

**Your Activism's Not Welcome There:
Divesting State Pension Funds for Social Purposes and the Ramifications of
*Giannoulas***

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INTRODUCTION

One of the more contentious legal battles over the course of American history has centered around what role state and local governments may play in foreign affairs. The Constitution has defined the exclusive role of federal government in several matters pertaining to foreign affairs. Yet, as with most doctrines, the devil is in the details, and courts have had to improvise on how the foreign affairs power should be applied. One of these unanswered details is the level to which states may get involved in crafting a sort of foreign policy. Specifically, what can a state do to express disapproval of a foreign country's practice, if it believes that the federal government is not doing an adequate job at communicating such disapproval?

Legal challenges to state laws targeting foreign countries with some form of consequence for malicious acts have come infrequently, and when they do they often rely on a mishmash of Constitutional doctrines and decades-old caselaw. States defend their laws also on various Constitutional principles that may or may not apply to the situation at hand. Judges, left with little with which to fashion a rule, dare not delve any further than they absolutely must to either uphold or strike down these state acts.

The ramifications of these decisions is substantial. Activist groups organized for the purpose of directing the national attention to a country suffering at the hands of its government often turn to states and municipalities when the federal government turns an

unsympathetic or unwilling ear. Naturally, the smaller scale of state and local lobbying results in more success. Unfortunately for the groups, state and local laws risk being struck down at the moment when they are potentially most effective.

Past experiences in South Africa have shown the value in instituting state and local laws that run counter in some way to federal policy. This leads one to the question: Why should we deny Americans the tools in these state and local laws, when they have been successful in promoting the social good in countries that most need it?

On the other side, should these state actions be upheld, they would saddle business groups operating internationally with significantly more responsibilities. Additionally, such state actions would send mixed messages to the targeted country. Who in the United States is in charge of directing foreign policy? Who must representatives contact in order to conduct future foreign relations? If a foreign government wishes to improve relations, must it try to comply with multiple sets of requirements, which may or may not be compatible with each other?

Part One of this paper lays out the different bases on which the federal government has successfully preempted state laws dealing with foreign policy. While courts have consistently found three different principles to analyze state acts, they have inconsistently applied them, and the principles themselves have undergone radical changes over the last generation. Part Two looks at the modern-day conflict between states and federal laws targeting Sudan. In response to the genocide still happening in Darfur, states have enacted laws divesting state funds from public and private entities operating in Sudan. However, the laws themselves vary widely, and some present possible conflicts with federal policy in the area. Part Three examines how Illinois'

divestment statute was challenged and defeated in a recent case, *National Foreign Trade Council v. Giannoulias*, in federal court. While the law appeared ripe for preemption based on how it was written, the Court's opinion on the matter raises further questions on how the doctrines should work. This part also predicts the repercussions of the *Giannoulias* opinion on the other state laws currently in effect. Finally, Part Four presents several observations and arguments on the development of the doctrines directing the interplay between state and federal laws on foreign policy. It argues that one doctrine in particular, the federal foreign affairs power first utilized in *Zschernig v. Miller*, has spun out of control in its application. Another doctrine, the Foreign Commerce Clause power, is currently muddled by the unanswered question . Finally, it proposes that state power in foreign affairs is as such a low that activist groups should target other sources for action. Whether right or wrong, as the law currently stands states can do little more than play the part of Sisyphus: pushing the federal government into action through their own laws only to have them wiped out once Congress finally acts.¹ While they will continue to push up against the still not-fully-defined boundary dividing allowed acts and proscribed acts, the practicality of the laws that can be implemented have suffered to the point where they are no longer an effective use of organizations' time, money, and energy.

PART ONE: THE EVOLUTION OF DOCTRINES IN A WORLD TOUR – FROM EAST GERMANY TO SOUTH AFRICA TO BURMA TO . . . GERMANY

¹ Sisyphus is a character from Greek mythology who was cursed by the gods to an eternity of pushing a boulder up the side of a mountain. At the end of the day, the boulder would roll back down the mountain, and Sisyphus would have to start his task anew each morning.

The issue of federalism as applied to foreign affairs has roots as old as the country itself.² On numerous occasions, the Supreme Court has taken pains to ensure that in the field of foreign relations, state laws and interests must give way to federal ones.³ However, this strong underlying principle breaks down when courts try to determine whether to uphold or strike down state laws that somehow touch on foreign relations. Of course, states cannot engage in treaties or official diplomatic relations with foreign countries; this much the Constitution expressly prohibits.⁴ When state act more subtly, challengers base their complaints on one or more of three different sources of federal power: the Supremacy Clause itself, the Foreign Commerce Clause, and the unstated yet understood capacity of the federal government to exert exclusive control over the country's foreign affairs. The first two bases are explicitly found in the Constitution and relatively uncontroversial. The third basis, however, requires some more explanation to show how it has developed into a doctrine justifying the Court's disposal of state laws.

A. The Three Challenges to State Action

Supremacy Clause powers

Under the Constitution, once the federal government has spoken on a matter, it becomes the "supreme Law of the Land," and states are prohibited from occupying the

² "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." James Madison, *The Federalist* No. 42.

³ *See, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference") or 68 (noting that "international relations" is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority"); *U.S. v. Pink*, 315 U.S. 203, 232–33 (1942) (noting that foreign policy was an "exclusive federal function" and that foreign policy would be threatened "[i]f state laws and policies did not yield before the exercise of the external powers of the United States . . .");

⁴ This power is expressly given to both the President and Senate under Article II, Section 2 of the Constitution.

same territory.⁵ This power extends to areas of law where Congress has clearly intended to “occupy the field” on a particular matter. As many of the powers to deal with foreign affairs are exclusively handed to the federal government,⁶ states are prohibited from enacting certain legislation right out of the gate.⁷ On matters of foreign affairs, courts have construed the federal government’s exclusive powers rather broadly, and controversy seems only to arise under a few circumstances. As will be discussed, those circumstances include instances where the states legislate and administrate affairs that are explicitly or traditionally under state control. In such a scenario, the Supremacy Clause by itself does not have the answer to whether the state action is legal, and courts would turn to other doctrines.

Foreign Commerce Clause powers

The U.S. Constitution provides that “[t]he Congress shall have power to . . . regulate commerce with foreign nations”⁸ This Constitutional provision has been the source of much struggle and strife with respect to interstate commerce; it is less controversial with respect to foreign matters. Clearly, states cannot engage in free trade agreements with or impose tariffs on the goods of foreign countries. Much of the evolution of this Constitutional provision has involved this clause’s complement, the Interstate Commerce Clause.⁹ In both cases, courts have read in a dormant function of the clause that prevents states from getting directly involved in interstate commerce. The rationale for a dormant Foreign Commerce Clause is also similar to its interstate

⁵ U.S. CONST. ART. VI, CL. 2.

⁶ *See supra* notes 4–8 and accompanying text.

⁷ States of course cannot engage in treaties or impose economic sanctions against a foreign country, for example. *See* U.S. CONST. ART. I, § 10.

⁸ U.S. CONST. ART. I, § 8, CL. 3.

⁹ *Id.*

counterpart: states should not interfere with the federal government's ability to speak with "one voice" on a matter touching foreign relations.¹⁰ It is because of this "one voice" doctrine that courts have read the Foreign Commerce Clause to be tilted even more strongly in favor of the federal government than its interstate counterpart.¹¹

Yet, the Foreign Commerce Clause does not always have the final say on a matter touching foreign relations. Some state actions can impinge on foreign relations without necessarily treading on foreign commerce. Additionally, questions still remain about whether exceptions that allow states to act notwithstanding the Interstate Commerce Clause would extend to Foreign Commerce Clause situations.¹²

Foreign affairs powers

The last basis for striking down state laws is due to their violating the exclusive federal power to conduct foreign affairs. This source of power has been arguably the most controversial, as it is not as easily found as the above two powers.¹³ Although every court touching the subject has acknowledged the federal government's supremacy in dealing with foreign affairs, they nonetheless required an explicit federal act or federal allocation of power before overturning state law; the "dormant" foreign affairs power by itself was not enough to preempt states from acting. The first time the Supreme Court harnessed this source of federal power and used it to overturn a state law was in the middle of the Cold War.

¹⁰ See, e.g., *Japan Line Ltd. v. Co. of Los Angeles*, 441 U.S. 433 (1979).

¹¹ See *id.* at 449 (suggesting that state regulations that affect foreign commerce should be viewed with more skepticism than similar regulations affecting interstate commerce).

¹² See *infra* notes 152–56 and accompanying text.

¹³ See J. Matthew Saunders, *An Iron Fist or Kid Gloves: American Insurance Association v. Garamendi and the Fate of the Federal Monopoly on Foreign Policy*, 7 CHAP. L. REV. 279, 284 (2004). One important distinction is that no exclusive federal power to conduct foreign affairs explicitly exists in the Constitutional.

A. *Clark v. Allen and Zschernig v. Miller – Giants from the Cold War*

The seminal case that advanced the doctrine is *Zschernig v. Miller*,¹⁴ but it must be discussed in conjunction with a case decided in 1947—over twenty years earlier. *Clark v. Allen*¹⁵ involved a California statute stating that a foreign national is only able to inherit property from the United States if his or her country of origin grants the same privilege to U.S. citizens. This statute survived a challenge declaring that California was impermissibly intruding on foreign relations. It did so on the grounds that California had a strong interest in administering its probate laws, that the federal government had no policy that would warrant preemption via the Supremacy Clause, and that California had not targeted or negotiated with any particular country for enforcement of the statute.¹⁶ All these factors led for Justice Douglas to conclude that the state law had no more than an “incidental or indirect effect on foreign countries,” and therefore they would not “cross the forbidden line” into laws that would be stricken down under this as-yet unharnessed power.¹⁷

Not long after *Clark*, a similar probate law in Oregon would undergo the same challenge, this time with different results.¹⁸ The Oregon probate law mandated that foreign nationals had the right to receive proceeds of Oregon estates without risk of confiscation by the individual’s government. *Zschernig* was an East German who was the sole heir of an Oregon resident who died intestate.¹⁹ Even though the federal stance on probate laws (or lack thereof) had not changed since *Clark*, the Supreme Court struck

¹⁴ 389 U.S. 429 (1968).

¹⁵ 331 U.S. 503 (1947).

¹⁶ *Id.* at 510–11.

¹⁷ *Id.* at 517.

¹⁸ *Zschernig*, 389 U.S. at 441.

¹⁹ *Id.* at 430.

down this statute as an unconstitutional invasion of federal prerogative on foreign policy.²⁰ The Court concluded that while states have traditionally handled probate affairs, they nonetheless must “give way if they impair the effective exercise of the Nation’s foreign policy.”²¹ This statute in particular gave Oregon judges an unacceptable window of commentary and criticism of Communist nations, and therefore it could not stand in the face of federal policy toward those nations.²² It did not matter to the Court that the United States still had no explicit policy on how to manage probate matters, holding that “even in the absence of a treaty, a State’s policy may disturb foreign relations.”²³

Justice Douglas wrote the opinion on *Zschernig*, and curiously enough reached the opposite conclusion as he did in *Clark* without expressly overruling the case.²⁴ The most logical way that scholars have resolved cases was to view the two as showing how facial challenges differ from as-applied challenges; a probate statute with a reciprocity requirement may be facially acceptable, but when it is used to invite judicial criticism of a foreign country’s government, it crosses the line.²⁵

If *Zschernig* is a “landmark” case, it was a landmark amidst a desert. For a long time, *Zschernig* was “the only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power of the federal government.”²⁶ No court, federal or state, chose to extend the *Zschernig* doctrine for nearly thirty years. Legal

²⁰ *Id.* at 441.

²¹ *Id.* at 440–41.

²² *Id.* at 440.

²³ *Id.* at 441.

²⁴ See Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245, 283–85 (2006).

²⁵ See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 417 (2003).

²⁶ See *Natsios v. Nat’l Foreign Trade Council*, 181 F.3d 38, 56 (1st Cir. 1999) (internal quotations and citations omitted).

scholars debated the scope of the doctrine, with many reaching the conclusion that its applicability in future scenarios should be narrow.²⁷ Others were willing to lump the doctrine together with the Foreign Commerce Clause, describing them both as parts of the same “foreign-relations pie.”²⁸ Although the case could have sunk into memory as an artifact of the Cold War, courts have been reluctant to do so.²⁹ While the Supreme Court never chose to elaborate on the foreign affairs doctrine, it also did not shut the door on the case. On the few occasions that the Court has had the opportunity to advance or retract the foreign affairs power, it has chosen instead to punt. Without further guidance on what states could do, it was only a matter of time before they tried to push the boundaries on what legislation they could enact.

B. The States Strike Back – The South African Divestment Movement of the 1980’s

The first opportunity that courts had to hold the *Zschernig* doctrine to the light came in the 1980s in state and local challenges to South Africa’s apartheid system. Led by activist organizations tired of seeing the federal government’s noncommittal policies toward South Africa, the mood on followed one main tenet: political pressure by itself will not change a “rogue” nation’s practices unless it is accompanied by economic pressure.³⁰

²⁷ See, e.g., Thomas A. Troyer, Walter B. Slocombe, & Robert A. Boisture, *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds*, 74 GEO. L.J. 127, 159 (1985) (declaring that the flaw in Oregon’s statute is merely that it opened up “detailed, case-by-case judicial inquiries into foreign practices that the law entailed”); Wendy L. Wallace, *Are States Denied a Voice?: Citizen-Driven Foreign Policy After Crosby v. National Foreign Trade Council*, 52 CASE W. RES. L. REV. 793, 802 (2002) (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996) (suggesting that *Zschernig* can be read to strike down only those state statutes critical or “sitting in judgment” of a foreign country’s policy).

²⁸ Peter J. Spiro, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 832 (1986).

²⁹ See, e.g., *Natsios* at 57 (“no decision cited by the [Supreme] Court . . . suggests that it is not binding”).

³⁰ “The South Africa Model”, <http://www.divestterror.org/SAmodel.html>

These divestment actions were quite successful, and certainly contributed to South Africa’s eventual abandonment of apartheid by the end of the decade—although the level of contribution is disputed.³¹ Organizations targeted investments everywhere that were tied to businesses in South Africa, including state pension funds. While states may have been unaware that they had placed public funds into companies in South Africa advancing (or at least tolerating) apartheid, they were not likely to act without nudging from activist leaders and groups.

Not only did activists have to fight state inertia to encourage divestment, they had to fight a federal policy encouraging such inertia. Nearly all divestment laws starkly contrasted with President Ronald Reagan’s policy of “constructive engagement” and its complex carrot-and-stick approach to foreign policy.³² The public divestment actions were not directly challenged in federal court, and they were only sparsely heard in state courts. *Board of Trustees v. City of Baltimore*³³ was one of a very few state cases arising from the divestment measures. The challenge in *Board of Trustees* focused largely on whether divesting public funds for social purposes violated the public fund manager’s fiduciary duties to the fund beneficiaries. The Board’s argument that the city’s divestment ordinances were unconstitutional was secondary, although it did include the three grounds for preemption discussed above.³⁴ The court simply looked at express preemption, and did not implicate either the dormant Foreign Commerce Clause or the

³¹ See Brad Hershbein, *The Devil in Divestment*, HARVARD-RADCLIFFE PERSPECTIVE, Oct. 2002, available at <http://www.digitas.harvard.edu/~perspy/issues/2002/oct/brad.html>; Paul Gray, *Helping Darfur: Is Divestiture Really Effective?*, THE TECH, Jan. 10, 2007, available at <http://www-tech.mit.edu/V126/N61/61GrayDivestment.html>.

³² “Constructive engagement” allowed states to continue investing in companies that adhered to a set of principles encouraging non-discrimination in hiring practices and in the workplace. These principles were named the “Sullivan Principles,” after Louis Sullivan.

³³ 317 Md. 72 (Md. App. 1989).

³⁴ *Id.* at 82–83.

Zschernig doctrine. It held that first, the state campaigns were not preempted by any federal law or policy; and second, management of pension funds was traditionally a matter under state authority, and that the divestment ordinances did not encroach onto federal foreign affairs powers.

As the South Africa divestment movement was allowed to proceed, other states have since enacted laws dealing with companies doing business in Northern Ireland, China, Cuba, Indonesia, Nigeria, and Switzerland.³⁵ Sometimes the laws have specifically mentioned the country it is targeting, other times it references certain principles or tenets under which a country organizes. Florida, for example, has imposed its own laws restricting Florida residents or companies from “financing transactions” involving nationalized property—a not-so-subtle jab at Cuba.³⁶

So much analysis since before the South Africa divestment campaign suggests that no general foreign affairs power is so great that it automatically preempts a state law that reaches beyond national boundaries.³⁷ While the body of caselaw touching the subject is sparse, no court seemed willing to look beyond whether Congress explicitly preempted the state laws. Neither was any court willing to find preemption based on President Reagan’s preference toward selective engagement. Less than fifteen years later, the courts would take a near 180-degree turn.

³⁵ See 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, 308 (1999).

³⁶ Fl. Stat. 288.853 (2006).

³⁷ See Robert Stumberg, *Preemption & Human Rights: Local Options After Crosby v. NFTC*, 32 LAW & POL’Y INT’L BUS. 109 (2000); Grace A. Jubinsky, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 572–73 (1985) (suggesting that *Clark* and *Zschernig* stood for the premise that state intrusion into foreign affairs is tolerated when the states exercise a legitimate state power—such as management of its own funds—that the federal government has traditionally left alone).

C. The Doctrine Evolves: Burma and Beyond

i. Background

Before Burma, most state laws targeting foreign countries acted with the purpose of expressing disapproval of the country's discriminatory practices and hope that the country would reform those practices. This time around, the state act targeted a country and expressed its alarm and denunciation for the target country's violent behavior. In 1988, the Burmese army violently repressed demonstrators protesting the regime's corrupt practices. The crackdown killed thousands of Burmese civilians, students, and monks. Following the incident, the Massachusetts state legislature passed a Act "Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)."³⁸ This Act is not merely a divestment act: it also restricts state agencies or entities from purchasing goods or services from businesses that also engage in business with Burma. While the law contained several exceptions and exemptions on the restrictions, it also contained a fairly broad definition of "doing business with Burma."³⁹ Finally, although the Act does not include any "statement of purpose," the state later argued that the law was intended to express "disapproval of the violations of human rights committed by the Burmese government."

Several months later, the federal government imposes its own set of sanctions on Burma.⁴⁰ The Federal Burma Act generally bars US assistance to Burma with few exceptions; authorizes the President to impose conditional sanctions; instructs the President to work with trading and investment interests in Burma to develop a

³⁸ 1996 Mass. Acts 239, ch. 130. Codified at 7 Mass. Gen. Laws. §§ 22G-22M.

³⁹ *Id.* at § 22G.

⁴⁰ See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167 [hereinafter "Federal Burma Act"].

“comprehensive, multilateral strategy” to reverse the human rights abuses in that country; requires the President to provide update reports to Congress; and gives the President authority to waive sanctions if application of those sanctions “would be contrary to the national security interests of the United States.”⁴¹ While this act mirrors much of what is in the Massachusetts act, it deviates in others.⁴²

ii. The NFTC Challenge – *Baker*

The National Foreign Trade Council (NFTC), representing a number of U.S. companies doing business internationally, files suit against the Massachusetts Secretary of State on three grounds: first, that Massachusetts’ law unconstitutionally interfered with the federal government’s ability to manage foreign affairs; second, that Massachusetts’ law violated the Foreign Commerce Clause; and third, that Massachusetts’ law had been preempted by the Federal Burma Act.⁴³ In deciding the matter, the District Court of Massachusetts dug up *Zschernig* from its resting place, noting that it held that any state law was invalid so long as it had more than “some incidental or indirect effect in foreign countries.”⁴⁴ Like Rip Van Winkle waking from his thirty’ years nap, the *Zschernig* doctrine was reinvigorated when the District Court held that states and municipalities “must yield” on matters of foreign policy. Once it found that doctrine, the rest of the opinion was elementary. The Massachusetts law was intended as a sanction against Burma—as evidenced by its legislative history, and it in fact had a disruptive impact on

⁴¹ Natsios, 181 F.3d at 47-48.

⁴² For example, the federal law authorized the President to determine whether to prevent new investments in Burma, while Massachusetts’ Act automatically established the “restricted purchase list” of companies operating in Burma. Additionally, the President has the ability to waive sanctions under certain circumstances, while the Massachusetts Act contains no such sunset or waiver provision. See Robert Stumberg, *Preemption & Human Rights: Local Options after Crosby v. NFTC*, 32 LAW & POL’Y INT’L BUS. 109, 119–121 (2000).

⁴³ Nat. Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998)

⁴⁴ *Id.* at 290.

foreign relations—as evidenced by amicus briefs from the European Union documenting the impact. Massachusetts’ goal may have been noble, but as the court pointed out, “[s]tate interests, no matter how noble, do not trump the federal government’s exclusive foreign affairs power.”⁴⁵ The court disregarded the Baltimore divestment case, noting the difference between Baltimore’s law (affecting its own behavior) and Massachusetts’ (influencing individuals and companies in their business activities).⁴⁶

iii. On appeal - *Natsios*

After the District Court issued an injunction prohibiting enforcement of the Massachusetts law, the First Circuit upheld.⁴⁷ Interestingly enough, the District Court only sided with the NFTC on that first claim—interference with the foreign affairs power. It held that the NFTC did not adequately show that the federal law preempted the state, and it did not even consider the Foreign Commerce Clause claim.⁴⁸ Nonetheless, the First Circuit on appeal held in favor of the NFTC on all three claims.

The First Circuit approved of the lower court’s interpretation of *Zschernig* and discarded Massachusetts’ argument that the case was “weak precedent.”⁴⁹ It built on the District Court’s interpretation of *Zschernig*, introducing factors to use to determine whether a state law has more than an “incidental or indirect effect on foreign relations”:

⁴⁵ *Id.* at 293.

⁴⁶ *Id.* at 292.

⁴⁷ *Nat. Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999).

⁴⁸ The District Court noted that the central issue in the Commerce Clause claim is whether Massachusetts can take advantage of the “market participant” exception similar to that found in the Interstate Commerce Clause. [cite?] At the time, only the Third Circuit had acknowledged any sort of market participant exception to the Foreign Commerce Clause. *See Trojan Tech., Inc. v. Penn.*, 916 F.2d 903, 909–13 (3d Cir. 1990). However, even in that case, the Trojan Tech District Court did not explicitly define the market participant exception, and the Third Circuit did not address the subject on appeal.

⁴⁹ *Natsios*, 181 F.3d at 52.

1. The design and intent of the law is to affect the affairs of a foreign country;
2. The state is in a position to effectuate that design and intent, and has had an effect;
3. The effects may be magnified should other states enact similar legislation;
4. Other countries have noticed the state law and protested;
5. The state law diverges in multiple ways from the federal law.

As an aside, the list may appear arbitrary at first blush. For example, the first, fourth, fifth, and—to a lesser extent—second factors appear heavily fact-driven, while the third factor requires the court to make predictions. Courts would either be unwilling to speculate on future impact of other rules or automatically declare this factor satisfied based on mere aggregation of effects. The fourth factor also presents an unusual circumstance. The First Circuit in its decision noted an *amicus* brief filed by ASEAN, which declared that Massachusetts’ law is “an attack on international law,” because it puts countries in the near-impossible position of having to negotiate with states or local governments for change.⁵⁰ It marks a rare departure from modern judicial trends by giving foreign governments a “say” in interpretations of U.S. and state law. The fifth factor also seems to naturally satisfy preemption based on the Supremacy clause, so its presence in the foreign affairs power seems duplicative.⁵¹ While the First Circuit took a noble attempt at further clarifying the *Zschernig* doctrine, its qualifying factors appear to result in a further muddying of the different grounds of federal power.

Finally, the First Circuit remarked on the breadth of the power, holding that neither the Tenth Amendment nor the First Amendment provide states appropriate

⁵⁰ *Id.* at 53–54.

⁵¹ The First Circuit notes that the purposes of this factor in foreign affairs analysis is distinct from its purpose in preemption analysis. The latter requires looking into the substance of the areas of departure for their significance, while the former merely requires the differences to exist, given that such differences indicate a “threat of embarrassment to the country’s conduct of foreign relations” *Id.* at 55.

defenses to a foreign affairs challenge, and similarly no market participant exception exists in the doctrine.⁵²

Although the First Circuit could have simply affirmed the lower court's holding on the foreign affairs power, it went further by addressing the two other causes of action. Ordinarily, Foreign Commerce Clause analysis is rather simple compared to the foreign affairs power analysis. Unless it can show a compelling justification, "a State may not advance its legitimate goals by means that facially discriminate against foreign commerce."⁵³ Even if the law does not facially discriminate, it may still violate the Commerce Clause if it "interferes with the federal government's ability to speak with one voice" on the matter.⁵⁴

The First Circuit sided against Massachusetts on both facets of the argument. State laws that are designed and intended to limit trade with a specific foreign nation are precisely the type of "facially discriminatory" law that the Foreign Commerce Clause is designed to prevent. In addition to this finding, the Court went on to find that the Massachusetts law interfered with the federal government's ability to speak with "one voice" on the matter in Burma, amounted to an attempt to regulate conduct beyond the state's borders, and lacked a legitimate local justification.⁵⁵

The Court went in a somewhat unorthodox manner in the Commerce Clause analysis. It started by holding that Massachusetts was not acting as a market participant,

⁵² *Id.* at 59–61.

⁵³ *Id.* at 66.

⁵⁴ *Id.* at 68.

⁵⁵ *Id.* at 67.

and then went on to hold that even it were, no market participant exception belongs in foreign Commerce Clause analysis.⁵⁶

iv. The Supreme Court - *Crosby*

The Supreme Court later upholds the First Circuit's decision,⁵⁷ but it does so on narrower grounds.⁵⁸ Rather than scrutinize the details on the foreign affairs power that *Natsios* presented, the Court hangs its hat on explicit preemption via the Supremacy Clause.⁵⁹ In that regard, it found three reasons why the federal and state acts conflicted.

First, the state law interfered with explicit Presidential discretion by using means to sanction Burma that were outside of Presidential control.⁶⁰ Although the ends may have been the same, the means were different enough to potentially undermine the President's bargaining authority, thus warranting preemption. Second, the federal law set explicit limits on its economic sanctions against Burma.⁶¹ The state law went beyond the boundaries established by the federal law and touched persons and companies that weren't completely under Massachusetts' jurisdiction (and who were explicitly protected from any sanction under the federal law). Finally, the state law was at odds with the President's "intended authority to speak for the United States . . . in developing a comprehensive and multilateral strategy to bring democracy to, and improve human rights practices and the quality of life in, Burma."⁶² This aspect of the decision closely

⁵⁶ *See id.* at 62–66.

⁵⁷ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

⁵⁸ *See Stumberg, supra* note 38, at 110.

⁵⁹ *Crosby*, 530 U.S. at 372.

⁶⁰ *Id.* at 374.

⁶¹ *Id.* at 377.

⁶² *Id.* at 380.

mirrors the “one voice” doctrine that *Natsios* elaborated on in the Commerce Clause discussion, but the Supreme Court wraps this discussion into express preemption.⁶³

As noted, the Supreme Court ducked the contentions based on the foreign affairs power and the Foreign Commerce Clause. Its ruling was wholly grounded in preemption doctrine; even though the state and federal acts shared the same goals, they achieved those goals through different means.⁶⁴ That the Supreme Court failed to address many of the issues brought out by the First Circuit led observers to conclude that the opinion was banal or “anti-climactic.”⁶⁵ While the holding is relatively narrow compared to *Natsios*, it does lay out a broad Supremacy Clause-based power for Congress on this matter. Because Congress did not specifically state it was preempting any state acts, and because the Massachusetts act shared most of the same concerns and goals as the federal act, the Court had to find preemption based on disparity of means. This decision portends that any time Congress acts on a foreign policy matter, state laws are at risk of being stricken down unless they either strictly mirror federal guidelines in means of execution or adopt the federal guidelines as their own.

D. Zschernig-redux: American Insurance Association v. Garamendi

Only three years after *Crosby*, the Supreme Court got another opportunity to refine and explain the different federal powers on international matters. In *American Insurance Association v. Garamendi*,⁶⁶ insurance companies challenged a California statute (The Holocaust Victim Insurance Relief Act) requiring insurers doing business in

⁶³ *Id.* at 381.

⁶⁴ See Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 928–29 (2003).

⁶⁵ Mark B. Baker, *Flying Over the Judicial Hump: a Human Rights Drama Featuring Burma, the Commonwealth of Massachusetts, the WTO, and the Federal Courts*, 32 LAW & POL’Y INT’L BUS. 51, 105 (2000).

⁶⁶ 539 U.S. 396 (2003).

the state to disclose information about Holocaust-era policies. Contrast this with federal treatment, where President Clinton agreed with Germany to establish a foundation—called the German Foundation Agreement—funded by the German government and German companies to compensate Holocaust victims.⁶⁷ Additionally, President Clinton also agreed with Germany that lawsuits against German companies on Holocaust-era claims should be handled through an independent international organization.⁶⁸

Upon challenge, the federal district court struck down the law as violative of both the foreign affairs powers and the Foreign Commerce Clause.⁶⁹ The Ninth Circuit disagreed on both counts.⁷⁰ The Supreme Court, in a 5-4 decision led by Justice O’Connor, sided with the district court and reversed the Ninth Circuit decision.⁷¹

The first point of departure from this case and *Crosby* is that the federal action is executive rather than legislative. That alone does not end the story; the President has a good deal of legitimacy in managing foreign relations. As O’Connor noted, “[a]lthough the source of the President’s power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the ‘President’s vast share of responsibility for the conduct of our foreign relations.’”⁷² Specifically, the Court points out that executive agreements—including executive agreements on handling the settlement of claims

⁶⁷ *Id.* at 407–08.

⁶⁸ *Id.* at 406.

⁶⁹ *Id.* at 412.

⁷⁰ *Id.*

⁷¹ *Id.* at 429.

⁷² *Id.* at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952)).

against foreign governments—are a longstanding practice that have the full effect of law.⁷³

Nonetheless, the German Foundation Agreement did not contain any express preemption clause, and the Court was unwilling to extend to executive actions the same implicit “intent to occupy the field” test that Congressional acts receive.⁷⁴ The Court is left with Commerce clause and *Zschernig*, and it chooses the latter. For the first time since *Zschernig*, the Supreme Court applied the *Zschernig* doctrine to strike down a state law.

O’Connor introduces *Zschernig* in an astoundingly broad light, suggesting that it held that any state act “with more than incidental effect on foreign affairs is preempted,” even if it does not conflict with any federal law or policy.⁷⁵ While this begs the question whether *Zschernig* could obviate the need for a challenger to have to present a conflict as grounds for preemption, the Court ducks that particular question.⁷⁶ O’Connor only goes so far as to claim that if the President has spoken, any state act with more than a mere “incidental effect” conflicting with the President’s prerogative is preempted.⁷⁷ However, in footnote 11, O’Connor suggests an interesting application of *Zschernig* that adopts tenets of both field and conflict preemption. If a state were to act on a foreign policy

⁷³ *Id.* at 415. The Court also left open the question of what happens when an executive policy decision is inconsistent with a Congressional law and the ramifications of such tension on a state law that comports with one federal act but not the other. *See id.* at 427.

⁷⁴ *Id.* at 417.

⁷⁵ *Id.* at 418.

⁷⁶ *Id.* at 419-20.

⁷⁷ Note that O’Connor’s initial interpretation of *Zschernig* may have been more in line with how that Court viewed the ruling. Nowhere in the *Zschernig* opinion did the Court discuss how Oregon’s law conflicted with any federal policy; in fact, Justice Harlan notes in his dissent that Oregon’s law neither conflicted with federal policy nor stirred any foreign country to raise a diplomatic protest against the United States. *Zschernig*, 389 U.S. at 459–60 (Harlan, J., dissenting).

matter without any “serious claim to be addressing a traditional state responsibility,” that act would be preempted regardless of any federal action.

The Court started by declaring that resolving international insurance claims was a matter within federal executive competence.⁷⁸ Because the President exercised legitimate executive authority, the Court determined that the state law must give way where “there is evidence of clear conflict between the policies adopted by the two.”⁷⁹ That conflict was readily apparent in this case: the federal policy has been to encourage negotiation and settlement over litigation and sanctions. California’s law, with automatic sanctions imposed on companies not complying with its disclosure requirements, acted as an “iron fist” where the federal plan has been to use “kid gloves.”⁸⁰ Regardless of the state’s interest, it cannot deviate from a federal policy once that policy is on display, no matter where the policy decisions originated.

The dissent, aside from bringing together the political ends of the Court in an unlikely marriage,⁸¹ explicitly notes the concern about raising *Zschernig* from the ashes.⁸² Justice Ginsburg would have held *Zschernig* to its original circumstances, where a state crafted a law “critical of foreign governments and involves ‘sitting in judgment’ on them.”⁸³ Nonetheless, the expansive view won out, and as a result of this opinion, the *Zschernig* had been stretched in some areas and flattened in others. The *Garamendi* Court approached *Zschernig* as a quasi-Supremacy Clause issue, given that it required a conflict between state and federal policy before it would strike down a state

⁷⁸ *Id.* at 420.

⁷⁹ *Id.* at 421.

⁸⁰ *Id.* at 427.

⁸¹ The dissent was written by Justice Ginsburg, who was joined by Stevens, Scalia, and Thomas.

⁸² “We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here.” *Id.* at 439.

⁸³ *Id.*

law. That requirement notwithstanding, the Court was willing to travel to great lengths to find such a conflict, going so far as to include implicit understandings behind executive agreements. How would the *Crosby* and *Garamendi* opinions play out in shaping future state actions against foreign countries? The country needed less than three years to find out.

PART TWO: THE LATEST TARGET: SUDAN

The horrific and bloody crisis in the Darfur region in Sudan has set the stage for the next chapter in this tug-of-war between the federal and state governments.⁸⁴ This crisis centers around two groups of people in the region: the militia group known as the Janjaweed on one side, and several rebel groups including the Sudanese Liberation Army and Justice and Equality Movement on the other. The Sudanese government, while publicly claiming no direct support of either group, has discreetly (and not so discreetly) aided the Janjaweed economically and in its attacks. While the two sides have been fighting since 2003 over concerns of economic and political underdevelopment in the region, the source of the struggle bears little importance compared to its ferocity. The Janjaweed's efforts at marginalizing the rebel groups have come in the form of brutalizing the civilians in ethnic groups that support the rebels. The Coalition for International Justice has placed the number of deaths resulting from the conflict at over 400,000, and over two million more have been displaced from the region. President George W. Bush has labeled the Janjaweed's attacks as "genocide," although the United Nations has failed to follow suit. A recent peace agreement in May 2006 temporarily lifted hopes that the fighting would cease, but if anything, it has intensified since then.

⁸⁴ Many of the facts in this section come from the Save Darfur Campaign website, available at <http://www.savedarfur.org>.

Against this backdrop, private organizations have attempted to persuade states to implement South African-style divestment initiatives. These organizations believe that the Janjaweed will not and cannot be stopped so long as it has the approval (and access to the coffers) of the Sudanese government. Not content with waiting for UN or federal action, they have advocated to universities, churches, and state and local governments to divest their holdings from Sudan and Sudan-based businesses. Some groups, like the Sudan Divestment Task Force, have created targeted divestment model legislation for states to emulate.⁸⁵

The Federal Response

Both the President and Congress have taken measures in response to the Darfur atrocities. In 1997, President Bill Clinton signed Executive Order No. 13067, which prohibited seven kinds of transactions between the United States and Sudan.⁸⁶ The prohibitions center around exports and imports of goods into or out of Sudan, but the order also prohibits any grants or loans by any U.S. citizen to the government of Sudan.⁸⁷ The order only exempts official governmental and journalistic transactions.⁸⁸

Congress has also enacted a good bit of legislation addressing the Sudanese crisis.⁸⁹ Most recently, President Bush signed into law the Darfur Peace and Accountability Act (“DPAA”) on October 2, 2006.⁹⁰ The DPAA imposes strict penalties against individuals suspected of supporting the genocide in Darfur and authorizes the

⁸⁵ Sudan Divestment Task Force Home Page, <http://www.sudandivestment.org>.

⁸⁶ Executive Order No. 13067—Blocking Sudanese Government Property and Prohibiting Transactions With Sudan, 62 Fed. Reg. 59989, Nov. 5, 1997.

⁸⁷ *Id.* at §§ 2(a)–(b), (e).

⁸⁸ *Id.* at § 3.

⁸⁹ *See, e.g.*, Trade Sanctions Reform and Export Enhancement Act, PL 106-387, 114 Stat. 1549 (2000); Sudan Peace Act PL 107-245, 116 Stat. 1504 (2002); Comprehensive Peace in Sudan Act, PL 108-497, 118 Stat. 4012 (2004).

⁹⁰ PL 109-344, 120 Stat. 1869 (2006).

President to monitor and adjust the country's foreign policy on Darfur as he should see fit. President Bush accompanied the DPAA with Executive Order 13412, which both tightened sanctions on parts of Sudan consistent with the DPAA and eliminated restrictions on private activities and transactions in Southern Sudan and Darfur.⁹¹

Equally as important as the Act's contents is what was missing from the final version. Initially, the DPAA contained language that not only recognized the various state divestment acts, but attempted to allow them to continue without *Crosby*-type repercussions. The initial Section 11 of the DPAA stated, "Nothing in this Act (or any amendment made by this Act) or any other provision of law shall be construed to preempt any State law that prohibits investment of State funds, including State pension funds, in or relating to the Republic of the Sudan." This section was in the initial bill that passed the House, but it fell victim to Senator Lugar and was left on the Senate cutting floor on Sept. 21, 2006. The Lugar amendment was passed without debate, and the House agreed to the Senate amendments on Sept. 25, 2006.⁹² Congress's refusal to officially recognize the state divestment actions may be enough for courts to hold that it did not intend to give up the "field" on which it has the exclusive power to manage relations with Sudan.

The State Responses

Despite this federal response—including the ominous elimination of any statutory provision condoning state action, several states were not satisfied. These states wanted to make a stronger statement. As non-procurement laws or other *de facto* embargoes were most likely unavailable to states post *Crosby*, they instead re-enacted the South African

⁹¹ Executive Order No. 13412—Blocking Property and Prohibiting Transactions With the Government of Sudan, 71 Fed. Reg. 61368, Oct. 13, 2006.

⁹² See S. 3884, 109th Congress, Sept. 12, 2006 (containing Senator Lugar's version of the Act).

action model and enacted divestment statutes.⁹³ The movement caught on quickly. Beginning with Illinois in June 2005, eleven states have now enacted divestment laws, and nineteen others have introduced campaigns to pressure their respective governments to do the same.⁹⁴

The Sudan Divestment Task Force has been one of the leading organizations pressuring states to enact these divestment laws, and it has included model legislation that it believes is effective in its mission yet still satisfies Constitutional muster. A majority of states have followed this model legislation, but some have gone out on their own to divest pension holdings from Sudan.

A. Task Force Model

The Sudan Divestment Task Force has presented model legislation that it believes states should emulate. As of May 11, 2007, five states have followed suit, and a number of others have bills in various stages of the lawmaking process.⁹⁵

From the outset, one will notice that the model legislation treads along a fine line, as it must represent a law that is neither so robust as to step over Constitutional boundaries nor so bland as to be waived away by legislators. Although it initially declares that it is a “fundamental responsibility” of the state “to decide where, how, and

⁹³ Note that these state divestment statutes eliminate the specter of blanket field preemption presented by O’Conner in the *Garamendi* opinion. See *supra* notes 67–82 and accompanying text. Managing state pension and other public funds is unquestionably an area within “traditional competence.” See *Garamendi*, 539 U.S. at 419–20 n.11; *Baltimore*, 317 Md. 72, 116 (1989). Under O’Connor’s hypothetical, these laws would require some sort of balancing against the “conflicting” federal practice, although how such a balance is to be carried out is another question entirely beyond the scope of this note.

⁹⁴ Sudan Divestment Task Force – Interactive State of Divestment Map, <http://www.sudandivestment.org> (current as of May 9, 2007).

⁹⁵ The four states that have enacted the Task Force model legislation are California, Colorado, Iowa, and Vermont. See <http://www.sudandivestment.org/home.asp>.

by whom financial resources in its control should be invested,”⁹⁶ it takes care in the opening sections to refrain from acting in a way inconsistent with federal foreign policy.⁹⁷ The model law also acknowledges that mandatory divestment is indeed a radical measure—albeit a justified one in the face of a federal declaration of genocide in a foreign country.⁹⁸ In making this acknowledgement, the drafters point out to legislators that the kinds of state-managed funds chosen for divestment must be done so carefully.⁹⁹ Additionally, the Task Force model legislation emphasizes the importance of targeting companies that meet certain criteria. Instead of sweeping all Sudan-based entities with a few narrow exceptions under its scope, the Task Force model legislation requires entities to target particular businesses that have some sort of relationship with the Sudanese government, that “impart minimal benefit” on Sudan’s poor and underprivileged, and lack a corporate governance policy on the Darfur genocide.¹⁰⁰

Of course, this model does require a good deal of investment and effort on the parts of implementers. Not all states share the same view as the Task Force on what constitutes appropriate legislation divesting funds from Sudan. Several states have gone a separate way with their laws, and some of these will be discussed in turn.

B. Other State Divestment Laws

Oregon

⁹⁶ *Id.* at § 1(p).

⁹⁷ *Id.* at § 1(r). The model legislation also spends some effort summarizing federal actions against the Sudanese government beginning in 2004. *Id.* at § 1(a)–(m).

⁹⁸ *Id.* at § 1(s).

⁹⁹ *Id.* at § 2(n) (recommending a specific definition of “Public Fund” so that it does not include funds or assets that would be inappropriate for targeting). Notably, the drafters do not elaborate on what characteristics make certain funds appropriate and others inappropriate for targeting.

¹⁰⁰ *See* Task Force Model for Targeted Divestment, <http://www.sudandivestment.org/position.asp#model>.

Oregon’s divestment law was passed in the summer of 2005.¹⁰¹ Declaring that “the investment of subject investment funds in business firms and financial institutions with ties to the repressive regime in Sudan is inconsistent with the moral and political values of the people of Oregon,”¹⁰² the law requires the Oregon Investment Council to “try to ensure” that no investment funds from five different sources are tied to companies doing business in Sudan.¹⁰³ The only exceptions for divestment are for companies authorized by the federal government to do business in Sudan, companies organized to promote “welfare, health, education or religious or spiritual activities” or organized to relieve human suffering, and companies solely engaged in journalistic activities.¹⁰⁴

New Jersey

New Jersey adopted its divestment statute in July 2005.¹⁰⁵ The law prohibits any assets of any pension or annuity fund under the jurisdiction of the Division of Investment in the Department of the Treasury from being invested in any “foreign company with an equity tie to [the] government of Sudan or its instrumentalities.”¹⁰⁶ An “equity tie” includes, among other things, any fiduciary, monetary, or physical presence “of any kind” in the country. The only exception here is for foreign companies providing humanitarian aid through government or NGOs.¹⁰⁷

Maine

¹⁰¹ <http://www.sudandivestment.org/campaigns.asp?campaignid=106>.

¹⁰² Oregon law, § 4(m).

¹⁰³ The “subject investment funds” targeted for divestment are the Public Employees’ Retirement Fund, the Industrial Accident Fund, the Common School Fund, the Oregon War Veterans’ Fund, and any funds from the State Board of Higher Education under the Investment Council’s control. OR law § 4(a)–(e)

¹⁰⁴ Ore. law § 7.

¹⁰⁵ <http://www.sudandivestment.org/campaigns.asp?campaignid=100>.

¹⁰⁶ N.J. law § 2.

¹⁰⁷ *Id.*

Maine adopted its divestment statute in April 2006.¹⁰⁸ The Maine Act places the onus on the Board of Trustees of the Maine State Retirement System to divest assets from “any state pension or annuity fund” from “stocks, securities or other obligations of any corporation or company . . . doing business in or with the nation of Sudan” by the beginning of 2008.¹⁰⁹ The exception to this rule is very narrow, limited to certain commingled short-term investment funds.¹¹⁰ There are no exceptions based on the nature of the business in Sudan, and the law is only set to be repealed at a fixed date in 2009.¹¹¹ Between the enacting date and the repeal date, Maine’s law is essentially a one-and-a-half year ban on investing state pension funds from any company doing business in Sudan.

Connecticut

Connecticut adopted its statute in May 2006. Unlike many other state acts, this acts as more of a recommendation than a binding requirement. The Statement of Purpose explicitly targets Sudan,¹¹² but the actual text of the Act does little more than allow the State Treasurer to use his or her judgment in deciding not to invest state holdings (and not just state pension holdings) in Sudan or companies that do business in Sudan.¹¹³ In doing so, the Act outlines a number of factors that the Treasurer should consider in making his or her decision.¹¹⁴ The Act is also deferential to the federal position on Sudan; it partially relies on the Office of Foreign Assets Control determinations of who is “doing business”

¹⁰⁸ See Sudan Divestment Task Force: Campaign Information, <http://www.sudandivestment.org/campaigns.asp?campaignid=90> (last visited May 9, 2007).

¹⁰⁹ 5 Maine Stat. § 1956(1) (2006).

¹¹⁰ *Id.* at § 1956(2).

¹¹¹ The law is to be repealed on July 1, 2009. *Id.* at § 1956(3).

¹¹² See Conn. Raised Bill 5632 (Feb. 2006).

¹¹³ *Id.* at § 2(a)–(b).

¹¹⁴ *Id.* at § 2(b)(2)(A)–(I).

in Sudan,¹¹⁵ and it only grants the Treasurer such authority until Executive Order 13067 is rescinded or repealed.¹¹⁶

Maryland

Maryland became the most recent state to enact non-Task Force legislation on April 10, 2007.¹¹⁷ It is crafted almost identically to the New Jersey legislation, including similar language in the preamble and identical definitions of “equity tie” and “humanitarian aid.”¹¹⁸ It contains no references to federal law, and only exempts companies providing humanitarian aid and delays “imprudent” divestments.¹¹⁹

Published simultaneously with Maryland’s law was a “Fiscal and Policy Note.” This note warns that the divestment plan carries a “potentially significant increase or decrease in State expenditures,” but also admits that nobody is sure whether implementing the provisions would in fact result in an increase or decrease in investment returns.¹²⁰ Also, the note underscores the fact that states cannot regulate how the investment funds operate; Maryland would have to withdraw from certain funds because it is “not in a position to dictate its investment strategy.”¹²¹ The letter suggests that it is acting as a participant, but it also contains regulatory characteristics, in that it is directing external managers – “All SRPS’s asset management is conducted by external managers selected by the board of trustees.” The very nature of this management means that every Board decision has a regulatory effect in that it directs these managers to adopt a particular investment strategy, even if it could claim it was acting merely as a participant.

¹¹⁵ *Id.* at § 2(a).

¹¹⁶ *Id.* at § 2(d).

¹¹⁷ <http://www.sudandivestment.org/campaigns.asp?campaignid=89>.

¹¹⁸ Md. House Bill 1001 § 1A(1)(B)–(C) (Feb. 2006).

¹¹⁹ *Id.* at § 1A(2)(B), 1A(3)(B).

¹²⁰ Md. Fiscal and Policy Note, *available at*

¹²¹ *Id.*

Illinois

Illinois's Sudan Divestment Act, while first in time, is last on this list because it also has been the first Sudan divestment statute subjected to Constitutional Scrutiny. The Act to End Atrocities and Terrorism in the Sudan (the "Illinois Sudan Act") became law in June 2005, and it is actually two laws in one.¹²² The first part amends the Deposit of State Moneys Act to read that the State Treasurer shall not deposit any public funds into financial institutions that fail to certify that they do not do business with "forbidden entities."¹²³ The forbidden entities include the government of Sudan, companies operating in the area, and most strikingly, any company that fails to certify under oath that it conducts no dealings with or in Sudan.¹²⁴

The second law amends the Illinois Pension Code.¹²⁵ This amendment prohibits all fiduciaries and pension funds formed under the code from investing in entities whose fund managers do not certify to the Treasurer that they have no investments involved in forbidden entities. The definition for "forbidden entities" is slightly different from the one in the Deposit of State Moneys Act, in that only non-public companies are required to certify under oath that they conduct no dealings in Sudan.¹²⁶ Public companies are considered forbidden entities based on determinations made by an independent researching firm.¹²⁷

As mentioned earlier, the Illinois law was the first one to come into effect. As will be discussed, this state law was also the first one to be questioned Constitutionally.

¹²² Ill. Pub. Act 094-0079.

¹²³ 15 Ill. Comp. Stat. 520/22.5–22.6 (2006).

¹²⁴ *Id.* at 520/22.6(b).

¹²⁵ 40 Ill. Comp. Stat. 5/1-110.5 (2006).

¹²⁶ *Id.* at 5/1-110.5(b)(6).

¹²⁷ *Id.* at 5/1-110.5(b)(5).

PART THREE: QUESTIONS ANSWERED AND ANSWERS QUESTIONED: GIANNOULIAS V. NATIONAL FOREIGN TRADE COUNCIL

A. *The Decision*

The National Foreign Trade Council, fresh off its victory in *Crosby*, filed a lawsuit challenging the Illinois Sudan Act in the Northern District of Illinois in July 2006. The lawsuit was not necessarily a surprise; the Sudan Divestment Task Force took great pains emphasizing the differences between its model legislation and targeted divestment approach as compared to Illinois' "shotgun" approach.

On Feb. 23, 2007, the Federal District Court granted the NFTC's request for a permanent injunction against the Illinois Sudan Act, thus negating the first state law touching on divesting funds from Sudan.¹²⁸ However, the holding was based on unlikely grounds—the Foreign Commerce Clause. Judge Kennelly broke the Illinois Sudan Act into its two parts: one amending the Deposit of State Moneys Act, and one amending the Illinois Pension Code. He then held each part up to the three causes of action challenging their Constitutionality.

i. Supremacy Clause preemption

Kennelly began the analysis with the Supremacy Clause challenge.¹²⁹ In doing so, he relied on the notion of "field preemption," where Congress—in passing its series of Acts on Sudan—intended to "occupy the field" in that area. If this were the case, any state law in the area that could frustrate Congress's "purposes and objectives" on relations with Sudan. He went on to hold that the Deposit of State Moneys Act

¹²⁸ *Giannoulis v. Nat'l Foreign Trade Council*, __ F. Supp. 2d __, 2007 U.S. Dist. LEXIS 13341 (N.D. Ill. Feb. 23, 2007).

¹²⁹ *Id.* at *17.

amendments did so frustrate Congress’s purposes, in that this law was broader than the federal act in several ways.¹³⁰ However, the Pension Code amendments survived this challenge, because its effects on the federal government’s ability to conduct foreign policy are “highly attenuated.”¹³¹ The court found no evidence suggesting that divestment from pension funds would hinder Congress’s purposes or objectives.

The court relied on the differences in means to achieve the same end as its basis for striking down the Deposit of State Moneys Act. In so doing, it broadened the holding of *Crosby* by neglecting to consider several factors specifically mentioned by the Supreme Court. It also spent a good amount of ink questioning the validity of *Board of Trustees* while eventually preserving its spirit. The court seemed to hinge its discussion on whether the effects of the two amendments in the Illinois Sudan Act were direct or indirect.¹³² This also marks a departure from *Crosby*’s preemption analysis.

ii. Foreign affairs power

The court then turns to the NFTC’s challenges based on the foreign affairs power. It comments on the relative scarcity of doctrine before turning to *Zschernig* and *Garamendi* as the primary sources of law on the matter. However, upon analysis, the

¹³⁰ Kennelly specifically cited the lack of “safety valve” exceptions in the state law, the prohibition on transactions in the state law that are not prohibited by Congress, and the prohibitions on regions of Sudan that are exempted from the federal Acts. *Id.* at *18.

¹³¹ *Id.* at *30. Even though the Pension Code was not preempted, the court made sure to minimize the effect of *Board of Trustees*, which was based on Baltimore’s divestment of pension funds from South Africa. *See infra*. Kennelly noted that much of what *Board of Trustees* could have stood for—the premise that activities traditionally under state regulation (such as pension fund management) are presumed not to be preempted by federal law, state laws survive preemption when they only apply “indirect economic leverage” on companies doing business in Sudan—was specifically rejected in *Crosby*. *Id.* at **23–27.

¹³² *See id.* at **30–31 (noting that “[t]he amendments to the Deposit of State Moneys Act directly impact the ability of banks and corporations to do business in Sudan . . .” while the Pension Code amendments prohibit funds from purchasing the securities of “restricted companies”).

court still relies on the same arguments enunciated in the Supremacy Clause.¹³³ The multi-factor analysis proposed in *Natsios* was at best undocumented, and at worst ignored; this Court declared that the foreign affairs power applies merely upon the showing of a “tangible effect or risk of such an effect.” Without describing what kind of effect is necessary,¹³⁴ the court concludes that the Deposit of State Moneys Act would have an effect “at least equal to or greater than” the effects seen in *Zschemig* and *Garamendi*.¹³⁵ In doing so, it relies on two facts. First, the Illinois Act targets one country while the state laws in the two Supreme Court cases did not. Second, the Act has cost “non-compliant banks” in the state \$275 million in state deposits.¹³⁶ On these bases, the Deposit of State Moneys Act fails this analysis.¹³⁷

The Pension Code amendment, once again, survives this challenge. The court wanted to see an effect or risk of an effect that a state law has on the federal government’s ability to maintain foreign affairs. It did not find such a risk with the Pension Code; the law as it stands does not risk anything “more than a hypothetical impact” on foreign affairs.¹³⁸ In practice, the Pension Code amendments reduce the number of participants able to purchase a company’s stock, artificially reducing its potential demand. The court found merely speculative, however, the possibility that this reduced demand for a corporation’s stock would either decrease the price of that

¹³³ *Id.* at **36–37 (holding that “the federal government and the State of Illinois have taken different approaches to achieve the same goal—ending human rights abuses in Sudan”).

¹³⁴ The court does make a point of excluding bilateral agreements and “sister state” relationships that encompass economic, cultural, and political exchanges. *Id.* at *38.

¹³⁵ *Id.* at *39.

¹³⁶ *Id.* at **39–40.

¹³⁷ Note that although the court did cite *Natsios* in stating the rule of whether the state has a “incidental or indirect effect in foreign countries,” it did not adopt the factors that *Natsios* crafted in its discussion.

¹³⁸ *Id.* at *41.

company's stock or increase it at a lower rate.¹³⁹ On the other hand, the Deposit of State Moneys Act amendments have cost banks a quantifiable amount of money.

Taken to its logical conclusion, this ruling presents an uncomfortable paradox for organizations pushing for divestment acts throughout the country. What *Giannoulis* suggests is that a state law divesting pension fund investments from companies doing business in a foreign country will be tolerated only so long as its effects on those companies' practices are unknown. Should the law (either by itself or in tandem with other state acts) ever successfully persuade a company to pull out of the targeted country, a court of law would have enough evidence of an "effect" to strike down that law under the foreign affairs power.

iii. Foreign Commerce Clause

Having found two grounds to invalidate the Deposit of State Moneys Act, the court presses on to the Commerce Clause challenge. It starts with the rule that the Commerce Clause will hold unconstitutional any state law that is either facially discriminatory against foreign commerce or facially neutral but creating "a substantial risk of conflicts with foreign governments or imped[ing] the federal government's ability to speak with one voice in regulating commercial affairs with foreign states."¹⁴⁰

The court quickly dispatches both amendments under this challenge. Kennelly correctly notes that both parts of the Illinois Sudan Act exist for the explicit purpose of distancing state money from Sudan. The purposes implicate foreign commerce, and thus they violate the Foreign Commerce Clause.¹⁴¹ Also, just as the First Circuit had done in

¹³⁹ *Id.* at *42.

¹⁴⁰ *Id.* at *46.

¹⁴¹ *Id.* at **47–48.

Natsios, this Court dismissed Illinois’ argument that any sort of market participant exception applies. Similar to *Natsios*, the Court spends a fair amount of ink discussing how even if the market participant doctrine were to apply, Illinois is not acting as a market participant with regard to the Pension Code amendments, because the amendments govern local and municipal pension funds in which the state otherwise does not participate.¹⁴²

B. The Aftermath

The decision, at first blush, continues the trend of an expanding federal power at the expense of the states in enacting legislation that touches foreign governments. However, it also leaves several questions that remain to be answered, perhaps in future litigation involving other states’ laws.

Surprisingly, it did not address the provision in Illinois Sudan Act that most strikingly differentiated it from any other state law. Unlike any other state, this statute explicitly places the onus on companies to certify that they do no business in Sudan.¹⁴³ Such a categorization is far broader than any other state has promulgated, and yet it was not the focus of Kennelly’s decision.

Besides the concern over new and unanswered questions, the most pressing issue is how vulnerable other state laws are to similar preemption. If other courts adopt the Northern District of Illinois’ reasoning, the answer is not a good one for states. What

¹⁴² *Id.* Kennelly notes that the Act applies to *all* fiduciaries and pension funds “established under this Code” 40 Ill. Comp. Stat. 5/1-110.5(a),

¹⁴³ *See, e.g.*, 15 Ill. Comp. Stat. 520/22.6(b)(5); 40 Ill. Comp. Stat. 5/1-110.5(b)(6) (applying the Pension Code amendments to non-public entities who fail to submit affidavits certifying that they do no business in Sudan). At the other extreme, with respect to public entities, the Pension Code amendments take any determination about their inclusion as a “forbidden entity” out of their hands altogether. *See* 40 Ill. Comp. Stat. 5/1-110.5(b)(5) (leaving the decision up to the hands of an “independent researching firm that specializes in global security risk”).

Crosby did for the Supremacy Clause and *Garamendi* arguably did to the *Zschernig* doctrine, this case did for the Foreign Commerce Clause. The rule is wickedly simple: If the law discriminates against foreign commerce, it will be struck down.

Based on the *Giannoulis* decision, any state law that implicates foreign commerce such as the Illinois Act would violate the Foreign Commerce Clause. This holding would extend everywhere; nearly every state's law contains a Statement of Purpose or some other provision establishing the grounds for the law's existence, and nearly all of these purposes clearly state that the law exists to influence and change Sudan's domestic practices.¹⁴⁴ Analysts are already predicting that the *Giannoulis* ruling will both impact the divestment laws currently implemented in other states and influence the direction of legislation being complemented in other states.¹⁴⁵ The only possibility for a state to overcome this sort of ruling would be if it could successfully invoke the market participant defense, and as will be discussed, this is an unlikely scenario.¹⁴⁶

Even absent the Foreign Commerce Clause argument, the state laws are likely to be in trouble. From an explicit preemption standpoint, the DPAA arguably appears to address the same issues that state divestment statutes do. Congress's refusal to include Section 11 in the DPAA may doom most state statutes under *Crosby* grounds.

PART FOUR: THE PRESENT LANDSCAPE: REMARKABLE OCCURRENCES, STATE CONUNDRUMS, AND FURTHER SUGGESTIONS

¹⁴⁴ See, e.g., Illinois Public Act 094-0079 (naming the act "the Act to End Atrocities and Terrorism in the Sudan"); Oregon Senate Bill 1089 ("an Act Relating to Republic of the Sudan"); N.J. P.L. 2005, ch. 162 § 1(i) (2005) ("[i]t is in the best interest of [New Jersey] that a statutory prohibition be enacted to prohibit the investment of public employee retirement funds in foreign companies doing business in Sudan . . .");

¹⁴⁵ See Andrew Stern, *Judge voids Illinois law barring Sudan investment*, REUTERS, Feb. 23, 2007, available at <http://www.reuters.com/article/bondsNews/idUSN2335511320070224>.

¹⁴⁶ See *infra* Part IV(B).

A. *Remarkable occurrences*

One remarkable occurrence resulting from the string of caselaw culminating with *Giannoulis* is seeing the expansion of the *Zschernig* doctrine. Certainly before *Crosby* and arguably before *Garamendi*, both courts and experts paired *Zschernig*'s application with the literary equivalent of a shoulder shrug.¹⁴⁷ The Court was not clear, the boundaries are not precise, nobody knows what to make of it. Given such insecurity with the decision, the doctrine has advanced considerably over the past few years. In fact, given the factual circumstances surrounding the Oregon statute and the Court's reason for overturning it, the doctrine has probably spun out of control. *Zschernig* had to be reasoned somewhat narrowly to remain consistent with the *Clark* decision.¹⁴⁸ Were it not for the critical way in which the Oregon probate statute were applied, the case may never have made it to court. Nowadays, the ruling seems to extend to facial challenges in such a way as the dissenting judges in *Zschernig* feared from the start.¹⁴⁹

Another remarkable occurrence resulting from the string of caselaw is that so much ink has been spilt over an exception that nobody knows exists. Although both *Giannoulis* and *Natsios* ultimately conclude that the Foreign Commerce Clause contains no market participant exception, both courts spend a considerable amount of time discussing how each state acted as a regulator and not merely as a participant.¹⁵⁰ Both cases mention a quasi-Circuit split on the matter, but then distinguish any potential for a split on their facts.¹⁵¹

¹⁴⁷ See *supra* notes 27–30 and accompanying text.

¹⁴⁸ See *supra* note 11 and accompanying text.

¹⁴⁹ See *Zschernig v. Miller*, 389 U.S. 429, 457–62 (Harlan, J., dissenting) (also noting that no foreign entity has raised a complaint over the Oregon statute, in contrast to the Massachusetts Burma law).

¹⁵⁰ *Giannoulis*, 2007 U.S. Dist LEXIS at **48–57; see also *Natsios*, 181 F.3d at 59–60.

¹⁵¹ The case leading to the potential split is *Trojan Technologies v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990). In it, the Third Circuit upheld the Pennsylvania Steel Products Procurements Act—which requires

The market participant doctrine is well-established in Interstate Commerce Clause cases. It has almost no history in Foreign Commerce Clause matters. Experts are largely split on whether the market participant defense should extend to dormant foreign affairs preemption power.¹⁵² The closest the Supreme Court has come to touching on a market participant exception in Foreign Commerce Clause analysis is in one footnote in *Reeves, Inc. v. Stake*, where the Court seemed skeptical of such an exception.¹⁵³ When one looks more broadly, one will find many more clues that the Court strongly disapproves of demarcating public and private acts as applied to foreign policy.¹⁵⁴

On a more practical note, the market participant doctrine exists for good reason. Public entities acting privately, with no regulatory or governmental characteristics, place no burdens on communication between parties any greater than similar communication solely between private individuals. That detail, however, does not carry over into relationships between states and foreign countries. Unlike a domestic public-private relationship, a state-foreign entity relationship does not fall within the umbrella of federal oversight. It would also be impossible for a state to conduct relations with a foreign

suppliers for public works to use American-made steel—in the face of a Canadian challenge. The Court held that Pennsylvania was acting as a market participant, thus not implicating the dormant Commerce Clause. *Id.* at 909–12. In its analysis, the Third Circuit accepted that statutes implicating foreign commerce are subject to “a more searching review.” *Id.* at 912; *see also Reeves*, 447 U.S. at 438 n.9; *Japan Line, Ltd. v. Co. of L.A.*, 441 U.S. 434, 449 (1979). It did not explain what was required in such a review, but it did still accept the market participant doctrine. On the facts, *Trojan Technologies* differs in two ways. First, Pennsylvania’s statute did not target any particular country, and second, Congress had no federal laws speaking to steel procurement in public projects. *See Trojan Techs.*, 916 F.2d at 904–05.

¹⁵² Compare Chiang, *supra* note 65, at 929 n.33, with Denning, *supra* note 36, at 351–68.

¹⁵³ 447 U.S. 429 (1980). In footnote 9, the Court opines that while it has “no occasion to explore the limits imposed on state proprietary actions by the ‘foreign commerce’ Clause . . . [such] scrutiny may well be more rigorous when a restraint on foreign commerce is alleged.” *Id.* at 438 n.9. The Court has commented similarly on closely-related topics, suggesting that state regulations impacting foreign commerce should be viewed with more skepticism than similar regulations merely impacting interstate commerce. *See, e.g., Japan Line*, 441 U.S. at 449; *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95–96 (1984).

¹⁵⁴ *See, e.g., Garamendi*, 539 U.S. at 416 (“[w]hile a sharp line between public and private acts works for many purposes in the domestic law, insisting on that same line in defining the legitimate scope of the Executive’s international negotiations would hamstring the President in settling international controversies”).

entity in a way devoid of any political aftereffects. If a state act puts the burden on the foreign relationship, even if the state acts in a non-regulatory way, the relationship founders. This situation is unacceptable, and has been since the founding of the Nation.¹⁵⁵

No market participant exception should exist when the relationship is between state and foreign country. Also, commerce is merely one item in the basket that constitutes the whole of foreign relations. If no market participant exception exists in Foreign Commerce Clause matters, it certainly should not exist in the general foreign affairs power.

B. State conundrums

Both remarkable occurrences have something in common: they both spell bad news for state and local governments considering “activist” legislation touching foreign matters. Considering the legal challenges facing states—some new, some old, some reborn—one wonders whether states get any sort of say in foreign policy matters anymore. Certainly, the national climate that prompted the South African divestment campaign has been distorted to where it may never be replicated again. Has it been so mangled so that states can no longer “express their views”?¹⁵⁶

Despite seeing the pendulum of federalism swing away from state rights, states will still attempt to make inroads on foreign policy. They will not take a mere passive role and quietly wait for the federal government to enunciate a policy or address a

¹⁵⁵ “The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.” Alexander Hamilton, Federalist Paper No. 80.

¹⁵⁶ See Robert Stumberg, *Preemption & Human Rights: Local Options after Crosby v. NFTC*, 32 LAW & POL’Y INT’L BUS. 109, 112 (2000) (referring to discussion in the *Crosby* oral argument between Massachusetts’ Assistant Attorney General and Justice Souter).

calamity occurring elsewhere in the world. Nor should they; judges and legal scholars have long believed that states serve a useful role as “laboratories” of social and economic policy.¹⁵⁷ While foreign policy “laboratories” need and deserve more careful scrutiny than those of the kind Justice Brandeis anticipated, the basic principle—federal government is more effective and efficient when it can base a policy on a model shown to be successful at the state level than when it must engineer a policy from the ground up—remains the same. Additionally, state action is often the impetus from which Congress can overcome its inertia on a foreign policy matter that it has yet to address.¹⁵⁸

States are still going to act. The Illinois legislature has already introduced a bill designed to replace the current Illinois Sudan Act.¹⁵⁹ While it has not necessarily satisfied critics of the previous act, it has made strides in critical parts of Judge Kennelly’s decision.¹⁶⁰ More generally, people get involved in state and local government because it works at a level that most are able to understand and try to influence. Federal government lobbying is far too “impersonal” for most people’s tastes.¹⁶¹ Indeed, people are driven to act largely on the lack of a federal direction. There must still be a place for states in the post-*Giannoulis* world, but just where that place is is the source of much confusion and frustration.

¹⁵⁷ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

¹⁵⁸ [Source?]

¹⁵⁹ See *Illinois tries new Sudan divestment law*, PENSIONS & INVESTMENTS, Apr. 5, 2007, available at <http://www.pionline.com/apps/pbcs.dll/article?AID=/20070405/DAILY/70405005>.

¹⁶⁰ See *id.* (quoting a consultant to the *Giannoulis* plaintiffs as doubting that the new act “has cured the defects of the previous legislation”).

¹⁶¹ Shanna Singh, *Brandeis’s Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT’L L. REV. 537, 539 (2005) (quoting GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 195 (1985)).

C. *Suggestions*

In the shadow of the *Crosby* decision, Stumberg suggested a spectrum of actions states could undertake based on likelihood of preemption.¹⁶² Non-procurement laws (like the Massachusetts Burma Act) unsurprisingly presented the greatest risk of preemption, followed by procurement conditioned on disclosure laws, divestment actions, public fund shareholder resolutions, and—least offensive—public fund political speech. That spectrum of choices appears to be shrinking in the face of *Giannoulis*.

On its face, divesting pension or other public funds would seem to have a substantial impact; these public funds inject billions of dollars into the marketplace and their absence would be deeply felt.¹⁶³ Nonetheless, divesting pension funds produces a much lower economic impact on the offending country than non-procurement or other regulatory laws targeting that country.¹⁶⁴ Some scholars consider divestment little more than a “symbolic act of economic speech,” with a purpose of rejecting any affiliation with or ownership of a morally bankrupt company or country.¹⁶⁵

Even in the best-case scenario, divestment may not be a useful strategy. Officials have warned about the costs of divesting public funds using a blanket non-targeted strategy, where costs would presumably be lower.¹⁶⁶ Studies from South Africa divestment showed mixed results with regard to fund performance. It largely drew funds to smaller companies and firms that had an easier time proving they had no ties to South Africa. Overinvestment in one size of firm may be advantageous in the short term, but it

¹⁶² See generally Stumberg, *supra* note 38, at 128–58.

¹⁶³ For example, CalPERS—the California Public Employees’ Retirement System—has an investment portfolio with a market value of well over \$200 billion as of June 30, 2006. CalPERS 2006 Annual Investment Report, *available at* <http://www.calpers.ca.gov/>. New Jersey reported assets in its basket of public pension funds of almost \$75 billion in June 2005 (NJ annual report).

¹⁶⁴ Stumberg 149.

¹⁶⁵ *Id.* at 149.

¹⁶⁶ [Cite news article discussing costs of divesting in MD?]

forces funds into an investment strategy that may not be appropriate given market conditions. In this sense, divestment measures leave footprints, and fund managers are stuck between following social policy objectives and fulfilling their fiduciary duty of maximizing value for their beneficiaries.¹⁶⁷ Others have argued that public pension funds by nature are bad instruments for directing social policy.¹⁶⁸ John Silber, former President of Boston University, stood out during the South African divestment movement by being unwilling to divest university funds from the area.¹⁶⁹ His rationale was that divesting “immoral” stocks requires either that the owner sell the stock—and pass the “guilt”—to another party, or that the owner destroys the stock, thus benefit the immoral company and the other holders by consolidating their market share.

What else may be available to states? Stumberg suggested rewriting procurement and divestment laws to target violators of human rights laws generally as opposed to targeting a specific country. The most-cited example of this difference is the *Barclays Bank* case, involving unsuccessful challenges to “Buy American” laws.¹⁷⁰ Laws applying generally and not targeting a particular foreign country may have some more success in the courts; previous cases have opined that they may not have to undergo *Zschernig*-style scrutiny.¹⁷¹ It remains to be seen if a state can enact a divestment statute targeting conditions rather than regimes; for example, where “no state fund shall invest in companies doing business in any country meeting criteria X.” Such a practice may be

¹⁶⁷ Roberta Romano, *Article: Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 *Colum. L. Rev.* 795, 796 (1993).

¹⁶⁸ *See, e.g., id.* (arguing that public pension funds “face fully distinctive investment conflicts that limit the benefits of their activism”).

¹⁶⁹ News sources (online sources out of date).

¹⁷⁰ *See generally* *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 98 (1994).

¹⁷¹ *See, e.g., Natsios*, 181 F.3d at 58-59 n.13.

more difficult to challenge, and it may allow for exceptions that targeted laws cannot enjoy.

Under a more stark perspective, perhaps now is the time to change the targets of lobbying efforts from state and local governments to private and quasi-public organizations. Corporations, churches, and universities are three other main targets for the Sudan Divestment Task Force, and they do not have their hands tied in targeting either Sudan or companies based there for change. One wonders whether the laws that states could manage to eke out are worth the lobbying, handwringing, and investment in pushes to enact that law. States must walk such a delicate tightrope to ensure that its laws pass the “new” Constitutional muster, and the laws that are passed are as best uncertain as to their effectiveness beyond symbolically expressing disapproval. Private organizations, on the other hand, are not Constitutionally tied to remaining so passive in the face of federal powers, and they can exert far more direct consequences against a repressive regime.¹⁷²

CONCLUSION

The caselaw dealing with the interplay of federal and state laws dealing with foreign affairs is few and far between. The combination of multiple sources of federal power on foreign matters from which a judge may choose and rarely-presented challenges result in doctrines that are inconsistently applied. Principles freely travel from

¹⁷² Of course, the organization may have a more difficult time convincing a private corporation to disassociate itself from a potentially lucrative investment operating in Sudan (or elsewhere). Warren Buffett, for example, has been one of the larger names resisting the call to separate Berkshire Hathaway from oil companies—such as PetroChina—that have significant operations in Sudan, doing so on the grounds that divesting from PetroChina would neither affect Sudan nor the Chinese government. On May 5, Berkshire shareholders voted overwhelmingly against divesting \$3.3 billion in PetroChina. Josh P. Hamilton & Jesse Westbrook, *Berkshire Shareholders Defeat PetroChina Resolution*, BLOOMBERG, May 5, 2007, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=ayg30EbB4LLs&refer=home>.

one source of power to another, factors are developed and summarily discarded, and litigants are left with little choice but to throw all their arguments and defenses into a vat from which the judge must pick out the issues that speak most directly to the matter.

Unfortunately for states, while specific applications of doctrine may be inconsistent and ever-changing, the fundamental legal atmosphere has been consistently heading in one direction since the turn of the century. With the change in the legal atmosphere, the divestment model that worked for South Africa cannot likely be duplicated. The line of cases since *Crosby* have rounded out various grounds for invalidating state laws, and states are left with little recourse. Experts have repeatedly doubted that divestment initiatives play more than an incidental role on the federal government's ability to conduct foreign relations.¹⁷³ Nonetheless, the judicial tide has clearly turned against states in their ability to provide anything more than a symbolic and strictly political gesture of disapproval.

Ultimately, both states and challengers could benefit from having one familiar doctrine with understandable features that apply to situations involving state activism that may intrude on foreign affairs. This doctrine may not have to look much different from the three that currently exist; even determining and eliminating the areas of overlap would be an improvement. Such a time does not appear to be coming soon; there is no sign yet that Illinois intends to escalate *Giannoulis* to the Seventh Circuit for further elaboration. Whether the NFTC would set its sights on other state laws or the Task Force Model remains to be seen. Perhaps one of these impending challenges would both resolve unanswered questions and sew up the doctrines to produce a result acceptable to both states, industries, and the federal government.

¹⁷³ See, e.g., Jubinsky, *supra* note 35, at 574.