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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. 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. These initiatives mirror state and municipal participation in the economic boycott of apartheid South Africa beginning in the 1970s.

2 See id. at 41-42.
Subsequent state and municipal action has focused on Northern Ireland, and more recently, countries such as Burma, Indonesia, Nigeria, Tibet, Cuba and China. 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.

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. 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. 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. 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. In short, the Dormant Foreign Affairs Power may constrain state and local efforts to address key foreign policy concerns.

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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.
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 (declaring 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.


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.

financial assets. 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. Because public pension funds invest so much in the private sector, they may become subject to social investment restrictions. 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.

Nearly one quarter of public pension funds must invest their assets in accordance with some type of social investment restriction. First, some proposals have called for an outright divestment from suspect countries and companies that do business in suspect countries. 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.

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.


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


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. Finally, state and municipal pension funds, through their day-to-day investment decisions, may impact international markets.

Divestment has been the most visible form of social investing activity by state and local governments. 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. 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. 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. 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, including Burma, Indonesia, Nigeria, Switzerland.

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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.

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-


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); MICH. 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. Some state laws relating to Northern Ireland are precatory, only requiring a report about corporations' compliance with the MacBride Principles. Other state laws mandate divestment from companies failing to comply with the MacBride Principles. 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. 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.

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.

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).

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


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

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

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

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 90, 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.\textsuperscript{54} A number of state laws mandate how pension fund directors or state treasurers must vote in shareholder resolutions relating to social issues.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} For example, the New York City Employees Retirement System ("NYCERS") sponsored several shareholder resolutions to implement the MacBride Principles.\textsuperscript{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.\textsuperscript{59} Furthermore, activists have pursued shareholder resolutions that would require companies to adopt general corporate codes of


\textsuperscript{56} See R.I. Gen. Laws § 35-10-12.

\textsuperscript{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.


\textsuperscript{59} See Marlene Givant Star, Burma is Investors' Issue; Social Coalition May Sue to Get Resolutions on Proxy, Pensions and Investments, May 29, 1995, at 37.
conduct regarding human rights, without identifying a specific target country.\textsuperscript{60} As fiduciaries of a public pension fund, the investment board or treasurer may have an obligation to vote in shareholder resolutions.\textsuperscript{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.\textsuperscript{62} Because these boards have authority to make investment decisions not explicitly mandated by a legislative act, their actions might also implicate foreign affairs.\textsuperscript{63} As global investors, pension fund boards make decisions about investing in foreign countries based on investment risk.\textsuperscript{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.\textsuperscript{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

\textsuperscript{60} See Marlene Givant Star, PepsiCo Plans to Divest Stake in Burma 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.

\textsuperscript{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.


\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{65} See, e.g., Joel Cheroff, 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. In addition, public pension funds can use their economic power to effectuate policy changes regarding financial practices in foreign countries.

For nearly two decades states and municipalities have used their economic power to express their citizens' concerns about the conduct of foreign nations. 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. 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.

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. First, these restrictions could be considered an infringement upon the federal government's exclusive power over foreign affairs—the Dormant Foreign

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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.
Affairs Power—an implied constitutional power. 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. Finally, sanctions enacted by Congress, as in the case of South Africa and Burma, could preempt state and local actions.

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. A state or municipality is precluded

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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 Trs., 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 the 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 Trs., 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. 929, 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 Repraisal.”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 33, at 68-70, 73.
Supreme 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. 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

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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. 303, 242 (1942) (“In our dealings with the outside world, the United States speaks with one voice.”) (Frankfurter, 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 391 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. 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. 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. 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.

The Supreme Court has only once struck down a state law for impermissibly interfering with the federal government's dormant power over foreign affairs. In 1968, in Zschernig v. Millet, 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. In Zschernig, the decedent, a resident of Oregon, died intestate. 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. The Oregon decedent's sole heirs, residents of East Germany, challenged the state law because they had been denied inheritance under the law. The State of Oregon argued that the estate should escheat because the heirs did not meet Oregon's alien reciprocity requirements. 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.\textsuperscript{101}

The \textit{Zschernig} Court distinguished \textit{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.\textsuperscript{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."\textsuperscript{103} Therefore, Oregon's actions had more than an incidental effect on foreign affairs.\textsuperscript{104}

In assessing whether a state action has more than an incidental effect on foreign affairs, the \textit{Zschernig} Court considered four factors.\textsuperscript{105} First, the Court examined whether the law required a state government to inquire extensively into the nature of foreign governments.\textsuperscript{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.\textsuperscript{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.\textsuperscript{108} Third, the Court consi-

\textsuperscript{101} \textit{See id.} at 431. The \textit{Zschernig} Court distinguished \textit{Clark} based on the content of judicial commentary arising from implementation of the Oregon statute. \textit{See id.} at 433–34. In contrast to \textit{Clark}, the \textit{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. \textit{See id.} at 435–40.

\textsuperscript{102} \textit{See id.}

\textsuperscript{103} \textit{Id.} at 441. The \textit{Zschernig} Court did not explain how the state action directly impacted foreign relations. \textit{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. \textit{See id.} The Court allowed that state courts routinely must interpret foreign laws and have jurisdiction over foreign citizens. \textit{See id.} at 433. The \textit{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. \textit{See id.} at 434. The Court appears to have wanted to make a broader statement about the treatment of citizens of communist countries. \textit{See id.} at 435.

\textsuperscript{104} \textit{See Zschernig}, 389 U.S. at 434–35.

\textsuperscript{105} \textit{See id.} at 433–41.

\textsuperscript{106} \textit{See id.} at 433–34.

\textsuperscript{107} \textit{See id.} at 435.

\textsuperscript{108} \textit{See id.} at 441.
ordered if other countries had protested the action. 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. 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.

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. For that reason, the wishes of the branches of government entrusted to formulate foreign policy were dismissed. 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.” In contrast, Justice Harlan, concurring only in the judgment, criticized the Court for not deciding the case on the narrower preemption grounds. 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.

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. The Court has addressed, however, claims that state laws impermissibly interfere

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. The Court has also ruled that federal sanctions have preempted state action against foreign nations.

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. 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. They further noted that foreign governments had protested this tax.

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. 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.” 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.

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. 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.
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. 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. The Court concluded, "the Constitution does not make the judiciary the overseer of our government." Holding that the tax formula was otherwise legal, the Court deferred to Congress to preempt the law if it impaired United States foreign policy.

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. 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. Under the federal Burma sanctions, Congress had delegated significant discretionary power to the President to devise multilateral strategies towards Burma.

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. Noting
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. 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. The Crosby Court also sought to limit a reading of Barclays that would dismiss the protests of foreign governments. 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.

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 Zschernig prohibition against state and local action that has more than an incidental effect on foreign relations. Lower courts have reached contrary conclusions on whether state or municipal actions violate the Dormant Foreign Affairs Power. 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.

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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 Txs., 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 Txs., 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 Txs., 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. The First Circuit upheld a lower court decision invalidating the Massachusetts Burma Law as a violation of the Dormant Foreign Affairs Power. 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.

To determine whether the law had more than an incidental effect, the court looked to the intended and potential impact of the law. The court found that the only purpose of the law was to change Burma's human rights policies. 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. 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. 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."

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

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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.\textsuperscript{151} The court similarly declined to entertain arguments about scholarly criticism of the \textit{Zschernig} decision.\textsuperscript{152} Second, the First Circuit also refused to interpret \textit{Barclays} as implicitly narrowing the scope of \textit{Zschernig}, despite \textit{Barclays} indication that Congress is the only proper entity to determine whether a state action interferes with foreign affairs.\textsuperscript{153} Although \textit{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 \textit{Barclays} applied only to the Foreign Commerce Clause.\textsuperscript{154} The First Circuit noted that \textit{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.\textsuperscript{155}

Other lower court decisions have invalidated state policies that target a single country.\textsuperscript{156} In \textit{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.\textsuperscript{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.\textsuperscript{158} Iranian students presented three constitutional challenges: an equal protection claim, a due process claim and a Dormant Foreign Affairs Power claim.\textsuperscript{159}

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

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\item \textsuperscript{151} See id.
\item \textsuperscript{152} See id. at 58–59.
\item \textsuperscript{153} See Natsios, 181 F.3d at 58–59.
\item \textsuperscript{154} See id. at 59. The Natsios Court noted that the parties in \textit{Barclays} cited to \textit{Zschernig} in their briefs and oral arguments, but that the Supreme Court never cited \textit{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. \textit{Barclays} represents the Foreign Commerce Clause analysis. See id.
\item \textsuperscript{155} See id.
\item \textsuperscript{156} See \textit{Tayyari}, 495 F. Supp. at 1380; \textit{Springfield Rare Coin Galleries}, 503 N.E.2d at 305.
\item \textsuperscript{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.
\item \textsuperscript{158} See id.
\item \textsuperscript{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.
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Affairs questions.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{163}

Similarly, in 1986, in \textit{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.\textsuperscript{164} Although states are generally given great deference in tax policy matters, the court recognized constitutional limits to this state power.\textsuperscript{165} Citing legislative debate, the court found that the purpose behind the exclusion was "to avoid the appearance of encouraging South African investment."\textsuperscript{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.\textsuperscript{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.\textsuperscript{168}

\textsuperscript{160} See id. at 1375, 1380.

\textsuperscript{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.

\textsuperscript{162} \textit{Teyvani}, 495 F. Supp. at 1378.

\textsuperscript{163} See id. at 1380.

\textsuperscript{164} See 503 N.E.2d at 305.

\textsuperscript{165} See id.

\textsuperscript{166} See id. at 302.

\textsuperscript{167} See id. at 306.

\textsuperscript{168} See \textit{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. 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. The California court interpreted the “Buy American” law as an embargo on foreign products. As such, the court found that, under the Dormant Foreign Affairs Power, the law invaded the exclusive federal power over trade policy. The court reasoned that the law was an attempt by the state to “structure national foreign policy to conform to its own domestic policies.” 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.

Some lower courts have upheld state laws that may touch on foreign affairs as constitutional under the Dormant Foreign Affairs Power. 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.

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*. 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. Although the

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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.
The 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.” The court observed that, unlike Zschernig, the divestment statute required no continuous investigation by a state entity into South Africa’s law. Because the pension divestment ordinances were a single statement about a foreign country, the court reasoned that they were beyond the scope of Zschernig. 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.”

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. 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. 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.

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. 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. In hold-
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. 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. 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. Therefore, invalidation would amount to a “judicial redirection of established foreign trade policy—a quite inappropriate exercise of the judicial power.”

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. 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. 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.” 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.

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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. 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. 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.

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. 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. 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.

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. Where exactly this bar-

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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).
rier lies, however, is uncertain. The doctrine does not present a clear standard by which states and municipalities can determine the constitutionality of their actions. 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.

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. 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. In contrast, if Zschernig is more narrowly construed, many of these state actions could be held constitutional.

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. 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. 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

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203 See National Foreign Trade Council v. Natsios, 181 F.3d 38, 51-52 (1st Cir. 1999), off'd sub nom. Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288, 2290-91 (2000); Board of Txs. 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").


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; Teyyari, 495 F. Supp. at 1380; Springfield Rare Coin Galleries, 503 N.E.2d at 305; Bethlehem Steel, 276 Cal. App. 2d at 229.

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


210 See 389 U.S. at 434-35.
have some effect on the United States' ability to conduct foreign affairs.\textsuperscript{211}

The two main Supreme Court cases in this area, \textit{Zschernig} and to a lesser extent \textit{Clark}, when read together, raise questions about the scope of the foreign affairs power.\textsuperscript{212} Although \textit{Zschernig} did not explicitly overrule \textit{Clark}, \textit{Clark}'s balancing test, weighing the state's interest in areas of traditional local concern against the impact on foreign affairs has been sub silento overruled by \textit{Zschernig}.\textsuperscript{213} \textit{Zschernig} implicitly replaces the \textit{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.\textsuperscript{214} If the state activity exceeds some threshold level—i.e., \textit{Zschernig}'s routine reading of foreign laws—the state has violated the Dormant Foreign Affairs Power.\textsuperscript{215}

\textit{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.\textsuperscript{216} Lower courts, however, grappled with this line.\textsuperscript{217} The courts examine two factors: whether the law or action impacts foreign affairs and whether the impact is more than incidental.\textsuperscript{218}

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

\begin{itemize}
\item \textsuperscript{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").
\item \textsuperscript{212} Compare \textit{Zschernig}, 389 U.S. at 440-41, with \textit{Clark}, 331 U.S. at 517. See also Henkin, supra note 7, at 164 ("[I]t may take many years and many cases, to develop the distinctions and draw the lines that will define the \textit{Zschernig} limitations on the states.").
\item \textsuperscript{213} See 389 U.S. at 433-35, 440-41; 331 U.S. at 516-18.
\item \textsuperscript{214} See 389 U.S. at 440-41; see also Natsios, 181 F.3d at 52 (interpreting \textit{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).
\item \textsuperscript{215} See 389 U.S. at 434-35.
\item \textsuperscript{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 \textit{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).
\item \textsuperscript{217} Compare Natsios, 181 F.3d at 52 (unconstitutional), and Tayyari, 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 Ts., 562 A.2d at 749 (constitutional), and K.S.B. Technical Sales, 381 A.2d at 784 (constitutional).
\item \textsuperscript{218} See supra notes 140-201 and accompanying text.
\item \textsuperscript{219} See supra notes 140-201 and accompanying text.
\end{itemize}
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. Foreign affairs is a broader category of activity than foreign policy—it need only touch on countries outside of the United States. 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.

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. 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. Therefore, their application of the Dormant Foreign Affairs Power analysis has condensed the first two factors that the Court considered in Zschernig. 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. 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.

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

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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.


223 See Natsios, 181 F.3d at 53; Tagari, 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. For example, in upholding "Buy American" laws, lower courts concluded that the laws did not criticize or demonstrate a bias toward a given country. 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.

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. Instead, these factors reinforce suspicions about the potential negative impact on the federal government’s ability to deal with foreign countries. 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.

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. 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. 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. Therefore, once a court has made a finding that the state or local action criticizes

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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 807.
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.
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. 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. Therefore, state or municipal actions that express local concern and do not directly target a foreign country or its citizens would be constitutional.

Although this approach may be more practical than an absolute ban on state activity impacting foreign nations, Supreme Court precedent does not support it. First, Board of Trustees gives too much consideration to areas of local concern. The Dormant Foreign Affairs Power, as articulated in Zschernig, is not a balancing test between state and federal interests. 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.

Second, the Board of Trustees approach attempts, unconvincingly, to distinguish the South Africa divestment ordinance from the facts in Zschernig. 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 government. By rejecting investment opportunities in South Africa because of apartheid, Baltimore engaged in a very public criticism of a foreign government. This legislative criticism impacts many companies, and is perhaps even more

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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 Tis.' interpretation of Zschernig); Ramsey, supra note 75, at 361 ("The 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 Tis., 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 Tis., 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 Barclay, 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.
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. 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.

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. 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. 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. 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. 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.

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. The Zschernig

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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.


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.\textsuperscript{274} For that reason, the wishes of the branches of government entrusted to formulate foreign policy were dismissed.\textsuperscript{275} The Supreme Court rejected this type of judicial activism in \textit{Barclays}.\textsuperscript{276} Effectively, this makes \textit{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.\textsuperscript{277} Furthermore, by declining to consider other nations' protests or retaliatory action, because Congress, not courts, should determine United States foreign policy, the \textit{Barclays} Court, in essence, told the multi-nationals challenging the California tax law to find a political, not constitutional solution to their problem.\textsuperscript{278} Although the \textit{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 \textit{Crosby}, Congress had not enacted a foreign policy scheme that required the President to work with other nations.\textsuperscript{279}

The \textit{Barclays} alternative could allow state or local action touching on foreign affairs unless Congress had explicitly or implicitly preempted the action.\textsuperscript{280} \textit{Barclays}, however, dealt with a state tax formula.\textsuperscript{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.\textsuperscript{282} Furthermore, it concerned state tax policy, an area that the court has always considered to be of traditional local concern.\textsuperscript{283} \textit{Barclays} does not clarify if a court should only defer to Congress's preemptive abilities if

\begin{footnotesize}
\textsuperscript{271} See 389 U.S. at 440–41.
\textsuperscript{272} 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).
\textsuperscript{276} See 512 U.S. at 328–31.
\textsuperscript{277} See id.
\textsuperscript{278} See id. at 327–28 (noting that the companies' complaints to the judiciary were directed at the wrong forum).
\textsuperscript{279} See id.
\textsuperscript{280} See id. at 327–28.
\textsuperscript{281} See 512 U.S. at 302–03.
\textsuperscript{282} See id. at 302–03.
\textsuperscript{283} See id. at 327 n.28.
\end{footnotesize}
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 Zschernig 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 supra notes 290-290 and accompanying text.
291 See supra notes 290-290 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. 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.

In the case of divestment activity, states and localities are targeting countries for divestment because they disagree with the policies enacted by foreign governments. These initiatives particularly focus on the human rights record of the country. 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. 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. 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. 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. 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.

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294 See supra notes 102-104 and accompanying text.
295 See DeSimone & Moses, supra note 37, at 2, 17-22.
296 See supra notes 209-240 and accompanying text.
297 See id. at 1-2.
298 See id.
299 See Natimos, 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. Even so, through their reporting requirements, states and municipalities seek to highlight publicly the inequitable treatment of foreign nationals within a foreign country. They are a means to raise awareness about the conditions in a foreign country. 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. 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. Additionally, the plethora of similar state and local measures raises, under Zschernig, the possibility that the federal government's foreign relations with these countries will be affected. Therefore, they would be similarly unconstitutional under the Dormant Foreign Affairs Power.

Shareholder resolutions may mandate a company's divestment from a country or may require its compliance with certain business practices when operating overseas. Because the Dormant Foreign Affairs Power, as articulated in Zschernig, is not limited to state laws, but encompasses any state action, participation in shareholder resolutions is susceptible to Dormant Foreign Affairs Power scrutiny. Many states, however, establish voting practices on some issues by law. 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. 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 supra notes 47-52 and accompanying text.
305 See supra notes 47-52 and accompanying text.
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315 See supra notes 47-52 and accompanying text.
a statute. 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.

Some shareholder resolutions seek to force companies to adopt generic human rights treatment when the company decides to conduct business abroad. 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. 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. This policy would require states to engage in country-by-country criticisms of the type specifically forbidden by Zschernig.

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. 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. Because Zschernig did not indicate any reason to distinguish criticism of a foreign govern-

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514 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.

515 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).

516 See supra note 60 and accompanying text.

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

518 See supra note 65 and accompanying text.

519 See supra notes 238-240 and accompanying text.

520 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.

521 See generally Fyr, 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., Natlco, 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. Investment decisions about political or economic risk also would focus primarily on companies. This permissive approach, however, has not been followed by other lower courts, and indeed, is not supported by Zschernig.

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. 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. Congress is aware, and has not acted against, social investing by public pension funds in response to foreign countries’ human rights violations. In the 1980s, Congress debated but failed to enact any measure preventing states from this type of activity. Therefore, because of congressional acquiescence, state and local investment restrictions would be constitutional under this interpretation of the Dormant Foreign Affairs Power. The constitutionality of shareholder resolutions and investment decisions would similarly turn on whether Congress implicitly or explicitly acquiesced to state and local action. 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.

332 See supra notes 246–250 and accompanying text. 333 See supra notes 246–250 and accompanying text. 334 See supra notes 246–250 and accompanying text. 335 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 Zschernig). 336 See supra notes 268–280 and accompanying text. 337 See supra notes 268–280 and accompanying text. 338 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). 339 See Board of Trs., 562 A.2d at 741–44. 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. 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. To do less would impair their ability to fulfill their obligations to pension plan participants. 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. Any reformulation of the Dormant Foreign Affairs Power must balance these extremes to be workable in this era of global market activity.

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. 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. 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. As articulated in Zschernig, the line is drawn at a more than incidental effect on foreign affairs—i.e., criticizing foreign nations. As states and localities invest more in the global

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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 Fry, 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).
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.\textsuperscript{359} Congress cannot realistically preempt every state and local action—there are after all tens of thousands of sub-federal governmental entities.\textsuperscript{360} Therefore, the Court should reserve the ability to act in the most egregious cases, where the state action looks substantially like foreign policy.\textsuperscript{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.\textsuperscript{362} Yet because government entities are acting, their actions are more likely to be confused with official United States foreign policy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{365} Zschernig did not make this distinction, but it should have.\textsuperscript{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.\textsuperscript{367} Probate, in particular, is an area where the federal government generally does not speak, but rather is ordinarily a state matter.\textsuperscript{368} Because there is no federal foreign policy on probate disposition to foreign nationals, the state action becomes the only

\textsuperscript{359} See supra notes 268–280 and accompanying text.
\textsuperscript{360} See Denning & McCall, supra note 41, at 369; Ramsey, supra note 75, at 374–75.
\textsuperscript{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").
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{364} See, e.g., Burr, supra note 34, at 8 (detailing the growing acceptance of social investment criteria).
\textsuperscript{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).
\textsuperscript{366} See supra notes 94–116 and accompanying text.
\textsuperscript{367} See supra notes 94–116 and accompanying text.
\textsuperscript{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 Zehrenig, 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

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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. 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. 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. 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. 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. Furthermore, the Equal Protection Clause protects aliens from discriminatory treatment by states and the Dormant Commerce Clause limits direct state regulation of foreign commerce.

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-

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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 stale laws impacting foreign affairs is an impossible task).
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 Iranians 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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