

CITIZENS NOT SUBJECTS: U.S. FOREIGN RELATIONS LAW AND THE DECENTRALIZATION OF FOREIGN POLICY

*Nick Robinson**

INTRODUCTION

[L]ocal assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty are what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.¹

De Tocqueville found America's "spirit of liberty" grounded in its citizens' engagement with municipal political institutions.² It was here that locally relevant and creative new policies were fostered, tyranny was resisted, and the responsibilities of self-governing were internalized by a democratic people. For De Tocqueville this "spirit of liberty" required not only direct democracy at a local level, but also that municipalities possess relative power over their own affairs.³ It was this combination of local democracy with local independence that turned "good subjects" into "active citizens."⁴

Today, there are few municipalities in the United States that are

* Yale Law School, J.D. 2006. Currently Fox Fellow at Jawaharlal Nehru University, New Delhi. I would like to thank Judith Resnik and Reva Siegel for their comments on an earlier draft of this article. An earlier version of this article was selected for presentation at the 2006 Yale Journal of International Law Young Scholars Conference. I am grateful for feedback from participants at that conference, especially Paul Berman. Finally, I would like to thank Bruce Ackerman for his comments arising out of discussions of this article.

1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* VOLUME ONE 63 (Phillip Bradley ed., Francis Brown rev., Henry Reeve trans., 1954) (1835).

2. *Id.*

3. *Id.* at 69.

4. *Id.* at 69.

ruled through local assemblies of citizens. Instead, representative forms of government are the norm. However, citizens' involvement with the politics of state and local governments ("localities") still fosters and protects many of the liberty interests De Tocqueville identified in the 1830s. Citizens continue to find that it is generally easier to access the democratic process through state and local governments rather than the federal government. This involvement is worthwhile for citizens because localities still possess independence over many policies that affect citizens' lives. Although certainly not every citizen is politically involved, localities create separate political communities in which citizens can participate. Within these communities, issues of purely local relevance are debated and decided upon, but also issues that hold relevance beyond the localities' and even the nation's borders. In this way, localities continue to be school houses of democratic empowerment while providing a check against the power of the federal government.

It would seem that there are few areas of policy where the federal government has greater justification for claiming exclusive control than in foreign relations. A misstep in foreign affairs by a state or local government can have adverse and potentially devastating effects on the entire country. If a state or local government adopts a position that differs from official federal foreign policy, it fractures the country's voice and negotiating power abroad. Moreover, it seems prudent to centralize in the federal government the expertise and resources that have traditionally been required to conduct relations with other nations.

And yet, state and local governments today have become deeply enmeshed in international affairs as globalization has decentralized foreign relations. On the one hand, localities have become more autonomous international actors than they ever were or could have been before. In pursuing interests with international implications, they tread in a sphere traditionally monopolized by the federal government. On the other hand, the internationalization of many formerly domestic issues means that an increasing number of traditional state and local government actions now have foreign policy implications.

The emergence of localities as actors in American foreign policy creates new possibilities for creating more participatory and democratic international relations. It also merely reflects a world where increased interconnectivity across borders and the global regulation of markets and values has collapsed local and international concerns. This article will argue that U.S. foreign relations law has failed to address this new reality. The Supreme Court has largely clung either explicitly or implicitly to a jurisprudence that holds that the country should speak

with “one voice” in foreign relations. Such a position is not only naïve, but it also weakens American democracy. With globalization’s commingling of the local and the international, a strong judicial bias towards federalizing issues with a bearing on foreign relations will lead to a hollowing out of the decision-making power of localities. States and municipalities will risk becoming largely units of administrative governance.

To be clear, this article does not challenge the view that under the Constitution and its subsequent interpretation the federal branches have the power to trump state and local laws and actions that affect foreign relations.⁵ Article I, Section 8 and Article II of the Constitution provide the legislative and executive branches power to “conduct foreign relations through the enactment of federal statutes, treaties, and executive agreements.”⁶ Article VI establishes the supremacy of these federal enactments over state law.⁷ Article III grants federal judicial power to cases concerning these federal enactments and controversies involving foreigners.⁸ Article I, Section 10 prohibits a state from performing certain foreign affairs functions, including entering into a “treaty, alliance, or confederation.”⁹ The Supreme Court has interpreted these provisions together to give the federal political branches a power over international affairs that “cannot be subject to any curtailment or interference on the part of the several states.”¹⁰ The federal government clearly has the power to override state and local government policies for the sake of a unified federal foreign policy.

Arguably, the judiciary should no longer accommodate the federal government’s unlimited plenary power in foreign relations. The judiciary should instead balance federal foreign policy concerns against the interests of localities to ensure the federal government does not wrongly usurp local power under the guise of its foreign relations powers. Court cases involving localities’ interests in foreign affairs often impact a diffuse and disparate set of issues. As such, there is reason to believe localities may not effectively organize together to protect their interests in these cases. Further, Madison and other founders probably more generally overestimated the ability of states to

5. Jack Goldsmith makes a similar caveat in his work on foreign relations law in Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1619-20 (1997).

6. *Id.* at 1619; U.S. CONST. art. I, § 8; *Id.* art. II, §§ 2-3.

7. *Id.* art. VI, cl. 2.

8. *Id.* art. III, § 2.

9. *Id.* art. I, § 10.

10. *United States v. Belmont*, 301 U.S. 324, 331 (1937); *See also Mo. v. Holland*, 252 U.S. 416, 432-35 (1920).

resist federal encroachment on their power. This initial Constitutional miscalculation may need to be corrected by increased judicial intervention on the behalf of localities' interests.¹¹

This article, however, leaves to others to determine whether the Constitution has been properly interpreted to give the federal government a largely unchecked hand in foreign relations. This article makes a more modest claim. It argues that courts should protect the space that is currently open to state and local government action that affects foreign relations—i.e., the space where neither the executive, Congress, nor the Constitution has barred state and local action that nonetheless affects foreign affairs.

Instead of protecting this available space though, courts have adopted the opposite approach by repeatedly curtailing localities' actions in foreign relations even without an explicit conflict with federal foreign policy or the Constitution. Part I of this article details the four primary ways the Supreme Court has limited state and local action in such instances: (1) the reading of a dormant foreign affairs power into the Constitution; (2) heightened statutory and executive agreement preemption for matters affecting foreign policy; (3) heightened dormant commerce clause scrutiny in matters affecting foreign commerce; and (4) making certain claims nonjusticiable under the act of state or political question doctrines because they implicate foreign relations in a manner that courts have deemed should not be judged.

These doctrines all find at least part of their justification in the idea that the nation should speak with “one voice” in foreign affairs. This “one voice” doctrine is borrowed from principles of international law, which not only preference, but largely only recognize a univocal nation-state—primarily the executive branch of the national government. Under the “one voice” doctrine, the judiciary's senses become heightened. It examines disputes before it to see if the federal government's one voice might be impaired in foreign relations, sometimes finding that it is even in situations where the federal government contends it is not. State and local interests are all too often undervalued or left out of the reasoning process altogether.

After surveying in Part I these judicially created limitations on localities' actions that affect foreign relations, Part II then explores how international tribunals increasingly circumscribe state and local actions. Although none of these tribunals' decisions are directly binding on

11. JENNA BEDNAR, *THE MADISONIAN SCHEME TO CONTROL THE NATIONAL GOVERNMENT* 21-33 (May 2002), <http://www-personal.umich.edu/~jbednar/WIP/madison.pdf>.

localities, these bodies can penalize the United States as a whole for a locality's action that brings the U.S. into noncompliance with an international treaty or agreement. In turn, U.S. courts may find that these tribunals' decisions, or simply a tribunal's attention to a complaint, constitute enough interference with foreign relations to strike down the locality's suspect policy. Indeed, the mere threat of U.S. judicial action or scrutiny by an international tribunal may in and of itself be enough to cause a locality to back down from actions it otherwise finds in its interest.

Part III defends a limited decentralization of foreign relations. Advocating decentralization in this context is not an argument to necessarily limit the federal government's role or its trumping power in foreign relations, but rather to legitimize localities as actors in foreign relations as well. The varied voices of the different branches of the federal government and of U.S. non-governmental actors mean that the United States has never truly spoken with "one voice" in foreign relations. Further, there are a number of reasons to believe that localities' involvement in many aspects of foreign affairs has a positive impact. To defend the decentralization of foreign relations, this article adapts three of the traditional defenses of federalism: the benefits of having diversity of state and local policies; state and local governments' check on the power of the federal government; and localities' ability to empower citizens. It also addresses three often cited critiques of federalism that can be applied to localities' involvement in foreign relations: the resource constraints of federal subunits; the danger of empowering or protecting local perpetrations of injustice; and federalism's diffusion of accountability.

Part III then argues that courts are ill-suited to determine when localities' policies unduly damage U.S. foreign relations. Instead, it is better to let the executive and legislative branches use their Constitutional prerogative to decide when to occupy or preempt certain activities within a field of foreign relations. Therefore, the federal judiciary should only strike down a state or local law that affects foreign relations when it is in explicit conflict with the Constitution or has been validly and clearly preempted by the executive or legislative branches. Although courts should largely let these other branches regulate state and local governments' actions in foreign relations, the federal judiciary is better suited to regulate both state courts' involvement in foreign relations as well as their own. Therefore, a limited invocation of the act of state and political question doctrines may at times be appropriate to curtail the judiciary's enforcement of some federal and state laws.

Understanding the benefits of a decentralized foreign policy, however, the federal judiciary should use these doctrines with caution.

Part IV applies the more jurisprudential and theoretical arguments discussed in Parts I, II, and III to a series of examples of localities' actions that affect foreign relations. Part IV differentiates these actions into five categories. Such actions may: (1) foster exchange and cooperation with other countries; (2) protect or promote local markets and/or values in a manner that affects foreign relations; (3) judge other countries' behavior; or (4) influence the federal government's foreign policy. Localities may also (5) adopt or borrow from foreign or international law. It is chiefly actions that are deemed to protect or promote local markets and/or values (category two) that are placed under the greatest scrutiny under international law. Meanwhile, it is both these protective actions (category two) and actions that judge or criticize other countries (category three) that raise the greatest level of suspicion under U.S. jurisprudence. However, Part IV also notes that a restrictive interpretation of foreign relations law has implications for all five categories.

The examples in these five categories provide greater context to understand some of the benefits of decentralizing foreign relations. For example, state trade missions are designed to foster economic exchange. Partially decentralizing these missions to the state or local level may allow for greater economic rewards to the country as a whole than if such missions were only initiated by the federal government. Localities' actions that protect and promote local markets and values enable citizens to have fuller agency over their local communities as well as their own lives and provide a check against federal or international power. Such actions may also encourage experimentation and debate over policies at a local level before similar national policies are implemented or a local standard gains acceptance across the country.

Local mobilization around a foreign policy issue can also have an important precedent-setting effect on federal foreign policy. For example, the South African anti-apartheid divestment movement engaged citizens in localities across the country. Such local engagement helps foster human rights moments in which a section of the American public expresses support for a human rights-based foreign policy. Arguably, such human rights moments encourage foreign policymakers to promote similar human rights-based policies in relation to foreign policy issues the public is less mobilized around.

There have been other proposals to strengthen participatory democracy outside preserving the democratic role of state or local

governments. Part V briefly addresses one of these proposals. James Fishkin and Bruce Ackerman have put forward a strong argument for having a deliberation day in local neighborhoods around the country before national elections in which citizens would debate and discuss amongst themselves the issues of the day. Evidence indicates that such forums for deliberation do have an impact on voters' views on foreign relations. A proposal like deliberation day would likely get a larger section of the American public to actively engage in issues of foreign relations than simply ensuring localities retain independence in an internationally saturated governance environment. However, strengthening localities' independence addresses larger federalism concerns that ideas like deliberation day do not. Instead, such ideas should be seen as complimentary to a movement towards decentralizing foreign relations.

In conclusion, this article argues that more than a change in the mindset of the courts is necessary for localities to be effective foreign policy actors. The federal government and localities themselves must also recognize the benefits of decentralization and amend their governance strategies accordingly. Finally, ordinary citizens need to actively support a more balanced approach to foreign affairs in which localities are concurrent actors in foreign relations with the federal government.

A general theme of this article is that the drafters of the Constitution did not envision the dominating and pervasive role foreign relations would play in the United States. As such, the Constitution does not fully address the balance of power implications of giving the federal government, and specifically the executive, such a privileged role in conducting foreign affairs. In *Democracy in America*, De Tocqueville remarks on the isolation in which the United States was largely born and spent its early years “[s]eparated from the rest of the world by the ocean, and too weak as yet to aim at the dominion of the seas, it has no enemies, and its interests rarely come into contact with those of any other nation of the globe.”¹² He notes the implications of this isolation on the power of the President within the U.S. constitutional framework: “[t]he President of the United States possesses almost royal prerogatives [in foreign relations], which he has no opportunity of exercising; and the privileges which he can at present use are very circumscribed. The laws allow him to be strong, but circumstances keep him weak.”¹³

12. De Tocqueville, *supra* note 1, at 131.

13. *Id.*

In light of globalization's increasing enmeshment of foreign and domestic relations, this article highlights a double fear. It is not only that the federal government is given a new opportunity by globalization to commandeer control over many areas of governance from localities, but that the executive is strengthened in relation to the other branches. In this context, citizens' involvement in foreign relations at a local level and the promotion of decentralizing foreign policy more generally should be seen as a method, however imperfect, to regain a safer balance of power within the government. There may be other ways of creating this balance within the federal government such as by strengthening the respective power of Congress or the courts in foreign relations. Alternatively, more structural changes could be made such as transforming the U.S. representative to the U.N. into a nationally elected position.¹³ However, none of these alternatives so clearly engage citizens at a local level to become politically active in the creation of foreign policy.

The argument in this article for local democratic participation is also, perhaps primarily, a humanist one. With more possibility for participation, we become thicker citizens. We have greater ability to engage in our communities and in turn more control over and understanding of our own lives as humans. For Durkheim, government had its own consciousness. Such a characterization highlighted that although government at its root might merely be a shared idea in a community of conscious humans, it could also have its own agency. The state had its own logic that was removed, and even unknown, from those that "thought" government into existence. He writes of a democratic state that "[t]he closer communication becomes between the government consciousness and the rest of society, and the more this consciousness expands and the more things it takes in, the more democratic the character of the society will be."¹⁴

For Durkheim, it is the democratic state's reflection upon its citizens through its citizens that gave democracy a moral superiority.¹⁵

13. Although worthy and much needed inquiries, the overall relative merits of these different suggestions must remain beyond the purview of this article (as must proposals about how to make U.S. foreign policy more democratically accountable to the rest of the world).

14. EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 84 (Cornelia Brookfield trans., Greenwood Press 1983) (1957).

15. *Id.* at 91.

This is what gives democracy a moral superiority. Because it is a system based on reflection, it allows the citizen to accept the laws of the country with more intelligence and thus less passively. Because there is a constant flow of communication between themselves and the State, the State is for individuals no longer like an exterior force that

When we debate where and how democratic governance will occur, we are battling over what choreography of thought will define our state and we as citizens. Such stakes are not easily quantifiable. If our aim in structuring governance, however, is not to reach definable utopias, but rather to balance as best we can the competing interests and tensions of being human and being governed, then we must take into account governance's transcendent depths and not just its readily chartable currents.

I. U.S. FOREIGN RELATIONS LAW'S MARGINALIZATION OF LOCALITIES

When state and local government actions affect foreign relations, the Supreme Court's senses become heightened, finding preemption and nonjusticiable claims where it would find none in a matter it deemed of merely domestic concern. This heightened sensitivity is displayed in four primary ways: (1) the reading of a dormant foreign affairs power into the Constitution; (2) heightened legislative and executive preemption for matters affecting foreign policy; (3) heightened scrutiny for the dormant commerce clause in commerce affecting foreign relations; and (4) finding some claims related to foreign relations nonjusticiable under the act of state and political question doctrines. State and local government actions that affect foreign relations, but are not expressly preempted by Congress, the executive, or the Constitution, can be challenged and struck down under any one of these doctrines. The law in this area, however, remains unsettled and underdeveloped leaving many questions unanswered about the constraints it imposes on localities' involvement in foreign affairs.

1. Dormant Foreign Affairs Power

In *Zschernig v. Miller*,¹⁶ the Supreme Court held that the structure of the Constitution implied a dormant foreign affairs power that could preempt certain state laws that affected foreign relations.¹⁷ Such a state law did not have to conflict with any explicit federal law or policy to be preempted.¹⁸ In fact, in *Zschernig*, the government filed an amicus

imparts a wholly mechanical impetus on them. Owing to constant exchanges between them and the State, its life becomes linked with theirs, just as their life does with that of the State.

Id.

16. 389 U.S. 429 (1968).

17. *Id.* at 440-41.

18. *Id.* at 441.

supporting the state's position and denying it conflicted with federal policy.¹⁹

The Oregon statute at issue in *Zschernig v. Miller* prohibited inheritance by non-resident aliens unless they could show the property they inherited would not be confiscated by their home country.²⁰ Additionally, these non-resident aliens had to show that American citizens enjoyed reciprocal rights of inheritance in the non-resident aliens' home country.²¹ The Court found that this statute gave Oregon courts reason to probe and criticize the law of authoritarian and Communist regimes²² and in so doing intruded into a "domain of exclusively federal competence."²³ Justice Douglas distinguished the facts in *Zschernig* from the facts in *Clark v. Allen* (where the Court had upheld a similar California statute 20 years earlier)²⁴ by claiming that the statute in *Clark* only had "some incidental or indirect effect on foreign relations"²⁵ while the statute in *Zschernig* "affect[ed] international relations in a persistent and subtle way."²⁶ In particular, it enmeshed courts into probing the laws of foreign governments in a manner that might be considered provocative during the Cold War.²⁷ This judgment of other countries by the courts could "adversely affect the power of the central government to deal with those problems,"²⁸ thereby weakening the federal government's position in foreign relations.

In his concurrence, Justice Harlan argued that the Oregon statute by itself did not infringe on the federal foreign relations power and such a broad reading of preemption in foreign relations could not be supported by prior precedent.²⁹ He observed that the majority had not shown that the Oregon statute had caused adverse effects on foreign policy.³⁰ The mere possibility that the statute could have such adverse consequences should not be determinative, he argued, as many state court decisions of purely domestic concern had the possibility of raising criticism of foreign nations.³¹ Instead, Justice Harlan found that the Oregon statute

19. *Id.* at 434.

20. *Id.* at 430 n.1.

21. *Id.*

22. *Id.* at 440.

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

24. *Clark v. Allen*, 331 U.S. 503 (1947).

25. *Zschernig*, 389 U.S. at 434 (quoting *Clark v. Allen*, 331 U.S. 503 (1947)).

26. *Id.* at 440.

27. *Id.*

28. *Id.* at 441.

29. *Id.* at 443-62. (Harlan, J., concurring).

30. *Id.* at 461.

31. *Id.*

conflicted with U.S. treaty obligations with Germany and, therefore, should be found unconstitutional.³² Justice White dissented in *Zschernig* agreeing with Justice Harlan's analysis that dormant foreign affairs preemption should not be applied to the Oregon statute, but disagreeing that the Oregon statute conflicted with any U.S. treaty obligations.³³

Zschernig left unclear the reach of dormant foreign affairs preemption. Under a wide reading of *Zschernig*, any state action that had more than "incidental or indirect"³⁴ effect on foreign countries or carried the "potential for disruption or embarrassment to"³⁵ the federal government's conduct of foreign relations could be struck down by the court. Such a sweeping reading would bar any state laws that directly affected foreign relations and even those that did not if they were potentially disruptive or embarrassing to U.S. foreign relations. Under a less encompassing view, states could interfere in portions of the field of foreign relations as long as their actions did not in fact adversely affect the power of the federal government to conduct foreign relations. One could also read *Zschernig* to hold that dormant foreign affairs preemption could only be invoked if it involved "a state policy critical of foreign governments and involve[d] 'sitting in judgment'" of these foreign governments.³⁶ Finally, *Zschernig* could be read very narrowly confining it to cases with similar facts—in *Zschernig* the state court had been unusually critical and inflammatory of its judgment of a communist government during a time of heightened Cold War tensions. This narrow interpretation of *Zschernig* is supported by the Court's unwillingness to overrule *Clark v. Allen*, which was a case with substantively similar facts, but that took place in a different historical and political context twenty years earlier.³⁷

The Supreme Court has not based another decision on the dormant foreign affairs power.³⁸ As will be discussed, however, dormant foreign affairs preemption has been invoked, although not relied upon, to expand

32. *Id.* at 443.

33. *Id.* at 462.

34. *Id.* at 434 (majority opinion) (quoting *Clark v. Allen*, 331 U.S. 503 (1947)).

35. *Id.* at 435.

36. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996), cited in *Am. Ins. Ass'n v. Garamendi*, Ins. Comm'n, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting).

37. Brannon Denning & Michael Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM AND MARY L. REV. 825, 857 (2004).

38. *Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting). Justice Ginsburg noted in her dissent that *Zschernig* has not been relied on since it was decided. *Id.* She did not suggest, however, that it should be overturned. *Id.*

executive agreement preemption in *Am. Ins. Ass'n v. Garamendi*³⁹ in 2003. The continued ambiguity surrounding the sweeping doctrine *Zschernig* suggests has created much uncertainty about the scope of judicial preemption of localities' actions that affect foreign relations.

2. Statutory and Executive Agreement Preemption

A. Statutory Preemption

In 2000, in *Crosby v. National Foreign Trade Council* the Supreme Court articulated a heightened legislative preemption doctrine for matters affecting foreign relations.⁴⁰ The National Foreign Trade Council (which represents many of the largest foreign companies operating in the United States) challenged a Massachusetts selective purchasing law that generally barred Massachusetts state entities from buying goods or services from companies that did business with Burma.⁴¹ Massachusetts had enacted the statute in protest over the Burmese government's notorious human rights abuses against its own people.⁴²

In a unanimous decision, the Supreme Court found that the selective purchasing law was preempted by federal legislation that created a national sanctions regime towards Burma.⁴³ The court reached this conclusion even though the national sanctions regime did not explicitly declare that states could not take punitive economic actions toward Burma on their own.⁴⁴ According to the Court, however, the Massachusetts law undermined "the intended purpose and 'natural effect'" of three provisions of the federal sanctions regime: (1) the legislation's delegation of discretion to the President to control economic sanctions against Burma; (2) its limitation of sanctions only to United States persons and new investment; and (3) its directive to the President to develop a national multilateral strategy toward Burma.⁴⁵

The Court argued that the Massachusetts legislation, by acting outside this national sanctions regime, weakened the President's capacity for effective diplomacy.⁴⁶ The Court noted:

39. 539 U.S. 396 (2003).

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

41. *Id.* at 367, 371.

42. *See id.* at 367.

43. *Id.* at 388.

44. *Id.* at 372.

45. *Id.* at 374.

46. *Id.* at 381.

[U]nyielding application [of the Massachusetts legislation] undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.⁴⁷

The Court made clear that there was heightened statutory preemption of state law in cases affecting foreign policy. In particular, the Court stated that it would give added weight to the opinion of the executive branch in such cases⁴⁸ and even consider the reactions of foreign powers to the state law at issue.⁴⁹ In other words, there did not have to be as explicit a conflict in these cases with federal legislation for preemption.

B. Executive Foreign Relations Power Preemption

Three years after the Supreme Court found heightened statutory preemption in matters affecting foreign relations in *Crosby*, the Court was confronted with the preemptive status of executive agreements in *Garamendi*. Writing for the majority, Justice Souter found that like legislation that ordered our relations with other countries executive agreements with other nations could preempt state law even when there was no direct conflict between the state law and executive agreement.⁵⁰ Until *Garamendi* the Court had only held that executive agreements preempted state law where conflict between them was explicit.⁵¹

In *Garamendi*, a California law required insurers to disclose information about policies sold in Europe between 1920 and 1945 in an

47. *Id.* at 377.

48. The court stated that they had "consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court[.]" *Id.* at 385-86 (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983)).

49. *Crosby*, 530 U.S. at 385.

50. *Garamendi*, 539 U.S. at 416.

51. *See* *United States v. Belmont*, 301 U.S. 324 (1937) (finding international compact with Soviet Union undertaken by the President validated alleged confiscation of property); *United States v. Pink*, 315 U.S. 203 (1942) (holding that executive agreement with Soviet Union that settled claims against nationalized insurance company barred further claims of this type); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding executive orders that created Iran Claim Tribunal preempted petitioners claims against Iran in U.S. courts).

attempt to help Holocaust survivors more easily bring claims against these insurance companies.⁵² Justice Souter held that the California law was preempted by an executive agreement which encouraged Germany to create a voluntary compensation fund as the sole form of relief for Holocaust victims of Nazi-era insurance company crimes.⁵³ The executive agreement, however, was silent on state information disclosure laws.⁵⁴

In showing a conflict with federal policy, the Court in *Garamendi* drew parallels between the California legislation and the Massachusetts legislation at issue in *Crosby*.⁵⁵ Justice Souter noted that both pieces of legislation affected the ability of the President to negotiate with other countries and frustrated the mechanism of operation the President had chosen to conduct foreign policy on a particular issue.⁵⁶ The leap from a broad reading of statutory preemption in foreign relations (where both the executive and legislature were acting in concert) to a similarly wide understanding of executive agreement preemption was novel, not to mention questionable based on past precedent.⁵⁷

In dicta the Court left open the possibility for dormant foreign affairs preemption in the case, hinting that the decision in *Zschernig* might not be as anomalous as some had concluded or hoped.⁵⁸ Although the Court did not directly rely on the precedent of *Zschernig*, it used it as a mask of legitimacy for a precarious expansion of executive conflict preemption in foreign affairs. Instead of relying on the dormant foreign affairs power, the Court explained it would use the more traditional logic of conflict preemption for its decision.⁵⁹ As already noted though, this preemption analysis was anything but traditional.⁶⁰ Coining a new term, the Court found an expansive “executive foreign relations power” which preempted state laws with executive agreements.⁶¹

In determining a standard for when an executive agreement would preempt state law, Justice Souter borrowed from the muddied waters of *Zschernig*. He categorized the majority’s opinion in *Zschernig* as preempting state actions from the entire field of foreign relations (i.e.,

52. *Garamendi*, 539 U.S. at 401, 410.

53. *Id.* at 420.

54. *Id.* at 438 (Ginsburg, J., dissenting).

55. *Id.* at 423 (majority opinion).

56. *Id.* at 424.

57. Denning, *supra* note 37, at 831.

58. *Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting); Denning, *supra* note 37, at 856-57.

59. *Garamendi*, 539 U.S. at 420.

60. *Id.*

61. *Id.* at 419.

preempting all state actions that had more than an “incidental” or “indirect” effect on foreign relations)⁶² and Justice Harlan’s concurrence as advocating preemption only in the case of conflict with express federal policy in foreign relations.⁶³ Justice Souter then found that under either analysis presented in *Zschernig* the California legislation would be preempted.⁶⁴ The majority in *Garamendi* did not decide which of these—field or conflict preemption—would apply to the “executive foreign relations power.”⁶⁵ In a footnote, Justice Souter, however, hinted they might both be applicable:

The two positions can be seen as complementary. If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine Where, however, a State has acted within what Justice Harlan called its ‘traditional competence,’ . . . but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question.⁶⁶

Although the language is ambiguous, it would seem that when faced with a state act that affects foreign relations the first test is to determine if the act is “addressing a traditional state responsibility.”⁶⁷ If it is not, then it is presumably void under the dormant foreign relations power. This portion of the test, which importantly is in *dicta*, adopts a broad reading of *Zschernig* to be applied to state foreign relations actions where there is no traditional state responsibility.⁶⁸

The second part of the test is invoked if the suspect state action is in its traditional domain. It weighs the interest of the state in the policy at issue against the clarity of the conflict.⁶⁹ Justice Souter rests the decision on this second part of the test and Justice Harlan’s view in *Zschernig* that if any state policy conflicts with the federal government’s foreign policy it is preempted.⁷⁰ To determine what severity of conflict is necessary, the Court should weigh the respective state and national

62. *Id.* at 418.

63. *Id.* at 419.

64. *Id.* at 420.

65. *Id.* at 419-20.

66. *Id.* at 420 n.11.

67. *Id.*

68. Denning, *supra* note 37, at 926-27.

69. *Garamendi*, 539 U.S. at 420 n.11.

70. *Id.*

interests involved.⁷¹ Justice Souter found that the California legislation at issue was sufficiently in conflict with an executive agreement to merit preemption and held on these grounds.⁷²

It is not clear from *Garamendi* whether the “executive foreign relations power” needs to be articulated through an executive agreement to preempt state actions. Indeed, in *Garamendi* the Court uses statements made by sub-cabinet level officials to support the position that the California law was in conflict with the executive agreement.⁷³ Statements like these could potentially be used in the future to preempt state legislation without even the need for an executive agreement under a broad theory of the executive foreign relations power.

3. Dormant Foreign Commerce Clause

The use of heightened preemption is not just confined to statutory or executive agreement preemption, but also extends to the dormant commerce clause.⁷⁴ The Court has moved away from a far-reaching interpretation of the dormant foreign commerce clause to one that much more closely resembles ordinary dormant commerce clause preemption. Such a move is welcome, but may come under threat if the logic of *Garamendi* is applied to future dormant foreign commerce clause cases.

In *Japan Line, Ltd. v. County of Los Angeles*, the Court indicated that the dormant commerce clause has greater reach when applied to international commerce.⁷⁵ It held that “[shipping containers] that are owned, based, and registered abroad and that are used exclusively in international commerce [could not be] subjected to apportioned ad valorem property taxation by [California].”⁷⁶ According to the Court, when a state attempts to tax containers in foreign commerce, as opposed to merely interstate commerce, there is an increased risk of multiple taxation (since it is difficult for states to coordinate their taxation

71. *Id.*

72. *Id.* at 420.

73. *Id.* at 411; *id.* at 441-42 (Ginsberg, J., dissenting).

74. The Supreme Court has long held that state laws that are “inimical” to interstate commerce will be struck down even if Congress has not acted. *See, e.g.,* *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *S.C. Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 185 (1938); *City of Phila. v. New Jersey*, 437 U.S. 617, 627 (1978).

75. 441 U.S. 434, 448 (1979) (“Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce ‘with foreign Nations’ and ‘among the several States’ in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.”).

76. *Id.* at 434-45.

schemes with foreign countries).⁷⁷ Further, the California tax undermined the ability of the federal government to “[speak] with one voice” when regulating foreign commerce.⁷⁸

In 1986, the Court limited the impact of *Japan Line* in *Wardair Canada, Inc. v. Fla. Dep’t of Revenue*.⁷⁹ In *Wardair* the Court upheld a Florida aviation fuel tax despite the applicant’s and the United States’ claim as amicus curiae that the tax “threaten[ed] the ability of the Federal Government to ‘speak with one voice.’”⁸⁰ The Court clarified that although they found that the tax in *Japan Lines* prevented the Federal Government from speaking with one voice in foreign relations they did not thereby suggest that “the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.”⁸¹

In 1993, in *Itel Containers Intern Corp. v. Huddleston* the Court upheld a Tennessee tax on containers where that tax avoided imposing multiple taxation⁸² and the U.S. government had submitted an amicus brief supporting the state tax.⁸³ *Japan Line* was further limited in *Barclays Bank v. Franchise Tax Board* in 1994.⁸⁴ In *Barclays*, Justice Ginsburg, writing for the Court, upheld California’s system of taxing a portion of foreign corporations’ worldwide operations. The Court first found that California’s tax system did not violate the interstate commerce clause as traditionally applied domestically.⁸⁵ The Court then found that the risk of double taxation was acceptable as long as it was not an “inevitable result” of the California taxation scheme and that an alternative taxing scheme “could not eliminate the risk of double taxation.”⁸⁶ Importantly, the Court also required that Congress indicate that it intended to bar the taxation system in order for there to be a conflict with the country’s “one voice” in foreign relations.⁸⁷ Although major trading partners had objected to the tax, the Court concluded that by not specifically prohibiting California’s taxation system Congress had “passively indicate[d] that certain state practices do *not* ‘impair federal uniformity in an area where federal uniformity is essential.’”⁸⁸ Justice

77. *Id.* at 446.

78. *Id.* at 452.

79. 477 U.S. 1 (1986).

80. *Id.* at 9.

81. *Id.* at 13.

82. 507 U.S. 60, 74 (1993).

83. *Id.* at 75.

84. 512 U.S. 298 (1994).

85. *Id.* at 314.

86. *Id.* at 318-19.

87. *Id.* at 324.

88. *Id.* at 323 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)).

Ginsburg also rejected the petitioner's claim that executive statements demonstrated that the California taxing system interfered with the federal government's ability to speak with a uniform voice.⁸⁹ She found that it is Congress, and not the executive, that is given the power to regulate commerce under the Commerce Clause.⁹⁰

Wardair, Itel, and Barclays limited the heightened nature of the dormant foreign commerce clause that was upheld in *Japan Line*. *Garamendi*, however, which was decided after *Barclays*, raises new questions about this jurisprudence. If there are strong executive statements or orders surrounding a commerce clause issue, the Court might find preemption under the executive foreign relations power or give such executive branch actions new weight under the dormant foreign commerce clause.

4. Act of State and Political Question Doctrines

The act of state and political question doctrines both limit justiciability. Courts often use these doctrines to refuse to hear issues that could potentially affect foreign relations. In relinquishing their role as arbitrators of these disputes, state law or state common law is often simply not enforced. As such, courts can use these doctrines to limit the impact of localities' actions that affect foreign affairs.

In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court assumed the competence to trump state law to create judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine.⁹¹ The act of state doctrine is not found in the Constitution, but is instead a judicially created doctrine that "arises out of the basic relationships between branches of government in a system of separation of powers."⁹² Its classic formulation is that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."⁹³ Like *Garamendi*, *Crosby*, and *Zschernig*, the general finding of *Sabbatino* is that normal lawmaking gives way when a dispute has international implications.⁹⁴

89. *Id.* at 328-29.

90. *Id.* at 329.

91. 376 U.S. 398, 425 (1964) ("[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

92. *Id.* at 423.

93. *Id.* at 416 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

94. Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 240 (2000).

The act of state doctrine does not apply to every situation in which a state's actions are called into question. The Court in *Sabbatino* laid out two considerations to help determine when the act of state doctrine should apply. First, "the less important the implications of an issue are for our foreign relations," the more likely the court will not invoke the act of state doctrine.⁹⁵ Second, "the greater the degree of codification or consensus concerning a particular area of international law" that the court is being asked to apply to a state's actions, the more likely the court will not invoke the doctrine.⁹⁶ Later cases have even further constrained the doctrine.⁹⁷ A court will take into consideration the opinions of the executive branch in a potential act of state doctrine case, but the courts have treated the executive branch's observations as only one relevant factor of consideration and not binding.⁹⁸

The political question doctrine is invoked by courts when they feel absolute deference to the other branches of government is appropriate.⁹⁹

95. *Sabbatino*, 376 U.S. at 428.

96. *Id.* The Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1982), passed by Congress effectively overrode the specific outcome of *Sabbatino* by making it clear that an uncompensated government taking is a clear violation of international law in which the Act of State doctrine would not be applicable. See *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 829 (1987).

97. *E.g.*, *W.S. Kirpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400 (1990) (finding that the doctrine does not apply when a court only incidentally makes a factual judgment about an act of state that may embarrass a foreign government); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (finding the act of state doctrine does not protect foreign sovereigns when they are acting in purely commercial areas); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (finding that the burden of proof that the acts at issue were acts of state rests on the one claiming the doctrine applies); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965) (finding act of state doctrine does not apply to actions sovereign takes to confiscate property in the United States).

98. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 790 (1972) (Brennan, J., dissenting). In *First National City Bank*, three Supreme Court justices in the five justice majority upheld the use of the Bernstein exception which gives the executive branch authority to override the act of state doctrine. *Id.* at 768 (plurality opinion). Under this exception, if the executive makes clear that it does not want the courts to be barred from hearing a case under the act of state doctrine a court would then proceed with the case without applying the act of state doctrine. *Id.* However, one justice did not feel that the Bernstein exception needed to be applied in the case. *Id.* at 773 (Douglas, J., concurring). Further, one justice in the plurality and four justices in the minority rejected the Bernstein exception. *Id.* (Powell, J., concurring); *id.* at 792 (Brennan, J., dissenting). Since then, lower courts have generally treated executive suggestions as relevant, but not dispositive.

99. *Baker v. Carr*, 369 U.S. 186, 210 (1962). The Court found that on the surface of any case involving a political question there is at least one of the following formulations:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking

The judiciary has found such deference may be necessary in cases that involve the foreign policy decisions of the executive and legislative branches of the United States. Many times, this abdication of decision-making power to the other branches of the federal government affects localities' interests. For example, in *Made in the USA Foundation v. United States*, the Eleventh Circuit found that the question of whether the Senate must ratify the North American Free Trade Agreement (NAFTA) by the two-thirds of the Senate required for treaty ratification was a nonjusticiable political question.¹⁰⁰ As will be discussed later in this article, NAFTA has far ranging implications for localities' interests, but the judiciary refused to even consider whether the United States had properly bound itself to the agreement.

In 2006, at least three negligence suits against private contractors whose employees were killed in Iraq were removed from state court and dismissed from federal district court on the basis of the political question doctrine.¹⁰¹ The courts who heard these cases held that even though it was private contractors whose actions were in question a decision in these cases would necessarily implicate the actions and judgments of the U.S. military.¹⁰² In this way, the political question doctrine can be applied to not only the actions of the federal government, but also to those whose actions are intertwined in the federal government's policies.

II. INTERNATIONAL LAW'S IMPACT ON LOCALITIES

International law has increasingly scrutinized state and local government policies. These challenges have come primarily in the areas of trade and human rights. The arbitrators of international agreements do not have the power to directly strike down offending state or local statutes or policies, but can penalize or reprimand the United States as a whole, thereby imposing collective national punishment for state or local action.¹⁰³

independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

100. 242 F.3d 1300 (2001).

101. *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 644 (S.D. Tex. 2006); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 U.S. Dist. LEXIS 61980, at *26 (S.D. Tex. Aug. 30, 2006); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006).

102. *Fisher*, 454 F. Supp. 2d at 644; *Smith*, 2006 U.S. Dist. LEXIS 61980, at *20; *Whitaker*, 444 F. Supp. 2d at 1282.

103. *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

Investors have used Chapter Eleven of NAFTA to challenge state and local laws and judicial decisions.¹⁰⁴ In October 2002, in *Mondev International Ltd. v. United States* a Chapter Eleven Arbitral Tribunal rejected a NAFTA challenge by a Canadian real estate developer to a decision by the Massachusetts Supreme Judicial Court.¹⁰⁵ The Chapter Eleven Tribunal held that the Massachusetts court's decision to deny the developer relief did not constitute a breach of Article 1105 of NAFTA, which specified certain minimum standards of treatment for investors in accordance with international law.¹⁰⁶ In particular, it found that the Massachusetts court's decision that the Massachusetts legislature had legally extended limited immunity from liability to the Boston Redevelopment Agency did not breach Article 1105.¹⁰⁷ The tribunal indicated though that some types of immunity from liability, even if granted by the legislature, would be barred by Article 1105.¹⁰⁸

In June 2003, in *Loewen Group, Inc. v. United States*, a Chapter Eleven Arbitration Tribunal examined a multi-hundred million-dollar Mississippi jury award against a Canadian company.¹⁰⁹ The company had argued that the award was exorbitant and was the outcome of protectionist appeals to the jury.¹¹⁰ The NAFTA Tribunal rejected the complaint on jurisdictional grounds, finding that all avenues of appeal had not been exhausted in U.S. courts.¹¹¹ Further, through corporate restructuring the Canadian company who brought the case had effectively become a U.S. company, thereby barring it from challenging its own government under NAFTA.¹¹² Despite dismissing the complaint on these jurisdictional grounds, the Tribunal did find that the actions of the Mississippi courts had violated Article 1105 of NAFTA and that the company would have been entitled to recover if not for the jurisdictional

104. NAFTA's dispute settlement mechanisms are found in Chapter Eleven, Nineteen, and Twenty. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, 639-99 [hereinafter NAFTA]. This article primarily deals with cases that have arisen under Chapter Eleven of NAFTA, which guarantees certain standards of treatment and non-discrimination for investors from NAFTA's other member-parties. *Id.* ch. 11, 32 I.L.M. 639-49.

105. *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2 (NAFTA Ch. 11 Arb. Trib. Oct. 11, 2002), available at <http://www.state.gov/documents/organization/14442.pdf>.

106. *Id.* at 55.

107. *Id.* at 58.

108. *Id.* at 54-55.

109. ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. June 26, 2003), available at <http://www.state.gov/documents/organization/22094.pdf>.

110. *Id.* at 2-3.

111. *Id.* at 61.

112. *Id.* at 67.

faults in its case.¹¹³

Taken together these two cases might represent a foundational moment in which NAFTA tribunals ensured future jurisdiction for similar claims while denying relief for these two specific claims.¹¹⁴ These decisions laid out flexible standards for determining similar cases that could easily be interpreted to give NAFTA tribunals broad jurisdiction in the future. For example, in *Mondev* to determine whether there had been a denial of justice under Article 1105 the tribunal created the following nebulous test:

In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.¹¹⁵

A Chapter Eleven tribunal has already found that actions by local government officials in Mexico violated NAFTA. In *Metalclad v. United Mexican States*, Metalclad, a U.S. waste disposal company, claimed that it had been invited to build a landfill site in Guadalucazar and was assured by government officials that a needed municipal permit was a mere formality.¹¹⁶ Metalclad began construction of the site, but “local [community] opposition resulted in the [m]unicipality denying a construction permit [in] 1995 and [receiving] an injunction in Mexican courts to prevent operation of the site.”¹¹⁷ In August of 2000, the NAFTA tribunal found that Articles 1105 and 1110 of NAFTA had been violated.¹¹⁸ In particular, the Mexican government had breached NAFTA transparency requirements.¹¹⁹ Further, the tribunal found that denial of a construction permit to which Metalclad was otherwise legally entitled amounted to an expropriation of Metalclad’s property under NAFTA.¹²⁰ The tribunal awarded Metalclad nearly \$16.7 million in

113. *Id.* at 70.

114. JOHN D. ESCHEVERRIA, GEORGETOWN ENVTL. LAW & POLICY INST., *LOWEN, MONDEV AND REVIEW OF U.S. JUDICIAL RULINGS BY INTERNATIONAL ARBITRATION PANELS* (2003), http://www.law.georgetown.edu/gelpi/research_archive/trade/LoewenMondev.pdf.

115. *Id.* at 7.

116. *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, at 14 (NAFTA Ch. 11 Arb. Trib. Aug. 30, 2000), available at <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>.

117. Simon Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18 J. Envtl. L. 207, 220 (2006).

118. *Id.* at 221.

119. *Id.*

120. *Id.*

damages.¹²¹

NAFTA is not the only international trade agreement which affects state and local laws and regulations. GATT, the WTO trade dispute panels, and the WTO's appellate body have found the United States to be in breach of its trade commitments because of state policies.

In 1992, a GATT panel found that federal and state differential treatment for in-state and domestic alcohol brewers in regards to taxes, tax credits, and regulations violated GATT.¹²² The decision has potentially larger implications because the GATT panel found that the U.S. government was responsible for state law in violation of GATT. The panel examined U.S. law and found that since GATT was part of federal law the federal government could override inconsistent state law under the commerce clause.¹²³ Further, after reviewing U.S. Supreme Court precedent the panel concluded that "the Twenty-first Amendment grants broad police powers to the states to regulate the distribution and sale of alcoholic beverages but does not grant the states powers to protect in-state producers of alcoholic beverages against imports of competing like products."¹²⁴ Finding no barrier to the federal government enforcing its findings against the states, the panel dismissed any suggestion to the contrary as merely pretext for noncompliance.¹²⁵

The United States has a duty under GATT to take reasonable measures to ensure observance of the provisions of the agreement by regional and local governments.¹²⁶ No GATT panel, however, has yet to directly address a situation in which it found the state party did not have the power to change the offending law of a governmental subunit.¹²⁷ If there was such a finding it is unclear whether this would affect a country's obligations for compliance under GATT.

In November 2004, a WTO panel found that certain U.S. restrictions on overseas gambling violated the General Agreement on Trades in Services (GATS). Antigua, who brought the complaint, only

121. *Metalclad*, ICSID Case No. ARB(AF)/97/1, at 35.

122. Report of the Panel, *United States – Measures Affecting Alcoholic and Malt Beverages* (June 19, 1992), GATT B.I.S.D. (39th Supp.) at 206 (1993).

123. *Id.* ¶ 5.45.

124. *Id.* ¶ 5.46.

125. *Id.* ¶ 6.

126. General Agreement Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories." *Id.* at art. XXIV.

127. Edward T. Hayes, *Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments Within Their Territories*, 25 NW. J. INT'L L. & BUS. 1, 30 (2004).

generally stated in its written and oral submissions that state laws restricting gambling might be in violation of GATS, while the focus of its complaint was on U.S. federal law.¹²⁸ The panel, however, reviewed eight state laws that restricted online gambling, and found that four of them were inconsistent with GATS.¹²⁹ The panel also found that provisions of U.S. federal law restricting online gambling were in violation of America's GATS obligations.¹³⁰

In April 2005, a WTO appellate panel reversed the decision of the November 2004 panel in regards to the state laws. The appellate panel found that since Antigua did not detail how the state laws violated GATS in its submissions it had not established a prima facie case of inconsistency. The lower panel was therefore wrong to examine these state laws when they had not been seriously contested by either side.¹³¹

The appellate panel did not find that the state laws in question were consistent with America's GATS obligations or they could not be challenged in the future, only that Antigua had not made a prima facie case of inconsistency. The lower panel's decision demonstrates that WTO panels are willing to find that state laws conflict with WTO obligations. It also shows Antigua might have some likelihood of success if it challenged state laws that restricted online gambling in the WTO in the future.

Although striking down the lower panel's finding against state laws, the April 2005 appellate panel decision held that certain U.S. federal laws restricting online gambling were inconsistent with GATS. In 2006, the United States adopted a bill that outlawed banks and other financial institutions from processing online gambling transactions.¹³² In March 2007, a WTO panel found that the U.S. had yet to comply with the April 2005 appellate panel decision.¹³³ It is still uncertain how this ongoing controversy will be resolved and if state laws restricting online gambling will eventually be challenged by Antigua in the WTO.

It is likely that the number of challenges made to state and local

128. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005), par. ¶¶ 149-50.

129. *Id.* ¶¶ 151-52.

130. *Id.* ¶ 5

131. *Id.* ¶¶ 149-56

132. *US Online Law Takes Effect*, BBCCARIBBEAN.COM, Oct. 13, 2006, http://www.bbc.co.uk/caribbean/news/story/2006/10/061013_antiguagaming.shtml (last visited Apr. 21, 2007).

133. *Antigua Scores Again Over the US*, BBCCARIBBEAN.COM, Mar. 30, 2007 http://www.bbc.co.uk/caribbean/news/story/2007/03/070330_antiguawto3003.shtml (last visited May 3, 2007).

regulations and judicial decisions will only increase in the WTO and under international trade agreements like NAFTA. Meanwhile, the United States also has responsibilities under a number of international human rights and labor agreements to which it is a party. Unlike under trade agreements, in which trade penalties can be levied against the United States for noncompliance, the United States cannot be punished for noncompliance with human rights agreements beyond reprimand and bringing international attention to the breach.

The actions of localities have come to the attention of the oversight bodies of several of the human rights agreements. The UN Human Rights Commission that monitors compliance with the International Covenant on Civil and Political Rights requires periodic reports from states that have ratified the Covenant. In July 2006, when the United States submitted its report, Commission members raised concerns about a number of state and local policies.¹³⁴ These concerns ranged from a proposal to punish child sex offenders with the death penalty in South Carolina, police brutality in Chicago, disenfranchisement of criminals in Florida, the death of the homeless during a heat wave in Arizona, and widespread disenfranchisement in New Orleans in the wake of Hurricane Katrina.¹³⁵ Members also made observations that implicated state and local governance more generally from racial profiling by local law enforcement to the high number of juveniles sentenced to life imprisonment without parole.¹³⁶ The Inter-American Commission on Human Rights has heard several cases which implicate states actions that charge the U.S. is in violation of its commitments under the American Declaration of the Rights and Duties of Man.¹³⁷ The new Human Rights Council has mandatory reporting procedures for members of the United Nations¹³⁸ that will inevitably place U.S. state and local action that affects human rights under international scrutiny.

Although not specifically a human rights tribunal, the International Court of Justice has enforced consular rights in cases involving the death penalty. In *Avena*, the ICJ found that 54 Mexican nationals on the death

134. See generally U.N. Int'l Covenant on Civil and Political Rights, Human Rights Comm., *Consideration of Reports under Article 40 of the Covenant*, U.N. Doc. CCPR/C/Sr.2380 (July 27, 2006).

135. *Id.*

136. *Id.*

137. Most of these cases involve the use of the death penalty by states. *E.g.*, Javier Suarez Medina v. United States, Case 12.421, Inter-Am. C.H.R., Report No. 91/05, OEA/Ser.L/V/II.124, doc. 5 (2005) available at <http://www1.umn.edu/humanrts/cases/91-05.html>.

138. G.A. Res. 251, U.N. GAOR, 60th Sess., at 5(e), U.N. Doc. A/60/L.48 (2006), available at http://www.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf

rows of various states had not been given their consular rights in violation of the Vienna Convention on Consular Relations.¹³⁹ The ICJ ordered the United States to review and reconsider their cases.¹⁴⁰ The United States accepted the ruling, and President Bush issued a memorandum to the Attorney General directing the states to abide by the decision.¹⁴¹ It is unclear whether states are bound by Bush's memo or the I.C.J. decision.¹⁴² As a result of this controversy, the United States has withdrawn from the Optional Protocol to the Vienna Convention on Consular Relations, which gave the ICJ jurisdiction over claimed violations of the Convention.¹⁴³

Besides the unknown binding effect of *Avena*, the decisions of international tribunals are generally not directly binding on American localities. U.S. courts though may grant considerable weight to these bodies' decisions, or even these bodies' consideration of certain matters, in determining whether to preempt a state or local policy that affects U.S. foreign affairs. For example, the Supreme Court in *Crosby* noted that the European Community and Japan had lodged a complaint with the WTO that the Massachusetts Burma Law violated U.S. obligations under the Agreement on Government Procurement (GPA).¹⁴⁴ The Court specifically pointed to the WTO complaint as evidence that the Massachusetts Act was hampering the ability of the President to speak with one voice for the nation on the issue of Burma.¹⁴⁵ It also cited a statement by the Assistant Secretary of State that the Massachusetts Act was injuring the U.S.'s ability to negotiate with the EU to create an effective Burma strategy.¹⁴⁶ In the future, these statements may give added weight to heightened legislative preemption as in *Crosby* or be used to justify the invocation of executive foreign relations power preemption as in *Garamendi*. Further, if the Court were to resurrect *Zschernig*, it might find that localities' actions, which merely create

139. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

140. *Id.* at 23.

141. Memorandum from President George W. Bush for the Attorney General (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

142. *Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (deciding that the Supreme Court will not hear appeals involving the *Avena* or the Bush memos until all remedies in state courts have been exhausted); *Napier-El v. Johnson*, 2006 U.S. Dist. LEXIS 40798, *14 n.18 (finding that the status of states' obligations under the *Avena* decision were uncertain)

143. Adam Liptak, *U.S. Says it has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16.

144. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383 (2000).

145. *Id.* at 382-83.

146. *Id.* at 383-84.

controversy before an international tribunal, could be struck down under the dormant foreign affairs power. A court might also find that localities' actions that interfered with the trade commitments of the United States might be preempted by the heightened dormant foreign commerce clause.

International tribunals create additional political pressure on localities to change their policies as well. For example, in 2004, the Florida state legislature amended a tax on Brazilian orange juice after being heavily lobbied to do so by the U.S. government after Brazil filed a WTO complaint against the tax.¹⁴⁷ The Florida state legislature had a choice between retaining its discriminatory orange juice tax policy or inviting the ire of the federal government. With the prospect of the entire United States being punished for its actions in the WTO, it backed down and amended the tax.

Certainly, some state and local policies deserve international examination and condemnation. Such scrutiny, however, also takes away local control. The Florida juice tax or the Massachusetts Burma Act might be viewed as protectionist trade policies or representing parochial interests, but they also reflect local values. It is not the task of international trade tribunals to weigh the value of free trade versus these local concerns, nor are these tribunals particularly well-placed to weigh these competing interests. The answer is not to abandon international agreements, whether in trade or human rights, but instead to involve localities more when the United States is negotiating these agreements.

Most important for purposes of this article, it should be the federal government and not courts that decide whether specific local policies should be preempted when these policies come under the scrutiny of international bodies. The Florida orange juice tax case demonstrates that the federal government is willing and able to intervene when U.S. foreign policy interests are truly threatened by localities' actions even when the locality in question (Florida) has disproportionate weight in American electoral politics.

III. JUSTIFYING PARTIALLY DECENTRALIZED FOREIGN RELATIONS

In *Garamendi* the Supreme Court stated:

There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National

¹⁴⁷ Todd Benson, *Brazil Resolves Complaint On Florida Juice-Import Tax*, N.Y. TIMES, May 29, 2004, at C3.

Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.¹⁴⁸

This echoes Madison's concerns in *Federalist 42* where he wrote "[i]f we are to be one nation in any respect, it clearly ought to be in respect of other nations."¹⁴⁹ As Part I showed, the Court has generally found the argument that the nation must speak with "one voice" highly persuasive. Except for in dormant foreign commerce clause cases, the Court has usually found that a plea to "one voice" in foreign affairs trumps competing state concerns.¹⁵⁰

The Court's jurisprudence not only dramatically preferences the federal over the state and local in issues that touch on foreign relations it also biases power allocation toward the President, whom the Court has found has the "vast share of responsibility for the conduct of our foreign

148. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003).

149. THE FEDERALIST NO. 42, at 232 (James Madison) (Clinton Rossiter ed., 1961); *see also*, THE FEDERALIST NO. 80, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The peace of the *whole* ought not to be left at the disposal of a *part*.").

150. *See Crosby*, 530 U.S. at 381.

The state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with *one voice* in dealing with other governments.

Id. (emphasis added).

[I]n discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that 'the Federal Government must speak with *one voice* when regulating commercial relations with foreign governments.' The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause.

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979) (emphasis added). "[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Bano Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). "The law thus 'compromise[s] the very capacity of the President to speak for the Nation with *one voice* in dealing with other governments' to resolve claims against European companies arising out of World War II." *Garamendi*, 539 U.S. at 424. (citing *Crosby* 530 U.S. at 381) (emphasis added). *See also* *Chae Chan Ping* 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

relations.”¹⁵¹

This section first argues that the United States has never spoken with “one voice” in foreign relations, so any unequivocal appeal to the “one voice” doctrine is misleading. Second, it lays out a number of benefits to decentralizing foreign relations and addresses some of the critiques of such decentralization. Finally, it finds that although there are areas of foreign policy where the federal government should speak with a united voice unfettered by localities’ actions courts are not well-suited to determine these instances. Given that the nation rarely has a united voice in foreign relations and given the complexity of the potential benefits and drawbacks of localities’ actions that affect foreign relations, the courts should only strike down localities’ actions that are explicitly preempted by the legislature, the executive, or the Constitution.

1. America’s Multiple Voices

Although the executive is often the privileged voice in foreign affairs, it must also compete with the legislative and judicial branches.¹⁵² For example, the Senate’s rejection of the Treaty of Versailles was a harsh rebuke to Woodrow Wilson’s support for the League of Nations. More recently, calls from Congress to withdraw troops from Iraq have differed from, and perhaps undermined, President Bush’s stated plans.

A plethora of non-state actors symbolize, and in many ways speak for, the United States abroad as well. These actors include large American companies that invest in foreign countries; the entertainment industry, which dramatically shapes culture abroad; American missionaries who have started religious denominations and movements across the globe; U.S. unions which have financially and otherwise supported foreign unions in labor struggles; and U.S. based nongovernmental organizations (NGOs) that may provide aid to other countries or be critical of some foreign governments’ policies.

The actions of these non-state actors are rarely condemned by the U.S. government even though they often complicate relations with foreign countries. Indeed, the U.S. government can do little to control the behavior of most of these actors. U.S. sanctions against a country can prevent many of these non-state actors from operating in a specific

151. *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

152. See Generally Sarah H. Cleveland, *Crosby and the ‘One-Voice’ Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 989 (2001).

country, but sanctions are blunt and heavy-handed instruments that are difficult to use against a specific actor that is disrupting the federal government's ability to speak with "one voice" in foreign relations. Laws like the Foreign Corrupt Practices Act¹⁵³ and the Alien Tort Claims Act¹⁵⁴ provide some avenues for regulating how these non-state actors affect foreign relations, but such laws tend to be the exception and not the norm.

State and local governments are arguably seen as representing the U.S. government abroad in a more official capacity than U.S. non-state actors. The governments of these localities are democratically elected and so it is more likely that they will be seen as acting on behalf of the American people. Additionally, the federal government generally has a greater ability to control the actions of these localities than non-state actors. Therefore, there is a greater chance that nonintervention by the federal government to stop offensive activity will be seen as federal endorsement of such activity.

Such logic though should caution against court intervention in these cases rather than encourage it. If localities' actions damage U.S. foreign policy interests, the federal government can easily preempt the state or local policies in question. Further, with the world's increased interconnectedness, it is more likely that if a foreign government takes offense to a locality's policy it can discriminate between the policy of the locality and the policy of the federal government.¹⁵⁵

2. Benefits of Decentralizing Foreign Relations

Democracy that takes place at the level of the nation-state has long been considered suspect. As Robert Dahl and Edward Tufte observe in *Size and Democracy*, two thousand years of democratic theory either explicitly or implicitly presupposed that democracy could only work on a very local level.¹⁵⁶ The first democracies were city-states whose citizens practiced a form of limited direct democracy.¹⁵⁷ Both Plato and

153. Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§ 78dd-1 to 78dd-3 (West 2006).

154. Alien Tort Claims Act, 28 U.S.C.A. § 1350 (West 2006).

155. Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 (2002).

156. ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* 55 (1973).

157. Greek city-states, like Athens, did not give women or slaves the right to participate in their democracies. Over two thousand years later, the United States that De Tocqueville traveled still disenfranchised these same groups both nationally and at a local level. Neither Ancient Athens nor the United States of the 1840s could rightly be considered a democracy today. The models they provide for direct and participatory democracy are entangled in a history of oppression that only allowed for the empowerment of some. Lessons drawn from these two experiences must take this

Aristotle assumed in their work that democracy would only occur in city-state like units of governance. For instance, Plato uses the example of a population of 5,040 as an ideal number of citizens for a democracy.¹⁵⁸

Montesquieu and Rousseau, two of the thinkers who most influenced the founders of the United States, both believed in small scale democracy and largely believed democracy could only successfully take place at this level. Rousseau argued for small direct democracies and cautioned that “[t]he moment a people allows itself to be represented, it is no longer free: it no longer exists.”¹⁵⁹ In contrast to Rousseau, Montesquieu wrote that representatives of the people were better at discussing public affairs and making decisions for the community than the people as a whole.¹⁶⁰ He also felt, however, that democracy was not well-suited to a large country because it was too difficult to foster trust and a sense of public good on this scale.¹⁶¹

Inheriting a vast geographic area and a relatively large population (approximately 3.9 million people in 1790),¹⁶² the United States adopted a representative form of democracy on a national scale. Commitment to democracy at the state and local level, however, remained strong. De Tocqueville’s snapshot of the United States in *Democracy in America* showed the continued liveliness of democratic institutions at a municipal level in the early 1800s.¹⁶³ An allegiance to states and regions was so overwhelming in the 1850s and 1860s that it created the preconditions for the South to attempt to form their own union during the Civil War.

Since the Civil War, there has been a general centralization of political power to the federal government, most notably during Reconstruction and the New Deal. In the 1930s, federal expenditures

systematic disenfranchisement into account. See ANDREA DWORKIN, *Women in the Public Domain*, in LIFE AND DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN 196-97 (1997) (on how Athenian democracy kept women out of public political life).

158. PLATO, *Laws*, bk. V, in THE DIALOGUES OF PLATO 686, 692 (Benjamin Jowett trans., Encyclopedia Britannica, Inc. 1952); Plato, *Laws*, bk. VI, in THE DIALOGUES OF PLATO 697, 706 (Benjamin Jowett trans., Encyclopedia Britannica, Inc. 1952). See generally, Aristotle, *Politics*, bk. V, in *The Works of Aristotle Vol. II*, in GREAT BOOKS OF THE WESTERN WORLD VOL. 9 (Benjamin Jowett trans., Encyclopedia Britannica 1952).

159. Jean-Jacques Rousseau, *The Social Contract*, bk. 3, Ch. 15, in GREAT BOOKS OF THE WESTERN WORLD VOL. 38, at 422 (G.D.H. Cole trans., Encyclopedia Britannica 1952).

160. BARON DE MONTESQUIEU, *Spirit of Laws*, bk. XI, Ch. 6, at 177 (Thomas Nugent trans., Robert Clark & Co. 1873).

161. *Id.* at bk. VIII, Ch. 16.

162. U.S. DEPT. OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, pt. 1, at 8 (1975).

163. The direct democracy De Tocqueville documented in *Democracy in America* occurred in New England townships of two to three thousand people. DE TOCQUEVILLE, *supra* note 1, at 64.

per year finally became greater than local expenditures.¹⁶⁴ State and local democracy did not necessarily become less vibrant during this progression, but localities lost relative power over their citizens in relation to the federal government. Further, Americans' political identities became less attached to their region, state, or town and more linked to the country as a whole.

The country though has also seen countervailing trends. The second half of the 20th century saw a relative expansion of state and local government in relation to the federal government although federal spending remained significantly higher throughout. State and local expenditures have increased from 1950 to 2001 from 5.6% of GDP to 9.8%.¹⁶⁵ During this same period, overall federal government expenditures changed relatively little, ranging from 15% to 23% of GDP (15.6% in 1950 and 18.4% in 2001). These overall federal numbers mask an important trend though because the Reagan presidency saw the beginning of a large drop in federal spending that was not defense, interest payments, or transfers (4.1% of GDP in 1980, 2.2% in 1988, and 2% in 2001).¹⁶⁶ Meanwhile state and local spending consistently increased during this time (8.6% of GDP in 1980, 9.2% in 1988, and 9.8% in 2001).¹⁶⁷ This change in federal, state, and local expenditures along with Supreme Court decisions supporting state rights and a general shift in public opinion for greater federalism indicates a moderate trend towards decentralizing many aspects of governance over the last 25 years in the United States.¹⁶⁸

Federal systems are often adopted out of political necessity to accommodate religious, ethnic, or linguistic differences between groups from different geographic areas within the same country. These groups are granted guarantees of limited autonomy while the central government is granted limited overall control. This article does not examine the political necessity of American federalism. Instead, three other traditional justifications of federalism in the United States are

164. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

165. OFFICE OF MANAGEMENT AND BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003, tbl. 15.3 - Total Government Expenditures as Percentages of GDP: 1947-2001 (2002), available at <http://www.whitehouse.gov/omb/budget/fy2003/pdf/hist.pdf>.

166. OFFICE OF MANAGEMENT AND BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003, tbl. 15.5 - Total Government Expenditures by Major Category of Expenditure as Percentages of GDP: 1947-2001 (2003), available at <http://www.whitehouse.gov/omb/budget/fy2003/pdf/hist.pdf>.

167. *Id.*

168. See Generally, John D. Donahue, *Tiebout? Or Not Tiebout? The Market Metaphor and America's Devolution Debate*, 11 J. ECON. PERSPECTIVES 73, 74 (1997).

highlighted and explicitly adopted to show the benefits of more decentralized foreign relations. These are the following: (1) federalism creates a greater diversity of policies which are more locally relevant, more economically efficient, and/or allow for more experimentation with less risk to the nation as a whole; (2) federalism provides a check on the over-centralization of power; and (3) federalism fosters thicker citizens by creating a more participatory and locally relevant democratic process.

First, federalism allows for and fosters a greater diversity of policies. Decentralization can allow for a number of governmental subunits to work on the same problem creating what Jack Walker calls a “national system of emulation and competition”¹⁶⁹ while also taking into account local conditions and preferences. In a similar vein, Charles Tiebout famously argued that if “consumer-voters” are mobile and have full information they will sort amongst bundles of public goods offered by competing local governments, thereby leading to the distribution of public goods in an optimal manner.¹⁷⁰

Certainly, not all localities perform equally well at developing and adapting new policies. Research has shown that wealthier states tend to be more innovative although local political situations are in large part determinative as well.¹⁷¹ There is also reason to believe localities are best at determining solutions to middle-level difficulty problems as large problems often require more resources than are at their disposal while decentralization can often confuse remedies for smaller problems.¹⁷² With these limitations in mind, however, localities are remarkably adaptive, often correctly pinpointing problems and finding new solutions before the federal government does.

Dissenting from *New State Ice Co. v. Liebmann*, Justice Brandeis summarizes the frequently invoked idea that states can be laboratories for experimentation:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of

169. Jack L. Walker, *The Diffusion of Innovations among the American States* 63 AM. POL. SCI. REV. 880, 898 (1969).

170. Tiebout, *supra* note 170. For a brief overview of the literature criticizing the theoretical problems of the Tiebout model see Ken Kollman, John H. Miller & Scott E. Page, *Political Institutions and Sorting in a Tiebout Model*, 87 AM. ECON. REV. 977, 978-79 (1997).

171. See generally, Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174, 1185 (1973).

172. Ken Kollman, John H. Miller & Scott E. Page, *Decentralization and the Search for Policy Solutions*, 16 J.L. ECON. & ORG. 102, 104 (2000).

the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.¹⁷³

Of course, if state and local policies affect foreign relations, such experimentation is not “without risk to the rest of the country.”¹⁷⁴ Localities’ policies that antagonize other countries could sour relations with important trade partners, needed political allies, or belligerent enemies. Although such dangers should be seriously considered, they are often overstated while in other cases the larger benefits of state or local action in foreign relations may be worth the potential for some limited adverse consequences. Further, the federal government can preempt localities’ policies that it finds endanger the country or its foreign policy.

State trade missions are an example of state action directed abroad that carries little risk for the nation as a whole. States may tailor these missions to the special needs of their business communities. The diverse tactics and goals of these missions may ultimately be more successful at developing business ties with other countries than if all efforts were concentrated through the U.S. government.

A number of areas of formerly local or national concern that have become internationalized, such as environmental policy, also benefit from decentralization. Within the framework of minimum national standards, localities can experiment with creative new environmental policies, defraying risk for the country and creating support for successful policies.

Second, federalism provides a check on the over-centralization of power. Federalism embraces a “conception of justice” that implies that a diffuse political ordering is both “necessary and desirable.”¹⁷⁵ In *Federalist 51*, James Madison reassures his readers that a federalist

173. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also*, Justice Powell in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 567-68 n.13 (1985) (Powell, J., dissenting) (“The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as ‘laboratories.’”); Justice O’Connor in *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 787-88 (1982) (O’Connor, J., dissenting) (“Court’s decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 states serve as laboratories for the development of new social, economic, and political ideas.”). Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 *BROOK. L. REV.* 1313, 1325 (2004).

174. There are potential spillover affects to many state domestic policies as well.

175. DANIEL ELAZAR, *EXPLORING FEDERALISM* 84 (1987).

republic provides a “double security” against usurpations of power because power is not only divided between the different branches of the federal government, but also between the federal and state governments.¹⁷⁶ Justice O’Connor picks up this theme in *Gregory v. Ashcroft* where she remarks that “[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”¹⁷⁷

As areas of traditional local governance increasingly become objects of international concern there is an increased danger that localities will be weakened in their ability to act as a counterweight to federal and international power. Further, localities can play an active role in checking abuses of federal foreign policy in areas not traditionally associated with local governance.

For example, localities may be able to resist perceived misuses of federal power that touch on foreign relations if they require the assistance of local authorities to implement. Several cities, such as San Francisco and Detroit, have passed resolutions denouncing the U.S. Patriot Act, and some cities have even gone so far as to decline to provide assistance to federal authorities in any instance where civil liberties might be jeopardized.¹⁷⁸

As will be discussed in the next section, localities have also taken a number of actions to oppose or attempt to change federal foreign policy, such as passing resolutions condemning the war in Iraq or adopting “Buy America” laws. These actions in and of themselves may have questionable impact on any perceived abuses of foreign policy decision-making power in Washington D.C., but they mobilize citizens around foreign policy issues at a local level.

This mobilization of citizens is perhaps the greatest check on usurpations of power by the federal government and leads to the third justification for federalism in foreign relations: federalism creates control and independence at a local and state level which encourages

176. THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961).

177. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). See also Chief Justice Rehnquist in *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“This constitutionally mandated division of authority ‘was adopted by the Framers to ensure protection of our fundamental liberties.’”); Justice Scalia in *Printz v. United States*, 521 U.S. 898, 921 (1997) (“The separation of the two spheres is one of the Constitution’s protections of liberty.”). Chemerinsky, *supra* note 179, at 1325.

178. Vikram David Amar, *Converse § 1983 Suits in Which States Police Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369, 1370 (2004).

citizen participation and empowerment.¹⁷⁹

Although fewer people vote in local elections than in national elections (in part because local elections tend to be more lop-sided affairs), more people try to influence local politics than national politics.¹⁸⁰ State and local politicians are usually more accessible than national ones. It is also often easier to create local and state constituencies. Sometimes these state or local constituencies are connected with or develop into national constituencies, but it is the chance to participate locally and impact the governance of one's locality that often mobilizes those involved. The idea that local action may then turn into a national movement can create synergetic inspiration.

State and local democracy leads to large reservoirs of engaged and committed citizens participating in a diverse array of political communities. Not every citizen will take the opportunity to engage with the governments of their localities, but many will. Local political communities' involvement in questions of foreign relations ensures that debates around these topics will occur at multiple levels of government and in multiple forums. With pools of active and committed citizens, it is then more likely these citizens can and will check an overzealous Congress or executive. The involvement of engaged political classes in localities who also participate in national politics makes it more likely that the potential for tyranny in the federal government's policies will be checked both here and abroad.

To further illuminate localities' role in foreign relations, it is helpful to address three critiques of decentralizing foreign relations that also draw off of traditional critiques of federalism in general. First, the federal government has superior resources and expertise in foreign relations so localities' involvement in foreign relations will therefore lead to unwise or underdeveloped foreign policy. Second, given freedom in the arena of foreign policy, localities may pursue unjust policies. Third, involvement of localities in foreign relations confuses who is accountable for foreign policy.

The federal government has an unmatched institutional capacity to develop, shape, and implement a comprehensive foreign policy for the nation. Many state and local representatives are rightly hesitant to take on foreign policy issues because they correctly perceive their expertise to be in local decision-making and not in foreign decision-making. Individual citizens often find themselves similarly intimidated by foreign

179. ELAZAR, *supra* note 181, at 8.

180. DAHL & TUFTE, *supra* note 162, at 55-57.

policy matters.

Max Weber observed that “[u]nder normal conditions, the power position of a fully developed bureaucracy is always overtowering. The ‘political master’ finds himself in the position of the ‘dilettante’ who stands opposite the ‘expert,’ facing the trained official who stands within the management of administration.”¹⁸¹ There is perhaps no bureaucracy as seemingly impenetrable to citizens as that which has developed around foreign relations. Multiple agencies deal with a plethora of issues that surround our relations with countries. Citizens often know little about the countries with which these agencies deal. Terms like “national security” and “national interest” often intimidatingly loom in the background. Even the term “foreign relations” still connotes a certain degree of untouchable importance and danger.

The information and expertise differential between local and federal decision-makers and officials may seem overpowering when looked at broadly,¹⁸² but local and state officials actually have a potential information advantage in many foreign relations issues such as fostering trade. Further, with an interconnected world a great deal of information is available to legislators, and they have become savvier at interpreting it. State and local legislators can also take their cue from the federal government. For example, the legislators of many localities likely felt more comfortable condemning the regime in Sudan after the federal government stated genocide was occurring in Darfur. Most importantly, localities are not developing a comprehensive foreign policy, but instead are crafting a foreign policy that furthers their localities’ more limited interests.

A second critique of federalism is that if localities are given too much power they will pursue narrow-minded or unjust ends. Madison wrote in *Federalist 10* that the tyranny of the majority could be checked more easily in a larger country because it was less likely they would share common enough interests to consistently suppress the rights of

181. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 232 (H. H. Gerth and C. Wright Mills eds. and trans., 1946).

182. *Id.* at 229 (“The ruled for their part cannot dispense with or replace the bureaucratic apparatus of authority once it exists. For this bureaucracy rests upon expert training, a functional specialization of work, and an attitude set for habitual and virtuoso-like mastery of single yet methodically integrated functions. If the official stops working, or if his work is forcefully interrupted, chaos results, and it is difficult to improvise replacements from among the governed who are fit to master such chaos.”). Of course, no one is suggesting the U.S. dispense with its federal foreign policy bureaucracy, but only also allow a space for state and local decision-making in foreign relations.

others.¹⁸³ Indeed, many who grew up during the Civil Rights era in the United States associate state and local governments with racist laws in the American South that were entrenched in localities. These laws were only ultimately purged through the commitment of the national government. Many have argued for international human rights and trade regimes so that people and markets under localities' control are not subject to parochial policies. They claim that localities' actions not in line with these commitments can only weaken the high standards of these international regimes.

There are at least two reasons to doubt the validity of this criticism. First, if localities are not involved in and do not accept the validity of international agreements, these agreements can seem hollow and illegitimate no matter how just their goals purport to be. International agreements and the norms they promote are not as likely to be successfully internalized without local involvement and participation in the development, contestation, and implementation of these agreements.

Second, history has shown localities were often on the forefront of causes of justice. An examination of American history shows a number of notable examples where state and local governments took the lead in protecting basic human rights. For example, the Constitution initially entrenched a system that would favor the continuation of slavery.¹⁸⁴ While the federal government actively condoned slavery, northern states banned its practice and worked towards its national abolition.

Localities also pushed women's suffrage before the national government. In 1869 the Wyoming territory accorded women equal rights with men to vote and hold office, and in 1890 it entered the United States as the first woman-suffrage state.¹⁸⁵ By 1917, 11 states – all in the west – had full suffrage for women.¹⁸⁶ Suffrage advocates used the example of these states to successfully lobby for the 19th amendment, which was adopted in 1920.

It is beyond the scope of this article to predict if greater or less federal or local control over the issues of slavery or women's suffrage would have hastened or slowed these moves towards freedom and equality at the national level. Both the abolitionist and suffrage

183. THE FEDERALIST NO. 10, at 51 (James Madison) (Clinton Rossiter ed., 1961).

184. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 20-21 (2005).

185. *Id.* at 419.

186. THE WOMAN SUFFRAGE YEARBOOK 1917, at 21 (Martha Stapler ed., 1917), available at [http://memory.loc.gov/cgi-bin/ampage?collId=rbnawsa&fileName=n7468/rbnawsan7468.db&recNum=19&itemLink=r?ammm/nav:@field\(DOCID+@lit\(rbnawsan7468div11\)\):%23n7468020&linkText=1](http://memory.loc.gov/cgi-bin/ampage?collId=rbnawsa&fileName=n7468/rbnawsan7468.db&recNum=19&itemLink=r?ammm/nav:@field(DOCID+@lit(rbnawsan7468div11)):%23n7468020&linkText=1).

movements, however, leveraged state and local action to pursue their national objectives. A certain decentralization of power to localities should appeal to any advocate for justice. State and local governments have an important role to play in decrying the injustices of the federal government and international treaty regimes.

A third critique of federalism emphasizes the decrease in accountability as more levels of government become involved in an area of policy. In many ways accountability for foreign relations, however, remains much clearer in a partially decentralized system than in most areas of domestic policy. The federal government is clearly to blame for mistakes in a distant war and not one's local or state government. Meanwhile, a state government is to blame for a state trade mission that mishandles tax payer money without producing any business for the state. Similarly, although a citizen should not expect their state to end apartheid in South Africa, they may hold them accountable for not joining a divestment campaign aimed at this goal. Citizens should not hold their locality's government accountable for the unfolding of world events, but they can hold it accountable for how it reacts to these events.

Dahl and Tufte observe that “[n]o single type of size of unit is optimal for achieving the twin goals of citizen effectiveness and system capacity.”¹⁸⁷ When the federal government all but monopolized foreign relations, it seemed difficult for a citizen to impact formulation of these policies. Today, localities have an increasingly larger role as actors in foreign relations. It is generally easier for citizens to affect their localities' policies than to affect national ones. Most localities, however, do not have the capacity to have much effect on large global issues. Instead, their goals in foreign relations must be more modest: fostering productive trade and other exchanges with other countries, protecting their own values and markets, decrying international injustices, or pressuring the federal government to change its foreign policy in line with the localities' interests. In a globalized world, foreign relations become a broader concept. Both the federal government and state and local governments have increased responsibility in foreign relations. In turn, we should work to democratize foreign relations at all these levels of government recognizing the strengths and weaknesses of each level of government.

187. DAHL & TUFTE, *supra* note 162, at 138.

3. *Judicial Implications*

The U.S. has never spoken with “one voice” in foreign relations and certainly does not today. Further, the benefits of decentralizing foreign policy to include the involvement of localities are numerous. Given the pervasive nature of globalization, there is little reason to believe foreign relations should be the soul domain of the federal government. Instead, as Judith Resnik has argued more generally, categories in federalism are rarely truly bounded. We should recognize “that many categories are intertwined in lawmaking enterprises and that more than one source of legal regulation is likely to apply to any set of behaviors.”¹⁸⁸

There are clearly times that the U.S. must act with a united voice, but the legislature and executive are better suited than the judiciary to determine when localities’ actions are a genuine threat to the nation’s foreign relations interests.¹⁸⁹ These branches are better acquainted with the nation’s foreign policy and can more efficiently and accurately target localities’ actions that adversely affect foreign relations than courts. Also, giving broad preemption power to the judiciary may result in diverse decisions by lower courts in the same area of foreign relations, creating further confusion.¹⁹⁰ Therefore, courts should abandon their heightened preemption analysis in the field of foreign relations. They should only preempt localities’ actions in foreign relations when they are explicitly required to by the executive, the legislature, or the Constitution.

Although courts should let the other branches of government regulate localities’ actions in foreign relations, courts are better suited to determine when their own actions may adversely affect foreign relations. As a result, there may be instances when a court should find a dispute nonjusticiable because of the implication of a judgment on foreign relations. When coming to such a conclusion, the court should weigh the interest localities have in the judicial resolution of these cases. A court should not overestimate the need to use these doctrines of nonjusticiability. Frequently a decision will not have as dire consequences on foreign relations as the courts imagine. Further, the executive and Congress can often pass laws to limit courts’ jurisdiction if they do overreach. Finally, an overzealous use of the act of state and

188. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 622 (2001).

189. Goldsmith, *supra* note 5, at 1714.

190. Goldsmith, *supra* note 5, at 1694.

political question doctrines on issues that affect foreign relations will keep courts out of an ever-increasing number of disputes, many of which could benefit from the judiciary's intervention.

IV. IN CONTEXT: LOCALITIES' ACTIONS THAT AFFECT FOREIGN RELATIONS

Not all localities' actions that affect foreign relations do so in the same way. Such actions may: (1) foster exchange and cooperation with other countries; (2) protect or promote local markets and/or values in a manner that affects foreign relations; (3) judge other countries' behavior; or (4) influence the federal government's foreign policy. Localities may also (5) adopt or borrow from international or foreign law. This part of the article provides examples for each of these categories to make the implications of the arguments laid out so far more tangible.

These examples demonstrate the varied and sometimes complex ways localities affect foreign relations. Some brief analysis is given to demonstrate how foreign relations law is constraining or could constrain localities' actions in each of the five categories. In particular, localities' actions that affect foreign relations in categories two and three are most likely to come under the scrutiny of domestic law, while activities in category two are most likely to be found suspect by international law.

These examples, however, also show that no category is without scrutiny from U.S. law. Some actions may fit into more than one category. For example, a procurement policy like the one at issue in *Crosby* may be an attempt to influence foreign policy (category four), but it also fits in categories two and three. Further, if localities are consistently told by the courts that their business is not foreign relations, this may have a chilling effect on activities in all of these categories.

1. Policies that Foster Exchange and Cooperation with Other Countries

Localities' policies that foster exchange and cooperation with other countries are one of the least scrutinized categories under domestic or international law. State and local governments' involvement in these activities, however, especially concerning trade promotion, demonstrates how localities have become not just occasional, but routine international actors. Arguably, America's foreign policy gains more from these numerous and diverse exchanges to promote business with other countries by localities than if the federal government attempted to centralize this cooperation. Localities emulate each other's tactics to strengthen exchanges with foreign countries and often compete for

business. Citizens also become engaged in these exchanges, thereby furthering citizen involvement and exposure to foreign affairs.

Bayless Manning noted in the 1970s that “[t]he economic interdependence of the modern world is more than international. It is also inter-local.”¹⁹¹ Indeed, localities today tirelessly promote economic activity with foreign countries and foreign localities both to create markets for their products and to attract overseas investment.¹⁹²

Although states have long sent trade delegations abroad, the number of these delegations increased greatly during the 1990s as states gained a new awareness of the importance of international trade, the amount of international trade increased, and larger state budgets made such delegations possible.¹⁹³ In 1980 there were only four overseas offices maintained by states, but by 2002 this had increased to 240 overseas offices.¹⁹⁴ States also cooperate with one another to coordinate economic outreach overseas.¹⁹⁵ Friendship state or partnership relationships between states and subunits of other countries are created to encourage trade and cultural exchange as well.¹⁹⁶ Cities across the U.S. have promoted their businesses through sister-city programs¹⁹⁷ as well as through the U.S. Conference of Mayors.

Other countries or sub-national units often make specific attempts to create stronger economic ties with specific states. For example, at

191. Bayless Manning, *The Congress, The Executive, and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306, 309 (1977).

192. See generally, Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1028-33 (2001).

193. CHRIS WHATLEY, STATE OFFICIAL'S GUIDE TO INTERNATIONAL AFFAIRS 3 (2003), available at <http://www.csg.org/pubs/Documents/SOG03InternationalAffairs.pdf>.

194. *Id.* at 3, 49-51.

195. For example, the National Association of State Development Agencies (NASDA) organizes trade and investment missions as well as helps educate state economic development directors about attracting investment. NASDA Website, International Business Development Division Description, available at <http://www.nasda.com/> (last visited Dec. 30, 2006); The Council of American States in Europe coordinates the activities of U.S. States with offices in Western Europe. EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 68 (1998).

196. It is estimated some “90% of states maintain partnerships or working relationships with foreign jurisdictions.” WHATLEY, *supra* note 194, at 13.

197. Pat Guinane, *State trade office plays matchmaker as Quincy courts China*, ILLINOIS ISSUES, Feb. 2005 (detailing trade mission sponsored by the state of Illinois between Quincy, IL, and its sister-city Jiaying, China); HEIDI HOBBS, CITY HALL GOES ABROAD: THE FOREIGN POLICY OF LOCAL POLITICS 2 (1994) (describing how San Francisco and Shanghai created their sister-city relationship to help foster trade). In 2005, “Sister Cities International represented over 2,500 communities in 126 countries around the world.” See Sister-cities international website, Frequently Asked Questions at <http://www.sister-cities.org/sci/aboutsci/faqs> (last visited Dec. 30 2006). Sister-cities international is a partially federally funded organization dedicated to “increased global cooperation, cultural exchange, and economic development.” *Id.*

least 35 countries have foreign trade offices in California alone.¹⁹⁸ Foreign leaders will meet with state government officials while touring the United States,¹⁹⁹ and foreign companies will often use state governors as a single point of contact to navigate regulatory and political hurdles.²⁰⁰

Some have argued that competition between state and local governments for business strengthens free markets and thereby creates greater economic growth.²⁰¹ Others have argued that it is not clear such competition will create growth²⁰² and express concern that such overt competition between localities sets off a regulatory race to the bottom and increases inequalities.²⁰³ Certainly, many foreign (and domestic companies) expect large tax breaks and other subsidies before deciding to start major operations in a given locality.

Localities foster other exchanges with foreign countries that are not purely economic. One of the principal ways in which state and local governments create connections with foreign countries is by developing the education systems that shape their citizens global worldview, including the training of foreign language skills and the teaching of history of other countries.²⁰⁴

A number of states have developed environmental partnerships with other countries to share knowledge and often aid these countries in their environmental programs.²⁰⁵ California Governor Arnold Schwarzenegger and British Prime Minister Tony Blair signed a formal

198. California Business Portal, Foreign Trade Offices in California, *available at* http://www.ss.ca.gov/business/ibrp/trade_offices.htm (last visited Dec. 30, 2006). Sometimes these foreign trade offices are sub-national units present in the United States such as the State of Bavaria's, South West of England's, or the Catalonian trade offices in California.

199. Office of the Governor, *Governor Schwarzenegger, Mexico President Fox Discuss Pressing Cross-Border Issues at Historic*, May 25, 2006, *available at* <http://gov.ca.gov/index.php/press-release/816/>.

200. Halberstam, *supra* note 198, at 1031.

201. Barry Weingast and others have argued that federalism preserves markets by devolving power away from the central government and forcing subunits to compete against each other in their policies. Qian, Yingyi & Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11(4) J. OF ECONOMIC PERSPECTIVES 83 (1997). Ideally, such decentralization and deregulation will lead to growth. *Id.* at 85-86. Weingast points to China and the United States as cases of this occurring. *See id.* at 83-92.

202. Jonathan Rodden & Susan Rose-Ackerman. *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521, 1524 (1997) (Arguing that a federal model of competition between states may actually slow growth). For example, state politicians may not always act to maximize citizen benefits. There may be more points of corruption in a federal system, state level inequality may increase, and such a federal system may be unstable over the long term.

203. Donahue, *supra* note 174, at 73.

204. WHATLEY, *supra* note 199, at 12.

205. *Id.* at 18-19.

agreement in July 2006 pledging environmental cooperation between their two jurisdictions.²⁰⁶

Since the 1990s, at least 36 states have created ties with countries around the world through the State Partnership Program of the National Guard. For example, the Montana National Guard has provided infantry training to Kyrgyzstan. As an outgrowth of this military exchange, the Montana Nurses Association also sent representatives to train public health personnel in Kyrgyzstan, and a Montana NGO has funded the construction of a clinic for the developmentally disabled.²⁰⁷ In December 2003, the President of Kyrgyzstan flew to Montana to meet with Montana's Governor and representatives from agriculture, academics, the military, and other organizations.²⁰⁸

2. Laws and actions that protect and promote localities' markets and values in a manner that affects foreign relations

State and local actions often protect domestic markets or values. These actions may be designed to specifically protect against foreigners. Often the regulation of markets or values by localities has merely incidental effects on foreigners. With the increased internationalization of the areas of governance of localities, there is a greater chance for these incidental conflicts to arise.

States have explicitly preferred local or U.S. companies against foreign companies in procurement policies. Proponents of preferring local or U.S. firms in procurement policies claim that the government should use tax dollars to support domestic companies and spur the local economy. Further, they argue domestic companies should not be penalized for having to comply with tighter domestic labor and environmental regulation.

Thirty-seven states voluntarily agreed in the early 1990s to cover some of their state procurement under the WTO Agreement on

206. Press Release, Office of the Governor, *Gov. Schwarzenegger, British Prime Minister Tony Blair Sign Historic Agreement to Collaborate on Climate Change, Clean Energy*, Jul. 31, 2006, available at <http://gov.ca.gov/index.php/press-release/2770/>. It is unclear what the status of this agreement is under Art. 1 Sec. 10 of the Constitution, which bars states from entering treaties with foreign powers. U.S. CONST. art I, § 10. Agreements of this type will likely increase in the coming years, and their constitutional validity will come under increasing scrutiny. The California-UK agreement is seemingly non-binding, and it appears unlikely that it will be challenged.

207. WHATLEY, *supra* note 199, at 16-17.

208. National Guard Bureau of International Affairs website, *Montana National Guard State Partnership Program in Kyrgyzstan*, available at http://www.ngb.army.mil/ia/states/states/mt_kyrgyzstan.htm (last visited Dec. 27, 2006).

Government Procurement (GPA).²⁰⁹ By so agreeing, these states allow suppliers from the other country to have an equal opportunity to compete for purchases in those states.²¹⁰ Most states, however, still have some preferences for in-state bidders and firms in their state procurement policies.²¹¹ Several states have explicitly told the federal government that they will decline a foreign company's bid for procurement contracts. In May 2004, the Governor of Maine rescinded his state's commitment to be bound by CAFTA's procurement rules and stated that he will review all future trade agreements on a case-by-case basis.²¹² In 2004, over concerns about outsourcing abroad, at least 35 states introduced legislation that would require that state contracts be performed inside the United States.²¹³ Lower courts have been split if such "Buy American" laws are constitutional, and a case on this topic has not been decided in the wake of *Crosby and Garamendi*.²¹⁴ Several municipalities have also prohibited the purchase of goods made with sweatshop labor and require companies receiving municipal contracts to pay a living wage.²¹⁵

Localities have taken steps to actively protect non-economic interests as well. For example, several U.S. cities are members of United Cities and Local Governments, a U.N. affiliated organization that promotes cities' interests at the U.N. United Cities has lobbied the UN to create principles on decentralization and to give local governments

209. Office of the USTR, *State Government Procurement and Trade Agreements*, Apr. 1, 2004, available at http://www.ustr.gov/Document_Library/Fact_Sheets/2004/State_Government_Procurement_Trade_Agreements.html.

210. *Id.*

211. See SELL2USGOV, *State Procurement Preferences*, Dec. 12, 2005, available at <http://www.dfait-maeci.gc.ca/sell2usgov/statelawsreg-en.asp> (website maintained by Canadian Department of Foreign Affairs and International Trade detailing procurement preferences for all 50 states).

212. Karen Imas, *States Get Savvy on Trade Strategy*, STATE NEWS, May 2005, at 24.

213. See National Conference of State Legislatures, *2004 Legislation Regulating or Prohibiting Non-U.S. Citizens from State Contracts*, June 29, 2004, available at <http://www.ncsl.org/standcomm/scecon/04LegisECON.htm>.

214. See *K.S.B. Technical Sales Corp. v. N. Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 789 (1977) (upholding constitutionality of state "Buy American" law on the grounds that it did not "impermissibly interfere with the federal government's conduct of foreign affairs" or impose judgment on any foreign state); *Bethlehem Steel Corp. v. Bd. of Comm'rs*, 276 Cal. App. 2d 221, 229 (1969) (invalidating state "Buy American" law as conflicting with federal trade policies).

215. San Francisco, Cleveland, and a number of other cities have laws banning the procurement of products made in sweatshops. See, *Pittsburgh Joins City Fight Against Sweatshops*, U.S. NEWSWIRE, Sept. 23, 1997 (discussing Pittsburgh sweatshop ordinance); Linda Himelstein, *Going Beyond City Limits? Municipalities Are Exercising Their Clout on Social Issues - And Business Is Balking*, BUS. WK., July 7, 1997, at 98 (noting passage of San Francisco ordinance).

special observer status at the U.N.²¹⁶ These recommendations are based on the assumption that localities have a unique perspective about and role in governing that needs to be protected and promoted at an international level.

With the pervasive effects of globalization, many localities' actions that protect and promote domestic markets and values have an incidental effect on foreign relations. Sometimes these cases also have protectionist or xenophobic undertones, but in all of them traditional state and local interests are also being pursued.

Such incidental effects have been challenged in U.S. court cases. For example, in 2004 in the complaint to *Central Valley Chrysler-Jeep, Inc. et al. v. Witherspoon*²¹⁷ several major automakers including Ford and General Motors sued the California Air Resources Board. They argued that the Clean Air Act and federal fuel economy laws preempted the California's regulation of carbon dioxide. They also claimed, however, that the federal foreign affairs power and the dormant foreign interstate commerce clause preempted the state regulations. The petitioner's brief submitted that California's regulation of carbon dioxide "... interferes with the U.S. speaking with one voice on matters of global climate change, and it diminishes the President's leverage in negotiating multilateral commitments to reduce greenhouse gases."²¹⁸

Local regulations that have an incidental impact on foreign commerce have also been challenged under Chapter Eleven of NAFTA. In December 2003, Glamis Gold Ltd, a Canadian mining company, filed a complaint under Chapter Eleven challenging state regulations that blocked their development of a California mine site.²¹⁹ The regulations

216. United Cities and Local Governments, *Stronger partnership with local governments central to reforming the UN*, available at <http://www.cities-localgovernments.org/uclg/index.asp?pag=template.asp&L=EN&ID=282> (last visited Dec. 27, 2006).

217. First Amended Complaint for Declaratory and Injunctive Relief, *Central Valley Chrysler-Jeep, Inc., et. al. v. Witherspoon*, Case No. 1:04-cv-06663-REC-LJO (E.D. Cal. Feb. 16, 2005).

218. *Id.* at 95. The Brief continues:

The President's bargaining power is reduced even further if other states adopt California's fuel economy standards. Far from attempting to conform their actions to the position of the national government, California officials, including the Secretary of the California Environmental Protection Agency and CARB officials beneath him, are actively campaigning for adoption of CARB's regulation by at least one foreign government (Canada), to make federal fuel economy policy irrelevant or much less important in the global automobile industry.

Id.

219. Glamis Gold, LTD., *Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade and the North American Free Trade Agreement: Glamis Gold Ltd., Claimant/Investor, and The Government of the United States of America*,

required backfilling the mine site, which would make the project financially infeasible.²²⁰ The regulations had general applicability, but were implemented because of specific concerns about environmental and cultural damage that the Glamis Gold mine site might cause.²²¹ The arbitration is ongoing.

In 2005 in *Methanex Corp. v. United States of America*, a Chapter Eleven Tribunal rejected the claim of a Canadian company that a California Executive Order banning the use of the gasoline additive MTBE, which the company manufactured, violated NAFTA.²²² It ordered the company to pay the costs of litigation for the United States.²²³

In March 2004, Grand River Enterprises Six Nations, Ltd., a Canadian company in the tobacco industry operating in the United States, lodged a complaint under Chapter Eleven.²²⁴ Under an agreement between the major cigarette makers and forty-six states, the states agreed to not pursue litigation against tobacco companies in exchange for a multi-billion dollar settlement.²²⁵ The tobacco companies had to raise prices to fund the settlement.²²⁶ They feared, however, that smaller companies who had not been sued, and so were not part of the settlement, would thereby gain an unfair market advantage.²²⁷ In response, the states established a series of incentives to attract non-party tobacco companies to join the agreement as well as imposed additional regulations if they did not join the agreement.²²⁸ Grand River Enterprises Six Nations challenged these state acts under NAFTA.²²⁹ The litigation is ongoing.²³⁰

Respondent/Party, Dec. 9, 2003, *available at* <http://www.state.gov/documents/organization/27320.pdf>.

220. *Id.*

221. *Id.*

222. U.S. Dept. of State, *Methanex v. United States of America Summary*, *available at* <http://www.state.gov/s/l/c5818.htm> (last visited Dec. 28, 2006) (the claimed violations were under Article 1110 (a claim of expropriation), Article 1105 (denying fair and equitable treatment in accordance with international law), and Article 1102 (discriminatory treatment against foreign investors)).

223. *Id.*

224. Grand River, et al., *Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and The North American Free Trade Agreement: Between Grand River Enterprises Six nations, Ltd., et al. and the Government of the United States*, Mar. 10, 2004, *available at* <http://www.state.gov/documents/organization/30961.pdf>.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

The WTO has also been a site of international debate around state and local policies that affect foreign commerce. In 2005, the WTO Appellate Body found that U.S. federal cotton subsidies violated provisions of GATT and the Agreement on Subsidies and Countervailing Measures (SCM).²³¹ State and local subsidies have also come under scrutiny though. In a trade dispute between the European Union and the United States over their respective support of Airbus and Boeing, each brought a complaint against the other in the WTO over government subsidies.²³² In its original complaint, filed in October 2004, the European Union claimed that the United States was not in compliance with the Agreement on Subsidies and Countervailing Measures as well as provisions of GATT. The complaint not only argued that different forms of federal subsidies violated these agreements, but also argued that tax and incentive packages given by Kansas, Washington State, and the city of Chicago violated these agreements.²³³ According to the EU, the Washington state package to Boeing was worth \$7 billion.²³⁴ There is currently a WTO panel reviewing these complaints.²³⁵ Localities have long given subsidies to attract corporations, rejuvenate depressed communities, and retain businesses that are part of their cultural heritage. Such subsidies are likely to come under increasing scrutiny from the WTO.

The unsuccessful implementation or inadequacy of state or local laws and regulations can also have an impact on commerce with foreign countries. For example, states are responsible for the tracking of animals and any diseases they might have. In 2004, an outbreak of mad cow disease in Washington cost the U.S. \$400 million in lost sales to Japan alone.²³⁶ In this way, the effectiveness of one state's regulation of

230. U.S. Dept. of State, Grand River Enterprises Six Nations, Ltd., et. al. v. United States of America Summary, available at <http://www.state.gov/s/l/c/11935.htm> (last visited Dec. 28, 2006).

231. WTO, Dispute Settlement: Dispute DS267, United States – Subsidies on Upland Cotton, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (last visited Dec. 28, 2006).

232. BBC, *U.S. takes Airbus dispute to WTO*, BBC NEWS, Oct. 6, 2004, available at <http://news.bbc.co.uk/2/hi/business/3720710.stm>.

233. United States - Measures Affecting Trade In Large Civil Aircraft: Request for Consultations by the European Communities, G/SCM/D63/1, Oct. 12, 2004.

234. European Union News Releases, *EU Resumes WTO Case Against Boeing*, May 31, 2005, available at <http://www.eurunion.org/News/press/2005/2005056.htm>.

235. WTO, Dispute Settlement: Dispute DS317, United States - Measures Affecting Trade In Large Civil Aircraft, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds317_e.htm (last visited Dec. 28, 2006).

236. Gene Rose, *State Legislatures' Top 10: Here's a Sample of the Key Policy Issues that Promise to Cross State Borders and Test Political Wills*, STATE LEGISLATURES, Jan. 2005, at 10.

animal disease can affect the ability of all states to access international markets for their animal products. This may add fuel to the argument to federalize such regulations.

Localities' laws also affirm local values that may be contrary to the values of other countries. The "culture wars" that take place between different constituencies in the United States are often joined by foreign voices who feel that certain policies offend universal rights, values, or sensibilities. For example, until the Supreme Court's decision in *Roper v. Simmons*, twenty states continued to allow for the execution of juveniles despite near universal international condemnation of juvenile executions.²³⁷ Opposition to the death penalty in general is widespread in much of the world, and the continued widespread use of the death penalty in the United States has at times become a diplomatic strain, especially with countries in Europe. The European Union maintains an official website detailing EU member state action on the U.S. death penalty. European Union members angered by executions taking place in the United States have written numerous open letters to state governors, declarations of condemnation, and amicus briefs.²³⁸ As already noted, the ICJ in *Avena* held that 54 Mexican nationals on state death rows had their consular rights violated under the Vienna Convention for Consular Relations.²³⁹

Gay marriage and civil unions provide another sight for potential conflicts of values on the international stage. Most states have laws which prohibit marriage between same-sex couples, and many have passed constitutional amendments barring same-sex marriage.²⁴⁰ Vermont, Connecticut, and New Jersey allow civil unions between same-sex couples.²⁴¹ In 2003, the Massachusetts Supreme Court ruled that outlawing same-sex marriages was unconstitutional under the Massachusetts constitution.²⁴² Canada, Spain, the Netherlands, and

237. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

238. See generally, European Union, *EU & Action on the Death Penalty* (section on "Action on US Death Row Cases") available at, <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases> (last visited Dec. 28, 2006).

239. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 43 I.L.M. 581 (2004).

240. See Lambda Legal, *Background: State Laws and Proposed Amendments to State Constitutions to Deny Civil Rights to Same-Sex Couples*, available at <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1530> (last visited Dec. 28, 2006).

241. *Gay Marriage Around the Globe*, BBC NEWS, Dec. 22, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4081999.stm> [hereinafter *Gay Marriage*].

242. *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).

Belgium all have nation-wide same-sex marriage.²⁴³ Canada allows same-sex foreign nationals to marry.²⁴⁴ Several other countries such as Denmark and Germany offer similar although not always equal benefits to same-sex couples as married couples (i.e. civil unions).²⁴⁵ Recognition of same-sex marriages and civil unions consummated abroad is done on a state by state basis in the United States. States in the U.S. that do not recognize same-sex marriage or civil unions may upset countries that allow such unions if same-sex couples from their country seek temporary residency in these states and want their marriages or civil unions recognized. Similarly, a same-sex couple from Vermont who is in a civil union may ask Vermont to advocate that their union be recognized in another country in which they are temporarily residing that does not currently recognize same-sex unions.

Differing views about what constitutes human life also may embroil states in a global debate about values. In November 2004, in reaction to federal limitations on National Institutes of Health (NIH) funding for certain types of stem-cell research, California voters passed a \$3 billion initiative to finance stem-cell research.²⁴⁶ This makes California's stem-cell research budget on par with countries such as Sweden and Singapore which have made such research a priority.²⁴⁷ Several other states have either budgeted money or proposed money for stem-cell research as well.²⁴⁸ Meanwhile, Arkansas, Iowa, Michigan, North Dakota, and South Dakota all prohibit cloning of embryos for the purpose of research or reproduction.²⁴⁹ The issues surrounding cloning and stem-cell research all have the potential to insult the moral sensibilities of the citizens and governments of foreign countries and become diplomatic issues in the future.

States' differing stances on illegal immigrants directly affect relations with foreign citizens and their countries. States have taken different positions on whether illegal immigrants will be eligible for non-emergency health care, certain labor rights, in-state college tuition rates, legal services, voting, identification cards, and other public benefits. Some states have also specifically trained state officials to

243. *Gay Marriage, supra* note 247.

244. *Id.*

245. *Id.*

246. Silla Brush, *The Stem Cell Race*, STATE LEGISLATURES, Apr. 2005, at 24-25.

247. *Id.*

248. New Jersey has approved money for stem cell research. New York, Illinois, Wisconsin, Maryland, and Connecticut all have proposed legislation that proposes money for stem cell research. *Id.* at 26.

249. *Id.*

arrest illegal immigrants. In others, state officials make no coordinated effort to track or arrest illegal immigrants.²⁵⁰ Such actions and anti-immigrant sentiment fueled by local politicians can offend foreign governments and complicate U.S. foreign relations.

Even something as seemingly innocuous as the choice of a textbook by a school board can have far reaching international implications. In April of 2005, thousands of protesters marched in Chinese cities angered by the Japanese government's approval of textbooks that were perceived by many in China as glossing over the atrocities Japan committed in China during World War II.²⁵¹ Although this was a Japanese national government decision made in the context of deep historical animosity between the two nations, in the United States this decision would be made on the state and local level.

The traditional domains of localities are becoming of greater international concern. Many of these areas of regulation are at the heart of state and local governance. Local decisions in these areas allow citizens to more fully shape their lives, create a nation-wide system of policy experimentation, and provide a check on federal and international power. The internationalization of trade, human rights, and environmental commitments means, however, that many of these core functions of localities are coming under new scrutiny and threat. These state and local policies could be struck down by U.S. courts under the dormant foreign relations clause, heightened legislative or executive preemption (depending on what steps the executive or legislative branches have taken to occupy the field), or even the dormant foreign commerce clause. Such judicial intervention could severely and, quite possibly, unnecessarily constrain the ability of localities to express core values in the name of a united "one voice" in foreign policy.

3. Laws and actions that judge other countries' behavior

Localities' actions that judge other countries' behavior could be defined as a sub-category of protecting or promoting localities' values (category two). These actions, however, are dealt with in a separate category here because these judgments are targeted at particular policies

250. Mark Mathews, *Immigration Bedevils Lawmakers*, STATELINE, Sept. 2, 2005, available at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=51980>; National Conference of State Legislatures, *2006 State Legislation Related to Immigration: Enacted, Vetoed, and Pending Gubernatorial Action*, June 7, 2006, available at <http://www.ncsl.org/programs/immig/06ImmigEnactedLegis.htm>.

251. BBC, *China Rejects Call for an Apology*, BBC NEWS, Apr. 17, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4453055.stm>.

of specific countries. They have also garnered special judicial scrutiny.

Localities may judge other countries' behavior explicitly through resolutions or legislation. States may also delegate that judgment to the state executive or judiciary. These judgments of foreign countries can sometimes be just rhetorical expressions in the case of state resolutions, have real economic or judicial force behind them as in the case of divestment campaigns or lawsuits, or be symbolic such as when cities have used their sister-city ties to pursue human rights objectives.²⁵² These judgments may be purely expressive, an ethical attempt to ensure state resources are not complicit in the judged behavior, or an attempt to influence behavior by other countries.

State legislatures have used resolutions as a way to condemn the actions of other countries on such diverse issues as Apartheid in South Africa, genocide in Sudan,²⁵³ or the arrest and show trials of Jews in Iran.²⁵⁴ These resolutions may bring media attention to a specific issue and are circulated to the state's congressional delegation. They also provide tangible goals for local constituencies to work towards, which helps build momentum for broader movements. Although these state resolutions may undermine the U.S.'s one voice in foreign relations, they are likely protected by the First Amendment.²⁵⁵

States have also used their economic power to condemn human rights abuses overseas. The South African divestment campaign spread during the 1980s as many localities felt Reagan's policy of "constructive engagement" and "quiet diplomacy" towards South Africa was not a forceful enough response to apartheid.²⁵⁶ During the South Africa divestment campaign, 37 states adopted some form of sanctions against the government of South Africa.²⁵⁷ These sanctions usually involved

252. FRY, *supra* note 201, at 84 (discussing efforts by various U.S. cities to promote international human rights); HOBBS, *supra* note 203, at 6 (noting that Mayor Dinkins of New York City traveled to South Africa during Apartheid to express his support for continued sanctions).

253. See Assem. Res. 209, 211th Leg., Reg. Sess. (N.J. 2004); H. J. Res. 56, 94th Gen. Assem., Reg. Sess. (Ill. 2005); H. Con. Res. 143, 79th Leg., Reg. Sess. (Tex. 2005); S. 608, 116th Leg., Reg. Sess. (S.C. 2005); H. Con. Res. 143, 2005 Leg., Reg. Sess. (Ky. 2005); S. Res. 112, 2005 Leg., Reg. Sess., (Haw. 2005); S. Con. Res. 205, 2005 Leg., Reg. Sess., (Haw. 2004).

254. Assem. J. Res. 64, 2000 Leg., Reg. Sess., (Cal. 2000).

255. However, the precedent here is not clear. Individual state legislators certainly enjoy full, if not heightened, first amendment protection (*see* Bond v. Floyd, 385 U.S. 116 (1966)), but a state assembly could potentially be enjoined from passing a resolution that disrupted the U.S.'s ability to conduct foreign relations. The Court in Nat'l Foreign Trade Council v. Giannoulas, 2007 U.S. Dist. LEXIS 13341, remarks in dicta that *Garamendi* and *Zschernig* do not seem to prohibit state resolutions which contradicts U.S. foreign policy. *Id.* at 38. However, the Court is only speaking in dicta and this statement is not otherwise substantiated.

256. HOBBS, *supra* note 203, at 29.

257. See PETER DESIMONE & WILLIAM F. MOSES, A GUIDE TO AMERICAN STATE AND LOCAL

different restrictions on the ability of the state pension plan to invest in companies that did business in South Africa. Additionally, at least 105 cities and 32 counties maintained some type of restriction on their banking, investment, and procurement practices with South Africa.²⁵⁸

In 1996, Massachusetts adopted an act that restricted the state's procurement of goods or services from companies that did business in Burma.²⁵⁹ Apple Computer along with other companies reportedly terminated their Burma operations in response to the Massachusetts Burma statute.²⁶⁰ In 2000, in *Crosby* the Supreme Court ruled that this selective purchasing law was preempted by federal legislation that created a national sanctions regime towards Burma.²⁶¹ Since *Crosby* there has been debate about how articulated a national policy must be toward another country before it preempts state action toward that country. Further, it is unclear what types of state action besides selective procurement policies could be preempted.²⁶²

Despite the ambiguity surrounding *Crosby*, cities and states continue to use their clout as investors to express their scorn for the policies of certain governments as well as attempt to promote their view of a more just world. For example, the MacBride Principles provide a corporate code of conduct for doing business in Northern Ireland for multinationals to ensure nondiscrimination on the basis of religion.²⁶³ At least 16 states have passed MacBride Principles legislation that directs their pension funds to only invest in companies in compliance with these principles if they are active in Northern Ireland.²⁶⁴

Other restrictions on pension funds exist as well. Connecticut, for example, restricts its pension fund from investing in companies that are

LAWS ON SOUTH AFRICA 19-43 (1993).

258. *Id.* at 1, 47-138 (city ordinances), 141-63 (county ordinances).

259. 1996 Mass. Acts 239, ch. 130 (codified at MASS. GEN. LAWS ch. 7 § 22G-M, 40F.5(1997)) (cited in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 367 (2000)).

260. See Frank Phillips, *Apple Cites Mass. Law in Burma Decision*, BOSTON GLOBE, Oct. 4, 1996, at B6 (stating "company would end its operations in Burma because of the Massachusetts law"); See also, *Crosby*, 530 U.S. at 370 (noting that three plaintiff member companies had withdrawn from Burma after passage of Massachusetts law).

261. *Crosby*, 530 U.S. at 388.

262. Andrea Sendlenski, *Note: Taking Our Money and Going Home: State Divestment Policy and the Foreign Affairs, Foreign Commerce, and Supremacy Clauses*, 24 SUFFOLK TRANSNAT'L L. REV. 317 (2001) (arguing state divestment statutes with the intent to effect foreign affairs violate the Foreign Affairs, Foreign Commerce, and Supremacy Clauses)

263. Father Sean McManus, *The Macbride Principles*, Dec. 1997, available at <http://www1.umn.edu/humanrts/links/macbride.html>.

264. *Id.* These states include Connecticut, Florida, Illinois, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Vermont. *Id.*

doing business in Iran in a manner that is contrary to U.S. foreign policy interests there.²⁶⁵ The State of Arizona requires its state treasurer to report twice a year on the global security risks of state investments.²⁶⁶ This report must include a list of companies held in the treasurer's portfolio who have business activities in countries that the federal government has listed as supporting terrorism.²⁶⁷ Vermont requires its treasurer to cast proxy votes in the companies it holds stock in to promote human rights and transparency in relation to Burma.²⁶⁸ Other state and local governments have adopted human-rights based sanctions against Indonesia, Nigeria, Cuba, and countries engaging in religious persecution.²⁶⁹

In 2004, the New York State Senate blocked the UN's proposed renovation of its New York City headquarters.²⁷⁰ Various Senators cited the oil for food scandal, anti-Semitism in the organization, and the nonpayment of parking tickets by visiting diplomats as part of their reasons for blocking the proposed renovation.²⁷¹ In this case, it was not a specific country, but a specific international organization that was targeted for a state's scorn.

In some states, judgment of other countries' behavior or policies is delegated to officials of the state executive. In California, for example, the State Treasurer evaluates the political stability in emerging equity markets using such factors as the country's human rights and civil liberties record before it invests CALPERS, the largest state pension fund in the country.²⁷² The treasurer lists which emerging markets it will invest in each year. This list of the \$168 billion pension plan does not go unnoticed by investors or government officials abroad.²⁷³ In

265. STATE OF CONNECTICUT RETIREMENT PLANS & TRUST FUNDS, INVESTMENT POLICY STATEMENT, Mar. 13, 2002, at 21, *available at* <http://www.state.ct.us/ott/pensiondocs/IPS.pdf>.

266. ARIZ. REV. STAT. ANN. § 35-319 (2007).

267. *Id.*

268. H.B. 34, 65th Leg., Biennel Sess., (Vt. 1999).

269. Organization for International Investment, Current Issues, <http://www.ofii.org/issues/sanction.cfm> (last visited Dec. 28, 2006) (listing state and municipal sanctions from the 1990's); FLA. STAT. ANN. § 215.471 (West 2001) (restricting the investment of Florida's funds in Cuba).

270. Press Release, News From the Senate Republican Majority, Senate Will Not Take Up United Nations Bill Next Week (Dec. 2, 2004), <http://www.senate.state.ny.us/pressreleases.nsf/2e0e86fa9105ed5a85256ec30061c0be/109e9077be71eb7985256f5e006c703b?OpenDocument>.

271. *Id.*

272. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, STATEMENT OF INVESTMENT POLICY FOR PERMISSIBLE EQUITY FOR EMERGING EQUITY MARKETS, Oct. 17, 2005, at 2, *available at* <https://www.calpers.ca.gov/eip-docs/investments/policies/equity/permissible-country.pdf>.

273. See Nuntawun Polkuamdee, *Thailand back in US fund's good books*, BANGKOK POST,

Connecticut, the state treasurer is directed to consider environmental and social implications of its investments, which inevitably involves at least implicitly judging the social situations in other countries.²⁷⁴ State Treasurers in California, New York, and Connecticut have also worked to address companies' contributions to sweatshop labor and global warming.²⁷⁵ These actions often attempt to regulate companies' behavior abroad because the countries in which they are doing business are unable or unwilling to do so themselves.

In 2005, Illinois, New Jersey, and Oregon all passed legislation to divest their pension plans from companies because of their business in Sudan, where there are ongoing atrocities being committed in Darfur.²⁷⁶ As of April 2007, seven more states had joined these three in passing divestment legislation.²⁷⁷ Several cities and counties have also divested their funds from companies that do business in Sudan.²⁷⁸

In August of 2006, the National Foreign Trade Council (NFTC) and several municipal pension funds in Illinois brought suit against the Illinois Act to End Atrocities and Terrorism in the Sudan [the Illinois Sudan Act].²⁷⁹ The Illinois Sudan Act amended the Deposit of State Moneys Act to bar the state from depositing state funds in a financial institution unless it annually certifies that it does not borrow money to a "forbidden entity" (i.e. almost any company that does business in or with Sudan). The Illinois Sudan Act also prevented any pension fund created under the Illinois Pension Code (which includes many municipal pension funds) from investing in a "forbidden entity."²⁸⁰ The Act's definition of forbidden entity was one of the broadest of any of the states' Sudan divestment legislation. Further, the Illinois Sudan Act

Apr. 20, 2005.

274. CONN. GEN. STAT. § 3-13d (West 2006).

275. Tracy Rembert, *CSR in the Cross-Hairs*, BUSINESS ETHICS ONLINE, Spring 2005, available at http://www.business-ethics.com/current_issue/spring_2005_csr_crosshairs.html.

276. S.B. 23, 94th Gen. Assem., Reg. Sess. (Ill. 2005); S.B. 2145, 211 Leg., Second Sess. (N.J. 2004); S.B. 1089, 73rd Leg., Reg. Sess., (Or. 2005).

277. See Assem. B. 2941, 2005-2006 Leg., Reg. Sess., (Cal. 2006), H.B. 5632, 2006 Leg., Feb. Sess., (Conn. 2006); S. Paper 675, 122nd Leg., Reg. Sess., (Me. 2005) See generally, Sudan Divestment Taskforce, <http://www.sudandivestment.org/home.asp> (last visited May 5, 2007).

278. *Id.*

279. Elizabeth Kelleher, *U.S. Trade Group Files Suit over Illinois Sanctions on Sudan*, U.S. Dept. of State News from Washington, Aug. 7 2006, available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=August&x=20060807174000berehellek0.6285974>; Complaint for Declaratory and Injunctive Relief, *Nat'l Foreign Trade Counsel v. Giannoulis*, No. 06C4251 (N.D. Ill. Aug. 7, 2006), available at <http://www.nftc.org/default/sudan%20lawsuit/NFCT%20v.%20Topinka%20complaint.pdf>.

280. *Nat'l Foreign Trade Council v. Giannoulis*, 2007 U.S. Dist. LEXIS 13341, at 3-9.

went beyond most divestment legislation in barring the state from depositing money in financial institutions that gave loans to Sudan-involved companies.

The U.S. District Court for the Northern District of Illinois enjoined enforcement of the Illinois Sudan Act in a February 2007 decision. It found unconstitutional both the amendments to the Deposit to the States Money Act and the Illinois Pension Code.²⁸¹ The District Court's reasoning though could potentially be used to uphold other states' divestment legislation, or a revised Illinois statute.

The District Court first asked if the Illinois Sudan Act was barred by the Supremacy Clause. The Court found that U.S. relations with Sudan were governed by a 1997 Executive Order, the 2000 Trade Sanctions Reform and Export Enhancement Act, the 2002 Sudan Peace Act, the 2004 Comprehensive Peace in Sudan Act, and the 2006 Darfur Peace and Accountability Act.²⁸² Citing *Hines v. Davidowitz, Zschernig*, and a first circuit opinion, the Court argued that when the U.S. government acts in an area of foreign relations there is a strong presumption it intends to occupy the field. The District Court found that the Illinois Sudan Act's amendment of the Deposit of State Moneys Act, like the Massachusetts' legislation at issue in *Crosby*, "attempt[s] to influence foreign policy directly by encouraging business entities not to do business with a foreign country; if the entities decide not to do so, they lose their ability to do business with the state."²⁸³ This amendment is in conflict with U.S. foreign policy because the Illinois Sudan Act lacks flexibility (the president cannot suspend the Illinois legislation in the national interest); it applies to areas of Sudan not covered under federal sanctions (i.e. Southern Sudan); and it extends to foreign entities while the federal legislation only regulates U.S. entities.²⁸⁴

Therefore, the District Court held the amendments to the Deposit of State Moneys Act violated the supremacy clause because it pressured banks and corporations to cut ties with Sudan and, thereby, came in conflict with U.S. policy towards Sudan. The amendments to the Pension code did not violate the Supremacy Clause though because no evidence was presented that suggested pensions' divestment from companies that do business in Sudan would likely affect whether these companies decided to stay in Sudan.²⁸⁵ In other words, the Court said

281. *Giannoulas*, 2007 U.S. Dist. LEXIS

282. *Id.* at 9-14.

283. *Id.* at 27.

284. *Id.* at 28-30.

285. *Id.* at 30-31.

that pressuring banks to limit who they lent to will likely have an effect on banks and corporations so this action is preempted by federal policy, but since divestment will likely have little effect it is not preempted.

The Court followed a similar reasoning when examining whether the Illinois Sudan Act was barred by the Foreign Affairs Power. Citing *Zschernig* and *Garamendi*, the District Court held that the amendments to the Deposit of State Moneys Act violated the Foreign Affairs Power because it applied immediate pressure on banks and corporations to leave Sudan. Such action had more than “an incidental or indirect effect in foreign countries.”²⁸⁶ In contrast, the evidence divestment would have an effect on companies’ behavior, and thus foreign policy, was only speculative. As a result, the Court found that the amendments to the Pension code withstood scrutiny by the Foreign Affairs Power.²⁸⁷

Finally, the District Court examined whether the Illinois Sudan Act violated the Foreign Commerce Clause. It found that both components of the Illinois Sudan Act effected foreign commerce since the purpose of the act was to limit trade with Sudan.²⁸⁸ The Court noted that it was unclear if there was a market-participant exception for states under the foreign commerce clause as there is under the ordinary commerce clause.²⁸⁹ This question, however, was not reached. The amendments to the Deposit of State Moneys Act had already been found to violate the Supremacy Clause and Foreign Affairs Power. The amendments to the Pension code could not qualify for the market-participant exception because the Pension code covered both state and municipal pensions. The state could only potentially act as a market participant when it regulated its own pension funds. However, when it regulated municipal pension funds – which are administered and contributed to locally – it was acting as a regulator and not a market-participant. Since the language of the Illinois Sudan Act did not distinguish between its regulation of state and municipal pensions the Court could not just strike out the offending language that regulates municipal pensions.²⁹⁰ Instead, the District Court found the whole provision barred by the Foreign Commerce Clause.

The District Court’s opinion suggests that state divestment legislation, like that in Illinois, would be constitutional if it does not

286. *Id.* at 40, quoting *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999), citing *Clark v. Allen*, 331 U.S. 503 (1947)).

287. *Giannoulas*, 2007 U.S. Dist. LEXIS at 43-44.

288. *Id.* at 46-47.

289. *Id.* at 50-51.

290. *Id.* at 53-56.

mandate that governmental sub-units also divest. Of course, a future court would still need to determine whether a state was acting as a market participant when it divests.

The Illinois District Court's line of reasoning leaves the constitutionality of divestment on unstable ground. This is particularly problematic since NFTC has announced it may challenge other state divestment laws and any revised Illinois Sudan Act.²⁹¹ Why does barring a state from investing its money in a bank that makes loans to companies that do business in Sudan have more impact than divesting state funds from companies that do business in Sudan? Divestment often involves larger amounts of money. Both actions bring bad publicity to companies who are invested in Sudan applying pressure on them to leave. If companies did start leaving Sudan because of states divesting would this then mean divestment had an impact on foreign affairs and so would be struck down? Divestment would then only be held unconstitutional if it was successful at achieving its goal.

The Illinois Sudan Act required the state to divest from many companies and financial institutions with only an incidental relation to Sudan. By casting such a wide net, the Illinois legislation may have unnecessarily risked the financial health of Illinois pension plans. The answer to this problem, however, is not for courts to dictate to states that they cannot control whether their money is invested in companies that support genocidal regimes. Instead, if this legislation is overly broad, a legislative remedy is more appropriate. Legislators do not want to unnecessarily jeopardize the returns of the state pension plans. If Illinois does not amend their divestment legislation, it may be because the state genuinely wishes to divest from companies that have any relation to Sudan, even if this relation is more incidental than direct.

Although the Illinois divestment legislation may seem heavy-handed, the Sudan divestment strategies of other localities have been remarkably savvy. With the aid of the Internet, localities and groups that have mobilized around divestment can relatively quickly identify many of the companies who are most active in supporting the government of Sudan.²⁹² Localities can then direct their fund managers to divest from

291. Kelleher, *supra* note 285; *Foreign trade group against Sudan legislation*, PENSIONS & INVESTMENTS, April 9, 2007, available at <http://www.pionline.com/apps/pbcs.dll/article?AID=/20070409/DAILY/70409005>.

292. *See generally*, Sudan Divestment Taskforce, *supra* note 278; ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, AN ANALYSIS OF SELECT COMPANIES' OPERATIONS IN SUDAN: A RESOURCE FOR DIVESTMENT (2005), available at <http://acir.yale.edu/YaleLowensteinSudanReport.pdf>.

these companies.

Like in *Crosby*, Congress has not expressly acted to affirm the Illinois state divestment legislation just as it did not expressly act to affirm Massachusetts's procurement policy. In both cases, Congress, however, passed later stages of its sanctions regime, knowing of the state actions and did not expressly preempt such activity.

The House version of the Darfur Peace and Accountability Act contained a provision affirming the legality of state divestment legislation.²⁹³ This provision, however, was later taken out of the Senate version in committee.²⁹⁴ The revised version was passed in September of 2006.²⁹⁵ Meanwhile, SB 831 was introduced in the Senate in March 2007. This bill would declare that it is the sense of Congress that divestment by states and other governmental entities is constitutional and does not violate the Supremacy Clause, the Foreign Affairs Power, or the Foreign Commerce Clause.²⁹⁶ Although Congress has not yet explicitly endorsed the legality of localities' divestment action, it is clearly aware of localities' divestment activity and has not explicitly preempted it.

It should not be the role of the courts to interfere with the foreign policy of localities and the federal government when no explicit conflict has arisen between these policies. As of May 2007, there were eight co-sponsors of SB 831.²⁹⁷ Does this mean Congress supports localities' divestment? What of the Senate's removal of the provision of the Darfur Peace and Accountability Act that would have affirmed the legality of divestment legislation? Courts would be engaging in a guessing game at this point if they were to strike down the Illinois divestment legislation claiming it interfered with the country's foreign policy. This is dangerous to America's foreign policy and unnecessarily undermines the democracy and federalism interests of localities and the citizens they represent. If actions, like divestment, require federal affirmation before they are considered constitutional, the states will rarely act on foreign policy issues. Congress is unlikely to affirm state action like divestment until several states have divested, but most states are unlikely to divest if that action is considered unconstitutional until federal approval is given.

293. DarfurScores.org, Darfur Legislation, <http://www.darfurscores.org/darfur-legislation#hr6140> (last visited Dec. 30, 2006).

294. *Id.*

295. *Id.*

296. S. 831, 110th Cong. (2007).

297. *S. 831: Sudan divestment Authorization Act of 2007*, GOVTRACK.US, available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-831> (accessed May 6, 2007).

The state judicial system also either explicitly or implicitly judges foreign countries. For example, in *Zschernig* the state of Oregon allowed property to escheat to a foreigner only if the foreigner's country gave a reciprocal right to Americans.²⁹⁸ Both the actual legislation and the judicial opinions allowed for a judgment of Communist countries.²⁹⁹ This was found to be too controversial during the Cold War by the Supreme Court and was struck down.³⁰⁰

In *John Doe, et. al. v. Unocal Corp.*, the Superior Court of California ruled that Unocal, a California based oil and gas company, could be tried for its involvement in abuses against Burmese villagers during its construction of a pipeline in that country.³⁰¹ Under pressure from the upcoming state trial and a possible unfavorable decision by an en banc 9th Circuit decision in an ATCA case being heard on the same set of facts, Unocal settled with the Burmese villagers.³⁰² The decision by the state court that Burma was not an adequate forum for the suit was a judgment of the competency and independence of Burmese courts. The trial of the claims against Unocal would have not only judged the company's actions, but implicitly judged the actions of the Burmese government as well (as many of the abuses were committed by Burmese military hired by Unocal as security).³⁰³

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), the Supreme Court found that claims could be made by foreign citizens in U.S. courts for private claims under federal common law, but they cannot be claims "for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when 1350 [the ATCA] was enacted."³⁰⁴ *Alvarez* may be read to create a federal common law that preempts state common law claims

298. *Zschernig v. Miller*, 389 U.S. 429, 430 n.1 (1968).

299. *Id.* at 440.

300. *Id.* at 435.

301. 395 F.3d 932 (9th Cir. 2001). The original complaint made claims of wrongful death, battery, false imprisonment, assault, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence per se, conversion, negligent hiring, negligent supervision, violation of Business and Professions Code Section 17200, injunctive and declaratory relief, violation of California Constitution Art. 1 Sec. 6 [outlawing slavery], and unjust enrichment. *Id.* at 943-44. Defendants eventually received summary judgment on the intentional tort and negligence causes of action as to direct liability, but were to go to trial on issues of vicarious liability. *Id.*

302. EarthRights International, *Final Settlement Reached in Doe v. Unocal*, Mar. 21, 2005, http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v._unocal.html; EarthRights International, *Doe v. Unocal Case History*, Jan. 30, 2006, http://www.earthrights.org/site_blurbs/doe_v._unocal_case_history.html.

303. *Id.*

304. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

that involve abuses in foreign countries such as in the state *Unocal* case. It is unclear what role state courts will have in the future of hearing claims concerning human rights abuses abroad since state courts do not have the same standards for hearing these cases as federal courts do under the ATCA.

4. Laws and actions that influence the nation's foreign policy

Localities' actions often attempt to influence national foreign policy. Some of these actions merely help reinforce and support preexisting federal foreign policy. The most prominent example of this is localities' support of the U.S. military in their operations abroad.³⁰⁵

However, localities' actions may also be in protest to U.S. foreign policy or designed to change it. The Central American sanctuary movement grew out of dissatisfaction with the U.S.'s policy towards Central America in the 1980's and the belief that refugees from El Salvador and Guatemala were politically persecuted despite U.S. support for these regimes. In all, "more than 20 cities and two states declared themselves sanctuaries for Central American refugees."³⁰⁶ During this same period, 87 cities created sister city type relationships with communities in Nicaragua, in part to show solidarity against U.S. policy there.³⁰⁷

U.S. sanctions on Cuba have similarly been a target of state and local action both on political and economic grounds. The Illinois and Texas state legislatures have passed resolutions in support of normal relations between the U.S. and Cuba.³⁰⁸ Some cities in the United States have established "Sister City" type relations with Cuban cities to express their support for more normal relations between the United States and Cuba.³⁰⁹ After lobbying by agricultural interests, Illinois Governor Ryan

305. At least twenty-six state governors have made trips to Southwest Asia to meet with National Guard troops from their states as well as active duty military since military operations began in Afghanistan and Iraq. Donna Miles, *Governors Praise Troops Following Middle East Visit*, AMERICAN FORCES PRESS SERVICE, Apr. 19, 2006, available at http://www.defenselink.mil/news/Apr2006/20060419_4868.html. States have also created specific benefits and exemptions to help support those in the military in their states while the conflicts in Afghanistan and Iraq are ongoing. For example, New York passed a "Patriot Plan" to help support active duty troops while there are active military operations in Iraq. Press Release of Gov. George E. Pataki, *Governor Visits Families of Deployed 105th Military Police Company* (Mar. 24, 2003) available at http://www.state.ny.us/governor/press/03/march24_03.htm.

306. HOBBS, *supra* note 203, at 36-37.

307. *Id.* at 34.

308. *On First Reading Some States Want to Open Cuba's Closed Doors*, STATE LEGISLATURES, Dec. 2001.

309. These cities include Mobile, Pittsburgh, and Milwaukee. The Center for International

led a mission to Cuba in 1999 to promote trade and deliver aid.³¹⁰ During the trip he met with Cuban President Fidel Castro.³¹¹ Shortly after returning he stated, “My hope is there will be other state delegations that go, and hopefully we’ll lift this embargo.”³¹² In 2002, Havana hosted governors and other representatives from seven states at a Food and Agribusiness Exhibition.³¹³

Over one hundred cities passed resolutions calling for the end of the Iraq War.³¹⁴ In early 2005 during the annual town hall day in Vermont, 49 cities and towns passed a resolution that asked the state legislature to investigate what the impact of National Guard deployments to Iraq are having on the state.³¹⁵ Several cities across the country have passed resolutions calling on their states to withdraw their National Guard troops from Iraq.³¹⁶ Dozens of local ballot initiatives in communities across the country called on the federal government to bring the troops home from Iraq in the November 2006 elections.³¹⁷ State governors have also been openly critical of the U.S.’s involvement in the conflict in Iraq.³¹⁸

In March 2007, several towns in Vermont passed resolutions calling for the impeachment of President Bush and Vice President Cheney. In April 2007, the Vermont State Senate in a non-binding resolution called on members of the U.S. House of Representatives to begin impeachment proceedings against the President and Vice President because of their actions in the United States and abroad, including Iraq. These calls for

Policy, State and Local Government Resolutions on Cuba, <http://ciponline.org/cuba/trade/stateresmemo.htm> (last visited Apr. 18, 2007).

310. William Claiborne, *Illinois Governor Defends Visit to Castro*, WASH. POST, Oct. 29, 1999, at A2.

311. *Id.*

312. *Id.* After Ryan’s meeting with Castro, State Department spokesman James P. Rubin said that personal visits with Castro should be avoided “to not give the impression that anyone supports the oppression that he has visited on his people.” *Id.*

313. Carolyn Orr, *To Trade or Not to Trade?*, STATE GOVERNMENT NEWS, Nov./Dec. 2002, at 30, available at <http://www.csg.org/pubs/Documents/sgn0212ToTradeOrNot.pdf>.

314. Karen Dolan, *Cities for Peace*, TOMPAINE.COM, Nov. 10, 2006, http://www.tompaine.com/articles/2006/11/10/cities_for_peace.php.

315. 57 of Vermont’s 251 cities and towns debated the proposal. Katie Zezima, *National Briefing: New England*, N.Y. TIMES, Mar. 3, 2005, at 25; Pam Belluck, *Vermonters Vote on Study of National Guard’s Role*, N.Y. TIMES, Mar. 2, 2005, at 12.

316. *See generally*, Code Pink, States That Are Working to Bring Their Guard Home, <http://www.codepinkalert.org/article.php?list=type&type=91> (last visited Apr. 18, 2007).

317. Wisconsin Network for Peace and Justice, State Referendum to Bring Our Troops Home, <http://www.wnpj.org/homenow> (last visited Apr. 18, 2007).

318. Michael Blood, *Schwarzenegger Cites Iraq ‘Mistakes’*, WASH. POST, Oct. 11, 2006 (quoting Governor Arnold Schwarzenegger as stating that a lot mistakes were made by the U.S. in Iraq).

impeachment, which highlight a deep internal divide within the United States over its policy in Iraq, were reported upon by media around the world.³¹⁹

States and localities have pushed to change U.S. foreign policy more broadly as well. For example, after the failure of SALT II during the Carter administration, the unwillingness of Reagan to support a nuclear test ban treaty, and the development of the Strategic Defense Initiative, citizens banded together to promote a freeze on the production of nuclear weapons in the 1980s. Through town meetings, local referenda, resolutions, or other initiatives, more than 900 local governments acted on the freeze issue.³²⁰

After the end of the Cold War, at least 70 mayors in the United States as well as hundreds of mayors from over 100 countries have signed a statement in support of a nuclear free world.³²¹ State assemblies have similarly passed resolutions calling for the end of nuclear weapons.³²² Some states have taken a different approach towards this national defense issue with at least 10 states having passed resolutions calling upon the national government to deploy a missile defense system since 1997.³²³

States have also urged the United States to sign and ratify international agreements. For example, several state governments have passed resolutions in support of the Convention on the Elimination of Discrimination Against Women (CEDAW).³²⁴

Often state and local action arises out of dissatisfaction with the perceived inadequacy or incorrectness of a federal policy towards a foreign policy issue. Catherine Powell calls the impact of state and local

319. *Vermont state senate seeks to impeach Bush, Cheney*, XINHUA, Apr. 21, 2007, available at http://news.xinhuanet.com/english/2007-04/21/content_6006599.htm (last visited May 3, 2007); *Senators vote to impeach Bush*, THE TIMES OF INDIA, Apr. 22, 2007, available at http://timesofindia.indiatimes.com/World/Europe/Vermont_senators_vote_to_impeach_Bush_Chene_y/articleshows/1936513.cms (last visited May 3, 2007).

320. HOBBS, *supra* note 203, at 21.

321. Abolition Now!, *Mayors for Peace Emergency Campaign to Ban Nuclear Weapons*, http://www.abolitionnow.org/site/c.lmK0JcNSJrF/b.1316337/k.9BB7/Mayors_for_Peace_Emergency_Campaign_to_Ban_Nuclear_Weapons.htm (last visited Apr. 18, 2007).

322. See S. J. Res. 33, Gen. Assem. (Conn. 2005), available at <http://www.cga.ct.gov/2005/fc/2005SJ-00033-R000489-FC.htm>.

323. See *Missilethreat.com*, *State Resolutions Calling for Missile Defense*, <http://missilethreat.com/treaties/pageID.177/default.asp> (last visited Apr. 18, 2007).

324. Laura Roskos, *International Law, National Sovereignty, and Local Norms: What's to become of CEDAW in the U.S.?*, THE BOSTON CONSORTIUM ON GENDER, SECURITY, AND HUMAN RIGHTS WORKING PAPER SERIES, Aug. 2003, at 32, available at http://www.ksg.harvard.edu/wapp/research/working/bc_roskos.pdf.

laws on national foreign policy “dialogic federalism.”³²⁵ She argues that enough local ordinances can create a norm cascade that affects federal policy.³²⁶ The U.S. federal sanctions against South Africa passed by Congress over President Reagan’s veto in 1986 were arguably in part a result of just such a norm cascade created by anti-apartheid resolutions and laws at the state and local level.³²⁷

In many ways, it is the mobilization of citizens around, more than the passage of a resolution or act on a foreign policy issue that leads to a norm cascade which changes federal policy. The effort required to convince legislators and their fellow citizens to support a locality’s official action gives citizens a tangible and reachable local goal to focus their efforts on. This helps organize constituencies locally that can develop into a national coalition. For example, someone who has worked continuously to garner support for a local divestment initiative on Sudan is also more likely to call their Congressperson to urge them to pass the Darfur Accountability Act.

Norm cascades created by localities’ actions do not only impact the policy they are directed at, but have a wider impact as well. For instance, the South Africa or Sudan divestment campaigns can be seen as national human rights moments. These are moments in which a segment of the American public becomes unusually organized to promote a human rights-based foreign policy goal. Most voters remain generally unaware of how U.S. foreign policy implicates human rights in other countries. Further, most voters do not base their vote on foreign policy human rights issues. The signal given by these human rights moments, however, creates an environment in which sympathetic legislators and policymakers can prioritize human rights concerns in other areas of foreign policy, knowing there is a constituency that generally supports this type of action.

Local mobilization around human rights issues is not without its drawbacks though. Local and state resolutions and laws may bring some attention to human rights problems in other parts of the world, but not in a timely manner. The Rwandan genocide occurred in 100 days. The South African divestment campaign began in the late 1970s and only built critical mass in the 1980s, decades after the creation of Apartheid. The genocide in Sudan began in early 2003. The first resolution condemning the Sudanese government was in late 2004 after tens of

325. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for the Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250 (2001).

326. *Id.* at 289.

327. HOBBS, *supra* note 203, at 30.

thousands had already died. Although mobilization can happen increasingly quickly in a more interconnected world, any policy change that localities are able to bring about at the federal level will happen relatively slowly.

Local actions might also unduly bias certain foreign policy initiatives. Although the conflict in Sudan has inspired a large divestment campaign, the devastating civil war in the Democratic Republic of Congo at the turn of the twenty-first century inspired little action on the state and local level.

Localities' actions may also create the illusion of stronger support for an issue than there actually is. When states and cities pass resolutions condemning genocide in Sudan and calling for more action, they may not have in mind the commitment of large amounts of U.S. troops or resources. In this way, specific interest groups that are good at organizing on the local level around human rights issues could have a disproportionate effect on our foreign policy.

In the end though, localities can provide an important forum to highlight foreign policy concerns of citizens and foster debate around these issues. Localities can act as a refuge for dissent from national foreign policy and as a spark for change.

Localities' actions to influence foreign policy are often less nuanced than what would occur at the federal level. This bluntness, however, can still serve valuable ends. Localities may re-inject moral weight into foreign policy discussions through strong stands against slavery, genocide, apartheid, or sweatshop labor that often get lost in the realpolitik of the nation's foreign policy bureaucracies. Anger over local jobs leaving the United States to countries with lower wages and less regulation may result in "Buy America" laws. These laws register a sense of disempowerment felt by citizens that federal agencies may not fully recognize when they negotiate new trade agreements that result in large movements of jobs and capital.

5. Adoption of International or Foreign Law

State and local governments also effect foreign relations by adopting, citing, or borrowing from international law. In this way, they take on international commitments and enter a discourse with international institutions and other nations. Such adoption of international law has so far been rare, but their existence shows a willingness of states and localities to take the lead in internalizing international norms at their own impetus. Such adoption is also often in

protest of the U.S.'s unwillingness to adopt these norms for the country as a whole.

The City of San Francisco passed an ordinance in 1998 to make the Convention on the Elimination of Discrimination Against Women (CEDAW) part of its local law.³²⁸ The city created a CEDAW taskforce to craft and monitor implementation of the Convention over a five year period.³²⁹

In 2005, out of concern for how climate change will affect their cities and frustration over the lack of leadership from the federal government, a coalition of 132 mayors (representing nearly 29 million people) pledged to meet the emission reduction requirements Kyoto would have placed on them if the U.S. was a party.³³⁰ This is a non-binding pledge, but has led to some city actions to reduce emissions.³³¹

In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court cited foreign law to contextualize its holding that a ban on same-sex marriage was unconstitutional.³³² The use of international or foreign law is still rare outside citations to the Anglo-American common law, however.

State and city governments will also share best practices with their international counterparts on issues ranging from counterterrorism, to human trafficking, and to good governance.³³³ In this way, components of many foreign laws are incorporated into U.S. law through emulation.

V. ALTERNATIVE PROPOSALS TO INCREASE PARTICIPATORY DEMOCRACY

There have been a number of proposals to foster greater participation in American democracy.³³⁴ Recently, James Fishkin and Bruce Ackerman have put forth a strong argument to create a

328. S.F., CAL., ADMIN. CODE ch. 12K (2001), available at http://www.ci.sf.ca.us/site/cosw_page.asp?id=10849.

329. Mark Sappenfield, *In One US City, Life Under a UN Treaty on Women*, CHRISTIAN.SCI. MON., Jan. 30, 2003, at 1.

330. Eli Sanders, *Rebuffing Bush, 132 Mayors Embrace Kyoto Rules*, N.Y. TIMES, May 14, 2005, at 9A.

331. *Id.*

332. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (citing *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276 (Can.) and *Eagle Canada, Inc. v. Canada (Attorney Gen.)*, [2003] 13 B.C.L.R. (4th) 1 (Can.)).

333. Ilene Grossman, *Roles Differ but Goals are Similar for State, Provincial Lawmakers*, STATELINE, May 2005, <http://www.csg.org/pubs/Documents/slmw-0505RolesDiffer.pdf>.

334. For example, Benjamin Barber supports creating a system of neighborhood assemblies in which citizens could routinely question their elected representatives on their concerns. BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 270 (1984).

deliberation day two weeks before major national elections.³³⁵ Citizens would be paid to attend and gather in groups of 15 to 500. In these groups, they would discuss the major issues in the next election. Deliberative polling has shown that such civic engagement can have a large impact on citizens' voting behavior.³³⁶ The implementation of an idea like deliberation day would also likely effect how voters voted on foreign policy issues. After deliberative polling in Texas, voters were more likely to find that the current level of foreign aid was about right and that the U.S. should cooperate more with other countries militarily to address trouble spots in the world.³³⁷

Indeed, if the goal is only to increase citizen discussion of foreign relations, a proposal like deliberation day would certainly engage more Americans than would result out of protecting localities' role in foreign relations. A proposal like deliberation day, however, does not address the other federalism benefits of having localities involved in foreign relations such as being laboratories for experimentation, a check on the power of the federal government, or the promotion of local autonomy.

Instead, an idea like deliberation day is complimentary to localities' involvement in foreign relations. After discussing federal foreign policy in such a forum, members of a community may decide to work to take additional local-based action on a foreign policy issue. For example, they may work to create a sister-city or sister-state relationship in a country the U.S. is aiding after a humanitarian disaster; institute CEDAW principles in their locality's governance; or divest their community funds from a country that is committing egregious human rights abuses. Further, the incidental foreign policy implications of many localities' actions are more likely to be brought to the attention of voters during community discussion. This may influence how voters look at issues and decisions that they once saw as purely domestic concerns.

CONCLUSION

Courts should recognize localities as concurrent actors with the federal government in U.S. foreign policy. The judiciary should strike

335. Ackerman and Fishkin propose that the holiday actually be two days so as many people could participate as possible while businesses could still operate. Bruce Ackerman & James Fishkin, *Righting the Ship of Democracy*, LEGAL AFFAIRS, Jan./Feb. 2004.

336. *Id.*

337. James Fishkin, *Deliberative Polling: Toward a Better-Informed Democracy*, CENTER FOR DELIBERATIVE DEMOCRACY, available at <http://cdd.stanford.edu/polls/docs/summary/#exec> (last visited Dec. 24, 2006).

down localities' actions that affect foreign relations only when they are expressly preempted by the executive, Congress, or the Constitution. To prosper in crafting foreign relations, however, localities need more than judicial recognition of their coexisting control over American foreign policy.

First, the federal government must actively support localities' role in foreign policy. The federal government should better integrate localities into its foreign policy decision making. For example, states are asked for some input by the United States Trade Representative (USTR) on national trade policy, but they still do not play a lead role during trade negotiations.³³⁸ In contrast, in Canada provinces play a direct role in the creation of the nation's trade policy. In 2003, Ontario reportedly had more trade policy experts than all 50 states combined.³³⁹

The federal government should also ensure that its foreign policy bureaucracy has interoperability at all levels of federalism. The USTR, the State Department, the Treasury Department, and other divisions of the federal government can provide the information they gather and analyze not only to federal decision-makers, but also to state and local decision-makers. In this way, the bureaucratic advantage that the federal government has in many foreign policy areas is shared as best as possible.

Second, localities should also view themselves as foreign policy actors. Localities can organize themselves more effectively to cope with governing in an internationally saturated environment. For instance, some states have set up committees to study how trade policy is affecting them and to craft appropriate responses.³⁴⁰ Others have set up sub-cabinets to coordinate the state's international relations.³⁴¹

Finally, citizens themselves must recognize that localities have

338. The United States Trade Representative receives state input when it negotiates international agreements from state and local officials that serve on its Intergovernmental Policy Advisory Committee on Trade. Also state contact persons, usually the state chief economic or trade development officer, are given information and asked for input while the USTR is in negotiations. Jeremy Meadows, *Consulting with States on Trade*, STATE LEGISLATURES, Jul/Aug 2004, at 22.

339. WHATLEY, *supra* note 199, at 44.

340. In Texas, the Senate's Committee on International Relations and Trade is charged with examining the North American Free Trade Agreement and the state's economic relationship with Mexico. The California Senate Select Committee on International Trade Policy and State Legislation studies the impacts of international trade agreements on state laws. Topics the committee considers are environmental protection, natural resource management, human rights protections, and public safety. Maine passed a bill in 2004 that established a public commission to advise legislators regarding the economic impact of trade agreements on the state. Nick Steidel, *States Study Trade Policy*, STATE LEGISLATURES, Jul/Aug 2004, at 23.

341. WHATLEY, *supra* note 199, at 41.

become international actors. Americans may or may not be global citizens, but they are certainly citizens with global worries. Americans should view state and local governments as a place to express and act upon many (although certainly not all) of these concerns.

Public recognition of the importance of localities' involvement in foreign policy is critical to ensure that this space is not taken by the federal government. Localities are far from perfect foreign policy actors, but American foreign policy is stronger with them engaged in international relations. Further, without their engagement in foreign affairs, there is a real danger American democracy will increasingly become less accessible and participatory. Courts can protect the available space left for localities in foreign relations, but it is ultimately Americans who will determine their continuing relevance. As De Tocqueville warned in *Democracy in America* in a passage that still seems fitting today:

[A] highly civilized community can hardly tolerate a local independence, is disgusted at its numerous blunders, and is apt to despair of success before the experiment is completed. Again, the immunities of townships, which have been obtained with so much difficulty, are least of all protected against the encroachments of the supreme power. They are unable to struggle, single-handed, against a strong and enterprising government, and they cannot defend themselves with success unless they are identified with the customs of the nation and supported by public opinion.³⁴²

342. DE TOCQUEVILLE, *supra* note 1, at 62.