

THE DORMANT FOREIGN AFFAIRS POWER: CONSTITUTIONAL IMPLICATIONS FOR STATE AND LOCAL INVESTMENT RESTRICTIONS IMPACTING FOREIGN COUNTRIES

Abstract: State and local pension funds have billions of dollars invested in global markets, and often use these assets to pressure foreign nations to change their human rights policies. Social investing practices and other non-social investment decisions impacting foreign nations may be impermissible incursions into the federal government's exclusive power over foreign policy under the Dormant Foreign Affairs Power, an implied constitutional restriction on state activity. This Note argues that in this era of global markets, a blanket prohibition against criticism of foreign nations does not allow states to fulfill their investment obligations. This Note calls for a flexible test to determine the constitutionality of state action—a test that considers the federal government's need for uniformity in foreign policy with the need of state governments to be global economic actors.

INTRODUCTION

State and municipal governments have often used the economic power of their pension funds to protest the conduct of foreign nations that they have determined follow socially unacceptable human rights policies.¹ These state and municipal actions have included divesting from companies that do business in the offending nations, requiring compliance with certain employment practices by companies that do business abroad and spearheading shareholder resolutions, through their pension stock ownership, to encourage companies to alter their corporate practices when they operate overseas.² These initiatives mirror state and municipal participation in the economic boycott of apartheid South Africa beginning in the 1970s.³

¹ See, e.g., Camille Q. Bradford, *Goals of Public Institutional Investors*, in *INSTITUTIONAL INVESTORS, SOCIAL INVESTING, AND CORPORATE GOVERNANCE* 37–45 (Roger Clegg ed., 1996) (describing the history of social investing).

² See *id.* at 41–42.

³ See James F. Hogg, *Issues Raised by Institutional Investing*, in *INSTITUTIONAL INVESTORS, SOCIAL INVESTING, AND CORPORATE GOVERNANCE* 4 (Roger Clegg ed., 1996).

Subsequent state and municipal action has focused on Northern Ireland, and more recently, countries such as Burma, Indonesia, Nigeria, Tibet, Cuba and China.⁴ In addition to proposals relating to the investment of pension funds, state and municipal expressions of concern over human rights conditions abroad have included limitations on state and municipal governments' ability to engage in contracts with companies that do business in a suspect country.⁵

Both pension investment proposals and purchasing rules, driven by social policy goals, raise constitutional issues relating to state and local governments' ability to effectuate foreign policy.⁶ Because the Constitution created a federal system of government, the Dormant Foreign Affairs Power reserves power over foreign affairs exclusively to the federal government and precludes states and municipalities from interfering with the foreign affairs power of the federal government.⁷ Although not a power expressly enumerated in the Constitution, the Dormant Foreign Affairs Power is generally considered to derive from the structure of the Constitution.⁸ Because power to conduct foreign affairs falls within the bailiwick of the federal government, state and local authorities may be encroaching into an area occupied exclusively by Congress and the Executive Branch.⁹ In short,

⁴ See, e.g., Paul Bluestein, *Thinking Globally, Punishing Locally: States, Cities Rush to Impose Their Own Sanctions, Angering Companies and Foreign Affairs Experts*, WASH. POST, May 16, 1997, at G1 (describing current social investing initiatives).

⁵ See, e.g., MASS. GEN. LAWS, ch. 7, § 22G-M (1998) ("Massachusetts Burma Law"). The Investor Responsibility Research Center reports that nineteen municipal governments in addition to Massachusetts have adopted purchasing restrictions on companies that do business in Burma. See INVESTOR RESPONSIBILITY RESEARCH CENTER, COUNTRY-SPECIFIC STATE AND LOCAL SELECTIVE PURCHASING LAWS AS OF JULY 1998 15-82, 159 (1998).

⁶ See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2290-291 (2000); *Board of Trs. v. Mayor of Baltimore*, 562 A.2d 720, 748-49 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990). Commentators have debated whether the Dormant Foreign Affairs Power precludes state action in both purchasing and investment decisions. Compare Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 470-71 (1987) (arguing that state investment restrictions are constitutional), with Daniel Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443, 447-48 (1998) (arguing that state purchasing laws are unconstitutional).

⁷ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 162 (1996).

⁸ See *Perez v. Brownwell*, 356 U.S. 44, 57 (1958).

⁹ See HENKIN, *supra* note 7, at 162-65; Lewis, *supra* note 6, at 470-71; Price & Hannah, *supra* note 6, at 447-48.

state and local efforts to protest the acts of foreign entities may violate basic principles of federalism embedded in the Constitution.¹⁰

In the 2000 term, the Supreme Court of the United States, in *Crosby v. National Foreign Trade Council*, held that a Massachusetts selective purchasing statute that prohibited the state from hiring contractors that conducted business in Myanmar (formerly Burma) was preempted by federal sanctions against Burma.¹¹ A trade association argued that the Massachusetts law violated the Dormant Foreign Affairs Power and the Foreign Commerce Clause, and also was preempted by federal sanctions.¹² Although the United States Court of Appeals for the First Circuit held the law unconstitutional on all three grounds, the Supreme Court affirmed only on the preemption issue.¹³ The Court declined to discuss either the Dormant Foreign Affairs Power or the Foreign Commerce Clause arguments, thus leaving open the question of whether a state or local action impermissibly interferes with the federal government's power over foreign affairs.¹⁴

The *Crosby* decision indicates that the Court is hesitant to invoke a broad prohibition on state action that impacts foreign affairs, but instead would prefer to decide these issues on the narrower ground of preemption.¹⁵ One can imagine situations arising, however, where states will protest foreign nations' policies, but Congress does not act at all.¹⁶ In these situations, the Court will be unable to base its decision on preemption and will be required to explore the boundaries of the Dormant Foreign Affairs Power.¹⁷

The First Circuit's discussion of the Dormant Foreign Affairs Power describes a doctrine that would severely curtail state and municipal governments' ability to use their investment power to protest human rights violations abroad.¹⁸ The decision's reasoning further

¹⁰ See *Natsios*, 181 F.3d at 45; Price & Hannah, *supra* note 6, at 455–71.

¹¹ See 120 S. Ct. 2288, 2302 (2000).

¹² See *id.* at 2293.

¹³ See *id.* at 2302, *aff'g sub nom.* *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999).

¹⁴ See *id.* at 2294 n.8 ("Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgement below, we decline . . . to pass on the First Circuit's rulings addressing the foreign affairs power or the Dormant Foreign Commerce Clause.").

¹⁵ See *id.*

¹⁶ For example, the Massachusetts Burma Law was actually passed three months prior to the enactment of Congressional sanctions against Burma. See *Crosby*, 120 S. Ct. at 2291.

¹⁷ See *id.* at 2294 n.8.

¹⁸ See *Natsios*, 181 F.3d at 45, 55–56 (declining, however, to rule on the constitutionality of similar restrictions on pension investments).

implicates any area of state action that touches upon foreign affairs.¹⁹ Because state and local governments have emerged as global economic actors, with over a trillion dollars invested in financial markets, courts must articulate boundaries between acceptable, incidental intrusions into foreign affairs and unacceptable expressions of foreign policy.²⁰ Without a clear constitutional rule, many state and local decisions might be construed as violations of the federal government's foreign affairs power.²¹

This Note examines the scope of the Dormant Foreign Affairs Power as a constitutional limitation on state and local governments' pension fund investment proposals and argues that, in its current formulation, the Dormant Foreign Affairs Power would preclude any state and local investment action deemed critical of a foreign nation. Part I summarizes past and current social investment activity.²² Part II examines Supreme Court and lower court decisions based on the Dormant Foreign Affairs Power.²³ Part III presents majority and minority formulations of the Dormant Foreign Affairs Power, and suggests the outcome to constitutional challenges to state and local governments' investment decisions under those interpretations.²⁴ Part IV presents policy considerations that the current formulations fail to address and suggests that the Court adopt a functional approach to future cases.²⁵ This Note advocates a less restrictive approach to the Dormant Foreign Affairs Power that accounts for both the need for uniformity in United States foreign policy and the need for states and municipalities, as global investors, to have flexibility in their investment decisions.

¹⁹ See *id.* at 45. *Natsios* would certainly buttress the position that these acts are unconstitutional. Compare *Lewis*, *supra* note 6, at 470-71 (concluding state divestment laws targeting single nations are constitutional); with *Price & Hannah*, *supra* note 6, at 447-48 (concluding state purchasing laws targeting single nations are unconstitutional).

²⁰ Compare *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (invalidating a state law that may disturb foreign relations), with *Clark v. Allen*, 331 U.S. 503, 517-18 (1947) (upholding a state law as not infringing on the federal government's constitutionally enumerated foreign affairs powers because it had an incidental effect on foreign countries).

²¹ See, e.g., *Natsios*, 181 F.3d at 61 n.18 (declining to consider if a state could pass a resolution condemning a foreign nation for human rights violations under the Dormant Foreign Affairs Power).

²² See *infra* notes 26-70 and accompanying text.

²³ See *infra* notes 71-201 and accompanying text.

²⁴ See *infra* notes 202-341 and accompanying text.

²⁵ See *infra* notes 342-394 and accompanying text.

I. STATE AND MUNICIPAL INVESTMENT RESTRICTIONS

State and municipal governments, through their pension investment portfolios, represent a powerful force in the financial markets, and, therefore, constituents and social activists often call upon them to effectuate social policy goals through their economic power.²⁶ Direct initiatives for pension funds to alter their investments to advance social causes, as well as investment decisions regarding the management of international portfolios, may implicate the federal government's power over foreign affairs.²⁷ Although state and municipal governments manage public pension funds, pension funds are not government assets.²⁸ Instead, the state or municipality must hold assets in trust for the benefit of the plan participants.²⁹ As such, public pension plans, when making investment decisions, have a fiduciary duty to pension plan participants to manage assets for the exclusive benefit of participants.³⁰

No longer confined to investment in government securities, public pension funds are major economic players in financial markets.³¹ In 1998, state and municipal pension funds held over \$1.7 trillion in

²⁶ See Bradford, *supra* note 1, at 37; Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, COLUM. L. REV. 795, 797 (1993). Public pension funds are considered to be more active than other investors in social investing issues. See Hogg, *supra* note 3, at 12.

²⁷ See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2290-291 (2000); *Board of Trs. v. Mayor of Baltimore*, 562 A.2d 720, 748-49 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990).

²⁸ See, e.g., R.I. GEN. LAWS § 36-8-15; § 35-10-6(b) (1997) (establishing a trust for pension funds).

²⁹ See, e.g., R.I. GEN. LAWS § 35-10-6(b) (establishing that pension funds must be invested for the exclusive benefit of plan participants); see also 26 U.S.C. § 401(a) (1994). To maintain federal preferential tax treatment that allows employee pension contributions to be made on a pre-tax basis and earnings to accrue on a tax-exempt basis, a public pension plan must comply with Internal Revenue Code provisions. See generally 26 U.S.C. § 401 (establishing requirements for preferential tax treatment).

³⁰ See 26 U.S.C. § 401(a)(2). To be a qualified trust under the Internal Revenue Code, it must be impossible, prior to the satisfaction of all liabilities to participants and their beneficiaries, to divert any part of the corpus or income from the trust to purposes other than the exclusive benefit of employees and their beneficiaries. See *id.*

³¹ See David M. Walker, *The Increasing Role of Pension Funds in the Capital Markets and in Corporate Governance Matters*, in INSTITUTIONAL INVESTING: THE CHALLENGES AND RESPONSIBILITIES OF THE 21ST CENTURY 34-37 (Arnold W. Sametz ed., 1991); Romano, *supra* note 26, at 799-800.

financial assets.³² Of this amount, approximately \$1.2 trillion was invested in non-governmental securities, with \$639 billion in corporate stocks, \$258 billion in corporate bonds and \$195 billion in international investments.³³ Because public pension funds invest so much in the private sector, they may become subject to social investment restrictions.³⁴ Furthermore, as public pension funds are increasing their investment allocation to international markets in an effort to modernize portfolio management and gain higher returns, any direct investment by the pension fund abroad may be subject to social investment restrictions.³⁵

Nearly one quarter of public pension funds must invest their assets in accordance with some type of social investment restriction.³⁶ First, some proposals have called for an outright divestment from suspect countries and companies that do business in suspect countries.³⁷ Second, state and municipal governments have sought to encourage companies operating abroad to adhere to particular business practices that promote social goals advanced by local governments.³⁸

³² See *Census Bureau Data Shows Rise in Public Retirement Plan Holdings*, BNA PENSION & BENEFITS REPORTER, Feb. 22, 2000, at 568. State and municipal pension fund assets are growing at substantial rates. In 1995, they were estimated to have assets of over \$1.3 trillion. See EMPLOYEE BENEFIT RESEARCH INSTITUTE, EBRI DATABOOK ON EMPLOYEE BENEFITS 150 (4th ed. 1997).

³³ See *Census Bureau Data Shows Rise in Public Retirement Plan Holdings*, *supra* note 32, at 568.

³⁴ See Hogg, *supra* note 3, at 12; Romano, *supra* note 26, at 797. A study by the Social Investment Forum found that \$2 trillion or approximately 13% of funds are invested in socially screened portfolios—43% of this social investment was based on human rights concerns. See Barry B. Burr, *Sin Screens: Socially Investing Tops \$2 Trillion in U.S.*, PENSIONS AND INVESTMENTS, Nov. 15, 1999, at 8.

³⁵ See *U.S. Pension Plans Investing More Assets in International Equities*, BNA PENSION & BENEFITS REPORTER, May 11, 1998, at 1121; Susan Barreto, *Police, Fire Funds to Go Abroad*, PENSIONS AND INVESTMENTS, June 1, 1998, at 1; see also EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 30-31 (1998) (describing the growth in international direct investments); INSTITUTIONAL INVESTOR, *Public Funds: Plans Break Free From Investment Restrictions*, MONEY MGMT. LETTER, Dec. 28, 1998, at 8 (describing the increased discretion given to fund boards to select equity investments, including international investments).

³⁶ See INSTITUTIONAL INVESTOR, *Think Tank Views Public Funds as Too Political*, MONEY MGMT. LETTER, May 17, 1999, at 10.

³⁷ See, e.g., PETER DESIMONE & WILLIAM F. MOSES, INVESTOR RESPONSIBILITY RESEARCH CENTER, *A GUIDE TO AMERICAN STATE AND LOCAL LAWS ON SOUTH AFRICA* 2 (1995) (describing divestment policies).

³⁸ See, e.g., FRY, *supra* note 35, at 95 (describing types of state actions against Northern Ireland).

Third, state and municipal governments have increasingly become participants in shareholder resolution activity designed to facilitate the withdrawal of companies from suspect countries or to change overseas business practices.³⁹ Finally, state and municipal pension funds, through their day-to-day investment decisions, may impact international markets.⁴⁰

Divestment has been the most visible form of social investing activity by state and local governments.⁴¹ As part of a comprehensive boycott against South Africa in the 1980s, a total of thirty-two states and the United States Virgin Islands enacted some type of sanction against South Africa.⁴² These sanctions were not limited to partial or total divestment from companies doing business in South Africa and bans on new investment, but also included restrictions against using banks that do business in South Africa and selective contracting and purchasing rules.⁴³ Additionally, 113 cities adopted some type of sanction against South Africa, and another forty local governmental units (such as county governments or transit authorities) adopted sanctions.⁴⁴ In the wake of the success of the South Africa campaign, many states and municipalities have considered or have enacted laws and policies regarding their investment in companies that do business in suspect countries, including⁴⁵ Burma, Indonesia, Nigeria, Switzerland

³⁹ See, e.g., Kurt N. Schacht, *Institutional Investors and Shareholder Activism: Curse or Cure?*, in *INSTITUTIONAL INVESTORS, SOCIAL INVESTING, AND CORPORATE GOVERNANCE* 26 (presenting a history of public pension activity in shareholder resolutions).

⁴⁰ See Walker, *supra* note 31, at 43–44 (outlining the growing role of pension plans in the financial markets).

⁴¹ See, e.g., Brannon P. Denning & Jack H. McCall Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or A Sorry State of Affairs?*, 26 *HASTINGS CONST. L.Q.* 307, 307–08 (1999) (describing proliferation of divestment proposals targeting South Africa).

⁴² See DESIMONE & MOSES, *supra* note 37, at 2. The following states adopted some form of South Africa sanctions: Arkansas; California; Colorado; Connecticut; Florida; Hawaii; Illinois; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Nebraska; New Jersey; New York; North Carolina; North Dakota; Oklahoma; Oregon; Pennsylvania; Rhode Island; Tennessee; Texas; Vermont; Virginia; West Virginia; and Wisconsin. See *id.* at 17–18.

⁴³ See DESIMONE & MOSES, *supra* note 37, at 2, 17–22.

⁴⁴ See *id.* at 18–22.

⁴⁵ See, e.g., USA ENGAGE, *State and Local Sanctions Watch List* at <http://www.usaengage.org/news/status.html> (last updated Mar. 2000) (listing state and local purchasing and investment restrictions targeting specific countries). California, Connecticut, Colorado, Texas, Vermont, and Maine have considered investment or purchasing bills relating to Burma. See A.B. 888, 1997–98 Reg. Sess. (Cal. 1997) (purchasing); S.R. 5, 61st Gen. Ass. (Colo. 1997) (non-binding resolution against purchasing); H.B. 6354, 1997 Reg. Sess. (Conn. 1997) (purchasing); S.P. 783, 119th Leg. (Me. 1999) (purchasing and investment);

and China. Some initiatives contain detailed legislative findings about these countries' perceived negative policies.⁴⁶

In addition to partial or total divestment from companies that do business in a suspect country, several state and municipal pension funds have sought to encourage certain employment practices when companies operate abroad.⁴⁷ For example, Rhode Island, Massachu-

H.B. 3369, 181st Leg. (Mass. 1999) (investment); H.B. 1090, 76th Leg. (Tex. 1999) (purchasing and investment); H.B. 34 65th Leg. (Vt. 1999) (shareholder resolutions regarding Burma). New York City and Los Angeles have adopted anti-Burma ordinances. See USA ENGAGE, *State and Local Sanctions Watch List*.

In 1999, both Massachusetts and Rhode Island considered, but did not adopt, laws banning investments in companies doing business in Indonesia. See H.B. 3165 181st Leg. (Mass. 1999); H.B. 6424 1999-2000 Leg. (R.I. 1999). In 1998, a bill restricting purchasing and investment in Nigeria failed to pass the Maryland Assembly. See S.B. 354, 1998 Reg. Sess. (Md. 1998); H.B. 1273, 1998 Reg. Sess. (Md. 1998). Municipalities that have passed ordinances targeting Nigeria include Alameda County, Cal. (purchasing, investments and bank deposits); Amherst, Mass. (purchasing, investments and bank deposits); Berkeley, Cal. (purchasing); Oakland, Cal. (purchasing, investments, and bank deposits). See USA ENGAGE, *State and Local Sanctions Watch List*. In 1998, New York City, New York State, California, Pennsylvania, and New Jersey considered sanctions against Switzerland, including limiting investment in Swiss companies and/or restricting use of Swiss banks and Swiss-owned investment money managers to encourage Swiss banks to make restitution to Holocaust victims and their families. See Susan Barreto & Tamela Odom, *Public Funds Enter Holocaust Fray*, PENSIONS AND INVESTMENTS, July 13, 1998, at 1. The State of New Jersey Division of Investment was ordered by the Governor of New Jersey to cease investing in Swiss-owned companies. See *id.* In 1998, Virginia considered a bill that would prohibit state procurement of foreign-made goods produced with indentured labor in China. See H.B. 1324, 1998 Sess. (Va. 1998).

⁴⁶ See, e.g., INVESTOR RESPONSIBILITY RESEARCH CENTER, *supra* note 5, at 83-108 (reproducing full text of city ordinances concerning Nigeria). These ordinances contain legislative findings that express a moral responsibility "to take positive steps to end human rights abuses and support legitimately elected governments." See *id.* at 91. The findings further detail the invalidation of a democratic election in Nigeria by a military dictatorship and the imprisonment for treason of the candidate who is believed to have won the election, the documentation of human rights abuses by international groups, and specific arrests and executions of dissidents in Nigeria. See *id.* at 91-92, 96.

⁴⁷ See, e.g., CAL. GOV'T CODE § 7513.5 (West 2000) (requiring reports on investments in Northern Ireland detailing compliance with the MacBride Principles); CONN. GEN. STAT. ANN. § 3-13h(b) (West 1999) (requiring divestment of corporations doing business in Northern Ireland and not in compliance with the MacBride Principles); 1987 Mass. Acts ch. 697 § 133 (requiring a report of invested companies compliance with the MacBride Principles); MICH. COMP. LAWS ANN. § 38.1133a (West 1999) (requiring investment fiduciary to support shareholder resolutions to adopt the MacBride Principles); MINN. STAT. ANN. § 11A.241 (1997) (requiring an annual report about investments in Northern Ireland, requesting board support or sponsor shareholder resolutions, but specifically stating that divestment is not required); NEB. REV. STAT. § 72-1246.06 (1995) (requiring the state investment officer to report on compliance of investments with the MacBride Principles); N.H. REV. STAT. ANN. § 6:32, § 6:34 (1999) (requiring treasurer to report on invested corporations' compliance with the MacBride Principles and limit future investments to corporations adhering to the principles); N.J. STAT. ANN. § 52:18A-89.4; § 52:34-

setts and New York have adopted investment policies requesting that companies doing business in Northern Ireland comply with the MacBride Principles which are designed to protect the minority Catholic population in Northern Ireland from employment discrimination.⁴⁸ Some state laws relating to Northern Ireland are precatory, only requiring a report about corporations' compliance with the MacBride Principles.⁴⁹ Other state laws mandate divestment from companies failing to comply with the MacBride Principles.⁵⁰ As economic boycotts against South Africa were lifted, some states adopted socially responsible investment guidelines similar to the MacBride Principles to govern reinvestment in South Africa.⁵¹ For example, Massachusetts requires that South Africa investments be made in accordance to the African National Congress's guiding principles that ask companies to use fair employment practices and environmental protection policies.⁵²

Some social investing proponents have advocated abandoning the divestment strategy and instead using stock ownership to encourage changes in company behavior through shareholder resolutions—a movement that mirrors the growing use of shareholder resolutions by public pension funds to reform corporate governance generally.⁵³

12.2 (1999) (authorizing director to report on invested corporations compliance with the MacBride Principles and restricting state purchasing to bidders that comply with the principles); N.Y. RETIREMENT AND SOC. SEC. LAW § 423-a (McKinney 1999) (restricting state investments to companies complying with the MacBride Principles); R.I. GEN. LAWS § 35-10-14 (1997) (requiring monitoring and reporting of pension fund investments in Northern Ireland for compliance with the MacBride Principles). In 1999, California enacted a similar measure that targets Switzerland. *See* 1999 Cal. Legis. Serv. 216 (West) (requiring the state pension funds to monitor and report on companies and their affiliates that owe compensation to victims of World War II slave labor).

⁴⁸ *See, e.g.*, CONN. GEN. STAT. ANN. § 3-13h(b) (restating the MacBride Principles).

⁴⁹ *See* CAL. GOV'T CODE § 7513.5; 1987 Mass. Acts ch. 697 § 133; MINN. STAT. ANN. § 11A.241; NEB. REV. STAT. § 72-1246.06; N.H. REV. STAT. ANN. § 6:32; N.J. STAT. ANN. § 52:18A-89.4; R.I. GEN. LAWS § 35-10-14.

⁵⁰ *See* CONN. GEN. STAT. ANN. § 3-13h(b); N.H. REV. STAT. ANN. § 6:34; N.Y. RETIREMENT AND SOC. SEC. LAW § 423-a.

⁵¹ *See, e.g.*, MASS. GEN. LAWS ch. 32 § 23 (2A)(h), (5); R.I. GEN. LAWS § 35-10-12 (1997).

⁵² *See* MASS. GEN. LAWS ch. 32 § 23 (2A)(h), (5).

⁵³ *See* Bradford, *supra* note 1, at 41-42 (noting that advocates have argued that divestment is not the only means to effectuate a change in corporate policy on social issues); Ricki Fulman, *Investors Push to Cut Myanmar Ties*, PENSIONS AND INVESTMENTS, Nov. 10, 1997, at 38; Romano, *supra* note 26, at 797; *see also* Schacht, *supra* note 39, at 27-28 (noting a 400% increase in shareholder resolutions on corporate governance matters from 1986 to 1990); Walker, *supra* note 31, at 43-45 (discussing corporate governance issues raised by the growth of private and public pension plan assets in equities).

Social investing resolutions encourage a company to adopt certain business practices or withdraw its operations from certain countries.⁵⁴ A number of state laws mandate how pension fund directors or state treasurers must vote in shareholder resolutions relating to social issues.⁵⁵ For example, on repeal of its South Africa divestment law, the Rhode Island General Assembly directed the State Investment Commission to encourage, through shareholder proxy voting, corporations doing business in South Africa to comply with socially responsible standards established by the South African Council of Churches.⁵⁶

Although some states specify shareholder voting as a matter of law, pension investment boards also can set their own policy with regard to shareholder resolutions.⁵⁷ For example, the New York City Employees Retirement System ("NYCERS") sponsored several shareholder resolutions to implement the MacBride Principles.⁵⁸ In 1994, shareholders of Unocal Corporation, including the NYCERS and the State of Connecticut Trust Funds, supported a shareholder proxy resolution before Unocal to disclose information about its business in Burma.⁵⁹ Furthermore, activists have pursued shareholder resolutions that would require companies to adopt general corporate codes of

⁵⁴ See INVESTOR RESPONSIBILITY RESEARCH CENTER, HOW INSTITUTIONS VOTED ON SOCIAL POLICY SHAREHOLDER RESOLUTIONS IN THE 1992 PROXY SEASON 64-101 (1992) (listing shareholder resolutions related to South Africa and Northern Ireland); Fulman, *supra* note 53, at 38.

⁵⁵ See, e.g., CAL. GOV'T CODE §7513.5(c) (West 2000) (requiring reports on investments in Northern Ireland detailing compliance with the MacBride Principles); CONN. GEN. STAT. ANN. § 3-13h(a) (authorizing the State Treasurer to initiate or support shareholder resolutions relating to Northern Ireland); 1987 Mass. Acts ch. 697 § 133 (requiring that state pension boards initiate and vote shareholder resolutions consistent with non-discrimination provisions as applied to Northern Ireland); MICH. COMP. LAWS ANN. § 38.1133a, sec. 13a(2) (requiring investment fiduciary to support shareholder resolutions to adopt the MacBride Principles); N.H. REV. STAT. ANN. § 6:33 (1999) (authorizing state treasurer to sponsor or support shareholder resolutions to adopt the MacBride Principles); N.J. STAT. ANN. § 52:18A-89.4 (authorizing director to support shareholder resolutions regarding equal opportunity in Northern Ireland); R.I. GEN. LAWS § 35-10-12 (requiring State Investment Commission through shareholder resolutions to encourage corporations doing business in South Africa to adopt certain employment practices); R.I. GEN. LAWS § 35-10-14(c) (requiring treasurer to support shareholder resolutions for compliance with the MacBride Principles).

⁵⁶ See R.I. GEN. LAWS § 35-10-12.

⁵⁷ See Romano, *supra* note 26, at 831-32. Romano notes that, unlike private plans, public plans do not usually defer to the judgement of their external investment managers in proxy votes. See *id.*

⁵⁸ See *Partial Checklist of Shareholder Resolutions*, CORP. SOC. ISSUES REP., Aug.-Sept. 1999, at 23-24; *Partial Checklist of Shareholder Resolutions*, CORP. SOC. ISSUES REP., Oct. 1999, at 15.

⁵⁹ See Marlene Givant Star, *Burma is Investors' Issue; Social Coalition May Sue to Get Resolutions on Proxies*, PENSIONS AND INVESTMENTS, May 29, 1995, at 37.

conduct regarding human rights, without identifying a specific target country.⁶⁰ As fiduciaries of a public pension fund, the investment board or treasurer may have an obligation to vote in shareholder resolutions.⁶¹

State and municipal legislative bodies, ultimately responsible for the pension fund, generally delegate the day to day investment authority to a board or commission.⁶² Because these boards have authority to make investment decisions not explicitly mandated by a legislative act, their actions might also implicate foreign affairs.⁶³ As global investors, pension fund boards make decisions about investing in foreign countries based on investment risk.⁶⁴ These decisions, whether to reject, divest or reduce investment in a given country, could be viewed as commenting on a foreign nation's policies.⁶⁵ An investment decision may be based on a foreign country's internal management of its affairs—i.e., its political stability, its regulation of

⁶⁰ See Marlene Givant Star, *PepsiCo Plans to Divest Stake in Burmese Operation*, PENSIONS AND INVESTMENTS, May 13, 1996, at 8. The code would require a company to consider investment or withdrawal from countries "with a pattern of ongoing, systematic violation of human rights where a government is illegitimate or where there is a call by human rights advocates, pro-democracy organizations or legitimately elected representatives for economic sanctions against their country." See *id.*

⁶¹ See generally Mark E. Brossman & John F. Cinque, *Proxy Voting and Shareholder Activism: The Emerging Issues*, EMPLOYEE BENEFITS J., June 1996, at 5. Brossman and Cinque outline the Department of Labor's position that it is a fiduciary duty under ERISA of employee benefit plan trustees to vote shareholder proxies, unless that duty has been explicitly or implicitly delegated to investment managers. See *id.*, at 5-6. Although public pension funds are not subject to ERISA, the trustees of public plans are required to act as fiduciaries. See *id.* at 6.

⁶² See, e.g., R. I. GEN. LAWS § 35-10-6 (1997) (delegating investment authority to the state investment commission).

⁶³ See, e.g., INSTITUTIONAL INVESTOR, *CALPERS Pushes Shareholder Values in Asia*, EMERGING MARKETS WEEK, May 10, 1999, at 1 (outlining recent efforts of the California Public Employees Retirement System to promote stronger corporate governance policies in Asian companies).

⁶⁴ See, e.g., Steve Hemmerick, *Expecting Comeback: Plans Bet on Recovery; CALPERS, Wisconsin Among Funds Banking on Quick Resurgence in Asian Economies*, PENSIONS AND INVESTMENTS, Mar. 22, 1999, at 1 (noting that one investment manager indicated that countries such as Indonesia, South Vietnam, China and Malaysia were bad investment risks); *Funds Trim Allocation to Russia*, PENSIONS AND INVESTMENTS, Aug. 24, 1998, at 10 (noting general market reduction in Russian holdings).

⁶⁵ See, e.g., Joel Chernoff, *Many Questions: CalPERS Looks at Social Issues in Emerging Markets*, PENSIONS AND INVESTMENTS, Jan. 10, 2000, at 25. The California Public Employees Retirement System ("CalPERS"), the largest U.S. public pension fund, creates an investment list of acceptable countries based in part on a "civil society criteria" that includes democratization and human rights factors. See *id.* CalPERS has considered hiring a political risk consultant to examine the countries in which they invest. See *id.*

its own markets, or its debt practices.⁶⁶ In addition, public pension funds can use their economic power to effectuate policy changes regarding financial practices in foreign countries.⁶⁷

For nearly two decades states and municipalities have used their economic power to express their citizens' concerns about the conduct of foreign nations.⁶⁸ At the same time, state and municipal pension funds have become more diversified investors, increasing both investments in corporations operating internationally and direct investment abroad.⁶⁹ The growing role of states and municipalities as global investors makes them more desirable targets to advance social investing goals and makes it more likely that even non-socially motivated investment decisions could be viewed as impacting on foreign affairs.⁷⁰

II. THE DORMANT FOREIGN AFFAIRS POWER: SUPREME COURT AND LOWER COURT DECISIONS

State and municipal social investment restrictions targeting foreign countries pose several constitutional questions.⁷¹ First, these restrictions could be considered an infringement upon the federal government's exclusive power over foreign affairs—the Dormant Foreign

⁶⁶ See Chernoff, *supra* note 65, at 25; Hemmerick, *supra* note 64, at 1.

⁶⁷ See, e.g., Laura Mahoney, *CALPERS, United Kingdom Firm Form International Corporate Governance Alliance*, BNA PENSION & BENEFITS REPORTER, Nov. 30, 1998, at 2738 (reporting that CalPERS has been actively seeking better corporate governance structure in foreign countries); Laura Mahoney, *CalPERS Predicts Major Disruptions in International Investment Markets*, BNA PENSION & BENEFITS REPORTER, June 21, 1999, at 1658 (reporting that CalPERS also sought to pressure foreign companies into Y2K compliance measures).

⁶⁸ See, e.g., Romano, *supra* note 26, at 795, 806–07 (noting that political pressure on public pension funds, particularly from unions, affects investment decisions).

⁶⁹ See Walker, *supra* note 31, at 37 (citing an estimate that the international investment by public pension funds would grow from 2.6 percent to five percent of assets from 1991 to 1994).

⁷⁰ See Romano, *supra* note 26, at 806–07.

⁷¹ See, e.g., *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 55–56, *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2290–91 (2000) (declining to comment on pension fund investment restrictions); *Board of Trs. v. Mayor of Baltimore*, 562 A.2d at 757 (upholding the constitutionality of pension fund restrictions on South Africa investments); see also LAURENCE TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 6–24 at 1153–54 (3d ed. 2000) (discussing state investment restrictions and the Dormant Foreign Affairs Power); Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 400–05 (1999) (same); Andrea McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMPLE L. REV. 813, 817–47 (1989) (same).

Affairs Power—an implied constitutional power.⁷² Second, social investment restrictions that impact foreign affairs may encroach upon Congress's exclusive power to regulate foreign commerce, an enumerated power in the United States Constitution.⁷³ Finally, sanctions enacted by Congress, as in the case of South Africa and Burma, could preempt state and local actions.⁷⁴

A. Supreme Court Decisions Establishing the Dormant Foreign Affairs Power

The Supreme Court has inferred the Dormant Foreign Affairs Doctrine from the structure of the Constitution, the federal government's enumerated powers over foreign affairs and past Court statements about the exclusive role of the federal government in conducting United States foreign policy.⁷⁵ A state or municipality is precluded

⁷² See *Price & Hannah*, *supra* note 6, at 490–94 (arguing that purchasing and divestment laws should both be invalid under the Dormant Foreign Affairs Power). *But see Board of Tis.*, 562 A.2d at 749 (holding city divestment ordinance constitutional under the Dormant Foreign Affairs Power).

⁷³ See U.S. CONST. art. I, § 8, cl. 3 (stating Congress may “regulate Commerce with foreign Nations”). As an enumerated power, the regulation of foreign commerce is exclusive to the federal government, and, even in the absence of direct congressional action, states are not allowed to regulate foreign commerce. See *TRIBE*, *supra* note 71, § 6–24, at 1150–51. The Foreign Commerce Clause would be violated if social investment restrictions on companies doing business abroad are deemed regulation of foreign commerce and not a proprietary ordering of state affairs with no significant effect on foreign affairs. See, e.g., *Barclays Bank, PLC v. Franchise Tax Bd.*, 512 U.S. 298, 310 (1994) (explaining that that Foreign Commerce Clause does not preclude a non-discriminatory state tax formula that included income earned overseas); *TRIBE*, *supra* note 71, § 6–24 at 1150–52 (explaining that states are allowed to regulate foreign commerce, such as foreign ships in their ports, so long as there is no significant affect on foreign commerce).

⁷⁴ See *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288, 2302 (2000); *Natsios*, 181 F.3d at 74–75; *Board of Tis.*, 562 A.2d at 740–41; *TRIBE*, *supra* note 71, § 6–28, at 1172–73. Under the Supremacy Clause of the United States Constitution, if the federal government has spoken or has the power to speak on the issue, then federal action may preempt any state action relating to the issue. See U.S. CONST. art. VI, cl. 2; see also *TRIBE*, *supra* note 71, § 6–28, at 1172–73 (explaining preemption analysis).

⁷⁵ See *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968); *Clark v. Allen*, 331 U.S. 503, 516–17 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 62–64 (1941). Although the Court has not explicitly delineated the roots of the Dormant Foreign Affairs Power, most commentators argue that this power is implicitly reserved to the federal government from the structure, text and history of the Constitution. See, e.g., *Denning & McCall*, *supra* note 4, at 317–24 (describing origins of the Dormant Foreign Affairs Power); *Lewis*, *supra* note 6, at 508–09 (arguing that the Dormant Foreign Affairs Power predates the Constitution as a characteristic of sovereignty); *Price & Hannah*, *supra* note 6, at 455 (acknowledging, however, that the “constitutional source of [the Dormant Foreign Affairs Power] is uncertain”). *But see HENKIN*, *supra* note 7, at 162 (“Until 1968 there was no hint of such a principle [as the Dormant Foreign Affairs Power].”); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1641–42 (1997) (arguing that the Dormant Foreign Affairs

from acting, not because the federal government has acted, but because the state or local government is encroaching on a power exclusively held by the federal government.⁷⁶

Although the Dormant Foreign Affairs Power is an implied restriction on state action, the Constitution does restrict explicitly some state activity in the foreign relations area.⁷⁷ Article I of the Constitution forbids a state from entering "into any Treaty, Alliance, or Confederation" or to "grant Letters of Marque and Reprisal."⁷⁸ States may not "without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws."⁷⁹ States are also forbidden, without congressional consent, from entering "into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."⁸⁰ States must also respect treaties of the United States as the supreme law of the land.⁸¹

The Constitution does not expressly grant power over foreign affairs to the federal government, yet the Supreme Court has recognized that the federal government has an exclusive power over foreign affairs.⁸² For example, in 1937, in *United States v. Belmont*, the Su-

Power is a federal common law doctrine and not supported by the text of the Constitution); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 346 (1999) (arguing that the Dormant Foreign Affairs Power has little textual basis in the Constitution, except perhaps in the Constitution's presidential powers).

⁷⁶ See HENKIN, *supra* note 7, at 163-64.

⁷⁷ See U.S. CONST. art. I, § 10, cl. 1, 2, 3, art. VI cl. 2.

⁷⁸ U.S. CONST. art. I, § 10, cl. 1.

⁷⁹ *Id.* at cl. 2.

⁸⁰ *Id.* at cl. 3.

⁸¹ See U.S. CONST. art. VI, cl. 2.

⁸² See *Perez v. Brownwell*, 356 U.S. 44, 57 (1958). In *Perez*, the Supreme Court held that despite the lack of specific enumeration in the Constitution, there is no doubt as to Congress's power over foreign affairs. See *id.* at 57. The power is "indispensable" to a sovereign nation and its ability to interact with other nations. See *id.*; see also Ramsey, *supra* note 75, at 351-56 (describing history of Supreme Court decisions on the federal government's exclusive power over foreign affairs).

In some cases, however, states may make agreements with foreign governments without the consent of Congress "so long as they do not impinge upon the authority or the foreign relations of the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 reporter's note 9. As the *Natsios* Court acknowledged, Massachusetts alone maintains twenty-three bilateral trade agreements with sub-national foreign governments and trade organizations. See 181 F.3d at 50. Many states have sister state agreements with foreign sub-national governments, have trade offices in other countries and conduct trade missions overseas. See FRY, *supra* note 35, at 68-70, 73.

preme Court stated that power over foreign affairs is vested exclusively in the federal government, and ruled that a decision by the New York Court of Appeals was preempted by federal action—a diplomatic agreement between the executive branch and the Soviet Union.⁸³ Although the *Belmont* Court recognized an exclusive federal power over foreign affairs, the Court decided that case, and most subsequent cases, on preemption grounds.⁸⁴

Ten years later, the Supreme Court revisited the Dormant Foreign Affairs Power in *Clark v. Allen*.⁸⁵ In that case, the Court ruled that a California statute governing the probate disposition of assets did not interfere with the federal government's exclusive power to conduct foreign affairs.⁸⁶ In *Clark*, six California residents, intestate heirs, claimed that German nationals bequeathed property from a decedent were ineligible heirs under California law.⁸⁷ The statute dictated that the rights of non-resident aliens to take property depended on the existence of reciprocal rights of citizens of the United States to take property of persons dying in foreign countries.⁸⁸ The California residents argued that the will should be voided because the German nationals were ineligible heirs under California law since Germany did not grant reciprocal rights to take property to United States residents.⁸⁹

The *Clark* Court held that a 1923 treaty between the United States and Germany did not preempt state law with regard to personal

⁸³ See 301 U.S. 324, 330, 331–32 (1937) (“Governmental power over external affairs is not distributed, but is vested exclusively in the national government.”); see also *United States v. Pink*, 315 U.S. 203, 242 (1942) (“In our dealings with the outside world, the United States speaks with one voice.”) (Frankfurter, J., concurring); *Chae Chan Ping v. United States*, 130 U.S. 581, 605 (1889) (“The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, negotiations and intercourse with other nations; all of which are forbidden to state governments.”).

⁸⁴ See 301 U.S. at 330–32; see also *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2294 n.8, 2302 (2000) (ruling only on preemption issue and declining to pass on the Dormant Foreign Affairs Power). The Supreme Court's decision in *Crosby* is in keeping with past Court decisions that couple narrow holdings with broad dicta about state and federal relations in foreign affairs. See generally *Pink*, 315 U.S. at 234 (holding diplomatic agreement preempts state law); *Hines*, 312 U.S. at 62 (deciding case on preemption grounds, not an exclusive federal power over foreign affairs).

⁸⁵ See 331 U.S. at 517–18.

⁸⁶ See *id.* at 517–18.

⁸⁷ See *id.* at 505–06.

⁸⁸ See *id.* at 505 n.1.

⁸⁹ See *id.* at 505–06. The California residents sought to take the property as intestate heirs. See *id.*

property.⁹⁰ The Court also held that the California statute, as applied to personal property, was not an encroachment by the state into an exclusive federal power over foreign affairs because inheritance is an area of traditional local concern.⁹¹ Although the Court acknowledged that many state actions could have an effect on foreign countries and that California's actions "will have some incidental or indirect effect in foreign countries," the Court found that the state had not negotiated with foreign nations or entered into compacts with foreign nations in violation of the Constitution.⁹² The *Clark* Court did not explain what state action, except those actions explicitly forbidden by the Constitution or preempted by federal law, would be unconstitutional.⁹³

The Supreme Court has only once struck down a state law for impermissibly interfering with the federal government's dormant power over foreign affairs.⁹⁴ In 1968, in *Zschernig v. Miller*, the Supreme Court overruled a decision by the Oregon Supreme Court relating to the treatment of non-resident aliens in probate as a violation of the Dormant Foreign Affairs Power.⁹⁵ In *Zschernig*, the decedent, a resident of Oregon, died intestate.⁹⁶ The decedent's only potential heirs lived in East Germany.⁹⁷ At the time of the decedent's death, Oregon law required that the non-resident alien's country confer the same rights to United States citizens inheriting property as the United States confers to the alien citizens of that country.⁹⁸ The Oregon decedent's sole heirs, residents of East Germany, challenged the state law because they had been denied inheritance under the law.⁹⁹ The State of Oregon argued that the estate should escheat because the heirs did not meet Oregon's alien reciprocity requirements.¹⁰⁰ The Oregon Supreme Court, following *Clark*, held that state law governed the inheritance of personal property, and, therefore, the heirs could

⁹⁰ See *Clark*, 331 U.S. at 516.

⁹¹ See *id.* at 516-18.

⁹² See *id.* at 517.

⁹³ See *id.*

⁹⁴ See *Zschernig*, 389 U.S. at 441.

⁹⁵ See *id.*

⁹⁶ See *id.* at 430.

⁹⁷ See *id.*

⁹⁸ See *id.* at 430-31.

⁹⁹ See *Zschernig*, 389 U.S. at 430.

¹⁰⁰ See *id.* at 430-31.

not take the property because East Germany did not grant reciprocal rights to American citizens.¹⁰¹

The *Zschernig* Court distinguished *Clark*, finding that state judges had not simply read foreign nations' laws, but had inquired extensively into the nature of the foreign nations' governments in a manner that demonstrated a bias against communist countries.¹⁰² This judicial criticism intruded into the federal government's foreign affairs power because "it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."¹⁰³ Therefore, Oregon's actions had more than an incidental effect on foreign affairs.¹⁰⁴

In assessing whether a state action has more than an incidental effect on foreign affairs, the *Zschernig* Court considered four factors.¹⁰⁵ First, the Court examined whether the law required a state government to inquire extensively into the nature of foreign governments.¹⁰⁶ Second, the Court considered whether the state action indicated a bias against certain countries—in other words, led to public criticism of foreign nations.¹⁰⁷ By publicly commenting on the nature of that country, the Court reasoned that those affected countries might take offense, an offense that could hurt the federal government in subsequent relations with that country.¹⁰⁸ Third, the Court con-

¹⁰¹ See *id.* at 431. The *Zschernig* Court distinguished *Clark* based on the content of judicial commentary arising from implementation of the Oregon statute. See *id.* at 433–34. In contrast to *Clark*, the *Zschernig* Court explicitly reviewed how the statute was being applied and catalogued judicial findings and comments—concluding that the state was making political judgements about specific foreign nations. See *id.* at 435–40.

¹⁰² See *id.*

¹⁰³ *Id.* at 441. The *Zschernig* Court did not explain how the state action directly impacted foreign relations. See *id.* The Court seemed to offer three possibilities: the state judiciary should not be commenting on the governments of foreign nations, the judicial criticism treated foreign countries unequally because of their governmental structure and/or policies or the foreign government could be offended by wrongs to its citizens. See *id.* The Court allowed that state courts routinely must interpret foreign laws and have jurisdiction over foreign citizens. See *id.* at 433. The *Zschernig* Court could have decided the case on preemption, by reinterpreting the 1923 Treaty to apply to personal property, as the Department of Justice requested, or found that the application of the statute was invalid, but the statute was not impermissible. See *id.* at 434. The Court appears to have wanted to make a broader statement about the treatment of citizens of communist countries. See *id.* at 435.

¹⁰⁴ See *Zschernig*, 389 U.S. at 434–35.

¹⁰⁵ See *id.* at 433–41.

¹⁰⁶ See *id.* at 433–34.

¹⁰⁷ See *id.* at 435.

¹⁰⁸ See *id.* at 441.

dered if other countries had protested the action.¹⁰⁹ This third factor served as evidence that the state action affected foreign relations in a way that could hamper the federal government's future relations with a foreign country.¹¹⁰ Fourth, the Court assessed the likelihood that other states would act in a similar manner, increasing the probability that the United States government would be hampered in the area of foreign affairs by the state action.¹¹¹

The Court refused to consider the Department of Justice's statements that the law had no effect on the nation's ability to conduct foreign affairs, reasoning that the state action could have an effect on foreign governments that the Executive and, by implication, Congress had failed to appreciate.¹¹² For that reason, the wishes of the branches of government entrusted to formulate foreign policy were dismissed.¹¹³ Justice Stewart, concurring, took an even less deferential stance towards Executive branch statements supporting the Oregon law, stating that "[t]oday, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may."¹¹⁴ In contrast, Justice Harlan, concurring only in the judgment, criticized the *Zschernig* Court for not deciding the case on the narrower preemption grounds.¹¹⁵ He further argued that where there is an area of traditional state competence, such as probate, and there is no conflicting federal policy or express provision of the Constitution, the state law should be constitutional on its face.¹¹⁶

B. *Post-Zschernig* Supreme Court Decisions Concerning State Action and Foreign Affairs

Since *Zschernig*, the Supreme Court has not invoked the Dormant Foreign Affairs Power to invalidate a state or local law.¹¹⁷ The Court has addressed, however, claims that state laws impermissibly interfere

¹⁰⁹ See *Zschernig*, 389 U.S. at 433-34.

¹¹⁰ See *id.* at 440.

¹¹¹ See *id.* at 433-34.

¹¹² See *id.* at 434-35, 440.

¹¹³ See *id.*

¹¹⁴ See *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring).

¹¹⁵ See *id.* at 443 (Harlan, J., concurring in the judgment).

¹¹⁶ See *id.* at 458-59 (Harlan, J., concurring in the judgment).

¹¹⁷ See, e.g., *Crosby*, 120 S. Ct. at 2294 n.8 (declining to pass on lower court's dormant foreign affairs analysis); *Barclays*, 512 U.S. at 320-31 (declining to discuss a constitutional argument based on *Zschernig*); HENKIN, *supra* note 7, at 165 (noting that the Supreme Court has not decided a case using the Dormant Foreign Affairs Power since *Zschernig*).

with the explicit federal power over foreign commerce.¹¹⁸ The Court has also ruled that federal sanctions have preempted state action against foreign nations.¹¹⁹

In 1994, in *Barclays Bank, PLC v. Franchise Tax Board*, the Supreme Court held that a California formula for taxing corporations to include worldwide revenue did not violate the Foreign Commerce Clause.¹²⁰ In that case, two international corporations with operations in California argued that the state tax formula, because it had the effect of taxing income from operations overseas and not just income earned from California operations, impaired the federal government's ability to "speak with one voice" in foreign commerce.¹²¹ They further noted that foreign governments had protested this tax.¹²²

In evaluating whether a state action impacted the "one voice" standard, the *Barclays* Court considered whether Congress has implicitly or explicitly permitted state action, thereby indicating that state practices do not impair federal uniformity.¹²³ The Court stated that Congress, through inaction, could "passively indicate that certain state practices do not impair federal uniformity in an area where federal uniformity is essential."¹²⁴ Because the Court had considered a similar tax challenge eleven years before, and Congress had taken no preemptive action on the matter, the Court implicitly reasoned that the California tax policy did not offend uniformity of federal policy.¹²⁵

The Court further noted that Congress was aware that foreign governments disliked the tax formula, that Congress had studied the issues of state taxation of multinational businesses and had failed to enact several bills prohibiting the California formula.¹²⁶ Because Congress had not acted and instead indicated a "willingness to tolerate" the state action, the Court declined to usurp Congress's decision-making authority on a foreign policy matter—an area that the Constitution delegated to particular expertise of Congress and the Executive

¹¹⁸ See *Barclays*, 512 U.S. at 320–31.

¹¹⁹ See *Crosby*, 120 S. Ct. at 2302.

¹²⁰ See 512 U.S. at 330–31.

¹²¹ See *id.* at 302–03.

¹²² See *id.* at 324 n.22.

¹²³ See *id.* at 323.

¹²⁴ *Id.* at 323 (internal quotations omitted). Both Justice Blackmun and Justice Scalia disagree that the Court may infer congressional permission from congressional inaction. See *id.* at 331 (Blackmun, J., concurring), 331–32 (Scalia, J., concurring).

¹²⁵ See *Barclays*, 512 U.S. at 324.

¹²⁶ See *id.* at 324–25.

Branch.¹²⁷ Although the Court acknowledged the petitioner's argument that California's tax formula was "likely to provoke retaliatory action by foreign governments," the Court found that the complaint was "directed to the wrong forum," intimating that the complainants should have sought legislative redress.¹²⁸ The Court also refused to accept that Executive Branch statements against the tax indicated an impairment of uniformity in foreign policy—stating that the Commerce Clause is an enumerated power of Congress.¹²⁹ The Court concluded, "the Constitution does not make the judiciary the overseer of our government."¹³⁰ Holding that the tax formula was otherwise legal, the Court deferred to Congress to preempt the law if it impaired United States foreign policy.¹³¹

In *Crosby v. National Foreign Trade Council*, the Supreme Court held that the Massachusetts Burma Law, prohibiting state business with companies operating in Burma, was preempted by federal sanctions against that country.¹³² Although the lower court had invalidated the state law as a violation of the Dormant Foreign Affairs Power, the Foreign Commerce Clause, as well as on preemption grounds, the Court reached only the preemption issue—holding that the state law was preempted because it interfered with the President's ability to implement federal law in the manner that Congress directed.¹³³ Under the federal Burma sanctions, Congress had delegated significant discretionary power to the President to devise multilateral strategies towards Burma.¹³⁴

The Court rejected petitioner's argument that *Barclays* mandated that Congress must explicitly preempt state action touching on foreign affairs when Congress was aware of the state action.¹³⁵ Noting

¹²⁷ See *id.* at 327–28.

¹²⁸ *Id.* The Court stated: "The judiciary is not vested with the power to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'" *Id.* at 327–28.

¹²⁹ See *id.* at 329. The Court quoted Justice Scalia, "[the President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress." See *id.* (quoting *Intl Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring)).

¹³⁰ *Barclays*, 512 U.S. at 330–31.

¹³¹ See *id.* at 330–31. "[W]e leave it to Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy." *Id.* at 331.

¹³² See 120 S. Ct. at 2302.

¹³³ See *id.* at 2294 n.8, 2302.

¹³⁴ See *id.* at 2292.

¹³⁵ See *id.* at 2301–02.

that congressional silence is ambiguous, the Court found that Congress's inaction towards state sanctions could be read as an assumption that they were implicitly preempted and not congressional approval of state action.¹³⁶ Furthermore, the *Crosby* Court noted that the Supremacy Clause requires a finding of preemption regardless of whether Congress acknowledges a conflict of state and federal law.¹³⁷ The *Crosby* Court also sought to limit a reading of *Barclays* that would dismiss the protests of foreign governments.¹³⁸ The Court found foreign objections to the Massachusetts Burma Law important because federal sanctions required the President to work with foreign nations to implement congressional goals.¹³⁹

C. Lower Court Interpretations of the Dormant Foreign Affairs Power

In contrast to the Supreme Court's reticence to decide cases on the basis of the Dormant Foreign Affairs Power, lower courts have grappled with the *Zschemig* prohibition against state and local action that has more than an incidental effect on foreign relations.¹⁴⁰ Lower courts have reached contrary conclusions on whether state or municipal actions violate the Dormant Foreign Affairs Power.¹⁴¹ Whereas some of the state laws reviewed targeted specific countries, either facially or by application, others mandated a preference for American products over foreign products.¹⁴²

¹³⁶ See *id.*

¹³⁷ See 120 S. Ct. at 2302.

¹³⁸ See *id.* at 2300-01.

¹³⁹ See *id.*

¹⁴⁰ See, e.g., *Natsios*, 181 F.3d at 51-52 (state purchasing law); *Board of Tis.*, 562 A.2d at 746 (city divestment ordinance).

¹⁴¹ Compare *Natsios*, 181 F.3d at 52 (unconstitutional), and *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1380 (D. N.M. 1980) (unconstitutional), and *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 305 (Ill. 1986) (unconstitutional), and *Bethlehem Steel Corp. v. Bd. of Commissioners*, 276 Cal. App. 2d 221, 229 (Cal. App. 2d 1969) (unconstitutional), with *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990) (constitutional), and *Board of Tis.*, 562 A.2d at 749 (constitutional), and *K.S.B. Technical Sales Corp. v. New Jersey Dist. Water Supply Comm'n.* 381 A.2d 774, 784 (N.J. 1977) (constitutional).

¹⁴² See, e.g., *Natsios*, 181 F.3d at 45 (statute facially targeting Burma); *Board of Tis.*, 562 A.2d at 724 (South Africa); *Springfield Rare Coin Galleries*, 503 N.E.2d at 302 (South Africa). Decisions where actions had the effect of targeting a single country include *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1368 (D. N.M. 1980) (Iran) and *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963, 964 (N.Y. 1977) (South Africa). Decisions addressing laws of general application include *Bethlehem Steel*, 276 Cal. App. 2d at 223-24 and *Trojan Technologies*, 916 F.2d at 904; *K.S.B. Technical Sales*, 381 A.2d at 776.

In *Crosby*, the Supreme Court left standing, as dicta, the First Circuit's 1999 discussion of the Dormant Foreign Affairs Power in *National Foreign Trade Council v. Natsios*.¹⁴³ The First Circuit upheld a lower court decision invalidating the Massachusetts Burma Law as a violation of the Dormant Foreign Affairs Power.¹⁴⁴ The First Circuit applied the *Zschernig* threshold test—whether the state action has “more than an incidental or indirect effect on foreign relations”—and rejected any balancing test based on federal and state interests.¹⁴⁵

To determine whether the law had more than an incidental effect, the court looked to the intended and potential impact of the law.¹⁴⁶ The court found that the only purpose of the law was to change Burma's human rights policies.¹⁴⁷ The court also concluded that the law would have a potential effect on foreign affairs because the state government annually purchases approximately \$2 billion of goods and services and the state's actions might cause other state and local governments to follow suit.¹⁴⁸ Like the *Zschernig* Court, the *Natsios* court did not view Massachusetts' actions in isolation, but considered the possible impact on foreign affairs should other state and local governments enact similar laws.¹⁴⁹ The court also observed that foreign countries had protested the law and that the law differed from federal law in numerous ways, “raising the prospect of embarrassment for the country.”¹⁵⁰

Although acknowledging that the Supreme Court has neither subsequently invoked *Zschernig* to invalidate a state law nor clarified its holding in *Zschernig*, the First Circuit listed instances where the Supreme Court cited *Zschernig* for general propositions about federal

¹⁴³ See 120 S. Ct. at 2294 n.8.

¹⁴⁴ See 181 F.3d at 52. In *National Foreign Trade Council v. Baker*, the district court held that the Massachusetts Burma Law was unconstitutional under the Dormant Foreign Affairs Clause. See 26 F. Supp. 2d 287, 292 (D. Mass. 1998). The district court held that the state law was not preempted by federal action because there was not sufficient conflict between the state and federal laws. See *id.* at 293. The district court declined to discuss the Foreign Commerce Clause challenge. See *id.*

¹⁴⁵ See *Natsios*, 181 F.3d at 52, 53.

¹⁴⁶ See *id.* at 53–54.

¹⁴⁷ See *id.* at 54.

¹⁴⁸ See *id.* at 53.

¹⁴⁹ See *id.* at 53–54 (noting that the United States has 39,000 non-federal governments).

¹⁵⁰ See *Natsios*, 181 F.3d at 54. The First Circuit did not recognize that in *Zschernig*, Bulgaria was protesting the treatment of its own citizens by a state, unlike the protests directed at the Massachusetts Burma Law by the European Union and the Association of Southeast Nations (ASEAN). See *id.* Here, the targeted country, Burma, did not protest. See *id.*

power over foreign affairs.¹⁵¹ The court similarly declined to entertain arguments about scholarly criticism of the *Zschernig* decision.¹⁵² Second, the First Circuit also refused to interpret *Barclays* as implicitly narrowing the scope of *Zschernig*, despite *Barclays* indication that Congress is the only proper entity to determine whether a state action interferes with foreign affairs.¹⁵³ Although *Barclays* discussed the "speaking with one voice test," common to both the Dormant Foreign Affairs Power and Foreign Commerce Clause the First Circuit found that *Barclays* applied only to the Foreign Commerce Clause.¹⁵⁴ The First Circuit noted that *Barclays* did not consider a law that targeted a single foreign nation or attempted to express foreign policy, but a tax policy applied to all corporations.¹⁵⁵

Other lower court decisions have invalidated state policies that target a single country.¹⁵⁶ In *Tayyari v. New Mexico State University*, the United States District Court for the District of New Mexico held in 1980 that a New Mexico State University prohibition against admitting students whose home country permits the holding of U.S. hostages was an unconstitutional infringement by the state on the federal power to regulate immigration and to conduct foreign affairs.¹⁵⁷ The Regents of New Mexico State University, a public entity, instituted this prohibition in the wake of the hostage crisis between the United States and Iran.¹⁵⁸ Iranian students presented three constitutional challenges: an equal protection claim, a due process claim and a Dormant Foreign Affairs Power claim.¹⁵⁹

The court invalidated the Regents's prohibition, ruling for the Iranian students on both the equal protection and Dormant Foreign

¹⁵¹ See *id.*

¹⁵² See *id.* at 58–59.

¹⁵³ See *Natsios*, 181 F.3d at 58–59.

¹⁵⁴ See *id.* at 59. The *Natsios* Court noted that the parties in *Barclays* cited to *Zschernig* in their briefs and oral arguments, but that the Supreme Court never cited *Zschernig* in its decision. The First Circuit interpreted this to mean that the Supreme Court recognized two distinct doctrinal analyses, the foreign affairs power and the Foreign Commerce Clause. *Barclays* represents the Foreign Commerce Clause analysis. See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *Tayyari*, 495 F. Supp. at 1380; *Springfield Rare Coin Galleries*, 503 N.E.2d at 305.

¹⁵⁷ See 495 F. Supp. at 1380. The Regents' motion did not explicitly name Iran as the offending country, but the court found that the motion was directed against Iran. See *id.* at 1367–68.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* at 1371, 1376. Upon invitation by the district court judge, the United States filed an *amicus curiae* brief on behalf of the Iranian students on the issue of Dormant Foreign Affairs doctrine. See *id.* at 1367.

Affairs questions.¹⁶⁰ In holding that the prohibition violated the Dormant Foreign Affairs Power, the court found great potential for an effect on international relations because the purpose was a political statement against Iran in retaliation for the then-pending hostage crisis.¹⁶¹ The court reasoned that a state entity speaking with anger toward a foreign nation at a time of conflict is different than a private actor because "it is an action cloaked with the officiality of an arm of the government of this state."¹⁶² Therefore, considering the potential for disruption of foreign relations, the court held that the prohibition against Iranian students was unconstitutional because the policy interfered with the federal government's Dormant Foreign Affairs Power.¹⁶³

Similarly, in 1986, in *Springfield Rare Coin Galleries v. Johnson*, the Supreme Court of Illinois held that a state law exempting from taxation all coins but those from South Africa was an unconstitutional infringement on the federal power over foreign affairs.¹⁶⁴ Although states are generally given great deference in tax policy matters, the court recognized constitutional limits to this state power.¹⁶⁵ Citing legislative debate, the court found that the purpose behind the exclusion was "to avoid the appearance of encouraging South African investment."¹⁶⁶ The court further recognized that some state actions might be permissible because they have only an incidental effect on foreign nations, such as an even-handed tax on imported products.¹⁶⁷ Noting that "[t]he line of demarcation between incidental and unconstitutional intrusions into foreign affairs is difficult to draw with absolute precision," the court concluded that because the Illinois act was motivated by disapproval of a single nation's policies, it compromised the ability of the federal government to speak in one voice and to develop foreign policy options toward South Africa.¹⁶⁸

¹⁶⁰ See *id.* at 1375, 1380.

¹⁶¹ See *id.* at 1379-80. To buttress its reasoning that the Regents' action invaded the exclusive federal power over foreign affairs, the court noted that the power to regulate immigration "rests exclusively with the federal government" and is derived from the Constitution. See *id.* at 1376-77. The court, however, concluded that it was the impact on foreign relations that made the action unconstitutional, not that the action touched on immigration. See *id.* at 1378.

¹⁶² *Tayyari*, 495 F. Supp. at 1378.

¹⁶³ See *id.* at 1380.

¹⁶⁴ See 503 N.E.2d at 305.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* at 302.

¹⁶⁷ See *id.* at 306.

¹⁶⁸ See *Springfield Rare Coin Galleries*, 503 N.E.2d at 307.

A state court has also invalidated a state law for violating the Dormant Foreign Affairs Power when it did not target a single foreign nation.¹⁶⁹ In 1969, in *Bethlehem Steel Corp. v. Board of Commissioners*, the California Court of Appeals for the Second District held unconstitutional a California "Buy American" statute that required California governmental entities to use domestic products.¹⁷⁰ The California court interpreted the "Buy American" law as an embargo on foreign products.¹⁷¹ As such, the court found that, under the Dormant Foreign Affairs Power, the law invaded the exclusive federal power over trade policy.¹⁷² The court reasoned that the law was an attempt by the state to "structure national foreign policy to conform to its own domestic policies."¹⁷³ Because the effect of several states trying to create trade policy could present an obstacle to the federal government's ability to maintain national trade policy—similar to the obstacle the Supreme Court found in *Zschernig*—the court reasoned that the California "Buy American" law was impermissible under the Dormant Foreign Affairs Power.¹⁷⁴

Some lower courts have upheld state laws that may touch on foreign affairs as constitutional under the Dormant Foreign Affairs Power.¹⁷⁵ These courts have generally interpreted *Clark* and *Zschernig* to allow some state activity in the foreign affairs area and have sought more evidence that the law has an actual, as opposed to potential, impact on foreign relations.¹⁷⁶

The only case that examined whether the foreign affairs doctrine prohibited local divestment laws is the 1989 Maryland Court of Appeals decision *Board of Trustees v. Mayor of Baltimore City*.¹⁷⁷ In *Board of Trustees*, the court held that city ordinances ordering the divestment of city pension funds from companies that do business in South Africa do not violate the Dormant Foreign Affairs Clause.¹⁷⁸ Although the

¹⁶⁹ See *Bethlehem Steel*, 276 Cal. App. 2d at 229.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 225.

¹⁷² See *id.*

¹⁷³ See *id.* at 229.

¹⁷⁴ See *Bethlehem Steel*, 276 Cal. App. 2d at 228–29.

¹⁷⁵ See *Trojan Technologies*, 916 F.2d at 913; *Board of Trs.*, 562 A.2d at 749; *K.S.B. Technical Sales*, 381 A.2d at 784.

¹⁷⁶ See *Trojan Technologies*, 916 F.2d at 913; *Board of Trs.*, 562 A.2d at 749; *K.S.B. Technical Sales*, 381 A.2d at 784.

¹⁷⁷ See 562 A.2d at 744–49.

¹⁷⁸ See *id.* at 749. The city ordinance stated that no pension funds shall remain invested in, or in the future be invested in, banks or financial institutions that make loans to South Africa or Namibia or companies "doing business in or with" those countries. See *id.* at 724.

court acknowledged that state laws might be struck down as unconstitutional—even though not preempted by federal law—if the state policy impairs the federal government's constitutional power to conduct foreign relations, the court noted that *Zschernig* did not represent an absolute ban on a state's ability "to take actions involving substantive judgments about foreign nations."¹⁷⁹ The court observed that, unlike *Zschernig*, the divestment statute required no continuous investigation by a state entity into South Africa's law.¹⁸⁰ Because the pension divestment ordinances were a single statement about a foreign country, the court reasoned that they were beyond the scope of *Zschernig*.¹⁸¹ The court further noted that the city ordinance was a matter of local concern; the city should not invest its funds "in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds."¹⁸²

The court also held that the pension divestment statute, mandating only the sale of stock of a company doing business in South Africa, had a minimal or indirect effect on foreign countries and had no "immediate effect" on the United States' foreign relations with South Africa.¹⁸³ The court, distinguishing the city ordinances from other cases where an effect on foreign relations was found, noted that the city was structuring its own financial affairs and was not curtailing the rights of South Africa, its citizens or any foreign national.¹⁸⁴ For these reasons, the court reasoned, the effect of the ordinances was only tangential and had a far smaller impact on foreign affairs than the cases sought to be distinguished.¹⁸⁵

Other courts have also upheld state laws under the foreign affairs power because they determined that the law has only an incidental effect on foreign affairs.¹⁸⁶ In 1990, in *Trojan Technologies, Inc. v. Pennsylvania*, the United States Court of Appeals for the Third Circuit held that a Pennsylvania law requiring public agencies to use steel produced in the United States did not violate the Constitution.¹⁸⁷ In hold-

¹⁷⁹ See *id.* at 744, 746.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *Board of Trs.*, 562 A.2d at 744, 746.

¹⁸³ See *id.* at 747 (quoting Note, *State and Municipal Governments React Against the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 574 (1985)).

¹⁸⁴ See *id.* at 748.

¹⁸⁵ See *id.*

¹⁸⁶ See *Trojan Technologies*, 916 F.2d at 913; *K.S.B. Technical Sales*, 381 A.2d at 783-84.

¹⁸⁷ See 916 F.2d at 913. The law was challenged on preemption, Foreign Commerce Clause and the Dormant Foreign Affairs Power grounds. See *id.* at 904.

ing that the law did not violate the federal government's foreign affairs power, the Third Circuit stated that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional," but an act that has only an incidental effect is not.¹⁸⁸ The court distinguished the statute from the facts in *Zschernig*, noting that the law neither facially nor by effect allowed state administrative or court officials to comment on or base their decisions on the conduct of foreign regimes; the statute required that all foreign steel be treated the same.¹⁸⁹ The court further reasoned that the mere possibility that the restriction might become a topic of international dispute was not sufficient to invalidate the statute, especially because Congress was aware of these state restrictions and had not preempted them.¹⁹⁰ Therefore, invalidation would amount to a "judicial redirection of established foreign trade policy—a quite inappropriate exercise of the judicial power."¹⁹¹

Similarly, in 1977, in *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*, the Supreme Court of New Jersey upheld a state "Buy American" law as permissible under the foreign affairs power.¹⁹² Because the New Jersey law did not single out foreign nations for their political ideologies and the law was not motivated by a country's particular actions, the court held that *Zschernig* did not preclude the New Jersey "Buy American" law.¹⁹³ The court noted, however, that "if refined inquiries into foreign ideologies entered into the decision to apply or not to apply the condition, there would, of course, be little difficulty in finding a constitutional infirmity of the type condemned in *Zschernig*."¹⁹⁴ The court explicitly rejected the reasoning of *Bethlehem Steel* stating that *Zschernig* and *Clark* permit some state action that impacts foreign affairs if it does not have a demonstrable impact on foreign relations.¹⁹⁵

¹⁸⁸ *See id.* at 913. In using the term "actual conduct," the Third Circuit appears to take a narrower approach to the issue of incidental effect, limiting the ability of a party to argue that if there is any potential for negative foreign reactions the state action would be unconstitutional. *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.* at 914.

¹⁹² *See* 381 A.2d at 789. The New Jersey Supreme Court also held that the law was not preempted by the General Agreement on Tariffs and Trade and was not prohibited under the Commerce Clause. *See id.*

¹⁹³ *See id.* at 783–84.

¹⁹⁴ *Id.* at 784.

¹⁹⁵ *See id.*

One lower court decision failed to reach majority consensus on the issue of the constitutionality of a law under the Dormant Foreign Affairs Power.¹⁹⁶ In 1977, in *New York Times Co. v. City of New York Commission on Human Rights*, the New York Court of Appeals held that advertisements for employment in South Africa appearing in the *New York Times* were not a violation of New York City anti-discrimination laws.¹⁹⁷ The *New York Times* had appealed a ruling by the City of New York Commission on Human Rights (the "Commission") that an advertisement for employment in South Africa violated a city ordinance against discrimination because of South Africa's racially discriminatory employment laws.¹⁹⁸

Three judges agreed that the Commission's ruling sought to impose an economic boycott of the South African government and, therefore, was an impermissible encroachment of the federal government's foreign affairs power that potentially could embarrass the nation's foreign policy if other localities acted similarly.¹⁹⁹ The dissent, in contrast, reasoned that the foreign affairs doctrine only prevented state courts "from inquiry into the validity of acts of a foreign government done within its own territory."²⁰⁰ The dissent noted that the Commission was neither engaged in an economic boycott nor determining the rights of South Africans in this country and, in the absence of a federal policy on point, New York was not required to acquiesce to the discrimination of South Africa when done in the United States.²⁰¹

III. INTERPRETATIONS OF THE DORMANT FOREIGN AFFAIRS POWER AND ITS APPLICATION TO STATE AND LOCAL INVESTMENT RESTRICTIONS IMPACTING FOREIGN NATIONS

The foreign affairs power, as articulated by the Supreme Court of the United States in *Zschernig*, represents a barrier to state and municipal actions that implicate foreign affairs.²⁰² Where exactly this bar-

¹⁹⁶ See *New York Times*, 361 N.E.2d at 969 (Jones, J., concurring).

¹⁹⁷ See *id.* at 967-68.

¹⁹⁸ See *id.* at 965-66.

¹⁹⁹ See *id.* at 968. Three judges joined the majority decision. Two judges concurred with the majority with respect to the definition of discriminatory expression but failed to reach the foreign affairs doctrine issue. Two judges dissented in entirety. See *id.* at 973.

²⁰⁰ See *id.* at 972 (Fuchsberg, J., dissenting).

²⁰¹ See *New York Times*, 361 N.E.2d at 972-73 (Fuchsberg, J., dissenting).

²⁰² See *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

rier lies, however, is uncertain.²⁰³ The doctrine does not present a clear standard by which states and municipalities can determine the constitutionality of their actions.²⁰⁴ As states and municipalities become more like any other major United States economic actor, i.e., a global market participant, the need for a clear standard becomes more pressing.²⁰⁵

Although the Supreme Court has not spoken on this issue since *Zschernig* was decided in 1968, the majority of lower court cases have followed *Zschernig* closely, invalidating laws, in particular, that target specific nations.²⁰⁶ In its broadest articulation, as most courts have interpreted *Zschernig*, the Dormant Foreign Affairs Power would render almost any state and local statements about policies of foreign nations or actions touching on foreign affairs unconstitutional.²⁰⁷ In contrast, if *Zschernig* is more narrowly construed, many of these state actions could be held constitutional.²⁰⁸

A. *The Scope of the Dormant Foreign Affairs Power: Majority and Minority Interpretations*

As a basic principle, there can be little dispute that the federal government should articulate official American foreign policy.²⁰⁹ The foreign affairs doctrine, as expressed in *Zschernig*, however, precludes any state or local action that has more than an incidental or indirect effect on foreign affairs.²¹⁰ Thus, the Dormant Foreign Affairs Power reaches beyond state and local laws that are in conflict with official United States foreign policy to state and local laws and actions that

²⁰³ See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 51–52 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2290–91 (2000); *Board of Trs. v. Mayor of Baltimore*, 562 A.2d 720, 746 (Md. 1987); see also *Loschin & Anderson*, *supra* note 71, at 400 (describing the Dormant Foreign Affairs Power as “amorphous”).

²⁰⁴ Compare *Zschernig*, 389 U.S. at 440–41 (invalidating state probate law), with *Clark v. Allen*, 331 U.S. 503, 517 (1947) (upholding state probate law).

²⁰⁵ See *supra* notes 26–70 and accompanying text (describing how state and local pension funds impact foreign affairs).

²⁰⁶ See *supra* notes 140–201 and accompanying text.

²⁰⁷ See *Zschernig*, 389 U.S. at 434–35; *Natsios*, 181 F.3d at 52; *Tayyari*, 495 F. Supp. at 1380; *Springfield Rare Coin Galleries*, 503 N.E.2d at 305; *Bethlehem Steel*, 276 Cal. App. 2d at 220.

²⁰⁸ See *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d at 913; *Board of Trs.*, 562 A.2d at 749; *K.S.B. Technical Sales*, 381 A.2d at 784.

²⁰⁹ See *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J. concurring); *United States v. Belmont*, 301 U.S. 324, 330–32 (1937).

²¹⁰ See 389 U.S. at 434–35.

have some effect on the United States' ability to conduct foreign affairs.²¹¹

The two main Supreme Court cases in this area, *Zschernig* and to a lesser extent *Clark*, when read together, raise questions about the scope of the foreign affairs power.²¹² Although *Zschernig* did not explicitly overrule *Clark*, *Clark*'s balancing test, weighing the state's interest in areas of traditional local concern against the impact on foreign affairs has been sub silentio overruled by *Zschernig*.²¹³ *Zschernig* implicitly replaces the *Clark* balancing test with a threshold test: any activity, regardless of the state interest in that area, that has more than an incidental effect on foreign affairs is unconstitutional.²¹⁴ If the state activity exceeds some threshold level—i.e., *Zschernig*'s routine reading of foreign laws—the state has violated the Dormant Foreign Affairs Power.²¹⁵

Zschernig does not explain where this threshold level lies, and the Supreme Court, at least under the Dormant Foreign Affairs Power, has not clarified this test.²¹⁶ Lower courts have, however, grappled with this line.²¹⁷ The courts examine two factors: whether the law or action impacts foreign affairs and whether the impact is more than incidental.²¹⁸

First, the lower courts have examined whether the state action touches on foreign affairs.²¹⁹ A majority of courts have concluded that

²¹¹ See *id.* at 434–35, 440–41; see also HENKIN, *supra* note 7, at 163–64 (noting that the Dormant Foreign Affairs Power applies even where Congress has not acted); Ramsey, *supra* note 75, at 352 (noting Court statements about foreign affairs power indicate that “states as a general matter lack power to pass laws with international implications”).

²¹² Compare *Zschernig*, 389 U.S. at 440–41, with *Clark*, 331 U.S. at 517. See also HENKIN, *supra* note 7, at 164 (“[It] may take many years and many cases, to develop the distinctions and draw the lines that will define the *Zschernig* limitations on the states.”).

²¹³ See 389 U.S. at 433–35, 440–41; 331 U.S. at 516–18.

²¹⁴ See 389 U.S. at 440–41; see also *Natsios*, 181 F.3d at 52 (interpreting *Zschernig* as establishing a threshold, not balancing, test). But see Lewis, *supra* note 6, at 509 (advocating a balancing test of state and federal interests).

²¹⁵ See 389 U.S. at 434–35.

²¹⁶ See *id.* at 440–41; see also *Natsios*, 181 F.3d at 51–52 (“The precise boundaries of the Supreme Court’s holding in *Zschernig* are unclear.”); HENKIN, *supra* note 7, at 165 (noting the Supreme Court has not decided any subsequent cases under the Dormant Foreign Affairs Power).

²¹⁷ Compare *Natsios*, 181 F.3d at 52 (unconstitutional), and *Tayari*, 495 F. Supp. at 1380 (unconstitutional), and *Springfield Rare Coin Galleries*, 503 N.E.2d at 305 (unconstitutional), and *Bethlehem Steel*, 276 Cal. App. 2d at 229 (unconstitutional), with *Trojan Technologies*, 916 F.2d at 913–14 (constitutional), and *Board of Trs.*, 562 A.2d at 749 (constitutional), and *K.S.B. Technical Sales*, 381 A.2d at 784 (constitutional).

²¹⁸ See *supra* notes 140–201 and accompanying text.

²¹⁹ See *supra* notes 140–201 and accompanying text.

state actions that target a specific foreign nation by name or effect or that discriminate against products made abroad touch on foreign affairs—even though the action may be directed at United States companies and affect a foreign nation only indirectly.²²⁰ Foreign affairs is a broader category of activity than foreign policy—it need only touch on countries outside of the United States.²²¹ The determinative issue as to the constitutionality of a state action under the Dormant Foreign Affairs Power, therefore, is whether the law has more than an incidental effect on foreign affairs.²²²

In applying the “more than incidental” test, lower courts addressed the four *Zschernig* factors: state inquiry into foreign nations, demonstrated bias toward foreign nations, protests by other nations, and potential for other sub-national governments to act similarly.²²³ Unlike *Zschernig*, where the law itself was not motivated by a desire to criticize foreign governments, but led inevitably to criticism by state courts, most lower courts invalidating state action under the Dormant Foreign Affairs Power determined that the law itself criticized foreign countries.²²⁴ Therefore, their application of the Dormant Foreign Affairs Power analysis has condensed the first two factors that the Court considered in *Zschernig*.²²⁵ The lower courts examined if the state law or action was a critical inquiry into the nature of foreign governments demonstrating a bias against a foreign country.²²⁶ If the purpose behind the law was to encourage a change in that country’s behavior, then, according to lower court interpretations, it satisfied the *Zschernig* test.²²⁷

In the cases that did not invalidate a law under the Dormant Foreign Affairs Power, the courts have found that the law had neither the

²²⁰ See *supra* notes 140–174 and accompanying text. But see *Board of Trs.*, 562 A.2d at 748 (noting that law did not impact foreign countries or their citizens directly and had no impact on foreign affairs); *New York Times Co. v. City of New York Comm’n on Human Rights*, 361 N.E.2d 963, 973 (N.Y. 1977) (Fuchsberg, J., dissenting) (arguing that the Commission’s decision did not violate the Dormant Foreign Affairs Power because it impacted New York Corporations, not South Africa).

²²¹ See Goldsmith, *supra* note 75, at 1632–33.

²²² See *Zschernig*, 389 U.S. at 434–35, 440–41.

²²³ See *Natsios*, 181 F.3d at 53; *Tayyari*, 495 F. Supp. at 1379–80; *Springfield Rare Coin Galleries*, 503 N.E.2d at 307.

²²⁴ See *supra* notes 143–168 and accompanying text.

²²⁵ See *supra* notes 143–168 and accompanying text.

²²⁶ See *supra* notes 143–168 and accompanying text.

²²⁷ See *supra* notes 143–168 and accompanying text. But see *New York Times*, 361 N.E.2d at 972 (Fuchsberg, J., dissenting) (finding no effect on foreign affairs because Commission was not reviewing South African laws).

purpose nor effect of criticizing other nations.²²⁸ For example, in upholding "Buy American" laws, lower courts concluded that the laws did not criticize or demonstrate a bias toward a given country.²²⁹ Therefore, lower courts have held that the decision on the first two *Zschernig* factors, inquiry and criticism of foreign governments, is decisive of the issue of constitutionality of state and local action touching on foreign affairs.²³⁰

The remaining two factors considered in *Zschernig*—protests by foreign nations and the likelihood that other states and municipalities would follow suit—have not been interpreted as determinative of the constitutionality of state or local action.²³¹ Instead, these factors reinforce suspicions about the potential negative impact on the federal government's ability to deal with foreign countries.²³² For example, the court in *Natsios* cited protests by United States trading partners and the potential for many such anti-Burma laws—shown by the fact that nineteen municipalities had already enacted similar laws—as further evidence, but not a dispositive factor, that the law could effect foreign affairs.²³³

Although a foreign country's protest is easily established as a matter of fact, the likelihood of other states and localities acting similarly reveals the speculative nature of the *Zschernig* analysis.²³⁴ The ability of other state and local governments to act similarly creates the presumption that the action in question will have a negative impact on foreign affairs.²³⁵ This presumption is difficult to rebut because, under *Zschernig*, courts should not consider statements by the Executive branch or Congress that the law does not have an effect on the federal government's ability to conduct foreign affairs.²³⁶ Therefore, once a court has made a finding that the state or local action criticizes

²²⁸ See *supra* notes 177–195 and accompanying text.

²²⁹ See, e.g., *K.S.B. Technical Sales*, 381 A.2d at 783–84 (noting that the "Buy American" law did not single out countries based on ideology).

²³⁰ See *Natsios*, 181 F.3d at 53; *Trojan Technologies*, 916 F.2d at 913; *Tayyari*, 495 F. Supp. at 1379–80; *K.S.B. Technical Sales*, 381 A.2d at 783–84; *Springfield Rare Coin Galleries*, 503 N.E.2d at 307.

²³¹ See *Natsios*, 181 F.3d at 47, 53–55; see also *Tayyari*, 495 F. Supp. at 1376–80 (holding state action unconstitutional under the Dormant Foreign Affairs Power without finding protests from foreign countries or potential for similar action by other states or municipalities); *Springfield Rare Coin Galleries*, 503 N.E.2d at 304–08 (same).

²³² See *Natsios*, 181 F.3d at 47, 53–55.

²³³ See *id.* at 47, 55.

²³⁴ See *id.* at 53.

²³⁵ See *Zschernig*, 389 U.S. at 433–34; *Natsios*, 181 F.3d at 53–54.

²³⁶ See 389 U.S. at 434–35.

foreign nations and concluded that other states or localities could act similarly—an easy leap unless the questioned activity is somehow unique to that state or locality—*Zschernig* leaves states and localities no defense for their actions.²³⁷

An analysis of the majority of lower courts interpretations of *Zschernig* demonstrates that the Dormant Foreign Affairs Power creates a broad prohibition against states and municipalities entering the area of foreign affairs.²³⁸ If a state or local action identifies a foreign country by name or discriminates between the United States and foreign countries, then the law or action implicates foreign affairs.²³⁹ The state or local action is unconstitutional if it has the purpose or effect of criticizing foreign countries' policies in a manner that would demonstrate a bias against that country by treating it differently than other foreign nations.²⁴⁰

Despite the fact that *Zschernig* and its progeny have interpreted the Dormant Foreign Affairs Power broadly, as an almost per se restriction against state activity implicating foreign affairs, two alternative interpretations of this power are possible.²⁴¹ First, the role of *Clark* and its considerations of local concerns could be more closely followed.²⁴² *Board of Trustees* follows this approach.²⁴³ Second, the Supreme Court has articulated a more deferential approach towards state and local action under the Foreign Commerce Clause than under *Zschernig*.²⁴⁴ In particular, *Barclays* offers a means to mitigate the near absolute ban against states and localities engaging in activities implicating foreign affairs.²⁴⁵

The *Board of Trustees* approach differs from the strict *Zschernig* analysis on several crucial points.²⁴⁶ First, *Board of Trustees* maintains the *Clark* balancing of traditional areas of local concern.²⁴⁷ Second, *Board of Trustees* focuses on the laws' direct impact on countries and foreign nationals, and not laws that touch on foreign countries indi-

²³⁷ See *id.* at 434–35, 440–41.

²³⁸ See *supra* notes 143–174 and accompanying text.

²³⁹ See *supra* notes 143–201 and accompanying text.

²⁴⁰ See *supra* notes 143–174, 197–201 and accompanying text.

²⁴¹ See *supra* notes 120–131, 177–185 and accompanying text.

²⁴² See *supra* notes 85–93, 177–185 and accompanying text.

²⁴³ See *supra* notes 177–185 and accompanying text.

²⁴⁴ See *supra* notes 120–131 and accompanying text.

²⁴⁵ See 512 U.S. at 327–28.

²⁴⁶ See 562 A.2d at 744–49; see also Lewis, *supra* note 6, at 507–17 (advocating a balancing test).

²⁴⁷ See 562 A.2d at 744–49.

rectly.²⁴⁸ Third, the *Board of Trustees* approach looks to the actual impact that the law has on foreign relations and does not speculate about potential cumulative state action.²⁴⁹ Therefore, state or municipal actions that express local concern and do not directly target a foreign country or its citizens would be constitutional.²⁵⁰

Although this approach may be more practical than an absolute ban on state activity impacting foreign nations, Supreme Court precedent does not support it.²⁵¹ First, *Board of Trustees* gives too much consideration to areas of local concern.²⁵² The Dormant Foreign Affairs Power, as articulated in *Zschernig*, is not a balancing test between state and federal interests.²⁵³ By invalidating such a similar inheritance law, *Zschernig* did not support reading traditional areas of state concern as a permissible exception to the Dormant Foreign Affairs Power.²⁵⁴

Second, the *Board of Trustees* approach attempts, unconvincingly, to distinguish the South Africa divestment ordinance from the facts in *Zschernig*.²⁵⁵ Although *Zschernig* did address a situation where foreign nationals actually suffered injury by the state action, and the South Africa divestment ordinance arguably did not directly injure foreign nationals, the overriding concern of the *Zschernig* court was the negative commentary on foreign governments.²⁵⁶ By rejecting investment opportunities in South Africa because of apartheid, Baltimore engaged in a very public criticism of a foreign government.²⁵⁷ This legislative criticism impacts many companies, and is perhaps even more

²⁴⁸ See *id.* at 746.

²⁴⁹ See *id.* at 748.

²⁵⁰ See *id.* at 744-49.

²⁵¹ See Price & Hannah, *supra* note 6, at 494 (rejecting *Board of Trs.*' interpretation of *Zschernig*); Ramsey, *supra* note 75, at 361 ("[T]he campaign to limit *Zschernig* to its facts has failed adequately to explain its rationale.").

²⁵² See 562 A.2d at 748.

²⁵³ See 389 U.S. at 434-35; *Natsios*, 181 F.3d at 52.

²⁵⁴ Compare *Zschernig*, 389 U.S. at 440-41 (invalidating a state probate law even though probate was an area of traditional state concern), with *Clark*, 331 U.S. at 516-18 (upholding a similar state probate law, in part, because probate was a traditional area of local concern).

²⁵⁵ Compare *Zschernig*, 389 U.S. at 435-40 (detailing state court statements about conditions in communist countries), with *Board of Trs.*, 562 A.2d at 724 n.6 (detailing legislative history of ordinance and previous attempts at enacting measures that indicate law was designed to support ending apartheid in South Africa).

²⁵⁶ See 389 U.S. at 435-41.

²⁵⁷ See *Board of Trs.*, 562 A.2d at 724 n.6.

offensive than a probate court's criticism impacting a few individuals.²⁵⁸

Finally, *Board of Trustees* focuses, albeit sensibly, on the actual impact of the local activity and not the speculative impact of possible action by other states and municipalities.²⁵⁹ The court concluded that the city ordinance had no effect on the federal government's ability to conduct foreign affairs.²⁶⁰ *Zschernig*, however, does not allow a court to ignore the interplay of states and localities enacting similar measures.²⁶¹

Another alternative Dormant Foreign Affairs Power analysis incorporates statements that the Supreme Court has made in its Foreign Commerce Clause jurisprudence.²⁶² Because the Dormant Foreign Affairs Power and the Dormant Foreign Commerce Clause power both restrict state action impairing federal authority over foreign affairs, the standards should be similar.²⁶³ The federal government's foreign affairs power implicitly includes actions implicating the narrower Foreign Commerce Clause, therefore, a state activity should not be permissible under the narrower Foreign Commerce Clause and impermissible under the broader foreign affairs power.²⁶⁴ Although in *Barclays*, the Court analyzed the claim under the Foreign Commerce Clause and did not address *Zschernig* or the Dormant Foreign Affairs Power, the Court's analysis of the problem resembled a Dormant Foreign Affairs Power analysis.²⁶⁵ The Court focused on the potential im-

²⁵⁸ See generally Price & Hannah, *supra* note 6, at 493-94.

²⁵⁹ See 562 A.2d at 747-48.

²⁶⁰ See *id.* at 749.

²⁶¹ See 389 U.S. at 433-34.

²⁶² See *supra* notes 120-131 and accompanying text.

²⁶³ See HENKIN, *supra* note 7, at 162 (noting that the Supreme Court has not discussed foreign commerce under the "larger" power over foreign affairs); TRIBE, *supra* note 71, § 6-24, at 1153-154 (including discussion of *Zschernig* within the section of his treatise on the Foreign Commerce Clause).

²⁶⁴ See, e.g., *Board of Trs.*, 562 A.2d at 744 n.50 (noting that Foreign Commerce Clause analysis and foreign affairs doctrine analysis are closely related and the Foreign Commerce Clause "seems no more than a slice of the foreign relations pie") (quoting Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 832 (1986)).

²⁶⁵ See *id.* at 320-31; see also *Zschernig*, 389 U.S. at 440-41 (citing uniformity of federal government in foreign affairs as its primary concern); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 305-06 (Ill. 1986) (applying the "one voice" test to the Dormant Foreign Affairs Power). Although analyzing the impact of the Massachusetts law on the ability of the President to execute a federal statute, the *Crosby* Court echoed the same concerns raised in a dormant foreign affairs analysis. See 120 S. Ct. at 2998. "It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate the discussions; they compromise the very capacity of the

pact of the state law on the federal government's ability to interact with foreign countries.²⁶⁶ Because the *Barclays* Court discussed the impact of state action on the federal government extensively, albeit in a Foreign Commerce Clause analysis, the decision may be important to any future Dormant Foreign Affairs Power analysis.²⁶⁷

In *Barclays*, the Supreme Court held that where Congress was aware of the state action, but had failed to act, the Court could not find that the state had impaired the federal government's ability to speak with one voice in foreign policy.²⁶⁸ In that sense, *Barclays* could be interpreted to overrule *Zschernig*'s ban against considering the statements of the federal government in evaluating whether the state or local action had an impact on the federal government's ability to conduct foreign relations.²⁶⁹ At its root, *Barclays* is a decision about the interplay of the federal branches and the judiciary's lack of competence in the area of foreign affairs.²⁷⁰ The great deference that the judiciary affords Congress in the area of foreign commerce seems to render the concept that the federal government has an exclusive power over foreign affairs a truism, but not a judicially enforceable limit on state power.²⁷¹ Although *Crosby* appeared to limit *Barclays*' holding, the Court, by analyzing the issue under preemption, still looked to congressional action to determine whether the state action was permissible.²⁷²

Barclays and *Zschernig* reached diametrically opposed conclusions about the role of the judiciary in foreign affairs issues, buttressing arguments that *Barclays* should have overruled *Zschernig*.²⁷³ The *Zschernig*

President to speak for the Nation with one voice in dealing with other governments." See *id.*

²⁶⁶ See *Barclays*, 512 U.S. at 311.

²⁶⁷ See *id.* at 320-31. The "one voice" standard was first expressed in *Pink* to describe generally the relationship between state and federal power in matters concerning foreign affairs. See 315 U.S. at 242 (Frankfurter, J., concurring). Because *Pink* was ultimately decided on preemption grounds, there is no reason to limit the "one voice" standard to Foreign Commerce Clause cases. See 315 U.S. at 234.

²⁶⁸ See 512 U.S. at 323, 324, 330-31. But see *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2302 (2000) (rejecting that Congress's failure to preempt indicated Congress's endorsement of state sanctions).

²⁶⁹ See 512 U.S. at 328-31.

²⁷⁰ See *id.*

²⁷¹ See *id.* at 330-31.

²⁷² See 120 S. Ct. at 2302.

²⁷³ Compare *Barclays*, 512 U.S. at 328-31 (deferring to Congress's inaction on foreign affairs issue), with *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring) (refusing to defer to Executive Branch statements about foreign affairs issue). In *Crosby*, however, the Supreme Court noted that preemption analysis is a matter of constitutional interpretation and,

Court argued that the state action could have an effect on foreign governments that the Executive and, by implication, Congress had failed to appreciate.²⁷⁴ For that reason, the wishes of the branches of government entrusted to formulate foreign policy were dismissed.²⁷⁵ The Supreme Court rejected this type of judicial activism in *Barclays*.²⁷⁶ Effectively, this makes *Zschernig*'s presumption that a state activity has an impact on foreign affairs rebuttable upon a showing that Congress has considered, but failed to act in this area.²⁷⁷ Furthermore, by declining to consider other nations' protests or retaliatory action, because Congress, not courts, should determine United States foreign policy, the *Barclays* Court, in essence, told the multi-nationals challenging the California tax law to find a political, not constitutional solution to their problem.²⁷⁸ Although the *Crosby* decision did consider statements of foreign governments, it would not be appropriate for the judiciary to consider foreign governments' statements where Congress had not considered them or where, as in *Crosby*, Congress had not enacted a foreign policy scheme that required the President to work with other nations.²⁷⁹

The *Barclays* alternative could allow state or local action touching on foreign affairs unless Congress had explicitly or implicitly preempted the action.²⁸⁰ *Barclays*, however, dealt with a state tax formula.²⁸¹ The law in question did not single out specific foreign countries for criticism nor did it allow for the discriminatory treatment of some entities based on the countries in which they operated.²⁸² Furthermore, it concerned state tax policy, an area that the court has always considered to be of traditional local concern.²⁸³ *Barclays* does not clarify if a court should only defer to Congress's preemptive abilities if

therefore, there is no requirement that Congress expressly preempt state action. See 120 S. Ct. at 2302.

²⁷⁴ See 389 U.S. at 440-41.

²⁷⁵ See *id.* Justice Stewart, concurring, went further; responded that the executive branch could not anticipate the future impact of these state laws. See 389 U.S. at 443 (Stewart, J., concurring).

²⁷⁶ See 512 U.S. at 328-31.

²⁷⁷ See *id.*

²⁷⁸ See *id.* at 327-28 (noting that the companies' complaints to the judiciary were directed at the wrong forum).

²⁷⁹ See *id.*

²⁸⁰ See *id.* at 327-28.

²⁸¹ See 512 U.S. at 302-03.

²⁸² See *id.* at 302-03.

²⁸³ See *id.* at 327 n.28.

a law is non-country specific in its application and the state action is in an area of traditional local concern.²⁸⁴

The three alternative views of the Dormant Foreign Affairs Power analysis present varying degrees of deference towards state or local activity touching on foreign affairs.²⁸⁵ The first, most widely accepted, formulation of the Dormant Foreign Affairs Power, establishes what is essentially a per se rule against state or local activity in this area.²⁸⁶ A state cannot criticize foreign nations.²⁸⁷ The second formulation, adopted only in *Board of Trustees*, would allow state or local action if the action expresses a state interest, indirectly relates to a foreign nation and does not have an actual impact on foreign relations.²⁸⁸ The third approach, incorporating tests developed under the Foreign Commerce Clause, would allow state or local activity unless the action was disavowed expressly or implicitly by Congress.²⁸⁹ This approach, however, may be limited to areas that the Court considers traditionally local and actions that do not identify a specific foreign country.²⁹⁰

B. *The Constitutionality of State Investment Restrictions Under Majority and Alternative Formulations of the Dormant Foreign Affairs Power*

The three approaches to the Dormant Foreign Affairs Power lead to different conclusions about the constitutionality of state and local investment restrictions touching on foreign countries.²⁹¹ This section analyzes divestment mandates, reporting requirements, shareholder resolutions and investment choices.²⁹²

Under the strict approach to state or local action touching on foreign affairs adopted in *Zschemig* and most subsequent cases, all investment restrictions identifying a foreign nation would be considered an unconstitutional violation of the Dormant Foreign Affairs Power.²⁹³ The only exception is a routine reading of foreign laws by a state

²⁸⁴ See *id.* at 330 (noting that tax formula was non-discriminatory); see also Denning & McCall, *supra* note 41, at 338-39 (arguing that state divestment laws are unconstitutional under Foreign Commerce Clause).

²⁸⁵ See *supra* notes 209-284 and accompanying text. But see Ramsey, *supra* note 75, at 346 (arguing that there is no Dormant Foreign Affairs Power).

²⁸⁶ See *supra* notes 209-240 and accompanying text.

²⁸⁷ See *supra* notes 209-240 and accompanying text.

²⁸⁸ See *supra* notes 246-260 and accompanying text.

²⁸⁹ See *supra* notes 268-284 and accompanying text.

²⁹⁰ See *Barclays*, 512 U.S. at 330.

²⁹¹ See *supra* notes 209-290 and accompanying text.

²⁹² See *supra* notes 26-70 and accompanying text.

²⁹³ See *supra* notes 209-240 and accompanying text.

court and, possibly, the routine application of a state policy that does not evidence criticism of a foreign nation.²⁹⁴ Because all of the above mentioned investment restrictions mention a foreign country by name or allow for disparate treatment of foreign countries in relation to the United States, they touch on foreign affairs and invoke Dormant Foreign Affairs Power scrutiny—whether the investment restrictions have “more than [an] incidental effect” test of the Dormant Foreign Affairs Power.²⁹⁵

In the case of divestment activity, states and localities are targeting countries for divestment because they disagree with the policies enacted by foreign governments.²⁹⁶ These initiatives particularly focus on the human rights record of the country.²⁹⁷ Indeed, were it not for a foreign country's policies, the state or municipality would not seek to divest itself from companies doing business there.²⁹⁸ Divestment proposals are economic boycotts of countries designed to encourage a change in their policies, similar to other state economic boycotts that lower courts have held unconstitutional under the Dormant Foreign Affairs Power.²⁹⁹ Although the nature of the state or local action—essentially economic boycott in response to a perceived foreign government failure—is sufficient to render a divestment statute unconstitutional under the foreign affairs power, states and municipalities do not act in isolation when enacting these divestment proposals.³⁰⁰ As evidenced by the South Africa campaign, and to a lesser extent, the Burma campaign, divestment laws tend to be passed en masse, after one state or municipality enacts a law, others tend to follow.³⁰¹ Therefore, divestment statutes carry all of the traits that the *Zschernig* Court determined to be decisive in evaluating whether a state or local action was unconstitutional under the Dormant Foreign Affairs Power.³⁰²

²⁹⁴ See *supra* notes 102–104 and accompanying text.

²⁹⁵ See *supra* notes 209–240 and accompanying text.

²⁹⁶ See DESIMONE & MOSES, *supra* note 37, at 2, 17–22.

²⁹⁷ See *id.* at 1–2.

²⁹⁸ See *id.*

²⁹⁹ See *Natsios*, 181 F.3d at 53 (“[T]he design and intent of the law is to affect the affairs of a foreign country.”); *Springfield Rare Coin Galleries*, 503 N.E.2d at 307 (“[T]he practical effect of the exclusion is to impose, or at least encourage, an economic boycott of the South African Krugerrand.”).

³⁰⁰ See *supra* notes 234–235 and accompanying text.

³⁰¹ See, e.g., DESIMONE & MOSES, *supra* note 37, at 17–22 (describing state and local activity regarding South Africa); USA ENGAGE, *supra* note 45 (describing state and local activity regarding Burma).

³⁰² See *supra* notes 238–240 and accompanying text.

Laws requiring states and municipalities to report on businesses' compliance with the MacBride Principles do not mandate divestment and, therefore, are not like economic boycotts.³⁰³ Even so, through their reporting requirements, states and municipalities seek to highlight publicly the inequitable treatment of foreign nationals within a foreign country.³⁰⁴ They are a means to raise awareness about the conditions in a foreign country.³⁰⁵ Because they implicitly state that a foreign country has failed to enact proper measures to ensure the acceptable treatment of its citizens, they are a criticism of a foreign country.³⁰⁶ Although the effect on the foreign country may not be as severe as an economic boycott and, therefore, do not raise the specter of retaliatory action to the same extent, the measures still criticize foreign countries.³⁰⁷ Additionally, the plethora of similar state and local measures raises, under *Zschemig*, the possibility that the federal government's foreign relations with these countries will be affected.³⁰⁸ Therefore, they would be similarly unconstitutional under the Dormant Foreign Affairs Power.³⁰⁹

Shareholder resolutions may mandate a company's divestment from a country or may require its compliance with certain business practices when operating overseas.³¹⁰ Because the Dormant Foreign Affairs Power, as articulated in *Zschemig*, is not limited to state laws, but encompasses any state action, participation in shareholder resolutions is susceptible to Dormant Foreign Affairs Power scrutiny.³¹¹ Many states, however, establish voting practices on some issues by law.³¹² Where a state statute treats a resolution differently based on a foreign country, the statute implicates the same issues as a divestment statute and would be similarly unconstitutional.³¹³ If the state, without statutory guidance, spearheads a resolution naming a particular country, the resulting state criticism is the same as if the state had enacted

³⁰³ See *supra* notes 47-52 and accompanying text.

³⁰⁴ See INVESTOR RESPONSIBILITY RESEARCH CENTER, *supra* note 5, at 6-8 (describing history of the MacBride Principles as a means to encourage equitable treatment of Catholics and Protestants in Northern Ireland).

³⁰⁵ See *id.* at 6-8, 109-51.

³⁰⁶ See *supra* notes 47-52 and accompanying text.

³⁰⁷ See *supra* notes 47-52 and accompanying text.

³⁰⁸ See *supra* notes 47-52, 94-116 and accompanying text.

³⁰⁹ See *supra* notes 238-240 and accompanying text.

³¹⁰ See *supra* notes 53-61 and accompanying text.

³¹¹ See 389 U.S. at 433-34.

³¹² See *supra* note 55 and accompanying text (listing laws specifying how a state should vote in shareholder resolutions on issues relating to Northern Ireland and South Africa).

³¹³ See *supra* note 55 and accompanying text.

a statute.³¹⁴ Because the Dormant Foreign Affairs Power precludes state action criticizing a country, any vote on a shareholder resolution, whether initiated by the state or not, would be unconstitutional.³¹⁵

Some shareholder resolutions seek to force companies to adopt generic human rights treatment when the company decides to conduct business abroad.³¹⁶ To the extent that the company is criticizing a foreign country, and the state is not in any way evaluating a foreign country, a state vote on this type of shareholder resolution would be constitutional.³¹⁷ A similar generic human rights code adopted by a state to evaluate its investment portfolio, where the state would then make a list of acceptable and unacceptable countries in which companies it does business with can invest, would be, however, unconstitutional.³¹⁸ This policy would require states to engage in country-by-country criticisms of the type specifically forbidden by *Zschernig*.³¹⁹

Investment decisions based on more traditional investment risk criteria may touch on foreign affairs because the decision is commenting on a foreign government's policies—similar to the type of criticism with which *Zschernig* was concerned.³²⁰ Criticism of economic policies could have potentially even more impact on a foreign government than criticism of its human rights policies because they might affect the behavior of other investors.³²¹ Because *Zschernig* did not indicate any reason to distinguish criticism of a foreign govern-

³¹⁴ See *Zschernig*, 389 U.S. at 433–34; see also *Natsios*, 181 F.3d at 53 (listing factors including intent to change policies, economic power of state, and potential for other states to act similarly). These factors would also be common to shareholder resolutions. See generally Bradford, *supra* note 1, at 41–42.

³¹⁵ See *Zschernig*, 389 U.S. at 433–34; *Natsios*, 181 F.3d at 53; see also Price & Hannah, *supra* note 6, at 464 (arguing *Zschernig* applies to all local government arms because it concerned state intrusions into federal domain generally).

³¹⁶ See *supra* note 60 and accompanying text.

³¹⁷ See *Zschernig*, 389 U.S. at 433–40 (describing criticism by state actors as offensive); *Natsios*, 181 F.3d at 53–54 (same).

³¹⁸ See *supra* note 65 and accompanying text.

³¹⁹ See *supra* notes 238–240 and accompanying text.

³²⁰ See *Zschernig*, 389 U.S. at 434–40; HENKIN, *supra* note 7, at 164 (arguing that even if Dormant Foreign Affairs Power is limited to state actions critical of foreign governments, it still “might cast doubts on the right of the states to apply their own ‘public policy’ in transnational situations”); Chernoff, *supra* note 65, at 25; Hemmerick, *supra* note 64, at 1; Mahoney, *supra* note 67, at 2738. In contrast, Lewis argues that states can avoid invalidation by showing that it considered politically neutral factors, such as investment risk. See Lewis, *supra* note 6, at 514. Lewis, however, maintains the minority position that the Dormant Foreign Affairs Power uses a balancing test of state and federal concerns to determine if a state action is constitutional. See *id.* at 509.

³²¹ See generally FRY, *supra* note 35, at 3–9 (describing power of state governments in global economy).

ment's economic policies from its human rights policies, states and local investment decisions are a type of state action directed at a foreign country's policies that *Zschernig* would prohibit.³²²

Under a strict view of the Dormant Foreign Affairs Power, most state and local investment restrictions touching on foreign affairs would be unconstitutional.³²³ Where the state activity, whether implemented by law or policy, touches on foreign affairs in a manner critical of the internal workings of a foreign nation, the strict interpretation would preclude such activity.³²⁴ Of the types of investment restrictions considered, only ones that do not allow the state itself to criticize a foreign government would be permissible under the Dormant Foreign Affairs Power.³²⁵

The two alternate interpretations of the Dormant Foreign Affairs Power might permit more state and local investment restrictions.³²⁶ These alternate approaches, the *Board of Trustees* approach and the *Barclays* approach, preserve the ability of states and municipalities to restrict their investments based on considerations that implicate foreign affairs.³²⁷ Their authority in relation to *Zschernig*, however, is unclear.³²⁸

The first alternative approach, as set out in *Board of Trustees*, would allow any state or local activity that did not directly affect foreign governments or foreign citizens.³²⁹ Under this formulation, state investment activity is an area of local concern.³³⁰ So long as the restriction only affected company behavior, and did not directly apply to countries, then the policy would be permissible.³³¹ Because all of the above investment restrictions—divestment, reporting on companies' business practices abroad and shareholder resolutions—focus on companies' behavior and do not directly apply to countries or their

³²² See *supra* notes 94–116 and accompanying text.

³²³ See *supra* notes 238–240 and accompanying text; see also Loschin & Anderson, *supra* note 71, at 401 (noting that “in the normal course of business, states inevitably affect the lives of foreign nationals, companies, and governments”).

³²⁴ See *supra* notes 238–240 and accompanying text.

³²⁵ See *supra* notes 238–240 and accompanying text.

³²⁶ See *supra* notes 246–250, 268–280 and accompanying text.

³²⁷ See *supra* notes 246–250, 268–280 and accompanying text.

³²⁸ See, e.g., *Natsios*, 181 F.3d at 54–59 (rejecting arguments based on *Barclays* and *Board of Trs.*).

³²⁹ See *supra* notes 246–250 and accompanying text.

³³⁰ See *supra* notes 246–250 and accompanying text.

³³¹ See *supra* notes 246–250 and accompanying text; see also *New York Times*, 361 N.E.2d at 972 (Fuchsberg, J., dissenting) (noting difference between action against U.S. corporations and foreign countries).

citizens, they would be constitutional under this interpretation of the Dormant Foreign Affairs Power.³³² Investment decisions about political or economic risk also would focus primarily on companies.³³³ This permissive approach, however, has not been followed by other lower courts, and indeed, is not supported by *Zschemig*.³³⁴

The third approach to the Dormant Foreign Affairs Power is to adopt criteria the Supreme Court established in *Barclays* for the Foreign Commerce Clause area—a law is constitutional if Congress considered, but failed to preempt state or local action.³³⁵ A presumed incursion into the federal government's exclusive power over foreign affairs, such as a divestment initiative, can be deemed constitutional if a state or locality can prove that Congress considered, but did not act on the issue, and in no other way preempted the state action.³³⁶ Congress is aware, and has not acted against, social investing by public pension funds in response to foreign countries' human rights violations.³³⁷ In the 1980s, Congress debated but failed to enact any measure preventing states from this type of activity.³³⁸ Therefore, because of congressional acquiescence, state and local investment restrictions would be constitutional under this interpretation of the Dormant Foreign Affairs Power.³³⁹ The constitutionality of shareholder resolutions and investment decisions would similarly turn on whether Congress implicitly or explicitly acquiesced to state and local action.³⁴⁰ *Crosby* would further limit this approach by preempting state sanctions where Congress had enacted sanctions against the target nation but did not expressly invalidate state sanctions.³⁴¹

³³² See *supra* notes 246–250 and accompanying text.

³³³ See *supra* notes 246–250 and accompanying text.

³³⁴ See 389 U.S. at 434–35, 440–41; *Natsios*, 181 F.3d at 55–56 (invalidating state law under the Dormant Foreign Affairs Power when law was directed at companies); *New York Times*, 361 N.E.2d at 968 (failing to differentiate between corporations and companies); *Price & Hannah*, *supra* note 6, at 492–94 (arguing *Board of Trs.* misinterpreted the Dormant Foreign Affairs Power); *Ramsey*, *supra* note 75, at 361–62 (arguing that *Board of Trs.* is unsupported by *Zschemig*).

³³⁵ See *supra* notes 268–280 and accompanying text.

³³⁶ See *supra* notes 268–280 and accompanying text.

³³⁷ See, e.g., *Trojan Technologies*, 916 F.2d at 913–14 (noting that Congress had noticed, but not preempted, state “Buy American” statutes); *Board of Trs.*, 562 A.2d at 741–44 (presenting a summary of congressional debate over state and local South Africa sanctions including a failed amendment to preempt the sanctions).

³³⁸ See *Board of Trs.*, 562 A.2d at 741–44.

³³⁹ See *supra* notes 268–280 and accompanying text.

³⁴⁰ See *supra* notes 268–280 and accompanying text.

³⁴¹ See 120 S. Ct. at 2301–02.

IV. A FLEXIBLE TEST ALLOWING STATE AND LOCAL PARTICIPATION IN THE GLOBAL ECONOMY UNDER THE DORMANT FOREIGN AFFAIRS POWER

As a matter of public policy, the federal government should be able to establish United States foreign policy unfettered by state and local action.³⁴² States and localities, however, should have the flexibility to select investments for their pension funds based on investment criteria that consider the risk profile of foreign countries.³⁴³ To do less would impair their ability to fulfill their obligations to pension plan participants.³⁴⁴ States and localities should also be allowed to vote in all shareholder resolutions because they have a fiduciary duty to pension plan participants to exercise their proxies.³⁴⁵ Any reformulation of the Dormant Foreign Affairs Power must balance these extremes to be workable in this era of global market activity.³⁴⁶

The Supreme Court's recent reticence to invoke the powerful Dormant Foreign Affairs Power to nullify state action criticizing other nations' policies—*Crosby*—or impacting foreign nationals—*Barclays*—implicitly acknowledges that the Dormant Foreign Affairs Power may invalidate too much state action in this era of globalization.³⁴⁷ The Court's unwillingness to overrule *Zschernig* expressly, however, also belies a concern that some state and local action may pose a real threat to federal uniformity in foreign policy.³⁴⁸ Thus, the Dormant Foreign Affairs Power lurks in the background as a constitutional doctrine that may be invoked when states and municipalities cross some line of egregious behavior.³⁴⁹ As articulated in *Zschernig*, the line is drawn at a more than incidental effect on foreign affairs—i.e., criticizing foreign nations.³⁵⁰ As states and localities invest more in the global

³⁴² See generally Ramsey, *supra* note 75, at 342.

³⁴³ See *id.* at 374–75 (“There is no precise demarcations between the local and the international, and the category of state laws having some potential effect upon foreign policy is unmanageably broad.”).

³⁴⁴ See *supra* notes 28–30 and accompanying text.

³⁴⁵ See *supra* note 61 and accompanying text.

³⁴⁶ See generally FRV, *supra* note 35, at 3–9; Goldsmith, *supra* note 75, at 1671–74 (describing increasing impact of international concerns on issues of domestic governance); Lewis, *supra* note 6, at 515–17 (noting immense power of the Dormant Foreign Affairs Power, if construed broadly, to invalidate state action); Ramsey, *supra* note 75, at 365 (calling for a reexamination of the merits of the Dormant Foreign Affairs Power because “state activities increasingly have international implications”).

³⁴⁷ See *supra* notes 120–139 and accompanying text.

³⁴⁸ See *supra* notes 120–139 and accompanying text.

³⁴⁹ See *supra* notes 75–116 and accompanying text.

³⁵⁰ See *supra* notes 94–116 and accompanying text.

market, however, more of their actions can be portrayed as a criticism of foreign nations' policies.³⁵¹ Thus, mere criticism alone is not a sufficiently flexible test to allow for necessary state and local investment, not only abroad, but also in U.S. based companies that operate abroad.³⁵² A better approach to determine whether state and local action interferes with the federal government's ability to make foreign policy is to first look to other express constitutional restrictions on state and local power—for example, preemption and the Equal Protection Clause.³⁵³ If there remains an incursion into foreign affairs not encompassed by other constitutional limits, then the court should examine whether that state or local action looks substantially like foreign policymaking. The Court should consider whether the action is likely to be confused with United States foreign policy, whether the action has legitimate undertones of state regulation or market behavior and whether the act punishes those who interact with foreign nations.

To the extent that state and local actions are likely to impinge substantially upon the federal government's ability to conduct foreign affairs, they should be prohibited.³⁵⁴ The Dormant Foreign Affairs Power under *Zschernig*, however, sweeps beyond what the average person would consider express foreign policy, by speculating on the potential to disrupt the federal government's ability to create uniform foreign policy.³⁵⁵ By creating a speculative test, the foreign affairs power applies to more than direct conflicts with expressed United States foreign policy.³⁵⁶ Therein lies its difficulty. It invites the judiciary to speculate about the impact of a certain state action on an area, foreign policy, where the judiciary is not an expert, but states and municipalities are increasingly involved via the global market.³⁵⁷ *Barclays* would appear to reserve judgement until Congress acts.³⁵⁸ However, total judicial deference does not fulfill the goal of ensuring that

³⁵¹ See *supra* notes 26–70 and accompanying text.

³⁵² See *supra* notes 26–70 and accompanying text.

³⁵³ See *supra* notes 132–139, 157–163 and accompanying text.

³⁵⁴ See Goldsmith, *supra* note 75, at 1632–33 (distinguishing between state actions that impact the federal government's ability to conduct foreign relations and that affect foreign affairs generally).

³⁵⁵ See *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968).

³⁵⁶ See *id.* at 458–59 (Harlan, J., concurring in the judgement).

³⁵⁷ See *id.*; see also *Barclays Bank, PLC v. Franchise Tax Bd.*, 512 U.S. 298, 327–28 (1994) (raising concerns about judicial competence in the area of foreign affairs).

³⁵⁸ See 512 U.S. at 327–28, 330–31 (indicating that disputes in the foreign affairs area warrant political, not judicial solutions).

states do not hamper United States foreign policy.³⁵⁹ Congress cannot realistically preempt every state and local action—there are after all tens of thousands of sub-federal governmental entities.³⁶⁰ Therefore, the Court should reserve the ability to act in the most egregious cases, where the state action looks substantially like foreign policy.³⁶¹

It is not clear that simply because a sub-national government is acting, it is expressing foreign policy that would interfere with American foreign policy anymore than the actions of a major United States corporation would interfere with American foreign policy.³⁶² Yet because government entities are acting, their actions are more likely to be confused with official United States foreign policy.³⁶³ If the state is acting more akin to a private entity, however, that would not be construed to be American foreign policy and the harm to the federal government is less compelling.³⁶⁴

Thus, hampering America's ability to create foreign policy is not the real risk, but confusion over which government is articulating official United States policy would be a real risk to a uniform federal policy.³⁶⁵ *Zschernig* did not make this distinction, but it should have.³⁶⁶ Insofar as *Zschernig* dealt with the allocation of property to foreign nationals, *Zschernig* looks more like the American government speaking as the United States on the rights of heirs to take decedent's property.³⁶⁷ Probate, in particular, is an area where the federal government generally does not speak, but rather is ordinarily a state matter.³⁶⁸ Because there is no federal foreign policy on probate disposition to foreign nationals, the state action becomes the only

³⁵⁹ See *supra* notes 268–280 and accompanying text.

³⁶⁰ See Denning & McCall, *supra* note 41, at 369; Ramsey, *supra* note 75, at 374–75.

³⁶¹ See Loschin & Anderson, *supra* note 71, at 406 (arguing that courts should only invalidate state laws when there is a “clear potential to cause embarrassment” to the United States); Ramsey, *supra* note 75, at 368 (noting that the Dormant Foreign Affairs Power is based on a functional argument to “avoid conflicting signals to foreign nations”).

³⁶² See, e.g., *Board of Trs. v. Mayor of Baltimore*, 562 A.2d 720, 747 (Md. 1989) (declining to conclude that municipal action would impact United States foreign policy).

³⁶³ See, e.g., *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1378 (D. N.M. 1980) (discussing the significance of a state actor criticizing a foreign nation).

³⁶⁴ See, e.g., Burr, *supra* note 34, at 8 (detailing the growing acceptance of social investment criteria).

³⁶⁵ See Ramsey, *supra* note 75, at 367 (quoting an expert who argues one goal of the Dormant Foreign Affairs Power is to avoid appearance of confusion about U.S. foreign policy).

³⁶⁶ See *supra* notes 94–116 and accompanying text.

³⁶⁷ See *supra* notes 94–116 and accompanying text.

³⁶⁸ See *supra* notes 94–116 and accompanying text.

pronouncement of the nation's policy regarding foreign nationals—thus it looks like the federal government's policy on this issue.³⁶⁹

State investment decisions, particularly shareholder resolutions, however, do not have the same potential for confusion—they cannot be construed as United States trade policy.³⁷⁰ Furthermore, to constrain state government action, when states are acting in the same manner as private entities would act, could unduly burden the state's ability to participate in that area of economic activity.³⁷¹ Because states are implicitly or explicitly making legislative findings about foreign governments, state mandates for divestiture, codified in statutory form, look more like foreign policy statements than state investment decisions or participation in shareholder resolutions.³⁷²

State and local acts criticizing foreign countries should be evaluated according to the following factors. First, does the state or local action lead to confusion over what is United States foreign policy? Second, does the state or local action resemble regulatory action or market behavior? Third, is the state or local act mandatory, punishing those who interact with foreign governments, or precatory in nature? If a court, considering these factors, concludes that the state or local action looks substantially like an expression of foreign policy and not legitimate state action relating to foreign nations, then a court should hold that the action is unconstitutional under the Dormant Foreign Affairs Power.³⁷³

For example, state divestment laws condemn foreign nations on policy grounds.³⁷⁴ To the extent that divestment laws make findings about the wrongs created by foreign nations, they sound like foreign policy pronouncements.³⁷⁵ As sub-national government entities, these pronouncements are more similar to expressions of official government policy that could be viewed by an outsider as supported by the

³⁶⁹ See *supra* notes 94–116 and accompanying text.

³⁷⁰ See *Barclays*, 512 U.S. at 324–28; see also *K.S.B. Technical Sales v. New Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 784 n.6 (N.J. 1977) (noting that “Buy American” law seemed to be consistent with United States foreign policy).

³⁷¹ See, e.g., *Lewis*, *supra* note 6, at 517 (arguing that a broad Dormant Foreign Affairs Power may have a “chilling effect” on legitimate state activity).

³⁷² See *supra* note 41–46 and accompanying text (describing state divestment statutes).

³⁷³ See generally *Zschernig*, 389 U.S. at 460 (Harlan, J., concurring); *Trojan Technologies v. Pennsylvania*, 916 F.2d 903, 913–14 (3rd Cir. 1990).

³⁷⁴ See *DESIMONE & MOSES*, *supra* note 37, at 17–22 (describing South Africa divestment laws condemning apartheid).

³⁷⁵ See *supra* note 46 and accompanying text.

United States.³⁷⁶ Therefore, they carry a higher risk for confusion with official United States policy.³⁷⁷ Because divestment laws attempt to alter companies' behavior, and therefore indirectly foreign countries' behavior, they are punitive in nature.³⁷⁸ They are, as courts have concluded in regard to other similar state activity, economic sanctions.³⁷⁹ Under this functional approach to the Dormant Foreign Affairs Power, divestment laws would be unconstitutional.

Laws requiring that states monitor and report on business practices abroad, such as the Northern Ireland laws, are precatory in nature.³⁸⁰ Although they may contain findings about conditions in a foreign country that could be considered a criticism of that nation's policies, the laws do not impose any direct or indirect penalties on those countries.³⁸¹ Thus, they attempt to regulate certain businesses, but do not rise to the level of economic sanctions.³⁸² Therefore, requirements that a treasurer report on state investments' compliance with the MacBride Principles look less like a foreign policy initiative, carry less risk for confusion, and should not be unconstitutional under the Dormant Foreign Affairs Power.³⁸³

Participation in shareholder resolutions implicating foreign affairs should be constitutional under the Dormant Foreign Affairs Clause.³⁸⁴ States generally have not enacted laws regarding shareholder resolutions.³⁸⁵ The state itself, by law, is not making foreign policy-type pronouncements.³⁸⁶ A state voting on a shareholder resolution is not regulating or mandating any behavior.³⁸⁷ By itself, without the support of other shareholders, the resolution will not take effect.³⁸⁸ Therefore, unlike divestment laws, the state on its own, although criticizing foreign nations, has no power to give effect to the

³⁷⁶ See, e.g., *Tayyari*, 495 F. Supp. at 1378 (discussing danger of sub-national government retaliating against foreign countries).

³⁷⁷ See Ramsey, *supra* note 75, at 367.

³⁷⁸ See *supra* notes 41-46 and accompanying text.

³⁷⁹ See *supra* notes 143-155, 164-168 and accompanying text.

³⁸⁰ See *supra* notes 47-52 and accompanying text.

³⁸¹ See *supra* notes 47-52 and accompanying text.

³⁸² See *supra* notes 47-52 and accompanying text.

³⁸³ See *supra* notes 47-52 and accompanying text.

³⁸⁴ See *supra* notes 53-61 and accompanying text.

³⁸⁵ But see *supra* note 55 and accompanying text (describing laws that direct shareholder voting).

³⁸⁶ See *supra* notes 53-61 and accompanying text.

³⁸⁷ See *supra* notes 53-61 and accompanying text.

³⁸⁸ See, e.g., *Star*, *supra* note 60, at 8 (describing shareholder resolution on Burma that failed to gain majority vote).

proposed policies.³⁸⁹ Shareholder resolutions would carry the least potential for confusion with official foreign policy.

There are other constitutional checks on state power in the area of foreign affairs to protect federal authority.³⁹⁰ As the Court acknowledged in *Barclays*, Congress always has the power, under the Supremacy Clause, to preempt explicitly state and local action that it finds particularly offensive.³⁹¹ Although this check may not be viable due to political or practical considerations, it should serve as the ultimate constitutional check on state and local activity implicating foreign affairs.³⁹² The *Crosby* Court, by holding that Congress had implicitly preempted state sanctions, broadened subsequent courts' ability to find a federal statute that similarly preempts state action.³⁹³ Furthermore, the Equal Protection Clause protects aliens from discriminatory treatment by states and the Dormant Commerce Clause limits direct state regulation of foreign commerce.³⁹⁴

CONCLUSION

The Dormant Foreign Affairs Power is a vague constitutional doctrine that may invalidate any state action touching on foreign affairs. Under its current formulation, the Power excludes any state action that could be deemed critical of a foreign nation. Perhaps this is why, in its last term, the Supreme Court in *Crosby* declined to invoke the Dormant Foreign Affairs Power, instead resting its decision on narrower preemption grounds. The doctrine, however, remains in the Court's arsenal to limit state activity that impacts foreign affairs.

State and local action in the pension investment area can be construed as touching on foreign affairs, both because states have increas-

³⁸⁹ See *id.*

³⁹⁰ See Goldsmith, *supra* note 75, at 1682, 1689-90.

³⁹¹ See U.S. CONST. art. VI, cl. 2; 512 U.S. at 330-31.

³⁹² See Denning & McCall, *supra* note 41, at 369 (characterizing reliance on congressional action as "shutting the barn door long after the horses have run off"); Goldsmith, *supra* note 75, at 1682 ("The likelihood of congressional redress for untoward state activity will increase as does the clarity and the extent of the threat posed to the national interest."); Ramsey, *supra* note 75, at 374-75 (arguing that invalidation of all state laws impacting foreign affairs is an impossible task).

³⁹³ See *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2294 n.8 (2000).

³⁹⁴ See Goldsmith, *supra* note 75, at 1689-90. One could also argue that *Zschernig*, because it applied to state's treatment of aliens, presented an equal protection violation. Under the Equal Protection Clause, state classifications based on alienage are subject to strict scrutiny, and the law in *Zschernig* would probably be found to be unconstitutional. See, e.g., *Tayyari*, 495 F. Supp. at 1371-75 (invalidating state action against Iranian citizens as a violation of the Equal Protection Clause, as well as the Dormant Foreign Affairs Power).

ingly been called upon by activists to highlight inequities abroad and because public pension funds have a growing presence in international investments. Their investment activities, therefore, will continue to be subject to criticism under the Dormant Foreign Affairs Power.

Because the doctrine, as currently construed, can invalidate state and local activity in this growing area, it should be clarified. Alternative approaches, as formulated by lower courts or implied from a reading of the Court's Foreign Commerce Clause cases, do not adequately weigh legitimate concerns about states and localities intruding on the federal government's exclusive power over foreign affairs and, indeed, its need to express the nation's foreign policy. Furthermore, their persuasive value is questionable. When the Court revisits the Dormant Foreign Affairs Power, as it undoubtedly will because of the major role of states and localities in the global economy, it should consider the need for flexibility when states and localities interact in an international setting. These actors must be able to structure their affairs as global economic actors to uphold their duties to pension plan participants. The Dormant Foreign Affairs Power should not be so broad that states and localities are precluded from interacting with the world.

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