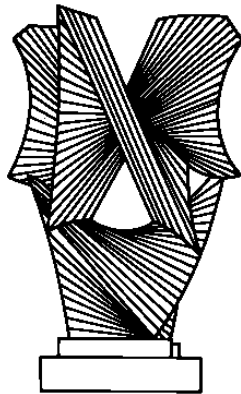


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Statutory Foreign Affairs Preemption

Jack Goldsmith*

In November 1999, Florida fishermen found the six-year old Cuban boy Elian Gonzalez drifting at sea off the coast of Florida. The boat carrying Elian, his mother, and eleven others from Cuba had capsized two days earlier. The Immigration and Naturalization Service (“INS”) took custody of Elian and then paroled him into the custody of his Miami uncle, Lazaro Gonzalez. Lazaro sought political asylum on Elian’s behalf, but Elian’s Cuban father represented that he wanted the application withdrawn. The INS eventually determined that the father, not the uncle, had the exclusive rights to control the asylum application. Because Lazaro’s control over Elian extended only to the extent granted by the INS parole, Lazaro filed an action in a Florida state court seeking temporary custody over the child.

Family law is at the core of the states’ reserved powers. Supreme Court jurisprudence suggests that Congress lacks the authority to regulate many aspects of family law, including the law of custody.¹ Moreover, nothing in the federal immigration statutes or regulations speaks to the validity of state power to award custody over an unaccompanied minor alien. Nonetheless, the Florida court had little difficulty in concluding that federal immigration law preempted Lazaro’s state law custody action. The essence of the court’s reasoning was as follows: “While the court recognizes the many, many authorities that establish that domestic relations, family law, is an area reserved to state courts, Petitioner fails to recognize the fundamental nature of this case – it is an immigration case, not a family case.”²

The *Gonzalez* court’s terse analysis reflects the conventional view that statutory foreign affairs preemption is a simple issue because foreign affairs statutes are easy to identify, and because these statutes carry a powerful presumption of preemption. But matters are much more complex than this. As the distinction between domestic and foreign affairs blurs, and as international law comes to regulate issues formerly regulated by domestic law alone, the characterization of a case or issue as involving “foreign” or “domestic” affairs is often not obvious.³ Even the application of a state’s criminal law to crimes committed within the state can have profound international repercussions.⁴ In addition, as foreign affairs and international

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¹ See *United States v Lopez*, 514 US 549, 564 (1995) (asserting that Congress’s power does not extend to “family law (including marriage, divorce, and child custody)”); id at 624 (Breyer, J, dissenting) (insinuating the same); but see Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L Rev 1297 (1998) (arguing the contrary).

² *In re Lazaro Gonzalez*, 2000 WL 492102 (Fla Cir Ct 2000). The federal courts eventually upheld the Attorney General’s authority to determine that Elian’s father was Elian’s exclusive representative in applying for asylum. *Gonzalez v Reno*, 212 F3d 1338 (11th Cir 2000), cert denied, 120 S Ct 2737 (2000)

³ See Jack L. Goldsmith, *Federal Courts, Federalism, and Foreign Affairs*, 83 Va L Rev 1617, 1670-80 (1997).

⁴ This was true, for example, of *Breard v Greene*, 523 US 371 (1998).

law expand to include issues at the core of the states' reserved power, it is not at all clear that a presumption in favor of statutory foreign affairs preemption makes sense. Indeed, there may well be states-rights based limitations on the federal government's power to regulate traditional state prerogatives that implicate U.S. foreign relations.⁵

In this article I will assume plenary federal power to preempt in this area, and will focus instead on difficult and largely unanalyzed issues concerning statutory foreign affairs preemption. One issue concerns the proper interpretive default presumption. Should preemption analysis indulge a presumption in favor of the federal government's strong national interest in conducting foreign affairs? Should it instead be biased to protect traditional state prerogatives? Or should no presumption attach in either direction? I argue that neither an interpretive canon favoring federal foreign affairs interests, nor one favoring state interests, is warranted in this context. Considered separately, each canon rests on implausible institutional and empirical assumptions. When a foreign relations statute touches on traditional state prerogatives, both canons are implicated, and both lose coherence. The prudent course is for courts to apply "ordinary" principles of preemption without any presumption in favor of state or federal law, even when they think the statute concerns foreign affairs.

Of course, courts have an array of "ordinary" preemption doctrines at their disposal even after they have resolved the default presumption issue. Which preemption doctrine(s) should they apply in the foreign relations context? When a case involves a state law that appears to implicate foreign relations, options for preemption include express preemption, conflict preemption, obstacle preemption, field preemption, dormant commerce clause preemption, dormant foreign affairs preemption, and the federal common law of foreign relations. These doctrines can be compared along two dimensions: (a) the degree to which the political branches have spoken to the preemption issue, and (b) the extent to which preemption doctrines require courts to engage in an independent assessment of the state law's effect on U.S. foreign relations. I argue that, for reasons of institutional competence and political process, and because of the waning of the domestic-foreign affairs distinction, courts should engage in minimalist statutory foreign affairs preemption. They should eschew independent judicial foreign policy analysis, and preempt state law only on the basis of policy choices traceable to the political branches in enacted law.

The occasion for this analysis is the Supreme Court's decision last Term in *Crosby v. National Foreign Trade Council*, which held that federal sanctions on Burma (formerly Myanmar) preempted Massachusetts sanctions on Burma.⁶ *Crosby* is the most important statutory foreign affairs preemption case in fifty years, and thus provides a good vehicle for analyzing the issue

⁵ This issue has been vetted most thoroughly in the treaty context. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich L Rev 390 (1998) (arguing for federalism-based limitations on the treaty power); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich L Rev 1075 (2000) (challenging this view); Curtis A. Bradley, *The Treaty Power and American Federalism – Part II* (forthcoming rebuttal, on file with Mich L Rev).

⁶ 120 S Ct 2298 (2000).

in the modern era. I argue that *Crosby* is best viewed as reflecting the minimalist approach to statutory foreign affairs preemption sketched here. The *Crosby* Court appeared sensitive to the difficulty of statutory foreign affairs preemption in a world in which the line between domestic and foreign affairs has blurred; it went out of its way to indulge no presumption whatsoever in favor of federal or state law, or to inject its own views of the foreign policy consequences of preemption versus non-preemption; and it decided the preemption issue on the narrowest possible basis, leaving it to political process to work out the scores of other difficult issues about the relationship between state and federal law related to foreign affairs. We cannot be sure why *Crosby* embraced this minimalist approach. But whatever the Court's motivation, its analysis is a normatively attractive model for all statutory foreign affairs preemption cases.

A general caveat is in order at the outset. The Supreme Court's preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate. Their relations to one another are unclear. And the decisional outcomes are difficult to cohere. Only in passing does this article try to figure out what (if anything) is going on, behind the doctrines, in the preemption cases.⁷ My primary aim is to take the Court's doctrines and justifications seriously and make the best normative sense of them I can in the context of statutory foreign affairs preemption.

I. *CROSBY*

Since 1962, the nation formerly known as "Burma" and today known as "Myanmar" has been run by a repressive military regime.⁸ Numerous public and private entities around the world have imposed various sanctions on Burma in an attempt to restore democracy there. In 1996, Massachusetts adopted "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)."⁹ According to its sponsors, the Act was designed to show disapproval of human rights violations in Burma, and to pressure the government there to reform.¹⁰ The Act barred state entities from buying goods or services from any person or firm on a "restricted purchase list" of persons and firms doing business with Burma.¹¹ The boycott did not apply if there was insufficient competition for important products, if the procurement concerned medical supplies, or if the highest bid from a non-covered firm was over 10% higher than a bid from a covered firm.¹²

⁷ For an attempt at a positive theory of preemption, see David B. Spence and Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal L Rev 1125 (1999).

⁸ Like the courts and parties in *Crosby*, I will refer to the country as "Burma."

⁹ See Mass Ann Laws ch 7, §§ 22G—M, § 40 F1/2 (1997).

¹⁰ See *National Foreign Trade Council v. Natsios*, 181 F3d 38, 47 (1999).

¹¹ Mass Ann Laws ch 7, § 22H(a), § 22J (1997). The Statute exempts news organizations, telecommunications firms, and medical suppliers from its scope. See Mass Gen Laws ch 7, § 22H(e), § 22I (1997).

¹² See *id.* at § 22H(b); § 22I; § 22H(d).

Three months after Massachusetts imposed its sanctions, Congress passed a statute imposing federal sanctions on Burma.¹³ (The record does not indicate whether Congress was influenced by the Massachusetts statute.¹⁴) The federal Act banned most aid to Burma, required the United States to vote against assistance to Burma in international financial institutions, and prohibited entry visas for Burmese government officials unless required by treaty or needed to staff the Burmese mission to the United Nations.¹⁵ It authorized the President to prohibit “United States persons” from “new investment” in Burma if he certified to Congress that the Burmese government committed violence against the Burmese democratic opposition or harmed, re-arrested, or exiled opposition leader and Nobel Peace Prize winner Daw Aung San Suu Kyi.¹⁶ And it also required the President to develop “a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma,” to file reports to Congress on Burma’s progress, and to waive any sanction under the statute if doing so was in the national security interests of the United States.¹⁷

An organization representing several companies on Massachusetts’ restricted purchase list, the National Foreign Trade Council, brought a lawsuit against Massachusetts officials in federal district court seeking declaratory and injunctive relief from the Massachusetts Burma sanctions. The court granted the relief on the basis of dormant foreign affairs preemption, reasoning that the Massachusetts state law “unconstitutionally impinged on the federal government’ exclusive authority to regulate foreign affairs.”¹⁸

The United States Court of Appeals for the First Circuit affirmed the district court on three independent grounds. It first agreed with the district court that the Massachusetts sanctions impinged on the foreign affairs power “vested exclusively in the federal government.”¹⁹ It then held that the Massachusetts statute violated the dormant commerce clause because it discriminated against foreign commerce and interfered with the federal government’s ability to speak with “one voice.”²⁰ The court’s third holding concerned statutory preemption. The court began with the premise that “when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern.” Without making clear what brand of statutory preemption it was resting on, the court concluded that the federal statute preempted the state statute.²¹

¹³ See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167.

¹⁴ See Edward T. Swaine, *Crosby as Foreign Relations Law*, n. 10 (forthcoming draft on file with Va J Intl L).

¹⁵ Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570(a).

¹⁶ *Id* at § 570(b).

¹⁷ *Id* at § 570(c).

¹⁸ *National Foreign Trade Council v Baker*, 26 F Supp 2d 287, 291 (Mass 1998).

¹⁹ *National Foreign Trade Council v Natsios*, 181 F3d 38, 49-57 (1st Cir 1999).

²⁰ *Id* at 58-71.

²¹ *Id* at 71-75.

A unanimous Supreme Court affirmed.²² The Court declined to address the dormant preemption issues, and instead rested its decision to preempt solely on the ground that the state sanctions stood “as an obstacle to the accomplishment of Congress’s full objectives under the federal Act” because they “undermine[d] the intended purpose and ‘natural effect’ of at least three provisions of the federal Act.”²³ First, the State Act undermined Congress’s delegation of discretion to the President to control economic sanctions against Burma. The Massachusetts sanctions blunted the consequences of this delegated discretion by limiting the President’s ability to harness “the fully coercive power of the national economy” in calibrating sanctions against Burma.²⁴ Second, the State sanctions were broader than the federal sanctions. They prohibited contracts permitted by the federal act, prohibited more investment in Burma than the federal act, and applied to foreign companies not covered by the federal Act. The inconsistency of the two sets of sanctions, the Court concluded, “undermines the Congressional calibration of force.”²⁵ Third, Congress conferred authority on the President to develop, in the words of the federal statute, a “comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.”²⁶ The state law interfered with this aim.

II. PRESUMPTIVE CANONS

Statutory preemption, we are told, “fundamentally is a question of congressional intent.”²⁷ And yet in many statutory contexts, preemption analysis begins, and often ends, with general interpretive assumptions that appear to have nothing to do with congressional intent. Indian preemption provides a good example. In this context, courts reject “a narrow focus on congressional intent to pre-empt state law as the sole touchstone.”²⁸ They instead base their analysis on “broader and less statute-focused considerations bearing on the nature of the state, federal, and tribal interests at stake, [thereby giving] preemptive effect to a broadly framed or highly abstract federal objective.”²⁹

There are two justifications for interpretive presumptions of this sort. The first is that courts should bias outcomes to serve constitutional values, leaving the final decision to the federal political branches.³⁰ In the Indian context, we might say that the Constitution evinces a preference for federal solutions to Indian relations. The second justification is that the presumption is a “majoritarian default” rule. Courts embrace the presumptive rule that they

²² *Crosby*, 120 S Ct 2288. Justice Scalia filed an opinion, joined by Justice Thomas, concurring in the judgment. The opinion objected to the majority opinion’s reliance on legislative history. See *id* at 2302-04.

²³ *Id* at 2294.

²⁴ *Id* at 2296.

²⁵ *Id* at 2298.

²⁶ *Id*.

²⁷ *English v General Electric*, 496 US 72, 79 (1990); see also *Medtronic, Inc v Lohr*, 518 US 470, 485 (1996).

²⁸ *New Mexico v Mescalero Apache Tribe*, 462 US 324, 334 (1983).

²⁹ Laurence H. Tribe, *American Constitutional Law* 1174-75 (Foundation 3rd ed 2000).

³⁰ Cf William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand L Rev 593 (1992).

believe Congress would want in most cases.³¹ In the Indian context, we might think that courts have determined that over the class of cases in which federal Indian law touches up against state law, Congress generally prefers federal law to triumph.

This Section considers the two canons of presumption most relevant to the question of statutory foreign affairs preemption: the presumption against preemption of state law, and the canon that favors federal preemption for foreign relations statutes.

A. The Presumption Against Preemption

The presumptive against preemption has a number of formulations. Sometimes it is a mere “assumption that Congress did not intend to displace state law.”³² Other times the presumption is couched more narrowly not to protect all state law, but rather only “historic police powers of the States.”³³ Yet other times the presumption is bolstered with the requirement that it can only be overcome with a plain statement or clear manifestation of congressional intent.³⁴ Although the presumption against preemption is nominally embraced by courts and widely hailed by commentators,³⁵ it is difficult to justify on either constitutional or majoritarian default grounds.

Consider the majoritarian default justification first. The notion of a “general” congressional intent not to preempt state law over a run of different statutory contexts makes even less sense than the notion of congressional intent in enacting a particular statute.³⁶ We can make the notion somewhat more coherent by recharacterizing it as a prediction about whether Congress would usually preempt state law if it were forced to consider the issue.³⁷ But this recharacterization requires intractable counterfactual analyses. With respect to the presumption against preemption, there is no empirical basis for predicting what Congress would have done had it addressed preemption in any particular statute, much less over the range of all statutes.³⁸

³¹ See Cass Sunstein, *Must Formalism be Defended Empirically?*, 66 Chi L Rev 636 (1999).

³² *Maryland v Louisiana*, 451 US 725, 746 (1981).

³³ *Rice v Santa Fe Elevator Corp.*, 331 US 218, 230 (1947).

³⁴ *Gregory v Ashcroft*, 501 US 452, 460-61 (1991); *Rice*, 331 US at 230.

³⁵ For commentators, see, for example, Ken Starr et al., *The Law of Preemption: A Report of the Appellate Judges Conference*, American Bar Association 40-55 (ABA 1991); Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 Ariz L Rev 1379 (1998); S. Candice Hoke, *Preemption Pathologies and Civil Republican Values*, 71 BU L Rev 685, 760-761 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const L Q 69, 111-14 (1988). For challenges to the presumption against preemption, see Caleb Nelson, *Preemption*, 86 Va L Rev 225 (2000); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Georgetown L J 2086 (2000).

³⁶ On the manifold difficulties with discerning congressional intent, see Frank H. Easterbrook, *Statutes' Domain*, 50 U Chi L Rev 533 (1983).

³⁷ Compare Richard A. Posner, *Statutory Interpretation -- in the Classroom and in the Courtroom*, 50 U Chi L Rev 800 (1983) (advocating “imaginative reconstruction”).

³⁸ I am not suggesting that such predictions are always impossible. For example, I believe that one can deduce from the various enforcement schemes in federal statutes that Congress generally legislates with domestic conditions – that is, conditions within the borders of the United States – in mind. See Jack Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U Colo L Rev 1395, 1430-36 (1999). With respect to preemption, we have no such evidence of general congressional intent.

Certainly the actions Congress does take cut in no particular direction. Sometimes Congress makes clear that a federal statute does preempt; and sometimes it makes clear that a federal statute does not. The large majority of statutes in which Congress is silent provide no information – indeed, they are the very statutes we are trying to account for.

Public choice assumptions provide little assistance in the predictive enterprise. We might think that a Congress consisting of members seeking to maximize political support would “always exercise its power to preempt local law -- either to regulate or to forbear from regulating -- in order to obtain for itself the political support associated with providing laws to interested political coalitions.”³⁹ If true, this assumption would attenuate the majoritarian basis for a presumption against preemption. But it is also plausible to think that in many circumstances federal legislators maximize political support by deferring to state regulation of particular issues.⁴⁰ When Congress is silent about its preemptive intent, therefore, public choice theory provides little guidance. Nor can we deduce a general congressional intent to preempt state law from the fact that Congress has for or so fifty years legislated against the backdrop of a nominal judicial presumption against preemption. There is no actual evidence that Congress legislates with the canon in mind.⁴¹ And there is little reason to think it would rely on such a presumption, since the presumption is applied so unpredictably.⁴²

The presumption against preemption is no easier to justify on constitutional grounds. The Constitution allows states to regulate on any subject unless prohibited by the Constitution, statute, or treaty. In the absence of a controlling federal enactment, there is a conclusive presumption that state law governs.⁴³ But if the federal political branches make federal law within their delegated powers under Articles I or II, the Supremacy Clause makes these enactments “the supreme Law of the Land.” The supremacy clause is a “constitutional choice of law rule . . . that gives federal law precedence over conflicting state law.”⁴⁴ It does not contemplate any special requirement to trump state law over and above consistency with the lawmaking procedures in Articles I and II. Moreover, as Caleb Nelson has recently shown, the supremacy clause’s *non obstante* clause -- “any thing in the Constitution or Laws of any State to the contrary notwithstanding” -- was designed precisely to eliminate any residual presumption against implied repeals of state statutes.⁴⁵

For these reasons, it is difficult to see how a presumption against preemption follows from the Supremacy clause or “the role of States as separate sovereigns” that inheres in the 10th

³⁹ Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 Va L Rev 265, 266 (1990).

⁴⁰ This is Macey’s thesis. See *id.*

⁴¹ See Nelson, 86 Va L Rev at 287-88 (cited in note 34).

⁴² See *id.* at 288-89. Nelson provides additional reasons for giving no credence to the feedback effect argument. See *id.* at 289-90.

⁴³ This is the essence of the constitutional holding of *Erie R.R. v Tompkins*, 304 US 64 (1938), which follows from the vesting clauses, Article I, sec. 10, and the 10th Amendment, among other provisions.

⁴⁴ Dinh, 88 Georgetown L J at 2088 (cited in note 34).

⁴⁵ See Nelson, 86 Va L Rev at 232 (cited in note 34).

Amendment.⁴⁶ State sovereignty ends precisely at the point to which federal power, properly exercised, extends. This analysis does not tell us what types of conflicts should trigger preemption. But it does show that it is wrong, or at least question-begging, to infer a presumption against preemption from constitutional text.

The absence of a textual basis for the presumption against preemption leads many to rely on functional arguments. The leading functional argument is that the presumption is necessary to effectuate the "political safeguards of federalism" embraced in *Garcia*.⁴⁷ As the Court in *Gregory v. Ashcroft* stated:

Inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."⁴⁸

On this view, the presumption "pushes Congress to carefully consider the federal-state balance of power when making legislation."⁴⁹ Or, relatedly, the presumption gives the states notice of impending preemptive legislation and facilitates their efforts to marshal resources against the legislation.⁵⁰

This set of arguments also fails to persuade. To the extent they rest on the absence of judicially-enforced limits on Congress's commerce clause power, their force is attenuated by the Court's renewal of judicial review in this context.⁵¹ The arguments also fail on their own functional terms. The concern here is that courts will erroneously interpret congressional ambiguity against states, where "error" means "contrary to congressional intent," however understood. This type of error is illegitimate, the argument goes, because in these cases authority for preemption flows from the judiciary (where the states are not represented) rather than Congress (where they are).⁵²

⁴⁶ See *Geier v American Honda Motor Co*, 529 US 861 (2000) (Stevens, dissenting).

⁴⁷ *Garcia v San Antonio Metro Transit Auth*, 469 US 528 (1985).

⁴⁸ *Gregory*, 501 US at 464 (quoting Tribe, *American Constitutional Law* at 480 (cited in note 28)).

⁴⁹ Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 Case W Res L Rev 823, 840 (1995)

⁵⁰ See *Gregory*, 501 US at 461; see also *United States v Bass*, 404 US 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact found, and intended to bring into issue, the critical matters involved in the judicial decision.").

⁵¹ See *United States v Morrison*, 120 S Ct 1740 (2000); *United States v Lopez*, 514 US 549 (1995).

⁵² See, for example, Starr et al., *The Law of Preemption*, at 47-50 (cited in note 34); Wolfson, 16 Hastings Const L Q at 111-114 (cited in note 34).

If this were the only type of judicial error, it might well be a reason to bias outcomes in favor of states. But it is not the only type of judicial error. Courts can also commit the opposite error of interpreting an ambiguous statute to preserve state authority when in fact Congress intended to displace it. This type of error, too, is illegitimate, for unelected judges fail to follow the wishes of the political branches and the dictates of the Supremacy clause. Both errors, in other words, involve unauthorized judicial lawmaking.⁵³ There is no reason to believe that one error is more suspect under the Constitution than the other.

Nor is there any general reason to believe one type of judicial error is more prevalent than the other. If anything, non-preemption errors that favor state power are likely to be more pervasive. States are among the most influential of interest groups in the federal legislative process, and thus are relatively well suited to convince Congress to revise unwanted judicial interpretations.⁵⁴ Erroneous judicial preemptions (which adversely affect states) are thus more likely, on balance, to be corrected than erroneous judicial non-preemptions (which adversely affect groups that are on balance less influential in Congress than states). This points to a similar error in thinking about the plain statement requirement that is sometimes attached to the presumption against preemption.⁵⁵ The plain statement requirement is usually justified by the fact that it forces Congress to make clear its intent to preempt. But the requirement only works if we can be confident that, along the general run of cases, congressional silence results from a design not to preempt rather than the usual factors informing congressional inertia. For reasons already given, there is no reason to think this is true.

The related notice argument for the presumption also runs into difficulties. A presumption against preemption can put states on notice of preemption by forcing Congress, in its lawmaking processes, to take discernible steps to overcome the presumption. But *any* default rule will put the states on notice as long as the rule is clear. Thus, for example, a presumption in favor of preemption would give states notice that *all* federal legislation potentially preempts state law. This latter rule would require the states to monitor and lobby Congress much more extensively, and it would certainly result in more federal preemption than the opposite rule. But this is a point about the distributive consequences of the rule, not its notice-conferring effects. This is why the notice argument depends at bottom on a constitutional reason to bias outcomes in favor of states – a reason that is thus far lacking.

A final constitutional argument for the presumption against preemption is a translation argument. As an historical matter, modern statutory preemption doctrine's focus on congressional intent, as well as the rise of the presumption against preemption, occurred at the same time as, and probably in response to, the enormous expansion of federal regulatory power

⁵³ Compare *Dinh*, 88 Georgetown L J at 263-288 (cited in note 34).

⁵⁴ See William N. Eskridge, Jr. *Dynamic Statutory Interpretation* (Harvard 1994). This point holds for erroneous federal preemptions that harm the interests of all or most states; it has less force with respect to preemptions that adversely affect only one or a few states.

⁵⁵ *Gregory*, 501 US at 461.

during the New Deal.⁵⁶ One might argue that these changes in preemption doctrine were needed to “translate” the Constitution’s original commitment to limited federal government and state autonomy in a world in which the federal government has near-plenary authority to regulate.⁵⁷ Something like this argument is probably what underlies support for the presumption against preemption. Like all translation arguments, this one is difficult to evaluate because the object of translation (original meaning), the identification of the changed circumstances that warrant translation to preserve original meaning, and the selection of the proper translation, are all generally contested.⁵⁸ Nonetheless, the translation argument is the most persuasive account we have for the presumption against preemption. We will return to it below.

2. The Foreign Affairs Presumption

Hines v. Davidowitz is famous for its influential early articulation of the doctrines of field and obstacle preemption.⁵⁹ It is also a leading case in support of federal preemption for federal foreign relations statutes. *Hines* held that a federal alien registration law preempted a similar state alien registration law. The *Hines* Court did not, as many maintain, establish that federal power in foreign relations, or even in immigration, is exclusive of the states.⁶⁰ Rather, it held that the Pennsylvania law “stands as an obstacle to the accomplishment and execution of the full purposes of Congress.”⁶¹ In explaining why the state law stood as an obstacle, the Court noted that Congress had regulated “in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.”⁶² The Court also noted that when a federal statute concerns foreign relations, “[a]ny concurrent state power that may exist is restricted to the narrowest of limits.”⁶³ These and similar statements have led many to conclude that *Hines* establishes a rule that “preemption is more easily found when Congress has passed legislation relating to foreign relations.”⁶⁴

In analyzing this canon, we begin with the constitutional arguments in its favor. The Constitution delegates broad foreign relations powers to the federal government. The Articles of Confederation experience demonstrated that the absence of a powerful national foreign

⁵⁶ See Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767 (1994).

⁵⁷ Compare Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 Sup Ct Rev 125 (1996).

⁵⁸ See Michael Klarman, *Antifidelity*, 70 S Cal L Rev 381 (1997).

⁵⁹ 312 US 52 (1941).

⁶⁰ The Court pointedly declined to address the argument that “federal power in this field, whether exercised or unexercised, is exclusive.” *Id* at 62.

⁶¹ *Id* at 67.

⁶² *Id* at 68.

⁶³ *Id* at 67.

⁶⁴ *Natsios*, 181 F 3d at 97, *affd*, *Crosby*, 120 S Ct 2298. See also *Maryland*, 451 US at 746 (citing *Hines* for proposition that an “Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”); compare *Boyle v United Technologies*, 487 US 500, 508 (1988) (“fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.”).

relations apparatus would lead states to undersupply public goods (like military defense) and, relatedly, to pursue their parochial interests in various ways that harmed the national foreign relations interest.⁶⁵ But the clear need for federal control over foreign affairs says nothing about the manner in which control should be exercised – whether, for example, federal power should be exclusive, concurrent, or some combination of the two. The Framers chose a combined approach. And they chose to be specific about which powers were exclusive and which were concurrent. Article I, section 10 reflects a decided preference for federal over state regulation with respect to some of the traditional “high” agenda foreign relations issues concerning war, peace, and diplomacy. But it does not suggest that the Constitution biases federal over state power in the many other regulatory contexts traditionally regulated by states that might cause (and throughout our history have caused) foreign relations controversy – contexts that include tort and contract law, criminal law, family law, procurement law, procedural law, education, and much more.⁶⁶

These and other issues outside the scope of Article I, Section 10 fall within concurrent federal-state power. When the political branches enact statutes within this realm, their enactments trump inconsistent state law under the Supremacy clause. But the Constitution provides no justification for courts to give extra preemptive weight to federal foreign relations enactments. The costly prerequisites to federal foreign relations lawmaking suggest the contrary. The Senate’s supermajority veto was expressly designed to make it difficult to enter into treaties that impinged on state power;⁶⁷ Article I’s bicameralism and presentment requirements, which apply to “domestic” and “foreign relations” powers alike, were similarly meant to protect state authority.⁶⁸ Despite these provisions, one could imagine that the Framers made it costly to enact federal foreign relations law but wanted courts to construe the preemptive scope of this law generously once enacted. The U.S. Constitution suggests no such scheme, however. And one can read Article I, sec. 10 to rule one out, for like a presumption of preemption, it reverses the states’ usual burden of inertia in certain specified foreign affairs contexts, suggesting that no such reversal attaches in other contexts.

Many find this conclusion troubling because they believe that without the extra push of the judicial presumption, “normal” interpretive principles governing preemption will allow states acting selfishly to harm the national foreign relations interest at the margin. This worry rests on several unjustified assumptions. The first is that any state-provoked harm to the national foreign affairs interest is constitutionally unwarranted. This assumption rests on the mistaken view that the accommodation of foreign relations concerns is an absolute value under our Constitution. The establishment of a powerful federal foreign relations apparatus was but

⁶⁵ See Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (LSU 1973); Bradford Perkins, *The Cambridge History of American Foreign Relations: The Creation of a Republican Empire, 1776-1865*, at 54-80 (1993).

⁶⁶ See Goldsmith, 83 Va L Rev at 1655-59 (cited in note 3).

⁶⁷ See, for example, Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 Persps in Am Hist 233, 236-250 (1984).

⁶⁸ See ___.

one means to the framers' goal of establishing a more perfect union.⁶⁹ Another important means was presumptive decentralization of regulatory authority subject to national override. The Constitution does not elevate the importance of one means over the other.

Nor does the Constitution suggest (outside of Article I, section 10) that the potential public goods and externality problems produced by presumptive state authority to affect foreign relations are more worrisome than the many potential public goods and externality problems created by presumptive state authority of any number of important "domestic" interstate issues. In the former as well as latter context, there are benefits from decentralization -- experimentation, information generation, maximizing preference satisfaction, local control, and the like⁷⁰ -- that counterbalance these drawbacks. Thus, for example, state and local activities can put underscrutinized foreign activities on the federal agenda⁷¹ and provide economic and political goods to local constituencies that are beyond the capacity of the federal government.⁷² In addition, although we sometimes label state selective purchasing laws "foreign relations activities," they could also be described as self-governing decisions about how to spend local tax dollars on local services consistent with local view of morality.⁷³ Finally, state and local "foreign affairs" activities sometimes "provide the federal government with additional leverage in addressing foreign policy issues," as arguably happened when threatened state sanctions on Swiss banks helped facilitate the Holocaust bank settlement.⁷⁴ As in the domestic interstate context the costs of these "foreign relations activities" will sometimes outweigh their benefits. The Constitution provides the political branches with extensive power to resolve these tradeoffs, in foreign and domestic contexts alike, subject to the burden of inertia.

⁶⁹ See US Const Preamble; Alexander Hamilton, *The Federalist Papers* 1; see generally Curtis A. Bradley and Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 Am J Int'l L J 675 (1998).

⁷⁰ For overviews, see David L. Shapiro, *Federalism: A Dialogue* 36 (Northwestern 1995); Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U Chi L Rev 1484 (1987).

⁷¹ This is what happened, for example, with the dozens of state and local divestment laws with respect to South Africa in the 1980s, which resulted in pressure on the national government to do the same. See Michael Shuman, *Dateline Main Street: Courts v Local Foreign Policies*, 86 Foreign Policy 158, 160 (1992).

⁷² For example, states have been aggressive in international economic affairs in areas where the federal government has either been unwilling or unable to provide adequate local assistance. See Earl H. Fry, *The US States and Foreign Economic Policy: Federalism in the "New World Order,"* in *Foreign Relations and Federal States* 124 (Brian Hocking 1993); John M. Kline, *State and Local Boundary Spanning Strategies in the United States: Political, Economic, and Cultural Transgovernmental Interactions*, cited in *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States*, 329-37 (Jong Jun & Deil Wright 1996).

⁷³ State and local governments often tailor their spending to comport with local conceptions of morality in numerous contexts beyond international human rights at issue in *Crosby*. For example, some state and local governments refuse to buy wood from rain forests, see, for example, Ariz Rev Stat Ann § 34-201 (West 1998); Tenn Code Ann § 4-3-112 (1998), establish purchasing preferences for goods made from recycled content, see, for example, NY Admin Code § 6-322 (Law Co-Op 1999), and bar the purchase of products made in sweatshops, see, for example, North Olmstead, Ohio, Resolution § 97-9 (1998).

⁷⁴ Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U Colo L Rev 1089, 1099 (1999); compare Lisa Martin, *Democratic Commitments: Legislatures and International Cooperation* (Princeton 2000) (domestic democratic processes enhance international credibility).

The second unjustified assumption is that the political branches need the nudge of the presumption to fully protect U.S. foreign relations interests from intrusion by the states. The case for a bias in favor of federal foreign relations statutes seems particularly weak because the federal government's normal burden of inertia is easier to reverse when the nation's foreign relations are at stake. The federal government faces fewer collective action hurdles to preemption because state-provoked foreign affairs controversy is likely to come to the attention of Congress, and because the President possesses extraordinary powers to preempt state law affecting foreign relations on his own constitutional authority and his authority delegated by Congress.⁷⁵ It is impossible to say for sure whether the political branches can fully protect U.S. foreign relations interests without the assistance of the presumption, for we lack settled criteria for the identification of such unprotected interests. But as suggested above, we should not assume that every state-provoked foreign relations controversy constitutes a foreign relations interest that requires federal accommodation. Sometimes, perhaps often, the proper tradeoff favors states.

This conclusion is bolstered by the steps actually taken by the federal political branches in federal foreign relations statutes. (Here we also begin to address the majoritarian default justification for the presumption of preemption.) Sometimes they expressly preempt. Usually they are silent. But often they expressly protect state law, even in important foreign relations contexts, and even where states appear to have incentives inconsistent with foreign relations harmony. Consider three recent examples. First, the United States made the GATT and NAFTA agreements non-self-executing; the implementing legislation for these agreements establishes a two-way consultative process between the state and federal governments, and precludes courts from preempting state law under these agreements except in actions initiated by the federal government.⁷⁶ Second, when Congress established federal law immunities for foreign sovereigns, it specified that cases against foreign sovereigns would in most instances be governed by state law.⁷⁷ Third, the treaty-makers (the President and the Senate) have consistently attached both "federalism understandings" and "non-self-executing declarations" to human rights treaties to ensure that the treaties do not trump state law or otherwise affect the federal-state balance.⁷⁸ There are many similar modern examples, as well as many historical precursors.⁷⁹

⁷⁵ This includes the President's broad "emergency" powers to preempt under IEEPA, see 50 USC § 1702, his power to preempt pursuant to executive agreements, see *United States v Belmont*, 301 US 324 (1937), and his residual inherent Executive power, compare *Dames & Moore*, 453 US 654, 673-74 (1981)). For elaboration of this point, see Goldsmith, *supra* note ____.

⁷⁶ See the 1994 General Agreement on Tariffs and Trade (GATT), codified at 19 USC § 3512 (1994); North American Free Trade Agreement (NAFTA), codified at 19 USC § 3312 (2000).

⁷⁷ 28 USC 1608 (2000).

⁷⁸ See Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, (forthcoming article on file with U Pa L Rev).

⁷⁹ For example, the Senate modified or denied consent to numerous treaties, both before and after the 17th Amendment, on the ground that the treaties interfered with local state prerogatives. See Bradley, 97 Mich L Rev at 419-422 (cited in note 5). For other examples in this vein, see Goldsmith, 83 Va L Rev 1617 (cited in note 3).

Some believe that the federal political branches frequent preference for statute authority over foreign relations interests represents illegitimate democratic decisionmaking. Peter Spiro, for example, argues that “the politics of particular [state-provoked foreign relations] controversies will all too often cut against disciplining a state” because federal legislators will not want to be viewed as benefiting foreign actors at the expense of local actors,” and concludes that “this is hardly democracy at work.”⁸⁰ Spiro’s is a simplistic view of the federal legislative process, since (as *Crosby* shows) it is often very powerful U.S. interests who are the driving force behind suppression of state foreign relations activity. More fundamentally, the process Spiro bemoans could just as easily be described as democracy working well, with legislators responding to constituent preferences. As Ernest Young has noted in response to Spiro’s argument: “if we are to take at all seriously the proposition that state prerogatives are remitted to the political process for their protection, then these are *precisely* the sort of political and structural impediments to federal preemption that courts must respect.”⁸¹

It is possible, of course, that there is a truly destructive collective action problem here; legislators servicing constituent interests to gain re-election might in fact be producing sub-optimal outcomes from the perspective of the national interest. But how can we tell? One suspects that complaints about underprotected national interests are based on the just-questioned belief that reduction of foreign relations friction is an absolute constitutional value. When the national interest is essentially contested, as it usually has been in federalism-foreign relations conflicts, the most accurate measure of the interest is the democratic political process – a process that, as just noted, faces fewer collective action hurdles to action than usual in foreign affairs.

These are all reasons to believe that courts should not indulge a special presumption of preemption for federal foreign relations statutes. Running against the grain of these arguments, however, is the claim in *Curtiss-Wright* that “the states severally never possessed international powers,” and that the “investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution,” but rather passed from Great Britain to the United States as a corporate entity by virtue of the law of nations.⁸² Relatedly, a string of Supreme Court dicta suggests that all federal foreign relations powers are exclusive,⁸³ and some commentators agree.⁸⁴ And beginning in the 1960s, the Supreme Court recognized an exclusive, though ill-defined, federal foreign affairs sphere beyond Article I,

⁸⁰ Peter J. Spiro, *Foreign Relations Federalism*, 70 U Colo L Rev 1223, 1253 (1999).

⁸¹ See Ernest A. Young, “Dual Federalism,” *Concurrent Jurisdiction, and the Foreign Affairs Exception* (forthcoming, Georgetown Law Journal).

⁸² *United States v Curtiss-Wright Export Corp*, 299 US 304, 316 (1936).

⁸³ See, for example, *United States v Pink*, 315 US 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively”); *Belmont*, 301 US at 331 (“In respect of our foreign relations generally, state lines disappear. As to such purposes the State... does not exist.”); *The Chinese Exclusion Case*, 130 US 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”).

⁸⁴ See, for example, Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U Pa L Rev 1245, 1296-99 (1996); John Norton Moore, *Federalism and Foreign Relations*, 1965 Duke L J 248, 275-76.

section 10.⁸⁵ One might think that a presumption in favor of the preemptive force of federal foreign relations statutes follows from the fact that states have no residual authority in foreign affairs.

I will address the reality, and legitimacy, of a non-textual exclusive federal foreign affairs power in the next Section. For now, it suffices to show that the existence of such a power would say little about a presumption in favor of statutory foreign affairs preemption. Within the scope of states' disability under the exclusive federal power, any state action would be *ultra vires*. Preemption would follow as a constitutional matter and there would be no need for statutory interpretation. There has been no such constitutional preemption for most of the issues of tension between federal enactments and state power; most difficult statutory preemption questions must therefore fall outside the exclusive federal power, whatever its scope. But if that is true, then the existence of an exclusive federal power need have no implications for a presumption in favor of statutory foreign affairs preemption beyond that exclusive realm, just as Article I, section 10 need have no such implications outside its realm.

Nonetheless, the *reasons* for the development of an exclusive federal power beyond Article I, section 10 might also support a presumption in favor of statutory foreign affairs preemption. Here we meet perhaps the best argument for such a presumption, an argument once again from translation. It is no accident that an aggressive regime of statutory foreign affairs preemption received its major impetus, in *Hines*, in the middle of World War II. Between the beginning of World War I and the end of World War II, the United States emerged as a world superpower in a dangerous nuclear world. There was a general consensus beginning in this period, and continuing throughout the Cold War, that these significantly changed circumstances required a much more centralized and flexible constitutional foreign relations apparatus than had previously been the case.⁸⁶ During this period the Supreme Court presided over, and indeed encouraged, an extraordinary and unprecedented centralization of foreign relations power in the federal government.⁸⁷ The extra thumb on the scales of a presumption in favor of preemption can be viewed as part of the broader need to establish federal control during the World and Cold Wars. Of course, because "foreign affairs" had a much narrower meaning then than today, foreign affairs centralization during this period did not extend nearly as far it would today. We will return to these points below.

3. The Case for No Presumption

To determine when the presumptive canons apply, a federal statute must be characterized as involving a foreign affairs issue or an issue of traditional state prerogative.

⁸⁵ See *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964); *Zschernig v Miller*, 389 US 429 (1968).

⁸⁶ See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va L Rev 1 (1999); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Cal L Rev 671 (1998).

⁸⁷ See sources cited in notes 84, 85. The leading cases were *Curtiss-Wright Export Corp*, 299 US 304; *Missouri v Holland*, 252 US 416 (1920); *Pink*, 315 US at 229; and *Belmont*, 301 US 324.

There is no reason in theory why the two categories of characterization need necessarily overlap. The issues traditionally governed by state law might have nothing to do with relations with other countries, and *vice versa*. Courts have made just this assumption in invoking the two canons during the last fifty years.

Consider this passage from a wartime labor preemption case:

[In *Hines*] we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. . . . Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.⁸⁸

In this case, the court characterized the statute non-controversially as one concerning a traditional state rather than a foreign relations concern. This choice of characterizations is necessary for the canons to work, even in cases when the choice is controversial. This is why the *Gonzalez* court characterized the case as about immigration rather than family law before proceeding to select the canon favoring federal preemption.⁸⁹ And it is why the court of appeals in *Crosby* characterized the case to concern foreign affairs rather than state procurement.⁹⁰

The problem is that these latter two cases actually implicate *both* traditional state prerogatives and foreign relations interests. As the world becomes more interconnected – as international law increasingly regulates traditional “local” issues, as the category of “foreign affairs” expands to include traditional domestic “concerns,” as local activities increasingly have foreign effects, and as state and local governments increasingly participate on the foreign stage

⁸⁸ *Allen-Bradley Local v Board*, 315 US 740, 749 (1942). See also *Hillsborough County v Automated Medical Laboratorie, Inc.*, 471 US 707, 719 (1985):

[In *Hines*] the Court inferred an intent to pre-empt from the dominance of the federal interest in foreign affairs because "the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution," and the regulation of that field is "intimately blended and intertwined with responsibilities of the national government." Needless to say, those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily, and historically, a matter of local concern

⁸⁹ See *supra* ___

⁹⁰ 181F3d at 74

in response to the growing influence of external activities on local communities⁹¹ -- this overlap in the canons will only grow. Consider other federal enactments that in recent years have simultaneously implicated both foreign affairs and traditional state prerogatives: the execution of Angel Breard (punishment for murder and alien rights to consul),⁹² the New York City parking ticket controversy (traffic regulation versus diplomatic immunity),⁹³ and California's unitary tax scheme (state tax versus foreign protest).⁹⁴ There are many other examples.⁹⁵

What should courts do when a federal foreign relations statute implicates a traditional state prerogative? In this circumstance, the competing presumptions against and for preemption lose coherence and usefulness. Consider the majoritarian default justifications for the two presumptions. It was difficult enough to determine "general congressional intent" about preemption on the assumption that the foreign-local distinction was mutually exclusive. The task becomes all the more challenging as the distinction blurs. As local affairs increasingly implicate foreign affairs, and as federal foreign relations statutes increasingly overlap with traditional state prerogatives, congressional preferences concerning the tradeoff between foreign relations and localism necessarily become more difficult for courts to discern or predict. But without confidence in their ability to ascertain congressional intent across the run of foreign relations statutes, courts have no basis to indulge in general presumptions, at least on a majoritarian default rationale.

A similar conclusion follows for the constitutional arguments for the two canons. If a federal statute simultaneously implicates foreign affairs and a traditional state prerogative, the canons suggest that the Constitution creates both a presumption for and against preemption, which is nonsense.

One way out of this conundrum is for courts to decide that one of the two values at stake here -- accommodation of foreign relations concerns, or protection of traditional state prerogatives -- is more important, and simply choose the canon in support of that value across the board. The case for choosing the presumption against preemption would emphasize the following points. The justification for the foreign relations canon has diminished. The evaporation of the near-emergency circumstances of the World and Cold Wars suggests that our constitutional system need no longer depart from its "normal" assumptions about the relationship between state and federal power.⁹⁶ This is especially true because the category "foreign relations" has expanded in the last fifty years to include so much of what was once considered to be of local, and thus state, concern. On this view, the "translation" argument for a

⁹¹ These points about the consequences of globalization for the distinction between domestic and foreign affairs are standard in the literature. For elaborations, see Goldsmith, 83 Va L Rev 1617 (cited in note 3); Spiro, 70 U Colo L Rev 1223 (cited in note 82).

⁹² See *Breard*, 523 US 371.

⁹³ See, for example, Clifford J. Levy, *Giuliani May Again Trim Diplomats' Parking*, NY Times, 35 (Apr 20 1997).

⁹⁴ *Barclays Bank PLC v Franchise Tax Bd*, 512 US 298 (1994).

⁹⁵ These clashes are not new. Numerous intractable foreign relations disputes in U.S. history have resulted from the application of state law. But they are more pervasive, and their resolution is more intractable.

⁹⁶ See White, 85 Va L Rev 1 (cited in note 88).

presumption against preemption is heightened by the waning of the distinction between domestic and foreign affairs, while the “translation” argument for the foreign affairs presumption is attenuated. This conclusion finds further support in the fact that the federal political branches have developed special means during the last 50 years to make their preemptive intent effective if they deem it necessary.

This argument has much force. But there are also powerful arguments for choosing the foreign affairs presumption. Many believe that globalization increases the need for the nation to speak with a single voice before the world in order to better coordinate our activities with other nations with whom we have relations of unprecedented scope and depth.⁹⁷ If the presumption against preemption is chosen, then the federal government faces yet higher costs in conducting a unitary foreign policy when it so chooses. On this view, the protection of states qua states is simply less important than international harmony. And in any event, states are well enough organized in Congress to immunize themselves from preemption for issues that truly demand decentralized control.

I do not see how courts can choose between these two sets of arguments in a categorical fashion. Certainly the choice of either canon at the expense of the other is more controversial than the choice to embrace each canon separately in the 1940s, both because the already weak arguments for either canon are weakened by the blurring of the categories, and because the cost of choosing either canon -- the suppression of the value represented by the other -- increases. Moreover, courts lack competence or any plausible basis for identifying U.S. foreign relations interests as broadly conceived in modern times and weighing them in a categorical fashion against the continued viability of presumptive state regulatory authority. Categorical conclusions are infeasible, because the case for federal versus state control depends on contested political priors and the vagaries of particular context-specific tradeoffs. What is needed are fine-grained, not categorical, solutions. Politicians, who are both politically accountable and relatively expert in foreign relations, are much more likely than courts to provide intelligent solutions of this sort.⁹⁸

⁹⁷ See, for example, Gerald L. Neuman, *The Global Dimension of RFRA*, 14 *Const. Commentary* 33, 48 (1997).

⁹⁸ As Justice Breyer noted in a different context:

Courts cannot easily draw the proper basic lines of authority. The proper local/national/international balance is often highly content specific. And judicial rules that would allocate power are far too broad. Legislatures, however, can write laws that more specifically embody that balance. Specific regulatory schemes, for example, can draw lines that leave certain local authority untouched . . . That is why the modern substantive federalist problem demands a flexible, context specific legislative response.

College Savings Bank v Florida Prepaid Postsecondary Education Expense Board, 119 S Ct 2219, 2239 (1999) (Breyer, J. dissenting).

It is of course possible to imagine more fine-grained characterizations than “foreign affairs statutes” and “traditional state prerogatives” to trigger application of the presumptive canons. But it is unclear what finer lines courts should draw. They could begin narrowly, perhaps leaving the presumption against preemption for foreign relations statutes that regulate the central operations of state government, and preserving the presumption of preemption for contexts in which the arguments for uniform national treatment are least controversial, such as immigration. Even these categories will present inevitable characterization problems. And even within these categories it will often be controversial whether state or federal regulation is most appropriate. *Crosby*, for example, concerned state procurement policies for state activities, a central government function. And even in federal contexts such as immigration, the Court has zigzagged in its commitment to presumptive federal regulation, recognizing that in many areas related to immigration, there are good reasons to preserve presumptive state control.⁹⁹

Another possibility would be to limit the presumption of preemption to state laws enacted with the purpose of influencing foreign relations. Purpose (or motive) review has gained wide approval in the constitutional law literature because it allows courts to enforce important constitutional values without engaging in effects-based inquiries for which they are unsuited.¹⁰⁰ But there are problems with extending purpose review to the statutory preemption context. The biggest problem is that the narrower presumption begs the questions raised above whether the Constitution disallows state activities with a foreign relations purpose.¹⁰¹ There are also problems of application. In the contexts in which purpose inquiry has flourished, the illicit purpose tends to be uncontroversial and easily identifiable. Not so with respect to state foreign relations activity. In many cases (*Crosby* probably is not one) the identification of the illicit purpose would be difficult and controversial.¹⁰² In addition, many state activities that implicate the greatest international tensions (such the juvenile death penalty and state taxation schemes) and greatest constitutional concern are not motivated by the illicit purpose, and thus would be unaffected by the canon. A canon linked to foreign affairs purpose might be both difficult to apply and non-responsive to the underlying constitutional value, whatever its scope.

All of this leads me to conclude that courts should perform preemption analysis without recourse to the presumptive canons. The canons have an uncertain justification in any event, and they probably conceal more than they enlighten about what drives the judicial decision to preempt or not. Courts are not particularly well suited to make the policy tradeoffs needed to choose one canon over the other, or to develop more fine-grained canons. Perhaps most

⁹⁹ See, for example, *De Canas v Bica*, 424 US 351 (1976) (applying presumption against preemption, and invoking state police powers, in concluding that California law prohibiting employer from employing illegal alien not preempted by federal immigration laws).

¹⁰⁰ For a summary and empathetic analysis of this trend, see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal L Rev 297 (1997).

¹⁰¹ Compare Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L J 1127, 1251 (2000) (“a purpose inquiry [for foreign affairs preemption] has the same problem as the effects approach: before considering how much state activity is too much, or what purposes are illegitimate, we must first establish more clearly the constitutional basis for the claim of interference.”).

¹⁰² See *id.* at 1250-51.

importantly, elimination of the presumptions leaves maximum room for political deliberation and compromise, which is appropriate in areas of contested constitutional policy where courts lack expertise.¹⁰³ This is especially so since there is little reason to fear a political process breakdown that would warrant a special thumb on the scale in this context; both the federal political branches and the states are well equipped to look after their interests in this context. Abandonment of the presumptive canons is *not* an abandonment of the interpretative enterprise. To the contrary, abandonment of these presumptions represents a flight *toward* statutory interpretation, since the presumptive canons have no discernible basis in statutory text or purpose.

Elimination of the presumptive canons in the foreign relations context would, however, raise two special difficulties. The first problem is that, as I have emphasized, the very category of “foreign relations statutes” is itself unclear. How can courts know when to abandon the presumptive canons and when not to? This difficulty arises only if there continues to be a justification for a presumption against preemption outside the foreign relations context, a proposition that I and others have questioned. But even if there remains a justification for the presumption against preemption when there is no conceivable foreign policy element in the case, and even if the presumption against preemption has real bite (a proposition many have questioned in recent years), courts should simply indulge no presumption whenever they are discerning whether a federal statute preempts state activity that they believe affects foreign relations.

The second problem is what to do when courts cannot decide whether a federal statute preempts state law using “normal” interpretive tools (which are discussed in detail in the next Section). What, in other words, should courts do when the interpretive materials do not indicate whether Congress intended to preempt state law? Such an outcome should rarely occur. But in any event, it is not a serious problem. If the party relying on federal law fails to demonstrate that federal law preempts, then state law applies by default in accordance with the usual presumptions of our constitutional order. This is not at all the same thing as a presumption against preemption. The presumption against preemption weighs the interpretive scales in favor of states at the beginning of the analysis, and biases the interpretive project from the outset. A state law tie-breaker occurs at the end of the analysis in the rare case when there are no other federal interpretive principles on which to draw.

III. PREEMPTION DOCTRINES AND THE CASE FOR MINIMALISM

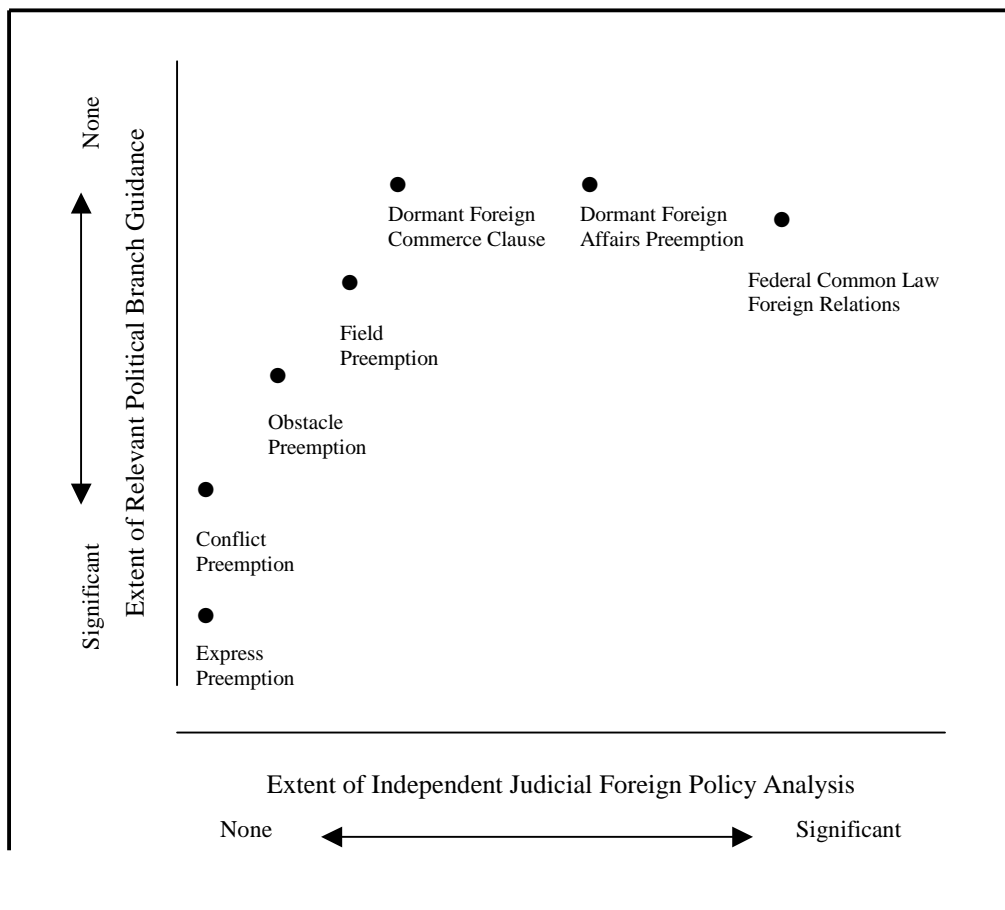
Even in the absence of presumptive canons, judges must choose among an array of statutory preemption doctrines, including express preemption, conflict preemption, obstacle preemption, field preemption, dormant foreign commerce clause, the federal common law of foreign relations, and dormant foreign affairs preemption. After sketching a framework for

¹⁰³ See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard 1999); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 2000); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Little, Brown 1893).

analyzing these doctrines, I argue for a particular form of interpretive minimalism: Courts should preempt state law only on the basis of foreign policy choices traceable to enacted federal law.

A. Mapping the Doctrines of Foreign Affairs Preemption

The chart below maps the foreign affairs preemption doctrines along two dimensions. The horizontal axis in the chart measures the degree to which the preemption doctrines require courts to engage in an independent judicial analysis of the foreign relations consequences of applying state law. The vertical axis measures “the relative presence or absence of congressional action related to the matter regulated by the displaced state law.”¹⁰⁴ (The significance of these measures will become clear presently.) The chart makes ordinal generalizations about foreign affairs preemption doctrines in order to make clear their broader relationships. There is much to quibble with in the precise location of each doctrine on the map, but I believe the relationship between the doctrines are, for reasons explained below, generally accurate.



¹⁰⁴ Dinh, 88 Georgetown L J at 2098 (cited in note 34). The vertical axis in the chart resembles, but is not identical to, Dinh’s more general analysis of preemption doctrines.

1. Dormant Preemption Doctrines

We begin with the three dormant preemption doctrines in the foreign affairs context. The central one is *dormant foreign affairs preemption*. This is the doctrine relied upon by the district and (in the alternative) by the court of appeals in *Crosby*. Courts applying this doctrine preempt state law on their own authority in the absence of any federal enacted law. The justification for this doctrine is that certain state foreign relations activities concern “matters which the Constitution entrusts solely to the Federal Government.”¹⁰⁵ In operation, however, courts apply this structural constitutional doctrine on the basis of a judicial determination that the state law or activity has sufficiently bad *effects* for U.S. foreign relations. The leading case of *Zschernig*, for example, preempted an Oregon statute that denied inheritance rights to certain East Germans because the statute “affect[ed] international relations in a persistent and subtle way” and had “a direct impact upon foreign relations.”¹⁰⁶ The Supreme Court reached this conclusion even though there was no controlling enacted federal law, and even though the Executive branch denied that the Oregon statute adversely affected the U.S. foreign relations. *Zschernig*’s “effects” analysis places great demands on courts. It requires courts to identify U.S. foreign relations interests, to determine whether and to what extent these interests are implicated by state law, and whether these interests are best accommodated by preemption.¹⁰⁷

The second dormant preemption doctrine is the *dormant foreign commerce clause*. Like its “domestic” sister, the dormant foreign commerce clause asks whether a state law facially discriminates against foreign commerce or has substantial discriminatory effects. But unlike its “domestic” sister, the dormant foreign commerce clause also preempts state laws that prevent the federal government from speaking with “one voice” in foreign relations.¹⁰⁸ This one-voice test is functionally similar to dormant foreign affairs preemption.¹⁰⁹ It turns primarily on an independent judicial assessment of the extent to which state law “offends” foreign nations and might provoke foreign retaliation.¹¹⁰ The third dormant preemption doctrine, the *federal common law of foreign relations*, also relies on a foreign affairs effects test for preemption. The basic difference is that the federal common law of foreign relations authorizes courts to go beyond mere preemption of state authority and actually “legislate” the federal rule of decision.¹¹¹ Thus, for example, the leading case of *Sabbatino* held not only that the act of state doctrine was an

¹⁰⁵ See *Zschernig*, 389 US at 436.

¹⁰⁶ *Id* at 440, 441.

¹⁰⁷ See Goldsmith, 83 Va L Rev 1617 (cited in note 3).

¹⁰⁸ See *Japan Line Ltd v County of Los Angeles*, 441 US 434, 451 (1979).

¹⁰⁹ See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 Va J Int'l L 121, 164 (1994).

¹¹⁰ Compare *Japan Line*, 441 US at 450-54 (invalidating state tax that pose “acute” risk of offense to foreign nation) with *Container Corp of America v Franchise Tax Bd*, 463 US 159, 194 (1983) (enforcing state law where offense to foreign nation is “attenuated at best”).

¹¹¹ See Louis Henkin, *Foreign Affairs and the United States Constitution* 139-40 (Oxford 2d ed 1996) (*Sabbatino* recognizes a “legislative” power in federal courts).

exclusive federal concern, but also prescribed the content of that doctrine as a matter of federal law.¹¹²

The three dormant preemption doctrines share several features. They all preempt state law in the absence of any congressional legislation of the issue at hand. They do so on the basis of a judicial analysis of the effects of state law on the judicially-identified U.S. foreign relations interest. Neither doctrinally nor in fact do judges applying this “effects test” rely on political branch enactments or even executive suggestions. As a result, even though the dormant preemption doctrines purport to draw their authorization from constitutional structure rather than written federal enactments, they are functionally identical to statutory preemption because the federal political branches retain the final say about whether state law should be preempted, and about the content of federal law that preempts state law.¹¹³ In effect, dormant preemption operates like statutory preemption without a statute.

Because the dormant preemption doctrines apply in the absence of direction from the political branches, they are all placed at about the same place at the north end of the vertical axis.¹¹⁴ They are also all placed at the east end of the horizontal axis, which measures the degree of independent judicial analysis of foreign affairs effects. Along this dimension, however, there are differences of degree. The federal common law of foreign relations is the most demanding of the doctrines, because in addition to requiring courts to determine whether and to what extent judicially identified U.S. foreign affairs interests are implicated by state law and should be preempted, it also requires courts to legislate the federal rule of decision that best accommodates these interests. Dormant foreign affairs preemption and the dormant foreign commerce clause do not require this final step; they preempt without affirmative legislation. The dormant commerce clause is somewhat less demanding along this dimension than dormant foreign affairs preemption, because it requires courts not to engage in an open-ended identification and assessment of U.S. foreign relations, but rather merely an assessment of whether the state law “offends” foreign nations and might provoke foreign retaliation.

2. Statutory Preemption Doctrines

There are four basic statutory preemption doctrines. *Express preemption* occurs when a statute on its face addresses preemption. *Conflict Preemption* occurs when it is impossible to

¹¹² See *id.*

¹¹³ Congress's power to revise dormant foreign affairs preemption decisions flows from the justification for the doctrine, namely, protection of political branch prerogatives. As in the dormant commerce context, it would make no sense to limit a power of the federal political branches in the name of protecting that power. See Henkin, *Foreign Affairs and the United States Constitution* at 164-65 (cited in note 113); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 137-38 (Michie 2d ed 1990).

¹¹⁴ The federal common law of foreign relations is placed somewhat lower than the other two in recognition of the fact that courts sometimes ostensibly point to enacted law in exercising this power. To the extent courts do this, their analysis becomes more like field or obstacle preemption. Since this form of “delegated” federal common law of foreign relations has not been the subject of academic focus, I will limit my remarks to consideration of “pure” federal common law of foreign relations.

comply with a federal statute (which is otherwise silent about preemption) and a state statute. In this context preemption follows by necessary implication from the fact of conflict. *Obstacle preemption* first identifies the “purposes and objectives” of a federal statute that is silent about preemptive scope; preemption follows if the state statute “stands as an obstacle to the accomplishment” of these purposes and objectives.¹¹⁵ *Field preemption* can occur in one of two ways. First, a federal regulatory scheme can be “so pervasive” as to imply that “Congress left no room for the States to supplement it.”¹¹⁶ Second, a “federal interest” in the field addressed by a federal statute may be “so dominant” that federal law “will be assumed to preclude enforcement of state laws on the same subject.”¹¹⁷

These preemption doctrines are, to put it mildly, not “rigidly distinct.”¹¹⁸ Conflict, obstacle, and field preemption are all forms of “implied” preemption. In these contexts, courts rely on evidence of congressional intent to preempt that is not apparent on the face of the statute. The doctrines use different criteria to identify implicit congressional intent.¹¹⁹ Even when courts interpret an express preemption (or savings) clause, they often look to implicit evidence of congressional intent in interpreting the scope of the preemption clause, or in ascertaining intended preemptive scope beyond the preemption clause.¹²⁰ In this respect, express preemption cases sometimes blur into obstacle preemption cases,¹²¹ and for analytical purposes I will treat reliance on such purposes as examples of obstacle preemption.¹²²

The four “statutory” preemption doctrines are lower on the vertical axis than the dormant preemption doctrines because they all have some basis in enacted law. Express preemption is lowest because Congress has made its preemptive intent plain. Conflict preemption comes next because it is impossible to comply with both state and federal law even though Congress has included no preemption clause. Obstacle preemption comes next. This form of preemption, too, trumps only that state law inconsistent with a specific, identified federal law. But the conclusion of preemption is based on inferences of congressional purpose and federal interest that cannot always be deduced from the statute of the text alone. Field preemption is higher yet on the chart. It is below the dormant preemption doctrines because it is grounded ultimately in enacted law. But the federal purposes and interests that warrant preemption here are drawn more broadly not from any particular text, but rather from a broad regulatory scheme or from a federal interest not tied to text. Field preemption resembles obstacle preemption in this respect, but it is located just above obstacle preemption because the

¹¹⁵ See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

¹¹⁶ *English v General Electric Co*, 496 US 72, 79 (1990).

¹¹⁷ *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947).

¹¹⁸ *English*, 496 US at 79 n 5.

¹¹⁹ See *id.*

¹²⁰ See, for example, *New York State Conference v Travelers*, 514 US 645, 655-67 (1995); *Medtronic, Inc v Lohr*, 518 US 470, 484 (1996); *Freightliner Corp v Myrick*, 514 US 280, 289 (1995); *Barnett Bank v Nelson*, 517 US 25, 31 (1996).

¹²¹ As the Court has noted. See *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

¹²² Compare Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 Vand L Rev 1149, 1178 (1998).

likelihood of reliance here on non-textual purposes and interests is greater, and because there is no particular federal statute identified to preempt state law.¹²³

Placing the statutory preemption doctrines along the horizontal spectrum is somewhat more complicated. They are all to the west of the dormant preemption doctrines, which are based wholly on independent judicial foreign policy analysis. The statutory doctrines basically line up amongst themselves in the same order as they do on the vertical axis. Express and conflict preemption inherently involve little if any independent judicial foreign policy analysis. Obstacle and field preemption, however, can. These forms of preemption explicitly depend on the extent to which the state law in question adversely affects federal interests and congressional purposes underlying the legislation in question. As many have noted, judges performing these analyses often introduce their own independent assessment of the federal interests and purposes at hand.¹²⁴ Translated into the foreign affairs context, this means that courts performing obstacle or field preemption can draw on an independent judicial assessment of the U.S. foreign relations interests at stake, and consider the extent to which the state law in question adversely affects these state interests. *At least one component of the obstacle and field preemption analysis, in other words, is often identical to dormant preemption analysis.* Field and obstacle preemption nonetheless remain to the left of the dormant preemption doctrines because (a) unlike these latter doctrines, they do not necessitate the foreign affairs effects analysis, and (b) the foreign affairs effects analysis will be cabined to some extent by the presence of a statutory scheme.

With these many distinctions in mind, I turn to the case for a minimalist approach to statutory foreign affairs preemption.

B. The Normative Case For Minimalism

By “minimalism” in the statutory foreign affairs preemption context, I mean two things. First, courts should eliminate from their bag of interpretive sources any independent judicial consideration of the foreign relations consequences of preemption. Second, courts should make the decision to preempt on the narrowest possible ground, which I shall argue is rarely broader than obstacle preemption of a particular sort. In defending this conception of preemption minimalism, I begin with the dormant preemption doctrines. In recent years the Supreme Court has questioned the continued viability of these doctrines in the foreign affairs context on

¹²³ Viet Dinh puts the point this way:

“Obstacle preemption stands at the midway point between conflict and field preemption. Like conflict preemption, it displaces only those state laws that are inconsistent with federal law. Like field preemption, the relevant law is not a specific provision or even a statute, but rather some broad regulatory scheme or independent interests external to the supremacy clause conflict analysis.”

Dinh, 88 Georgetown L J at 2105 (cited in note 34).

¹²⁴ See, for example, Jordan, 51 Vand L Rev 1149 (cited in note 124); Dinh, 88 Georgetown L J 2086 (cited in note 34); Nelson, 86 Va L Rev 225 (cited in note 34).

the ground that courts lack the authority or competence to make independent foreign policy judgments the doctrines require. My aim is to show that the reasons for attenuating the scope of the dormant preemption doctrines argues for minimalism in the statutory preemption context.

1. Dormant Preemption

The historical-textual case for dormant preemption has always been problematic. The originalist claim that the states never possessed foreign affairs power and thus retain no such residual power rests on contested historical premises about the locus and transfer of “external sovereignty” during the period 1776-1789.¹²⁵ As we saw above, this claim is belied by constitutional text. It is also belied by historical constitutional practice, for the states have always exercised residual powers to affect and event to conduct foreign relations.¹²⁶ Before the 1960s, courts never recognized a dormant foreign affairs preemption doctrine, even when states caused considerable foreign relations controversy.¹²⁷ Indeed, they dismissed the argument as non-serious on a number of occasions.¹²⁸

The best justification for the dormant preemption doctrines recognized in the 1960s is a functional one. It is no accident that the doctrines were applied by the Supreme Court in two cases in the height of the cold war involving parties -- Cuba and East Germany -- who were our cold war enemies.¹²⁹ In this milieu, courts deemed the foreign relations consequences of residual state power to affect foreign relations to be too high. Put differently, it seemed relatively uncontroversial for courts, on their own authority, to decide that there was no countervailing justification for residual state authority to cause foreign relations problems that potentially threatened the nation’s existence. The dormant preemption doctrines came at a cost. Because the doctrines’ applicability turned on a judicial identification and accommodation of U.S. foreign relations interests -- a task that courts properly emphasize is beyond judicial competence¹³⁰ -- courts are likely to err in their the identification and accommodation of U.S.

¹²⁵ Some believe that the states retained powers of “external sovereignty” in the post-revolutionary period, and that the United States acquired these powers via the Articles and the Constitution rather than directly from Great Britain. See, for example, David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 Yale L J 467, 478-90 (1946). Others believe, with Justice Sutherland, that the states never possessed foreign relations powers. See, for example, Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 Colum L Rev 1056, 1088-89 (1974). The truth is probably that the issue was contested during the period 1776-1789. See Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788*, at 153-80 (University of Georgia 1986).

¹²⁶ See Dennis James Palumbo, *The States and American Foreign Relations* 147-192 (1960) (unpublished Ph.D. dissertation); Goldsmith, 83 Va L Rev at 1643-58 (cited in note 3).

¹²⁷ See Henkin, *Foreign Affairs and the United States Constitution* at ___.

¹²⁸ See, for example, *Clark v Allen*, 331 US 503, 516-17 (1947) (rejecting dormant foreign relations attack on a state anti-alien inheritance statute as “farfetched”); *Blythe v Hinckley*, 180 US 333, 340 (1901) (rejecting as “extraordinary” the argument that a California statute permitting aliens to inherit real property invaded the unexercised treaty power).

¹²⁹ *Sabbatino*, 376 US 398; *Zschernig*, 389 US 429.

¹³⁰ See, for example, *Container Corp of America v Franchise Tax Bd*, 463 US 159, 194 (1983) (Court lacks capacity to “determine precisely when foreign nations will be offended by particular acts” and “nuances” of “the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court”);

foreign relations interests. But the “error” costs that inhered in the dormant preemption doctrines were thought to be outweighed by three countervailing considerations. First, federal courts were thought more likely to capture the national foreign relations interest than states. Second, and relatedly, the potential costs of unredressed state foreign relations activity were thought to be worse than the costs of judicial error in policing this activity. And third, the political branches retained the power to correct the judicial errors.

The dormant preemption doctrines were never robust, at least in the Supreme Court.¹³¹ And for several reasons, the functional justifications for the doctrine outlined above are less compelling today than in the Cold War period in which it was announced. Some of these reasons have been mentioned above in connection with the presumptive canons; and some apply uniquely in this context.¹³² The waning of the distinction between domestic and foreign affairs means that just about any state law, when applied in a case involving a foreign element, is potentially subject to judicial preemption.¹³³ The expanding array of preemptable state laws means that dormant foreign affairs preemption represents a potentially massive transfer of federal foreign relations lawmaking power to the federal courts at the expense of the states. It thus poses a greater threat than before to the federal structure. This concern is heightened by the fact that as the category of “foreign relations” expands, it is harder for courts to identify and weigh genuine U.S. foreign relations interests, and to balance the tradeoffs of those interests against the benefits of state control. Focusing on the federal side, the adverse consequences to the national interest is much less serious in these cases than in the cases that gave rise to the doctrine during the cold war, especially in light of the Executive’s independent unilateral preemption powers.¹³⁴ Moreover, the likelihood of preemptive federal foreign relations lawmaking by the political branches increases with the threat state activity poses to the federal foreign relations interest. A residual role for courts can only dissuade the more competent political branches from performing this constitutional role.¹³⁵

Chicago & S Air Lines Inc v Waterman SS Corp, 333 US 103, 111 (1948) (fine-grained foreign policy determinations are “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry”).

¹³¹ The Court has never again applied the dormant foreign relations preemption doctrine announced in *Zschernig*. Soon after *Zschernig*, the Court dismissed factually similar cases for lack of a substantial federal question, see *Gorun v Fall*, 393 US 398 (1968); *Ioannou v New York*, 391 US 604 (1968) (per curiam), leading some to question the Court’s continuing adherence to the doctrine. See Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 Vand J Transnatl L 133, 141-45 (1971) .

¹³² What follows is a very compressed form of arguments made at length in Goldsmith, 83 Va L Rev 1617 (cited in note 3); Goldsmith, U Colo L Rev 1395 (cited in note 38).

¹³³ In contrast to the Supreme Court, lower courts have expanded the doctrine significantly to justify federalization of various contract, tort, and property disputes as well as procedural issues (such as choice of law, forum non conveniens, and the enforcement of foreign judgments). See Goldsmith, supra note __, at 1632-39. Even when there is no obviously foreign element in a case (such as a foreign citizen or nation in the case), commentators have urged courts to use a dormant foreign affairs preemption rationale to preempt various state laws (such as the death penalty and prison practices) that conflict with customary international law. See id at 1639-41.

¹³⁴ See Goldsmith, 83 Va L Rev 1617(cited in note 3); Spiro, 70 U Colo L Rev 1223 (cited in note 82).

¹³⁵ Compare Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (cited in note 105)

Consistent with these concerns, and perhaps motivated by them, the Supreme Court beginning in the 1980s began to back away from dormant foreign affairs preemption doctrines.¹³⁶ The Court's expressed its skepticism most clearly in *Barclays Bank PLC v. Franchise Tax Bd*,¹³⁷ a case involving the validity of California's worldwide combined reporting tax for multinational firms. The California law violated no federal enactment. Plaintiffs nonetheless invoked *Zschernig*, the diplomatic controversy caused by the California law, and the complaints of foreign nations in arguing that the statute should be preempted because it "impaired federal uniformity in an area where federal uniformity is essential" and prevented "the Federal Government from 'speaking with one voice' in international trade."¹³⁸ The Court rejected the challenge. It made clear that federal courts are "not vested with power to decide how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please."¹³⁹ And it emphasized that it was the job of "Congress - whose voice, in this area, is the Nation's - to evaluate whether the national interest is best served by tax uniformity, or state autonomy."¹⁴⁰ The court emphasized that mattered was whether a federal enactment preempted the state action; foreign relations effects were not an independent basis for preemption.¹⁴¹ The court even went so far as to suggest that congressional inaction in the face of adverse state foreign relations activity indicates "Congress' willingness to tolerate" the state practice.¹⁴²

2. Statutory Preemption

Many believe that *Barclay's Bank* marks the end of all dormant foreign affairs preemption doctrines.¹⁴³ Whether or not this is true remains to be seen, for the Court has not explicitly rejected the dormant foreign affairs doctrines. But the retrenchment in *Barclay's Bank* is consistent with a broader trend toward formalism in U.S. foreign relations law. The central characteristics of this trend are that in determining the content of non-constitutional foreign relations law, courts eschew an independent role in identifying and accommodating foreign relations effects, and embrace of rules that narrow judicial discretion and leave resolution of these issues by the more competent and accountable federal political branches.¹⁴⁴

Consider other examples of the trend toward this "new" formalism in U.S. foreign relations law. The Supreme Court backed away from its prior view that courts should

¹³⁶ See *Container Corp of America v Franchise Tax Board*, 463 US 159 (1983).

¹³⁷ 512 US 298 (1994)

¹³⁸ Id at 320 (internal citations omitted).

¹³⁹ Id at 328.

¹⁴⁰ Id at 331.

¹⁴¹ Id at 328-330.

¹⁴² Id at 327; see also id at 326 ("Congress implicitly has permitted the States to use the worldwide combined reporting method."); id at 331 (Blackmun, J., concurring) (stating that majority opinion relies on "congressional inaction to conclude "that Congress implicitly has permitted the States to use the worldwide combined reporting method").

¹⁴³ See, for example, Spiro, 70 U Colo L Rev 1223 (cited in note 82).

¹⁴⁴ See Goldsmith, U Colo L Rev 1395 (cited in note 38).

determine the content of the act of doctrine based on a case-by-case judicial analysis of the foreign relations implications of examining the validity of a foreign act of state.¹⁴⁵ It eliminated this inquiry except, possibly, in the unusual case where the validity of the foreign act of state is an element in the case.¹⁴⁶ With the political question doctrine, the Court backed away from *Baker v. Carr*'s invitation to courts to balance foreign policy factors, and suggested that it lacks competence and authority to abstain from an adjudication based on the adjudication's foreign affairs effects.¹⁴⁷ Finally, in two federal extraterritoriality cases, the Court in different ways rejected lower court analyses that required a judicial assessment of foreign relations effects.¹⁴⁸

Moving to the statutory preemption context, we have seen that here too courts can, under the rubric of obstacle or field preemption, insert independent judicial conceptions of U.S. foreign relations interests. These factors probably play a less decisive role in statutory as opposed to dormant preemption. But these factors are no less inappropriate in the statutory context. It follows, I believe, that courts should preempt state law only when the justification for preemption is fairly traceable to the foreign policy choices *not* of the federal courts, but rather of the federal political branches. Returning to our chart, foreign affairs preemption of state law is more legitimate as the basis for preemption approaches the southwest quadrant, and less legitimate as it approaches the northeast quadrant.

This analysis argues for statutory over dormant preemption, and for statutory preemption approaches that eschew independent judicial foreign policy analysis. It also argues for express and conflict preemption over obstacle and field preemption. Field and obstacle preemption are not *per se* illegitimate. I have presented no arguments (subject to the caveat in the next paragraph) to suggest that field and obstacle preemption are illegitimate methods for ascertaining congressional intent to preempt. The danger with these forms of preemption, however, is that in practice they invite recourse to judicially created purposes and interests. My only claim is that the reasons underlying the move toward formalism in non-constitutional foreign relations law demands that courts engaging in obstacle or field preemption trace the federal foreign relations purposes and interests harmed by state law to political branch and not judicial choices. This should make clear that minimalism in statutory foreign affairs preemption does not engage the debate between purposivists and textualists about the best mode of discerning congressional intent. It simply says that however else courts discern congressional intent, they should not do so by recourse to their independent assessment of the foreign policy consequences of preemption.

The final implication of minimalism is a modest preference for obstacle over field preemption. (This suggestion is consistent with the Court's attenuated use of field preemption in general in recent years.¹⁴⁹) Both are forms of implied preemption. And yet obstacle

¹⁴⁵ This was the approach in *Sabbatino*.

¹⁴⁶ *W.S. Kirkpatrick & Co v Environmental Tectonics Corp.*, 493 US 4000 (1990).

¹⁴⁷ *Japan Whaling Ass'n v American Cetacean Society*, 478 US 221 (1986).

¹⁴⁸ *Hartford Fire Insurance Co v California*, 509 US 764 (1993); *EEOC v Arabian Am Oil Co*, 499 US 244 (1991).

¹⁴⁹ See *Cipollone v Liggett Group*, 505 US 504, 547-548 (1992)(Scalia, J concurring).

preemption focuses more sharply on Congress's actual aims than field preemption, which draws inferences from patterns of legislation rather than from a particular statute. In addition, field preemption less plausibly reflects congressional intent as the category "foreign relations" expands indefinitely. Finally, field preemption tends to sweep more broadly than obstacle preemption, thereby defeating minimalism's aim to maintain maximum room for political decisionmaking. The claim here is not that field preemption is never appropriate in the foreign affairs context, for it is possible that traditional interpretive tools would yield that conclusion as the best reading of an array of statutes. The claim is merely that minimalism requires special caution before concluding that a particular foreign relations field preempts, for the dangers of inappropriate judicial policy intrusion is greatest in this context.

This point applies even in a context, like federal immigration, that has long been viewed to preempt the field. Even here, the waning of the foreign/domestic distinction makes it difficult for courts to conclude, in the absence of clear congressional guidance or a fine-grained interpretive inquiry, that a state law implicates an exclusive federal interest. Consider *De Canas v. Bica*, in which the Court declined to preempt a California law that prohibited California employers from employing illegal aliens.¹⁵⁰ The Court concluded that Congress had not occupied the pertinent field because neither the text nor legislative history of the Immigration and Nationality Act indicated that "Congress intended to preclude . . . harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular."¹⁵¹ This minimalist approach – tying preemption to a decision traceable to Congress rather than on the basis of an immigration interest or policy identified by the Court – makes most sense in a world in which the regulation of aliens touches on any number of tradition state concerns.

Returning, then, to the *Gonzalez* case mentioned in the introduction: The court there may well have been right that the best reading of the immigration statutes preempted Lazaro's state law custody action. But it should have reached this conclusion, if at all, on the basis of a genuine interpretation of federal immigration law, not a cursory and ultimately question-begging characterization of the case as involving immigration rather than family law.

IV. BACK TO *CROSBY*

Crosby is a very narrow decision in three ways.

First, and most obviously, it decided very little. When *Crosby* was announced, it was heralded by some as the death knell for state international relations activities.¹⁵² This is not true. The Court's obstacle preemption analysis concluded only that Congress's own Burma sanctions

¹⁵⁰ 424 US 351

¹⁵¹ *Id.* at 358.

¹⁵² The president of the trade group that filed the lawsuit, for example, said the ruling would "help put an end to state and local efforts to make foreign policy." See USA*Engage Press Release, Supreme Court Rules Massachusetts Burma Law Unconstitutional, June 19, 2000. See also Linda Greenhouse, *Justices Overturn a State Law on Myanmar*, NY Times, 23 (June 20 2000).

preempted the Massachusetts sanctions. Because the Court carefully avoided any ruling on dormant or field preemption grounds, it has no implications for state international relations activities beyond state laws regulating transactions with Burma. State foreign relations activities beyond this -- including the scores of state human rights sanctions on countries not subject to sanction by the federal government¹⁵³ -- are technically untouched by the decision.¹⁵⁴

Second, the decision was methodologically modest. Although the parties argued extensively about whether and to what extent dormant foreign affairs preemption survived *Barclay's Bank*, the court declined to address the issue.¹⁵⁵ It also declined to address the court of appeals' holding about the dormant commerce clause.¹⁵⁶ Instead, the Court rested its decision to preempt solely on statutory grounds. The parties had argued extensively about whether a presumption for or against preemption was appropriate. Massachusetts maintained that a presumption against preemption was warranted because Massachusetts was exercising its traditional function of state procurement. The plaintiffs argued for a presumption in favor of preemption for foreign relations statutes. The Court, however, embraced neither presumptive canon. It expressly declining to indulge the presumption against preemption (and claimed that it would have been ineffectual in any event).¹⁵⁷ And it never mentioned the presumption in favor of preemption for foreign relations statutes.¹⁵⁸ The Court also declined the invitation to rule that the federal statute "preempted the field" because it concerned foreign affairs.¹⁵⁹ It

¹⁵³ For example, state and local governments have enacted selective purchasing laws with respect to __.

¹⁵⁴ One possible implication of the decision is that pending alien tort statute litigation by Burmese plaintiffs against Burmese officials, see, for example, __, is impliedly repealed by the federal Burma sanctions. The reasons the Court gave for concluding that Congress intended the President alone to construct a unitary foreign policy against Burma cut against allowing private parties to bring human rights suits pursuant to the ATS.

¹⁵⁵ *Crosby*, 120 S Ct at 2300-2301, n8.

¹⁵⁶ *Id.*

¹⁵⁷ *Crosby*, 120 S Ct at n8.

¹⁵⁸ Contrary to what many have said, see, e.g., __, the Court also declined to embrace any such "foreign affairs" preemption presumption earlier in the term in *United States v. Locke*, 120 S. Ct. 1135 (1999). *Locke* held that Washington state regulations concerning remedies for oil spills was preempted by the federal Port and Waterways Safety Act of 1972 (PWSA"). In the course of its analysis, the Court stated:

The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce. No artificial presumption aids us in determining the scope of appropriate local regulation under the PWSA

Id. at 1148. This passage does not remotely embrace a presumption in favor of preemption for foreign relations statutes. First, the passage is concerned with maritime trade and navigation safety, a much narrower category than foreign affairs law. Second, the Court's conclusion is based not on its naked identification of federal interests, but rather on the fact that Congress had created an "extensive federal statutory and regulatory regime" that traces its provenance to the early nineteenth century. *Id.* Third, the passage establishes that only (a) there is no presumption against preemption, and not that (b) there is a presumption in favor of preemption. These are not the same things.

¹⁵⁹ *Crosby*, 120 S Ct at 2300-2301, n8.

instead decided the case on obstacle preemption grounds, the narrowest of grounds presented to it.¹⁶⁰

Third, and most importantly in my view, the Court's obstacle preemption analysis appears to embrace the minimalist principles sketched above. The Court emphasized that the federal purposes and interests frustrated by the state scheme derived not from a judicial assessment of U.S. foreign relations, but rather from the statute and its purposes. To see the point, it is useful to contrast *Crosby's* approach to preemption with *Hines'* approach. Before the *Hines* Court even considered the federal statute at issue, it devoted the bulk of the opinion to a discussion of the importance of federal authority in foreign relations generally and immigration in particular, as well as the need for uniformity in this area – all by way of establishing a presumption in favor of preemption.¹⁶¹ The Court's analysis of the text and purposes of the federal alien registration law was curt and conclusory, almost an afterthought. The analysis in *Hines* was clearly driven by the Court's foreign relations characterization of the case and the Court's assessment of what U.S. foreign relations required, and not by congressional intent.

The contrast with *Crosby* is significant. From beginning to end, the Court tied its analysis self-consciously to the text and purposes of the statute. Unlike in *Hines*, there were no general preliminaries about the importance of federal uniformity in foreign relations. Instead, the Court jumped right into the three reasons why the state law was an obstacle to the accomplishment of the federal law's objectives. And it was scrupulous throughout to avoid any suggestion that the policies behind preemption came from any source other than congressional intent.

The Court's first reason for obstacle preemption was its conclusion, based on its reading of the text and legislative history of the statute, that "Congress clearly intended the federal act to provide the President with flexible and effective authority over economic sanctions against Burma." The Court emphasized here and five additional times that the problem with the Massachusetts statute was not that it offended a free-floating federal foreign affairs power, or even Presidential constitutional prerogatives, but rather the congressional policy, derived from the statute, of conferring discretion over U.S. Burma policy in the President.¹⁶²

¹⁶⁰ Ernie Young claims that *Crosby* "departed from the normal rules of preemption based on its view that the cases implicated foreign affairs." See Young, cited in note ___. By "normal rules," Young has in mind the presumption against preemption. He thinks the *Crosby* court "water[ed]-down" this presumption, and embraced a presumption a canon that favors preemption for "federal statutes that have a foreign affairs component." Young's analysis rests on the mistaken premise that the presumption against preemption was the only relevant canon here. In fact, as explained in Section II, the *Hines* canon favoring preemption for foreign relations statutes has been around just as long as the presumption against preemption. Young's conclusion that the Court watered down the presumption against preemption thus begins from an inappropriate baseline. The Court was faced with conflicting canons and declined to rely on either.

¹⁶¹ See *Hines v Davidowitz*, 312 US 52, 401-403 (1941).

¹⁶² See 120 S. Ct. at 2295 (referring to the "express investiture of the President with statutory authority to act for the United States in imposing sanctions with respect to the government of Burma, augmented by the flexibility to respond to change by suspending sanctions in the interest of national security); *id.* ("Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic

The Court's second basis for obstacle preemption was that "Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range."¹⁶³ The state sanctions were inconsistent with this congressional intent, the court reasoned, because it swept more broadly than the congressional sanctions, including penalties for individuals and activities that the federal statute immunized. Throughout this portion of the analysis, the Court is once again careful to attribute the purposes warranting preemption to Congress, with no admixture of any independent judicial foreign policy input.¹⁶⁴

The final basis for preemption was that the state Act was "at odds with the President's intended authority to speak for the United States among the world's nations in developing a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma."¹⁶⁵ The emphasis in this part of the opinion was on how the state scheme interfered with the President's "explicit delegation" of authority from Congress to achieve an international diplomatic solution.¹⁶⁶

It is true that in reaching this conclusion, the Court credited the protests of "allies and trading partners," including the formal EU and Japanese complaints against the United States in the WTO.¹⁶⁷ The important point, however, is that the Court considered these protests *not* in the course of applying an independent judicial foreign relations effects test, but rather because the federal Act made such protests relevant. The Court invoked the protests only as "evidence" of the threat to the President's delegated authority from Congress to "speak and bargain effectively with other nations."¹⁶⁸ In at least five other decisions in the past decade, the Court has, as part of its general drift toward formalism in U.S. foreign relations law, declined to credit foreign protests as a basis for interpreting the scope of federal law.¹⁶⁹ But in none of those decisions was there any plausible basis to conclude that Congress had made foreign protests

leverage against Burma, with an eye toward national security, as our law will admit); *id* ("The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action."); *id* at 2296 (state statute "undermines the President's intended statutory authority"); *id* ("the state Act reduces the value of the chips created by the federal statute").

¹⁶³ *Id* at 2296.

¹⁶⁴ See *id* at 2297 ("Congress's calibrated Burma policy is a deliberate effort "to steer a middle path").

¹⁶⁵ *Id* at 2298 (citing § 570)

¹⁶⁶ *Id*.

¹⁶⁷ *Id* at 2299.

¹⁶⁸ *Id*.

¹⁶⁹ See *Breard*, 523 US 371 (upholding state right to execute foreign national in face of vigorous foreign protest and International Court of Justice provisional order); *Federal Republic of Germany v United States*, 526 US 111 (1999) (same); *Barclays Bank*, 512 US at 324-29 (1994) (foreign government protests against California tax irrelevant to foreign dormant commerce clause analysis); *Hartford Fire Insurance Co v California*, 509 US 764, 798-99 (1993) (declining to credit British protests or, more broadly, to consider comity considerations in applying Sherman Act extraterritorially); *United States v Alvarez-Machain*, 504 US 655, 667 (1992) (foreign government objections to legality of abducting foreign national irrelevant); compare *EEOC*, 499 US at __.

relevant to the interpretive inquiry. And indeed, the *Crosby* Court distinguished one of these decisions -- *Barclay's Bank* -- precisely on the ground that the protests concerning the Massachusetts sanctions were relevant to "show the practical difficulty of pursuing a *congressional goal* requiring multinational agreement."¹⁷⁰ The Court ruled out any doubt about the reasons for considering the foreign protests when it disclaimed any competence or authority to weigh "foreign relations effects."¹⁷¹ *Crosby* is in line with the Court's consistent disclaimer of competence or authority to gauge such effects, and in its confirmation that congressional intent is the touchstone for preemption.¹⁷²

Very similar conclusions follow about the Court's invocation of Executive authority. In *Hines* and other "foreign relations effects" cases (including *Sabbatino* and *Zschernig*), the Court referred to an exclusive presidential foreign relations powers as a basis for a *judicial* determination of the effects of state law on federal exclusive authority. In *Crosby* too the Court made much of the fact that the Massachusetts statute interfered with the Executive's international duties. But the reasons for doing so were much different than the reasons in *Hines*. The *Crosby* Court emphasized that its concern about interference with Executive power flowed from Congress's delegation to the President to achieve multilateral solutions to Burma sanctions. The Court also made clear that Executive's views about the preemptive scope of the federal Act were relevant because congressional purpose made them so.¹⁷³ The Court once again distinguished *Barclay's Bank*, which it cited for the proposition that "we do not unquestionably defer to legal judgments expressed in Executive Branch statements when determining a federal Act's preemptive character."¹⁷⁴ In *Crosby*, by contrast, the Executive's views were relevant "to show the practical difficulty of pursuing a *congressional goal* requiring multinational agreement."¹⁷⁵ Once again, the Court ties its analysis of preemption to Congress's wishes.

At the end of the day there is no prove that *Crosby's* minimalism was motivated by the normative concerns expressed in the article. Mark Tushnet is right that, as a technical matter, "[t]he opinion is self-consciously written as an exercise in neutral statutory interpretation," and

¹⁷⁰ *Crosby*, 120 S Ct at 2301.

¹⁷¹ See *id* at 2301 ("We have, after all, not only recognized the limits of our own capacity to determine precisely when foreign nations will be offended by particular acts, but consistently acknowledged that the nuances of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.") (internal quotations and citations deleted)

¹⁷² Ed Swaine has questioned whether the Court read Congress' intent accurately in this respect. See Swaine, *Crosby as Foreign Relations Law*, (cited in note 14). The important point for present purposes, however, is that rightly or wrongly, the Court perceived the need to place responsibility for the relevance of foreign protests in Congress and not on its own authority. Swaine also suggests that the Court's statement that "Congress has done nothing to render [evidence of protests] beside the point" entails a presumption that the protests are relevant unless ruled out. *Id.* at ___. But in context it is clear, I think, that the Court meant nothing of the sort, for it emphasized time and time again that the protests were only relevant because of Congress's statutory goal of "requiring multinational agreement."

¹⁷³ See ___. On judicial deference to executive branch views in foreign relations, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va L Rev 649 (2000).

¹⁷⁴ *Crosby*, 120 S Ct at 2301.

¹⁷⁵ *Id.*

it “leaves open nearly every possibility for preemption in the area of foreign affairs.”¹⁷⁶ Moreover, as Ed Swaine has emphasized, *Crosby* relied on the canon of constitutional avoidance in declining to address the dormant preemption issues.¹⁷⁷ It did certainly did not commit itself to a rejection of dormant preemption principles in cases where there is no statutory preemption.

And yet it is hard not to read *Crosby* as motivated by the concerns that inform the case for preemption minimalism. *Crosby* is a single data point, but it is directly in line with many other data points – namely, the half dozen or so foreign relations decisions in the last fifteen years that have eschewed judicial foreign relations inquiries in an effort to maximize political resolution of contested foreign relations issues. Nothing in the doctrine of constitutional avoidance would have led the Court to choose obstacle over field preemption, or the self-consciously narrow form of obstacle preemption the Court embraced. Rather, the Court seemed driven in this direction by a realization that it has no independent basis for choosing between federalism and foreign relations interests. Moreover, although the Court avoided a ruling on the continued viability of the dormant foreign affairs preemption doctrines, it is hard to see how those doctrines survive the Court’s pointed disavowal of any competence to identify, measure, and accommodate U.S. foreign relations interests.

It remains possible, of course, that the Court in *Crosby* was engaging in 1960s-style judicial foreign relations effects analysis, and masking this analysis by tying it to the statute itself. Even if this were true -- and I think there is no basis in the opinion for such a conclusion -- it remains significant that the Court believes that the judicial foreign relations effects test is sufficiently illegitimate that it requires masking. Moreover, even if the Court were hiding its true motive for analysis with an elaborate disavowal of an independent foreign policy role, surely at the margins, and perhaps much more broadly, the need to tie the preemptive scope of federal law to a congressional foreign policy purpose will limit the Court’s independent role. In other words, even if we are skeptical that what the Courts say tracks what they really do, there is still reason to believe that the need to find a basis for preemption in a political branch policy judgment will in fact limit the scope of the foreign relations effects test.¹⁷⁸

CONCLUSION

Some have characterized *Crosby* as the first foreign affairs opinion in the age of globalization.¹⁷⁹ This characterization is misleading to the extent it suggests that *Crosby* presented a novel set of interpretive problems. In fact, during at least the last fifteen years the Court has been struggling with a similar set of problems across a variety of foreign relations law doctrines. These doctrines, which were created in the middle years of the 20th century, presupposed a sharp distinction between “domestic” law, to which “normal” constitutional and

¹⁷⁶ See Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, forthcoming, *Iowa L Rev.*

¹⁷⁷ See Swaine, *Virg J Int'l L.*

¹⁷⁸ Compare Jan Elster, *Alchemies of the Mind : Rationality and the Emotions* (1999) (discussing civilizing force of hypocrisy).

¹⁷⁹ See Mark Tushnet, *Globalization and Federalism in a Post-Printz World* (cited in note 176).

sub-constitutional law doctrines applied, and “foreign relations” law, which developed its own set of constitutional and sub-constitutional rules. As the line between domestic and foreign affairs has blurred, and as the category of “foreign relations” has lost distinctive meaning, the Court has been rethinking its approach across the many doctrines of U.S. foreign relations law.

The Court’s basic move in these cases has been to embrace a particular brand of formalism that eschews independent judicial foreign policy judgments, and that encourages the political branches to resolve contested issues of foreign relations law. *Crosby* joins this line of cases, extending the new formalism in U.S. foreign relations law to statutory preemption. There is every reason to think the Court will continue this approach as it works through related interpretive doctrines, including treaty preemption,¹⁸⁰ self-execution,¹⁸¹ and delegated lawmaking.¹⁸² In a world in which the category “foreign relations” has an indefinite scope, doctrines tied to the category make no sense.

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¹⁸⁰ The Court has never focused on this issue extensively, but in various cases throughout its history it has sent mixed signals in passing. Compare *Guaranty Trust Co v United States*, 304 US 126, 143 (1938) (“Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them.”) and *Pink*, 315 US at 230 (“Even treaties . . . will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this Nation unless clearly necessary to effectuate the national policy.”) with *El Al Israel Airlines v Tsui Yaun Tseng*, 525 US 155, 175 (1999) (rejecting claim that “federal preemption of state law is disfavored generally, and particularly when matters of health and safety are at stake” because “the nation-state, not subdivisions within one nation, is the focus of the [Warsaw] Convention and the perspective of our treaty partners,” and thus “[o]ur home-centered preemption analysis . . . should not be applied, mechanically, in construing our international obligations.”).

¹⁸¹ See Goldsmith, 70 U Colo L Rev at 1413 (cited in note 38).

¹⁸² See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn L Rev 71, (2000).

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