Crosby and the "One-Voice" Myth in U.S. Foreign Relations

Sarah H. Cleveland
Columbia Law School, scleve@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.
CROSBY AND THE "ONE-VOICE" MYTH IN U.S. FOREIGN RELATIONS

SARAH H. CLEVELAND*

In Crosby v. National Foreign Trade Council,1 the Supreme Court invalidated a Massachusetts government procurement statute that barred state entities from doing business with companies that did business in Burma. The plaintiffs, an organization of private companies with foreign operations, challenged the law on constitutional and statutory preemption grounds, arguing that it improperly conflicted with federal foreign relations authority. The Supreme Court limited its holding to implied statutory preemption, finding that the Massachusetts provision improperly compromised the President's ability "to speak for the Nation with one voice."2 Crosby thus joined a long line of decisions in which the Supreme Court has applied the "one-voice" doctrine to address the validity of state activities impinging on foreign relations.

The "one-voice" doctrine is a myth. It finds little support in the constitutional framework, which divides the foreign relations powers among the three federal branches, and even less in the actual practice of the government. Congress and the President have full power to expressly preempt state and local interference with foreign affairs, and they have exercised that power on occasion. But even more often they have tolerated, deferred to or even encouraged state and local measures impacting on foreign affairs. Neither Congress nor the President had expressly preempted the Massachusetts law at issue in Crosby, despite ample opportunity to do so. Quite to the contrary, repeated actions by both branches suggested an intent to tolerate the Massachusetts law. In the face of our constitutional history and this substantial evidence of federal practice, it was improper for the Court to preempt the statute on its own.

This Article examines the "one-voice" myth in U.S. foreign relations and its application by the Crosby Court. Part I discusses the reasoning in Crosby and the Court's reliance on the "one-voice" doctrine. Part II reviews the history of the "one-voice" doctrine and argues that neither the constitutional text nor U.S. history supports the principle of a solitary (execu-

* Professor, University of Texas School of Law; A.B. 1987, Brown University; M.St. 1989, Oxford University; J.D. 1992, Yale Law School. I am grateful for the advice and comments of Douglas Laycock, Sanford Levinson, Peter Spiro, Edward Tuddenham and Ernest Young, as well as the insights of the participants in a faculty colloquium on Crosby at the University of Texas School of Law, including Patricia Hansen and Louise Weinberg. I also appreciate the library support of Jonathan Pratter, the research assistance of Suzan Kern and the editorial assistance of the Villanova Law Review.

2. See Crosby, 530 U.S. at 381.
Part III examines contemporary U.S. practice regarding federalism and U.S. foreign relations, and contends that the United States has not only tolerated, but actively encouraged, independent state activities such as the Massachusetts Burma Law. The national government has done so both by preserving sub-national responsibility and autonomy in its treaty ratifications, and by declining to employ numerous political instruments available to both Congress and the executive to override state measures that diverge from national policy. The Article concludes that incorporation of the "one-voice" doctrine into the Court's implied statutory preemption analysis contravened the federal government's longstanding deference to the states in this area. The Court's reliance on the "one-voice" myth to strike down the Massachusetts statute merely allowed the Court to evade more searching inquiry into the legitimate state interests served by the Massachusetts procurement law and the proper balance of federal-state relations in this area. Indeed, under the most extreme interpretation of Crosby, the proposition that the nation should speak with one voice in foreign relations could be used to justify invalidating any state law that impacted U.S. foreign relations, however incidentally, regardless of the presence of a federal statute. If Crosby leads to a general practice of judicial invalidation of state and local measures that affect foreign affairs, at the behest of private litigants, regardless of the actions of the national political branches, it will reverse two centuries of constitutional practice and significantly reallocate power over foreign affairs.

I. THE CROSBY DECISION

The government procurement statute at issue in Crosby barred state entities from contracting with businesses that did business in Burma. The statute was adopted to prevent Massachusetts taxpayer dollars from supporting human rights violations committed by Burma's repressive military regime. The Crosby plaintiffs contended that the statute violated the federal foreign commerce and foreign affairs powers or was impliedly preempted by a federal law imposing sanctions on Burma. Massachusetts argued in defense that the provision did not unduly conflict with federal law and involved legitimate exercise of core state speech and spending rights. The United States appeared, as amicus, urging the law's illegality.

3. See Mass. Gen. Laws Ann. ch. 7, § 22 (H)(a), (J)(a) (West 2000) ("A state agency, a state authority, the house of representatives or the state senate may not procure goods or services from... any persons currently doing business in Burma (Myanmar)").
5. See id. at 379-80 (addressing state's arguments).
Both lower courts invalidated the Massachusetts law. The district court struck down the law under the dormant foreign affairs doctrine of Zschernig v. Miller, holding that the law had more than "some incidental or indirect effect in foreign countries" or a "great potential for disruption or embarrassment" of United States foreign policy. The United States Court of Appeals for the First Circuit invalidated the provision on all three grounds asserted by the plaintiffs. The court rejected Massachusetts' contention that the law fell within the state's local spending interests as a market participant and concluded that Massachusetts had no legitimate interest in expressing "moral concerns" regarding human rights conditions in a foreign state. The First Circuit went so far as to contend that the enumerated powers doctrine, which might otherwise have reserved room for state activity regarding its own spending policies, did not apply in the foreign affairs area.

The United States Supreme Court affirmed without addressing the Foreign Commerce Clause and foreign affairs issues, holding simply that the Massachusetts law was preempted sub silentio by the federal law. The Federal Burma Statute, which was adopted three months after the Massachusetts Burma Law, imposes a variety of mandatory sanctions against Burma for human rights violations. The Act prohibits foreign aid to Burma (other than humanitarian and anti-drug trafficking assistance), denies U.S. entry visas to Burmese officials and directs the U.S. to oppose financial assistance to Burma in international financial institutions such as the World Bank.

In addition to these mandatory provisions, the Act directs the President to take a number of actions with respect to Burma. The President is authorized to bar new investment in Burma by U.S. nationals if he finds that Burma has acted against the democracy movement leader, Aung San Suu Kyi, or has committed "large-scale repression" or violence against the democratic opposition. The statute instructs the President to develop "a comprehensive multilateral strategy" to improve the human rights situa-

10. See id. at 70-71 (noting that Supreme Court has not recognized moral concerns regarding international human rights as traditional areas of state concern).
11. See id. at 50 ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, ... is categorically true only in respect of our internal affairs.") (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315-16 (1936)).
13. See id. § 570(a) (describing mandatory sanctions).
14. See id. § 570(b).
tion and bring democracy to Burma.\textsuperscript{15} Finally, the President may terminate or waive any sanctions imposed under the statute upon finding that such action is in U.S. national security interests\textsuperscript{16} or that Burma has made progress toward human rights and democracy.\textsuperscript{17} In 1997, President Clinton exercised his authority under the Federal Burma Statute and the International Emergency Economic Powers Act (IEEPA)\textsuperscript{18} to prohibit new investment in Burma by U.S. persons and directed the Secretary of State to work with U.S. allies to develop a strategy for promoting democracy and human rights in Burma.\textsuperscript{19}

Neither the Federal Burma Statute nor President Clinton's executive order authorized sanctions on private trade in goods and services with Burma. The federal provisions also did not address the validity of state procurement policies. In particular, although the federal statute was adopted three months after the Massachusetts Burma Law, neither the federal statute nor the executive order mentioned the state law or purported to invalidate it. The Supreme Court thus was unable to rely on express preemption in striking down the state law. Instead, the Court inferred preemption from the statutory scheme, finding that the Massachusetts law improperly compromised the President's capacity "to speak for the Nation with one voice in dealing with other governments."\textsuperscript{20}

The Court held that the Massachusetts law violated the "one-voice" principle and contradicted the federal policy toward Burma in three respects. First, the Court found that the statute intruded on the delegation of power and diplomatic authority to the President to control Burma policy. In enacting the federal statute, the Court stated, "Congress clearly intended . . . to provide the President with flexible and effective authority over economic sanctions against Burma."\textsuperscript{21} The "unyielding application" of the Massachusetts law "undermine[d] the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy . . . ."\textsuperscript{22} "It is simply implausible," the Court reasoned, "that Congress would have gone to such lengths to em-
power the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action."23

Second, the Court found that the state law conflicted with federal policy by applying both to contracts for goods and services and to non-U.S. persons.24 In imposing sanctions on foreign entities that would not be sanctioned under the federal law, the state law interfered with the national government's decision "about the right degree of [sanctions] pressure to employ."25 "Sanctions are drawn not only to bar what they prohibit but to allow what they permit," the Court reasoned, "and the inconsistency of sanctions here undermines the congressional calibration of force."26

Finally, the Court found that the state law compromised the President's authority by limiting his ability to speak for the United States in the international community in its development of a "comprehensive, multilateral strategy" for reform in Burma.27 Congress' "clear mandate," the Court concluded, "belie any suggestion that Congress intended the President's effective voice to be obscured by state or local action."28

In relying on the proposition that the United States must speak with one voice, through the President, to invalidate the Massachusetts procurement law, the Court invoked a familiar mantra of U.S. foreign relations jurisprudence. The "one-voice" doctrine has been applied frequently by the courts to strike down state activities implicating foreign relations. The doctrine itself, however, finds little support in the constitutional framework and provides little guidance for discerning which state activities improperly infringe on U.S. foreign policy. As discussed in the following section, although the "one-voice" doctrine has lengthy roots in the case law, the Constitution ensures that the national government will speak at least as a trio in the foreign relations area. And as a matter of historical practice, if not text, states frequently take actions that impact foreign relations and that may even provoke international protest, through the exercise of core state spending, communicative, and regulatory authority.

II. THE "ONE-VOICE" MYTH IN U.S. FOREIGN RELATIONS

A. Judicial Origins of the "One-Voice" Doctrine

The principle that authority over foreign relations vests exclusively in the national government, to the exclusion of the states, has strong consti-

23. Id. at 376.
24. See id. at 378.
25. Id. at 380.
26. Id.
27. Id.
28. Id. at 381.
tutional roots, and early judicial decisions bolstered the states' exclusion from foreign relations. In Brown v. Maryland, Chief Justice Marshall struck down a state import-licensing requirement as violating federal exclusivity over foreign commerce, noting that state activity in this area could provoke conflict with foreign governments. In 1832, while invalidating Georgia's efforts to regulate Indian affairs (which were then considered part of U.S. foreign relations), the Marshall Court emphasized that the Constitution gave this authority exclusively to the national government. In the latter 1800s, state efforts to regulate immigration were invalidated on similar grounds. In Chy Lung v. Freeman, for example, the Supreme Court struck down a California immigration regulation as infringing on the exclusive national power over foreign commerce. The Court emphasized the ability of state policies to create international conflict: 

[If this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?

The state policy, the Court found, could "embroil us in disastrous quarrels with other nations."

29. For a discussion of the constitutional basis, see infra notes 111-17 and accompanying text.
31. Brown, 25 U.S. (12 Wheat.) at 447 ("What answer would the United States give to the [foreign] complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered.").
32. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").
33. See New York v. Compagnie Generale Transatlantique, 107 U.S. 59, 60, 63 (1883) (invalidating state immigration restrictions as violating exclusive national power over foreign commerce); Chy Lung v. Freeman, 92 U.S. 275, 280-81 (1875) (same); Henderson v. New York, 92 U.S. 259, 270-75 (1875) (same).
34. 92 U.S. 275 (1875).
35. Chy Lung, 92 U.S. at 279.
36. Id. at 280.
The trilogy of decisions in United States v. Curtiss-Wright Export Corp., United States v. Belmont and United States v. Pink solidified the states' exclusion from foreign relations and elevated the President to the position of national spokesperson. That the United States should speak with one voice through the President, as the "sole organ" of the United States in foreign relations, was the animating principle (albeit dicta) behind the Court's landmark 1936 decision in Curtiss-Wright. Writing for the Court, Justice Sutherland argued that states had never enjoyed any aspect of the nation's "external powers," which lay exclusively in the national government. Courts have repeatedly cited Curtiss-Wright for the proposition that the President is the preeminent instrument of U.S. foreign policy. In particular, the position that the United States must speak with a unified message has been invoked repeatedly to exclude states from activities that might infringe on U.S. foreign relations.

Building on the precedent in Curtiss-Wright, Pink and Belmont upheld the power of a sole executive agreement to trump a New York banking statute. In both cases, the Supreme Court emphasized that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." Indeed, the Court asserted, "in respect of our foreign relations generally, state lines disappear. As to such purposes the State . . . does not exist."

The apex of the Court's "one-voice" jurisprudence likely is the decision in Zschernig, the only case in which the Supreme Court has applied the doctrine of dormant foreign affairs preemption. Zschernig invali-

37. 299 U.S. 304 (1936) (upholding federal law delegating foreign affairs authority to President).
38. 301 U.S. 324 (1937) (holding that state banking policy cannot override executive agreement recognizing Soviet Union).
39. 315 U.S. 203 (1942) (holding that state banking policy cannot conflict with international agreement).
40. See Curtiss-Wright, 299 U.S. at 320 (recognizing exclusive power of "President as the sole organ of the federal government in the field of international relations").
41. Id. at 316; see also id. at 306 (same). For a critique and analysis of Justice Sutherland's history, see Charles A. Lofgren, The Foreign Relations Power: United States v. Curtiss-Wright Export Corporation: An Historical Reassessment, in Government from Reflection and Choice 167-205 (1986). See also Louis Henkin, Foreign Affairs and the Constitution 329-31 n.10 (2d ed. 1996) (critiquing Justice Sutherland's analysis).
42. For critiques of this position, see, for example, Harold H. Koh, The National Security Constitution 94 (1990) ("Curtiss-Wright painted a dramatically different vision of the National Security Constitution from that which [had] prevailed since the founding of the Republic.").
43. Pink, 315 U.S. at 233; see also Belmont, 301 U.S. at 331 ("Plainly, the external powers of the United States are to be exercised without regard to state laws or policies").
44. Belmont, 301 U.S. at 331.
dated an Oregon statute barring inheritance by nationals of communist states that denied inheritance rights to U.S. citizens. The Court so ruled despite the facts that the Oregon law did not conflict with any federal provision, and the U.S. Department of Justice had represented as amicus that the Oregon statute did not "unduly interfere[] with the United States' conduct of foreign relations."\(^{46}\) The Court held that the Oregon statute nevertheless constituted "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress."\(^{47}\) The resulting doctrine of foreign affairs preemption, which was clearly a product of Cold War tensions, suggested that any state or local government action with more than "some incidental or indirect effect in foreign countries"\(^{48}\) was per se invalid under the constitutional distribution of the foreign affairs powers, whether or not the action actually conflicted with national policy.

Thus, the requirement of a unified voice in foreign relations has emerged from two related lines of doctrine: the principle that states are excluded from international relations, and the assumption that the President speaks as a soloist for the United States.

The Supreme Court first expressly adopted the "one-voice" principle as an element of dormant Foreign Commerce Clause analysis.\(^{49}\) In the commercial arena, where Congress has not expressly preempted state activities, courts have employed the dormant Foreign Commerce Clause to prevent state commercial activities from unduly burdening the "special need for federal uniformity" in international economic policies.\(^{50}\) The underlying assumption of dormant Foreign Commerce Clause analysis is that congressional inertia and other legislative demands will prevent Congress from anticipating and invalidating every state measure that burdens foreign commerce. "The practical result is that in default of action by [the courts, the States] will go on suffocating and retarding and Balkanizing American commerce, trade and industry."\(^{51}\)

Accordingly, in Japan Line, Ltd. v. County of Los Angeles,\(^{52}\) the Court held that California's ad valorem property tax violated the dormant Foreign Commerce Clause by impeding the Government's ability to "speak with...
one voice” in foreign affairs. The holding was motivated by the Court's finding that “[t]he risk of retaliation by Japan . . . [was] acute, and such retaliation of necessity would be felt by the Nation as a whole.” Similarly, in South-Central Timber Development, Inc. v. Wunnikc, the Court held that Alaskan regulations governing the processing of state-owned timber for export violated the “one-voice” standard.

Despite the anti-state orientation of cases such as Belmont, Pink, Zschernig and Japan Line, the courts have tolerated some state activity that impinges on foreign relations. In Wardair Canada, Inc. v. Florida Department of Revenue, for example, the Court upheld the constitutionality of Florida's tax on the sale of aviation fuel despite the United States' assertion, as amicus, that the tax “threaten[ed] the ability of the Federal Government to 'speak with one voice.'” The Court found that international agreements regulating such taxation did not apply to the individual states, and noted that “we [have] never suggested . . . that the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.” In Itel Containers International Corp. v. Huddleston, the Court likewise held that Tennessee's tax on shipping containers did not violate the “one-voice” standard. The Court noted that U.S. treaties and other laws exempted state taxes from regulation, that the Executive defended the statute and that congressional actions suggested the state tax could be tolerated. Most recently, in Container Corp. of America v. Franchise Tax Board and Barclays Bank PLC v. Franchise Tax Board, the Supreme Court held that California's worldwide combined reporting requirement for taxation of corporations with foreign operations did not violate the “one-voice” standard.

Wardair, Container Corp. and Barclays Bank all rejected the suggestion that a clear statement or “specific indication[ ] of congressional intent” was required to allow a state practice under the dormant Foreign Com-

54. Id. at 453.
56. See Wunnike, 467 U.S. at 100 (“It is crucial to the efficient execution of the Nation's foreign policy that 'the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments.'”).
57. 477 U.S. 1 (1986).
58. See Wardair Canada, 477 U.S. at 9.
59. See id. at 13 (clarifying decision in Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434 (1979)).
60. 507 U.S. 60 (1993).
61. See Itel, 507 U.S. at 75-76 (“[T]ennessee's tax does not infringe the Government's ability to speak with one voice when regulating commercial relations with other nations.”).
62. See id.
64. 512 U.S. 298 (1994).
merce Clause. In Barclays Bank, the Supreme Court looked to the actions of Congress and the Executive in deciding whether a state activity improperly conflicted with national policy. Despite strenuous objection by the United States’ major trading partners, the Court concluded that by failing to prohibit California’s taxation system explicitly, Congress had "passively indicat[ed] that certain state practices do not ‘impair federal uniformity in an area where federal uniformity is essential.’" In other words, the Court reasoned that Congress "need not convey [its] intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce . . . ."

In short, the “one-voice” principle has been applied by the Court to strike down state activities with relatively little de facto impact on U.S. foreign relations (Zschernig), while the Court has declined to find the doctrine violated where state conduct has provoked substantial international outcry (Barclays Bank). The doctrine itself yields few criteria for meaningfully distinguishing conduct by states that can, or cannot, be tolerated in the foreign affairs arena. The decision in Crosby has now expanded this tradition by applying the “one-voice” doctrine to the statutory preemption context.

B. The National Foreign Relations Powers

Despite its relatively frequent use by the courts, the “one-voice” doctrine has little support in the constitutional text, U.S. history or practice. Turning first to the Constitution itself, it is clear that the Framers guaranteed, as a matter of constitutional design, that the United States would not “speak with one voice” in foreign relations. The foreign affairs powers are carefully divided among the three branches of the national government, with Article I of the Constitution bestowing the bulk of the foreign affairs powers on Congress. Thus, Article I, section 8 gives Congress the powers to provide for the common defense, to regulate foreign commerce, to establish a uniform rule of naturalization, to regulate foreign coin and to define and punish crimes on the high seas and against the law of nations. Congress further is authorized to prohibit the migration and importation of persons—that peculiar form of foreign commerce—after


67. See Barclays Bank, 512 U.S. at 323 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).

68. See id. (citing Maine v. Taylor, 477 U.S. 131, 139 (1986)).

69. See U.S. CONST. art. I.

70. See id. § 8.
1808,71 and to make all laws necessary and proper for carrying out those powers.72

Article II of the United States Constitution authorizes the President to receive ambassadors,73 and endows the President with the executive power.74 Important foreign relations powers such as the treaty, diplomatic and war powers are shared between Congress and the Executive. Thus, Article II authorizes the President to enter into treaties and appoint ambassadors with the advice and consent of the Senate.75 The President is designated the Commander in Chief of the armed forces,76 while the war powers of Congress include the authority to declare war; to grant letters of marque and reprisal; to make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the land and naval forces; to repel invasions; and to organize, arm and discipline the militia.77 Congressional authority over the purse78 gives Congress additional power to second-guess the decisions of the Executive in this and other areas.

Article III of the Constitution gives the federal judiciary a role in foreign relations. The courts are authorized to hear all cases arising under the laws and treaties of the United States, including cases involving admiralty or maritime jurisdiction and controversies in which foreign states, citizens or subjects are a party.79 The Supreme Court possesses original jurisdiction over cases involving ambassadors and consuls.80

This structural division of authority has yielded a number of memorable conflicts. The Senate may refuse to consent to international agreements that the President has negotiated and signed,81 as in the infamous case of the Versailles Treaty.82 This tension has manifested itself more recently with the Senate's refusal to ratify many human rights treaties. The Genocide Convention,83 for example, was signed and introduced to the Senate by President Truman in 1949. The treaty languished for nearly

71. See id. § 9, cl. 1.
72. See id. § 8, cl. 18.
73. See U.S. Const. art. II, § 3.
74. See id. § 1, cl. 1.
75. See id. § 2, cl. 2.
76. See id. § 2, cl. 1.
77. See U.S. Const. art. I, § 8.
78. See id. § 9, cl. 7.
79. See U.S. Const. art. III, § 2, cl. 1.
80. See id. § 2, cl. 2.
81. "A treaty entering the Senate," Secretary of State John Hay wrote, "is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain, it will never leave the arena alive." QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 360 (1922) (quoting 2 WILLIAM ROSCOE THAYER, THE LIFE OF JOHN HAY 393 (1915)).
four decades, despite renewed requests for ratification by the Nixon and Carter Administrations, before the Senate finally gave its consent in 1988. \(^{84}\) The Senate similarly declined to ratify conventions relating to forced labor and women's rights that were introduced by the Kennedy Administration. \(^{85}\) The Torture Convention, \(^{86}\) the International Covenant on Civil and Political Rights (ICCPR) \(^{87}\) and the Race Discrimination Convention \(^{88}\) were all introduced to the Senate by the Carter Administration, but Senate consent to these instruments was not forthcoming until the 1990s. \(^{89}\) The Senate has rendered the United States anomalous in the world community by continuing to withhold consent to the Convention to Eliminate All Forms of Discrimination Against Women \(^{90}\) and the Convention on the Rights of the Child. \(^{91}\) The Senate also has declined to consent to the American Convention on Human Rights. \(^{92}\) Although President Clinton signed the treaty creating a Permanent International Criminal Court, Senator Jesse Helms, then-Chair of the Senate Foreign Relations Committee, announced that the treaty would be "dead on arrival" in the


\(^{85}\) See 113 CONG. REC. 8364, 8364 (daily ed. Apr. 5, 1967) (noting Senate's rejection of conventions involving labor and women's rights).


\(^{89}\) For example, President Carter signed the ICCPR for the United States on October 5, 1977. See THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 317 (2d ed. 1993) (stating that ICCPR was consented to by United States Senate on April 2, 1992).


Senate. Opponents to the court have introduced legislation that would bar the United States from cooperating with the tribunal.

While the express shared responsibility over the treaty power makes treaties particularly susceptible to conflict, disagreement between Congress and the Executive is not limited to this area. Congress may adopt legislation, with the President's signature, that is opposed by the Executive and that exposes the United States to international controversy. Recent examples include Congress' refusal to appropriate funds for United Nations dues and Congress' imposition of restrictions on U.S. foreign assistance for international family planning organizations. Congress also may override an executive veto, as Congress did in imposing sanctions on South Africa in 1986.

The Executive, in turn, may ignore the desires of Congress. President George W. Bush and his three predecessors refused to honor Congress' effort to move the U.S. embassy from Tel Aviv to Jerusalem. Presidents Clinton and George W. Bush both exercised waivers to avoid enforcing the more extreme provisions of the so-called Helms-Burton Act, which authorized U.S. nationals to sue foreign persons and companies that trafficked in expropriated property in Cuba.

Congress and the Executive recently clashed further over the ability of U.S. nationals to pursue damages against foreign sovereigns in U.S. courts. In 1996, Congress waived foreign sovereign immunity for certain types of suits against foreign states deemed sponsors of terrorism, and Congress later adopted legislation that allowed successful litigants in such cases to attach the U.S. assets of foreign states. Having signed the latter legislation, President Clinton then acted to block its implementation, ar-


94. See Barbara Crossette, Clinton Weighing Options on World Criminal Court, N.Y. TIMES, Dec. 11, 2000, at A5 (discussing legislative opposition to court).

95. See infra note 139.


guing that it would endanger U.S. security interests. But in 2000, Congress adopted legislation allowing such judgments to be paid.

The war powers also have been an area of conflict between Congress and the Executive, with Congress lending ambivalent support to recent military conflicts. The War Powers Resolution, which was adopted by Congress over President Nixon's veto in order to restrain executive war-making, has been implicitly rejected by every succeeding President and was violated by President Clinton in the Kosovo conflict. Congress and the Executive pursued overtly conflicting military policies toward the Nicaraguan contras in the 1980s, ultimately causing a federal court to conclude that while the U.S. Congress was at peace with Nicaragua, the U.S. Executive had been at war.

Finally, federal courts, in exercising their legitimate constitutional authority, may disrupt U.S. foreign relations policies in a variety of ways. Courts may refuse extradition requests made by the federal government

106. See United States v. Terrell, 731 F. Supp. 473, 476-77 (1989) (“[B]y no stretch of the imagination can the United States be said to have been ‘at peace’ with Nicaragua . . . . [A]lthough Congress may have abstained from supporting the Contras for ten months, the executive branch did not abstain.”).
107. In 1997, a federal magistrate refused to authorize the transfer to the International Criminal Court for Rwanda of a Rwandan indicted for genocide, finding that the transfer would be unconstitutional, and released the suspect. He was rearrested in 1998 and ordered surrendered to the Tribunal. See Ntakirutimana v. Reno, 184 F.3d 419, 423 (5th Cir. 1999) (affirming transfer to Rwandan Tribunal);
and allow politically sensitive suits to proceed against foreign states. Courts also may disrupt international affairs by reviewing the legality of foreign relations actions of the political branches, and by rejecting the executive’s interpretation of national security matters.

Thus, on the national level, a trio of voices contributes to making U.S. foreign policy. And while those voices often speak in harmony, their independent authority creates real and constitutionally-intended potential for a-tonal and discordant policy results. On the federal level, at least, the proposition that the United States will speak with one voice in foreign relations is unsupported as a matter of both constitutional text and historical practice.

C. The States and Foreign Relations

The question posed by Crosby and by the broader question of federalism in U.S. foreign relations, however, is not whether the national government must speak with one voice (to which the answer must be no), but whether and to what extent state voices also may impact U.S. foreign relations. One could plausibly argue that while three national voices may be intentionally tolerated in foreign affairs, a chorus of fifty sub-national voices (or indeed, several thousand, if counties and municipalities are included) is too much. As discussed below, while the Constitution largely excludes states from participating in foreign relations, historic and contemporary practice has left some play for state action in this area.

see also Barbara Crossette, Rwandan in Genocide Case Makes Last Appeal to Stay in U.S., N.Y. TIMES, Aug. 15, 1999, at A10 (discussing case).


109. For example, actions by a federal court recently threatened to unravel a settlement agreement between Germany and the United States to compensate Holocaust victims, when the court refused to dismiss the victims’ legal claims until funds for the settlement agreement were secured. See Edmund L. Andrews, New Legal Disputes Put Holocaust Victim Payments in Doubt, N.Y. TIMES, Mar. 9, 2001, at A3 (discussing German reaction to court ruling).

110. See generally, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (rejecting President’s claim that national security required suppression of publication of Department of Defense papers regarding Vietnam War); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (rejecting President’s claim that Korean War warranted executive seizure of steel mills).
1. The Constitutional Text

Aside from the manageability problems posed by such a potential cacophony, the Constitution largely precludes states and localities from participating in foreign affairs. It is well established that the framers sought to give the national government authority to bind the states to U.S. foreign relations decisions, including U.S. treaty obligations. As Madison famously proclaimed in Federalist No. 42, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."\textsuperscript{111} The conduct of the states during the pre-constitutional era\textsuperscript{112} underscored the concern, as Edmund Randolph articulated, that "if a state acts against a foreign government contrary to the laws of nations or violates a treaty, the national government cannot punish that State or compel its obedience . . . ."\textsuperscript{113}

The Framers accordingly empowered the national government to silence the states in foreign relations where silence was deemed necessary. Article I, section 10 of the Constitution prohibits the states from entering into treaties or alliances or granting letters of marque and reprisal.\textsuperscript{114} This section further requires congressional consent before states may tax imports and exports, keep troops or warships in time of peace, enter into agreements or compacts with foreign states or engage in war (unless invaded).\textsuperscript{115} The Supremacy Clause likewise establishes that federal statutes and treaties trump state law and obligates state judges to respect federal law.\textsuperscript{116} Commentators dispute whether the Article I, section 10 prohibitions establish that the states enjoy concurrent jurisdiction over foreign relations powers not prohibited to the states in that clause.\textsuperscript{117} But the

\textsuperscript{111} THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961).


\textsuperscript{113} A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 86, 88 (Herbert J. Storing ed., 1981); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1937) (Madison’s Notes, May 29, 1787) (“[T]he federal government could not check the quarrels between states, nor a rebellion in any not having constitutional power ‘Nor means to interpose according to the exigency’”).

\textsuperscript{114} See U.S. CONST. art. I, § 10.

\textsuperscript{115} Id.

\textsuperscript{116} See U.S. CONST. art. VI, cl. 2.

\textsuperscript{117} Compare Jack Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617, 1642 (1997) (“The most natural inference from these provisions and from the Constitution’s enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power
power of the federal government under the Constitution to control the foreign relations actions of the states is well established.

2. Historical Practice

Despite the apparent clarity of the constitutional text, actual relations between the states and the national government over foreign relations have been significantly more nuanced, and the boundaries of state authority in this area remain unclear. The Tenth Amendment carves out a zone (albeit undefined) of traditional state authority, and certain foreign relations powers, such as the foreign commerce power, allow for some state activity where Congress has not prohibited it. From the beginning of the Republic, traditional state interests have presented a potential for conflict with both foreign nations and U.S. foreign policy. U.S. history has been characterized both by substantial actions by states that affect foreign affairs and by deference and tolerance of many such state actions by the national political branches. Thus, determining the extent to which legitimate state activities may impinge on foreign affairs remains difficult.

Numerous powers that are viewed as traditional areas of state authority have the potential to impact foreign relations. State authority over aliens historically has been a persistent source of international conflict. For example, when applied to aliens, local rules regarding land ownership, inheritance and occupational licenses may conflict with U.S. treaty of the state and federal governments until preempted by federal statute or treaty), with Peter Spiro, Foreign Relations Federalism, 70 U. COLO. L. REV. 1223, 1228 (1999) ("The constitutional architecture itself evinces a norm of federal exclusivity in foreign affairs, on the one hand granting expansive foreign relations power to the federal government, on the other denying them to the states.").

118. See U.S. CONST. amend. X.

119. During the antebellum period, coastal Southern states' Negro Seamen Acts, which provided for the detention of free black sailors, were "a persistent diplomatic embarrassment" to the United States and provoked direct diplomatic overtures between Great Britain and the Southern states. See Gerald Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 39 (1996); see also Spiro, supra note 117, at 1235-36 (discussing views that the seamen acts were unconstitutional). New York's prosecution of British subject Alexander McLeod in 1841, despite British assertions of diplomatic immunity, led to the adoption of legislation establishing federal jurisdiction over similar state prosecutions. 1 Charles H. Butler, The Treaty Making Power of the United States 142-149 (1902) (discussing the McLeod incident). At the turn of the last century, a San Francisco ordinance segregating Japanese school children and California laws barring Japanese from owning property provoked diplomatic protests that the legislation violated treaties with Japan. See Wright, supra note 81, at 30, 265. The lynching of Italian nationals in Louisiana in 1891 and in Mississippi in 1901 also provoked diplomatic protests by Italy against the United States. 6 John B. Moore, Digest of International Law 837-41 (1906) (discussing Louisiana incident); 1 Butler, supra, at 153-59 (same); Wright, supra note 81, at 206 (discussing Mississippi incident). For further discussion of state anti-alien activities circa 1900 and the U.S. response, see Spiro, supra note 117, at 1237-39.
obligations or provoke objection from foreign states.\textsuperscript{120} State interests in family law conflicted with federal immigration authority in the Elian Gonzalez case.\textsuperscript{121} States such as Texas that border on foreign countries may generate conflicts over land and water rights and a wide range of other local measures.\textsuperscript{122} State control of natural resources may become a foreign relations issue when regulated by treaty.\textsuperscript{123} Like the anti-communism statute that was struck down in \textit{Zschernig}, Florida in 1963 adopted a Territorial Waters Act, which denied vessels and nationals from communist states licenses to fish in Florida waters, absent a formal indication by the State Department that the individual or vessel was from a friendly state.\textsuperscript{124}

\textsuperscript{120} \textit{See} Asakura v. City of Seattle, 265 U.S. 332, 343 (1924) (invalidating, under U.S. treaty, municipal law barring aliens from trade licenses); Blythe v. Hinckley, 180 U.S. 333, 340-41 (1901) (finding that in absence of treaty, right of state to declare alien capable of taking and holding property is not precluded by Compact Clause); Geofroy v. Riggs, 133 U.S. 258, 265-66 (1890) (finding that U.S. treaty overrides state laws prohibiting alien inheritance of property); Hauenstein v. Lynham, 100 U.S. 483, 488-89 (1880) (same); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 271 (1817) (same); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (addressing impact of treaty on alien land rights).

\textsuperscript{121} \textit{See} In re Gonzalez, No. 00-00479-FC-28, 2000 WL 492102, at *4 (Fla. Cir. Ct. Apr. 13, 2000). The Florida court made clear that federal immigration authority overrode any conflicting provisions of state law.

\textsuperscript{122} For example, during the 77th Regular Session (2001) of the Texas Legislature, one state senator from El Paso had the following bills on his legislative agenda: SB 224, requiring that the Texas Transportation Commission meet with officials of bordering Mexican states to discuss transportation and infrastructure; SB 733, proposing that junior colleges in counties bordering Mexico grant in-state tuition to needy Mexican students; SB 749, authorizing the Texas Natural Resource Conservation Commission to contribute human and financial resources to environmental projects in Mexico; and SCR 5, urging the U.S. Congress to amend federal law so representatives from Mexico may sit on policy committees of metropolitan planning organizations along the border. For text, analysis and bill histories, see The Texas Senate, \textit{Bills Authored by Eliot Shapleigh}, at http://www.capitol.state.tx.us/cgi-bin/db2www/senate/mbrbills.d2w/report?LEG=77&SESS=R&LEGCODE=A1540&TYPE=A (last visited Oct. 18, 2001).

\textsuperscript{123} \textit{See} Missouri v. Holland, 252 U.S. 416 (1920) (federal legislation protecting migratory birds enacted pursuant to treaty overrides reserved state powers).

\textsuperscript{124} \textit{See} 1963 Fla. Laws ch. 63-202, at 457, as amended, Fla. Stat. Ann. § 370.21(3) (West 1994). A conviction under the statute apparently was upheld. \textit{See Note on Florida v. Manuel Gomez Barios (Application of Florida Territorial Waters Act to Cuban Fishermen)}, 3 I.L.M. 317, 317 (1964) (stating that masters of vessels were found guilty of violating statute); \textit{see also Henkin, supra note} 41, at 437 n.66 (discussing Florida Territorial Waters Act).
And, of course, states have communicative and spending interests that may impact foreign affairs.

States also have been granted or allowed a role in implementing aspects of U.S. foreign policy. Under the Articles of Confederation, states enjoyed power to punish offenses against the law of nations, and although the Constitution grants this power to Congress, states retain authority to pass supplemental legislation. Since the early days of the Republic, Congress has left enforcement of many laws implicating foreign affairs to the states, and the United States has ratified treaties authorizing states to engage in direct extradition to foreign governments. State courts also exercise jurisdiction over suits under treaties, those brought by ambassadors or consuls, or suits brought against foreign governments that are not barred by foreign sovereign immunity.

125. As early examples, in the 1798 Virginia and Kentucky Resolutions, states infamously protested against federal policies relating to the undeclared war with France. In the winter of 1814, New England states gathered in Hartford, Connecticut to protest the policies of the national government in the War of 1812. The Hartford Convention was mooted by the end of the war. See Donald Hickey, New England's Defense Problem and the Genesis of the Hartford Convention, 50 NEW ENG. Q. 587 (1977) (discussing of Hartford Convention). See generally THEODORE DWIGHT, HISTORY OF THE HARTFORD CONVENTION (1970). In 1897, Nebraska adopted a resolution extending sympathy to Cuba; other states have adopted resolutions urging recognition of foreign governments. See WRIGHT, supra note 81, at 265 n.5. For further discussion of state communicative activities, see infra notes 196-97 and accompanying text. For other state activities impacting on foreign relations, see generally FOREIGN RELATIONS AND FEDERAL STATES (Brian Hocking ed., 1993); HAROLD W. STOEKE, THE FOREIGN RELATIONS OF THE FEDERAL STATE (1931).

126. For further discussion of the ability of traditional state activities to impinge on foreign relations, see Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception 69 GEO. WASH. L. REV. 139, 184 (2001) (discussing potential negative consequences of state activities for foreign affairs). But see Spiro, supra note 117, at 1226-27 (arguing that “making states accountable to the international community... would likely further the incorporation of international laws in the United States”).

127. See WRIGHT, supra note 81, at 177-78.

128. See Fox v. Ohio, 46 U.S. (5 How.) 410, 417 (1847) (discussing state authority to pass criminal legislation enforcing law of nations); HENKIN, supra note 41, at 422-25 n.3 (same). California has adopted legislation allowing claims by Holocaust victims to proceed in its courts. See CAL. CIV. PROC. CODE § 354.5 (Deering 2001).

129. See, e.g., Alien Enemies Act, ch. 58, § 2, 1 Stat. 577, 577-78 (1798) (authorizing states to apprehend alien enemies); HENKIN, supra note 41, at 423 n.3 (“Congress has from the beginning left enforcement of many national policies to state officials and state courts.”).


Congress formally has consented to only a handful of state agreements with foreign governments under the Article I, section 10 Compact Clause. But state and local governments have entered agreements without congressional consent on local matters such as police cooperation, border control and road construction. Subnational governments engage in a range of informal relations with foreign governments. In 1989, for example, the Mayor of Irvine, California, and a California state senator traveled to Vietnam to lobby (with some success) for the release of thirty men whose families had fled Vietnam and resettled in California. Mayors of larger U.S. cities often lead international missions to pursue economic, social, cultural and other objectives. State and local governments have opened trade offices and established sister-city relationships with foreign municipalities. A number of cities with sister-city arrangements abroad, including Atlanta, Berkeley, Louisville, Milwaukee, St. Paul and Wichita, have used their sister-community ties to pursue specific human rights objectives, such as stopping the forced removal of black townships in South Africa. The legality of such state and local agreements is rarely

132. See Henkin, supra note 41, at 153 (discussing congressionally-approved state agreements regarding border rights).

133. See, e.g., Diana Washington Valdez, Deal May Have Real Substance, El Paso Times, Mar. 26, 2001, at B-3 (describing first-ever "International Statement of Cooperation," to be signed by U.S. Congress member from El Paso and his Mexican congressional counterpart, representing a commitment to work together on safety, immigration, health and economic development issues); see also Tex. Gov't. Code Ann. § 792.002 (Vernon 2001) ("A state agency or a political subdivision may, to the extent permitted under federal law, enter into an agreement with the United Mexican States or a political subdivision; or an agency or entity that is created under a treaty or executive agreement between the United States and the United Mexican States."). Pursuant to this provision, on May 22, 1998, the Texas Department of Protective and Regulatory Services signed an agreement with the Mexican federal agency charged with human services, Desarrollo Integral de la Familia (DIFF). The agreement outlines standards whereby both agencies are to investigate allegations of abuse and neglect of children and vulnerable adults who have ties in both countries, make cross-border client placements, and bring witnesses across the border to testify in abuse cases. Historic Agreement Spans Border To Help Victims of Abuse and Neglect, PRS Update (Tex. Dep't of Protective & Regulatory Servs.), July 1998, at 1, available at http://www.tdprs.state.tx.us/About_PRS/PRS_Releases_&_Newsletter/updatejul98.asp (last visited Oct. 18, 2001); see also Henkin, supra note 41, at 153, 155, 426-27 n.26 (discussing state agreements with foreign governments). For further discussion of the Compact Clause, see id. at 152, 425-26 nn.10-20.

134. For a discussion of lobbying efforts directed toward releasing Vietnamese nationals, see Michael H. Shuman, Dateline Main Street: Courts v. Local Foreign Policies, 65 Foreign Pol'y 154, 160 (1986).

135. The Florida International Affairs Act was one of the more far-reaching efforts to promote international trade. The Act established a commission to make recommendations regarding state policies relating to "immigration, criminal justice, human rights, drugs, and other internationally-related issues." See Fla. Stat. Sec. 288.801, 288.804(13) (1991) (repealed 2000).

136. See Earl H. Fry, The Expanding Role of State and Local Governments in U.S. Foreign Affairs 84 (1998) (discussing efforts by various U.S. cities to promote international human rights); Shuman, supra note 134, at 160 (same).
challenged by the national government. Ordinarily the agreements are
allowed to stand unless challenged by an aggrieved private party, as the
Massachusetts law was in Crosby.

3. State and Local Spending Measures

Recently, state spending has been a particular focus of state and local
efforts to give voice to the political concerns of their constituents. State
boycott measures have roots in the Boston Tea Party and other colonial
boycotts against Great Britain. Modern government procurement or
selective purchasing laws such as the Massachusetts measure that condi-
tion the issuance of government contracts serve a number of purposes.
They communicate the moral outrage of local constituents; raise public
consciousness regarding particular issues; stimulate debate; prevent local
tax revenues from being used to subsidize and implicitly endorse practices
that violate community standards and beliefs; serve as a catalyst for na-
tional, and even international, action on the subject; and ultimately may
help to promote reform in the foreign state.

The federal government historically has tolerated, if not encouraged,
such local actions. In the 1970s, thirteen states adopted anti-boycott laws
opposing the Arab League’s boycott of Israel, prior to the adoption of
federal legislation. In the 1980s, state and local governments promoted
South African divestment, in express disagreement with the national gov-
ernment’s policy of constructive engagement. Sub-national measures ulti-
mately helped to mobilize U.S. support for sanctions against South Africa,
both through national legislation and in the United Nations. By the time
Congress finally adopted the Comprehensive Anti-Apartheid Act of
1986, as many as 140 states, counties and localities had adopted divest-
ment or procurement laws targeting South Africa.

137. See generally Dirr Hoeder, Crowd Action in Revolutionary Massachu-
setts, 1765-1780 (1977) (discussing colonial boycotts); Walter H. Conser, Jr., The
Stamp Act Resistance, in Resistance, Politics, and the American Struggle for In-
dependence, 1765-1775, 22, 31-37 (Walter H. Conser, Jr. et al. eds., 1986) (discuss-
ing stamp act boycotts).

138. See Fry, supra note 136, at 94 (discussing state laws barring “companies
that did business with their state governments from complying with the Arab
League’s boycott”).

§ 5001(4)(c)(1)).

140. See Richard Bilder, The Role of States and Cities in Foreign Relations, 83 Am. J.
Int’l L. 821, 822 (1989) (identifying twenty-three states, fourteen counties, eighty
cities and Virgin Islands as having adopted anti-apartheid divestment or procure-
ment laws); Earl H. Fry, The U.S. States and Foreign Economic Policy: Federalism in the
‘New World Order’, in Foreign Relations and the Federal States 122, 134 (Brian
Hocking ed., 1993) (noting that there are 140 state and local governments with
policies restricting public funds with respect to South Africa); Kevin P. Lewis, Dealing
with South Africa: The Constitutionality of State and Local Divestment Legislation, 61
Tul. L. Rev. 469, 472 (1987) (identifying nineteen states and sixty-two cities that
Numerous states and localities presently have government procurement rules that directly or incidentally impact foreign relations. Although the Massachusetts Burma Law is the most infamous of these provisions, similar laws targeting Burma have been adopted by more than two dozen states and municipalities, including Vermont, Los Angeles, San Francisco and New York City. Other state and local governments have adopted human-rights based sanctions against Northern Ireland, Indonesia, Nigeria, Cuba and countries engaging in religious persecution. Florida had enacted anti-apartheid bills. The legislation received mixed treatment in the courts. Compare Bd. of Trs. of the Employees' Ret. Sys. v. Mayor & City Council of Balt., 562 A.2d 720, 737 (Md. 1989) (upholding constitutionality of city employee pension funds from companies doing business in South Africa), with New York Times Co. v. City of New York Comm'n on Human Rights, 41 N.Y.2d 345, 350 (1977) (rejecting claim that New York Times had aided and abetted discrimination by publishing South African employment advertisements).


143. See OFII web site, supra note 141, at http://www.ofii.org/issues/sanction.cfm (cataloguing state and local selective purchasing measures); see also Paul Blustein, Thinking Globally, Punishing Locally; States, Cities Rush to Impose Their Own
restricts investment of state funds in companies doing business with Cuba. Since 1992, Dade County, Florida also has barred government contracts with companies doing business with Cuba. The County expanded the provision in 1996 to include Helms-Burton "traffickers." Numerous states and localities impose environmental procurement restrictions mandating the use of recycled and energy-efficient materials. Others impose "Buy American" requirements on state and local agencies, prohibiting the use of goods made with sweatshop labor (defined as child labor, forced labor, sub-living wages and a work week that exceeds forty-eight hours) and require companies receiving municipal contracts to pay a living wage. Threats by New York City, New York State and California to impose restrictions on financial institutions recently spurred Swiss banks and insurers to settle the claims of Holocaust victims.


144. See FLA. STAT. ANN. § 215.471 (West 2001).

148. San Francisco, Cleveland and North Olmstead, Ohio, and a number of other cities and counties have laws banning the procurement of products made in sweatshops. See Pittsburgh Joins City Fight Against Sweatshops, U.S. NEWSWIRE, Sept. 23, 1998 (discussing Pittsburgh sweatshop ordinance); Linda Himelstein, Going Beyond City Limits? Municipalities Are Exercising Their Clout on Social Issues—And Business Is Balking, BUS. WEEK, July 7, 1997, at 98 (noting passage of San Francisco ordinance); see also OFII web site, supra note 141, at http://www.ofii.org/issues/sanction.cfm (noting enactment of North Olmstead measure).


150. See Greenberger, supra note 143, at A20 (discussing threat of sanctions against Swiss Banks); Stephen D. Moore, Choices Few to Swiss Banks on War Crimes, WALL ST. J., Aug. 18, 1998, at A12 (same).
government procurement measures also have had some effect on corporate practices. Motorola pulled out of Burma partially due to a San Francisco ordinance,\(^{151}\) and Apple Computer and several other companies terminated their Burma operations in response to the Massachusetts statute.\(^{152}\)

4. **International Controversy**

State and local measures frequently provoke international controversy. One of the primary criticisms of the Massachusetts Burma Law was the extent to which it provoked objection from the international community. The European Communities (EC),\(^{153}\) Japan and Thailand condemned the sanctions as violating the World Trade Organization (WTO) Agreement on Government Procurement (GPA).\(^{154}\) The EC, Japan and the Association of South East Asian Nations initiated dispute settlement proceedings in the WTO.\(^{155}\) When discussions with the United States failed to resolve the Massachusetts issue, Japan and the EC requested the establishment of a WTO dispute panel. A panel was established in October 1998 over the objection of the United States.\(^{156}\)

---


153. The European Communities are the official European member of the WTO.

154. See Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), at http://www.wto.org/english/docs_e/legal_e/gpr-94.pdf [hereinafter Government Procurement Agreement]. The Agreement states that “[a] Party shall not apply rules of origin to products or services imported or supplied for purposes of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same product or services from the same Parties.” See id. at art. IV (noting WTO rules); see also Brief for the European Communities and Their Member States at *2-3, Natsios v. Nat’l Foreign Trade Council, 2000 WL 177175 (1st Cir. 2000) (No. 99-474) (discussing European position); Massachusetts Law on Burma Riles EU, CHI. TRIB., Dec. 19, 1997, at A34 (same); *A State’s Foreign Policy: The Mass That Roared*, ECONOMIST, Feb. 8, 1997, at 32 (same).


proceeding was dropped after the U.S. district court invalidated the Massachusetts law, the Supreme Court noted that the EC had indicated its intention to initiate new WTO proceedings if that decision were not affirmed.157

The European Union, foreign governments and United Nations bodies frequently contend that state and local measures violate international law, including provisions of the General Agreement on Tariffs and Trade (GATT) and various international human rights treaties. The EC, for example, has objected to numerous sub-national U.S. measures as unlawful trade practices that conflict with the GATT/WTO system. These measures include state subsidies, health and safety standards, environmental standards and taxation of multinational corporate income.158 A 1994 study found ninety alleged conflicts between WTO provisions and California state laws alone.159 Canada likewise has complained that various sub-national U.S. laws, including inspection requirements for goods and food safety, regulation of alcoholic beverages and newsprint recycling requirements, constitute improper trade barriers.160 California's unitary system of taxing corporate assets provoked protests by a number of U.S. trading partners and retaliatory legislation by the United Kingdom. Dozens of foreign governments submitted amicus briefs opposing the practice before it was upheld by the Supreme Court in Barclays Bank.161

International bodies and foreign states also have criticized U.S. state practices relating to police brutality, prison conditions and capital punishment.162 State executions of foreign nationals who were convicted in violation of their right to notification under the Vienna Convention on Consular Relations have been a particular object of foreign concern in recent years. Such practices have provoked repeated diplomatic protests to the United States by foreign governments163 as well as several suits

---


157. See Crosby, 530 U.S. at 385 n.19.

158. See EUROPEAN COMM'N, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 34-35 (July 2000) (discussing various federal and state direct and indirect purchasing barriers).

159. See ROBERT STUMBERG, GATT IMPACT ON STATE LAW: CALIFORNIA (Ctr. for Policy Alternatives, 1994).

160. See Dep't of Foreign Affairs & Int'l Trade, Register of United States Barriers to Trade 13 (1999).


163. In the last eight years, fifteen foreign nationals have been executed by seven states, none of whom had been notified of their rights under the Consular Convention. The Governor of Oklahoma recently rejected a clemency request for
against the United States before the World Court. In June 2001, the World Court ruled that the United States had violated its obligations under the Vienna Convention on Consular Relations to German nationals on death row, both by failing to notify them of their right to consular notification and by failing to allow review of the death sentences in light of the violation.  

Foreign states have vigorously condemned the United States for state executions of juveniles and the mentally disabled as violating U.S. obligations under fundamental international human rights conventions.

The European Union has formally objected to over twenty executions in the United States since 1998. Texas' execution of Karla Faye Tucker provoked the European Parliament to adopt a resolution strongly condemning the execution. In June 2001, the Council of Europe threatened the United States with loss of its observer status unless the United States discontinued capital punishment by 2003. Italy and other European governments have responded to U.S. state death penalty practices by prohibiting extradition to the United States of individuals who may face

a Mexican national who had been convicted in "clear violation" of the Convention, despite Mexico's objection that the decision violated "international law and the elemental principles of cooperation between nations." See Raymond Bonner, Mexican Killer Is Refused Clemency by Oklahoma, N.Y. TIMES, July 21, 2001, at A8 [hereinafter Bonner, Clemency]. Mexico filed a formal diplomatic protest with the U.S. State Department regarding Texas' execution of Miguel Flores as a result of Texas' failure to notify Flores of his rights under the Convention. See Raymond Bonner, U.S. Bid to Execute Mexican Draws Fire, N.Y. TIMES, Oct. 30, 2000, at A20 (quoting Mexican official that practice "is a strain on bilateral relations").


165. See, e.g., Texas Death-Rose Inmate Granted Stay of Execution, AGENCE FRANCE PRESSE, Aug. 16, 2001 (reporting stay of execution for Napoleon Beazley, who was a juvenile at the time of the crime, and noting support for stay from various nations and human rights groups). Georgia's scheduled execution of Alexander Williams provoked calls by the European Union and other international groups to spare Williams because he had been a minor at the time of the crime. See Raymond Bonner, Georgia Execution Is Stayed in Case of Youthful Offender, N.Y. TIMES, Aug. 23, 2000, at A12 (discussing international response); cf. Brief of Amici Curiae Diplomats at 12, McCarver v. North Carolina, 70 U.S.L.W. 3282 (2001) (No. 00-8727) (arguing that allowing executions of the mentally retarded "will further the United States' diplomatic isolation and inevitably harm other United States foreign policy interests").


167. See Spiro, supra note 117, at 1263 (discussing international activism and death penalty protests).

European Members of Parliament have called for an investment boycott on states imposing the death penalty, and shareholder pressure for divestment from such states is increasing in Europe.  

III. THE DE FACTO FEDERALISM OF U.S. FOREIGN RELATIONS

A. National Deference to States

Despite the potential of state and local activities to provoke international conflict, Congress and the President have frequently tolerated, deferred to and in some cases abetted, such policies. The executive branch has defended state execution practices despite acknowledged breaches of U.S. treaty obligations and has deferred fully to state government decisions in this area. Indeed, in Breard v. Greene, which involved a protest in the World Court by Paraguay over Virginia’s execution of a Paraguayan national, the United States argued before the U.S. Supreme Court that the federal government lacked any authority to halt a state execution, despite an order for provisional measures from the World Court.  

The national political branches frequently have tolerated state and local boycott activities. In the 1970s, Congress allowed measures targeting the Arab League boycott of Israel to stand until Congress itself adopted federal legislation barring U.S. entities from participating in the boycott. Congress then expressly preempted the existing state legislation. Congress declined to preempt the state and local rules targeting apartheid in South Africa for the two decades that they conflicted with national policy. Even when national sanctions were imposed on South Africa in 1986, Congress...
gess allowed state and local rules to remain in place.\textsuperscript{175} Congress then voted to permit sub-national governments to enforce their South Africa selective purchasing laws on federally-funded transportation projects.\textsuperscript{176} When the United States lifted its sanctions against South Africa following the transition to democracy, Congress still did not eliminate the state and local measures, but merely “urge[d] state and local governments to rescind” their legislation.\textsuperscript{177}

National deference to federalism concerns has been particularly notable in the treaty context, where the United States frequently has refused to impose treaty obligations upon state and local governments.\textsuperscript{178} The


\textsuperscript{177} South African Democratic Transition Support Act of 1993 § 4(c)(1).

\textsuperscript{178} “In practice, both Congress and the treaty-making power have sometimes refrained from fully exercising their powers out of respect for state susceptibilities, and the courts have sometimes given rather strained interpretations to treaties for the same reason.” \textit{Wright, supra} note 81, at 75. Historically, the Senate has declined to ratify treaties considered to infringe on states’ rights, or has required state consent in order for the treaty to be binding. \textit{See id.} at 93. The United States obtained Maine’s consent to the Webster-Ashburton treaty of 1842, which adjusted the state’s boundaries, as a matter of political expediency, if not constitutional necessity. \textit{See id.} at 89. An 1853 treaty with France protected the right of French nationals to own land on equal terms with citizens “in all states of the Union where existing laws permit it, so long and to the same extent as the said laws shall remain in force.” In all other states, the President promised to “recommend” the passage of laws necessary to secure the right. \textit{Id.} at 90 n.79. And in an 1854 treaty with Great Britain, the United States promised to “urge upon the state governments” equal rights to use state canals for British subjects. \textit{Id.} at 31 n.11.
United States has declined to extend the obligations of many international taxation agreements to the states, a fact that was central to the decisions upholding the validity of state measures in many of the dormant Foreign Commerce Clause cases.179

In ratifying recent human rights conventions such as the Genocide and Torture Conventions, the Convention Against Race Discrimination and the ICCPR, the United States expressly adopted federalism declarations and understandings that delegated responsibility for certain U.S. international human rights obligations to the states.

The ICCPR, for example, is one of the leading international instruments prohibiting forced labor and the suppression of political speech such as that in Burma. In consenting to the treaty’s ratification, the U.S. Senate attached a federalism understanding stating as follows:

[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial 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 take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.180

179. In Container Corp. v. Franchise Tax Board, the Court emphasized that “the tax treaties into which the United States has entered do not generally cover the taxing activities of subnational governmental units such as States, and in none of the treaties does the restriction on ‘non-arm’s-length’ methods of taxation apply to the states.” 463 U.S. 159, 196 (1983); see also Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 327 (1994) (“Given these indicia of Congress’ willingness to tolerate States’ worldwide combined reporting mandates, . . . we cannot conclude that ‘the foreign policy of the United States . . . is [so] seriously threatened[,]” (quoting Container Corp., 463 U.S. at 196)). In Wardair Canada, Inc. v. Florida Department of Revenue, the Court noted that of the more than seventy relevant treaties entered by the U.S., none prohibited the states or their subdivisions from taxing airline fuel. The Court concluded that “the United States has at least acquiesced in state taxation [practices].” 477 U.S. 1, 12; see also Itel Containers Int’l Corp. v. Huddleston, 507 U.S. 60, 75 (“The Federal Government, in adopting various conventions, . . . has chosen to eliminate state taxes collected in connection with the importation of cargo containers.”).

The provision thus relegates to the states authority for enforcing human rights obligations with respect to matters within their legislative and judicial jurisdiction.\footnote{181}

The Constitution of the International Labour Organization (ILO) likewise contains a federalism clause that defers to sub-national authorities.\footnote{182} The United States Representative to the ILO has interpreted the clause as follows:

Where, in a country with a Federal Government like our own, it is decided that the subject of a convention comes under the jurisdiction of the constituent states as well as the federal authority, that particular convention is treated like a recommendation. It is referred to the state for such action as they care to take.\footnote{183}

ILO Convention Number 105,\footnote{184} to which the United States has acceded, prohibits the use of forced labor, which is one of the most persistent human rights violations in Burma. In an unprecedented step, the ILO recently called upon world governments, businesses and trade unions to review their relations with Burma to ensure that their actions did not perpetuate the system of forced labor, and to take additional actions to try to stop the use of forced labor in that country.\footnote{185} The ILO convention and request, which is binding on states through the Supremacy Clause, combined with the U.S. federalism provision, gives states a valid interest in ensuring that their procurement policies do not contribute to the use of forced labor in Burma.

\begin{flushright}
\end{flushright}

\begin{flushright}
\footnote{181. But see Carlos Manuel Vázquez, Breard, Printz and the Treaty Power, 70 U. COLO. L. REV. 1317, 1354-56 (1999) (arguing federalism understandings are unconstitutional under Supreme Court's anti-commandeering jurisprudence).}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\footnote{184. Convention Concerning the Abolition of Forced Labour (No. 105), June 25, 1957, 320 U.N.T.S. 291.}
\end{flushright}

\begin{flushright}
\end{flushright}
The United States was similarly deferential to state interests in ratifying the GATT/WTO system. The United States’ accession to the WTO in 1994 raised a number of potential conflicts with state regulations regarding food and product safety, banking and insurance, and local taxes and subsidies. The WTO Government Procurement Agreement, in particular, raised the potential for conflict with the exercise of traditional state authority. The national government insulated states from GATT/WTO obligations in three ways.

First, rather than simply imposing the GPA obligations on the states, the United States invited individual states to voluntarily consent to the Agreement. Thirty-seven states agreed to do so, including Massachusetts, though many qualified their consent in significant ways. Massachusetts Governor William Weld, for example, informed the United States Trade Representative that “Massachusetts has no present intention of going against the agreement.” The national government had, it would seem, constitutional authority to impose the GPA and other GATT obligations on states through the Supremacy Clause and could have avoided any tensions created by non-acceding states by doing so.

Second, in implementing the GATT/WTO agreement into domestic law, Congress provided that the agreement was not self-executing, and further provided that the federal legislation would not itself override state law. Additional legislation was required to accomplish this purpose. Finally, Congress barred private parties from enforcing GATT/WTO obligations against state and local governments. Domestic enforcement authority instead was restricted to the executive branch, thus leaving the decision whether to challenge a state’s economic policies to the President’s exclusive discretion.

---

186. See supra note 154.


188. See Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (holding that federal legislation enacted pursuant to treaty may override state authority).

189. See Uruguay Round Agreements Act (URAA) § 102(a)(1), 19 U.S.C. § 3512 (2000) (“No provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect.”); id. § 102(a)(2) (“Nothing in this Act shall be construed— . . . to amend or modify any law of the United States . . . unless specifically provided for in this Act.”).

190. See id. § 102 (limiting private remedies under Uruguay Round Agreements to “no person other than the United States” and providing that “[i]t is the intention of Congress . . . to occupy the field with respect to any cause of action or defense under . . . the Uruguay Round Agreements”); H.R. Doc. No. 103-316, at 676 (1994) (same), reprinted in 1994 U.S.C.C.A.N. 3775, 4055 (codified as amended
(SAA) accompanying the implementing legislation provides that WTO rules may not be used "directly or indirectly" in a private action, including an action based on "Congress' Commerce Clause authority." The SAA further emphasizes:

With respect to the states, section 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Uruguay Round Agreements. Suits of this nature may interfere with the President's conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under those agreements.

The decision by Congress and the Executive to expressly bar private actions against states to enforce U.S. international trade commitments appears to reflect the political desire to protect state activity in this area, as well as to insulate the GATT instruments from private efforts to interpret their terms.

In short, the longstanding practice of the national political branches has been to tolerate many state and local actions that may impact U.S. foreign relations, and to carve out room for state autonomy and responsibility with respect to U.S. treaty obligations.

IV. DEFERENCE TO THE STATES AND THE CROSBY DECISION

Federal deference to sub-national actions contributed to the Burma dispute in two ways. First, U.S. approaches to its treaty obligations bolstered Massachusetts' interest in promoting human rights through its state purchasing policies. Second, U.S. practices invited non-compliance by the states with GATT/WTO obligations. The federal government has authority to override state activities with respect to both of these points. But in the absence of express invalidation by the national political branches, U.S. practice granted states substantial room for independent action that was entitled to deferential treatment by the courts.

A. State Interests in Human Rights Compliance

An important question presented by Crosby is whether measures such as the Massachusetts law promote any legitimate local concern when they impact conduct outside the state's borders. As noted previously, in Crosby,


the Court of Appeals denied this possibility, and the Supreme Court avoided the question. But government procurement laws such as the Massachusetts Burma statute may be viewed from a number of perspectives. First, the measure could be considered a communicative effort by the State to condemn Burma's human rights practices. Second, the provision may have sought to prevent Massachusetts' expenditures from contributing to human rights abuse and to protect the state from the "moral taint" suffered from dealing with firms that do business with Burma. The final and potentially the most controversial purpose might be to promote compliance with international human rights abroad by altering the Burmese government's conduct.

Governments have a valid interest in engaging in communicative activities, whether protected by the First Amendment or as a result of their status as sovereigns. But while communication is a legitimate state interest, a state's communicative purpose of condemning Burma's human rights practices could be served simply by adopting a resolution decrying the government's use of forced labor and torture and suppression of democracy. One therefore might argue that the Massachusetts procurement measure was unjustifiable for this purpose.

Massachusetts' goal of avoiding complicity in the Burmese government's conduct, however, cannot readily be served in any other manner.

193. See discussion supra note 10 and accompanying text.
194. See Brief for Petitioners, Natsios v. Nat'l Foreign Trade Council, 2001 WL 35850, at *31 (1st Cir. Jan. 12, 2000) (No. 99-474) ("While one purpose of the Burma Law is indirectly to encourage change in Burma, ....... [t]he law is also intended to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma.").
195. The City of Berkeley, California's measure, for example, sought "to promote universal respect for human rights and fundamental freedoms, [and to] recognize the responsibility of local communities to take positive steps to support the rule of law and to help end injustices and egregious violations of human rights wherever they may occur." BERKELEY, CAL. RES. 57,881-N.S., IA (1995). Berkeley was the first municipality to enact a selective purchasing law for Burma. The Berkeley Resolution bars contracts for services or commodities from companies doing business with Burma "until the City Council determines that the people of Burma have become self-governing." Id. at IIIB & IVB.
196. See generally Matthew C. 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) (arguing that state and local "resolutions criticizing foreign regimes and purchasing and investment decisions based on foreign policy criteria are expressive activity beyond the reach of the federal government's preemptive authority"). The Supreme Court has suggested that public entities may have First Amendment rights and interests. See Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); see also Akhil Amar, A State's Right, a Government's Wrong, WASH. POST, Mar. 19, 2000, at B1 (stating that "Massachusetts' money is a form of speech, communicating its condemnation in a dramatically expressive way.").
197. On the other hand, the First Amendment protects speech that could have been made in a less offensive way. See, e.g., Cohen v. California, 403 U.S. 15 (1971) (holding that state improperly prohibited wearing of jacket stating "Fuck the draft").
Massachusetts' desire to avoid using public funds to support morally offensive practices would seem to be a legitimate local interest. States have a legitimate interest in engaging in the economy as market participants. And certainly Massachusetts' decisions regarding the use of its own local funds constitute an area of traditional state power. In the present case, the funds at issue were collected locally and distributed locally to serve local interests through such traditional state functions as road construction, law enforcement, public services and education. The First Circuit's conclusion that Massachusetts had no legitimate interest in avoiding "moral taint" in its state expenditures thus appears too facile.

Finally, even with respect to the goal of promoting human rights abroad, Massachusetts appears to have had some valid interest, at least in the absence of federal law precluding such action. U.S. treaties impose obligations on state and local governments to promote respect for international human rights themselves in areas of state authority.

U.S. treaty obligations to promote compliance with international human rights are binding on the several states, both as a matter of the treaty text, through the Supremacy Clause and through federalism provisions adopted by the Senate. Burma has been targeted extensively, both by the United States and by the international community, for the use of forced labor, suppression of political speech and other fundamental human rights violations. The United States has ratified a number of treaties prohibiting such conduct, including the ICCPR and various international agreements barring the use of forced labor. Through federalism clauses, the government has authorized the states to enforce these

198. See Bd. of Trs. of the Employees' Ret. Sys. v. Mayor & City Council of Balt., 562 A.2d 720, 755 (Md. 1989) (recognizing that "legitimate, local public interests" served by Baltimore's decision to divest city pension funds from firms doing business in South Africa, included "the local interest in . . . ensuring that pension funds are invested in a socially responsible manner [and the desire of] the City and its citizens to distance themselves from the moral taint of . . . help[ing] to maintain South Africa's system of racial discrimination").

199. See, e.g., Hughes v. Alexandra Scrap Corp., 426 U.S. 794 (1976) (finding that dormant interstate commerce clause analysis may not apply fully where state acts as market participant). The applicability of the market participant doctrine to the Foreign Commerce Clause is unclear. Cf. Trojan Tech., Inc. v. Pennsylvania, 916 F.2d 903, 909-13 (3d Cir. 1990) (finding that market participant exception protects state "Buy American" law from Foreign Commerce Clause preemption).

200. See, e.g., ICCPR, supra note 87, art. 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.").

201. For a discussion of the ICCPR and ILO federalism understandings, see supra notes 180-85 and accompanying text.


203. The United States is party to the ILO Convention Concerning the Abolition of Forced Labour (No. 105), supra note 184; the 1926 Convention to Suppress the Slave Trade and Slavery, 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 (entered into force Sept. 25, 1926); and the 1957 Supplementary Convention on the Abolition of
principles within their areas of jurisdictional competence. The ICCPR federalism understanding, for example, delegates to state and local governments the authority to implement U.S. obligations under the ICCPR through means subject to their own legislative and judicial jurisdiction.\textsuperscript{204} This jurisdiction surely would extend to decisions by Massachusetts regarding how to spend its own money in the conduct of governmental operations, including the decision whether state purchasing dollars may be used to target forced labor in Burma.

None of this is to suggest that the national government lacks the power to prevent a state from conditioning its procurement decisions as Massachusetts did. Massachusetts conceded, as it must, that the national government possessed authority to preempt its law.\textsuperscript{205} But where legitimate state interests are involved, and in the absence of federal law invalidating such state activity, the Court should have at least considered the state interests at stake in evaluating the measure’s incompatibility with national policy.

\textbf{B. States and International Trade Obligations}

National deference to the states in acceding to the WTO also undermined the claim that Massachusetts improperly was infringing on U.S. international trade obligations. The strongest argument for invalidating the Massachusetts law was the criticism by the EC and other nations that the Massachusetts statute violated the Government Procurement Agreement. The EC appeared as an amicus in \textit{Crosby} to object to the Massachusetts statute on this ground, and all three courts cited the Massachusetts statute’s potential conflict with the GPA in support of invalidating the statute.\textsuperscript{206}

This argument was weak in the \textit{Crosby} context for several reasons. First, the courts were not entitled to consider the National Foreign Trade Council’s claim that the law violated GATT rules, since Congress has barred private domestic enforcement of those obligations. Furthermore,

---

\textsuperscript{204} For discussion of the ICCPR federalism understanding, see \textit{supra} notes 180-81 and accompanying text.

\textsuperscript{205} \textit{See Crosby} v. Nat’l Foreign Trade Council, 530 U.S. 363, 373 n.7 (2000) (“The State concedes, as it must, that in addressing the subject of the federal Act, Congress has the power to preempt the state statute.”); Wis. Dep’t of Indus. v. Gould, Inc., 475 U.S. 282, 287 (1986) (rejecting argument that state’s “statutory scheme . . . escapes preemption because it is an exercise of the State’s spending power . . . ”).

\textsuperscript{206} \textit{See Crosby}, 530 U.S. at 382-83 & nn.18, 19 (noting that EU had warned that state law “could have a damaging effect on bilateral EU-US relations,” that it was issue of “serious concern,” was “threatening relations with the United States,” and that EU had threatened to reinstitute WTO proceedings if the law were upheld); Nat’l Foreign Trade Council v. Natsios, 181 F.2d 38, 52-53 (1st Cir. 1999) (regarding constitutionality of Massachusetts Burma Law), \textit{aff’d sub nom., Crosby}, 550 U.S. 363 (2000); Nat’l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 291 (discussing law’s “disruptive impact on foreign relations”).
it is by no means clear that the Massachusetts rule violated the GPA. The 
Procurement Agreement has not been construed by the WTO to date, and 
it language on this point is subject to interpretation.\textsuperscript{207} More impor-
tantly, as noted above, the United States has not made the GPA automatically 

 binding on the states. With U.S. tolerance, if not encouragement, 
thirteen states have declined to accept the GPA altogether, and many 
others have only partially embraced it.\textsuperscript{208} Given the United States’ defer-
tential approach to state compliance with the GPA, a state that chose not to 
accept the GPA, and then acted contrary to its requirements, would violate 
no domestic or WTO obligation. All of these considerations suggest that 
the Court protested too much over the international controversy.

C. National Deference to the Massachusetts Burma Law

In addition to the general deference to state authority discussed 
above, the national political branches consistently have deferred to the 
Massachusetts law. Their conduct suggests that, at least in the eyes of Con-
gress and the Executive, the addition of Massachusetts’ voice to the Burma 
sanctions chorus could be tolerated. The United States repeatedly has 
condemned, and continues to condemn, Burma’s forced labor and other 
human rights practices. Indeed, Burma is one of the primary targets of 
U.S. sanctions.\textsuperscript{209} As discussed below, in light of the federal government’s 
tolerance of the Massachusetts law, the Supreme Court reasonably could 
have concluded, as the district court did, that the Massachusetts law com-
plemented both U.S. international human rights obligations generally and 

the United States’ specific policies toward Burma.\textsuperscript{210}

The Massachusetts law did differ from the federal law by applying to 
state procurement policies (an area that the national government does 
not regulate), to contracts for goods and services and to non-U.S. persons 
and companies. Congress, however, had taken no action to suggest that 
these differences conflicted in any way with federal policy. Massachusetts 
adopted its statute three months before the Federal Burma Statute was 
passed; yet, nothing in the federal law purported to override the Massa-
chusetts provision. The federal law’s silence on this point is notable, as

\textsuperscript{207} See generally Christopher McCrudden, \textit{supra} note 156, at 35-46 (arguing 
that state selective purchasing laws for human rights purposes may not violate 
GPA).

\textsuperscript{208} For state adherence to the GPA, see World Trade Organization, \textit{supra} note 187, at http://www.wto.org/english/tratop_e/gproce/gproc_e/usa-2.doc.

\textsuperscript{209} See Cleveland, \textit{supra} note 202, at 9-11 (discussing U.S. policies toward 
Burma); see also U.S. Dept. of State, Secretary of State Madeleine K. Albright, State-
commitment to promoting democracy and human rights in Burma, and calling on 
ILO members to “consider additional measures, including trade sanctions, to 
respond to the ILO’s call to action”).

\textsuperscript{210} See \textit{Baker}, 26 F. Supp. 2d at 293 (“The evidence does not establish suffi-
cient actual conflict for this court to find implied preemption.”).
Congress must be presumed to have been aware of the controversial state statute. Moreover, although Congress has considered other sanctions reform legislation in recent years, none of its proposals purported to preempt state and local government procurement provisions, despite lobbying on this issue by business groups such as the Organization for International Investment.\textsuperscript{211}

Indeed, when the EC and Japan lodged complaints regarding the Massachusetts law in the WTO, Congress responded by proposing to insulate the states still further. Congress could have adopted legislation requiring Massachusetts to conform its law to the financial caps set forth in the GPA or to limit the law’s application to non-GPA members. Rather than chastise Massachusetts, however, Congress considered barring even the executive branch from challenging state and local laws as conflicting with U.S.-GATT obligations.\textsuperscript{212} Members of Congress also appeared as amici on both sides of the Crosby litigation. In short, Congress had numerous opportunities both to expressly preempt the state law and to express its disagreement with the provision. Congress’ failure to take any action with regard to the Massachusetts law, other than to rally in support of the state, suggests that a majority of Congress believed that the Massachusetts voice in this area could be tolerated.

The President, likewise, could have expressly preempted the Massachusetts law, but failed to do so. Current case law establishes that executive officials, when acting within the scope of their delegated authority, may preempt state law.\textsuperscript{213} Both the Federal Burma Statute and the IEEPA delegated broad authority to the President, which he exercised by imposing sanctions on Burma. These statutes reasonably conferred on the Presi-

\textsuperscript{211} In 1997, a sanctions bill that was intended to restrict federal sanctions practices did not limit state and local measures, even though in introducing the legislation, the sponsor noted that “roughly 20 States and localities have adopted laws prohibiting government commercial dealings with United States or foreign companies that do business with countries that have poor human rights records,” and that “in addition to antagonizing foreign governments, some of our State and local sanctions raise difficult questions concerning the constitutional authority to conduct U.S. trade and foreign policy.” See 143 CONG. REC. E2080 (daily ed. Oct. 23, 1997) (statement of Rep. Hamilton) (introducing \textit{Enhancement of Trade, Security and Human Rights Through Sanctions Reform Act}, H.R. 2708, 105th Cong. (1997)).

\textsuperscript{212} In August 1998, the House of Representatives nearly adopted a measure that would have barred the federal government from challenging any state or local law as violating an international agreement. See McCrudden, \textit{supra} note 156, at 26. In September 1997, the House of Representatives had approved a bill appropriating $1 million to the U.S. Trade Representative to report to Congress and state and local governments about any foreign complaint in the WTO that could affect U.S. laws. See id. (discussing H.R. 2267).

\textsuperscript{213} \textit{See} La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 369 (1986) (stating “federal agency acting within the scope of its congressionally delegated authority may preempt state regulation”); Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta, 458 U.S. 141, 159 (1982) (finding federal regulation preempted state law); \textit{see also} Young, \textit{supra} note 126, at 171 (“Under current law, ... executive officials acting within the scope of their delegated authority have the power to preempt state law.”).
dent the power to override conflicting state legislation.\textsuperscript{214} Or, if the President was concerned about possible conflict between the Massachusetts law and the GPA, he, like Congress, could have required Massachusetts to conform its law to the GPA requirements by satisfying the WTO financial caps or applying the law only to non-GPA members.

Thus, the \textit{Crosby} Court's assumption that the Massachusetts law would "compromise" the President's effectiveness by restricting his options in the foreign affairs arena was misplaced.\textsuperscript{215} If and when the Executive found the law to interfere with his authority vis-à-vis Burma, he easily could have eliminated the conflict. Furthermore, if the Executive was concerned that the Massachusetts law conflicted with U.S. international trade obligations, he could have initiated a WTO suit against Massachusetts under the WTO implementing legislation. Alternatively, the Executive could have allowed the EC and Japan's challenge to the Massachusetts law in the WTO to proceed. The Executive found no cause to take any of these actions.

In sum, both Congress and the Executive had numerous opportunities to expressly preempt or otherwise eliminate the conflict posed by the Massachusetts law, if either branch found it important to the national interest to do so. Neither branch took any such action. Instead, the constitutionality of the Massachusetts law was presented to the Court in private litigation, in the face of the apparent unwillingness of the President and Congress to take action against the legislation and with a background of federal deference to state procurement rules in general and to the Massachusetts law in particular. Under these circumstances, as the \textit{Barclays Bank} Court found, the Court reasonably could, and I believe should, have concluded that the political branches had "passively indicat[ed]" that the state law did not impair federal uniformity or otherwise unreasonably infringe on the national foreign affairs powers.\textsuperscript{216}

Instead, the Court applied the "one-voice" doctrine to hold that the state law was barred by implied statutory preemption. By assuming that no state voices could be tolerated in this area, the Court failed to recognize the de facto lenience that Congress and the Executive have bestowed on states in general, and on Massachusetts in particular, to adopt legislation such as the Burma law. The Court also failed to consider the valid interests of state and local governments in engaging in political expression, acting as market participants, and honoring U.S. human rights obligations. The decision accordingly reaches far beyond the Framers' primary concern of ensuring that the national government had \textit{authority} to prevent states from interfering in the foreign affairs area.

In fact, the Court's reliance on the "one-voice" doctrine was sufficiently broad that the Court might have reached the same conclusion in

\textsuperscript{216} See \textit{Barclays Bank PLC v. Franchise Tax Bd.}, 512 U.S. 298, 323 (1994).
the absence of the Federal Burma Statute.\textsuperscript{217} One possible interpretation of \textit{Crosby} is that any action or inaction by Congress with respect to sanctions against Burma would have occupied the entire field, leaving no room for state activity that differed, however slightly, from the national policy. From this vantage, if Congress had never adopted the federal law, the Court still could have found that Congress had either considered and rejected, or declined to consider, sanctions against Burma, and that the “one-voice” doctrine prevented any alternative state voice. The Court’s willingness to invalidate a state measure that was perceived as digressing from federal policy, however incidentally, is more akin to foreign affairs preemption in \textit{Zschernig} than to the simple statutory preemption the Court purported to apply.

Although the \textit{Crosby} decision can be interpreted this broadly, such a reading would have serious implications far beyond the scope of the Massachusetts Burma law, and potentially disrupt two centuries of constitutional practice in foreign relations. A conclusion that state laws implicating foreign relations are invalid, even in the absence of a federal statute directly addressing the subject, would have required invalidation of the pre-1986 state anti-apartheid laws, despite the fact that Congress ultimately allowed those provisions to stand.\textsuperscript{218} Because the decision in \textit{Crosby} fundamentally misconstrues the dynamic relationship between the states and federal government relating to Burma, the decision preferably should be overruled or abandoned. At the very least, \textit{Crosby} should not be interpreted to allow implied preemption whenever any state law diverges from federal policy, however minimally, and regardless of federal deference to the state activity or the state interests involved. A preferable reading of \textit{Crosby} would require a federal statute (or an executive order) that directly conflicts with the matter addressed by state legislation.\textsuperscript{219} It is also worth noting that, absent remedial action from the Court, Congress could reverse \textit{Crosby} and avoid such judicial overreaching in the future by attaching


\textsuperscript{218} See supra notes 175-77 and accompanying text.

\textsuperscript{219} Even this approach, of course, is rife with difficulties, given the number of federal trade, foreign assistance, and other laws that address U.S. relations with foreign states that could be pointed to as differing from a state measure. Cf. David R. Schmahmann, James Finch & Tia Chapman, \textit{Off the Precipice: Massachusetts Expands its Foreign Policy Expedition from Burma to Indonesia}, 30 \textit{Vand. J. Transnat’l L.} 1021, 1027-31 (1997) (arguing that federal policies providing aid to Indonesia under generalized system of preferences and fostering trade through Export-Import Bank and International Rubber Agreement, and Congress’ consideration and rejection of trade sanctions against Indonesia, should preempt state selective purchasing laws targeting Indonesia).
a boilerplate rider to future sanctions regimes that expressly approves state procurement measures. There is precedent for such measures in the federal South African sanctions and repeal. To the extent that such savings clauses were routinely adopted, they would better reflect constitutional allocations than anything in *Crosby*.220

V. Conclusion

In *Crosby*, the Court missed an opportunity to give an honest and searching examination to the complex relationship between states and the national government over foreign affairs. The Court’s presumption that the United States does and must speak with one voice in foreign affairs overlooked the United States’ long history of tolerance for state activity in this area. It also neglected the extent to which the national political branches had both created the opportunity for states to add their voices to the Burma sanctions chorus and had tolerated the specific state measure in this case. The Court thus failed to recognize the possibility and the reality that state and local voices do not inherently clash with national policy, but may instead help to promote a richer harmony of action by the United States as a whole. The ultimate power of the national government to silence Massachusetts was not in question; its constitutional authority to do so is clear. But where the national branches have tolerated and abetted a chorus that includes the states, the Court should not employ implied preemption to protect the political branches from having to exercise the authority they have been constitutionally granted.