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COMPELLING COLLABORATION WITH EVIL? A COMMENT ON *CROSBY v. NATIONAL FOREIGN TRADE COUNCIL*

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Our topic on this panel is “Constitutional Interpretation and Aspirations to a Good Society.” Clearly one must begin with some notion of what might be considered a “good society,” worthy of aspiring to, and then move on to the role that the Constitution, properly interpreted, might play with regard to achieving (or hindering) those aspirations. Let me offer one possible definition of a “good society”: Such a society would be one that minimizes its own engagement in, or even collaboration with, evil. The extent to which a state colludes with evil thus defines how much less “good” it might otherwise be. And “evil” means, of course, something other than not being the very best we can be. We are not required, as individuals or societies, to be saints, but it is a small enough requirement of both that we not sink to the depths of whatever we mean by non-goodness. As Judith Shklar argues, the first virtue of a liberal society is to try to minimize cruelty.¹ One should note, even if only in passing, that this concept of a “good society” clearly rejects a purely procedural notion of social order, by which *any* outcome is acceptable if it is the result of a fair process of decision-making.² There is nothing “neutral” about preferring goodness to evil.

The problem of collaborating with evil is inherent to the narrative of American constitutional law, given the paramount presence of chattel slavery within the constitutional order prior to the passage of the Thirteenth Amendment.³ Could anyone have described the United States, including its constituent member-states, as a “good

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1. See Judith N. Shklar, *Ordinary Vices* 7-44 (1984).

2. Given the brevity of these comments, I put to one side the possibility of describing a set of “purely procedural” restraints that does not smuggle into the idea of “fair process” a set of substantive notions as to what respect human agency requires.

3. This is not to say that slavery truly disappeared with the formal abolition of “involuntary servitude” in 1865.

society" during this period? While the "slave states" directly legitimized the ownership of some human beings by others, the "free states" collaborated with the evil, by, among other things, acquiescing in the return of ostensible "fugitive slaves" to the states where they had purportedly been held in bondage. In this article, I am most interested in the latter states, as I assume there is no serious argument about the wickedness of the former. But what of those purported free states, whose predicament we can perhaps understand far better than that faced by states directly committed to slavery? Specifically, what restrictions did the Constitution place on those states that wished to eliminate or minimize their collaboration with slavery?

*Prigg v. Pennsylvania*⁴ is, of course, the key case on such limits. There, the ostensibly anti-slavery Justice Story, who moonlighted as a professor of constitutional law at Harvard Law School, wrote for the Court in striking down Pennsylvania's so-called "liberty law," which required slave-owners to persuade local courts that those people they viewed as "their" fugitive slaves were in fact so. This meant, among other things, that Pennsylvania had no right to invoke its law against the slave-catcher Prigg, who had kidnapped Elizabeth Morgan in patent violation of the liberty law. Instead, said the Court, the Constitution itself licensed what we might today call "self-help repossession" of alleged fugitives by their masters.⁵ Story defended the Court's continued commitment to the ultimate evil of slavery as necessary for the overall goodness of the Union, and therefore, as a mandate to preserve the Union at all costs.⁶

Perhaps we agree with Story that pandering to the interests of slaveowners is preferable to acting in ways that would increase the likelihood of disunion and, possibly, war. If so, this suggests a possible distinction between the *genuinely* "good society," which the United States most definitely was not, and what might be termed the "good enough" society, that is, one that contains great evil but that is nonetheless deserving of the support of decent people, and concomitantly, justifies the rejection of views like those of William Lloyd Garrison, who counseled "No Union [and thus no collaboration] With Slaveholders."⁷ Reasonable people who are presumably good differ, however, on how much evil can be present in a society before being "good enough" collapses of its own weight.

It is now time to jump forward from 1842, when *Prigg* was decided, to the new millennium. In particular I will, in these brief remarks,⁸

4. 41 U.S. 539 (1842).

5. *Id.* at 639-40.

6. *Id.* at 623-26.

7. 3 The Letters of William Lloyd Garrison 118 (Walter M. Merrill & Louis Ruchames eds., 1971).

8. My formal role on the panel was to comment on Michael Dorf's very interesting paper. See Michael Dorf, *The Good Society, Commerce, and the Rehnquist*

play with modern-day notions of a “good society” within the context of a case decided this past June by the United States Supreme Court. In *Crosby v. National Foreign Trade Council*,⁹ the Court unanimously¹⁰ invalidated a Massachusetts act barring state entities from purchasing goods or services from companies doing business in Burma (now Myanmar),¹¹ on the grounds that it was pre-empted by congressional legislation.¹² There are, I submit, certain similarities between *Prigg* and *Crosby* that should be taken into account in any discussion of the propriety of the latter.

Generating the Massachusetts Act was, presumably, a repulsion by the people of Massachusetts, as represented by the legislature, at the prospect of collaborating even indirectly with the notably tyrannical regime that currently controls Burma.¹³ To be sure, the Supreme Court does not give the specific history of the Massachusetts Act, but it does quote from the somewhat comparable federal act that imposes similar, though not identical, sanctions on Burma.¹⁴ Thus Congress

Court, 69 Fordham L. Rev. 2161 (2001). To a significant extent, this article is more “freestanding,” certainly influenced in some respects by the themes that Dorf elaborated, but not truly a comment on the entirety of his paper.

9. 120 S. Ct. 2288 (2000).

10. Justice Scalia, joined by Justice Thomas, concurred only in the judgment, for reasons that need not concern this article.

11. There are certain exceptions and exemptions that need not be discussed. See An Act Regulating State Contracts With Companies Doing Business With or in Burma (Myanmar), Mass. Ann. Laws ch. 7, §§ 22G-M (Lexis 1998).

12. See *Crosby*, 120 S. Ct. at 2291 (citing Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166, 3009-167 (1997)).

13. One might, of course, regard this sentence as extremely naïve. After all, I have no evidence for the proposition that “the people of Massachusetts,” even if we were confident we could identify such an entity, spoke with a strong voice demanding such action. More likely, the legislation was elicited by well-placed groups, probably linked with the “human rights” community, who pointed out that Massachusetts could align itself with progressive political forces at a relatively small cost to the state. To this extent, I am adopting a highly informal social choice explanation. What I doubt, though, is that the legislation can be explained as more economic “rent-seeking” behavior in which local economic interests, in order to line their own pockets, attempt to enlist the coercive power of the state to deny access to local markets of potentially more efficient competitors. This assumption may have constitutional overtones, inasmuch as the strongest argument for intervening against state economic regulation is a well-merited suspicion that the regulation in question is an attempt to help out local economic interest by freezing out out-of-state competition. “[W]hen a state statute clearly discriminates against interstate commerce, it will be struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.” Laurence H. Tribe, 1 American Constitutional Law 1031 (2000) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)). See generally Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1092 (1986) (describing the Dormant Commerce Clause as a tool used to prevent states from “engaging in purposeful economic protectionism.”).

14. See *Crosby*, 120 S. Ct. at 2291-92 (citing § 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997).

noted that the Burmese government had committed "large-scale repression of or violence against the Democratic opposition,"¹⁵ the most notable member of which is the Nobel Peace Prize winner, Daw Aung San Suu Kyi. Indeed, President Clinton, acting under authorization of the congressional statute, found that the Burmese regime had "committed large-scale repression of the democratic opposition in Burma" as a predicate condition for an Executive Order imposing certain sanctions on the regime.¹⁶

One might see the two pieces of legislation as exemplifying the ability of two of the foundational governmental structures within the United States¹⁷ to forge concurrent policies responding to the same perception of an evil existing in the world that we should, to whatever extent possible, have nothing to do with and indeed, work to bring down. No serious argument was made that the Massachusetts legislation as a whole was in direct conflict with the federal legislation, which would, of course, present the problem that the Supremacy Clause was designed to resolve.¹⁸ But one would be wrong to predict peaceful constitutional co-existence. Instead, the Clinton Administration supported the private litigant, the National Foreign Trade Council, described as "a nonprofit corporation representing companies engaged in foreign commerce," thirty-four of whom were on Massachusetts' "restricted purchase list" and thus ineligible for unimpeded access to the market for state-purchased goods and services.¹⁹ The Solicitor General of the United States, therefore, strongly urged the affirmance by the Supreme Court of the circuit court's decision below striking down the Massachusetts law as being beyond the state's powers. And the Court agreed.²⁰

Although the initial arguments presented before the federal district court and the First Circuit Court of Appeals both emphasized the Dormant Commerce Clause and a so-called Dormant Foreign Policy Clause,²¹ the Supreme Court sidestepped these constitutional issues by

15. *Id.* at 2292 (citing § 570(b) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997).

16. *Id.* (discussing Exec. Order No. 13,047, 3 C.F.R. 202 (1997)).

17. The third is Indian tribes.

18. U. S. Const. art. VI. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 770-73, 814 (1994) (proposing that the Supremacy Clause and the pre-emption power are two distinctly different legal concepts, with the Supremacy Clause acting not to abolish concurrent state power, but rather, to be asserted only when existing state law conflicts with congressional action). Justice Souter did suggest, however, that the Massachusetts law "conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions." See *Crosby*, 120 S. Ct. at 2297. The case is not, however, an "as applied" challenge to Massachusetts' attempt to apply any given provision involving such "explicit" exemptions or exclusions, but is rather, in effect, a "facial" challenge to the legislation. See generally *id.* at 2302-04 (Scalia, J., concurring).

19. *Crosby*, 120 S. Ct. at 2293.

20. *Id.* at 2294.

21. See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 59 (1st Cir. 1999);

instead treating the case as one involving congressional pre-emption that displaced any state regulation, whether or not it was actually in conflict with the federal legislation. Still, the kinds of constitutional concerns that those other arguments evoke appear to hover in the background, including the ability of states to act against evils in ways that might run counter to certain conceptions of *national* interests (as against the interest of a particular *state*).

Justice Souter, for the majority, holds that the Massachusetts law is “an obstacle to the accomplishment of Congress’s full objectives under the federal Act.”²² One might have thought that if in fact Congress believed this to be the case, there would be at least a scintilla of evidence in the record that Congress indeed perceived the state law as such “an obstacle,” given that the federal Act was passed a full three months after the enactment of the Massachusetts law.²³ Indeed, what triggered Justice Scalia’s typically sarcastic concurring opinion was precisely the fact that Souter paid so much attention to legislative history,²⁴ so that one might especially expect Souter to have uncovered any such evidence if it existed. The most he was able to muster, however, was to hypothesize that it was “unlikely that Congress intended both to enable the President to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the President’s judgment of what national security requires.”²⁵

A few things are worth noting about this sentence, beginning with the fact that Souter is obviously inferring from the statute a limitation on Massachusetts’ power that he admits is explicitly stated nowhere in the statute.²⁶ This might normally be expected to generate some questions, if not outright opposition, from those members of the Court who in recent years have sought to revive a vigorous notion of state autonomy and concomitant protection from federal legislation.²⁷

Nat’l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 289, 293 (D. Mass. 1998).

22. *Crosby*, 120 S. Ct. at 2294.

23. *See id.* at 2291.

24. *See id.* at 2302-04 *passim*.

Of course even if all of the Court’s invocations of legislative history were not utterly irrelevant, I would still object to them, since neither the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor), nor Executive statements and letters addressed to congressional committees, nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us.

Id. at 2303 (Scalia, J. dissenting).

25. *Id.* at 2296 n.10.

26. *See id.* at 2293.

27. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 925 (1997) (holding unconstitutional the “commandeering” of state officials to aid in the implementation of federal legislation); *New York v. United States*, 505 U.S. 144, 174, 175 (1992) (holding unconstitutional the direction by the United States that states “take title” to otherwise undisposed-of radioactive waste); *Gregory v. Ashcroft*, 501 U.S. 452, 470

As noted though, there is no dissent, which suggests the importance of a second aspect of Justice Souter's sentence, which is its emphasis on "national security."²⁸ Indeed, the entire opinion is suffused with a language appropriate to the rise of the Leviathan State that occurred in the aftermath of World War II and the onset of the Cold War. President Clinton's own declaration regarding the existence of repression in Burma, for example, is followed by the finding that the actions of the Burmese regime constitute "an unusual and extraordinary threat to the national security and foreign policy of the United States,"²⁹ a situation, says the Court, "characterized as a national emergency."³⁰

No rational person could possibly believe this. The willingness of the Court to accept this boilerplate hysteria, and to use it as the underlying basis for limiting the power of Massachusetts to cordon itself off from collaboration with this evil regime, bespeaks a view of national power that is absolutely astonishing. A case like *Crosby* directly contradicts Professor Dorf's suggestion that the current majority of the Court is in the grip of a Jeffersonian obsession with local autonomy.³¹ There are, to be sure, certain cases that might support such a view,³² but *Crosby* is most certainly not one of them. Consider, for example, the full impact of the Court's citation to Hamilton's *Federalist* No. 80: "[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members."³³

(1991) (imposing "plain statement" rule on Congress with regard to imposition of Age Discrimination in Employment Act on state governments); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (holding Congress' imposition on states of a duty not to discriminate on grounds of age to be beyond congressional power to enforce the Fourteenth Amendment).

28. *Crosby*, 120 S. Ct. at 2296 n.10.

29. *Id.* at 2292 (quoting Exec. Order No. 13,047, 3 C.F.R. 202 (1997)). My colleague, Sarah Cleveland, informs me that this language comes from the International Emergency Economic Powers Act (IEEPA), 50 U.S.C.A. §§ 1701-1706 (1991 & Supp. 2000), which authorizes the President to impose a range of sanctions based on a finding that an international emergency indeed exists that threatens the national security or foreign relations of the United States.

30. *Crosby*, 120 S. Ct. at 2292.

31. Dorf, *supra* note 8, at 2177-86. One might also get this impression from recent sovereign immunity cases, which have, to put it mildly, seen the Court engage in Herculean efforts to prevent "sovereign" states from suffering the indignity of being sued merely because they are violating certain rights established by federal law. See generally Ernest A. Young, *Foreward: State Supreme Sovereign Immunity and the Future of Federalism*, 1999 Sup. Ct. Rev. 1, 1-2 (proposing that the current Court has made a formidable effort to enforce the doctrine of state sovereign immunity). As Professor Young well argues, however, this almost fanatical commitment to state autonomy is belied by the Court's general (and continuing) response in pre-emption cases, where the states have consistently lost out to expansive interpretation of purported congressional intent. See *id.* at 39-42. *Crosby*, of course, well exemplifies this latter aspect of the Court's approach.

32. See *supra* note 27 and accompanying text.

33. *Crosby*, 120 S. Ct. at 2299 n.16 (quoting *The Federalist* No. 80 (Alexander

Therefore, one should not expect, or want, states to play any role at all when "peace" with "foreign powers" is at issue.

The Court notes that the federal act authorizes the President to act "in the interest of national security"³⁴ not only to impose sanctions, but just as importantly, to lift them. And "it is just this plenitude of Executive authority that we think controls the issue of pre-emption . . ."³⁵ The Massachusetts law is characterized as "unyielding,"³⁶ as opposed to the flexibility placed by Congress in the hands of a President with full discretion, apparently, to impose or suspend sanctions based only on his or her reading of what American national security requires. The model of international politics suggested by the Court is one in which the President must have maximum freedom to bargain with other countries, and "[q]uite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence . . . [H]ere, the state Act reduces the value of the [bargaining] chips created by the federal statute."³⁷

Note well the practical implications of this model. It is clear that Massachusetts therefore may never effectively impose a lesser degree of sanction on Burma than that imposed by the national government. If the President is unable to strike a bargain with a foreign country and therefore continues sanctions, no state could plausibly claim a unilateral right to lift them. It is less clear, however, whether a state might have the freedom to act on its belief that the national government is not vigorous enough in its opposition to evil. With regard to slavery, the practical question was not whether a non-slave state could be especially cooperative with a slave one, but, rather, whether it could be *uncooperative* in any way in returning fugitive slaves. Similarly, in *Crosby* the question is whether Massachusetts has the power to place any obstacles at all in the way of the Burmese regime and its business collaborators beyond those endorsed by the President at any given moment.

The Court invokes the "capacity of the President to speak for the Nation with one voice in dealing with other governments,"³⁸ and it suggests that this capacity is "compromise[d]" by the Massachusetts law.³⁹ To put it mildly, this "one voice" notion of foreign affairs is subject to challenge, both descriptive and normative. Consider first the reality of American political practices, some of which are derived

Hamilton)).

34. *Id.* at 2295.

35. *Id.* The Court also refers to "the fullness of [the President's] authority," which presumably disallows any sharing at all with the authority of a state. *Id.* at 2296.

36. *Id.*

37. *Id.*

38. *Id.* at 2298.

39. *Id.*

from basic constitutional norms. A President negotiates and signs a treaty. Does that mean that he or she has "sp[oken] for the Nation?"⁴⁰ The answer, of course, is no. The Constitution itself requires that treaties be submitted to the Senate for ratification, and it is a notorious truth that one-third, plus one of the Senate can torpedo a President's most insistent vision of what the national interest requires. If one needs an example, begin with the Senate's rejection of the Treaty of Versailles; if that is too far in the past, consider the unwillingness of the Senate to ratify a treaty against genocide signed in 1948 by President Truman.

I hope that a personal anecdote is illuminating on this point. In 1987 I had the honor and pleasure of traveling to China to participate in a week-long seminar with Chinese scholars on American constitutional history. During the week that I was in Beijing, I was asked by a Chinese participant about the recent passage by Congress of a resolution condemning the Chinese repression in Tibet, which was accompanied by a statement by the spokesperson for the United States Department of State that what happened in Tibet was an internal matter for the People's Republic of China.⁴¹ Which of these positions, I was asked, represented the position of the United States Government? My answer, made entirely seriously, was that my interlocutor did not understand that the United States does not have "a government" in the sense that one often uses that term, as in "Her Majesty's Government." That is, the question assumed that there was indeed a singular entity called "the Government of the United States" that spoke with one authoritative voice, so that only one of the conflicting approaches to the Chinese role in Tibet could express "the Government's" position. But such a singular government does not exist. That, of course, is the central meaning of the system of separated and divided powers which, for better and worse, characterizes the American system of government(s). What one has, almost endlessly, is competing centers of political power claiming the authority to speak for the "We the People" for whom politicians are ostensibly the mere agents. Only when a certain degree of institutional coordination is achieved, as when Congress passes a law signed by the President, might one begin to say that "the Government" has spoken, although even that statement might be tempered by reference either to the role of the judiciary or to that of the states, whose approval might also be needed under some circumstances, to provide the "one voice."

40. *Id.*

41. *See* Human Rights Violations in Tibet, H.R. 2476, 100th Cong., 133 Cong. Rec. 13032 (1987); *see also* Elaine Sciolino, *Beijing is Backed by Administration on Unrest in Tibet*, N.Y. Times, Oct. 7, 1987, at A1 (describing the divergent positions taken by the Reagan Administration and Congress on the Chinese takeover of Tibet).

A standard normative defense of the baroque processes of American governance is that presented in Justice Brandeis' dissent in *Myers v. United States*⁴² and quoted by Justice Douglas in his concurrence in the *Steel Seizure Case*,⁴³ which sharply rejected the power of President Truman to do whatever he thought necessary to prosecute the Korean War:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.⁴⁴

Of course, Brandeis here was talking about so-called "horizontal separation of powers" at the national level of government, thus the reference to "three departments." But, obviously, there is a "vertical" dimension of separated powers within our system, even if limning the degree of constitutionally-protected separation is the single most enduring problem of our constitutional order. In any event, one can easily conceptualize the system of separated powers as one that protects the presence of multiple voices and places significant difficulties in the path of any one particular person or entity claiming the right to speak on behalf of "We the People."⁴⁵

One need not argue that Massachusetts has a constitutionally protected right to carry out a full-scale foreign policy. The Constitution itself prohibits any state, without congressional consent, from "enter[ing] into any Agreement or Compact with . . . a foreign Power, or engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay."⁴⁶ And, of course, I readily concede that Congress can prevent Massachusetts from engaging in all sorts of activity that might otherwise be constitutionally permissible in the absence of an invocation of national supremacy. It might indeed be necessary for the United States to climb into bed with extraordinarily unattractive and ruthless regimes and to guarantee them protection against hurdles posed by state legislation. No country that allied itself with Joseph Stalin in order to defeat Adolf Hitler can be unaware of the grim necessities of "lesser evilism."

42. 272 U.S. 52, 240-95 (1926) (Brandeis, J., dissenting).

43. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952).

44. *Id.*

45. I mimic Bruce Ackerman's argument here, insofar as he both takes the notion of popular sovereignty exceedingly seriously and notes the various hurdles that must be surmounted before anyone can claim the mantle of such sovereignty. See Bruce Ackerman, *Higher Lawmaking*, in *Responding to Imperfection* 63 (Sanford Levinson ed., 1995).

46. U. S. Const. art. I, § 10, cl. 3.

What is at issue is the degree of congressional specificity that is required in order to deprive states of what might otherwise be seen as important powers. As with all separation of powers arguments, the ultimate question is *not* whether a state or an individual can be deprived of certain otherwise protected liberties, but, rather, what particular institutions must be mobilized in order to make such deprivations legitimate.⁴⁷

Once one realizes the empirical fatuity of the Court's assertion of the "one voice" image of presidential authority to conduct foreign affairs, then one can well ask why states cannot have their own role to play in encouraging the kind of civic deliberation that is at the heart of the Brandeisian vision of an aroused citizenry constantly asking itself the deepest questions about what is being done in its name.⁴⁸ And what issue could possibly be more fit for public deliberation than the degree of collaboration with evil regimes that it is appropriate—one might even suggest "necessary and proper"—to engage in? This is, after all, the most fundamental issue of international politics, where one is constantly being asked to cooperate with—or some would say "appease"—regimes that are founded on values repugnant to those we fancy ourselves guided by. To be sure, the answers to such questions—not to mention the identification of repugnant regimes in the first place—are politically controversial. Consider only the competing arguments that might be made with regard to American policy vis-à-vis Cuba and China, one the victim of almost insanely stringent sanctions, the other welcomed by the United States into full participation in the international community.

Perhaps the most truly pathetic section of Justice Souter's opinion comes toward the end, when he attempts to address Massachusetts' point that a number of sub-national political communities passed measures imposing one variety or another of sanctions against the South African apartheid regime.⁴⁹ He does not mention that these were passed in the teeth of the Reagan Administration's position at the time that "constructive engagement," and not sanctions, constituted proper policy, as it resisted congressional efforts to pass national sanctions legislation.⁵⁰ In any event, such local sanctions, he

47. See, for example, the debate about Abraham Lincoln's unilateral suspension of habeas corpus during the opening days of the Civil War. The Constitution itself obviously contemplates such suspension, U.S. Const. art. I, § 9, cl. 2, but the question presented was whether it required prior congressional consent before the suspension could take place or whether Lincoln possessed certain "inherent" powers to do so even in the absence of such consent. Chief Justice Taney, among others, thought that Lincoln possessed no such powers. See *Ex parte Merryman*, 17 F. Cas. 144 (D. Md. 1861) (No. 9487).

48. See, for example, his classic concurrence in *Whitney v. California*, 274 U.S. 357, 372-80 (1927).

49. See *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2301-02 (2000).

50. See Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62

notes, were upheld both by courts⁵¹ and, perhaps equally significantly, by the Office of Legal Counsel of the Department of Justice.⁵² The Court is reduced to saying that “we never ruled on whether state and local sanctions against South Africa in the 1980s were pre-empted or otherwise invalid,”⁵³ which, among other things, appears to suggest the possibility that one of the most important (and morally defensible) political movements towards a “good society” in the 1980s might have been unconstitutional in the eyes of the Court, and that states and cities might have been forced to collaborate with the evils of apartheid even in the absence of a clear declaration by Congress to that end.

One might point to a special irony of *Crosby*, which was decided only nine days before *Boy Scouts of America v. Dale*.⁵⁴ There a sharply divided court upheld the right of the Boy Scouts to exclude homosexuals from participation in their programs, as against the right of New Jersey to subject the Scouts to the state’s public accommodations law prohibiting such discrimination. According to the majority opinion by Chief Justice Rehnquist, “Dale’s presence in the Boy Scouts would, at the very least, *force the organization to send a message*, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁵⁵ That is, the Scouts have a protected *expressive interest* that is protected against state regulation. Without taking sides as to whether *Dale* itself was correctly decided, I simply note the unwillingness of the Court to recognize a similar interest of the citizens of Massachusetts in wishing “to send a message . . . [to] the world,”⁵⁶ that the behavior of the Burmese regime is abhorrent to them.

Perhaps it is a category mistake to analogize private organizations to the State; one might, after all, say that the State, at least in its liberal version, must be relentlessly neutral with regard to how anyone, either at home or abroad, should live their lives. At the very least, however, such a view of state neutrality requires extended

Temp. L. Rev. 813, 814-15 (1989) (analyzing American sub-national governmental units’ protests against South African apartheid through sanctions during the Reagan era); Jeff Walker, *Economic Sanctions: United States Sanctions Against South Africa – Comprehensive Anti-Apartheid Act of 1986*, Pub. L. No. 99-440, 100 Stat. 1036 (1986), 28 Harv. Int’l L.J. 117 (1987) (reviewing the congressional response to the Reagan Administration’s policy of constructive engagement toward apartheid).

51. See *Crosby*, 120 S. Ct. at 2301-02 n.25 (citing Bd. of Trustees v. Mayor of Baltimore, 562 A.2d 720, 744-49 (Md. 1989) (holding that the Comprehensive Anti-Apartheid Act of 1986 does not pre-empt Baltimore’s divestment ordinance)).

52. *Id.* (citing Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal Counsel 49, 64-66, 1986 WL 213238) (“state and local . . . laws [are] not pre-empted by pre-CAAA federal law”).

53. *Id.* at 2302.

54. 120 S. Ct. 2446 (2000).

55. *Id.* at 2454 (emphasis added).

56. *Id.*

argument, and I think it is fair to say that most theorists find such a notion of antiseptic neutrality objectionable, if not outright incoherent. We are, after all, a country founded on the proposition that the point of our national enterprise is to “establish Justice”⁵⁷ and if one takes this seriously, then one can understand neither the United States as a nation nor individual states within a frame of strict neutrality. Moreover, as an empirical matter, governments are *always* trying to form a public consciousness as to what is proper or admirable behavior and, concomitantly, what is objectionable behavior.⁵⁸ A state university could surely present Daw Aung San Suu Kyi with an honorary degree praising her for her brave battle against Burmese repression; it could also choose to name a public square after her, with a statue designed to inform the public about her valor. The next step, obviously, is for the state to declare that it does not wish to help subsidize the regime by entering into contracts with businesses that serve, as a practical matter, to bolster its power. Yet this ostensibly conservative Court takes no cognizance at all of Massachusetts’ own expressive interests and seems absolutely indifferent to protecting them, at least until Congress clearly indicates that American national interests require speaking in far more muted tones than Massachusetts would prefer.

It would surely be hyperbolic to place *Crosby* in the same moral universe as *Prigg*, one of the most truly despicable decisions in the history of the United States Supreme Court.⁵⁹ That being conceded, one should not be blind to a genuine similarity between them, namely, the stunning dismissal by the Court of a state’s interest in minimizing its own participation, however indirect, in political regimes that tyrannically deprive their own populace of what we are increasingly inclined to describe as basic human rights. There is no eloquence, or inspiration, in *Crosby*. There is only a Court mouthing Cold War platitudes at a time when they make increasingly little sense. Whether one is to the conventional “left” or “right,” one might still be concerned about the Court’s complacent displacement of state authority in the name of a non-existent one-voice nationalism. And one might ask whether it represents an exercise in constitutional interpretation that fully recognizes what it might mean to aspire to a good society.

57. U. S. Const. pmbl.

58. See Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (1998) (describing the efforts of government entities to influence public opinion through public monuments).

59. Although I leave open the possibility that it is in fact the Constitution, and not merely *Prigg*, that is despicable.