional state actions that intersect with national foreign affairs. It is this task with which revisionists are most concerned.

The revisionist approach this Note suggests does not propose to impose federalism or enumerated powers limits on the federal government's authority to conduct foreign relations.<sup>194</sup> Many infringements on foreign affairs undoubtedly are unconstitutional, since any state and local activity affecting foreign policy is preempted by the Supremacy Clause of Article VI if it conflicts with federal laws or treaties.<sup>195</sup> Furthermore, state activities may be precluded in some instances by specific constitutional limitations.<sup>196</sup>

The orthodox view of foreign affairs law invalidates state laws as unconstitutional encroachments on the federal government's exclusive power over foreign relations even in the absence of a controlling and applicable federal statute, treaty, or specific constitutional provision.<sup>197</sup> It is this aspect of the orthodox view that the revisionist approach to foreign affairs jurisprudence disputes. In other words, where Congress and the President have not exercised their plenary powers to preempt state action on the international scene, and where such action is not forbidden by other concerns, courts should not invalidate state and local government actions merely because they involve foreign affairs.

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193. Maier, *supra* note 98, at 837.

194. Goldsmith, *supra* note 21, at 1619.

195. Ramsey, *supra* note 10, at 342.

196. *Id.*

197. *Id.*

Under this analysis, the Supreme Court should have upheld Massachusetts' Burma law in *Crosby v. National Foreign Trade Council*. Congress did not act to preempt the Massachusetts law when it enacted sanctions of its own. Indeed, the purposes of the two sets of sanctions were essentially identical. Furthermore, Congress had three years to preempt the state law before *Crosby* was decided, yet it chose not to exercise its affirmative preemption prerogative. Thus, not even implied preemption can withstand scrutiny as a valid basis for striking down Massachusetts' Burma law.

The Court's decision cannot be justified on functional grounds, either. Although Japan and the EU threatened retaliation against the United States for Massachusetts' Burma law, Congressional enactment and Executive implementation of similar sanctions—which surely angered those nations even more—eliminates that avenue of argument as a legitimate grounds for the opinion.

Nor did Massachusetts' law pose an invalid restriction on the Executive's authority once the President issued an Executive Order imposing sanctions on Burma in 1997. As with the Congressional enactment, the President's sanctions—like those of Massachusetts—were intended to further the cause of democracy in Burma and voice U.S. disapproval of Burma's ruling junta. Thus, the President retained the full grant of authority given to him by Congress,<sup>198</sup> even in light of Massachusetts' procurement law.

The only ground on which the sanctions might be struck under the revisionist framework is the dormant Foreign Commerce Clause. Although the Court declined to undertake this analysis, it is likely the Court would have invalidated the state law on this basis, as well. Whether this decision would have been correct would depend on whether the interest of Massachusetts in curtailing the investment of state funds in Burmese enterprises outweighed the possible damage to its sister states' foreign commerce.

Under the revisionist approach, however, investment decisions like those at issue in *Crosby* would lie outside the *Zschernig* preemption doctrine as a matter of policy.<sup>199</sup> If Massachusetts can show that by investing state funds in or using them to buy from companies doing business with Burma it is subjecting itself to a substantial risk of loss—due to political turbulence in Burma—or to substantial disruptions at home—due to protests over the immorality of such investment—this showing “should outweigh a few ‘potential embarrassments’ with regard to foreign nations.”<sup>200</sup>

State and local governments are increasingly involved in a wide variety of activities in the global marketplace that intersect in ways

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198. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

199. Lewis, *supra* note 166, at 514.

200. *Id.* at 515.

large and small with foreign affairs. Far from being problematic, this is a positive and healthy development for the states as laboratories of democracy. Indeed, some argue that recognizing a role for states in foreign policy matters serves a structural separation of powers purpose. A legal framework that precludes states from acting in foreign affairs might allocate too much power to the President to dictate foreign policy.<sup>201</sup>

By making room for a relatively small measure of state power, in the absence of statutory preemption or explicit constitutional preclusion, the revisionist framework constrains executive tendencies to engage in unconstitutional policymaking.<sup>202</sup> Thus, to some revisionists, the real issue posed by foreign policy federalism is the scope of executive power in conducting foreign relations.<sup>203</sup> This inquiry into the structural purposes of the reigning doctrine of foreign affairs preemption is one salutary characteristic of the revisionist approach to federalism and foreign affairs.

Courts should also conduct a more thorough analysis of the effects of a state law before preempting that law under the foreign affairs power. Justices White and Harlan seemed to recognize this in *Zschernig*, where they supported the traditional—now revisionist—view that state law should be preempted only upon a showing that it actually interfered with the federal government's conduct of foreign affairs.<sup>204</sup>

Because this analysis fully recognizes the explicit preemption powers granted to Congress and the President by the Constitution, it preserves ultimate federal authority over the nation's foreign affairs and assures that the nation will speak with one voice on matters of national importance. In reality, it signifies not so much the creation of a dramatic new doctrine as "a shift in constitutional presumptions, moving from deep skepticism to general tolerance of state activity involving foreign relations."<sup>205</sup> This attempt to accommodate legitimate state interests with the need for an effective, vigorous, and unified U.S. foreign policy introduces federalism's flexibility and healthy respect for the states into the too rigid constraints of orthodox foreign affairs jurisprudence.

Finally, the end of the Cold War, the spread of a "democratic peace,"<sup>206</sup> and the growing interconnectedness of global commerce

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201. Ramsey, *supra* note 10, at 429.

202. *Id.*

203. *Id.*

204. *Zschernig*, 389 U.S. at 458-62 (Harlan, J., concurring); *Id.* at 462 (White, J., dissenting).

205. Spiro, *supra* note 97, at 1226.

206. See generally BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993) (arguing that the spread of democracy in recent years reduces the possibility of a major war because democracies are reluctant to declare war against one another).

and communications have lessened the risks of allowing states a limited sphere of action in foreign affairs when their recognized interests—such as protecting their citizens through the police power—overlap with issues involving other nations. While these developments have by no means eliminated the constant potential for embarrassing or even dangerous disputes in international affairs, they have lessened it to the point that it no longer justifies invoking a tenuous, extra-constitutional doctrine to preempt state powers that were recognized for the first one hundred years of the Republic.

As one commentator has recognized, these historic, international developments greatly reduce the potential threat of severe externalities that undergirds the functional justification for the exclusivity principle.<sup>207</sup> The changing structure of international relations will permit nations to choose to tailor their retaliation to subnational units, such as states. This “innovation of targeted retaliation . . . could mark the emergence of a new doctrine of subnational responsibility of the states as demi-sovereigns under international law.”<sup>208</sup> In this changing international environment, the functional justifications for federal exclusivity in foreign affairs—the bedrock of the orthodox view of U.S. foreign affairs jurisprudence in the twentieth century—no longer stands as a sufficient reason to segregate federalism’s precepts from foreign affairs matters.

## VI. CONCLUSION

*Crosby v. National Foreign Trade Council* did not provide proponents of a revisionist analysis of federalism and foreign affairs with their hoped-for break with the twentieth century orthodox view of federal exclusivity in the field of foreign policy making. Nevertheless, because the case was decided on relatively narrow grounds, it has not emerged as the final word on the subject or precluded a revival of federalism concepts and textual constraints in foreign affairs law.

As long as the Supreme Court continues to endorse the legitimate role of the states in domestic affairs, pressure will mount from commentators, states, cities, and activists for the Court likewise to return to an understanding of foreign affairs that is closer to that of the Framers. Furthermore, the advent of globalization and the growing ability of nations to target their retaliation against subnational actors have greatly weakened the functional argument for abrogating states’ rights in the field of foreign affairs.

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207. Spiro, *supra* note 97, at 1259-60.

208. *Id.* at 1261.

Given these trends, it seems only a matter of time until the tide turns, and courts and commentators endorse a framework of foreign affairs law analysis more closely resembling that which prevailed in United States for much of its history.

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\* To my wife, Valerie.

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