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GLOBALIZATION AND FEDERALISM IN A POST- PRINTZ WORLD

Mark Tushnet*

I. INTRODUCTION

The current buzz-word about the economy is *globalization*.¹ In one aspect, globalization entails a reduction in the power of existing governments to regulate economic activity.² Does this reduction in power have any implications for the relation between the U.S. national government and state governments? Seen in the abstract, the implications might point in opposite directions. A national government seeing its power to regulate economic actors dissipate might attempt to sustain power by absorbing tasks previously relegated to subnational governments.³

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1. Defining *globalization* is notoriously difficult. As one commentator observes, the word is often “a simple catalogue of everything that seems different since, say, 1970, whether advances in information technology, widespread use of air freight, speculation in currencies, increased capital flow across borders, Disneyfication of culture, mass marketing, global warming, genetic engineering, multinational corporate power, new international division of labor, international mobility of labor, reduced power of nation-states, postmodernism or post-Fordism.” Peter Marcuse, *The Language of Globalization*, MONTHLY REVIEW, July-Aug. 2000 at 23. I think the term helpful nonetheless, and do not attempt a precise definition here.

2. As Saskia Sassen puts it, globalization involves “the unbundling of sovereignty . . . , the relocation of various components of sovereignty onto supranational, nongovernmental, or private institutions.” SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 92 (1998). See also John Gerard Ruggie, *At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy*, 25 MILLENNIUM 507, 508 (1995) (referring to “the denationalisation of control over significant decisions regarding production, exchange, and employment”). For a more complete description, see Richard Deeg, *Economic Globalization and the Shifting Boundaries of German Federalism*, 26 PUBLIUS 27, 28 (1996) (“[G]lobalization weakens the policy autonomy and capacity of all units of government. Autonomy is weakened because the increased mobility of investment capital narrows the range of policy strategies that governments may use effectively. Capacity is weakened because many conventional economic policy instruments are rendered ineffective in open and competitive markets”). As I discuss below, see *infra* text accompanying notes 128 -130, existing governments can facilitate the operation of transnational organizations. Their ability to restrict those organizations’ operations in ways inconsistent with the organizations’ own desires has been limited by globalization, however.

3. See, e.g., Martin S. Flaherty, *Are We to Be a Nation? Federal Powers vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1316 (1999) (“As Barry Friedman has observed, the march of globalization cannot help but have an overall nationalizing effect on our polity,” (citing Barry Friedman, *Federalism’s Future in the Global Village*, 47 VAND. L. REV. 1441, 1471-82 (1996))).

Alternatively, people might simply give up on regulating economic actors and decide to devote their political energy to things they can actually accomplish, which they might think are better done on levels below the national. In the abstract, then, globalization might lead to a reduction in the relative power of subnational units vis-a-vis the nation, or an increase in that relative power.⁴

This Article uses the recent Supreme Court decision in *Crosby v. National Foreign Trade Council*⁵ as the vehicle for examining the way in which the U.S. constitutional law of federalism might be responding to globalization.⁶ Part II develops the argument that globalization as such has no strong implications for domestic constitutional law. The remainder of the Article examines the U.S. constitutional response to the aspect of globalization revealed in *Crosby*, and argues that the Court's decision in *Crosby* is in tension with its other federalism decisions. But, the Article argues, that tension arises not from the fact that *Crosby* arises from globalization and implicates foreign affairs but from the Court's limited willingness to develop a robust law of federalism.⁷

At issue in *Crosby* was Massachusetts's so-called Burma Law.⁸ A repressive military regime took power in Burma in 1962 and intensified its repression in 1988.⁹ In response, international human rights groups, and governments, have

4. Relative power is what matters here, because my assumption is that globalization reduces what we might call the total power of government-in-the-large, as its important ability to regulate major economic actors diminishes.

5. 120 S. Ct. 2288 (2000).

6. The Supreme Court's first confrontation with the relation between federalism and the contemporary globalized political economy came in its hurried decisions in the *Breard* litigation. *Breard v. Greene*, 523 U.S. 371 (1998) (decided with *Paraguay v. Gilmore*). One available interpretation of the Court's decisions is that the U.S. system of federalism allows states to place the national government in breach of its international obligations. If that interpretation is accepted, the *Breard* cases are part of the same understanding of national and subnational power expressed more directly in the Court's federalism decisions. The case involved challenges by *Breard*, a convicted murderer, and his home nation, Paraguay, to *Breard*'s impending execution after an investigation during which *Breard* had not been notified of his treaty-based right to consult with a home-nation consular official. The Court rejected the challenges in a per curiam opinion issued shortly before the execution was to occur. The procedural posture of the cases makes it difficult to draw much from them. The Court held that *Breard* had forfeited his right to seek habeas corpus with respect to his treaty-based challenge, and that Paraguay's suits against the state and its governor were barred by the Eleventh Amendment. *But see* Carlos Manuel Vasquez, *Night and Day: Couer d'Alene, Breard, and the Unraveling of the Prospective-Retrospective distinction in Eleventh Amendment Doctrine*, 87 GEO. L. J. 1, 66-68 (1998) (arguing that the Supreme Court's decision should not be read as a holding on the Eleventh Amendment issue). In addition, the relevant treaty might not make reversal of a conviction the remedy for failure to inform a person of the right to consult his nation's consul; or the failure to inform might have been harmless error on the facts of the case; or the treaty might mean only that the national government must use its best efforts to ensure that subnational officials inform arrested foreigners of their right to consult. On the latter question, see Malvina Halberstam, *The Constitutional Authority of the Federal Government in State Criminal Proceedings that Involve U.S. Treaty Obligations or Affect U.S. Foreign Relations*, 10 IND. INT'L & COMP. L. REV. 1 (1999) (arguing that the national government had the power to require that the state stay *Breard*'s execution if a stay was required by U.S. international obligations). For extensive discussions of the many facets of the *Breard* litigation, see Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT'L L. 666 (1998).

7. *Crosby*, that is, should not be understood as exemplifying a foreign affairs exception to the Court's federalism jurisprudence.

8. The Supreme Court noted that the persons currently governing the nation formerly known as Burma refer to the nation as Myanmar, but that it would use the older name because that was the one used in state and federal law. 120 S. Ct. at 2290-91 n.1.

9. For a capsule political history of Burma over the relevant period, see Lucien J. Dhooze, *The*

sought ways to put pressure on the military government to restore democracy in Burma. Massachusetts's Burma Law was one such effort. Adopted by the state's legislature in 1996, the Burma Law barred state agencies from purchasing goods or services from businesses doing business in Burma. Three months after the state adopted its law, Congress enacted a statute imposing some sanctions on Burma, and authorized the president to impose others. The *Crosby* Court held that the national statute preempted the state one.

Preemption law raises questions about the relative scope of national and state power. A national statute that preempts a state law displaces the state's authority to accomplish the goals sought by the state legislature and, ultimately, by the state's voters.¹⁰ The more broadly the *power* to preempt is construed, the smaller the scope for state authority, and similarly the more broadly *statutes* are construed as preemptive, the narrower the scope of state authority. Preemption law should therefore be coordinated with the law dealing directly with the relative scope of national and state power, that is, with the constitutional law of federalism, if the nation is to have a coherently unified law of national and state power.

As is well known, the modern Supreme Court has engaged in a substantial effort to develop federalism-based restrictions on national legislative power. In the same Term that it decided the Burma Law case, for example, the Court held enactment of a civil remedy for violence against women beyond Congress's power under the Commerce Clause and Section 5 of the Fourteenth Amendment,¹¹ and invalidated Congress's attempt to impose monetary liability on states that discriminated in their employment practices against older workers.¹² One might expect a parallel development in the law of preemption. The Court's decisions on the scope of national power, which I call for simplicity the Court's federalism decisions, limit Congress's ability to displace states' judgments about the policies they can pursue. Preemption law is *about* Congress's power to displace such judgments. As the Court restricts Congress's power to displace state policy judgments in one area, it might do the same in the other. And, the Court may indeed have done so, at least in the arena of domestic policy.¹³

The Burma Law decision might have shed some light on the Court's understanding of the implications of federalism, and of the modern law of federalism, for state policy bearing on international affairs. Examined closely, however, *Crosby* says very little about those implications. It suggests that the Court would not accept the most expansive possible definition of the power to preempt, and rather clearly rejects the most expansive possible definition of the scope of state authority. The latter holding is the primary focus of this Article's analysis. I argue that the rejection of a constitutionally rooted state immunity from preemption is

Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution, 37 AM. BUS. L.J. 387, 390-92 (2000).

10. In their capacity as *state* voters. Of course in their capacity as national voters, the same people participate in the development of national statutes.

11. See *United States v. Morrison*, 120 S. Ct. 1740 (2000).

12. See *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000).

13. See *infra* text accompanying notes 74-75.

in tension with the Court's federalism decisions. That tension could be resolved in a number of ways. The tension might have gone unnoticed in *Crosby*, or at least underanalyzed.¹⁴ Later cases might resolve the tension by restricting the reach of preemption law in ways merely noted in passing in *Crosby*. Or the Court might distinguish between Congress's power to preempt with respect to domestic matters, limiting that power in the name of federalism, and its power to preempt with respect to international matters, allowing Congress a wider range of power in the name of globalization. Or, as I have argued elsewhere, the Court's federalism decisions will turn out to have a more limited reach than might now appear.¹⁵ If so, the apparent tension would be resolved by reducing the importance of the federalism decisions and preserving a large role for Congress in preemption.

At this point it is obviously premature to identify which course the Court will take. I argue, however, that the second and third paths are far more likely to be chosen than the first. Though globalization may weaken state authority to *regulate* transnational enterprises, those enterprises require support from legal regimes that allow them to operate across borders. Globalization therefore may require that national governments rein in their subnational units to the extent that subnational law might interfere with transnational operation. The tension between the Court's federalism decisions and preemption law may flow from globalization itself, and it might be impossible to eliminate that tension by limiting the national government's power to preempt. Sustaining a distinction between an expansive power to preempt with respect to international matters and a limited power with respect to domestic ones seems to me likely to be quite difficult. The line between international and domestic matters in a globalized economy is so thin as to be almost purely formal. The Court's federalism decisions are, however, primarily formalist, and that formalism might be sustainable at least as well in the context of preemption as it is in the context of the federalism decisions themselves. A less formalist Court might find the third path easier to pursue, though.

This Article begins by describing the relationship between domestic law and international affairs. It follows with a summary of preemption law's underlying structure, describing, along the way, the state of preemption law before and after *Crosby*. That discussion concludes by pointing out the tension between the Court's federalism decisions, which bar Congress from commandeering a state's legislative or executive officials,¹⁶ and preemption law, which operates as a sort of negative commandeering by foreclosing state legislatures from pursuing the poli-

14. As discussed below, *see infra* text accompanying notes 88, the *Crosby* Court disposed in a footnote of the most obvious argument that would align preemption law and the Court's federalism decisions. It may be worth noting that *Crosby*'s author, Justice David Souter, has dissented from the federalism decisions, and would therefore have had little incentive to address a tension that he personally would dissolve by abandoning the federalism decisions.

15. See Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Ambition*, 113 HARV. L. REV. 29 (1999).

16. See *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not require that state legislatures enact laws satisfying national requirements); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not direct state executive officials to enforce national law).

cies they prefer.¹⁷ Part IV examines the relation between affirmative and negative commandeering, to see whether the distinction can survive analytic scrutiny, and concludes that the distinction is quite difficult to sustain. The Article concludes by returning to the more general issues of globalization and federalism, and explains why a decision like *Crosby*, refusing to draw the strongest possible implications from the Court's federalism decisions, is almost inevitable in a globalized economy.

II. INTERMESTIC CONSTITUTIONAL LAW

The Mexican historian Carlos Rico Ferrat has used the useful term *intermestic* to describe "issues that are at the same time domestic and international."¹⁸ The constitutional law regulating the role of subnational governments on the international scene is intermestic constitutional law.¹⁹

Over a decade ago Richard Bilder provided a convenient enumeration of the many ways in which U.S., state and local governments act on the international scene.²⁰ To paraphrase Bilder, states and cities adopt resolutions on foreign affairs questions, send trade missions to attract foreign investors to their localities, and create sister city relationships designed to make investments in one city rather than another. And, as the Burma Law shows, sometimes subnational governments go farther and adopt enforceable policies with foreign affairs implications.

Globalization increases transborder economic contacts, and thus may make it more difficult for any single government to regulate the resulting economic activity: A government that attempts to control one aspect of the regulated entity's activities may discover that the entity simply relocates the activity across the border. One might think that the difficulty of regulating within a single jurisdiction impels regulatory jurisdiction ever upward, from subnational governments to national ones and eventually to transnational bodies. Globalization certainly has had such effects. So, for example, the North American Free Trade Agreement

17. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L.REV. 813, 817 (1998) (observing that functional justifications for the ban on affirmative commandeering "cannot explain why federal demands for state or local services should be regarded as more of an intrusion on state sovereignty than simple federal preemption of state or local law").

18. David Thelen, *Mexico, the Latin North American Nation: A Conversation with Carlos Rico Ferrat*, 86 J. AM. HIST. 467, 473 (1999). For earlier uses of the term, see Bayless Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306 (1977); John Kincaid, *Constituent Diplomacy: U.S. State Roles in Foreign Affairs*, in CONSTITUTIONAL DESIGN AND POWER-SHARING IN THE POST-MODERN EPOCH 107, 121 (Daniel J. Elazar ed., 1991); Franz Gress, *Interstate Cooperation and Territorial Representation in Intermestic Politics*, 26 PUBLIUS 53 (1996).

19. For an overview of issues on which international influences have domestic effects, including immigration, the environment, and social welfare, see EVAN LUARD, *THE GLOBALIZATION OF POLITICS: THE CHANGED FOCUS OF POLITICAL ACTION IN THE MODERN WORLD* (1990). Strictly speaking, the law dealing with international influences on domestic matters is necessarily domestic constitutional law, being the law of the relevant jurisdiction (even if the jurisdiction is a supranational government). Still, Rico Ferrat's term captures something important about the issues I discuss in this Article.

20. See Richard Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 830 (1989); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1225, 1248 (1999) (providing a more recent accounting of such actions).

and the General Agreement on Tariffs and Trade, now implemented by the World Trade Organization, restrict the ability of subnational and national governments to adopt particular regulatory policies, and create supranational agencies to determine when a lower-level government has violated these trade agreements. As one relatively early survey concluded, "the trade pacts create a wide range of new limits and duties for state and local governments," and "change power relationships in the federal system" by increasing the influence of federal trade officials, international standard setting bodies, and foreign investors vis-a-vis state and local governments.²¹

Transfer of power from subnational to national governments is not inevitable, however. Subnational governments can act across borders themselves, engaging in coordinated regulation with other nations or subnational governments. One useful study describes the efforts of New England governors to purchase electricity from Quebec in the 1970s and 1980s.²² The governors arranged for purchases in a series of meetings with the premiers of the Eastern Canadian provinces, pressuring private utilities in the New England states to accept the arrangements the governors had negotiated.²³

The experience of European integration is even more enlightening. The structure of the European Union has accommodated subnational governments in its Committee of the Regions, which consists of delegates from subnational units in the Union, although the Committee is only an advisory body. Germany's Basic Law was amended after the European Union was created by the Maastricht Treaty to ensure that Germany's subnational units would retain and even expand their power vis-a-vis the national government.²⁴ The Basic Law's Article 23 now provides that "the *Länder*, through the *Bundesrat*, shall participate in the affairs of the European Union," and, in particular, that "[w]hen legislative powers exclusive to the *Länder* are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member nation of the European Union shall be transferred to a representative of the *Länder* to be appointed by the *Bundesrat*."²⁵ Under this provision, German's subnational units are to participate directly in the decision-making processes of the European Union. In addition, the Basic Law ac-

21. Conrad Weiler, *Foreign-Trade Agreements: A New Federal Partner?*, 24 PUBLIUS 113, 130-32 (1994).

22. See Charles S. Colgan, *Internationalization of the Governor's Role: New England Governors and Eastern Canadian Energy, 1973-1989*, ST. AND LOCAL GOV'T. REV. Fall 1991, at 119.

23. The agreements did not require congressional approval, U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with . . . a foreign Power"), because they were nominally between the private energy companies and the Canadian suppliers.

24. For a discussion, see Juliane Kokott, *Federal States in Federal Europe: The German Länder and Problems of European Integration*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 175 (Antero Jyränki ed. 1999). The institutions Kokott describes are in their infancy, and it would be grossly premature to conclude that institutions provide effective involvement of Germany's subnational units in European Union affairs. At most, they suggest some possibilities that might develop as the institutions mature.

25. Grundgesetz [Constitution] [GG] art. 23(1), (7) (F.R.G.). The *Länder* are Germany's states; the *Bundesrat* is the legislative chamber in which delegates chosen by the *Länder* sit.

knowledges the long-standing practice of *Länder* maintaining "a constant relationship directly with the institutions of the European Union," through offices and missions.²⁶

As one scholar describes other aspects of the German experience, "Although a substantial amount of . . . centralization has occurred, a significant amount of decentralization of economic policymaking has also occurred within Germany."²⁷ Globalization limits the number of regulatory devices that can be deployed effectively, and subnational governments may be as competent as national ones to use those regulatory tools that remain effective. And, as the New England example indicates, some cross-border problems are regional rather than national, making the subnational governments in the region more effective policy-makers than the national government.²⁸

An additional aspect of globalization deserves mention. As I have suggested, transnational economic enterprises are the driving force behind globalization.²⁹ Other transnational actors play an important part, however. In particular, non-governmental; organizations (NGOs) linked by modern methods of communication have become important actors in the globalized economic system.³⁰ Massachusetts's Burma Law, for example, was enacted because transnational NGOs were able to mobilize local support for sanctions against Burma.

The initial reaction of many students of constitutional law to the question of the relation between globalization and federalism is skepticism: The transfer of sovereignty away from classic nation-states seems to entail a similar loss of authority for subnational governments relative not only to transnational entities but relative to national governments as well. The examples I have given suggest otherwise. In the U.S. context, Peter Spiro has suggested globalization has undermined the traditional proposition that in the international arena the United States must speak with a single voice.³¹ The "one voice" rationale rested on the view that the position of the national government would be compromised, and its diplomacy made unnecessarily complicated, unless the entire nation stood behind the positions taken by the national government. But, according to Spiro, globalization has enhanced the ability of non-U.S. nations to distinguish between actions taken by the United States and those taken by its subnational units, and to target only the latter for retaliation.³² The entity called the United States might still have to speak

26. *Id.* art. 23 (8). According to Kokott, these offices engage in advisory and business-promotion activities, not formal governmental activities. Kokott, *supra* note 24, at 188.

27. *See* Deeg, *supra* note 2, at 27.

28. *See id.* at 29.

29. *See* Wolfgang H. Reineke and Jan Martin Witte, "Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords," in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 78 (Dinah Shelton ed. 2000) ("globalization is a process mostly structured by private actors").

30. *Id.* at 93 (noting that transnational NGOs form part of "a real international community, a truly global civil society").

31. *See id.* at 1261-70 (describing "targeted retaliation"). *Cf.* Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2106 (2000) (suggesting that preemption doctrine can change as "the background in which Congress legislates" changes).

32. *But see* Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local*

with one voice, but the presence of other voices, Spiro argues, need not compromise what that one voice is saying. Here too globalization may strengthen rather than weaken the constitutional position of subnational units.³³

There is no necessary connection between globalization and centralization.³⁴ Manuel Castells expresses the complex dynamics well:

[B]ecause of the territorial differentiation of state institutions, regional and national minority identities find their easiest expression at local and regional levels. On the other hand, national governments tend to focus on managing the strategic challenges posed by the globalization of wealth, communication, and power, hence letting lower levels of governance take responsibility for linking up with society by managing everyday life's issues, so as to rebuild legitimacy through decentralization. However, once this decentralization of power occurs, local and regional governments may seize the initiative on behalf of their populations, and may engage in developmental strategies *vis à vis* the global system, eventually coming into competition with their own parent states.³⁵

How federal systems respond to globalization is a question that each nation may resolve for itself; answers are not dictated by the logic of globalization.³⁶ With this background, I turn to the particular U.S. constitutional response, as illustrated by preemption law and the Burma Law decision.

"Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?, 26 HASTINGS CONST. L.Q. 307, 330-31 (1999) (describing retaliation by Swiss government against proposed local sanctions, which would have retaliated against goods produced in states that proposed the sanctions and in states that had not). I should note that Spiro argues only that the possibility of targeted retaliation diminishes the need to invoke a presumption in favor of preemption. Denning & McCall in fact make the stronger argument that the Burma Law was preempted by the Constitution itself, and so are unconcerned with claims about positions further along the spectrum of possibilities for preemption doctrine.

33. If the term *globalization* is restricted to the development of agreements among nations, perhaps globalization does require greater centralization so that each nation can assure its partners of full compliance with the agreement by all governmental levels. Globalization contains so much more than this, however, that centralization due to the need to deliver on agreements seems to me likely to play a small role in the overall constitutional response to the larger phenomenon of globalization. Notably, *Crosby* did not involve such an agreement, although the statute the Court found to preempt the Burma Law authorized the president "to work to develop 'a comprehensive, *multilateral* strategy to bring democracy to and improve human rights practices and the quality of life in Burma,'" *Crosby*, 120 S. Ct. at 2292 (quoting the statute) (emphasis added).

34. See also Geoffrey Garrett and Jonathan Rudden, "Globalization and Decentralization," presented at the annual meeting of the American Political Science Association, Aug. 31-Sept. 3, 2000, Washington, D.C. (arguing that globalization reduces the cost of sustaining small jurisdictions but increases the risks for such jurisdictions because they are likely to lack a diverse economy, and that centralized jurisdictions can better insure against such risks); Michael J. Hiscox, "Supranationalism and Decentralization in the Global Economy," presented at the annual meeting of the American Political Science Association, Aug. 31-Sept. 3, 2000, Washington, D.C. (presenting a formal model to identify the conditions under which globalization leads to supranationalism or decentralization).

We should understand claims that there is a connection between globalization and centralization as the ideological expression of a particular vision of globalization. Cf. Stephen Gill, *Globalisation, Market Civilisation, and Disciplinary Neoliberalism*, 24 MILLENNIUM 399, 412-13 (1995) (describing proposals for a "new constitutionalism" as "confer[ring] privileged rights of citizenship and representation on corporate capital, whilst constraining the democratisation process that has involved struggles for representation for hundreds of years").

35. MANUEL CASTELLS, *THE POWER OF IDENTITY* 272 (1997). See also Friedman, *supra* note 3, at 1479-83 (describing a similar dynamic).

36. Cf. Kokott, *supra* note 24, at 187 (noting the differences among members-states of the European Union in the constitutional status of subnational units).

III. THE STRUCTURE OF PREEMPTION LAW

Preemption law operates on three levels. On the highest and most general level, we have broad principles about preemption; on the next, we have specific tests for determining when a national statute displaces state law; and on the lowest, we have the application of those tests to particular statutes. Focusing on the most general level provides the best illumination of the relation between globalization, national power, and state law.

I think it helpful to describe the possibilities for preemption law as lying along a continuum ranging from maximum national power at one end to maximum state power on the other. For present purposes, it is sufficient to identify five points: preemption *in* the Constitution, a presumption in favor of preemption, neutral statutory interpretation, a presumption *against* preemption, and constitutional immunity from preemption. As we will see, the opinion in *Crosby* is written in a way that rules out only the proposition that Massachusetts's statute is immune from preemption because of federalism concerns. The opinion is self-consciously written as an exercise in neutral statutory interpretation, but it leaves the other three possibilities open. And yet, ruling out a constitutionally based immunity from preemption is the decision most in tension with the Court's federalism decisions.

The Constitution preempts state law when it gives Congress exclusive power to prescribe the rules dealing with some subject.³⁷ Preemption in the Constitution might be thought to be rare because it creates a troublesome risk: The subject matter may be one as to which there ought to be regulation, according to some policy views, and yet Congress may not enact any regulation at all, not because it makes a conscious decision to reject those policy views but because Congress uses its limited time and political energy to deal with other problems. The area goes unregulated (despite the possibility that the area is one in which regulation is desirable) if Congress's power is exclusive and Congress fails to act.³⁸

Still, preemption in the Constitution is more common than one might initially think. Historically, the proposition that Congress's power to regulate interstate commerce was exclusive has had a fair amount of support in the Supreme Court. Justice William Johnson's separate opinion in *Gibbons v. Ogden* specifically endorsed that proposition,³⁹ and Chief Justice John Marshall's opinion for the Court conceded that the proposition had "great force."⁴⁰ The *Gibbons* Court

37. For present purposes it is unimportant to discuss the question of whether Congress can exercise its exclusive power by delegating authority to the states.

38. See Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 Vand. L. Rev. 1149, 1167 (1998) (noting that field preemption may create "a regulatory vacuum").

39. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J., concurring) ("The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon").

40. *Id.* at 209.

did not adopt Justice Johnson's view, however, because it did adopt a broad definition of the scope of the power to regulate interstate commerce.⁴¹ With such a definition the risk was too high that there would be large areas of subjects that ought to be regulated but were not.

Nonetheless, the idea of preemption in the Constitution remained an important part of constitutional law, in the guise of the dormant commerce clause. The dormant commerce clause is invoked when some state regulation interferes with interstate commerce,⁴² and yet Congress has not proscribed the interference. Dormant commerce clause cases are ones in which the mere grant of an unexercised power to Congress displaces state authority to adopt the regulation its legislators think best.

Consistent with its general federalism decisions, the modern Supreme Court has reduced somewhat the reach of dormant commerce clause doctrine. Typically it is said that that doctrine has two branches, one barring states from enacting statutes that discriminate against out-of-state commerce, and the other barring states from enacting statutes that place unacceptably high burdens on interstate commerce. The modern Supreme Court has made the first branch a serious limitation on state power by looking quite skeptically on state regulations that draw geographic lines that effectively treat local and interstate commerce differently.⁴³ The formality of using a geographic term in the regulation is crucial here, because the modern Supreme Court appears to be quite reluctant to invalidate statutes that have a substantial disparate impact on in-state and out-of-state commerce, even without drawing geographic lines.⁴⁴ The Court has not invoked the second "excessive burden" branch of dormant commerce clause to invalidate a state regulation in at least a decade.⁴⁵

41. The power was one to "prescribe the rule by which commerce is to be governed," *id.* at 196, and commerce was "commercial intercourse . . . in all its branches," *id.* at 189-90.

42. Again, for present purposes it is unnecessary to discuss the Court's complex set of standards for determining when a state statute unconstitutionally interferes with interstate commerce.

43. Probably the most dramatic recent example, but one of many, is *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), finding unconstitutional a flow control ordinance that directed that all solid waste generated within the town be deposited at a specified waste transfer station.

44. Here the most dramatic example is *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), upholding a facially neutral state regulation that adversely affected the large proportion of economic activity – here, integrated gasoline production and retailing – under out-of-state control and the small proportion of that activity under local control.

45. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), is the most recent case cited in the relevant section of ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 326 (1997). LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1053, 1070-74 (3d ed. 2000), points out that parts of the plurality opinion in *Kassel* and parts of the majority opinion in *Kassel's* predecessor, *Raymond Motor Transportation v. Rice*, 434 U.S. 429 (1978), suggest that the statutes in those cases were problematic because they contained provisions that the opinions' authors saw as discriminatory. The most recent case cited by Tribe as invalidating a statute on "excessive burden" grounds is *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). TRIBE, *supra*, at 1098-99. On the borderline between discriminatory statutes and nondiscriminatory ones are statutes the Court finds directly to regulate commercial activity in other states. See, e.g., *Healy v. The Beer Inst.*, 491 U.S. 324 (1989). Justice Sandra Day O'Connor relied on the "excessive burden" branch of dormant commerce clause doctrine in her opinion concurring in the judgment in *Carbone*. See 511 U.S. at 405-07 (O'Connor, J., concurring). (The infrequency with which the "excessive burden" doctrine is invoked to invalidate statutes suggests to me that one should be cautious about describing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), as a "seminal" case. TRIBE, *supra*, at 1082. *Pike* is the governing standard, of course, but the Court rarely

Foreign affairs might be one place we could find preemption in the Constitution, and the Court came close to doing so in its controversial decision *Zschemig v. Miller*.⁴⁶ There the Court invalidated an Oregon statute that barred non-resident aliens from inheriting property from an Oregon resident, if the alien lived in a country that might confiscate the inheritance. The Court said that statutes like Oregon's "radiate[d] some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory."⁴⁷ Justice Douglas's opinion for the Court found that the statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."⁴⁸ It did so notwithstanding a representation by the Department of Justice that the specific application of Oregon's statute did not "unduly interfere[] with the United States' conduct of foreign relations."⁴⁹ According to the Court, "As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts."⁵⁰ Justice Stewart, concurring, was even more explicit: The Oregon statute "launch[es] the State upon a prohibited voyage into a domain of exclusively federal competence."⁵¹ Preemption in *Zschemig* arose from the Constitution itself.⁵²

State power might be displaced somewhat less if the Court adopted a presumption in favor of preemption. Again the field of foreign affairs provides the best examples. States have attempted to tax the activities of multinational corporations in ways that place some of their non-United States business in the states' tax base. Not surprisingly, the corporations object, and frequently influence their home nations to place pressure on the United States to reduce the tax burden. These foreign relations complications of state tax policy might support a presumption in favor of preemption. For, as Justice Blackmun noted in *Japan Line, Ltd. v. County of Los Angeles*, "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."⁵³

employs it to invalidate state regulations).

46. 389 U.S. 429 (1968). For critiques of *Zschemig*, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 163-65 (2d ed. 1996); Bilder, *supra* note 20, at 830; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999).

47. *Zschemig*, 389 U.S. at 435.

48. *Id.* at 432.

49. *Id.* at 434 (quoting the *amicus curiae* brief filed by the Department of Justice).

50. *Id.* at 437.

51. *Id.* at 442 (Stewart, J., concurring).

52. As Justice Harlan's concurring opinion pointed out, the Court refrained from relying on the provisions of a treaty that might have been construed to displace the state law. *See id.* at 445-51. Notably, the *Crosby* opinion cited *Zschemig* only in describing the ruling of the lower court. *See* 120 S. Ct. at 2293.

53. 441 U.S. 434, 448 (1979) (quoting *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933)). *See also* *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (describing "international relations" as "the one aspect of our government that from the first has been most generally conceded imperatively

The Court effectively rejected the proposition that there should be a presumption in favor of preemption in *Barclays Bank PLC v. Franchise Tax Board*.⁵⁴ *Barclays Bank* involved a highly controversial application of California's corporate tax.⁵⁵ Executive officials with foreign affairs responsibilities had repeatedly expressed concern about the state's tax system.⁵⁶ But the Court found that Congress had the constitutional power to regulate interstate commerce and knew about the foreign affairs problems California's tax system was causing, and Congress had not enacted any statutes restricting California's ability to apply its tax system as it chose.

Barclays Bank applies ordinary preemption standards in the foreign affairs context. It amounts to more than a movement away from the stronger position taken in *Zschernig* because cases like *Japan Line*, with their emphasis on the need for the nation to speak with a single voice, seem to suggest that there might be a presumption in favor of preemption in matters affecting foreign affairs.⁵⁷

Still further along the continuum is the position in which preemption questions are ordinary matters of statutory interpretation, with no presumption that national statutes either override or preserve state authority.⁵⁸ *Geier v. American Honda Motor Co., Inc.* illustrates this position.⁵⁹ There the issue was whether a federal safety standard preempted state tort law.⁶⁰ The case involved an accident in which a car collided with a tree.⁶¹ The plaintiff sued the car's manufacturer, al-

to demand broad national authority").

54. 512 U.S. 298 (1994).

55. Briefs attacking the statute were filed on behalf of the United Kingdom and the member states of the European Communities, as well as by the United States Chamber of Commerce, and the Court quoted a letter from the Secretary of State to the governor of California asserting that "[t]he Department of State has received diplomatic notes complaining about state use of the worldwide unitary method of taxation from virtually every developed country in the world." *Id.* at 324 n.22.

56. The Solicitor General had argued that "statements of executive branch officials are entitled to substantial evidentiary weight" on the question of whether a state tax system "impairs the federal government's ability to speak with one voice," (quoting brief for United States as amicus curiae), but the Court found it unnecessary to accept or reject that argument because it found that the executive statements were insufficient to "authorize judicial intervention" "in light of Congress' acquiescence" in California's system. *Id.* at 330 n.32.

57. See Spiro, *supra* note 20, at 1239 n.74 (describing *Barclays Bank* as "a doctrinal watershed"). See also *id.* at 1264-65 (asserting that the *Breard* cases "at least implicitly reject *Zschernig* constraints in the state death penalty context"). It remains possible that there could be constitutionally based preemption, or a presumption of preemption, with respect to some subject matter *within* but not as comprehensive as the area of foreign affairs. One possibility, consistent with *Crosby's* outcome, is that states may not treat commerce related to one foreign nation worse than they treat commerce related to another – a requirement that states give "most favored nation" status to all foreign nations. Presumably the scope of such a doctrine would be determined by balancing the national interest in uniformity against whatever interests states might assert in favor of local decision-making.

58. Cf. Dinh, *supra* note 31, at 2087 ("Contrary to the prevailing wisdom and the unexplored assumptions of Supreme Court dicta, the constitutional structure of federalism does not admit to a general presumption against federal preemption of state law"); *id.* at 2092 ("as a matter of constitutional structure, there should be no general systematic presumption against or in favor of preemption"); *id.* at 2097 (preemption analysis is "garden-variety statutory interpretation"). Jeffrey R. Stern, Note, *Preemption Doctrine and the Failure of Textualism* in *Cipollone v. Liggett Group*, 80 VA. L. REV. 979 (1994), uses the term *text-controlled* to describe what I call neutral statutory interpretation.

59. 120 S. Ct. 1913 (2000).

60. See *id.* at 1918.

61. See *id.* at 1917.

leging that a car without an airbag was negligently designed.⁶² The relevant federal statute authorized the Department of Transportation to issue safety standards. The Department's standard required some but not all pre-1987 cars to have airbags, and the standard did not require that the plaintiff's car have an airbag.⁶³

The federal statute had two provisions dealing with preemption. One provision expressly preempted state "safety standards applicable to the same aspect of performance" different from the federally prescribed standard.⁶⁴ The manufacturer argued that state tort law established standards of conduct, and was therefore preempted.⁶⁵ The Court found it unnecessary to address that claim, because of the statute's second provision. It provided that compliance with a federal standard did not "exempt" anyone from liability under tort law.⁶⁶ In effect, the savings provision canceled out the express preemption provision.

But, the Court held, that left matters as they would have been without any statutory provisions addressing preemption: "The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles."⁶⁷ The Court thus held that it should apply the ordinary preemption principle that a national statute preempts state rules that actually conflict with the national law. Justice Stevens, writing for four dissenters, argued that the savings clause showed that the manufacturer should carry a "special burden" in attempting to establish preemption.⁶⁸ The Court rejected that proposition, however. Justice Breyer asked, "Why . . . would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake?"⁶⁹ Allowing a state to enforce a rule that actually conflicted with federal law "would take from those who would enforce a federal law the very ability to achieve the law's . . . objectives."⁷⁰

The Court in *Geier* invoked ordinary principles of statutory interpretation, rejecting the dissent's claim that there ought to be a presumption against preemption.⁷¹ It is possible to reach the same point on the continuum even if one recognizes a presumption *against* preemption. Sometimes something will offset such a presumption, not in the sense of giving a reason to conclude that national law preempts state law notwithstanding the presumption but in the sense of nullifying the presumption, thereby allowing the Court to apply ordinary principles of statutory interpretation.⁷²

62. *See id.*

63. *See id.* at 1916-17.

64. *Id.* at 1917.

65. *See Geier*, 120 S. Ct. at 1918.

66. *See id.*

67. *Id.* at 1920.

68. *Id.* at 1934 (Stevens, J., dissenting).

69. *Id.* at 1920.

70. *Id.*

71. In the form of the special burden the defendant should have been required to carry, according to the dissent.

72. The offsetting effect of the two statutory provisions in *Geier* captures the basic intuition in a statutory context.

The Court's decision last Term in *United States v. Locke* provides a useful illustration.⁷³ The case involved a state law regulating the design and operation of oil tankers, which the Court found preempted by national law.⁷⁴ The Court emphasized the pervasive national interest in the regulation of navigation.⁷⁵ The international implications of navigation regulation suggested that it was truly important that in this area the nation speak with one voice, that is, through Congress.⁷⁶ Analyzing the most important precedent, the Court concluded, "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."⁷⁷ There should be "[n]o artificial presumption" as the Court went about the job of interpreting the preemptive effect of national law.⁷⁸ Understood in this way, *Locke* does not involve a presumption in favor of preemption. Rather, the presumption against preemption is offset by the special need for uniformity, leaving the Court in a position to interpret the relevant statutes according to ordinary principles unaffected by any presumptions.

Locke is more representative of modern preemption law than *Geier*, at least in the sense that it implicitly acknowledges the *general* availability of a presumption against preemption even though it finds that presumption offset by the need for uniform national policy in an area traditionally regulated primarily by national law. The modern cases are filled with references to a presumption against preemption of the states' ordinary police powers, to the point where the Court can now refer to "the normal presumption against pre-emption."⁷⁹ The formulations vary. In 1947 the Court wrote, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."⁸⁰

Crosby suggests that this "normal" presumption might be inapplicable in the

73. 120 S. Ct. 1135 (2000).

74. See *id.* at 1140-41.

75. See *id.* at 1143.

76. The Court acknowledged that what was said in the single voice might be influenced by participation by state authorities in developing national policy. *Id.* at 1152 ("States, as well as environmental groups and local port authorities, will participate in the process").

77. *Id.* at 1147.

78. *Id.* at 1148.

79. A LEXIS search indicates that the phrase "presumption against pre-emption" first appeared in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985). It was then used in three cases in 1992, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 118 (1992) (Souter, J., dissenting); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 421 (1992) (Stevens, J., dissenting). See also Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress of the Courts?*, 40 VILL. L. REV. 1, 72-73 (1995) (collecting cases). Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 230 (2000), says that the Court "purports" to apply a presumption against preemption, and critiques such a presumption, *id.* at 292-98. For discussions of the alleged presumption against preemption and its scope, see R. David Allnutt, Comment, *FIFRA Preemption of State Common Law Claims After Cipollone v. Liggett Group*, 68 WASH. L. REV. 859 (1993); John A. Chartowski, Note, *Cipollone and the Clear Statement Rule: Doctrinal Anomaly or New Development in Federal Preemption*, 44 SYR. L. REV. 769 (1993).

80. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted and distinguished in *Locke*, 120 S. Ct. at 1147. The most prominent recent formulation is that there is a "presumption against the pre-emption of state police power regulations," *Cipollone*, 505 U.S. at 518 (1992).

area of foreign affairs. But *Crosby* was careful to “leave for another day” the possibility that there still might be a general presumption against preemption, finding that, even assuming that “some presumption against preemption is appropriate,” the Massachusetts Burma Law was preempted.⁸¹ And *Locke* suggests the difficulties of characterization that are likely to attend any effort to distinguish among subjects for purposes of deciding whether presumptions in favor of or against preemption should be invoked. *Locke* itself presented a conflict between an interest in preserving the local environment, fairly characterized as a police power interest, and an interest in ensuring the easy operation of trade across national borders, fairly characterized as a matter on which the nation must speak with a single voice. The Court attempted to avoid that difficulty by invoking a different distinction, between “a field which the States have traditionally occupied”⁸² and “an area where the federal interest has been manifest since the beginning of our Republic and is now well established.”⁸³ Difficulties with this distinction are obvious. First, surely there are large areas in which the contrast the Court draws is not nearly as stark as this: Where the states have done some legislating, but not all that much, and where Congress too has acted, but only intermittently. Indeed, one more familiar than I with shipping, oil tankers, and the environment could almost certainly explain why the contrast the Court drew was too stark even with respect to the subject at issue in *Locke*. That is, the distinction the Court draws relies on what are likely to be readily contestable characterizations of the history of state and national regulation of the area.

Second, the distinction between areas that states historically have regulated heavily and those they have not evokes memories of the Court’s unsuccessful attempt to identify areas of core state concern under the doctrinal regime of *National League of Cities v. Usery*.⁸⁴ The Court abandoned that effort when it realized the impossibility of devising a stable distinction between areas in which states have historically operated and those where their intervention was relatively recent. The distinction drawn in *Locke* seems likely to succumb to similar pressures.

The final difficulty is a more general problem of characterization. Whether something is a matter of domestic affairs or foreign affairs is not written in the book of nature; it is a characterization adopted by lawyers for particular purposes. Perhaps *shipping* is part of foreign affairs; perhaps *purchasing goods from multinational companies* is. But then again, perhaps *the environment* is part of domestic affairs; perhaps *respecting human rights* is too, in light of the legacy of the Reconstruction amendments.⁸⁵

81. 120 S. Ct. at 2294-95 n.8. This conclusion was “based on [the Court’s] analysis below,” *id.* But that analysis did not refer to a presumption against preemption, or discuss what it was about the national and state laws that overcame whatever presumption there might have been, because the Court expressly utilized only normal principles of statutory interpretation to decide the preemption question.

82. 120 S. Ct. at 1147 (quoting *Rice*).

83. *Id.* at 1143.

84. 426 U.S. 833 (1976).

85. Not surprisingly, there is likely to be an interaction between the characterization of the area involved and the characterization of the history of state and national regulation of that area.

Crosby leaves open nearly every possibility for preemption in the area of foreign affairs: Although the Court's opinion does not mention constitutionally based preemption or a presumption in favor of preemption, the case's result is consistent with either position; the opinion expressly invokes ordinary principles of statutory interpretation; and the opinion notes that the Court would reach the same result even if it invoked a presumption against preemption.⁸⁶ The only possibility *Crosby* rules out is a constitutionally based immunity from preemption with respect to the subject of the Burma Law.⁸⁷ The Court adverted to such a possibility in noting that a prior opinion had "rejected the argument that a State's 'statutory scheme . . . escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power.'"⁸⁸ Although the Court did not put it this way, it in effect held that there was no "market participant" exception to Congress's power to preempt state law analogous to the "market participant" exception to the judicially developed rule that states may not discriminate against out-of-state commerce.⁸⁹

In all three of last Term's major preemption cases, the Court effectively limited the reach of state regulatory authority. As Justice Stevens noted in his dissent in *Geier*, preemption cases are "about federalism."⁹⁰ Yet, when the Court has addressed federalism issues directly, it has limited the reach of national authority precisely to preserve the ability of states to pursue autonomously developed policies. There seems to be some tension between the Court's federalism decisions and its preemption cases. In the main, there is no direct conflict between the Court's solicitude for federalism in cases involving the scope of national power and the lack of regard it gives state authority in some preemption cases.⁹¹ The

86. This Part has focused on general principles of preemption, and has argued that *Crosby* adopts a neutral stance. Ernest A. Young, "The Last Bastion of 'Dual Federalism'" (forthcoming), argues that the *Crosby* Court interpreted the particular statute involved in a distinctive manner, reflecting the foreign-affairs setting. This may be true, but establishing it would require one to compare the way in which the *Crosby* Court interpreted the statute with the way the Court has interpreted purely domestic statutes. Young does not engage in that inquiry, which would in any event require a rather detailed understanding of a range of specialized domestic statutes.

87. I have added the final clause to this sentence to leave open the possibility that a state might have some constitutionally based immunity from preemption, but not one that extends to the Burma Law. (One possibility, for example, might be that Congress could not require that Massachusetts abstain from a primary boycott of goods made in Burma. Under such a rule Massachusetts could refuse to buy goods made in Burma even if that interfered with congressional policy, but it could not refuse to deal with businesses that themselves did business in Burma).

88. 120 S. Ct. at 2294 n.7 (quoting *Wisconsin Dep't. of Indus. v. Gould, Inc.*, 475 U.S. 282, 287 (1986)). The Court also noted that Massachusetts had "concede[d], as it must," that Congress had the power to preempt the Burma Law, and that the state had challenged only the assertion that Congress had in fact exercised that power. *Id.*

89. See *Gould*, 475 U.S. at 289 (asserting that "the 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted").

90. See, e.g., *Geier*, 120 S. Ct. at 1928 (Stevens, J., dissenting) ("This is a case about federalism," quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)).

91. One might think that the relatively recently articulated "presumption against preemption" was related to the Court's concern about the reach of national regulatory power. The Justices themselves, however, seem not to think so. Justice Stevens, a persistent dissenter in the federalism cases, is the Court's foremost proponent of the "presumption against regulation." Justice Thomas, the most vigorous proponent of restrictions on national power (see, e.g., *United States v. Lopez*, 514 U.S. 549, 584-85

preemption cases all involve statutes that clearly fall within Congress's power to regulate interstate and foreign commerce.⁹²

But "in the main" is the correct phrase. The Court has developed a non-textual limitation on congressional power, the anti-commandeering principle. And *that* principle is in real tension with a preemption doctrine that fails to recognize some state immunity from preemption.⁹³

IV. AFFIRMATIVE AND NEGATIVE COMMANDEERING

The Court has found in the Constitution a principle that Congress may not commandeer state legislatures or executive officials. That is, it may not direct them to enact or implement a policy established by Congress. At first glance it might seem that the anti-commandeering principle has nothing to do with preemp-

(1995) (Thomas, J., concurring) (suggesting the appropriateness of rethinking the Court's overall doctrine dealing with congressional power)), did join Justice Stevens's dissent in *Geier*, but his federalism colleagues Chief Justice Rehnquist and Justices O'Connor and Kennedy joined the majority opinion, which was written by Justice Breyer, one of the leading critics of the Court's federalism decisions, *see, e.g., Lopez*, 514 U.S. at 615 (Breyer, J., dissenting). It is tempting to develop a merely political account of the Court's cases: It is a conservative Court, restricting national power with respect to legislation supported by liberals and restricting state power when states adopt anti-business regulatory programs. There may be something to that analysis, but these "inconsistencies" in the line-ups weaken such an account.

I confine to this footnote another skeptical viewpoint, this one about globalization itself. Some see globalization as the projection of U.S. economic and cultural power abroad, through the medium of transnational corporations with strong U.S. connections. Globalization then would require the harmonization of rules in the service of trade liberalization. *Crosby* is consistent with such a requirement. Notably, this view suggests that the globalization's implications for domestic constitutional law are open only for the United States; elsewhere, globalization would impose external constraints on a nation's constitutional development. I am sympathetic to this position, but think defending it unnecessary for my present argument.

92. Two lines that appear to be emerging from the Court's decisions are (1) that Congress has essentially plenary power to regulate commercial activities but has less power to regulate non-commercial ones, and (2) that Congress may regulate a state's activities when they are identical to activities that private parties engage in. *See, e.g., Reno v. Condon*, 120 S. Ct. 666, 672 (2000) (upholding the federal Driver's Privacy Protection Act against the challenge that it "regulates the States exclusively," by noting that the Act "regulates the universe of entities that participate as suppliers to the market for motor vehicle information" (even though the states are the sole ultimate source for such information)). The preemption cases all involve regulation of clearly commercial activities. The requirement that national legislation be applicable to entities other than the states may be more difficult to satisfy in the preemption context. Preemption necessarily involves the displacement of a state's lawmaking authority, and only states can exercise such authority. In *Crosby*, for example, I doubt that the Court would have found that the national legislation it invoked would bar a private corporation from refusing to purchase goods from companies doing business in Burma. The Court in *Condon* refrained from deciding "whether general applicability is a constitutional requirement for federal regulation of the States." *Id.* It seems worth noting as well that the Court has occasionally stumbled in its conceptualization of these limits. Most notably, in *New York*, Justice O'Connor jumbled limitations arising from the limited subject-matter of the powers granted to Congress and limitations arising from aspects of state sovereignty that exist even if Congress is exercising power on a subject over which it has been given authority. 505 U.S. at 155 (asserting that "[t]hese questions can be viewed in either of two ways," that is, by asking "whether an Act of Congress is authorized by one of the powers delegated to Congress" or by asking "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment").

93. The anti-commandeering cases do not involve immunity from the preemptive force of national law, because in neither *New York* nor *Printz* did Congress attempt (at least formally) to bar states from pursuing policies *in addition* to the ones Congress was forcing them to pursue. Of course a state that complied with the national regulations in those cases might have found it difficult, either politically or practically, to do something in addition, but Congress erected no legal barrier to attempts to do so.

tion. A national law that preempts a state law does not affirmatively command state legislatures or officials to do anything. Rather, it directs them to refrain from doing something they would otherwise prefer to do, regulate some area. Why, though, should a negative directive to state legislatures differ from an affirmative one? We could put it this way: Preemption is an exercise of a power of negative commandeering. If affirmative commandeering is constitutionally impermissible, why is negative commandeering constitutionally unproblematic? The question can be sharpened by identifying a third form of commandeering, which we can call conditional commandeering. Here Congress says to a state, "If you have a process of competitive bidding for your contracts, you must accept a low bid submitted by a company that does business in Burma." That certainly looks a lot like affirmative commandeering, yet it is precisely the effect of the national statute found to preempt the Burma Law in *Crosby*.

Clearly we must come up with some ground for distinguishing between affirmative and negative or conditional commandeering if preemption law is to retain any vitality.⁹⁴ Identifying such a ground is made complicated by the unclear foundation the Court has provided for the ban on affirmative commandeering. The Court has hinted at two functional defenses of that ban, one quasi-formalist defense, and one purely formalist one. Only the last might support a distinction between affirmative and negative or conditional commandeering, and then only because formalism of the relevant sort can be arbitrary in the sense that it need not provide reasons for distinguishing one practice from another.

The first functional defense of the anti-commandeering principle is that political responsibility will be diffused when Congress directs a state legislature to enact a statute or a state executive official to enforce a national law.⁹⁵ The problem, according to the Court, is that the state's citizens will feel the brunt of the law, and may attribute the problems they face to the officials with whom they deal most directly, their legislators and executive officials. The Brady Handgun Violence Prevention Act, for example, required state law enforcement officials to run background checks on people who sought to purchase handguns, and no handgun could be transferred to a purchaser until the background check was completed.⁹⁶ A person seeking to buy a handgun, faced with the delay in transfer, would become annoyed with the local sheriff, the most readily identifiable person causing the delay, not with Congress, the entity truly responsible for the delay.

In this form, the "diffusion of political responsibility" argument is clearly vulnerable. The sheriff could post a large sign (or could require gun sellers to post

94. See Dinh, *supra* note 31, at 2095, which resolves the conflict this way: "The difference is akin to not having a will of one's own [commandeering], as opposed to having the free exercise of one's will but subject to correction within specified parameters [preemption]." This will not work, however, because commandeering statutes do not displace the state's entire range of free will, but only the free will within the domain covered by the commandeering statute, that is, the state's will "within . . . parameters" specified by congressional statutes. With preemption, states are automatons with respect to the subject covered by the national statute; so too with commandeering.

95. See *New York*, 505 U.S. at 168-69 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished").

96. See 42 U.S.C. § 992 (2000).

a large sign) saying, "Don't blame me for the delay; write your Senators and members of Congress, because it's their fault, not mine."⁹⁷ Developed a bit more carefully, however, the argument may have some force. What is needed is to identify some area in which state officials have some discretion. Here *New York v. United States* provides a better example than *Printz*. The statute at issue in *New York* required that states either regulate private producers of low-level nuclear waste according to standards Congress prescribed, or take title to the waste and then find some place to put the waste.⁹⁸ Picking a site within the state is clearly discretionary, and when the people who find a nuclear waste site in their neighborhood ask, "How come this material is our backyard rather than somewhere else in the state," the state's legislature cannot say, "Don't blame us, blame Congress." Congress did not tell the state where to put the waste site, but only to find one.⁹⁹

Political responsibility, that is, might be diffused when Congress commandeers state officials in an area where they have some discretion.¹⁰⁰ It might seem as if negative commandeering would not have that same effect. Consider Massachusetts's response to protestors who object to the purchase of goods made by a company that does business in Burma. Its officials might say, "We had no choice; Congress made us do it."¹⁰¹

Unfortunately, the protestors have two obvious responses. First, they might say, the state did not have to design its program in a way requiring they purchase *that* good rather than another. Buying from a company that did business in Burma was in fact discretionary, not with respect to the purchase itself but with respect to the program of which the purchase was a part. Second, the protestors might point out that the state might have avoided the purchase by abandoning its "low bid" process. The chance that a company doing business in Burma would get a state contract might drop dramatically if state purchasing agents had complete discretion to award contracts.¹⁰² Showing that the "diffusion of political responsibility" argument is inapplicable to negative commandeering will therefore require some distinction between the discretionary processes displaced by affirmative comman-

97. *Printz*, 521 U.S. at 957-58 n.18 (Stevens, J., dissenting) (asserting that the "diffusion of political responsibility" argument "reflects a gross lack of confidence in the electorate").

98. Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b.

99. In *Printz* the equivalent discretionary acts involve deployment of police investigative forces. A neighborhood hit by a rash of burglaries is unlikely to be appeased by a sheriff who says, "I would have had more police cars in the area, but too many of my officers were spending their time doing background checks that Congress made us do."

100. *But see Hills*, *supra* note 17, at 828 (observing that "the complexity inherent in any system of federalism . . . always has the potential to confuse voters and thereby undermine political accountability").

101. I think it worth noting that the simple "diffusion of political responsibility" argument, unmodified by the requirement that the action be one as to which state officials have discretion, is equally strong with respect to negative and affirmative commandeering.

102. Of course such a company might challenge the discretionary decision after the fact, alleging that the factor that controlled the exercise of discretion was that it did business in Burma, and that Congress directed states to remove that factor from their decisional processes. Such a challenge would undoubtedly be much more difficult to mount than was the one in *Crosby*.

deering and those displaced by negative commandeering.¹⁰³

The Court's second functional argument for the anti-commandeering principle is a somewhat more focused version of the first. State legislators and executive officials have limited time to accomplish things. Their constituents have policy priorities to which public officials respond. Congress forces those officials to spend time on programs that Congress wants rather than on programs that the officials' constituents want when Congress commandeers the officials. Again *New York* provides a good example.¹⁰⁴ One can readily imagine that the legislative battle over locating a nuclear waste disposal site would be politically contentious and time-consuming. Not only would New York's legislators lose time they could use to develop programs to improve the state's education system, for example, but the strains of the site-location battle, forced on the legislature by Congress, might make it more difficult for legislators to achieve compromises on other issues.

The problem here is that negative commandeering is in some sense clearly *worse* than affirmative commandeering, with respect to changes in legislatures' priorities and responsiveness to constituent demands. Affirmative commandeering puts a new and undesired element on the legislative and executive agenda. Everything below it on the legislature's priority list shifts down a bit and, given limited time and political resources, some things drop off the list entirely. Notice, though, that the things that drop off the list are, necessarily, low-priority ones anyway. In contrast, negative commandeering can remove from the legislative and executive agenda the policy that constituents want more than anything else.¹⁰⁵

Justice Scalia, the Court's leading formalist, rejected the argument made in *Printz* that the Court should balance the degree of intrusion on state authority, assertedly slight in *Printz*, against the national interests promoted by commandeering.¹⁰⁶ Frederick Schauer has given us the best instrumentalist defense of formalism,¹⁰⁷ and it is available in this context. According to Schauer, a decision-maker sensibly adopts a rigid, formalist rule in the following circumstances: The decision-maker knows that society's over-all well-being would be maximized by considering, on every occasion, whether on balance some policy is a good one, all things considered. The policy-maker is confident in its own judgment about that question. It is skeptical, however, about the ability of *other* decision-makers to make good all-things-considered judgments. Given the direction, "Do what is best, all things considered," those decision-makers will make many errors. The policy-maker is in a position to review what the other decision-makers do, but it knows that *its* own time is limited and that it will be unable to review everything the other decision-makers do. Many errors will thus go unreversed. The policy-maker might then conclude that society's well-being would be maximized if the other de-

103. See text accompanying notes 117-19 *infra*.

104. *New York v. United States*, 505 U.S. 144 (1992).

105. Suppose that the Burma Law was, by all political accounts, the single most important statute enacted by the Massachusetts legislature that year.

106. *Printz*, 521 U.S. at 932-33.

107. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

cision-makers were given a directive, "Never, ever, do that – even if you think that doing it would be the best thing, all things considered." And, notably, the policy-maker, in reviewing decisions, would reverse departures from that directive even if the policy-maker itself agreed that departing from the rule was indeed the right thing to do under the circumstances.

The formalist argument for the anti-commandeering principle is straightforward. The power to commandeer is, as the Court put it, a "highly attractive" one, because of the "diffusion of political responsibility" argument.¹⁰⁸ Congress will try to use the power to commandeer frequently.¹⁰⁹ Sometimes commandeering will make society better off, but sometimes it will not. The Court is not in a good position to review and reverse all the improvident exercises of the power to commandeer. A formalist rule against commandeering therefore is better for society.

Do affirmative and negative commandeering differ with respect to the concerns of this formalist argument? The formalist argument requires that Congress be likely to make a large number and a high proportion of errors in making all-things-considered judgments.¹¹⁰ The formalist argument would work if we could be confident that Congress made fewer errors when it preempted state law than when it commandeered state officials. Unfortunately, I can come up with no way of supporting such a judgment. As the Court noted in *Printz*, Congress has rarely attempted to commandeer state officials, so the evidentiary basis for the judgment about affirmative commandeering is quite thin.¹¹¹ Congress has preempted state law on many occasions, but I do not know of a metric that would allow us to say how often it had done so wisely or improvidently. What we are left with are intuitions, and mine is that there are no sharp differences relevant to the formalist argument between affirmative and negative commandeering.

There is, however, a final formalist position (rather than argument). It is that the anti-commandeering principle is part of the nature of U.S. federalism. In *Printz* Justice Breyer, dissenting, pointed out that other federal systems found that allowing the national government to determine policy that officials of subnational

108. *Printz*, 521 U.S. at 905.

109. This point is, however, in some tension with the Court's observation that Congress had not tried to use the power to commandeer until recently. See *Printz*, 521 U.S. at 905-10 (evaluating the historical evidence and concluding that the historical evidence supports the claim that commandeering was "until very recent years at least, unprecedented." *Id.* at 905). Perhaps, on the formalist argument, the power to commandeer is seen as a recent and dangerous discovery. The Court explained the infrequency of Congress's prior uses of the power as resulting from Congress's considered judgment that the Constitution denied it that power.

110. The large number is needed because otherwise the Court would be in a position to review all exercises of the power to commandeer. The high proportion is needed to ensure that the rule against commandeering eliminates more bad than good exercises of the power.

111. And, of course, the conclusions to be drawn from the evidence are obviously contestable. It is not clear to me, nor to most of the academic commentators, that *New York* and *Printz* provide evidence for the proposition that Congress makes too many errors when it commandeers. (It is worth emphasizing, however, that the formalist argument requires that the Court reverse exercises of the power to commandeer even when those exercises are good ones all things considered. As a result, the fact that, in the view of many, the statutes in *New York* and *Printz* were good ones does not count against the formalist argument).

governments would enforce was compatible with federalism, and even desirable.¹¹² Justice Scalia responded that whatever might be true of other federalisms, what was at issue in *Printz* was *American* federalism.¹¹³ One might take this to be an assertion that the Court was attempting to identify the essence of a distinctive federal system. "Natures" and "essences" are notoriously difficult tools in a doctrinal handbox. It is of course open, though, for the Court to take the position that affirmative commandeering is inconsistent with the genius of American federalism while negative commandeering is entirely compatible with it. If that is the Court's position, there is little to say about it.

I return, therefore, to the instrumentalist and the first formalist arguments and the distinctions between affirmative and negative commandeering that those arguments suggest. As the Court has emphasized, there is no relevant text that we can use to distinguish between affirmative and negative commandeering.¹¹⁴ The structural inferences from federalism as such are, I have suggested, unclear with respect to the distinction between affirmative and negative commandeering.

Probably the strongest argument in favor of such a distinction is that negative commandeering, that is, preemption, has been common and uncontroversial in constitutional history, while affirmative commandeering has been rare and, when it occurred, controversial. As noted earlier, however, arguments from history depend crucially on the characterization of the relevant history. One can concede that, taken at its broadest, the power to preempt has unquestionable historical roots and still wonder whether there might be a narrower principle denying Congress the power to commandeer negatively in some discrete areas.

Two possibilities for defining a domain of state immunity from preemption immediately suggest themselves. First, one might construct a doctrine barring Congress from displacing a state's policy choices when it acts as a market participant.¹¹⁵ The intuition underlying the market-participant doctrine is that states may reasonably use the tax revenue they have raised from their own citizens for the

112. 521 U.S. at 976-78 (Breyer, J., dissenting).

113. *Id.* at 921 n.11.

114. Preemption doctrine rests on the Supremacy Clause, which provides that "the Law of the United States which shall be made in Pursuance" of the Constitution are "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The question, however, is whether laws affirmatively or negatively commandeering state authority are "made in Pursuance" of the Constitution. *See Dinh, supra* note 31, at 2090 ("The power to preempt state law, if one exists, must be found elsewhere" than in the Supremacy Clause).

115. Denning & McCall, *supra* note 32, at 351-68, argue against adapting the market-participant doctrine to the preemption context. They do not, however, connect preemption with the Court's federalism decisions. It bears noting that the application of the federal wage and hour laws to state employees can be described as the application of preemption doctrine to a state's market participation: The federal labor laws preempt the state's own choices in the market for labor. Notably, the application of these laws to state employees performing functions characteristic of sovereignty, such as providing police and fire protection, remains constitutionally controversial. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (limiting the methods of enforcing the wage and hour laws, in a case involving state police officers); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (dissenting from the Court's holding that states must comply with federal wage and hour laws and referring to a principle that will "in time again command the support of a majority of this Court"). *Id.* at 589 (O'Connor, J., dissenting) (noting her agreement with Justice Rehnquist's "belief that this Court will in time again assume its constitutional responsibility").

benefit of those citizens,¹¹⁶ by discriminating against out-of-state commerce in the states' commercial activities. Negative commandeering requires the states to spend their tax revenues in ways that the revenue source, the citizens, dislike.¹¹⁷ The same policies that justify the market-participant doctrine might justify a constitutional immunity from preemption with respect to market participation.¹¹⁸

Second, either alone or in conjunction with the first, doctrine might distinguish between state actions taken for commercial reasons and those taken for other reasons, and give states immunity from preemption of their actions in the latter category. Here the idea would be that national actions preempt state ones ensuring that we have a national community that nonetheless preserves an important domain for citizens to choose, in their states, the policies they prefer. The constitutional theory underlying this idea is that the national community is to be attained by commercial intercourse unrestrained by parochial state legislation, while states may pursue varying policies with respect to non-commercial activities.

Obviously, I have designed the proposed doctrine of a state immunity from preemption with *Crosby* in mind. My point is not that the historical sources compel us to accept this doctrinal proposal, or indeed any other for a constitutional immunity from preemption. Rather, my point is that recharacterizing the scope of the power to preempt that emerges from constitutional history leaves the way open to developing such a doctrine.¹¹⁹ And, perhaps the Court should develop such a doctrine if it would harmonize well with the Court's federalism decisions.

116. As Dan T. Coenen puts it, the doctrine allows a state's citizens "to reap where they have sown." Dan T. Coenen, *Untangling the Market-Participant Exception to the Dormant Commerce Clause*, 88 MICH. L.REV. 395, 441 (1989).

117. Denning & McCall argue that the Burma Law provides "no tangible benefits . . . to the citizens of the State," *supra* note 32, at 362, and that as a result the rationale of the market-participant doctrine is inapplicable to sanctions. This argument obviously places great weight – too much, in my view – on the distinction between tangible and intangible benefits. Massachusetts's voters believed that they benefited, morally, from refusing to allow their tax money to go to businesses that, as the state's citizens saw it, benefited tangibly from doing business with a government that grossly violated human rights. I do not understand why this moral benefit is any less important in constitutional terms than the material benefits on which Denning & McCall focus. (Denning & McCall deride the benefits as "a psychic subsidy[,] a Karmic subsidy[,] a 'reputational benefits' subsidy"). *Id.*

118. *Gould*, 474 U.S. at 289, said, without explanation, that the Wisconsin statute there, which barred state agencies from doing business with persistent violators of national labor law, was "for all practical purposes . . . tantamount to regulation." It also asserted that "in our system States simply are different from private parties and have different roles to play." *Id.* at 290. Nothing in the opinion explains why the policies justifying the market-participant doctrine are inapplicable in the preemption context. Dinh, *supra* note 31, at 2097-98, locates preemption analysis along a spectrum of "Doctrinal Mechanisms Through Which Federal Law Displaces State Law" that includes dormant commerce clause analysis. The market-participant doctrine is an exception to the latter; it could also be an exception to analysis under the other doctrines on Dinh's spectrum. Standing alone, an immunity for market participation might not protect Massachusetts's Burma Law from preemption because the Burma Law involved a secondary boycott – of businesses that did business with Burma – rather than a primary boycott of Burma itself. The secondary nature of the boycott resembles the attempt by Alaska to regulate the "downstream" activities of those who purchased its timber, which the Court held outside the scope of the market-participant exception to dormant commerce clause doctrine. See *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984); Denning & McCall, *supra* note 32, at 364-66.

119. The doctrine could be formalist, absolutely barring preemption of rules regarding a state's own market participation, or it could allow preemption if national interests were sufficiently strong to override the otherwise available immunity.

That *Crosby* refused to do so, in a case presenting perhaps the strongest case for such a doctrine, suggests something about the scope of the Court's federalism decisions, a topic to which I return in the next section of this article.

The constitutional text is silent, and constitutional history can be made ambiguous. Does structure tell us anything more about the possibility of a constitutional immunity from preemption? Here, I think, the Court's functional arguments in its federalism cases return to view. Do the political processes at the state and national level differ with respect to affirmative and negative preemption? If not, the constitutional immunity states have from affirmative preemption perhaps should be extended to afford them immunity from negative preemption as well.

We should consider the question on both the state and the national levels. At the state level, recall that affirmative and negative commandeering seem almost indistinguishable when the state actually purchases goods.¹²⁰ The state can introduce a distinction by blurring what it is doing: Instead of having a system that requires it to accept the lowest bid, it can have a completely discretionary system for awarding contracts. Similarly, in the affirmative commandeering context, Congress can introduce ambiguity by shifting to conditional commandeering: Instead of directing state executive officials to enforce the Brady Act, Congress could enact a statute barring all sales of hand guns in states whose executive officials did not perform background checks that conformed to national standards.¹²¹ These examples indicate the problem with the suggestion that policy-making processes at the state level differ with respect to affirmative and conditional or negative preemption. The pressure on state governments to adopt low-bid contract award systems and to allow hand-gun sales is so great that we cannot reasonably expect the states to resist. They will enact a low-bid system, and be required to purchase from low bidders who do business in Burma; they will allow hand-gun sales, and have their sheriffs do background checks.

If the political process on the state level is the same with respect to affirmative and conditional or negative commandeering, what of the process on the national level? As suggested earlier, the issue here is whether Congress is more likely to adopt problematic statutes that affirmatively commandeer state officials than it is to adopt statutes that conditionally or negatively commandeer them. At least intuitively, one might think that conditional commandeering would be at least as attractive to Congress as affirmative commandeering, and that preemption might be *more* attractive. In light of the practical pressures on state governments to succumb, conditional commandeering is equivalent to affirmative commandeering from Congress's point of view. Negative commandeering might be more at-

120. See text accompanying note 100-01 *supra*.

121. At least, there is nothing in the anti-commandeering cases to suggest that conditional commandeering – or, put another way, conditional preemption – is unconstitutional. In *New York*, the Court upheld a provision allowing states with nuclear waste sites to discriminate against waste originating in states that did not have adequate waste storage systems. *New York v. United States*, 505 U.S. 144 (1992). This might be called conditional authorization, and the Court's decision that it is constitutionally permissible provides indirect support for the proposition that conditional preemption is also permissible.

tractive, however. Affirmative commandeering requires that some taxpayers foot the bill; Congress escapes responsibility by passing the costs off to state taxpayers. Negative commandeering, in contrast, costs taxpayers nothing. Indeed, as in *Crosby*, it might even save them money, as the state is required to accept a lower bid than it would otherwise accept.

Roderick Hills has developed the most careful argument supporting the conclusion that Congress is indeed more likely to attempt to commandeer affirmatively than conditionally.¹²² As I hope to show, Hills's argument does establish that the national political process does differ in some circumstances depending on whether Congress is contemplating using affirmative or negative commandeering. Even that conclusion supports the development of *some* doctrine banning negative commandeering for the reasons that support the ban on affirmative commandeering.¹²³

Hills argues that states are in a stronger bargaining position when Congress uses conditional preemption because the states can realistically threaten to refrain from engaging in the activity to which the condition is attached.¹²⁴ Desiring to accomplish its policy goals, Congress will restructure the statute to make the conditional preemption program more attractive to states. In doing so, however, Congress will inevitably compromise on the achievement of the goals it initially sought. Conditional preemption, that is, is costly to Congress, sometimes in dollar terms but always in terms of policy achievements forgone.¹²⁵ With affirmative commandeering, in contrast, Congress can simply impose its own program, at no cost to the policy goals Congress had in view when it designed the program.

Hills's argument goes no further than showing that affirmative commandeering is more likely than conditional commandeering where states can make credible threats to refrain from engaging in the underlying activity. He also shows that states can make such threats more often than enthusiasts of national power might think.¹²⁶ Still, conditional commandeering remains attractive for that sub-group of matters where states cannot make credible threats.

122. Hills, *supra* note 17. Hills pays primary attention to conditional *spending* as an alternative to affirmative commandeering, and I have adapted his arguments where appropriate for the different context of conditional or negative commandeering.

123. It seems worth suggesting, however, that Hills's argument, as adapted to deal with the question of negative commandeering, incorporates so many qualifications that it may well be unhelpful as a defense of the proposition that affirmative commandeering is problematic while negative commandeering is not. Given the complexity of the argument, a reasonably broad ban on negative commandeering might be defensible on formalist grounds.

124. Hills concedes that an unlimited power of conditional preemption could completely displace the ban on affirmative preemption, and argues that the power to preempt on condition must therefore be supplemented by a doctrine of unconstitutional conditions. *Id.* at 921-27. As noted above, *supra* note 17, the Court itself has not suggested that it is on the verge of developing such a doctrine.

125. Hills, *supra* note 17, at 871-91, argues that the costs incurred in compromise should be incurred, because the initial program will impose higher costs than are necessary: Congress could adopt cost-justified programs by purchasing state cooperation at a price equivalent to the benefits produced by state cooperation.

126. *See id.* at 862-63. *See also* Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y. 181, 184 n.12 (1998) (noting the fact that less than half the states have submitted plans to implement the federal Occupational Safety and Health Act).

Further, Hills's argument has no purchase if Congress's policy goals can be fully accomplished by displacing a state's power to regulate. Sometimes the threat to preempt, standing alone, would not be credible, because Congress lacks the will or resources to use national resources to implement a regulatory program.¹²⁷ Perhaps Congress cannot realistically threaten to impose a regime in which *nothing* could be done – no gun sales, for example, in states whose officials do not perform background checks.¹²⁸ State officials might realistically find no threat in such a proposal, because they should know that the prospect of actually enacting the proposal is minuscule. Again, however, the argument preserves the possibility that negative commandeering will be more attractive than affirmative commandeering, in circumstances where negative commandeering coupled with a regime of non-regulation fully accomplishes Congress's policy goals.¹²⁹ The Burma Law is a good example: It takes the investment of no national resources to accomplish the nation's policy goals by forcing Massachusetts to buy goods from companies that do business in Burma.¹³⁰

127. See Hills, *supra* note 17, at 868 (noting that Congress's exercise of the power to preempt on condition "is constrained by [Congress's] limited regulatory capacity").

128. Hills's proposed unconstitutional-conditions doctrine might foreclose this option. Hills would "prohibit conditional preemption of state or local policies whenever (1) the condition that the nonfederal government must meet would, if imposed unconditionally, be unconstitutional, and (2) Congress threatened preemption of nonfederal policy merely to gain leverage to extract compliance with the condition." *Id.* at 924. *Merely* appears to do a lot of work here: Suppose Congress imposed the condition because it was concerned about guns in the hands of people unqualified to use them, and believed that state-performed background checks would do a good job in screening out the unqualified. Is the condition imposed "merely to gain leverage?" In addition, it is easy to rewrite the proposed statute to avoid imposing a condition at all: No gun sales in states that cannot provide assurances that guns will not be transferred to unqualified buyers, coupled with criteria to identify systems that provide adequate assurance that, as a practical matter, can only be satisfied by systems that are state-operated or closely supervised by the state. Perhaps Hills would conclude that the criteria are "merely" a disguised form of impermissible condition. A formalist solution would be more attractive in some ways. A formalist might limit conditions to those arising from the program's "nature," for example. As before, text accompanying notes 112-13- *supra*, there is little to say in response to this sort of move.

129. *Cf. id.* at 899 (distinguishing affirmative commandeering from preemption on the ground that "federal money cannot buy preemption"). Hills offers another distinction, that "preemption is generally less harmful to useful state and local political activity than commandeering legislation." *Id.* at 900. This is so, Hills argues, because preemption expresses Congress's judgment that "nonfederal interest in [the preempted] topics would be counterproductive," whereas the point of affirmative commandeering "is to use state and local officials to regulate in some federal field, presumably because such officials are well-suited for such duties." *Id.* Everything in this argument turns on the characterization of the "fields" preempted and commandeered: It is hardly contradictory to assert both that a nonfederal interest expressed across a wide field would be counterproductive and that state and local officials are well-suited to express an interest in some sub-field within the larger one.

130. I have a lurking sense that Hills overlooks this dimension of the analysis because he is inclined to accept the proposition that as a general matter regimes of non-regulation are normatively more desirable than regulatory regimes. That normative proposition may be true, but the problems of concern at this point in the argument arise precisely because the people in some jurisdiction, acting through their democratically selected representatives, prefer some sort of regulatory regime, that is, reject the normative proposition. One indication of the difficulty with Hills's argument on this issue is that his argument that the national government can purchase state-level cooperation does not take into account the possibility that the people in one subnational jurisdiction have different preferences from those in other subnational jurisdictions and from those of the national aggregate. See, e.g., Hills, *supra* note 17, at 872-73. Instead, Hills appears to assume that all the people in the nation have the same set of preferences, which sometimes leads them to prefer action at a subnational level and sometimes leads them to prefer action at the national level. See, e.g., *id.* at 873 (arguing that "smaller-scale governments systematically may be better than larger-scale governments at managing nonfiscal costs"). I think it

Hills offers a final argument that might support a distinction between affirmative and negative commandeering. State officials will often cooperate in implementing national policy. But, Hills points out, state politicians are often competitors of national ones. They may want to claim credit for the national policies, sometimes as a springboard for a campaign against a sitting member of Congress.

¹³¹ Affirmative commandeering allows Congress to weaken the political position of these elected state officials. By commandeering them, Congress may direct that a state's elected officials refrain from interfering with bureaucrats, nominally employed by the states, who are actually engaged in implementing federal programs. Individual members of Congress can then deploy their personal resources to supervise the state's bureaucrats, "through telephone calls . . . [and] casework for individual constituents."¹³² Negative commandeering in the form of preemption does not give individual members of Congress that opportunity. I believe that this argument, while probably correct, is not strong enough to withstand the pressure that comes from trying to align doctrine dealing with affirmative and negative commandeering.

On neither the subnational nor the national levels, then, does the across-the-board operation of the political process make it less likely that Congress will employ negative rather than affirmative commandeering. If a ban on affirmative commandeering is necessary to preserve the structure of U.S. federalism, so is some sort of ban on negative commandeering.¹³³

Taken together, text, history, and structure do not explain why a suitably designed state immunity from preemption should be ruled out. And, as I have repeatedly suggested, such an immunity seems entirely compatible with the Court's federalism decisions. Can we make anything of the Court's reluctance to adopt, or even entertain the possibility of, such an immunity in *Crosby*?¹³⁴

worth noting, therefore, that some subnational governments are likely to be more attractive targets for successful NGO political organizing. (Hills does note that "local and state governments might be more sensitive to the ideological objections of well-organized interest groups," *id.* at 887, but the comparison he draws is between state and local governments on the one hand, and the national government on the other, not among state and local governments). If so, we should expect to discover variations in preferences among the people of different states. And, of course, the strongest defense of federalism rests on the proposition that such variations are inevitable and desirable.

131. Hills, *supra* note 17, at 191-92.

132. *Id.* at 191.

133. Hills, *supra* note 17, at 884-86, explains that an individual state's ability to refuse to exercise its regulatory power creates a "hold out" or "race to the bottom" problem in which no state will regulate because each will fear that regulation will drive businesses to locate in some other, nonregulating jurisdiction. This justifies the rule that Congress can regulate directly. This argument suggests to me that the best candidate for a state immunity from preemption would be along the lines of a market-participant doctrine: Market participation is not regulation and therefore does not raise the hold-out problem.

134. Of course, I acknowledge that the issue of a constitutionally based immunity from preemption was not presented to the Court in *Crosby*. The state's contention was that Congress had not in fact preempted the Burma Law. *But cf.* Brief of Members of Congress, Amici Curiae, Natsios [*Crosby*] v. National Foreign Trade Council, No. 99-174 (arguing that the fact that the Burma law applied to Massachusetts as a market participant was a reason for finding that federal law did not preempt the Burma Law). The Court dealt with the market-participant suggestion in a footnote, and it seems clear that no one conceptualized the case as presenting the possibility I am exploring in this Article.

V. THE LIMITS OF FEDERALISM IN THE GLOBAL ECONOMY

This Section examines three possible explanations for the Court's failure to develop a doctrine giving states some degree of immunity from preemption. The first is the simplest, and needs only the briefest mention. It is that the Court simply has not gotten around to developing such a doctrine yet. But, the suggestion is, as the Court's new federalism consolidates, it will eventually include such a doctrine. All that can be said about this suggestion is that nothing in the Court's cases even hints that this is the direction the Court is going to take.

The second possible explanation for *Crosby* ties the decision to globalization. Globalization is undergirded by a dense array of legal rules: rules dealing with the degree to which money from one nation can be invested in another, rules regulating the ability of people to move from one country to another, and the like.

¹³⁵ In the absence of an international legal regime, these rules must be rules of numerous domestic legal regimes. Corporations, even those operating across national borders, have rights because of domestic law.¹³⁶ The U.S. system of federalism makes state law – the law of property and contract – the basic source of the law governing the organization of such corporations. The foundation of property and contract in state law means that subnational units are in a position to determine the ability of their creatures, that is, corporations, to operate across national borders. Globalization can occur, then, only if the national government has the ability to displace state rules of contract and property that would interfere with corporations' transnational operations. In this sense, globalization *requires* that the national government have the power to preempt state law.¹³⁷

The fact that the national government must have the power to preempt, of course, does not determine the scope of that power. It may rule out the broad proposition that negative commandeering – preemption itself – is constitutionally equivalent to the affirmative commandeering that the Court has proscribed. But it leaves open a wide range of possibilities. In particular, a market-participant-like immunity from preemption would not seem to threaten directly the national government's power to ensure that state-based rules of contract and property not interfere with transnational operations. I think it striking, though, that we might see the proposal that states be immune from preemption with respect to their activi-

135. See SASSEN, *supra* note 2, at 199 (pointing out the role of the state – here meaning government generally – as the ultimate guarantor of capital through the provision of regimes defining and protecting property and contract rights). Cf. Philip G. Cerny, *Pardoxes of the Competition State: The Dynamics of Political Globalization*, 32 GOV. & OPPOSITION 251, 266 (1997) (observing that “liberalization, deregulation and privatization have not reduced the role of state intervention overall, just shifted it from commodifying bureaucracies to marketizing ones”).

136. This observation does not mean that corporations might not have rights protected against government action, but only that whatever such rights are, they originate in domestic (constitutional) law.

137. At least it is required if the national government is the entity in the best position to determine whether some subnational regulation interferes with transnational operations. See Spiro, *supra* note 20, at 1247 (noting that state-level actions affecting foreign affairs may have external effects that the states will not take into account). I add this qualification to deal with the obvious point that a government with the power to preempt need not exercise that power. The national government's failure to exercise its power to preempt might be taken as a judgment that the state laws did not interfere with globalization in the eyes of the entity best situated to determine whether interference existed.

ties as market participants as a proposal about the rules of property and contract law applicable to the property of and the contracts entered into by the states themselves. A market-participant immunity, that is, might support a broader rule allowing states to use their power to determine contract and property law in ways that would interfere with transnational operations. By strongly suggesting that there is no such immunity, the *Crosby* Court began to construct a preemption doctrine suitable for a globalized economy.¹³⁸

The final possibility is that *Crosby* illustrates the *limits* to the Court's new federalism. Here I draw on an argument I have made in more detail elsewhere.¹³⁹ I have argued that we are now in a new constitutional order. All the institutions in the U.S. constitutional system have roles different from the ones they had in the New Deal/Great Society constitutional order. The defining characteristic of the new constitutional order is what I have called a chastening of constitutional ambition. No institution – not the presidency, not Congress, not the Supreme Court, and not the states – will engage in bold initiatives or sharp departures from prior practice.

Take the Supreme Court's federalism decisions. Unquestionably, read for all they might be worth, the decisions could work a large transformation in the role of the national government. The decisions defining the scope of national power to regulate interstate commerce simultaneously accept three propositions. The first is derived from *Gibbons v. Ogden*: Congress has the power to regulate activities that affect interstate commerce.¹⁴⁰ The second is that the courts should determine effects on interstate commerce not by looking at the specific acts subject to the regulation at issue, but rather at the aggregate impact of the class of regulated acts.¹⁴¹ The third, the new order's innovation, is that the technique of aggregation may be used only when the regulated acts are themselves commercial.¹⁴² From a lawyer's point of view, this is an unstable structure. As Justice Breyer has pointed out, the first proposition means that Congress can regulate when there is a sufficient effect on interstate commerce, while the third means that whether Congress can regulate depends not on the effect on interstate commerce but on the nature of the regulated activity.¹⁴³

138. The case-by-case development of constitutional doctrine suggests that one ought not place too much weight on any particular decision, however.

139. Tushnet, *supra* note 15.

140. 22 U.S. at 195 ("The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those *internal concerns which affect the States generally*; but not to those which are completely within a particular State, *which do not affect other States*, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government") (emphasis added).

141. See *Lopez*, 514 U.S. at 560-61 (accepting as settled law the aggregation technique of *Wickard v. Filburn*, 317 U.S. 311 (1942), when applied to commercial activities).

142. See, e.g., *Morrison*, 120 S. Ct. at 1749-50 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor").

143. See *Morrison*, 120 S. Ct. at 1775 (Breyer, J., dissenting) ("[W]hy should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?").

The new doctrine's analytic structure is indeed unstable. But that instability is unlikely to be troublesome in the new constitutional order. The Court's federalism decisions look in two directions. To Congress, they say, "In the new constitutional order, you should refrain from aggressive uses of the powers apparently given you by the Constitution." To the Court itself, the decisions say, "We are not about to work a major transformation in constitutional doctrine, only some modest correctives to excesses in prior doctrine."¹⁴⁴

As Peter Spiro has suggested, the organization of institutions governing foreign affairs might change in the new constitutional order as well.¹⁴⁵ *Crosby* can be taken as an illustration of the chastened constitutional order, although my argument here is highly speculative. Like the Court's federalism decisions, *Crosby* looks in two directions. First, it looks to the Court: This Article has argued that the distinction between affirmative commandeering, proscribed in the new constitutional order, and negative commandeering through preemption is similarly difficult to sustain. Treating preemption as a form of commandeering, however, would work a major transformation in constitutional doctrine, and that is precisely *not* what the new constitutional order is about. The Court's unanimity in *Crosby* expresses the Court's sense that its role in the new constitutional order is not one of innovation, even innovation designed to make its own doctrines more analytically defensible.

The second direction *Crosby* looks is to the states. The Burma Law was itself something of an innovation. State and local governments have developed "foreign policies" only recently.¹⁴⁶ These policies are themselves the result of globalization, as state and local governments attempt to attract investment and, importantly, find themselves under pressure from transnational non-governmental organizations, one of the most characteristic institutions of the globalized political-economic system.¹⁴⁷

Crosby can be taken to express skepticism about this policy innovation on the state and local level, and perhaps particularly about the role of NGOs in promoting innovation. Recall that one functional defense of the anti-commandeering principle is that it protects the agenda of state policy-making from distortion by federal command. Affirmative commandeering is impermissible because it dis-

144. The Court's decisions on the immunity of states from federally imposed damage liability have the same limited scope. The decisions note the availability of alternative remedies, including damages in actions brought by the United States and prospective relief that would ensure the regulatory supremacy of national law. See, e.g., *Alden v. Maine*, 527 U.S. 706, 755-57 (1999) (mentioning alternative methods of enforcing national law).

145. Spiro, *supra* note 20, at 1225 ("I assert the historical contingency of federal exclusivity over foreign affairs").

146. The Court in *Crosby* noted that, during the apartheid era, some states had adopted statutes similar to the Burma Law barring purchases from companies doing business in South Africa. 120 S. Ct. at 2301. The Court observed that it "never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid . . ." *Id.* at 2302.

147. See Peter M. Haas, "Social Constructivism and the Evolution of Multilateral Environmental Governance," in *GLOBALIZATION AND GOVERNANCE* (Aseem Prakash & Jeffrey A. Hart eds. 1999), 103-33, at 114 (describing transnational NGOs as monitors of the international actions of national regimes).

places state policy-making in areas where states ought to be allowed to choose their own courses. One might say that commandeering is bad because it displaces *legitimate* state policy choices. Not all state choices are legitimate, however. The cases invoking a presumption in favor of preemption in the area of foreign affairs might be understood as asserting that states have very little legitimate interest in developing their own foreign policies. *Crosby*, though, seems not to invoke a presumption against preemption. The state's action in adopting the Burma Law might be seen as less than fully legitimate nonetheless. The thought would be that the new constitutional order should be alert to problems of government capture by transnational NGOs, a new actor in the policy-making field. To the extent that the Burma Law resulted from NGO pressure, finding it preempted signals that state and local governments in the new constitutional order may respond vigorously only to traditional interest groups, and must be cautious in their responses to new ones.

VI. CONCLUSION

Japan Line and *Barclays Bank* probably win the prize for being the Supreme Court's first sustained confrontations with the globalized economy. *Crosby*, though, exposes some novel facets of globalization's relation to U.S. federalism, particularly in showing NGOs as new actors on the subnational scene. Even more, *Crosby*'s caution brings the tension between the Court's federalism decisions and its preemption decisions into sharp relief. The imperatives of globalization dictated no particular result in *Crosby*, and those who thought the Court's federalism decisions represent bold departures in constitutional doctrine might have expected similar boldness in preemption law. It did not happen. The reason, I suggest, is that while we are indeed in a new constitutional order, structured in part by globalization, the distinctive doctrinal characteristic of that order is precisely caution rather than boldness. In that way, *Crosby* is exemplary.