

## DARFUR, DIVESTMENT, AND DIALOGUE

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“Influencing the national government is part of an age-old function of state legislatures. And that’s what we are doing. We *don’t* believe that what we are doing is foreign policy. Foreign policy would be *us* cutting a deal with some country. That’s foreign policy. We can’t do that. But we can certainly influence; we can use our sovereignty and our capacity to raise and spend money to influence the foreign policy of this country. And that’s what we are doing.”<sup>1</sup>

–Byron Rushing, Massachusetts State Representative

### 1. INTRODUCTION

Divestment<sup>2</sup> by state and local governments has emerged as one of the most visible responses in the United States to the

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<sup>1</sup> Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts’ “Burma Law,”* 115 POLI. SCI. Q. 353, 365 (2000) (emphasis in original) (quoting interview with Byron Rushing).

<sup>2</sup> The word “divestment” may be used in a variety of ways. In this Article, the word “divestment” is used to describe investment-related actions motivated principally by concern for noneconomic objectives, in this case mainly concern about the atrocities in Darfur. “Divestment” in this sense can involve both buy-side actions (i.e., refusing to buy new or additional securities in a target company) and sell-side actions (i.e., selling securities in a target company, here called “disinvestment” to distinguish it from the broader “divestment”). A divestment strategy can include shareholder engagement, perhaps coupled with any or all of a refusal to purchase new securities, a threat to disinvest already-owned securities, coordination with other concerned shareholders (or other concerned persons), and public expression of concerns.

atrocities<sup>3</sup> in Darfur. To date, twenty-seven states and the District of Columbia,<sup>4</sup> as well as twenty-two cities,<sup>5</sup> have adopted divestment policies regarding Darfur. This is the most widespread divestment movement in the United States since the end of apartheid, nearly a generation ago.<sup>6</sup> Indeed, concern for Darfur has been a “specific-event catalyst” sparking wider interest in

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<sup>3</sup> A terminological aside is in order to explain my use of the word “atrocities” here, as opposed to the more specific word “genocide.” As discussed *infra* Section 2.1, the word “genocide” is potent, both legally and politically, giving rise to ongoing debate about whether the atrocities in Darfur fall within the legal definition thereof. Based on my reading about Darfur, I believe that genocide is being committed there.

Nevertheless, for purposes of this Article, it generally does not matter whether the atrocities in Darfur satisfy the legal definition of genocide. Regardless of whether the Sudanese Government and Janjaweed have the requisite intent to destroy the “African” peoples, they have committed massive atrocities in Darfur demanding the world’s condemnation and, more, the world’s action to end the atrocities. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT, ¶¶ 4.19–20 (2001) available at <http://www.iciss.ca/pdf/Commission-Report.pdf>. (last visited Feb. 22, 2009) (indicating that the “responsibility to protect” applies to “large scale loss of life . . . with genocidal intent or not”); Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1103, 1135–36 (2005) (arguing that policy responses to ongoing mass violence should be divorced from questions about the legal definition of “genocide”). In my view, that is sufficient for purposes of discussing the divestment movement. Accordingly, this Article will generally use lay terms like “atrocities,” reserving legally-specific terms like “genocide” or “crimes against humanity” for use where relevant to particular arguments.

<sup>4</sup> Sudan Divestment Task Force, Divestment Statistics, <http://sudaninvestment.org/statistics.asp> (last visited Feb. 11, 2009). The Sudan Divestment Task Force also notes that:

[n]ineteen of these states have passed the Sudan Divestment Task Force model of targeted Sudan divestment: Arizona, California, Colorado, Florida, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Texas, and Vermont. Eight of these states have developed state specific methods of Sudan divestment: Arkansas, Connecticut, Illinois, Maine, Maryland, Missouri, New Jersey and Oregon.

<sup>5</sup> *Id.* (“Baltimore, MD; Charlottesville, VA; Chicago, IL; Cleveland, OH; Denver, CO; Edina, MN; Hopkins, MN; Los Angeles, CA; MetroWest, NJ; Miami Beach, FL; Miami Gardens, FL; Minneapolis, MN; New Haven, CT; Newton, MA; Palm Beach Gardens, FL; Philadelphia, PA; Pittsburgh, PA; Providence, RI; San Francisco, CA; Seattle, WA; St. Paul, MN; . . . and Worcester, MA.”).

<sup>6</sup> By the end of apartheid, “as many as 140 states, counties and localities” had divested from South Africa. Sarah H. Cleveland, Crosby and the “One-Voice” Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975, 995 & n.140 (2001).

divestment and other forms of socially-responsible investing (“SRI”).<sup>7</sup>

Divestment allows the states<sup>8</sup> to express their moral condemnation of business activities that significantly benefit the Sudanese Government, and to disassociate themselves from companies that persist with such activities. In so doing, divestment also places the states in public debate about U.S. policy towards Sudan. For this reason, the Darfur divestment movement was born in the shadow of constitutional doctrine intended to preserve the foreign-relations prerogatives of the federal government.

Further impetus for the state divestment movement thus comes from an intriguing source: the federal government.<sup>9</sup> The Sudan Accountability and Divestment Act of December 31, 2007 (“SADA”), authorizes the states to divest—within important bounds—from companies that do business in Sudan.<sup>10</sup>

SADA passed over the strong objections of the Bush Administration, although ultimately with the signature of

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<sup>7</sup> See Joel C. Dobris, *SRI—Shibboleth or Canard (Socially Responsible Investing, That Is)*, 42 REAL PROP. PROB. & TR. J. 755, 758 & n.12 (2008). This Article is going to publication as the financial crisis reshapes Wall Street in ways that seemed unimaginable only months ago. How will the financial crisis affect SRI? It may, especially in the near term, diminish interest in SRI, as flight from risk trumps other considerations for many investors. It may also affect SRI less directly, for example, by reducing interest in equity investing or distracting attention from Darfur (or international affairs more generally). And the Madoff fraud may—again, especially in the near term—deprive the Elie Wiesel Foundation and other human rights champions of resources needed for Darfur advocacy. See generally, Stephanie Strom, *Wall Street Fraud Leaves Charities Reeling*, N.Y. TIMES, Dec. 16, 2008, at A1, available at <http://www.nytimes.com/2008/12/16/business/16charity.html> (last visited Feb. 22, 2009). On the other hand, President-elect Obama may use his “bully pulpit” to focus greater public attention on the plight of Darfur. The financial crisis—and the regulatory responses thereto—may also weaken what Joel Dobris had identified as a countertrend to SRI: the “de-equitization” of the markets—because of the rise of private equity, hedge funds, and derivatives with some rights previously confined to equity—reduced transparency and made it harder to “name and shame” potential targets. Dobris, *supra*, at 775–76. These circumstances remind us, as Yogi Berra is said to have said, “It’s tough to make predictions, especially about the future.”

<sup>8</sup> In the interests of brevity, this Article will generally include local governments within discussion of “states,” except where the specific context requires separate mention of local governments.

<sup>9</sup> See Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 21 Stat. 2516 (2007) (authorizing states to divest from companies that conduct business operations in Sudan).

<sup>10</sup> *Id.* § 3(b).

President Bush.<sup>11</sup> The Administration raised “grave constitutional questions” about SADA,<sup>12</sup> and effectively challenged Congress to answer the question: Why should Congress enable state participation in U.S. foreign policy?<sup>13</sup>

This Article offers an answer—surely not the only answer—to the question “Why?” While the economic sanctions literature typically stresses issues of the effectiveness or expressiveness of economic sanctions imposed by the states, this Article places principal emphasis on the potential of state divestment, deployed wisely, to contribute valuably to the domestic political process for the formulation of foreign policy. That is to say, state divestment may call attention to an under-attended concern, influence societal attitudes about that concern, and build domestic political support for a more vigorous national response thereto. Congress may reasonably conclude that it wishes to hear state speech about Darfur as it continually reassesses the degree of priority to afford Darfur amongst the many concerns competing for Congressional attention.

Welcoming state participation in the process of foreign policy formulation has its costs, to be sure. It makes that process messier, noisier, and (on the margins) less predictable. It poses coordination challenges for the national government, which is ultimately responsible for deciding and executing foreign policy. Yet these very costs also contribute to the case for SADA, which may be conceived as regulating divestment by establishing bounds within which divestment is at least encouraged (if not required) to operate. Such a regulatory approach, which may be designed to foster the benefits of divestment while constraining excesses from

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<sup>11</sup> See *infra* notes 278–86 and accompanying text.

<sup>12</sup> *Negative Implications of the President's Signing Statement on the Sudan Accountability and Divestment Act: Hearing Before the H. Comm. on Financial Serv.*, 110th Cong. 67–72 (2008) [hereinafter Benczkowski Letter] (letter from Brian Benczkowski, Principal Deputy Assistant Att’y Gen., U.S. Dept. of Justice, to Richard Cheney, President of the U.S. Senate, giving the Dept. of Justice’s views on the Sudan Accountability and Divestment Act).

<sup>13</sup> See *id.* at 70 (“State and local governments are already engaging in a wide range of divestment activities, most of which have *not* given rise to preemption lawsuits, much less Federal judgments invalidating the State schemes on foreign affairs grounds. The divestment portion of the current bill is necessary *only* if State and local governments want to expand their divestment activity to interfere with Federal foreign policy in a way that would merit the Federal intervention the bill seeks to prevent. We do not understand why Congress would want to protect such activity.”).

harming national interests, offers Congress a superior alternative to outright prohibition.

SADA represents an unprecedented federal endorsement of state divestment. It thus exemplifies a constitutional theory called “dialogic federalism,”<sup>14</sup> which rejects the traditional doctrine that our nation does and must speak with only “one voice” in foreign relations, in favor of a more pluralistic vision that both more accurately describes the reality of our national political processes and more fully accords with our democratic values.<sup>15</sup> Dialogic federalism recognizes that the federal government has the dominant voice in foreign affairs, but it has the option to tolerate, encourage, and even listen to and benefit from other speakers. This recognition allows states to speak on matters of foreign policy subject to federal constraints. SADA illustrates the possibilities of both state speech and federal constraints in a federalist dialogue on foreign policy. This Article thus offers SADA as an important new case study to the literature on dialogic federalism,<sup>16</sup> demonstrating

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<sup>14</sup> This Article borrows this phrase, with appreciation, from Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001). Robert Ahdieh collects a variety of similar terms proposed in the federalism literature. See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination* 30 (Emory University School of Law and Economics Research Paper Series No. 08-30), available at <http://ssrn.com/abstract=1272967> (last visited Feb. 22, 2009). I use “dialogic” here as best capturing the vertical, horizontal, and transnational conversations that state divestment is capable of furthering, while also offering a nice antidote to the flawed “one voice” metaphor. Cf. Powell, *supra*, at 250 n.20 (“I prefer the phrase ‘dialogic federalism’ . . . to stress the central importance of dialogue in implementing international norms . . .”).

<sup>15</sup> On the virtues of pluralism, see generally Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (arguing for a pluralist approach to managing hybridity among communities as an alternative to both territorialism and universalism).

<sup>16</sup> Other scholars are also starting to discuss the import of SADA. Judith Resnik discusses SADA among other examples of what she describes as the changing landscape of horizontal federalism, as states coordinate more deeply on more issues through a variety of semi-official organizations (e.g., the National Governors’ Association). See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 34 (2007). Similarly, in a draft of a forthcoming article, Robert Ahdieh situates SADA and the Supreme Court’s decision last term in *Medellín II* (discussed *infra* Section 4.1) within the post-1995 “federalism revolution” in the Court’s jurisprudence, discussing them as examples of what he describes as a trend towards expanding into the international realm the ongoing devolution of authority from the federal government to the states, thereby necessitating voluntary coordination in place of top-down mandates. Ahdieh, *supra* note 14, at 8-13.

the potential of political bounding to reconcile remarkable federal openness to state input on foreign policy with the preservation of ultimate federal control over foreign policy.<sup>17</sup>

Section 2 of this Article situates the Darfur divestment movement in political, economic, and historical context. Section 3 explores justifications for state divestment based upon its value as an instrument of economic pressure, democratic process, and self-expression. Section 4 discusses prevailing constitutional doctrine governing state actions affecting foreign policy. Section 5 examines how SADA dispels doctrinal clouds over state divestment, offering instead a new model of federalist dialogue about U.S. policy towards Sudan within a bounded space established by Congress. Section 6 concludes.

## 2. DIVESTMENT IN CONTEXT

### 2.1 *The Impetus for Divestment*

#### 2.1.1 *The Horrors of Darfur*

Sudan's postcolonial history is marked by bloodshed.<sup>18</sup> The Government of Sudan responded to a rebellion in the Western Sudanese region of Darfur, which started in 2003,<sup>19</sup> with atrocities against civilian populations. The atrocities include murder, rape, and burning villages.<sup>20</sup> The atrocities have been committed mainly by Government forces and the *Janjaweed* ("Arab" militias),<sup>21</sup> mainly targeting the Fur, Masaalit, and Zaghawa ("African") peoples.

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<sup>17</sup> With its emphasis on SADA's dialogic virtues, this Article leaves for another day a fuller consideration of more contentious possibilities, such as the extent to which states may divest in the face of Congressional silence or even Congressional prohibition.

<sup>18</sup> See COUNCIL ON FOREIGN RELATIONS, CRISIS GUIDE: DARFUR, chap. II at 1956, 1983, <http://www.cfr.org/publication/13129/> (noting that "[a]part from an eleven-year period from 1972 to 1983, Sudan has been at war continuously since independence" from British-Egyptian joint rule in 1956) (last visited Feb. 22, 2009).

<sup>19</sup> *Id.* at 2003.

<sup>20</sup> See, e.g., Oliver Bercault, *Photo Essay: The Crisis in Darfur*, 31 FORDHAM INT'L L.J. 859 (2008); HUMAN RIGHTS WATCH, DARFUR 2007: CHAOS BY DESIGN (2007) (describing the atrocities in Darfur), <http://hrw.org/reports/2007/sudan0907/> (last visited Feb. 22, 2009).

<sup>21</sup> Janjaweed is "a derogatory term that normally designates 'a man (a devil) with a gun on a horse.' However, in this case the term Janjaweed clearly refers to 'militias of Arab tribes on horseback or on camelback.'" International Commission of Inquiry on Darfur, *Report to the United Nations Secretary-General*, ¶511, (Jan. 25,

Debate about whether these atrocities constitute genocide centers on the specific intent requirement set forth in the Genocide Convention, namely whether the perpetrators have the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>22</sup> In 2005, a U.N. Commission of Inquiry found “massive atrocities were perpetrated [in Darfur] on a very large scale,” but it concluded that the evidence did not show that the atrocities were committed with the necessary “intent to destroy” the “African” peoples, finding that they were committed instead “primarily for purposes of counter-insurgency warfare.”<sup>23</sup> By

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2005) [hereinafter U.N. Commission of Inquiry Report], available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) (last visited Feb. 22, 2009).

<sup>22</sup> The Genocide Convention defines the term “genocide” as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. A/810, Dec. 9, 1948, art. II [hereinafter Genocide Convention].

<sup>23</sup> See U.N. Commission of Inquiry Report, *supra* note 21, ¶513–22. In these circumstances, the Commission concludes that “crimes against humanity and war crimes . . . have been committed in Darfur,” stressing that these crimes “may be no less serious and heinous than genocide.” *Id.* at 4. It also notes the possibility that some individuals may personally have the requisite intent for genocide. *Id.* ¶520.

David Luban criticizes the Commission for relying on the legal definition of genocide without regard to its broader lay meaning:

Organized extermination of civilian populations regardless of specific intent is, under current legal definitions, a “crime against humanity.” But it isn’t genocide.

. . . . In everyday speech, we think of genocide as deliberate annihilation of masses of civilians, regardless of the specific intention. That means that for non-lawyers . . . the crime against humanity of exterminating civilian populations is genocide. Hence, when the UN Commission denied that Darfur was genocide, non-specialists could only conclude that there was no wholesale extermination going on in Darfur. That is not what the UN Commission found, and it is not what it said. But as the headlines indicate, it obviously is what people thought the Commission had found and said. The legal and moral meanings of the word “genocide” have parted ways. As a result, lawyers and journalists talk

contrast, in 2008, the Prosecutor of the International Criminal Court formally requested a warrant to arrest Omar Hassan Ahmed Al Bashir, the President of Sudan, to stand trial for genocide against the Fur, Masaalit, and Zaghawa, as well as war crimes and crimes against humanity.<sup>24</sup> The Prosecutor's view that the horrors in Darfur constitute genocide is shared by the Bush Administration,<sup>25</sup> President-elect Obama,<sup>26</sup> and Congress,<sup>27</sup> and nearly so by the Parliament of the European Union.<sup>28</sup>

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past each other, and politicians suddenly find a convenient linguistic excuse for doing nothing.

David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 308–09 (2006) (advocating revising the legal definition of "genocide" to include "the crime against humanity of extermination," to better align the definition with "public imagination" and "moral reality").

<sup>24</sup> INT'L CRIM. CT., PROSECUTOR'S APPLICATION FOR WARRANT OF ARREST UNDER ARTICLE 58 AGAINST OMAR HASSAN AHMAD AL BASHIR 1, available at <http://www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf> (last visited Feb. 22, 2009).

<sup>25</sup> See Colin Powell, Testimony Before the Senate Foreign Relations Committee (Sept. 9, 2004) [hereinafter Powell Testimony] ("When we reviewed the evidence compiled by our team . . . we concluded . . . that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit bear responsibility—and that genocide may still be occurring."), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm> (last visited Feb. 22, 2009); George W. Bush, Speech to the U.N. General Assembly (Sept. 21, 2004), 40 WEEKLY COMP. PRES. DOC. 2075, 2077 (Sept. 27, 2004) ("the world is witnessing . . . horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide"); George W. Bush, Speech at the Holocaust Museum (Apr. 18, 2007), 43 WEEKLY COMP. PRES. DOC. 458 (Apr. 23, 2007) ("No one who sees these pictures can doubt that genocide is the only word for what is happening in Darfur—and that we have a moral obligation to stop it").

<sup>26</sup> For example, then-Senator Obama's campaign website stated, "Stop the Genocide in Darfur: As president, Obama will take immediate steps to end the genocide in Darfur by increasing pressure on the Sudanese and pressure the government to halt the killing and stop impeding the deployment of a robust international force," available at [http://origin.barackobama.com/issues/foreign\\_policy/](http://origin.barackobama.com/issues/foreign_policy/) (last visited Feb. 23, 2009).

Also notable are the views of Dr. Susan Rice, who will be nominated as U.S. Ambassador to the United Nations: "I swore to myself that if I ever faced such a crisis [as the Rwanda genocide] again, I would come down on the side of dramatic action, going down in flames if that was required." Peter Baker, *Obama's Choice for U.N. is Advocate of Strong Action Against Mass Killings*, N.Y. TIMES, Dec. 1, 2008, at A12 (quoting Rice). See also SUSAN E. RICE, THE GENOCIDE IN DARFUR: AMERICA MUST DO MORE TO FULFILL THE RESPONSIBILITY TO PROTECT (2007), available at [http://www.brookings.edu/papers/2007/1024darfur\\_rice\\_Opp08.aspx](http://www.brookings.edu/papers/2007/1024darfur_rice_Opp08.aspx) (last visited Feb. 22, 2009).



2.1.2. *Insufficient Action in the Face of Declared Genocide*

Genocide is a potent word. Coined by Raphael Lemkin during the Holocaust,<sup>29</sup> it inevitably evokes the horrors of the Nazis' crimes. Only four years later, the new U.N. General Assembly adopted the Genocide Convention "to liberate mankind from such an odious scourge."<sup>30</sup> In other words, the Convention "was intended to institutionalize the promise of 'never again.'"<sup>31</sup>

As mentioned in its full name, the Convention on the Prevention and Punishment of the Crime of Genocide requires the nations of the world to "prevent" genocide and not merely "punish" it after the fact.<sup>32</sup> A 2007 decision of the International Court of Justice ("ICJ") highlights this duty of prevention:

The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope. . . . Even if and when [United Nations] organs have been called upon [to act to prevent the genocide], this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring. . . .

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<sup>27</sup> Darfur Peace and Accountability Act of 2006, Pub. L. 109-344, § 4(1) (Oct. 13, 2006) (describing "the genocide unfolding in the Darfur region of Sudan"); see H.R. Con. Res. 467, 108th Cong. (2004); S. Con. Res., 108th Cong., 120 Stat. 1869 (2004).

<sup>28</sup> European Parliament resolution on the Darfur region in the Sudan, ¶ 16 (2004), ("crimes against humanity, war crimes and human rights violations, which can be construed as tantamount to genocide"), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2004-0012+0+DOC+XML+V0//EN&language=EN> (last visited Feb. 22, 2009).

<sup>29</sup> See, e.g., Josef Kunz, *Editorial Comment: The United Nations Convention on Genocide*, 43 AM. J. INT'L L. 738, 738 n.3 (1949) (citing RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE*, ch. IX: Genocide (1944)); SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 40-45 (2003) (discussing Lemkin's efforts to coin and promote the word "genocide").

<sup>30</sup> Genocide Convention, *supra* note 22, pmbl.

<sup>31</sup> Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFF., Jan./Feb. 2005, at 123, 132.

<sup>32</sup> Genocide Convention, *supra* note 22, art. I.

[T]he obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.<sup>33</sup>

In short, the very word genocide is a call to action.

Given the power of this word, the nations of the world assiduously (and perhaps not surprisingly) avoided using it to describe ongoing slaughter. Notably, the Clinton Administration failed to describe the Rwandan genocide as genocide while it happened.<sup>34</sup> Even if one discounts the duty of prevention in the Genocide Convention,<sup>35</sup> as seemed reasonable before the ICJ's robust construction in 2007, the word "genocide" still has unmatched rhetorical power in the public imagination. David Luban writes:

Lemkin understood that without a memorable word he could never draw the world's attention to the uncanny crime that was his life's obsession. His ear for linguistics was impeccable. . . . Lemkin's word eventually conquered the world. It became one of the most powerful in any language, and it reshaped the moral landscape of the world—arguably, more so than any other single linguistic innovation in history. In doing so, it also reshaped our

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<sup>33</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91, ¶¶ 427-30 (Feb. 26 2007), available at <http://www.icj.org/docket/files/91/13685.pdf> (last visited Feb. 22, 2009). It ought be noted that the Court gives a robust construction to treaty language that had previously been disparaged for its weakness.

<sup>34</sup> In his apology to Rwandans in 1998, President Clinton acknowledged that "the international community . . . must bear its share of responsibility for this tragedy," because *inter alia*, "[w]e did not immediately call these crimes by their rightful name: genocide." William Clinton, Address at Kigali Airport, Rwanda (Mar. 25, 1998), reprinted in JARED COHEN, ONE-HUNDRED DAYS OF SILENCE: AMERICA AND THE RWANDA GENOCIDE, app. F at 207, 208 (2007).

<sup>35</sup> See, e.g., Van Schaack, *supra* note 3, at 1137-39 (criticizing the Convention's prevention provisions as "frustratingly indeterminate," "irresolute," and "anemic").

consciousness and, to some extent, it reshaped our culture as well.<sup>36</sup>

It was therefore an historic event when then-Secretary of State Colin Powell declared on September 9, 2004: “the evidence leads . . . the United States to the conclusion that genocide has occurred and may still be occurring in Darfur.”<sup>37</sup> This was the first time the United States invoked the Genocide Convention to govern an ongoing tragedy.<sup>38</sup> Secretary Powell reminded Sudan of its obligations “to prevent and to punish genocide” and called upon the United Nations to act under the Genocide Convention.<sup>39</sup>

Yet, Secretary Powell did not announce any significant new U.S. policy initiatives to stop the genocide. Worse, he suggested that none was needed: “[N]o new action is dictated by this determination. We [the United States] have been doing everything we can to get the Sudanese Government to act responsibly.”<sup>40</sup> The context of this quotation indicates that Secretary Powell wanted *others* in the international community to act more vigorously to stop the genocide, even if those other nations were not prepared to use the word.<sup>41</sup> But the Bush Administration failed, at this key moment, to commit itself publicly to further action in Darfur.<sup>42</sup>

A few months later, Scott Straus observed the post-determination inaction in *Foreign Affairs*:

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<sup>36</sup> Luban, *supra* note 23, at 307.

<sup>37</sup> Powell Testimony, *supra* note 25.

<sup>38</sup> See, e.g., Steven R. Weisman, *Powell Says Rapes and Killings in Sudan Are Genocide*, N.Y. TIMES, Sept. 10, 2004, at A3 (noting that this is the first time that any nation had called for the U.N. to take action under the Genocide Convention).

<sup>39</sup> Powell Testimony, *supra* note 25; see also Genocide Convention, *supra* note 21, art. VIII (“Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide . . .”).

<sup>40</sup> Powell Testimony, *supra* note 25.

<sup>41</sup> *Id.* (“So let us not be too preoccupied with this designation. These people are in desperate need and we must help them. Call it civil war; call it ethnic cleansing; call it genocide; call it ‘none of the above.’ The reality is the same. There are people in Darfur who desperately need the help of the international community.”).

<sup>42</sup> Cf. Power, *supra* note 29, at xxi (“No U.S. president has ever made genocide prevention a priority, and no U.S. president has ever made genocide prevention a priority, and no U.S. president has ever suffered politically for his indifference to its occurrence. It is thus no coincidence that genocide rages on.”) (writing in 2003).

So far, the immediate consequences of the U.S. genocide determination have been minimal, and . . . the international community has barely budged. Nor has the United States itself done much to stop the violence. . . . In the past, governments avoided involvement in a crisis by scrupulously eschewing the word 'genocide.' Sudan—at least so far—shows that the definitional dance may not have mattered.<sup>43</sup>

Straus aptly limits his conclusion with the words "so far," and that was indeed only the start. The Bush Administration used an evocative, loaded word and then fell short of the promise that word embodies: never again. This combination of an historic (if implicit) call to action with a failure to commit publicly to such action provides both impetus for public demands for further action on Darfur and a politically-salient tool to pursue these demands.<sup>44</sup>

This may be seen as the domestic political context for the Darfur divestment movement.<sup>45</sup> Indeed, Illinois enacted the first Sudan-specific divestment law just nine months later.<sup>46</sup>

## 2.2. *Divestment in Economic Context*

In 1993, the Clinton Administration designated Sudan as a "state sponsor of terrorism."<sup>47</sup> In 1997, citing terrorism and other

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<sup>43</sup> Straus, *supra* note 31, at 131-32.

<sup>44</sup> Straus notes similarly that "[t]he term [genocide] grabs attention, and in this case allowed pundits and advocates to move Sudan to the center of the public and international agendas," *id.* at 131, although he appears to refer to use of the word by "pundits and advocates" before the Bush Administration's determination and not to their continued use of it thereafter.

<sup>45</sup> I offer this narrative less as history than as reflection. In other words, it does not describe the actual motives driving key activists and legislators, which I have not researched, but instead provides context that I personally deem relevant to understanding the Darfur divestment movement. In calling attention to the power of the word genocide, however, I do not disagree with Secretary Powell's conclusion that the facts on the ground in Darfur demand world attention regardless of whether they satisfy the legal definition of genocide. *See supra* note 3 (arguing that the horrors of Darfur demand world condemnation regardless whether they fall within the legal definition of genocide); *see also supra* note 23 (noting other crimes may be no less heinous than genocide).

<sup>46</sup> The Illinois Act to End Atrocities and Terrorism in the Sudan, which provided for divestment among other measures directed against companies doing business with Sudan, was signed into law on June 25, 2005. *See Nat'l Foreign Trade Council, Inc. v. Giannoulis*, 523 F. Supp. 2d 731, 733 (N.D. Ill. 2007), discussed further *infra* Sections 4.1, 5.

concerns, President Clinton imposed economic sanctions against Sudan, broadly prohibiting U.S. persons from trading with Sudan and performing contracts in support of projects there.<sup>48</sup> In 1998, shortly after Al Qaeda bombed the U.S. embassies in Nairobi and Dar es Salaam, President Clinton ordered an air strike against a Sudanese pharmaceutical plant believed to be manufacturing chemical weapons.<sup>49</sup> In 2006, citing Darfur, President Bush expanded the U.S. sanctions against Sudan.<sup>50</sup>

In short: the United States has had little direct business dealings with Sudan.<sup>51</sup> Other nations have not imposed similar sanctions against Sudan.<sup>52</sup> Moreover, within limits, U.S. persons may invest in foreign companies that deal with Sudan.<sup>53</sup> This is

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<sup>47</sup> See Determination Sudan, 58 Fed. Reg. 52,523 (Oct. 8, 1993) (announcing the Secretary of State's determination that Sudan "has repeatedly provided support for acts of international terrorism").

<sup>48</sup> See Blocking Sudanese Government Property and Prohibiting Transactions with Sudan, Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 3, 1997) (imposing economic sanctions against Sudan); see also 31 C.F.R. Part 538 (setting forth the Sudanese sanctions regulations).

<sup>49</sup> See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161-66 (1999) (discussing the U.S. missile attacks on Afghanistan and Sudan).

<sup>50</sup> See Exec. Order No. 13,400, 71 Fed. Reg. 25,483 (Apr. 26, 2006) (blocking the property of certain persons responsible for the violence in Darfur); Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 26, 2006) (revising the economic sanctions imposed against Sudan pursuant to Exec. Order No. 13,067, *supra* note 48).

<sup>51</sup> Dealings with Sudan by foreign subsidiaries of U.S. companies, while lawful, were nevertheless constrained by legal and public pressures. See, e.g., 31 C.F.R. § 538.315 (omitting foreign subsidiaries from the definition of "U.S. person" subject to U.S. sanctions); §§ 538.206, 538.407 (prohibiting U.S. persons from "facilitating" third-country trade with Sudan); see also Vivienne Walt, *U.S. Oil Firm Pulls Out of Sudan*, FORTUNE (Sept. 14, 2007) (reporting that, after publicity of a foreign subsidiary's dealings in Sudan led to Weatherford's designation as a "highest offender," Weatherford announced its intent to leave Sudan within twelve months), available at [http://money.cnn.com/2007/09/12/magazines/fortune/walt\\_khartoumfolo.fortune/index.htm](http://money.cnn.com/2007/09/12/magazines/fortune/walt_khartoumfolo.fortune/index.htm) (last visited Feb. 22, 2009); Sudan Divestment Task Force, *Changes Since the Last Sudan Company Report* (Feb. 29, 2008) (removing Weatherford International Limited, a U.S. company, from the list of "ongoing engagement"), available at [http://sudandivestment.org/company\\_report\\_changes.asp](http://sudandivestment.org/company_report_changes.asp) (last visited Feb. 22, 2009).

<sup>52</sup> Among the companies doing the most notable business in Sudan, mainly in the oil and power sectors, are ABB, China National Petroleum Corporation (the parent of PetroChina), Oil and Natural Gas Corporation, Petronas, and Sinopec. See SUDAN DIVESTMENT TASK FORCE, SUDAN COMPANY RANKINGS (2008), available at [http://www.sudandivestment.org/docs/sudan\\_company\\_rankings.pdf](http://www.sudandivestment.org/docs/sudan_company_rankings.pdf) (last visited Feb. 22, 2009) (listing companies doing business in Sudan).

<sup>53</sup> The U.S. Department of the Treasury has taken the position that its regulations "do not prohibit U.S. persons from making investments in non-

half of the economic context for divestment from Sudan: U.S. persons are investing in "third country" companies that do business in Sudan that U.S. persons cannot lawfully do themselves.

The other half of the economic equation is the sheer volume of assets in state-controlled pension funds. The largest state pension fund, the California Public Employees' Retirement System ("CalPERS") alone has \$183.3 billion in assets under management ("AUM") as of December 31, 2008.<sup>54</sup> This excludes the \$161.5 billion in AUM held by the California State Teachers' Retirement System ("CalSTRS") as of June 30, 2008.<sup>55</sup> California to be sure has the largest pension funds, but smaller states nevertheless have not-insignificant AUM: Connecticut, for example, had AUM of \$25.9 billion in its combined pension and trust funds as of June 30, 2008.<sup>56</sup> Even though the portfolios are widely diversified, they are large enough to have sizable stakes in individual companies. For example, CalPERS estimated that California's Iran divestment law would require it to sell \$2 billion in shares in just ten companies.<sup>57</sup>

### 2.3. *Divestment in Historical Context*

This section briefly introduces the Darfur divestment movement and the two modern political precedents most relevant to it, and then situates this movement within the larger context of state speech on foreign policy.

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Sudanese third country companies doing business in Sudan . . . , provided that such companies are not owned or controlled by the Government of Sudan or predominantly dedicated to or derive the predominant portion of their revenues from investments, projects, or other economic activities in Sudan." Letter from Linda Robertson, Assistant Secretary (Legislative Affairs), U.S. Department of the Treasury to Rep. Frank Wolf, at 1-2 (Dec. 13, 1999) (on file with author).

<sup>54</sup> CAL. PUB. EMPLOYEES' RET. SYS., FACTS AT A GLANCE: INVESTMENT (2009), available at <http://www.calpers.ca.gov/index.jsp?bc=/investments/reports/home.xml> (last visited Feb. 22, 2009).

<sup>55</sup> See CAL. STATE TEACHERS' RET. SYS., COMPREHENSIVE ANNUAL FINANCIAL REPORT 23 (2008), available at [http://www.calstrs.com/Help/forms\\_publications/printed/CurrentCAFR/CAFRall.pdf](http://www.calstrs.com/Help/forms_publications/printed/CurrentCAFR/CAFRall.pdf) (last visited Feb. 22, 2009).

<sup>56</sup> See Office of the State Treasurer, Pension Fund Management Division, <http://www.state.ct.us/ott/aboutpension.htm> (last visited Feb. 22, 2009).

<sup>57</sup> See ASSEMBLY COMM. ON APPROPRIATIONS, COMMITTEE REPORT FOR 2007 CALIFORNIA ASSEMBLY BILL NO. 221, Comm. Rep. CA A.B. 221 (2007) (noting CalPERS's estimate).

### 2.3.1. *The Darfur Divestment Movement*

As mentioned, twenty-seven states have divested from Sudan. Nineteen of the divesting states have adopted the “targeted” approach to divestment based on model divestment legislation proposed by the Sudan Divestment Task Force.<sup>58</sup>

The Task Force’s model legislation provides for: “best efforts” to identify “Scrutinized Companies”<sup>59</sup> as targets for shareholder engagement and possible disinvestment;<sup>60</sup> quarterly updates of the list of “Scrutinized Companies;”<sup>61</sup> written notice to each Scrutinized Company, offering the company “the opportunity to clarify its Sudan-related activities” and urging the company to cease its “Scrutinized Business Operations” within ninety days;<sup>62</sup> an immediate prohibition against making new investments in the Scrutinized Company;<sup>63</sup> and disinvestment to begin if shareholder engagement does not succeed within ninety days, resulting in the sale of at least half the shares within nine months and all the shares within fifteen months.<sup>64</sup> The model legislation has several provisions aimed at minimizing conflict with U.S. foreign policy, including: exceptions from the definition of “Scrutinized Companies”;<sup>65</sup> an exemption for any company “which the United States Government affirmatively declares to be excluded from its present or any future federal sanctions regime relating to Sudan”;<sup>66</sup>

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<sup>58</sup> See Sudan Divestment Task Force, *supra* note 4 and accompanying text (listing states that have divested from Sudan).

<sup>59</sup> See SUDAN DIVESTMENT TASK FORCE, TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION §§ 2(d), 2(o) (2008), [http://www.sudandivestment.org/docs/task\\_force\\_targeted\\_divestment\\_model.pdf](http://www.sudandivestment.org/docs/task_force_targeted_divestment_model.pdf) (last visited Feb. 22, 2009) [hereinafter MODEL LAW] (defining “Scrutinized Companies” as those with certain operations in Sudan in the mining, oil, and power industries, certain sellers of military equipment to Sudan, and any company that is “complicit in the Darfur genocide”).

<sup>60</sup> *Id.* § 3(a). See also *supra* note 2 (defining “divestment” and “disinvestment”).

<sup>61</sup> MODEL LAW, *supra* note 59, § 3(c).

<sup>62</sup> *Id.* § 4(a)(3).

<sup>63</sup> *Id.* § 4(c).

<sup>64</sup> *Id.* § 4(b).

<sup>65</sup> *Id.* § 2(o) (omitting certain oil and mining companies assisting the regional government of Southern Sudan, certain power companies benefiting “Marginalized Populations of Sudan,” certain arms companies selling only to the regional government of Southern Sudan or international peacekeeping or humanitarian groups, and any “Social Development Company” that is not itself “complicit in the Darfur genocide”).

<sup>66</sup> *Id.* § 4(d).

and automatic termination of the divestment legislation upon certain conditions intended to stop divestment at such time as it should become either unnecessary due to changes in Darfur or contrary to formally-expressed policy of the United States.<sup>67</sup>

The Task Force also studies “over 800 companies with connections to Sudan” in order to recommend targets for engagement or disinvestment.<sup>68</sup> Based on this research, the Task Force publishes recommendations, updated at least quarterly, of companies to target for engagement or disinvestment. The Task Force only recommends disinvestment from relatively few targets—twenty-three companies at the moment—called the “Highest Offenders.”<sup>69</sup> These are companies that are not responsive to shareholder efforts at engagement and that have both a significant on-the-ground presence in Sudan (mainly in the oil and power sectors) and publicly-traded equity or debt.<sup>70</sup>

The Task Force model seems designed to minimize concerns under both the Constitution and general principles of pension/trust law (e.g., the fiduciary’s duty of loyalty to the beneficiary).<sup>71</sup> Although the latter is beyond the scope of this Article, it should be noted briefly that the small number of targets limits the impact on diversification of the investment portfolio and reduces transaction costs. On the other hand, the Task Force approach heightens administrative costs by eschewing use of “relatively mechanical, easy-to-apply criteria for identifying forbidden stocks (for example, \$X assets in [the target country])”<sup>72</sup> in favor of case-by-case judgments following research and shareholder engagement. As these costs are borne in the public interest, it is appropriate to find ways to transfer them from pension-fund beneficiaries to the public as a whole.<sup>73</sup>

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<sup>67</sup> *Id.* § 6.

<sup>68</sup> SUDAN DIVESTMENT TASK FORCE, SUDAN COMPANY RANKINGS, *supra* note 52, at 2.

<sup>69</sup> *Id.* at 5–10.

<sup>70</sup> *Id.*

<sup>71</sup> See generally RESTATEMENT (THIRD) OF TRUSTS (2007); JOHN H. LANGBEIN, SUSAN S. STABILE & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW (4th ed. 2006) (providing an overview of pension law).

<sup>72</sup> John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 106 (1980).

<sup>73</sup> Dobris, *supra* note 7, at 761 n.27 (“Computer time could be donated. SRI law students and MBA students could take up tasks, and SRI could be improved the way Linux is or a Wiki is.”); *id.* at 785–86 (“Found and fund something one might call ‘The SRI Fund for the Future’ that might make distributions to entities



### 2.3.2. *The Anti-Apartheid Divestment Movement*

Unlike Sudan today, until very late in the apartheid era, U.S. companies could legally trade with and invest in South Africa; indeed, one might say that the point of the divestment movement was to pressure the federal government to impose on South Africa economic sanctions of the sort that were ultimately enacted in the Comprehensive Anti-Apartheid Act ("CAAA") of 1986.<sup>74</sup> This meant that many of the largest companies in the United States were potential targets for divestment. Baltimore, for example, divested from 120 companies in the S&P 500, representing 40% of the total market capitalization of the S&P index at that time.<sup>75</sup> Massachusetts divested from all companies doing any business in or with South Africa, an approach Roy Schotland colorfully denounces as "blunderbuss divestment . . . good only for masochists and soap-box simplifiers."<sup>76</sup> Other jurisdictions tied their divestment approaches to the dollar value or nature of the company's dealings with or in South Africa, or to its compliance with the Sullivan Principles<sup>77</sup> or other conditions intended to help

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that incur excess transaction costs in pursuit of SRI justice. Alternatively, find funding for research into an SRI method that yields risk and gross return figures equivalent to a non-SRI portfolio, and then work on getting the transaction costs down, or . . . move the transaction costs over to a nonprofit or low profit entity.").

<sup>74</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C. § 5116 (1986)) (repealed 1993).

<sup>75</sup> See *Bd. of Tr. of Employees' Ret. Sys. v. Mayor of Baltimore City*, 562 A.2d 720, 726 (1989) [hereinafter *Baltimore Board of Trustees*] (discussing the impact of Baltimore's divestment on the volatility of its pension system's investment portfolio).

<sup>76</sup> Roy A. Schotland, *Divergent Investing of Pension Funds and University Endowments: Key Points about the Pragmatics, and Two Current Case Studies*, in *DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS* 31, 48, 59 (John H. Langbein et al. eds., National Legal Center for the Public Interest 1985).

<sup>77</sup> Reverend Leon Sullivan was a civil rights leader who became the first black director of General Motors. He developed the Sullivan Principles in 1977 to govern the activities in South Africa by GM and other signatory companies. The Sullivan Principles obliged signatories to desegregate their South African work forces, provide equal pay to South African employees without regard to race, and otherwise work to improve working and living conditions for black South African employees. After the end of apartheid, Reverend Sullivan expanded his principles for broader use under the name of the Global Sullivan Principles. See, e.g., Jan Hoffman, *Public Lives: A Civil Rights Crusader Takes on the World*, N.Y. TIMES, Nov. 3, 1999, at B2 (interviewing Sullivan); Leon H. Sullivan Foundation, *Biography of Rev. Leon H. Sullivan*, <http://www.thesullivanfoundation.org/foundation/rev/> (last visited Feb. 22, 2009).

the black population of South Africa.<sup>78</sup> Some jurisdictions added measures distinct in nature from divestment, such as New York City's ban on advertising job opportunities in South Africa and Illinois' restrictions on selling Krugerrands.<sup>79</sup>

Notwithstanding the duration and expanse of the anti-apartheid divestment movement, and the fact that some of the other anti-apartheid measures were overturned in court, the era produced little judicial guidance about the legality of state divestment. The main exception is the decision of the Maryland Court of Appeals upholding Baltimore's divestment ordinances against a variety of constitutional and other challenges.<sup>80</sup> The Reagan Justice Department similarly defended the right of states to divest.<sup>81</sup> But the Supreme Court later underscored that the opinions of the Maryland court and the Justice Department are not definitive, leaving the legality of state divestment as an open question.<sup>82</sup> The Congressional picture is also muddy: Congress debated whether to expressly preempt or "non-preempt" state divestment, ultimately deciding to do neither.<sup>83</sup>

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<sup>78</sup> See Schotland, *supra* note 76, at 48-51 (cataloging seven approaches to divestment from South Africa).

<sup>79</sup> See generally *N.Y. Times v. City of N.Y. Comm'n on Human Rights*, 41 N.Y.2d 345 (1977) (holding that advertising employment opportunities located within South Africa did not express discrimination within the meaning of the New York City antidiscrimination laws); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (1986) (holding unconstitutional an Illinois law restricting sales of South African gold coins).

<sup>80</sup> See generally *Baltimore Board of Trustees* (holding, among other decisions, that the "ordinances requiring that [Baltimore's] pension funds divest their holdings in companies doing business in South Africa . . . did not unconstitutionally impair obligation of city's pension contract with pension beneficiaries [and that] ordinances were not preempted by the Comprehensive Anti-Apartheid Act").

<sup>81</sup> See generally *Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 U.S. Op. Off. Legal Counsel 49 (1986) [hereinafter OLC, *South African Divestment*].

<sup>82</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) (noting various authorities that thought state divestment from South Africa was not preempted and stating that "[s]ince we never ruled on whether state and local sanctions against South Africa in the 1980's were preempted or otherwise invalid, arguable parallels between [those and the Massachusetts Burma law] do not tell us much about the validity of the latter").

<sup>83</sup> See *Cleveland*, *supra* note 6, at 1001-03 (discussing the legislative history of the CAAA).

### 2.3.3. *The Burma Sanctions Movement*

In the 1990s, Massachusetts and “[a]t least 18 local governments”<sup>84</sup> enacted measures intended to promote democracy in Burma. There are two critical points to note. First, these were not divestment measures, but instead “selective-purchase” restrictions limiting procurement of goods and services from companies doing business with Burma.<sup>85</sup> Second, the Supreme Court struck down the Massachusetts Burma law in *Crosby v. National Foreign Trade Council* and, as discussed later in this Article, the rationales invoked by the Court and lower federal courts provide a reference point for organizing discussion about constitutional doctrine relevant to state divestment.

### 2.3.4. *Other State Speech on Foreign Affairs*

The three examples discussed *supra* are far from the only instances where states have spoken on foreign affairs. Sarah Cleveland identifies examples dating back to 1798,<sup>86</sup> while Matthew Porterfield provides an originalist look at the role of local economic boycotts of British goods at the approach of the Revolution.<sup>87</sup> Porterfield also offers a “taxonomy” of state speech: (1) sense-of-the-legislature resolutions, (2) market-participation measures (including both divestment and selective-purchase rules), and (3) regulatory and tax measures.<sup>88</sup> Porterfield’s taxonomy might be further refined as (1) sense-of-the legislature resolutions and other pure speech, including expressive association and disassociation;<sup>89</sup> (2) symbolic gestures, more or less akin to

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<sup>84</sup> See Brief for the United States as Amicus Curiae Supporting Respondents, *Natsios v. National Foreign Trade Council*, U.S. S.Ct. No. 99-474, 2000 WL 14805, at 20 [hereinafter U.S. Amicus Brief in *Crosby*] (describing state and local action against Burma).

<sup>85</sup> For a description of the Massachusetts Burma law, see *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 44-47 (1st Cir. 1999) (holding the law unconstitutional).

<sup>86</sup> See Cleveland, *supra* note 6, at 993 (“Under the Articles of Confederation, states enjoyed power to punish offenses against the law of nations, and although the Constitution grants this power to Congress, states retain authority to pass supplemental legislation.”).

<sup>87</sup> Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L L. 1, 25-31 (1999).

<sup>88</sup> See *id.* at 3-7.

<sup>89</sup> The Clinton Justice Department identified examples of both permissible pure speech (in addition to resolutions) and symbolic disassociation: “A State may

pure speech;<sup>90</sup> (3) market-participation measures, with some differences between divestment and selective-purchase rules; and (4) regulatory, tax, and other measures with significant impact on private or public interests.<sup>91</sup>

Porterfield further draws a line treating pure speech and market-participation *qua* speech as protected from federal interference by the First Amendment, while recognizing that regulation or tax *qua* speech might cause constitutional difficulties, depending on the details.<sup>92</sup> With the endless potential mechanisms for state speech, at least some state speech is bound to prove objectionable in some respect, so Porterfield is correct that lines must be drawn somewhere and that line-drawers should take account of the nature and impact of the particular mechanism of state speech at issue.<sup>93</sup> It is not my purpose here to draw such lines among the varieties of speech, as this Article focuses on only one type of speech.<sup>94</sup>

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petition Congress and the President to take action against the regime, including the imposition of economic sanctions, or to authorize the States themselves to take certain action. A State may decline to send its own officials on trade missions to the country so long as the repressive regime remains in power." See U.S. Amicus Brief in *Crosby*, *supra* note 84, at 28. Other pure speech might include gubernatorial speeches, letters (open or private), telephone calls, and meetings with dissidents.

<sup>90</sup> Examples of symbolic gestures might include: giving the "key to the city" or other honor to a dissident; naming a public place for a dissident (as New York City named "Sakharov-Bonner Corner" near the Soviet Mission to the United Nations), perhaps accompanied by a statue of the dissident; revoking an honorary degree previously given by a state university to a government official (as the University of Massachusetts has done to Robert Mugabe); and—in a twist sure to warm the academic heart—endowing a chair at a state university in honor of a dissident (e.g., the new Aung San Suu Kyi Endowed Chair in Asian Democracy at the University of Louisville).

<sup>91</sup> For a litany of state actions, see EARL FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 91-99 (Council on Foreign Relations Press 1998).

<sup>92</sup> See Porterfield, *supra* note 87, at 47 ("Accordingly, selective investment laws arguably are entitled to even greater First Amendment protection and thus should be even less amenable to federal preemption than selective purchasing laws.").

<sup>93</sup> See Richard Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 829 (1989) (arguing that the variety of state actions should be "analyzed and assessed separately").

<sup>94</sup> Nor is it my purpose to distinguish among the potential targets for divestment campaigns apart from Darfur. Such determinations are best left to the democratic process, a process capable of generating particular outcomes with which I may disagree. Compare Resnik, *supra* note 16, at 89-91 (acknowledging "the substance of the policies generated at the local, the translocal, the national,

### 3. THE FUNCTIONS OF DIVESTMENT

#### 3.1. *Divestment as Economic Pressure*

The Sudan Divestment Task Force claims a dozen companies have curtailed or improved their practices in Sudan in response to the divestment movement.<sup>95</sup> This claim seems difficult to verify without a detailed case study of each company's internal decision-making. Organizational decision-making often reflects a complex mix of motives. Public statements may (whether purposefully or not) overstate or understate the role of divestment—or political or moral concerns about Darfur more generally—in the mix. It is known, for example, that Berkshire Hathaway sold its substantial interest in PetroChina after divestment advocates urged it to do so, but the company's motivation is debated.<sup>96</sup> Other companies may

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and the transnational levels do not intrinsically have a particular point of view," listing both liberal and conservative examples), with John H. Langbein, *Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal*, in *DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS* 9-12 (John H. Langbein et al. eds., National Legal Center for the Public Interest 1985) (criticizing social investing campaigns as "unprincipled" for focusing on South Africa and Northern Ireland, the latter "for the entertainment of the Boston Irish," but not on Pol Pot's Cambodia or Idi Amin's Uganda). Likewise, as Langbein's example suggests, one might criticize state legislatures as being susceptible to capture by powerful local interest groups (ethnic or otherwise), resulting in legislation not genuinely reflective of majority will, but such a broad critique of democracy in action is beyond the scope of this Article.

<sup>95</sup> "12 Companies have ceased operations in Sudan (or formalized and publicized a plan to do so) or significantly changed their behavior in the country since the proliferation of the Sudan divestment movement. Several of the companies have directly and/or publicly cited the Sudan divestment movement as a cause of their actions, while others have mentioned "humanitarian," "political," and even "moral" concerns related to Sudan. Those companies include: Bauer AG, CHC Helicopter, ICSA of India, La Mancha Resources, Petrofac, Rolls Royce, Schlumberger, Siemens, Sumatec, UMW Holdings, Weatherford International, and Weir Group." Sudan Divestment Task Force, *Divestment Statistics* (2008), <http://sudandivestment.org/statistics.asp> (last visited Feb. 28, 2009).

<sup>96</sup> Berkshire Hathaway sold its 11% stake in PetroChina for an 800% profit a few months after shareholders overwhelmingly rejected (1.8% to 97.5%) a resolution to require divestment. These facts allow management to maintain that the decision was commercial, while divestment advocates declare victory. *Compare Buffett Sells PetroChina Stake*, 54 OIL DAILY, Oct. 22, 2007 (quoting Warren Buffett as saying that "we sold based on price. It was 100% a decision based on valuation."), with Karen Richardson, *Buffett's PetroChina Sale: Fiscal or Social Move?* WALL ST. J., Oct. 14, 2007, at C1 (reporting "'I think he finally gets it,' Eric Cohen, Chairman of Investors Against Genocide, says about Buffett.").

act for commercial reasons (or largely so), but choose for a variety of reasons to publicly attribute their actions to moral or political concerns.

Nevertheless, it seems clear that divestment, if supported by enough investors, may put pressure on a company's share price. Consider Talisman, a Canadian company, which was accused of complicity in the atrocities in Southern Sudan (which are separate from the atrocities in Darfur, in Western Sudan) in connection with its role in a major oil project in Southern Sudan.<sup>97</sup> When Canada considered whether to impose economic sanctions that would have forced Talisman to leave Sudan, Talisman resisted on the ground that "it had already suffered a serious blow in the stock exchanges of North America that had resulted in such a significant reduction in its share price that it might become a takeover target."<sup>98</sup> Talisman ultimately sold its investment in Sudan, explaining, "We felt the controversy detracted . . . from the strength of our other assets."<sup>99</sup> Stephen Kobrin provides numbers supporting Talisman's claim:

[Talisman's] shares sold at a 20% premium (to net asset value) before the investment [in Sudan], [but] it was priced at a 10 to 20% *discount* during the period Talisman was in Sudan. The share price recovered almost immediately upon announcement of the sale, trading very close to its all time high in June 2002.<sup>100</sup>

Kobrin attributes the depression of Talisman's share price to the general political fallout from its investment in Sudan, saying that the impact of divestment cannot be isolated from other Sudan-related pressures.<sup>101</sup> The Talisman example suggests that the

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<sup>97</sup> See generally *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (denying Talisman's motion to dismiss); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (granting Talisman's motion for summary judgment).

<sup>98</sup> Robert Matthews, *Canadian Corporate Responsibility in Sudan: Why Canada Backed Down*, in *HARD CHOICES, SOFT, LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 244 (John Kirton & Michael Trebilcock eds., 2004).

<sup>99</sup> *Id.* at 246.

<sup>100</sup> Stephen Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 426 (2004).

<sup>101</sup> *Id.* at 444 ("[I]t is clear that the activities of the advocacy groups had a significant effect on Talisman's share price and enterprise value. While it is impossible to disentangle the impact of the risk within Sudan, American

economic impact of divestment may be sufficiently robust in at least some circumstances as to induce meaningful changes in company behavior.<sup>102</sup>

More broadly, situating divestment within the larger movements for corporate social responsibility (“CSR”) and socially-responsible investing (“SRI”), more companies – especially large, publicly-traded companies – are devoting more resources towards monitoring their compliance with CSR benchmarks.<sup>103</sup> KPMG reports that 79% of the “Global Fortune 250” companies<sup>104</sup> now publish reports about their CSR compliance, up sharply from 52% reporting in KPMG’s last survey in 2005.<sup>105</sup> The same trend is seen among the 100 largest companies in the United States, with CSR reports jumping from 32% in 2005 to 74% in 2008.<sup>106</sup> These CSR reports typically employ standard benchmarks to establish the

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sanctions, shareholder activism, and the divestment campaign, it is reasonable to assume that the impact of the latter has been significant.”).

<sup>102</sup> In this regard, the Genocide Intervention Network (which sponsors the Sudan Divestment Task Force) conducted a share value analysis, concluding:

On average, the “Highest Offenders” in Sudan underperformed their peer group average by 45.97% over one year, 22.23% over three years and 7.22% over five years. The one year forecasted return on equity for “Highest Offenders” in Sudan (based on analyst consensus estimates) was, on average, 6.06% less than the peer group mean . . . . Based on the median returns for “Highest Offenders” in Sudan, the “Highest Offenders” underperformed their peer group median by 1.09% over one year, 16.07% over three years and 3.3% over five years. The one year forecasted return on equity for “Highest Offenders” in Sudan (based on analyst consensus estimates) was, on average, 2.86% less than the peer group mean.

GENOCIDE INTERVENTION NETWORK, SUDAN PEER PERFORMANCE ANALYSIS (2008), [http://www.sudandivestment.org/peer\\_analysis.asp](http://www.sudandivestment.org/peer_analysis.asp) (last visited Feb. 22, 2009).

<sup>103</sup> See *infra* text accompanying notes 115 to 126.

<sup>104</sup> That is, the 250 largest companies in the world, measured by revenues, according to Fortune Magazine.

<sup>105</sup> KPMG, INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2008 4, available at <http://www.kpmg.com/SiteCollectionDocuments/International-corporate-responsibility-survey-2008.pdf> (last visited Feb. 22, 2009) [hereinafter KPMG SURVEY].

<sup>106</sup> *Id.* at 16. In addition to the Global Fortune 250, KPMG also examines CSR reporting by the largest 100 companies in each of twenty-two countries (mainly in the OECD), finding significantly increased CSR reporting in twelve of the thirteen countries that were also studied in 2005 (with a slight increase in the last, Denmark). *Id.* Among these 2,200 companies, 45% now publish CSR reports, albeit with significant variance from country to country. *Id.* at 4. As one might expect, a higher percentage (54%) of listed companies among the 2,200 report on CSR than of companies owned in any other manner. *Id.* at 23.

extent of each company's CSR performance. Among the Global Fortune 250, a plurality of 40% of the reports<sup>107</sup> reference the "ten principles" of the U.N. Global Compact,<sup>108</sup> which in turn incorporate the Universal Declaration of Human Rights,<sup>109</sup> while 21% of the reports directly reference the Universal Declaration and others reference other benchmarks incorporating human rights standards.<sup>110</sup>

A divestment strategy entailing shareholder engagement, backed by the possibility of disinvestment, may thus help to propagate and encourage the internalization of human rights norms among multinational businesses. In this sense, divestment may be seen as opening channels for transnational dialogue—supplementing, not replacing, traditional *international* dialogue—about human rights. This channel of discourse builds upon the established and uncontroversial channel of investor-company communication, as well as the trend towards greater inclusion of human rights discourse in such communication.<sup>111</sup> It also has the

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<sup>107</sup> *Id.* at 29.

<sup>108</sup> The U.N. Global Compact publishes a statement of principles signed by 4,700 businesses in 120 countries. United Nations Global Compact, *Participants & Stakeholders: U.N. Global Compact Participants*, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited Feb. 12, 2009). These principles involve a commitment by participating businesses to "support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses." United Nations Global Compact, *The Ten Principles of the Global Compact*, princs. 1-2, <http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/index.html> (last visited Feb. 12, 2009).

<sup>109</sup> *See id.* pmb1.

<sup>110</sup> KPMG Survey, *supra* note 105, at 28. In addition to the U.N. Global Compact and Universal Declaration of Human Rights, the other benchmarks mentioned by KPMG are: the ILO Core Conventions (24%), OECD Guidelines for Multinational Enterprises (13%), "Industry specific framework/standards" (12%), ICC Business Charter for Sustainable Development (3%), and the Global Sullivan Principles (2%). *Id.* Any one report could reference more than one benchmark.

<sup>111</sup> As an example of this trend, 52 investors representing about \$4.4 trillion in assets under management recently wrote a letter to the chief executive officers of 9000 companies listed on major indices worldwide urging them to join the U.N. Global Compact. Press Release, United Nations Principles for Responsible Investment, Global Investors Issue US \$4 Trillion Incentive for Sustainability (Oct. 27, 2008), available at <http://www.unpri.org/files/prfinalef2610.pdf> (last visited Feb. 22, 2009). The 52 signatories represent a subset of the investors, with \$15 trillion in assets under management (before the financial crisis), which have signed the U.N. Principles for Responsible Investment. *See* Principles for Responsible Investment, *Signatories to the Principles for Responsible Investment*, <http://www.unpri.org/signatories> (last visited Feb. 12, 2009) (listing signatories by category). The Principles encourage greater consideration of "environmental,



advantage of speaking directly with private persons in a position to advance (or, at least, to refrain from undermining) human rights.

### 3.2. *Divestment as Democratic Process*

The previous section examined divestment as it is conventionally understood, as an instrument of economic pressure directed against target companies. That might be regarded as the external aspect of divestment. This section discusses the internal aspect of divestment.<sup>112</sup> As stated by Byron Rushing, the chief sponsor of the Massachusetts Burma law, the purpose of that law was not to conduct foreign policy, but to “influenc[e] the national government” as *it* makes foreign policy decisions.<sup>113</sup> In a leading article about state measures implicating foreign policy, written at the time of the anti-apartheid movement, Richard Bilder concurs:

[A]t least some of these activities appear to implicate significant freedom of speech and petition values. Their real addressee is not some foreign government but our own U.S. policymakers, and their real purpose is not to intrude into the conduct of our foreign relations but to influence the making of our foreign policy. To the extent that state and local actions express citizen and community views, raise public consciousness and add to robust debate on

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social, and corporate governance (ESG) issues” by companies and investors. United Nations Principles for Responsible Investment, The Principles for Responsible Investment, <http://www.unpri.org/principles> (last visited Feb. 12, 2009).

<sup>112</sup> See Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMP. L. REV. 813, 815 (1989) (“These subnational measures, driven by an overarching concern to undermine apartheid, have both an internal and external dimension, speaking simultaneously to a national and international audience.”).

<sup>113</sup> The full quotation appears *supra* p. 823 as the epigraph. See also Powell, *supra* note 14, at 289 n.188 (quoting Rushing as saying that the purpose of the Massachusetts Burma law was “to put pressure on the federal government”). Of course the line between conducting foreign policy and influencing the federal government’s making of foreign policy may prove less than perfectly straight and clear in actuality. In this regard, Rushing has also acknowledged the “delicate process by which foreign diplomatic representatives came to talk directly to him on matters relating to the Burma bill. . . .” Peter Spiro, *International Law and the Work of Federal and State Legislators: Tracing the Institutional Insinuation of International Law*, 95 AM. SOC’Y INT’L L. PROC. 50, 51 (2001) (summarizing Rushing’s comments).

important public policies, they serve an important public function. We should think long and hard, and be sure we have very good reasons, before doing anything to restrain them.<sup>114</sup>

So regarded as an instrument of democratic process, the effectiveness of divestment should be measured in terms of its role in building domestic political support for a more vigorous national response to an underattended foreign concern. Although genuine measurement of these internal effects presents daunting empirical challenges, this section highlights anecdotal evidence establishing the *potential* of divestment for meaningful impact on the democratic policy-making process.<sup>115</sup>

### 3.2.1. *Attention-getting*

Politicians as a class are skilled at creating media-friendly events—including photo-ops with, and testimony by, sympathetic witnesses and celebrities—in support of their projects. When state legislatures introduce, consider, and enact divestment legislation,

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<sup>114</sup> Bilder, *supra* note 93, at 829; see also McArdle, *supra* note 112, at 845:

State and local government measures intended specifically to communicate foreign policy positions to the national government and influence the direction of that policy, implement the expressive and associational interests of the citizenry and should be presumptively protected under the first amendment. Absent extraordinary circumstances in which such expression would seriously jeopardize national security, the constitutional balance weighs heavily in favor of permitting such local advocacy.

<sup>115</sup> To make explicit the implicit, this argument about the democratic virtues of state divestment is limited to state actions that themselves result from democratic processes. This limitation avoids the criticism leveled by John Langbein:

It is vital to understand that, almost by definition, the causes that are grouped under the social-investing banner are *those that have failed to win assent in the political and legislative process . . .* The reason, therefore, that the proponents of social investing are bullying pension trustees is that they have been unable to get their political programs accepted in the political process.

John H. Langbein, *Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal*, in *DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS* 8 (John H. Langbein et al. eds., 1985) (emphasis in original). More fundamentally, in my view, Langbein misconceives state divestment as an alternative to the political process rather than as part of it—as shown, for example, by the passage of the CAAA the year after Langbein wrote.

and when governors sign such legislation, they create opportunities for local television and print coverage of the horrors of Darfur.<sup>116</sup> This coverage may inform more people about Darfur and persuade them that more can and should be done to stop the barbarity there. The President may have the “bulliest” “bully pulpit,”<sup>117</sup> but governors and state legislators also have pulpits capable of reaching and persuading (mainly) local audiences.

Speech by a state may be analogized, rather imperfectly, to “collective speech” by the citizens of the state in that it can be said that “by collective effort individuals can make their views known, when, individually their voices would be faint or lost.”<sup>118</sup> In this regard, the Seventh Circuit (Judge Posner) compares municipal speech with “a megaphone amplifying [residents’] voices that might not otherwise be audible . . . .”<sup>119</sup> Indeed, Terrence Guay provides anecdotal support, again involving Byron Rushing, for the possibility that states may further amplify their speech by expressing themselves symbolically rather than via pure-speech mechanisms like “sense of the legislature” resolutions:

In June 1997, U.S. Ambassador to Indonesia J. Stapleton Roy visited the Massachusetts State House to meet with legislators advocating a bill to impose sanctions on Indonesia. When the ambassador asked why the legislators

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<sup>116</sup> Even unsuccessful bills may generate local media attention and concern. For example, when the Idaho Statesman editorialized critically about a divestment bill, it took the opportunity to denounce “the staggering inhumanity” in Darfur. *See Our View: Would Divesting Really Help End Darfur Tragedy?* IDAHO STATESMAN, Dec. 20, 2007 (on file with author). Indeed, virtually all mentions of Darfur I found on a search of the STATESMAN’S website (which excludes wire stories printed in the newspaper) have a local dimension: an op-ed by a local high school class; the state pension fund’s creation of a voluntary “Sudan-free” investment fund; the Diocese of Idaho’s divestment from Sudan; local photography exhibits, fundraisers, rallies, concerts, and lectures about Darfur; a “tent for hope” erected at a local church; and coverage of the divestment bill, which failed in committee by a 5-4 vote after “two days of impassioned testimony” in a “packed committee room.” Heath Druzin, *Darfur Divestment Bill Dies in Committee*, IDAHO STATESMAN, Feb. 21, 2008 (on file with author).

<sup>117</sup> While not widely in use today, the word “bully” was an adjective akin to “superb” at the time when Theodore Roosevelt coined the famous phrase that captures the persuasive powers of the presidency.

<sup>118</sup> NAACP v. Claiborne Hardware, 458 U.S. 886, 907-08 (1982) (quoting Citizens Against Rent Control Coal. for Fair Hous. v. Berkeley, 454 U.S. 290, 294 (1981)).

<sup>119</sup> Creek v. Vill. of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996); *see also* Porterfield, *supra* note 87, at 34-35 (discussing Creek).

did not just pass resolutions instead of laws on the subject, Representative Rushing responded that, “for years we passed resolutions on a lot of international issues and we never even once got a letter back from the State Department. That’s why we pass selective purchase bills, because that gets your attention.”<sup>120</sup>

### 3.2.2. *Norm-changing*

James Fearon observes that social norms say, in effect, “Good people do X.”<sup>121</sup> Cass Sunstein notes that social norms tap into “wellsprings of shame and pride.”<sup>122</sup> They may influence behavior within the community, causing individuals to act in conformity with the norm so that they may think well of themselves (“self-conception”), others will think well of them (“reputation”), or both.<sup>123</sup>

Norms are not fixed across time, of course. Sunstein describes “norm entrepreneurs” as “people interested in changing norms . . . . If successful, they produce . . . *norm bandwagons* and *norm cascades*. Norm bandwagons occur when small shifts lead to large ones, as people join the ‘bandwagon’; norm cascades occur when there are rapid shifts in norms.”<sup>124</sup> He notes the power of law *qua* expression, even without meaningful risk of enforcement, to change social norms—citing, for example, norms about cleaning up after one’s dog.<sup>125</sup> He writes: “[L]aw might attempt to express a judgment about the underlying activity in such a way as to alter social norms. If we see norms as a tax on or a subsidy to choice, the law might attempt to change a subsidy into a tax, or vice versa.”<sup>126</sup>

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<sup>120</sup> Guay, *supra* note 1, at 365–66 (quoting Frank Phillips, *State’s Trade Sanctions Win Notice*, BOSTON GLOBE, June 15, 1997).

<sup>121</sup> Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 8 (Thomas Risse et. al. eds., 1999).

<sup>122</sup> Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 952 (1996).

<sup>123</sup> See *id.* at 916–17 (discussing role of reputation and self-conception in choosing among options).

<sup>124</sup> *Id.* at 909 (emphasis in original).

<sup>125</sup> See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031–32 (1996).

<sup>126</sup> *Id.* at 2034.

In this sense, states divesting from Sudan may be regarded as norm entrepreneurs, striving to “tax” business activities that support the commission of mass atrocities. They seek to limit a norm along the lines of “good people do not impose social constraints on the freedom of business to maximize profits,”<sup>127</sup> with a norm that “good people do not engage in business dealings that, directly or indirectly, support mass atrocities.” These norm entrepreneurs seek, to flip Daniel Patrick Moynihan’s phrase, to “defin[e] deviancy up” – that is, to make socially unacceptable practices that previously had been tolerated.<sup>128</sup>

Evidence suggests that norms are shifting in favor of greater sensitivity to nexuses between business and human rights. For example, in the case of South Africa, the anti-apartheid movement (of which divestment was a key locus) seems to have succeeded over time in capturing the attention of the U.S. public and convincing it that conducting business with the Botha regime was morally unacceptable unless done pursuant to special guidelines (e.g., the Sullivan Principles) designed to ensure that the business benefited the black population of South Africa.<sup>129</sup> This change manifested itself in public opinion polls, in the spread of divestment among campuses and governments across the country,

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<sup>127</sup> Cf. Milton Friedman, *The Social Responsibility Of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (arguing that the public interest is best served when business focuses exclusively on maximizing profits within the confines of the law and denouncing “social responsibility” as a “fundamentally subversive doctrine”).

<sup>128</sup> See generally, Daniel Patrick Moynihan, *Defining Deviancy Down*, AMERICAN SCHOLAR, Winter 1993, at 17 (arguing that American society has been re-defining deviancy so as “to permit previously stigmatized behaviors”).

<sup>129</sup> As a rough proxy for the attention of the U.S. public, I searched the Vanderbilt Television News Archive for news coverage on the major national network news programs. I searched for the words “divest,” “divestment,” “divestiture,” “disinvest,” and “disinvestment” from the start of the Archive in 1969 to the present. Of fifty-two national news stories with these words, forty addressed South Africa during a few years in the mid-1980s. By way of comparison, one CNN story about Berkshire Hathaway’s 2007 annual meeting mentioned the debate whether to divest from PetroChina. The other eleven stories addressed ordinary commercial transactions. See Vanderbilt Television News Archive, <http://tvnews.vanderbilt.edu> (last visited Feb. 22, 2009) (archiving television news coverage). For information about a broader spike in network television coverage of South Africa in 1985–86, see Donald R. Culverson, *The Politics of the Anti-Apartheid Movement in the United States, 1969–1986*, 111 POLI. SCI. Q. 127, 144 fig.1 (1996). The divestment movement spiked at about the same time, as did the *New York Times’* coverage of anti-apartheid activities. See Frederic I. Solop, *Public Protest and Public Policy: The Anti-Apartheid Movement and Political Innovation*, 9 POL’Y STUD. REV. 307, 321 fig.8, 310 fig.1.

and ultimately in the passage of the CAAA by a Republican-controlled Senate over President Reagan's veto.<sup>130</sup> More generally, divestment is part of the larger CSR movement, which is clearly progressing in its effort to persuade businesses to internalize human rights norms. As mentioned, KPMG reports that 79% of the "Global Fortune 250" companies now publish reports about their CSR compliance, leading KPMG to conclude that "[c]orporate responsibility reporting has gone mainstream."<sup>131</sup> Intriguingly, 52% of the companies publicly identify "employee motivation" as their reason for publishing CSR reports,<sup>132</sup> suggesting that employees of major multinationals tend to accept the social norm of CSR. They take "pride" (or avoid "shame") in knowing that their employer is behaving responsibly or taking steps to move towards responsibility.

### 3.2.3. *Door-opening*

It is a commonplace of federalist theory that state and especially local governments are closer to, and more responsive to, public concerns than the national government. Several examples suggest that this maxim extends to foreign-relations concerns. In the 1970s, thirteen states prohibited compliance with the Arab embargo of Israel before Congress passed the federal "anti-boycott" laws.<sup>133</sup> As many as 140 jurisdictions imposed divestment or selective-purchasing rules opposing apartheid before Congress enacted the CAAA.<sup>134</sup> At least eighteen local governments joined

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<sup>130</sup> Culverson, *supra* note 129, at 146 (showing that support in Gallup polls for increasing U.S. pressure on South Africa jumped from 47% in 1985 to 55% a year later). Roper Center polls similarly show that opposition to apartheid grew from the mid-1970s, becoming overwhelming by the mid-1980s, and that support for U.S. sanctions also grew during this time to the point that a majority of the public supported the override of President Reagan's veto of CAAA.

<sup>131</sup> KPMG Survey, *supra* note 105, at 13-14.

<sup>132</sup> *Id.* at 10, 18.

<sup>133</sup> See Eric L. Hirschhorn & Howard N. Fenton III, *States' Rights and the Antiboycott Provisions of the Export Administration Act*, 20 COLUM. J. TRANSNAT'L L. 517, 522 n.38 (1981) (listing those states that adopted anti-boycott laws). In discussing here the role played by state anti-boycott and selective-purchasing laws in securing passage of federal legislation, I note that those laws may raise certain constitutional issues distinct from divestment and (as mentioned *supra* notes 92-94) do not engage here with those issues.

<sup>134</sup> See Cleveland, *supra* note 6, at 995, n.140.

Massachusetts in imposing selective-purchasing rules regarding Burma before passage of the federal Burma law.<sup>135</sup>

State action may focus federal attention on an underappreciated issue and facilitate the development of a federal response. It may place an issue on the federal agenda for the first time,<sup>136</sup> heighten the priority given to the issue by the federal government, or build momentum towards a federal response. The movements to prohibit compliance with the Arab embargo of Israel, to end apartheid in South Africa, and to promote democracy in Burma all resulted in the passage of federal legislation. The Burma example highlights the door-opening potential of state action: advocates initially failed in the Congress, turned to Massachusetts "to put pressure on the Federal government,"<sup>137</sup> and then "leverage[d] their success in Massachusetts into a national policy."<sup>138</sup>

Apart from the impact on Congress of the attention-getting and norm-changing aspects of state action more generally, it ought not be surprising that state action is a particularly effective method of generating Congressional action. State action may motivate the Congressional delegation from that state to serve a bridging function that brings a matter of state concern before the Congress (as when Representatives Jonathan Bingham and Benjamin Rosenthal, both of New York, sponsored the main bill that drove passage of the federal anti-boycott law).<sup>139</sup> State action may also facilitate Congressional action by neutralizing opposition among the Congressional delegation from that state (as when Senator John Kerry of Massachusetts reversed his position on Burma sanctions when it became clear that Massachusetts would enact a Burma law).<sup>140</sup>

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<sup>135</sup> See U.S. Amicus Brief in *Crosby*, *supra* note 84, at 20 (describing state and local action against Burma).

<sup>136</sup> See generally Solop, *supra* note 129, at 134–22 (discussing the role of divestment in putting economic sanctions against South Africa on the "systemic agenda," "governmental agenda," and "decision agenda," culminating in enactment of the CAAA).

<sup>137</sup> Powell, *supra* note 14, at 289 n.188 (quoting Byron Rushing's description of the purpose of the Massachusetts Burma law).

<sup>138</sup> Guay, *supra* note 1, at 362.

<sup>139</sup> See Henry J. Steiner, *Pressures and Principles – The Politics of the Antiboycott Legislation*, 8 GA. J. INT'L & COMP. L. 529, 531 (1978) (discussing the role of the Bingham-Rosenthal bill in the legislative process).

<sup>140</sup> See Guay, *supra* note 1, at 356, 375.

This door-opening function may be seen as an illustration of Herbert Wechsler's "political safeguards of federalism." Wechsler highlights the critical role of states in "coloring the nature and scope of our national legislative processes," both because of the very fact of their existence and their importance "in the selection and the composition of the national authority."<sup>141</sup> The power of the states in the national government is limited neither to the Senate (where it is most plain)<sup>142</sup> nor to formal channels of influence.<sup>143</sup> Wechsler focuses on the negative aspects of state power—i.e., the ability of states to block federal action adverse to state interests.<sup>144</sup> Nevertheless, the same channels of influence identified by Wechsler should also afford each state a positive power to advance Congressional action on matters of concern to it—a point that Wechsler appears to acknowledge.<sup>145</sup>

The three examples of door-opening discussed in this section should not be taken as comprehensive nor even as representative. They are, rather, the "success stories," where a state initiative attracted sufficient horizontal and vertical support to affect—and to be seen as affecting—the formulation of federal foreign policy. In *Crosby*, the Clinton Justice Department informed the Court that "various state and local governments have adopted or considered similar selective-purchasing statutes aimed at other countries,

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<sup>141</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954). Wechsler's landmark article has given rise to debate about whether the courts should defer to Congressional assertions of power vis-à-vis the states on the ground that the states may be deemed to have acquiesced in the Congressional action. See, e.g., Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001) (criticizing the view that "political safeguards are the exclusive means of safeguarding the states"). This debate, however, is not relevant for present purposes: it concerns the scope of *judicial* protection of the states from *Congress*, while this Article concerns *Congressional* protection of the states from the *judiciary*. See Resnik, *supra* note 16, at 40 (distinguishing ordinary federalism cases from foreign affairs cases concerning the "judicial safeguards of national power").

<sup>142</sup> See Wechsler, *supra* note 141, at 546–58 (discussing the role of the states in the selection of the Senate, the House of Representatives, and the President).

<sup>143</sup> See *id.* at 547 n.10 (noting that "twenty-eight former governors" served in the Senate during the 80th Congress).

<sup>144</sup> See *id.* at 558 ("[T]he national political process . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.").

<sup>145</sup> See *id.* at 548 ("[A] latent power of negation has much positive significance in garnering the votes for an enactment that might otherwise have failed.").



including China, Cuba, Egypt, Indonesia, Iran, Iraq, Laos, Morocco, Nigeria, North Korea, Pakistan, Saudi Arabia, Sudan, Switzerland, Tibet, Turkey, and Vietnam.”<sup>146</sup> It is presumably the case that some of these laws failed to prompt federal action. State action only improves the chances of federal action; it does not guarantee such action. Even where state action fails to elicit a federal response, however, it may still contribute to the *process* of foreign-policy formulation. The first state to act on a matter of concern is essentially proposing to the federal government and, indeed, other states that they accord high priority to that matter. Inaction or even rejection of the proposal in other states can be said to represent a national consensus that the matter is not of the highest priority. Such information about democratic preferences may be valuable to the President and Congress as they constantly reprioritize the infinity of items potentially on the nation’s foreign policy agenda.

#### 3.2.4. *Assisting*

States may help formulate foreign policy, for example, by supporting a Presidential effort to secure passage of legislation empowering the President to pursue foreign policy objectives.<sup>147</sup>

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<sup>146</sup> U.S. Amicus Brief in *Crosby*, *supra* note 84, at 20.

<sup>147</sup> It appears that the Clinton Administration actively courted state support for federal legislation needed to allow China to join the World Trade Organization (“WTO”), a top priority for the Administration in 2000. The Annual Report of USTR for 2000 states:

USTR officials participate frequently in meetings of state and local government associations to apprise them of relevant trade policy issues and solicit their views. Associations include the National Governors’ Association (NGA), Western Governors’ Association (WGA), National Conference of State Legislatures (NCSL), Council of State Governments (CSG), National Association of Counties (NACo), U.S. Conference of Mayors (USCM), the National Conference of Black Mayors (NCBM), National League of Cities (NLC), and other associations. In 2000, USTR addressed plenary sessions of the NGA, NACo, NCSL, and USCM regarding the Administration’s top trade priorities.

... This past year, resolutions endorsing Permanent Normal Trade Relations (PNTR) with China in order to open the Chinese market to U.S. goods and services were passed by WGA, USCM, CSG, and NCBM. Furthermore, 47 governors endorsed the passage of China PNTR.

OFFICE OF U.S. TRADE REPRESENTATIVE, TITLE 228 (2001), *available at* [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2001/2001\\_Trade\\_Policy\\_Agenda/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/2001/2001_Trade_Policy_Agenda/Section_Index.html) ().

They may strengthen the President's negotiating position, for example, by highlighting the depth or breadth of public concern or by giving the President a chip that may be bargained (through preemption, if need be).

State action may complement federal policy. An example of complementarity is found in the practices of the Office of Global Security Risk ("OGSR") of the Securities and Exchange Commission ("SEC"). The purpose of OGSR is to require issuers (i.e., companies issuing securities in the United States), mainly foreign issuers, to provide "enhanced disclosure" about their activities in countries of foreign policy concern.<sup>148</sup> This effort has focused on countries designated by the Secretary of State as "state sponsors of terrorism,"<sup>149</sup> including Sudan. Ordinarily, the SEC

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<sup>148</sup> See Perry S. Bechky & Danforth Newcomb, *SEC Requires Enhanced Disclosure of Dealings with Disfavored Countries*, 1 (July 2006), [http://www.shearman.com/files/Publication/7960a3e3-35ea-4699-b975-086107b9d970/Presentation/PublicationAttachment/0423465c-771f-4eb1-8acb-17f8a02e3327/LIT\\_073106.pdf](http://www.shearman.com/files/Publication/7960a3e3-35ea-4699-b975-086107b9d970/Presentation/PublicationAttachment/0423465c-771f-4eb1-8acb-17f8a02e3327/LIT_073106.pdf); H.R. REP. NO. 108-221, at 151 (2003) (advocating "enhanced disclosure requirements based on the asymmetric nature of the risk to corporate share value and reputation stemming from business interests in these higher risk countries").

<sup>149</sup> The House Committee Report that led to the establishment of OGSR expressed concern about "companies with ties to countries that sponsor terrorism and countries linked to human rights violations," specifically naming Sudan. See H.R. REP. NO. 108-221, at 151 (2003). The emphasis on terror designation came to the fore, however, when the Committee described the mission of OGSR in terms that thrice mentioned "State Department-designated terrorist-sponsoring states," without further mention of human rights. *Id.* Of course, as in the case of Sudan itself, Congress may see meaningful connections between terrorism-sponsorship and gross disregard for human rights. Cf. 28 U.S.C. § 1605A(a)(2) (2006) (creating an exception to sovereign immunity as a defense to certain human rights claims brought against designated sponsors of terrorism).

The emphasis on terrorism may also be reconciled with another sometimes-mentioned focus of enhanced disclosure: countries subject to economic sanctions implemented by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury. See, e.g., Letter from Laura S. Unger, then-Acting Chair of the SEC, to Rep. Frank P. Wolf, at 3 (May 8, 2001) (on file with author) ("The fact that a foreign company is doing material business with a country . . . on OFAC's sanctions list is, in the SEC staff's view, substantially likely to be significant to a reasonable investor's decision about whether to invest in that company."). There is overwhelming overlap between countries subject to OFAC sanctions and countries designated as sponsors of terrorism. Countries currently designated by the Secretary of State as "state sponsors of terrorism"—the so-called Terrorist-4 or T-4—are Cuba, Iran, Sudan, and Syria. See U.S. Department of State, *State Sponsors of Terrorism*, <http://www.state.gov/s/ct/c14151.htm> (last visited Feb. 28, 2009) (listing the countries and their dates of designation). All are subject to OFAC sanctions, though Syria less so than the other three. See 31 C.F.R. Parts 515 (Cuba), 538 (Sudan), 542 (Syria), 560 (Iran) (2008). The other

requires issuers to disclose information material to a decision by a reasonable investor whether to buy, sell, or hold securities.<sup>150</sup> The SEC maintains that OGSR operates within the framework of the traditional materiality standard for disclosure, on the view that even dealings with terrorist countries that are not “quantitatively material” may be “qualitatively material”<sup>151</sup> because they present disproportionate risks.<sup>152</sup> As evidence of these disproportionate

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three countries designated in the recent past—Iraq, Libya, and North Korea—had also all been subject to OFAC sanctions. *See* 31 C.F.R. Parts 500 (North Korea), 550 (Libya), 575 (Iraq) (2002). Burma is the only major recent target of OFAC’s country-based sanctions programs not designated as a sponsor of terrorism. *See* 31 C.F.R. Part 537 (2008) (setting out the Burma sanctions regulations). In any event, OGSR practice emphasizes terror more than sanctions: there have been instances where OGSR required enhanced disclosure of dealings with terrorist-designated countries even when such dealings were not prohibited by OFAC. *See* Bechky & Newcomb, *supra* note 148, at 1 (describing heightened disclosure requirements for dealings with Libya after the Bush Administration suspended OFAC sanctions but before it rescinded Libya’s designation as a sponsor of terrorism).

<sup>150</sup> *See* JIM BARTOS, UNITED STATES SECURITIES LAW: A PRACTICAL GUIDE 214 (2006) (“[I]nformation should be considered material if there is a substantial likelihood that a reasonable investor would consider it material in making an investment decision or view the relevant facts as having significantly altered the total mix of information publicly available.”).

<sup>151</sup> The distinction between “quantitative materiality” and “qualitative materiality” is often made by the SEC Staff when requesting issuers to provide additional disclosure about business dealings with terrorist-designated countries in volumes that are financially immaterial to the issuers. For example, in comments on the 2007 annual report (20-F) filed by Tata Motors Limited, the Staff asked for additional information about Tata’s dealings with Iran, Sudan, and Syria:

You should address materiality in quantitative terms, including the approximate dollar amounts of any associated revenues, assets, and liabilities for the last three years concerning each referenced country. Also, address materiality in terms of qualitative factors that a reasonable investor would deem important in making an investment decision, including the potential impact of corporate activities upon a company’s reputation and share value.

*See* Tata Motors Limited, Letter to Cecilia Blye, Office of Global Security Risk, at 4 (May 21, 2008) (on file with author) [hereinafter Tata Response Letter].

<sup>152</sup> William Donaldson, then-Chairman of the SEC, testified to Congress that OGSR “will function within the traditional disclosure mission of the Commission,” adding that it “will focus on asymmetric risk” that may arise when an issuer has “operations or other exposure with or in areas of the world that may subject it and its investors to material risks, trends or uncertainties.” *See* Statement of William Donaldson, Testimony Concerning Fiscal 2005 Appropriations Request for the U.S. Securities and Exchange Commission (Mar. 31, 2004), <http://www.sec.gov/news/testimony/ts033104whd.htm> (last visited Feb. 22, 2009) [hereinafter Donaldson Testimony]. Donaldson echoes the view of

risks, OGSR regularly references state divestment measures.<sup>153</sup> Thus, state action assists federal policy by enabling the federal government to cite the state action in international discourse as justification for the federal policy.

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the House Committee report that led to the establishment of OGSR. See H.R. REP. NO. 108-221, at 151 (2003) (“[A] company’s association with sponsors of terrorism and human rights abuses, *no matter how large or small*, can have a material adverse effect on a public company’s operations, financial condition, earnings, and stock prices, all of which can negatively affect the value of an investment.”) (emphasis added).

<sup>153</sup> At the outset of OGSR, then-Chairman Donaldson specified that its mission would include consideration, *inter alia*, of “whether a company faces public or government opposition, boycotts, litigation, or similar circumstances that are reasonably likely to have a material adverse impact on a company’s financial condition or results of operations.” Donaldson Testimony, *supra* note 152. The SEC Staff comments to Tata Motors provide an example in practice:

We note, for example, that Arizona and Louisiana have adopted legislation requiring their state retirement systems to prepare reports regarding state pension fund assets invested in, and/or permitting divestment of state pension fund assets from, companies that do business with countries identified as state sponsors of terrorism. The Missouri Investment Trust has established an equity fund for the investment of certain state-held monies that screens out stocks of companies that do business with U.S.-designated state sponsors of terrorism. The Pennsylvania legislature has adopted a resolution directing its legislative Budget and Finance Committee to report annually to the General Assembly regarding state funds invested in companies that have ties to terrorist-sponsoring countries. States including California, Connecticut, Maine, New Jersey, and Oregon have adopted, and other states are considering, legislation prohibiting the investment of certain state assets in, and/or requiring the divestment of certain state assets from, companies that do business with Sudan. A number of states have adopted or are considering legislation regarding the investment of certain state assets in, and/or requiring the divestment of certain state assets from, companies that do business with Iran. Your materiality analysis should address the potential impact of the investor sentiment evidenced by such actions directed toward companies that have operations associated with Iran, Sudan, and Syria.

Tata Response Letter, *supra* note 151, at 4. This may be abbreviated as: “the federal government, various state and municipal governments, and numerous universities and other institutional investors have proposed or adopted divestment or other initiatives regarding investment in companies that do business with state sponsors of terrorism.” See, e.g., Cummins Inc., Letter to Cecilia Blye (Aug. 22, 2008) (on file with author). Intriguingly, when the SEC asked Cummins about public reports that its joint venture project in China had sold engines for trucks sold to Sudan, Cummins responded by describing its effort to stop such sales by its Chinese partner and noting, “Cummins’ actions prompted the Sudan Disinvestment Task Force to remove the Company from its watch list in August 2007 and to commend Cummins publicly for its response to the situation.” *Id.*

### 3.2.5. *Final Remarks about Divestment as Democratic Process*

Critics of divestment generally emphasize foreign policy, invoking in particular the mantra (discussed *infra* Section 4) that the nation must speak with “one voice” in foreign policy.<sup>154</sup> Proponents, by contrast, often shy away from foreign policy. Proponents often focus instead on domestic considerations like the right and duty of each state to manage state-controlled assets.<sup>155</sup> Some claim that divestment is warranted under ordinary principles of asset management, arguing for example that companies with investments in target countries face greater risks (including expropriation) or are likely to underperform more socially-responsible companies in the longer term.<sup>156</sup> These claims are not entirely persuasive.<sup>157</sup> Nor are they necessary. States may

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<sup>154</sup> See, e.g., Benczkowski Letter, *supra* note 12, at 67–68 (stressing foreign-relations objections to divestment); Lucien Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245, 315 (2006) (same).

<sup>155</sup> For example, the Senate Banking Committee grounds its support for SADA on the need of states to manage “risks to profitability, economic well-being, and reputations, arising from association with investments in a country subject to international sanctions.” S. REP. NO. 110–213, at 3 (2007).

<sup>156</sup> See, e.g., OLC, *South African Divestment*, *supra* note 81, at 62 (stating that “[a] state for instance, may decide not to invest in a company doing business in South Africa because it believes that there is a large risk of revolution and, thus, of expropriation in that country.”).

<sup>157</sup> A 2004 study says:

A stream of scholarly and applied research has sought to determine whether the out-performance argument is borne out in practice. . . . Although the literature is inconclusive regarding systematic SRI outperformance, it does suggest that actively managed SRI funds do not underperform their conventional counterparts. . . . The reason for correlations between the performance of conventional and SRI funds may be that the portfolios of SRI funds are not markedly different to those of conventional mutual funds.

Matthew Haigh & James Hazelton, *Financial Markets: A Tool for Social Responsibility?*, 52 J. BUS. ETHICS 59, 65 (2004). In this regard, one would expect that a portfolio constructed in accordance with the dominant targeted approach to Sudan divestment would not be “markedly different” from a conventional portfolio, because the Sudan Divestment Task Force only recommends disinvestment from 23 companies. See Sudan Divestment Task Force, *supra* note 52, at 5–10. By way of rough comparison, a 1980 study found that excluding eighteen named companies from the S&P 500 created an uncompensated 1% increase in risk. See STUART A. BALDWIN ET AL., PENSION FUNDS & ETHICAL INVESTMENT: A STUDY OF INVESTMENT PRACTICES AND OPPORTUNITIES: STATE OF CALIFORNIA RETIREMENT SYSTEMS, 102–03, appx. A (1980). Langbein and Posner, strong critics of SRI, agree that, “[i]f only token exclusions from the portfolio are made, the costs in underdiversification are slight,” while stressing that such a

properly and openly express views to influence federal formulation of foreign policy.

This pluralistic approach to making foreign policy is noisy, even cacophonous, to be sure. It enables participation in foreign policy formulation by a plethora of state officials who have neither expertise in foreign policy nor responsibility to execute the resulting decisions. It is, however, democratic. As a society, we do not believe that individuals should be obliged to demonstrate foreign policy expertise as a precondition to speaking about foreign policy, petitioning Congress about foreign policy, or voting on the basis of foreign policy. Nor should we foreclose those individuals from attempting to work through the governments closest to them to build support in Congress for their foreign policy objectives.

This endorsement of the democratic virtues of messiness recalls the conclusion to Robert Cover's important article about the benefits of having "redundant" federal and state courts:

[T]he inner logic of "our federalism" seems to me to point more insistently to the social value of institutions in conflict with one another. It is a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts. It is that view of federalism that we ought to embrace.<sup>158</sup>

It may be an even more "daring system" that permits "tensions and conflicts" to be displayed in the domestic formulation of foreign policy.<sup>159</sup> But it also seems, at least to some extent, to be

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limited approach to divestment is "arbitrary," unprincipled, and incapable of producing meaningful "social or moral benefits." Langbein & Posner, *supra* note 72, at 89; accord Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 829 & n.118 (1993) (finding that even during a period when divestment from South Africa caused some funds to underperform, mainly because they excluded many large businesses at a time when large businesses outperformed smaller businesses, "there is no perceptible effect on fund performance" among funds that limited divestment to companies failing to comply with the Sullivan Principles "because the number of firms excluded is so small").

<sup>158</sup> Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981).

<sup>159</sup> Cover does not address the application of his argument to foreign policy formulation, but some scholars have relied on Cover's ideas in the international context. See Berman, *supra* note 15, at 1210-18 (applying Cover's arguments for jurisdictional redundancy to several examples in international criminal law); Ahdieh, *supra* note 14, at 41 (applying Cover's arguments for jurisdictional

both inevitable and desirable in an open, robust democracy. It is to be hoped that a forum open to debate among many speakers will generate not only noise but also wisdom through competition of ideas and priorities. This is what we expect in domestic policy-making. As so many other lines between “the foreign” and “the domestic” blur, shift, fade or even vanish in this era of globalization, it cannot and should not be expected that this particular divide should persist eternally and insuperably. A degree of federal accommodation of state divestment should be expected and welcomed.

To be sure, it is to be hoped that states will demonstrate restraint and prudence, taking care both in the choice of subjects triggering divestment and in the manner in which divestment is implemented.<sup>160</sup> Yet, as Cover properly notes, “Unquestionably, my perverse perspective may be carried too far. I, ultimately, do not want to deny that there is value in repose and order.”<sup>161</sup> Should questions arise whether the states have “carried too far,” it is the job of Congress (with appropriate restraint of its own) to determine when to tolerate state divestment, when to encourage it, and when to impose “repose and order” upon it.<sup>162</sup>

### 3.3. *Divestment as Expression*

Having already considered arguments for state divestment based on its potential for economic and political impact, this section discusses the extent to which divestment might also be justified purely on expressive values—that is, based on the inherent value of self-expression wholly apart from any impact

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redundancy to advocate a theory of “intersystemic governance” that allows a role for states in U.S. foreign policy). Other scholars have made similar points about the value of “debate” or “conflict” in making foreign policy. See, e.g., Bilder, *supra* note 93, at 829 (stating that “we have never believed that dissent should be stifled in the name of efficiency, or that our nation would be better off if government policy were free from challenge, discussion and debate.”); Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 *FORDHAM L. REV.* 411, 435 (2008) (stating that “the tension between subnational and national policy approaches, while at times uncomfortable and destabilizing, also has important benefits.”).

<sup>160</sup> See Bilder, *supra* note 93, at 831 (arguing that the states must “take principal responsibility for ensuring that their activities stay within constitutionally permissible and appropriate bounds”).

<sup>161</sup> Cover, *supra* note 158, at 682.

<sup>162</sup> See discussion *infra* notes 294–318 and accompanying text (discussing SADA as a political standard).

that the divestment *qua* speech might have on target companies or the democratic process.

Divestment is symbolic speech, which is protected and valued in our society even when lacking in any political or economic impact. In this regard, one might agree with Alexander Meiklejohn that freedom of speech is essential to democracy,<sup>163</sup> without accepting that the needs of the democratic process are the only valid justification for free speech.<sup>164</sup>

As Douglas Kysar has argued in an analogous context, when consumers make decisions whether to buy goods based on whether the goods are produced in accordance with methods they regard as socially acceptable, they can “project their public views and practice their core moral convictions.”<sup>165</sup> That is, the consumer can “vote[] with one’s dollars” and thereby serve “expressive and ethical dimensions” wholly apart from whether the consumer’s decision has any “impact on the external world.”<sup>166</sup> For example, a consumer may legitimately decide to buy only “dolphin-safe” tuna as an expression of her opposition to fishing methods that harm neighboring dolphin populations, even if she lacks any expectation that her action will cause either tuna fleets to change their fishing practices or Congress to legislate fishing standards.<sup>167</sup> As with Kysar’s consumer, so too for an individual investor, who is free to express her ethical values by divesting personally from companies

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<sup>163</sup> See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that free speech is a necessity of political self-governance).

<sup>164</sup> As Vincent Blasi notes, the political process justification alone excludes “literature or scientific inquiry, an unsettling prospect even for minimalists. . . .” Vincent Blasi, *Free Speech and Good Character*, 46 *UCLA L. REV.* 1567, 1569 (1999). Blasi discusses two other commonly accepted rationales for free speech: human dignity/autonomy and “the search for truth.” *Id.* at 1568–69. He argues that greater emphasis should be given today to an additional rationale that “plausibly can be said to form the spine of each of the renowned defenses of free speech produced by John Milton, John Stuart Mill, Oliver Wendell Holmes, and Louis Brandeis”: the role of speech in developing “good character.” *Id.* at 1569.

<sup>165</sup> Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 *HARV. L. REV.* 526, 581 (2004).

<sup>166</sup> *Id.* at 581, 619.

<sup>167</sup> See *id.* at 540–52 (describing the Tuna/Dolphin case). In a similar vein, Cass Sunstein cites the expressive function served when “a pacifist . . . refuse[s] to take a job in a munitions factory, even if the refusal will have no salutary effects.” Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2027 (1996).



active in Sudan without regard to any expectation of “impact on the external world.”

Yet, even accepting the analogy of state speech to collective speech by the state’s citizenry, it is troubling to extend Kysar’s principle from the individual investor to the state *qua* investor. That would effectively license the state to behave, as individuals are free to do, wastefully—that is, without regard to the likely benefits and costs of its action. By stipulation, this section addresses circumstances where the speech provides neither economic nor political benefits. And divestment does impose costs on a state and its pension-fund beneficiaries; even if diligently minimized, these costs will always exceed the costs of sense-of-the-legislature resolutions, gubernatorial gestures, and the like.

State speech, therefore, or at least state divestment *qua* speech, might reasonably be limited to speech with important political (per Meiklejohn) or economic impact.<sup>168</sup> In a similar vein, Sunstein cautions against overstating the intrinsic value of expressive legislation without due regard to the likely consequences of the law: “good expressivists are consequentialists too.”<sup>169</sup>

If, as seems reasonable, state divestment ought to be limited to rare circumstances (lest, *inter alia*, it unduly limit opportunities for diversification of an investment portfolio), then divestment is best focused on those circumstances where there is a reasonable expectation of an “impact on the external world” affecting a matter of grave concern. But that conclusion, it should be said, is directed to the good judgment and discretion of the several states; it establishes only a rule of prudence, not of law.

A word should be added here about the extent to which associative values affect this discussion of expressive values. For most disinvestment, this distinction collapses because the very point of the disassociation is expression. There may be circumstances, however, where a meaningful distinction can be drawn. Consider the views of Derek Bok, the President of Harvard

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<sup>168</sup> In this regard, scholars who invoke the First Amendment to defend state divestment *qua* speech do so comfortably within the confines of Meiklejohn’s approach. See Porterfield, *supra* note 87, at 31–35 (arguing that states have First Amendment rights under, *inter alia*, the “modern democratic process view of the First Amendment”); McArdle, *supra* note 112, at 817 (positing that “the self-government theory underlying the first amendment allows state and local government units to be instruments for citizen access to the discourse on national policy without jeopardizing the conduct of foreign policy”).

<sup>169</sup> Sunstein, *supra* note 167, at 2045.

University during the anti-apartheid era and again more recently. Bok generally opposes disinvestment as contrary to the mission of a university endowment,<sup>170</sup> but he approves using Harvard's voice and vote as shareholder to influence company conduct on the ground that this is part of being a responsible shareholder.<sup>171</sup> And, if the company refuses to change its practices:

[t]he University may occasionally sell the stock of a corporation because of a disagreement with its policies. Such action, however, is not taken to pressure the company into conforming with Harvard's views but occurs because the University does not wish to continue an association with a firm that fails to live up to minimum ethical standards and offers no reasonable prospect of doing so in the future.<sup>172</sup>

Bok's approach is prospective, reserving disinvestment for circumstances where the company not only failed ethically in the past, but "offers no reasonable prospect" for improvements.<sup>173</sup> This approach accords with the ordinary, forward-looking logic of investment decisions: "A portfolio manager will never justify a buying decision by referring to the fact that the price of a stock has gained. Always, he will refer to the fact that he expected the stock to gain."<sup>174</sup> Bok's approach is thus genuinely associative, and not

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<sup>170</sup> See Derek Bok, Statement of Derek Bok on Investment Policy (1984), reprinted in JOHN H. LANGBEIN ET AL., *DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS* 100-01 (1985) (arguing that "the line is crossed when a university goes beyond expressing opinions and tries to exert economic pressure . . . in order to press its views on outside organizations.").

<sup>171</sup> See *id.* at 99. "We have cast our ballot with care in shareholder resolutions concerning South Africa, often voting to urge corporations to subscribe to the Sullivan Principles, sometimes voting to have a company withdraw entirely from South Africa. We have engaged in intensive dialog with corporations to persuade them to improve wage and employment practices for black South African employees and to improve the quality of life outside the workplace for these employees, their families, and nonwhites in general.").

<sup>172</sup> *Id.* at 101 n.1.

<sup>173</sup> This is also the approach favored by the Norwegian Government Pension Fund, a notable practitioner of SRI. See Jos Leys et al., *A Puzzle in SRI: The Investor and the Judge*, 84 J. BUS. ETHICS 221, 230-32 (2009) (discussing the Norwegian decisions to disinvest from Freeport McMoRan, but not from Total, based on different assessments about the companies' likelihood of continuing unacceptable behavior).

<sup>174</sup> *Id.* at 225.

expressive, in nature. It is not different in kind from other decisions by an investor to sell shares because of concerns about company management.

Should a state adopt Bok's approach, the associative values at stake can provide an independent justification for divestment following an unsuccessful effort at engagement, but this justification seems likely to remain limited to the rare ("occasional") case.

#### 4. DIVESTMENT AND THE CONSTITUTION

##### 4.1. *The "One Voice" Theory of Foreign Relations*

The dominant view of the role of the states in foreign affairs is encapsulated in the Supreme Court's pronouncement that states "do[] not exist" in matters of foreign relations.<sup>175</sup> But this pronouncement does not describe reality. The states "exist":<sup>176</sup> the federal government is cognizant of states in foreign relations, as are other nations and international tribunals;<sup>177</sup> 694 communities in all

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<sup>175</sup> *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.").

<sup>176</sup> See generally Julian Ku, *The State of New York Does Exist*, 82 N.C. L. REV. 457 (2004) (arguing that states play an important role in compliance with international legal obligations and that this role may "foster more, rather than less, development of international law within the United States").

<sup>177</sup> For example, the parallel WTO cases brought by the European Union and Japan against Massachusetts' Burma law alleged violations of commitments made by the United States specifically addressing procurement by Massachusetts. See World Trade Organization Uruguay Round Agreement on Government Procurement, Oct. 16, 2002, Appx. I, United States, Annex 2, Sub-Central Government Entities which Procure in Accordance with the Provisions of this Agreement, WT/Let/431, available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/appendices\\_e.htm#us](http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#us) (last visited Feb. 22, 2009) (detailing the U.S. commitment with respect to state procurement). In fact, the United States did not require Massachusetts to accept these commitments, but instead invited states to participate voluntarily. See, e.g., Matthew Schaefer, *Note on State Involvement in Trade Negotiations, the Development of Trade Agreement Implementing Legislation, and the Administration of Trade Agreements*, in JOHN H. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 137-38 (4th ed. 2001). More generally, the Office of the U.S. Trade Representative has a variety of mechanisms dedicated to promoting federal-state coordination on trade policy, including the Office of Intergovernmental Affairs and Public Liaison, the Intergovernmental Policy Advisory Committee, and a network of State Single Points of Contact. See OFFICE OF U.S. TRADE REPRESENTATIVE, 2008 TRADE POLICY AGENDA AND 2007 ANNUAL REPORT 232-36 (2008), available at [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2008/2008\\_Trade\\_Policy\\_Agenda/Section](http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_Trade_Policy_Agenda/Section)

fifty states have “sister city” relationships with 1,749 communities in 134 countries, through a program financed in part by federal grants,<sup>178</sup> thirty-nine states had overseas commercial offices as of 1994;<sup>179</sup> states may act in breach of, or in compliance with, treaties and customary norms;<sup>180</sup> and, as Louis Henkin shows, “inevitably, the states touch foreign affairs even in minding their proper business, since foreign nationals live or do business in a state pursuant to its laws . . . .”<sup>181</sup>

It is often said that our Nation “speaks with one voice” in foreign affairs, with the President as its “sole organ.”<sup>182</sup> Sarah

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[\\_Index.html?ht=](#) (last visited Feb. 22, 2009). (“[The] Office of Intergovernmental Affairs and Public Liaison . . . administers the federal trade advisory committee system and provides outreach to, and facilitates dialogue with, state and local governments . . . .”).

<sup>178</sup> Sister Cities International, Sister Cities International Statistics, <http://www.sister-cities.org/about/statistics.cfm> (last visited Feb. 27, 2009). Judith Resnik points to the federal funding of the sister city program as an example of “cooperative federalism.” Resnik, *supra* note 16, at 48.

<sup>179</sup> EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 68–69 (1998).

<sup>180</sup> The possibility of state breaches of international law has been foreseen since our founding and is uncontroversial as a matter of international law. *See, e.g.,* THE FEDERALIST NO. 80, at 446 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“The Union will undoubtedly be answerable to foreign powers for the conduct of its members.”); *see also* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, art. 4(1), U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001) (“The conduct of any State organ shall be considered an act of that State under international law . . . whatever its character as an organ of the central government or of a territorial unit of the State.”).

The obverse proposition, that states may comply with international law, should be both obvious and uncontroversial in the ordinary course—though Powell and Resnik (among others) flag the interesting trend of states opting to comply with norms established in treaties, such as the Kyoto Protocol and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), not (yet) ratified by the United States. *See* Powell, *supra* note 14, at 276–80; Resnik, *supra* note 16, at 49–62; *cf.* Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 760–61 (2006) (describing a “norm portal” as “an alternative pathway” for human rights norms to enter a domestic legal system without the formal approval of the national government). For a contemporary example where the states of Oklahoma and Texas took sharply opposed approaches towards compliance with international law, *see infra* notes 186 to 198 and accompanying text.

<sup>181</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996).

<sup>182</sup> *See, e.g.,* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (describing the “President as the sole organ of the Federal government in the field of international relations”); *Japan Line, Ltd. v. County of Los Angeles*,

Cleveland exposes this as a myth.<sup>183</sup> She gives examples of state resolutions expressing views on foreign policy dating back to the undeclared war with France in 1798 and the war of 1812,<sup>184</sup> and of a variety of ways in which the federal government has tolerated and even abetted state concerns affecting foreign relations. As inaccurate as “one voice” has proved historically as a description, trends towards both the disaggregation of states and the rise of non-state actors on the international plane will render it unrecognizable.<sup>185</sup>

Doctrinally, it is difficult to see how the “one voice” notion can be said to survive the Supreme Court’s recent decision in *Medellín v. Texas*.<sup>186</sup> The United States is a party to a consular treaty that requires the police to inform aliens under arrest “without delay” of their right to receive consular assistance from their home government.<sup>187</sup> In practice, as so much of our criminal justice system is left to the states, the burden of compliance with this notice rule falls mainly on the states. “[T]he individual States’ (often confessed) noncompliance with the treaty has been a vexing

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441 U.S. 434, 452-53 (1979) (holding that a California tax impeded the nation’s ability to “speak with one voice”); *Crosby v. United States*, 530 U.S. 363, 381 (stating that Massachusetts’ Burma law “compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments”); see also Cleveland, *supra* note 6, at 979-84 (reviewing cases).

<sup>183</sup> See generally Cleveland, *supra* note 6.

<sup>184</sup> *Id.* at 993.

<sup>185</sup> Even the federal government predicts with “relative certain[y]” that “[t]he international system—as constructed following the Second World War—will be almost unrecognizable by 2025 owing to . . . [among others] the growing influence of nonstate actors,” such as “businesses, tribes, religious organizations, and criminal networks.” U.S. NAT’L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD iv, vi (2008), available at [http://www.dni.gov/nic/PDF\\_2025/2025\\_Global\\_Trends\\_Final\\_Report.pdf](http://www.dni.gov/nic/PDF_2025/2025_Global_Trends_Final_Report.pdf) (last visited Feb. 22, 2009). Indeed, the Executive Branch itself speaks more often abroad with multiple voices. Compare Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997) (lauding the potential of transnational networks of regulators, judges, militaries, etc.), with George F. Kennan, *Diplomacy Without Diplomats?* 76 FOREIGN AFF., 198, 204 (1997) (lamenting trends towards “fragmented diplomacy”).

<sup>186</sup> *Medellín v. Texas*, 552 U.S. \_\_\_, 128 S.Ct. 1346 (2008) [hereinafter *Medellín II*]. For a variety of perspectives on this case, see generally David J. Bederman, *Agora: Medellín: Medellín’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529 (2008) (presenting articles by Professors Bederman, Bradley, Charnovitz, and Vásquez).

<sup>187</sup> Vienna Convention on Consular Relations and Optional Protocol on Disputes, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77 (1970).

problem,”<sup>188</sup> embroiling the United States in international controversies with Germany, Paraguay and most notably Mexico.<sup>189</sup> On behalf of fifty-one Mexican nationals on death row in the United States, Mexico successfully challenged the U.S. breach of the consular treaty before the International Court of Justice. As a remedy, the ICJ ordered the United States to ensure that— notwithstanding any “procedural default” bars under domestic law to objections raised for the first time after conviction—the covered individuals receive further process to determine whether they had suffered any prejudice from the breach.<sup>190</sup> Although the United Nations Charter obliges the United States to comply with ICJ orders,<sup>191</sup> the federal government initially left compliance to the discretion of the states. In 2004, the Governor of Oklahoma voluntarily complied with the ICJ order by commuting the sentence of a covered individual from death to life.<sup>192</sup> Texas, however, refused to implement the ICJ order, insisting on its procedural default bar to new arguments. In 2005, when the Supreme Court was to decide whether the ICJ order preempted application of Texas’ procedural default rule, President Bush issued a “memorandum” requiring the states to comply with the ICJ order.<sup>193</sup> Texas persisted with its objections. The issue returned to the Supreme Court, with the weight of the Presidential action added to that of the ICJ order itself. Yet the Court sided with Texas, apparently finding a “presumption of non-self-

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<sup>188</sup> *Medellín v. Dretke*, 544 U.S. 660, 674 (2005) (O’Connor, J., dissenting) [hereinafter *Medellín I*].

<sup>189</sup> See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (concerning U.S. failure to notify Mexican nationals); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27) (concerning U.S. failure to notify German nationals); *Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248 (Apr. 9) (concerning U.S. failure to notify Paraguayan nationals).

<sup>190</sup> *Avena Judgment*, 2004 I.C.J. at para. 133–34, 153(9).

<sup>191</sup> See U.N. Charter art. 94, para. 1 (“Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”).

<sup>192</sup> See John R. Crook, ed., *Oklahoma Court Finds Accused Was Prejudiced by Lack of Consular Notification in Death Penalty Case*, 99 AM. J. INT’L L. 695, 695–96 (2005) (recounting the actions taken by Oklahoma to comply with the *Avena* judgment); Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT’L L. 163, 171–72 (2004) (same).

<sup>193</sup> Memorandum from President George W. Bush to the U.S. Attorney General (Feb. 28, 2005), reprinted in 44 INT’L LEG. MATERIALS 964 (2005).

execution” of treaties robust enough to impede even Presidential efforts to prevent future breaches of one treaty intended to remedy past breaches of another treaty.<sup>194</sup> Notably, the Court so decided without a single mention of “one voice” or “sole organ.” Moreover, even though the Court recognized that the United States has a duty under international law to comply with the ICJ order and the natural consequence of its reasoning is that Congress should authorize the President to implement the ICJ order in domestic law<sup>195</sup>, it later refused to stay Texas’ execution of José Medellín for a reasonable period of Congressional consideration.<sup>196</sup> The Court thus knowingly enabled Texas to execute a Mexican national in deliberate violation of U.S. treaty obligations, contrary to the express preference of the President to resolve an ongoing controversy with the Government of Mexico.<sup>197</sup> The Court failed at perhaps its most basic duty: to prevent “the peace of the whole” from being “left at the disposal of a part.”<sup>198</sup>

Cleveland aptly proposes replacing the “one voice” concept with that of a Chorus.<sup>199</sup> The Chorus metaphor may be developed

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<sup>194</sup> See *Medellín II*, 128 S.Ct. at 1380–82 (Breyer, J., dissenting) (“[I]nsofar as today’s majority . . . erects clear statement presumptions designed to help find an answer [whether a treaty self-executes], it is misguided. . . . At best the Court is hunting the snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.”); *accord id.* at 1372 (Stevens, J., concurring in the judgment) (agreeing with the dissent that constitutional and treaty law “do not support a presumption against self-execution”). *But see id.* at 1366 (Roberts, C.J., writing for the Court) (rejecting the dissent’s reading as “a caricature of the Court’s opinion”).

<sup>195</sup> See *id.* at 1367 (“[W]hile the ICJ’s judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law . . .”).

<sup>196</sup> See *Medellín v. Texas*, 554 U.S. \_\_\_, 129 S.Ct. 360 (2008) [hereinafter *Medellín III*] (denying Medellín’s request to stay his execution); James C. McKinley Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 6, 2008, at A19.

<sup>197</sup> See *Medellín III*, 129 S.Ct. at 364 (Breyer, J., dissenting) (“[T]o permit this execution to proceed forthwith places the United States irremediably in violation of international law and breaks our treaty promises,” even though “the President of the United States has emphasized the importance of carrying out our treaty-based obligations in this case . . .”).

<sup>198</sup> See THE FEDERALIST NO. 80 (Alexander Hamilton) (explaining the scope of the federal judicial power).

<sup>199</sup> Cleveland, *supra* note 6, at 1014 states:

The [Crosby] Court thus failed to recognize the possibility and the reality that state and local voices do not inherently clash with national policy, but may instead help to promote a richer harmony of action by the United States as a whole. The ultimate power of the national government to

further, as the President sometimes: sings solo; sings (more or less harmonious) duets with Congress or the judiciary (or trios with both); remains silent to allow other voices to be heard; conducts a chorus of other voices; and competes with others (most notably, Congress) to determine what song will be sung when, by whom, in what key, and at what tempo and volume. Accordingly, in *Barclays*, the Supreme Court recognized Congress, not the President, as “the preeminent speaker” on foreign commerce, and noted that Congress “decided to yield the floor to others,” namely the states, in that case.<sup>200</sup>

In a country said to have 39,000 local governments,<sup>201</sup> allowing them any voice at all surely presents diplomatic challenges for the President. But it also presents diplomatic opportunities. Conducting an orchestra may present greater coordination challenges than singing solo or leading a string quartet, but it also offers a much richer and wider range of musical possibilities.<sup>202</sup> The President may choose to remain silent while letting others sing, and may even, offstage, encourage others to sing.<sup>203</sup> The President may encourage the states to prevail on Congress to enact legislation empowering him to pursue foreign policy objectives.<sup>204</sup> He may call state speech to the attention of other governments to put (or escalate) items on the diplomatic agenda or to strengthen his negotiating position, for example, by highlighting the depth or breadth of public concern or by giving the President a chip that may be bargained (through preemption, if need be).

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silence Massachusetts was not in question; its constitutional authority to do so is clear. But where the national branches have tolerated and abetted a chorus that includes the states, the Court should not employ implied preemption to protect the political branches from having to exercise the authority they have been constitutionally granted.

<sup>200</sup> *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 328–29 (1994).

<sup>201</sup> *Natsios*, 181 F.3d at 54.

<sup>202</sup> A. Bartlett Giamatti nicely captures both the possibilities and frustrations suggested here, when describing his own presidency of Yale University: “On a good day, I view the job as directing an orchestra. On the dark days, it is more like that of a clutch engaging the engine to effect forward motion, while taking greater friction.” William E. Geist, *The Outspoken President of Yale*, N.Y. TIMES MAG., Mar. 6, 1983, at 42.

<sup>203</sup> Cf. HENKIN, *supra* note 181, at 164–65 (“Domestic considerations apart, there might be foreign relations reasons why the political branches might deem it desirable to leave some matters to the states rather than deal with them by formal federal action.”).

<sup>204</sup> An example of this is discussed *supra* note 147.



As an alternative to widening the voice metaphor, one might simply abandon it. Porterfield reminds us of Judge Cardozo's warning that "metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."<sup>205</sup> Here, while the voice metaphor conjures images of expression, the Court does not genuinely concern itself with expression, but with the impact of state regulation on Presidential control over diplomacy.<sup>206</sup> Hence, in *Giannoulis*, the district court properly insisted that the threshold is actual interference with federal policy, not mere expression.<sup>207</sup>

#### 4.2. Manifestations of Constitutional Doctrine

Flawed as the "one voice" notion is, it manifests itself in three constitutional standards by which state actions implicating foreign affairs are typically judged: preemption by federal statute, incompatibility with the dormant effects of the Foreign Commerce Clause, and impermissible intrusion into the exclusive preserve of the federal government to control foreign affairs.

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<sup>205</sup> Porterfield, *supra* note 87, at 16, n. 105 (quoting *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926)).

<sup>206</sup> See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) ("Quite simply, if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.' 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." (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000))).

<sup>207</sup> See *Nat'l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731, 744-45 (N.D. Ill. 2007):

Though the cases place an emphasis on the ability of the president to speak for the nation with "one voice," . . . the inquiry quite obviously does not end there. For example, *Zschernig* and *Garamendi* would not appear to prohibit a state or local government from issuing a resolution condemning the actions of a foreign government, even if the national government had made no such declaration or did not support such a view. In such a case, although the United States would not be speaking with "one voice," the absence of actual hindrance to the national government's conduct of foreign policy would appear to preserve the state or local enactment. Without some tangible effect or the risk of such an effect, it would be difficult to see how a state or local policy could interfere with the national government's conduct of foreign affairs . . . Rather, *Zschernig* and *Garamendi* are both concerned with the practical effect a state law might have on the national government's ability to conduct foreign policy on behalf of the United States.

Massachusetts' Burma law may be mentioned here as an organizational reference point, because the courts scrutinized it under all three of these standards. The federal district court in Massachusetts held the law unconstitutional under the dormant foreign affairs power.<sup>208</sup> It rejected the statutory preemption argument and declined to reach the issue of dormant foreign commerce.<sup>209</sup> The First Circuit affirmed, *sub nom. Natsios*, holding the Massachusetts law unconstitutional on all three grounds.<sup>210</sup> Although the Supreme Court granted certiorari on all three issues,<sup>211</sup> it affirmed in *Crosby v. Nat'l Foreign Trade Council*, solely on the ground that Massachusetts' Burma law is "invalid . . . owing to its threat of frustrating federal statutory objectives."<sup>212</sup> *Crosby* declined to address both the Commerce Clause and foreign-affairs power arguments.<sup>213</sup>

#### 4.2.1. Statutory Preemption

The power of Congress to preempt state law may be said to flow from the Supremacy<sup>214</sup> and Necessary and Proper Clauses of the Constitution.<sup>215</sup> Where Congress does not expressly preempt state law, the courts will imply preemption in three circumstances, which are "not rigidly distinct"<sup>216</sup>: where there is an actual conflict

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<sup>208</sup> See *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (holding that the Massachusetts Burma Law "unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs").

<sup>209</sup> *Id.* at 293.

<sup>210</sup> *Nat'l Foreign Trade Council v. Natsios*, 181 F. 3d 38, 45 (1st Cir. 1999).

<sup>211</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 371-72 (2000).

<sup>212</sup> *Id.* at 366.

<sup>213</sup> *Id.* at 374 n.8 ("Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline . . . to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause."); see also *Garamendi*, 539 U.S. at 440 n.4 (Ginsburg, J., dissenting) (describing *Crosby* as "a statutory preemption case").

<sup>214</sup> U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>215</sup> U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

<sup>216</sup> *Crosby*, 530 U.S. at 372 n.6 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (internal punctuation omitted)).

between federal and state law (“conflict preemption”); where Congress “occupies the field,” leaving no room for further state regulation of the same subject matter (“field preemption”); and where state law is an obstacle to the fulfillment of the objectives of the federal law (“obstacle preemption”).<sup>217</sup>

In *Crosby*, neither express preemption nor conflict preemption was at issue. The Court nominally declines to address field preemption, while construing obstacle preemption in a way that is “not rigidly distinct” from field preemption.<sup>218</sup> *Crosby* deems Massachusetts’ Burma law “an obstacle to the accomplishment of Congress’s full objectives” under the federal Burma statute, explaining:

We find that the state law undermines the intended purpose and “natural effect” of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma.<sup>219</sup>

Although the details of the statutory analysis depend on the particulars of the federal and state legislation at issue in *Crosby*, the Court’s approach suggests that it accepts, at least to some degree, the Clinton Justice Department’s argument that statutory preemption applies “more readily” in the international context.<sup>220</sup> Notably, the Court finds that Massachusetts law posed an obstacle to federal objectives in circumstances where it seems that Congress knew of the Massachusetts action, shared Massachusetts’ concerns, and cooperated with Massachusetts to enact a federal statute that did not expressly preempt Massachusetts law.<sup>221</sup> Its approach

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<sup>217</sup> See generally LAURENCE TRIBE, 1 AMERICAN CONSTITUTIONAL LAW §§ 6.28–.31, at 1172–1212 (3d ed. 2000).

<sup>218</sup> See *Crosby*, 530 U.S. at 372 n. 6.

<sup>219</sup> *Id.* at 373–74.

<sup>220</sup> See U.S. Amicus Brief in *Crosby*, *supra* note 84, at 14; see also *id.* at 30 (arguing that the “Supremacy Clause applies with special force to state laws that deal with foreign commerce and foreign policy”).

<sup>221</sup> *Crosby*, 530 U.S. at 377–78. One Congressional aide describes *Crosby* as having “no grounding in legislative reality.” Spiro, *supra* note 113, at 51 (summarizing comments of Steve Rademaker, chief counsel to the House International Relations Committee). The chief sponsor of Massachusetts’ Burma

reveals the influence of the “one voice” school, at the least with regard to the third Congressional objective mentioned by the Court: effective diplomacy. The Court writes:

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. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.<sup>222</sup>

Because *Crosby* purports to limit itself to statutory construction, but also arguably engages in non-statutory analysis, it “has provoked substantial academic commentary that is noteworthy for its widely differing interpretations of the opinion.”<sup>223</sup> Suffice to say, for present purposes, that broader readings of *Crosby* cast darker doctrinal clouds over state actions—with less regard for the details of either the federal or state statutes.<sup>224</sup>

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law similarly notes that *Crosby* “said that we had been preempted by the legislation that we of course helped to pass in the United States Congress. Powell, *supra* note 14, at 289–90 n.189 (2001) (quoting Byron Rushing).

<sup>222</sup> *Crosby*, 530 U.S. at 381.

<sup>223</sup> CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 400 (3d ed. 2008) (summarizing academic literature about *Crosby*).

<sup>224</sup> Sarah Cleveland warns that a broad reading of *Crosby* could “potentially disrupt two centuries of constitutional practice in foreign relations,” invalidating state actions long tolerated by Congress. Cleveland, *supra* note 6, at 1013; *see also id.* at 976 (same). Likewise, Resnik argues that too-ready invocation of implied preemption can “expand the unilateralism of [federal] executive authority”:

I am a critic of the new preemption rules in which judges shape quasi-constitutional doctrines limiting federalism’s iterative opportunities. I commend revisiting the growing presumption in favor of executive or congressional foreign affairs preemption, and flipping it in favor of local initiatives. Before finding that national action is the exclusive means of interacting with “the foreign,” judges ought to require specific national legislative directives as well as the presentation of detailed factual information about how concurrent or overlapping rules (federal and state) do harm national interests. By insisting on “clear statement rules” from Congress and specific factual predicates about the harms of concurrency before preempting local initiatives, the courts would be

#### 4.2.2. *The Dormant Foreign Commerce Clause*

The Commerce Clause authorizes the Congress to regulate foreign and interstate commerce.<sup>225</sup> Under longstanding judicial construction of this clause, it also has dormant (or negative) aspects that limit state interference with foreign and interstate commerce even in the absence of Congressional action.<sup>226</sup> This is not to say, of course, that the states are barred from any regulation of commerce whatsoever. Rather, there are areas where “local and national powers are concurrent,” in which “the Court in the absence of congressional guidance is called upon to make ‘delicate adjustment of the conflicting state and federal claims.’”<sup>227</sup>

In the domestic context, Supreme Court jurisprudence establishes that a state may act as an “ordinary market participant” without running afoul of the Dormant Interstate Commerce Clause.<sup>228</sup> The Court has never decided, however, whether the ordinary market participant doctrine applies to Foreign

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letting the “political safeguards of federalism” (to return to Wechsler’s phrase) serve as a primary mechanism to “safeguard nationalism.

Resnik, *supra* note 16, at 41–42. Berman agrees:

At the very least, courts should carefully interrogate the claimed justification of preemption to ensure that the local action at issue poses a real, rather than conjectural, threat to the federal government’s conduct. After all, pluralism is built into the structure of federalism, and so actions of localities to import international or foreign norms or signal solidarity with them should not easily be displaced.

Berman, *supra* note 15, at 1200–01.

<sup>225</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>226</sup> For an introduction to the plentiful case law and academic literature on the dormant Commerce Clause, see TRIBE, *supra* note 217, §§ 6.1–.25, at 1021–1159. For recent controversy, see Dep’t. of Revenue of Kentucky v. Davis, 128 S. Ct. 1801 (2008) (showcasing seven different judicial opinions on the interpretation and application of the dormant Commerce Clause).

<sup>227</sup> See Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 553 (1949)); Pike v. Bruce Church, 397 U.S. 137 (1970).

<sup>228</sup> See, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (“Nothing in the purposes animating the Commerce Clauses prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others.”); Reeves, Inc. v. Stake, 447 U.S. 429, 436–37 (1980) (“[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the marketplace. There is no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market.”).

Commerce<sup>229</sup>—and it differentiates between the Interstate and Foreign Commerce Clauses in certain respects, including reference to the “one voice” test for the latter.<sup>230</sup>

*Natsios* expressly invokes the “one voice” prong of Foreign Commerce doctrine as a ground for ruling against Massachusetts.<sup>231</sup> It also suggests two other doctrinal challenges for state divestment. First, the First Circuit considers it “unlikely that the market participant exception applies to the Foreign Commerce Clause,” while leaving a definitive ruling on this point “to another day and another case.”<sup>232</sup> Second, the First Circuit considers that Massachusetts had not acted as an ordinary market participant. The court characterizes Massachusetts as “attempting to impose on companies with which it does business conditions

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<sup>229</sup> See *Reeves*, 447 U.S. at 437 n.9 (1980) (“We have no occasion to explore the limits imposed on state proprietary actions by the ‘foreign commerce’ clause,” but such “scrutiny may well be more rigorous when a restraint on foreign commerce is alleged.”).

<sup>230</sup> See *Barclays*, 512 U.S. at 311 (following *Japan Line* because of “the special need for federal uniformity” in “the unique context of foreign commerce”); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (adding to Dormant Foreign Commerce analysis of state taxation consideration whether the tax creates risk of multiple taxation or prevents the nation from “speaking with one voice” when dealing with other nations). Saikrishna Prakash criticizes this line of cases as inappropriately creating multiple meanings of common language in a single sentence. See Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1162–65 (2003). But see Adrian Vermuele, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1175 (2003) (arguing that Prakash’s originalist textual arguments should not apply to Dormant Commerce analysis, as “[t]here is no Dormant Commerce Clause” to subject to intrasentence textual analysis) (emphasis in original).

<sup>231</sup> *Natsios*, 181 F.3d at 68–69.

<sup>232</sup> *Id.* at 65–66. The federal district court in Puerto Rico relied on *Natsios* in holding that the market participant rule does not apply to Foreign Commerce. See *Antilles Cement Corp. v. Calderon*, 288 F. Supp. 2d 187 (D.P.R. 2003). Other authorities, including the Reagan and Clinton Justice Departments, are to the contrary. See OLC, *South African Divestment*, *supra* note 81, at 50 n.4 (“Although the Court expressly reserved the question of whether the market participant doctrine applies to the state statutes that affect foreign, as opposed to interstate, commerce, we believe that the rationale for the distinction—that the Commerce Clause was intended to restrict a state’s ability to regulate but not its ability to participate in markets—applies equally to statutes that affect foreign commerce.”); U.S. Amicus Brief in *Crosby*, *supra* note 84, at 13–14 (“[I]n our view, the market-participant exception recognized under the dormant Interstate Commerce Clause extends at least in some measure to foreign commerce as well . . . .”); *Baltimore Board of Trustees*, 562 A.2d at 752–53 (holding the market participant rule applies to Foreign Commerce); *Trojan Tech., Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (same).

that apply to activities not even remotely connected to such companies' interactions with Massachusetts."<sup>233</sup> In the court's view, such concern for remote matters "goes beyond ordinary private market conduct."<sup>234</sup>

#### 4.2.3. *The Dormant Foreign Affairs Power*

The Constitution gives certain powers affecting foreign relations to the President,<sup>235</sup> the Congress,<sup>236</sup> the "treaty-makers,"<sup>237</sup> and the federal courts<sup>238</sup>—while simultaneously limiting participation in foreign affairs by the states.<sup>239</sup> The Constitution

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<sup>233</sup> *Natsios*, 181 F.3d at 63.

<sup>234</sup> *Id.* at 64–65; accord Lucien J. Dhooge, *Darfur, State Divestment Initiatives, and the Commerce Clause*, 32 N.C. J. INT'L L. & COM. REG. 391, 439 (2007) (arguing, inter alia, that *Natsios* renders the Illinois Sudan statute unconstitutional because that statute "is not proprietary, as it represents an economically irrational action that would not be taken by a private contracting party"). Contra OLC, *South African Divestment*, supra note 81, at 53:

[S]tate divestment statutes are plainly proprietary in nature. In refusing to invest its funds in or contract with corporations doing business in South Africa, a state is exercising the prerogatives and the powers that any private person or entity enjoys as a matter of contract and property rights. The state is not employing the sovereign power that it uniquely enjoys in its jurisdiction to compel action under the threat of punishment.

*Baltimore Board of Trustees*, 562 A.2d at 749–52; Benczkowski Letter, supra note 12, at 4 (arguing that SADA is "not necessary for States to engage in certain market-based divestitures"). The Clinton Justice Department agreed with *Natsios* that the Massachusetts Burma law improperly regulated "companies' conduct unrelated to their performance of contractual obligations to the State," but expressly distinguished divestment as potentially legitimate. See U.S. Amicus Brief in *Crosby*, supra note 84, at 26–29.

<sup>235</sup> See, e.g., U.S. CONST. art. II, § 2, cl. 1 (commander in chief of the army and navy); cl. 3 (receive ambassadors).

<sup>236</sup> See, e.g., U.S. CONST. art. I, § 8, cl. 10 (define offenses against the law of nations); cl. 11 (declare war).

<sup>237</sup> The President may make treaties with the "advice and consent" of the Senate, U.S. CONST. art. II, § 2, cl. 2, so the President and Senate may be collectively described as the "treaty-makers." See generally Louis Henkin, *The Treaty-Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956) (discussing relationships between the federal legislative and treaty powers).

<sup>238</sup> U.S. CONST. art. III, § 2, cl. 1 (cases arising under treaties, cases affecting ambassadors, and cases between U.S. citizens and foreign nations or citizens thereof).

<sup>239</sup> See, e.g., U.S. CONST. art. I, § 10, cl. 1 (no treaties or alliances), cl. 2 (strict restrictions on duties on imports or exports), & cl. 3 (no compacts except as approved by Congress).

does not describe an overarching foreign affairs power, much less assign that power to any one branch of government.<sup>240</sup> In constitutional practice, however, it has come to be recognized that the federal government as a whole has broad powers over foreign relations<sup>241</sup> and that the President generally has the prime<sup>242</sup>—though not unlimited—role in exercising those powers.<sup>243</sup>

In 1947, the question arose whether California had intruded into an exclusive zone of federal control over foreign affairs by conditioning inheritance rights for aliens on whether the alien's home country allowed inheritance by U.S. citizens (i.e., reciprocity). In *Clark v. Allen*, the Supreme Court, per Justice Douglas, rejected this contention as "farfetched."<sup>244</sup> In 1968, in *Zschernig v. Miller*, Justice Douglas wrote again for the Supreme Court in a case examining Oregon's reciprocity requirement for transnational inheritance.<sup>245</sup> This time, the Court made "new constitutional doctrine."<sup>246</sup> *Zschernig* held that Oregon unconstitutionally "intru[ded] . . . into the field of foreign affairs which the Constitution entrusts to the President and the

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<sup>240</sup> See HENKIN, *supra* note 181, at 84 ("The Constitution is especially inarticulate in allocating foreign affairs powers."). But see Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001) (arguing that the original meaning of the "executive power" assigned to the President includes "residual" foreign affairs power subject to express limitations in other constitutional provisions).

<sup>241</sup> See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–16 (1936) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.").

<sup>242</sup> See, e.g., *United States v. Belmont*, 301 U.S. 324, 330 (1937) (upholding a sole executive agreement on the ground that "the Executive had authority to speak as the sole organ of [the national] government"); *Curtiss-Wright*, 299 U.S. at 319–20 ("the President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said . . . , 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'").

<sup>243</sup> See, e.g., *Medellín II* (disallowing Presidential claim of right to order Texas to waive its procedural default bar to postconviction review in order to secure compliance with adverse decision by the International Court of Justice); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (disallowing Presidential claim of right to nationalize steel industry during the Korean War).

<sup>244</sup> *Clark v. Allen*, 331 U.S. 503, 517 (1947).

<sup>245</sup> *Zschernig v. Miller*, 389 U.S. 429 (1968).

<sup>246</sup> HENKIN, *supra* note 181, at 163. For an originalist critique of *Zschernig*, see generally Michael D. Ramsey, *The Power of States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999).



Congress”<sup>247</sup>—thereby suggesting a zone of federal exclusivity into which states are barred from entry even in the absence of any “supreme” federal action under Article VI, a notion that might be regarded as the literal embodiment of the “one voice” metaphor (at least from a vertical point of view). Just as the Commerce Clause is construed to have negative implications, *Zschernig* found a dormant foreign affairs power that limits state action even when the federal government is silent. It did so absent a real demonstration of harm to U.S. foreign policy, indeed, in the face of a U.S. Government amicus brief disclaiming any such harm.<sup>248</sup> Despite the similarities between the two cases, *Zschernig* did not reverse *Clark*. *Zschernig* instead distinguished *Clark* on the ground that reciprocity requirements are constitutional on their face, but Oregon’s law became problematic in practice because of the detailed, intrusive way in which Oregon implemented it.<sup>249</sup>

The Supreme Court barely cited *Zschernig* for the next 35 years. Calling *Zschernig* “a unique statement and a sole application of constitutional doctrine,” Henkin wrote in 1996: “One would be bold to predict that it has a future life; might it remain on the Supreme Court’s pages, a relic of the Cold War?”<sup>250</sup>

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<sup>247</sup> *Zschernig*, 389 U.S. at 432.

<sup>248</sup> The Court characterizes the harm as “subtle,” if also as “persistent” and “direct.” It concludes only that the Oregon law “may well” —not that it does— “adversely affect the power of the central government to deal with [international] problems.” *Id.* at 440–41. Justice Harlan’s separate opinion, concurring only in the judgment, rejects the Court’s reasoning as “based almost entirely on speculation.” *Id.* at 460. Justice Harlan observes that the Court’s opinion and the record lack “any instance . . . [of] any foreign relations consequence whatsoever,” and quotes the Solicitor General as saying that “[s]tate reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country.” *Id.*

<sup>249</sup> *Id.* at 433–34. Justice Stewart’s concurrence expressly supports reversing *Clark* to establish, more clearly than the opinion of the Court, that states are barred from “voyag[ing] into a domain of exclusively federal competence,” as a fundamental matter of allocation of constitutional authorities unaffected by “the shifting winds at the State Department.” *Id.* at 442–43.

<sup>250</sup> HENKIN, *supra* note 181, at 165 & note; see also Peter Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1224–25, 1242 (1999) (arguing that the “exclusivity principle,” as perfected in *Zschernig*, is historically contingent and should be moderated to allow some room for state action in the international realm because strict exclusivity is no longer necessary outside a Cold War context where “one could plausibly draw a scenario in which offense caused by state action lit the fuse to World War III” and could not be stopped by the federal government “before the damage was done”).

Then, in 2003, the Supreme Court “resurrect[ed]” *Zschernig*—at least to a degree.<sup>251</sup> *Garamendi* invalidated California’s Holocaust Victim Insurance Relief Act, which “require[d] any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one ‘related’ to it,” as inconsistent with Presidential efforts to resolve Holocaust-related insurance disputes.<sup>252</sup> The Court clearly treated *Zschernig* seriously for the first time, but seemed to fall short of endorsing *Zschernig*’s view of preclusive exclusivity. Its logic is not that of exclusivity, but of preemption.<sup>253</sup> In that regard, *Garamendi* seems better understood as extending *Crosby*’s invigorated view of preemption in the foreign affairs context from statutory preemption to Presidential preemption,<sup>254</sup> at least with regard to the “particularly longstanding practice” of Presidential settlement of international claims.<sup>255</sup>

Problems with current doctrine on the dormant foreign affairs power include the absence of definition to critical contours of the doctrine (such as its relationships to Commerce Clause jurisprudence),<sup>256</sup> the difficulty of meaningfully reconciling *Clark* and *Zschernig* to distill principles predictably applicable to other

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<sup>251</sup> *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting) (“We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here.”).

<sup>252</sup> *Id.* at 401.

<sup>253</sup> *See, e.g., id.* at 425 (“The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.”).

<sup>254</sup> *See* Julian Ku, *Gubernatorial Foreign Policy*, 115 *YALE L.J.* 2380, 2398–2401 (2006) (arguing that *Garamendi*, unlike *Zschernig*, preserves constitutional space for state involvement in foreign relations).

<sup>255</sup> *Garamendi*, 539 U.S. at 415; *see also* *Medellín II*, 128 S.Ct. at 1371–72 (describing *Garamendi* as part of “a series of cases” that establish a “narrow and strictly limited [Presidential] authority to settle international claims disputes”).

<sup>256</sup> *Zschernig* does not concern the Commerce Clause. The word “commerce” appears nowhere in the case. Oregon was not regulating commerce, but setting the terms of inheritance under state law. By contrast, in *Garamendi*, California was regulating the insurance industry. The Supreme Court granted *certiorari* on three questions in *Garamendi*, including both foreign affairs and foreign commerce. In the end, however *Garamendi* decides only the foreign affairs issue, expressly declining to reach the other two issues, without providing any guidance as to why it omits the Foreign Commerce issue or how the foreign affairs and foreign commerce doctrines relate with each other. *Zschernig*, 389 U.S. at 429–441; *Garamendi*, 539 U.S. at 396–400.

facts,<sup>257</sup> and uncertainty about when the doctrine will be deemed to apply. It seems that lower courts may invoke the doctrine more often and more expansively than does the Supreme Court; for example, *Natsios* relies on *Zschernig* and construes it to exclude an exception for ordinary market participation.<sup>258</sup>

## 5. SADA'S PLACE IN FOREIGN-RELATIONS FEDERALISM

### 5.1. Divestment under Federal Authority

The key provision of SADA, Section 3(b), provides:

Authority to Divest—Notwithstanding any other provision of law, a State or local government may adopt and enforce measures that meet the requirements of subsection (e) to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, persons that the State or local government determines, using credible information available to the public, are conducting or have direct investments in business operations described in subsection (d).<sup>259</sup>

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<sup>257</sup> Attempting to reconcile *Clark* with *Zschernig*, the Office of Legal Counsel describes the latter as a “reaction to a particular regulatory statute”—i.e., that it is limited to its facts. OLC, *South African Divestment*, *supra* note 75, at 50.

<sup>258</sup> *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 50–61 (1st Cir. 1999). By contrast, the Office of Legal Counsel argues that the market participant rule should apply in the foreign affairs context as well, on the ground that states need space for proprietary acts. OLC, *South African Divestment*, *supra* note 75, at 63–64.

<sup>259</sup> SADA, *supra* note 9, § 3(b). SADA further defines “investment” to include “the entry into or renewal of a contract for goods or services,” suggesting that the authority in Section 3(b) is broad enough to allow states to refuse to enter or renew procurement contracts with companies doing specified business in Sudan. See Jerry Fowler and Zahara Heckscher, *Introductory Note to the Sudan Accountability and Investment Act of 2007 and the Signing Statement of President George W. Bush to the Act*, 47 I.L.M. 127 (2008). Indeed, SADA requires the federal government to restrict its own purchases of goods and services from such companies (subject to the possibility of a Presidential waiver). SADA, § 6. The procurement aspects of SADA are beyond the scope of this Article, which as mentioned *supra* note 2, is limited to “investment” decisions typically understood as distinct from purchases of goods and services. See, e.g., Iran Sanctions Act, § 14(9), 50 U.S.C. § 1701 (“the term ‘investment’ does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology”); Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104–208, 110 Stat. 3009, Sept. 30, 1996, § 570(f)(2) (same, with respect to definition of “new investment” for sanctions against Burma); North American Free Trade

As this provision makes clear, Congress bounded the authority it granted the states in a number of respects. First, the authority to divest is limited to companies with business operations in Sudan.<sup>260</sup> Second, the authority is limited to companies with operations in four specified industries: “power production activities, mineral extraction activities, oil-related activities, or the production of military equipment.”<sup>261</sup> Third, the authority does not extend to companies that have “voluntarily suspended” their activities in Sudan or that can demonstrate that their activities conform with federal policy concerning Sudan, such as contracts with the regional government in Southern Sudan, humanitarian activities, and activities licensed by the Office of Foreign Assets Control of the U.S. Department of the Treasury (“OFAC”).<sup>262</sup> Fourth, the authority to divest is conditioned on the satisfaction of procedural requirements intended to provide each target company “written notice and an opportunity to comment in writing,” in the pursuit of accuracy and (presumably) due process.<sup>263</sup> Fifth, the authority to divest is limited to companies that “have direct investments in Sudan.”<sup>264</sup> Sixth, the authority to divest includes assets owned or managed (e.g., pension funds) by the states, but excludes those assets governed by the Employee Retirement Income Security Act (“ERISA”).<sup>265</sup> Finally, the authority to divest ends thirty days after the President certifies that Sudan has met certain conditions assuring peace and safety for civilian populations.<sup>266</sup>

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Agreement, U.S.-Can.-Mex., Dec. 17, 1991, 32 I.L.M. 289 (1993), art. 1139(i) (“investment does not mean . . . claims to money that arise solely from . . . commercial contracts for the sale of goods or services . . .”).

<sup>260</sup> SADA § 3(d)(1). No other country is the subject of similar legislation, although Congress has been considering a similar bill directed against Iran. *See* Comprehensive Iran Sanctions, Accountability, and Divestment Act, S. 3445 & H. R. 7112, 110th Cong. (2008).

<sup>261</sup> SADA § 3(d)(1).

<sup>262</sup> SADA § 3(d)(2).

<sup>263</sup> SADA § 3(e).

<sup>264</sup> SADA § 3(b); *see also* §§ SADA 3(e)(3), 3(e)(4), 4, 5.

<sup>265</sup> SADA § 3(f)(2). The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-03 (2008), does not apply to most state-managed pension funds. 29 U.S.C. §§ 1002(32), 1003(b)(1); *see also* JOHN LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 96-98 (4th ed. 2006) (discussing ERISA’s scope and exemptions).

<sup>266</sup> SADA § 12.

The bounded nature of the authority to divest is also implied by SADA's "nonpreemption" provision, which specifies that divestment within the scope of the statutory authorization "is *not* preempted by any Federal law or regulation."<sup>267</sup>

### 5.2. *Dispelling Doctrinal Clouds*

It is fair to say that the Sudan divestment movement was born under doctrinal clouds cast by *Crosby*, *Garamendi*, and *Zschernig*. These clouds should be neither overstated nor ignored. None of the above cases addresses state divestment per se. Two lower court decisions, and an opinion of the Reagan Justice Department, are more pertinent. They provide a non-definitive degree of support for the view that state divestment is constitutional.

First, in 1986, months before Congress enacted the CAAA over President Reagan's veto, the Reagan Justice Department examined state divestment under pre-CAAA law.<sup>268</sup> "[A]s many as 140" jurisdictions divested from (or imposed selective-purchasing restrictions concerning) South Africa, in clear defiance of the Reagan Administration's preferred strategy of constructive engagement with South Africa.<sup>269</sup> Yet the opinion of the Office of Legal Counsel concludes that such divestment is constitutional—specifically, it is protected by the ordinary market participation doctrine, it reflects a traditional exercise of state control over state assets that does not intrude unduly into federal foreign-relations prerogatives, and then-existing federal rules regarding South Africa did not preempt it.<sup>270</sup>

Three years later, the Maryland Court of Appeals upheld Baltimore ordinances divesting from South Africa against

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<sup>267</sup> SADA § 3(g) (emphasis added).

<sup>268</sup> See generally OLC, *South African Divestment*, *supra* note 81 (outlining constitutionality of local divestment statutes).

<sup>269</sup> Cleveland, *supra* note 6, at 995.

<sup>270</sup> The OLC opinion treats divestment measures together with selective-purchasing measures like the Massachusetts Burma law, finding both constitutional under the same analysis. See OLC, *South African Divestment*, *supra* note 81, at 49 n.3 (referring to both divestment measures and selective-purchasing measures as "divestment statutes"). The Clinton Justice Department later disavowed the OLC opinion as applied to selective-purchasing measures. See U.S. Amicus Brief in *Crosby*, *supra* note 84, at 29 n.23 ("[A] statute like the Massachusetts Burma Act does not fall within the market participation exception.").

constitutional and other legal challenges.<sup>271</sup> *Baltimore Board of Trustees* holds that the CAAA did not preempt state divestment, that the ordinary market participant doctrine applies to exempt Baltimore from the disciplines of the Dormant Foreign Commerce Clause, and that Baltimore's divestment involved one-time judgments more like California's actions at issue in *Clark* than the ongoing analyses by Oregon deemed problematic in *Zschernig*.<sup>272</sup>

Finally, in *Giannoulas*, the federal district court in Chicago struck down portions of the Illinois Sudan law.<sup>273</sup> The Illinois law provided, *inter alia*, for divestment from Sudan of assets controlled by both the state and city governments. The divestment holding of *Giannoulas* turns on precedents in the Seventh Circuit establishing that the market participant doctrine does not extend to city governments.<sup>274</sup> *Giannoulas* suggests that a revised statute would be upheld if the state limited divestment to state-controlled assets.<sup>275</sup> The decision also holds that another part of the Illinois law, concerning banking services, intruded into the exclusive federal realm of foreign affairs, distinguishing that provision from divestment.<sup>276</sup>

Enter SADA, initially proposed by Senator Richard Durbin of Illinois two weeks after *Giannoulas*.<sup>277</sup> As enacted, SADA dispels

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<sup>271</sup> *Baltimore Board of Trustees*, 562 A.2d at 730-57 (following, *inter alia*, OLC, *South African Divestment*).

<sup>272</sup> *Id.* at 741-57. The case also rejects claims of improper delegation and impairment of contracts. *Id.* at 732-38.

<sup>273</sup> *Nat'l Foreign Trade Council v. Giannoulas*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

<sup>274</sup> *Id.* at 742, n.3 (citing *MIT Corp. v. Dixon*, 633 F.2d 486, 491 (7th Cir. 1980)).

<sup>275</sup> See James Bartlett III, *Export Controls and Economic Sanctions*, 42 INT'L LAW. 301, 321, n.137 (2008) (noting that *Giannoulas* distinguishes between assets controlled by the state and those controlled by "sub-state entities"). Apparently, severance of the offending application to city governments is not an option under Illinois law. See *Giannoulas*, 523 F. Supp. 2d at 750. Illinois proceeded to enact new divestment legislation intended to conform with *Giannoulas*. See 15 ILL. COMP. STAT. ANN. 520/22.5 (West 2007).

<sup>276</sup> See *Giannoulas*, 523 F. Supp. 2d at 745 ("The Court concludes that the section of the Illinois Sudan Act that amends the Deposit of State Moneys Act . . . unconstitutionally interferes with the Federal government's power to conduct foreign affairs. The Court reaches the opposite conclusion, however, regarding the provisions of the Illinois Sudan Act that amend the Illinois Pension Code.").

<sup>277</sup> Senator Durbin was the primary sponsor of the Sudan Divestment and Accountability Act, S. 831, 110th Cong. (1st Sess. 2007), a predecessor bill to SADA. See *Combating Genocide in Darfur: The Role of Divestment and Other Policy Tools: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 110th Cong. (2007) (statement of Sen. Richard Durbin) (urging passage of legislation,

the doctrinal clouds over state divestment by expressly authorizing it.

Concerns about the possibility of statutory preemption can be removed, of course, by statute. Congress can likewise clearly prevent the application of the Dormant Foreign Commerce Clause, which, by definition, only applies when Congress is silent.<sup>278</sup> Congress is “the branch responsible for the regulation of foreign commerce”<sup>279</sup> and, accordingly, Congress has the power to direct a different outcome than the courts might otherwise reach.<sup>280</sup>

The same result ought to be reached with respect to the federal foreign affairs power. Even *Natsios* limits its critique of Massachusetts’ Burma law by concluding with the sentence: “Absent express Congressional authorization, Massachusetts cannot set the nation’s foreign policy.”<sup>281</sup> *Zschernig* locates the exclusive

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*inter alia*, authorizing state divestment from Sudan), available at <http://banking.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=6dbf125b-a23e-4084-940f-1c26001043f1> (last visited Feb. 15, 2009).

<sup>278</sup> See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422–23 (1946) (“[I]t has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of [Congressional] power. Much less has this boundary been thought to confine what Congress and the states, acting together, may accomplish.”). Henkin similarly explains that:

Congress can permit the states to regulate commerce in ways that would not stand were Congress silent. So far as the Commerce Clause is concerned, then in principle Congress could authorize the states to exclude foreign commerce, to discriminate against it, to impose heavy burdens upon it, to satisfy minor local interests at the price of major obstacles to such commerce, to establish a patchquilt of local idiosyncrasies.

HENKIN, *supra* note 181, at 162 (noting that other constitutional constraints would remain, such as due process and the ban on states coining money).

<sup>279</sup> *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 324 (1994).

<sup>280</sup> See, e.g., *id.* at 310 (“absent congressional approval”); *id.* at 324 (“left the ball in Congress’ court . . . it could have enacted legislation”); *id.* at 331 (“we leave it to Congress—whose voice, in this area, is the Nation’s”). The minority opinions in *Barclays* expressly agree with the Court on this point, with Justice Scalia commenting that “today’s opinion restores the power to Congress.” *Id.* at 332 (Scalia J. concurring in part); see also *id.* at 331 (Blackmun, J., concurring) (concurring in the opinion except one point not here relevant); *id.* at 334 (O’Connor, J., concurring in part).

<sup>281</sup> *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 77 (1994) (emphasis added). See also *id.* at 58 (“The Federal government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority. . . . We never suggested in *Japan Line* or in any other case that the Foreign Commerce Clause insists that the Federal government speak with any particular voice” (quoting

federal foreign affairs power in “the President *and the Congress*.”<sup>282</sup> *Garamendi* likewise suggests that Congress has the “lead role” in foreign commerce, while ultimately declining to address “the possible significance for preemption doctrine of tension between an Act of Congress and Presidential foreign policy” because that case concludes that Congress had “not acted on the matter addressed.”<sup>283</sup>

Yet the Bush Administration voiced “grave constitutional questions” about SADA,<sup>284</sup> apparently based solely on the view that SADA allows the states to intrude into the federal government’s “exclusive authority to conduct foreign relations.”<sup>285</sup>

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*Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 12-13 (1986) (emphasis omitted)).

<sup>282</sup> *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (emphasis added).

<sup>283</sup> *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 422 n.12, 429 (2003). *Garamendi* distinguishes *Barclays* on the ground that *Barclays* concerns Foreign Commerce, where Congress is clearly “the preeminent speaker.” See *Barclays*, 512 U.S. at 329:

That the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation’s ability to speak with one voice, but is rather evidence that *the preeminent speaker* decided to yield the floor to others (emphasis added).

*Cf. Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60 (1983) (Scalia, J., concurring in part and in judgment) (“[The President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.”).

<sup>284</sup> *Benczkowski Letter*, *supra* note 12, at 67.

<sup>285</sup> Statement by President George W. Bush upon Signing S. 2271, 43 WEEKLY COMP. PRES. DOC. 1646 (Dec. 31, 2007) [hereinafter SADA Signing Statement]. The SADA Signing Statement reads in relevant part:

Today, I have signed into law S. 2271, the ‘Sudan Accountability and Divestment Act of 2007.’ . . . This Act purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy. However, as the Constitution vests the exclusive authority to conduct foreign relations with the Federal government, the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.

Retired Judge Patricia Wald describes the SADA Signing Statement as “cryptic and devoid of any detailed reasoning,” *Hearing of the House Financial Services Committee on the Sudan Accountability and Divestment Act*, H.R. REP. NO. 110-87, at 53, 57, 110th Cong. (Feb. 8, 2008) (prepared statement of Patricia Wald). The Bush



Beyond the just recited details of the case law, the Bush Administration's position is profoundly flawed.<sup>286</sup> The Administration claims that emanations from a series of specific powers granted to the President in Article II amount to a generalized foreign affairs power vested in the President so sweeping as to trump Congress' express power to regulate foreign commerce.<sup>287</sup> The claim that Congress cannot authorize the states to act is a claim that Congress itself cannot act.<sup>288</sup>

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Administration declined an opportunity to clarify its position by testifying at a House Committee hearing. *See id.* at 4 (statement of Chairman Barney Frank) ("We asked the White House to come and explain the public policy and the legal arguments here. They refused to do it.").

Nevertheless, some additional detail about the Bush Administration's position is found in an earlier Justice Department letter opposing the bill that became SADA. This letter makes clear that the Bush Administration acknowledged that Congress has the capacity to cure both statutory preemption and dormant Foreign Commerce. *See* Benczkowski Letter, *supra* note 12, at 3. The Administration's "grave constitutional questions" therefore rest solely upon the view that Congress cannot authorize State action that intrudes on the "Federal preemptive force that flows from the Constitution's grant to the President of certain foreign affairs powers under Article II." *Id.* at 69. The letter invokes *Garamendi*, *Zschernig*, and even *Crosby* in support of its argument for expansive and exclusive federal powers. *Id.* Likewise, another Administration letter invokes "the Supremacy Clause and the President's powers thereunder," which appears to refer less to traditional preemption doctrines than to the dormant foreign affairs power. Letter from Jeffrey Bergner, U.S. Dep't of Justice, to Mitch McConnell, U.S. Senate, at 2 (Oct. 22, 2007), at 61; *see also* Letter from Jeffrey Bergner, U.S. Dep't of Justice, to Harry Reid, U.S. Senate, at 2 (Oct. 22, 2007), at 63.

<sup>286</sup> A leading proponent of SADA questions whether the Bush Administration even intended the SADA Signing Statement to be taken seriously. *See* Fowler & Heckscher, *supra* note 259, at 128 ("The signing statement seems more a pro forma marker for this Administration's philosophy of a strong executive than a response to the actual provisions of the legislation.").

Ahdieh is blunter: "Given the statute's explicit authorization of state and local action, the only plausible meaning of the president's statement would seem to be that he enjoys the power to override Congress' will, in its imposition of sanctions against Sudan." Ahdieh, *supra* note 14, at 8 n.43.

<sup>287</sup> *See* HENKIN, *supra* note 181, at 89:

Broad assertions and extravagant adjectives, some of them supported by careless rhetoric in opinions of the Supreme Court, might leave the impression that the President can exercise virtually all the national political power in foreign affairs, at least concurrently with Congress, so that in foreign affairs no powers of Congress are exclusive. That is not so . . . [I]t would be difficult for a President to dispute that by vesting in Congress 'all legislative Powers herein granted,' and then granting Congress a comprehensive array of specific powers, the Constitution barred the President from exercising the powers specified, even those that relate to, or impinge on, foreign affairs . . . [The President] cannot unilaterally regulate commerce with foreign nations . . .

Justice Jackson's famous *Youngstown* concurrence is worth recalling here. In considering whether President Truman had the authority to nationalize steel mills during the Korean War, Justice Jackson wrote that, in areas of concurrent authority, Presidential power is "at its maximum" when the President acts with express Congressional authority, is "at its lowest ebb" when the President acts contrary to a Congressional prohibition, and rests in between

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Even advocates of a broad view of executive power over foreign affairs recognize that this "residual" power is "limited by specific allocation of foreign affairs power to other entities . . . . [T]he President cannot regulate international commerce . . . ." Prakash & Ramsey, *supra* note 240, at 235. Indeed, in arguing that the Massachusetts Burma law conflicted with federal power over foreign affairs, the Clinton Administration admitted that "[t]he most significant of these enumerated powers for present purposes is Congress's power to regulate Commerce with foreign nations" and that "[a] State may petition Congress and the President to take action against [a foreign government], including the imposition of economic sanctions, or to authorize the States themselves to take certain action." U.S. Amicus Brief in *Crosby*, *supra* note 84, at 12, 28 (internal punctuation omitted, emphasis added).

<sup>288</sup> In this regard, the Bush Administration opposed the passage of SADA not only on grounds of "federalism," but also of "separation of powers." See Benczkowski Letter, *supra* note 12, at 70.

To a similar effect, although from a vertical rather than a horizontal perspective, is Laurence Tribe's claim that "neither Congress nor the President could permit [state involvement in foreign policy] even if they chose to do so." TRIBE, *supra* note 217, at 1154 (citing Justice Stewart's concurring opinion in *Zschemig*); see also *id.* at 657 n.7 ("The result in *Zschemig* would have been the same it seems even if Congress had purported to authorize the states or their courts to shape the foreign policy of the United States."). Tribe appears to derive this approach by analogy from admiralty jurisprudence stressing the need for national uniformity. See *id.* at 981 n.10. Indeed, uniformity is crucial sometimes in foreign affairs. See, e.g., Perry S. Bechky, *Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation*, 60 J. AIR L. & COM. 455 (1995) (arguing that accomplishment of the treaty objective of international uniformity requires greater sensitivity to uniform jurisprudence among domestic courts). But the touchstone of federal dominance over foreign affairs is not uniformity per se, but *flexibility* for the political branches to deal with the countless circumstances the nation may face through history. It would be a strange rule of law that vests all power over foreign affairs in the political branches to such an extreme degree that they lacked the power to involve the states in foreign affairs even in those circumstances where they conclude such involvement is in the best interests of the nation. See HENKIN, *supra* note 181, at 165:

It is difficult to believe that the Court would find constitutionally intolerable state intrusions on the conduct of foreign relations that the political branches formally approved or tolerated. Domestic considerations apart, there might be foreign relations reasons why the political branches might deem it desirable to leave some matters to the states . . . .

in “a zone of twilight” when Congress is silent.<sup>289</sup> If the President were to act to invalidate state divestment within the bounds of SADA, his power would be at the nadir. The President could “rely only upon his own constitutional powers” over foreign affairs minus the “constitutional powers of Congress” over foreign commerce—and also minus whatever powers the states themselves might have over divestment of state-controlled assets. “Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”<sup>290</sup>

The reverse of Justice Jackson’s analysis might also be considered. It is tempting to think that Congress’ power is at its minimum when opposed by the President’s powers. But this analogy fails. The power of Congress is binary. Congress acts through legislation, which must be signed by the President or enacted by Congress over his veto<sup>291</sup>—either way, the statute has the same constitutional status. And, if the Jackson analysis does work in reverse, President Bush formally added his powers to those of Congress by signing SADA.<sup>292</sup> Whatever personal reservations he might have had when doing so are irrelevant.

SADA thus clears the doctrinal clouds away from state divestment from Sudan, within the bounds set by SADA itself.

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<sup>289</sup> *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

<sup>290</sup> *Id.* at 637–38.

<sup>291</sup> See U.S. CONST. art. I, § 7, cls. 2–3 (requiring statutes to be enacted either with the President’s approval or over his veto); *cf.* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944–51 (1983) (declaring the legislative veto unconstitutional because it did not involve presentment of bicameral action to the President for signature or veto).

<sup>292</sup> See U.S. CONST. art. I, § 7, cl. 2 (providing for the President to sign bills he “approve[s]”); see also *Negative Implications of the President’s Signing Statement on the Sudan Accountability and Divestment Act: Hearing Before the H. Comm. on Financial Serv.*, 110<sup>th</sup> Cong., at 43–44, 48, 50–51 (2008) (prepared statement of Paul Schwartz, Counsel to the Sudan Divestment Task Force) (arguing that President Bush’s signing statement does not invalidate SADA’s authority to the states because, *inter alia*, the President approved SADA for constitutional purposes by signing it).

### 5.3. SADA as Political Standard

#### 5.3.1. Congressional Flexibility

In authorizing (but not requiring) states to divest from Sudan, Congress left to each state the decision *whether* to divest state-controlled assets from Sudan. Should a state decide to divest from Sudan, it also has considerable discretion to decide *how* to do so.

But SADA bounds its authority to divest in various respects intended to ensure the compatibility of state actions with federal policy. In other words, SADA defines a space where a particular form of state expression is plainly authorized under particular circumstances. SADA thus enables us to move past the one-voice myth to respect the possibilities offered by a multiplicity of voices, while still preserving the ultimate dominance of the federal voice. It is the national government that has the authority and responsibility to protect the nation as a whole, and so Congress must have the capacity to constrain actions (even expressive actions) implicating foreign affairs where it concludes such constraints are needed to prevent any one state from creating unacceptable risks or burdens for the nation. But this need for ultimate Congressional power does not require all states to be silent all the time.<sup>293</sup>

This space defined by SADA is not fixed, but is changeable by federal law. It is changeable for any reason, including new federal policies or priorities, new developments in Sudan, new appreciation of the costs and benefits of divestment, or new Congressional concern about how the authority is implemented in practice. It is not only changeable, but revocable—and it can be replaced by either express preemption or a return to Congressional silence.

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<sup>293</sup> See Bilder, *supra* note 93, at 830 (“Clearly, any judgments as to what constitutes appropriate state or local involvement in foreign affairs ought to be made primarily by the political branches, in which the federal foreign relations power is lodged. If state or local action threatens or causes serious interference with foreign relations, it is, in the first instance at least, for Congress and the President to decide whether to preempt it.”); Davis, *supra* note 159, at 127–28 (arguing that states should have as much authority to promote international human rights norms as *Medellín II* gave Texas to resist them, but only “in the absence of congressional instructions to the contrary” to avoid “tension with the accepted notion that ultimate foreign affairs power rests with the federal government.”).

Congressional bounding allows the degree of federal control to vary over time, depending, for example, on the extent to which Congress perceives the needs of the nation, when interacting with the world, to allow or preclude state action.<sup>294</sup> It also allows for different degrees of federal control over state speech directed at different targets at the same time. If a state seeks to divest against a country, at a time, or in a manner that Congress deems inappropriate, Congress may preempt the action. Indeed, if four states seek to divest from four different countries, Congress has the option to preempt one, remain silent on another, expressly authorize the third under certain conditions, and expressly authorize the fourth under radically different conditions.

Such flexibility is the essence of political bounding. While SADA-like bills were proposed in the last Congress authorizing divestment from Iran and state action on Holocaust-related insurance (essentially overturning *Garamendi* on its facts),<sup>295</sup> such bills might not pass or might pass with substantially different conditions than those included in SADA itself. Some commentators have urged Congress, depending on their own preferences, to authorize<sup>296</sup> or prohibit<sup>297</sup> state divestment in all circumstances, but such all-or-nothing approaches ignore the value of variable political determinations in light of the overall balance of interests affecting a particular matter at a particular time. Congress might plausibly conclude that the benefits or costs of divestment from another country at another time are greater or

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<sup>294</sup> Cf. Spiro, *supra* note 250, at 1242 (describing *Zschernig's* "exclusivity principle" as a product of its historical cold war context).

<sup>295</sup> The Comprehensive Iran Sanctions, Accountability, and Divestment Act ("CISADA"), S. 3445 & H.R. 7112, 110th Cong. (2008) available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03445:@@L&summ2=m&> and <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR07112:@@L&summ2=m&> (last visited Feb. 22, 2009) (as passed by House and Senate Banking Committee, but not full Senate). The Holocaust Insurance Accountability Act, H.R. 1746, 110th Cong. (2007), passed the House Financial Services Committee with substantial amendments but expired without action by other House committees). See H.R. REP. NO. 110-820 (2008), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01746:@@L&summ2=m&> (last visited Feb. 22, 2009).

<sup>296</sup> See, e.g., Cleveland, *supra* note 6, at 1013-14 (advocating that Congress routinely attach a "boilerplate rider to future sanctions regimes that expressly approves state procurement measures").

<sup>297</sup> See, e.g., Dhooge, *supra* note 154, at 315 ("Congress must also make its will known in this area. . . . Congress must clearly preempt such regimes in any future legislation in this area.").

lesser than the benefits and costs of divestment from Sudan today, or that the circumstances are otherwise different, warranting a greater or lesser degree of federal support for state action than is set forth in SADA. Thus, SADA is best understood as setting a precedent not in the sense of creating a rule to be followed in the future, but of creating a bounded dialogue within borders adjustable as appropriate for new circumstances.

Porterfield and Andrea McArdle propose (separately) that state divestment is speech protected by the First Amendment, whether as a right belonging to the state itself or a right of individuals expressing themselves through the state.<sup>298</sup> Leaving aside the complexities of the broader questions of First Amendment protections for state actors (including libraries and universities) in manifold contexts,<sup>299</sup> which are beyond the scope of this Article, in my view, subjecting Congressional regulation of state divestment to First Amendment scrutiny inappropriately “lawifies” what is better left to political processes.<sup>300</sup> The appropriateness of divestment may vary from time to time and from case to case—the very antithesis of judicial determinations in a system of *stare decisis*. Moreover, as discussed previously, the main expressive purposes of divestment are directed to the democratic process. But the states do not need First Amendment protections to ensure that they have a voice in our national political process; their voice is embedded in our constitutional structure.<sup>301</sup> Congress has never expressly

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<sup>298</sup> Porterfield, *supra* note 87; McArdle, *supra* note 112.

<sup>299</sup> For a recent example highlighting the sensitive, unanswered questions that can arise in this area, see *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 210–11 (2003), where a plurality of the Supreme Court upheld a law that conditioned grants to libraries on the installation of anti-pornography filters, while declining to decide whether public libraries have First Amendment rights. *Id.*; see generally David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. REV. 1637, 1688 (2006) (surveying the case law and literature, and arguing for a differentiated approach that accords some but not all state speech with First Amendment protection because “government speech is neither a pure threat nor an unequivocal good, but rather a Janus-like phenomenon with the capacity to be either antidemocratic peril to or beneficial participant in the system of freedom of expression.”).

<sup>300</sup> Cf. MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 45–50 (1983) (arguing that it is not necessary to afford governments constitutional rights in order to advance the public interest with regard to governmental speech).

<sup>301</sup> Even less does state divestment need First Amendment protection under rationales other than Meiklejohn’s democratic process. All the goals of human dignity and autonomy, search for truth, and character development, are fully served by protecting the speech rights of the individuals and associations who

preempted state divestment. Should Congress find sufficient national need to overcome the political safeguards of federalism and preempt state divestment for the first time, the courts ought not invoke the First Amendment as a thumb on the scale for the states.<sup>302</sup>

### 5.3.2. *Congressional Restraint*

Just as states should exercise the judgment to limit the frequency of divestment, Congress should tread lightly with its preemptive power—as it has to date. To support a federal restraint on state divestment, Congress should first conclude that the state action is imposing a cost on the nation—one might say, as a rule of prudence only, a cost that is substantial enough to be unacceptable.

It may be claimed that divestment gives offense to other nations, imposing foreign-policy costs on the United States. Such offense, however, is unlikely to arise from the economics of divestment itself. A divesting state's sale of securities is effected in the vast capital markets, where prices of individual securities and the market as a whole may move (sometimes dramatically, as we have seen lately) throughout a day. A sale of a small interest, even a sale of a larger interest prudently managed over time,<sup>303</sup> is quite unlikely to have a sufficiently visible effect on a company's share price to cause genuine offense to that company's home government. The risk of offense is even less with a state's decision to refrain from purchasing shares.

If the offense does not arise from the economic impact of the divestment, then it would have to arise from the principle of the divestment, which is to say the criticism inherent in the divestment. This risk, however, seems remote as well. We live in a nation of 300 million people who are free to criticize other governments in a countless variety of ways—including

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support the state divestment without any need to extend those rights to the state itself. See Blasi, *supra* note 164, at 1570 (discussing the rationales for protecting free speech).

<sup>302</sup> I am also concerned that an effort by a state to interpose the First Amendment as a defense to a foreign-affairs preemption case could lead the courts to construe overbroadly the power of government to regulate speech, with implications for the civil liberties of all of us.

<sup>303</sup> As mentioned, the model legislation adopted by nineteen states provides for disinvestment to be completed over the course of fifteen months. See MODEL LAW, *supra* note 59, § 4(b)(1).

disparaging signs posted outside embassies in Washington, D.C.<sup>304</sup> Our citizens are free, within only a few limits, to express their criticisms through words and images of their own choosing—even including “patently offensive” words and images.<sup>305</sup> Given these conditions, it would seem to require a rather unusual set of circumstances for a government to take genuine offense at the criticism implicit in state divestment amongst all the express criticisms in the surrounding atmosphere that must be tolerated under our system.<sup>306</sup> And should state criticism cause actual offense, it would remain available to the Executive to explain that the state—like individuals, organizations, and even individual Members of Congress—is not speaking on behalf of the United States.

The downsides of preemption also tilt in favor of Congressional restraint. First, both the economic and democratic-process gains of a divestment campaign may take some time to manifest themselves, so Congress should not act with undue haste to end the process. Second, states must necessarily have the ability to manage their assets. This is a matter both traditionally reserved to the states and of great importance to them if they are to remain “separate sovereigns” in any meaningful respect. Finally, the case for Congressional tolerance is bolstered by considering the alternative. Imagine a counterfactual scenario where Congress expressly *preempts* state divestment from Sudan and a state wished to sell securities in a company that does business in Sudan, claiming (as Warren Buffett did with respect to Berkshire Hathaway’s sale of PetroChina shares) that its decision was commercially motivated. Congress would have three unappealing options: to prohibit the state from selling any shares in that

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<sup>304</sup> See *Boos v. Barry*, 485 U.S. 312, 315 (1988) (invalidating a Washington, D.C. ordinance that, in the interest of diplomatic protocol, banned the display of signs directing “public odium” or “public disrepute” against a foreign government within 500 feet of its embassy).

<sup>305</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (declining to allow a public figure to sue for intentional infliction of emotional distress caused by a parody that was “patently offensive” and “doubtless gross and repugnant in the eyes of most”); see also *Cohen v. California*, 403 U.S. 15 (1971) (overturning a conviction for disturbing the peace by wearing clothes bearing an obscenity to express opposition to the draft).

<sup>306</sup> Cf. *McArdle*, *supra* note 112, at 830–31 (arguing that state divestment is unlikely to interfere with foreign policy because both the expressive and commercial effects are akin to, and difficult to isolate from, those of private divestment).



company, forcing the state to hold the shares against its will; to scrutinize the state's "true reasons" for the sale; or to accept the state's "avowed" reasons for the sale, thereby creating a ready path to circumvent the ban on divestment.<sup>307</sup> Congress' options would diminish further when one considers that the line between selling shares for "bad" (i.e., "political") reasons and selling shares for "legitimate" (i.e., "commercial") reasons is not always bright.

### 5.3.3. Congressional Opportunity

One might reasonably argue that this call for Congressional restraint is misplaced, that the real problem is not Congressional excess, but Congressional lethargy in the face of state measures causing harm to the nation. Peter Spiro thus describes the "probability of effective congressional or presidential discipline" over state measures as an "illusion[]." <sup>308</sup> Spiro argues for leaving the policing of state measures to judges, who "are not buffeted (or are at least less buffeted) by the sorts of forces that distort political-branch decision making in these controversies."<sup>309</sup> Howard Fenton agrees: "The political pressures that result in these local laws [including their "political popularity"] will also discourage Congressional action to preempt such laws in the near term . . . . Judicial invalidation is the only realistic option for correction of this problem."<sup>310</sup>

There is much truth in these arguments: our system of checks and balances makes it difficult to pass federal legislation under the best of circumstances, a situation that may be made even more difficult here by "gridlock" in Congress, institutional reluctance to constrain the states, the popularity of the state measures at issue, and the difficulty of opposing state measures in circumstances that

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<sup>307</sup> Cf. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 210-16 (1983) (holding that the Atomic Energy Act did not preempt California's regulation of nuclear plants, reasoning that Congress occupied the field of nuclear safety, but left states free to regulate nuclear plants "for purposes other than protection against radiation hazards."). *Id.* at 210-16. Indeed, the Court "accept[ed] California's avowed economic purpose as the rationale" for enacting the statute at issue rather than "become embroiled in attempting to ascertain California's true motive," because "inquiry into legislative motive is often an unsatisfactory venture." *Id.* at 216 (emphasis added).

<sup>308</sup> Spiro, *supra* note 250, at 1253.

<sup>309</sup> *Id.* at 1253-55.

<sup>310</sup> Howard N. Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 *NW. J. INT'L L. & BUS.* 563, 590-92 (1993).

may be (mis)perceived as support for the “(usually unappealing) foreign country” targeted by the state.<sup>311</sup> And Robert Ahdieh aptly invokes the “endowment effect”: “[O]nce states and localities have been empowered to act against rogue states such as Sudan, it may be difficult to strip them of that power. As with coffee mugs, so with legislative authority.”<sup>312</sup>

This Article describes, even celebrates (within limits), the *possibilities* for state divestment in the democratic process: attention-getting, norm-changing, door-opening, and assisting the pursuit of federal goals. But these are only possibilities. States may divest and not bring about any national consensus or Congressional action. Congress may prove inattentive, may be unable to reach majority (often, supermajority in practice) agreement on a course of action, may act ambiguously, or may opt for avoidance by leaving politically difficult questions to the courts. Such “failure” may even occur in the majority of cases, especially those cases where a divestment campaign fails to attract broad horizontal support or other significant attention.

Accordingly, I do not deny that courts will continue to have a role in reviewing state measures—although divestment may continue to prove a less tempting target for litigation than other state measures. Should such litigation arise, it might be hoped that the courts would abandon the “one voice” myth in favor of a dialogic view that gives appropriate weight to the virtues of state divestment (and to the vices of federal management of state investment decisions). In the first instance, however, the possibilities discussed here are aimed at the political branches rather than the courts. They *may* act, as in SADA, in a way that minimizes the prospects for litigation. And they may find that the idea of bounding presents them with opportunities as well. While Spiro and Fenton posit that the political branches will suffer state conduct they deem harmful to the nation for lack of the political will to preempt it,<sup>313</sup> bounding offers a happy alternative. It allows Congress to craft politically popular legislation in support of state action, while also bounding the states’ authority in ways

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<sup>311</sup> See Spiro, *supra* note 250, at 1253, 1255.

<sup>312</sup> See Ahdieh, *supra* note 14, at 21 n.114 (citing Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. REV. 1227, 1236 (2003)).

<sup>313</sup> See *supra* text accompanying notes 308–10 (summarizing Spiro’s and Fenton’s arguments that political pressures inhibit effective congressional and presidential control over state measures).

acceptable to the Congress (and, except in the case of a veto override, at least tolerable to the Executive).

#### 5.3.4. *State Restraint*

Where Congress overcomes the “political safeguards of federalism” and enacts legislation limiting state divestment, states should ordinarily comply with those limits. Of course, there may be circumstances where Congress plainly preempts state divestment and the state has no choice but to comply or risk litigation. But there are other circumstances where the states are left with more discretion and they should exercise that discretion in favor of restraint.

SADA presents such a case. SADA’s “nonpreemption” provision specifies that divestment *within* the scope of the statutory authorization “is not preempted by any Federal law or regulation.”<sup>314</sup> It does not expressly address divestment *outside* the scope of the authorization. Opponents of divestment welcomed what they perceived as the negative implications of this provision. For example, in a curious statement, the National Foreign Trade Council criticized SADA as “unconstitutional” and “flaw[ed],” but nevertheless welcomed the law as “one of the more thoughtful approaches to divestment” because it “sets strict criteria” and “make[s] some legislation currently being considered by state legislatures around the country even more dubious from a constitutional perspective than they already are.”<sup>315</sup> The Council presumably believes that SADA “occupies the field” of divestment from Sudan or otherwise implicitly preempts divestment beyond its bounds.<sup>316</sup> Perhaps the Council is right. But that is a question of statutory interpretation, and a state in litigation would have counter-arguments (e.g., states have the authority to divest when Congress is silent and actions beyond SADA’s authority merely remain in that original position).

States ought not push such arguments. SADA affords states ample space to express their concerns about the horrors in Darfur.

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<sup>314</sup> SADA, *supra* note 9, § 3(g).

<sup>315</sup> Jennifer Cummings, *NFTC, USA\*Engage Release Statement on Sudan Bill*, Jan. 2, 2008, [http://www.usaengage.org/index.php?option=com\\_content&task=view&id=226&Itemid=61](http://www.usaengage.org/index.php?option=com_content&task=view&id=226&Itemid=61) (last visited Feb. 22, 2009) (quoting Bill Reinsch, NFTC President and USA\*Engage Co-Chair).

<sup>316</sup> *See supra* notes 214–20 and accompanying text (discussing federal preemption of state law).

Simple prudence urges a state to avoid the risks and costs of litigation by conforming its divestment to the bounds of SADA. More fundamentally, SADA represents an unprecedented Congressional accommodation of state divestment, and states should reciprocate with comity and respect for the national government's ultimate control over foreign affairs.<sup>317</sup>

### 5.3.5. SADA as Federalist Dialogue

As with the federal anti-boycott law, the CAAA, and the federal Burma statute, SADA represents a Congressional reaction to a state initiative. Senator Richard Durbin of Illinois first introduced the bill that became the divestment provision of SADA on March 8, 2007, just two weeks after the *Giannoulis* decision struck down the Illinois Sudan statute on February 23, 2007.<sup>318</sup>

Yet, SADA also represents something new. The federal anti-boycott law expressly preempts the state laws that had motivated it, making it a purely national response<sup>319</sup>—like a baton passing in a relay race, the states have no further role after the federal action. The federal Burma statute is silent on preemption,<sup>320</sup> but *Crosby* holds it implicitly preemptive—still culminating in a baton pass. In the debates leading to enactment of the CAAA, Congress considered whether to expressly approve or disapprove state

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<sup>317</sup> Such comity is indeed reflected in the model law prepared by the Sudan Divestment Task Force, which includes definitions, an exemption, and a termination clause all aimed at ensuring the compatibility of state law with federal bounds. See *supra* notes 59–67 and accompanying text (describing the Model Law for targeted divestment created by the Sudan Divestment Task Force).

<sup>318</sup> The Senate Report on SADA affirms that SADA represents Congress' reaction to *Giannoulis*. S. REP. NO. 110-213, at 3 (2007) ("In unanimously approving the legislation, the Committee sought to address the issues raised in the Illinois case . . . by clearly authorizing divestment decisions made consistent with the standards it articulates.").

<sup>319</sup> See 50 U.S.C. app. § 2407(c) (2006):

Preemption—The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.

<sup>320</sup> See Act of Sept. 30, 1996, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166 (1996) (providing for restrictions on foreign aid to Burma, visas for Burmese officials, and new investment in Burma).

divestment, but the CAAA ultimately remains silent on that issue.<sup>321</sup> Congress also debated the extent to which it ought to tolerate state decisions to terminate contracts with companies that did business in South Africa, ultimately adopting a narrow provision waiving otherwise applicable federal penalties for contract terminations on federally-funded transportation projects for a period of ninety days.<sup>322</sup> *Baltimore Board of Trustees* rejects an argument that the CAAA implicitly preempted Baltimore's divestment,<sup>323</sup> with the result of concurrent federal and state actions—a predominantly national policy with a limited measure of space for state action arising from a combination of silence and limited authority. In SADA, Congress goes beyond taking the policy baton from the states, beyond silently yielding preemption determinations to the courts, and beyond a ninety-day toleration of limited state authority. Rather than a *national* solution, SADA adopts an unprecedented *federalist* solution to a foreign-affairs problem—it is, in Judith Resnik's phrase, "a new iteration of the political safeguards of federalism."<sup>324</sup> Congress interposed itself as a shield protecting state prerogatives from the national judiciary.

SADA thus recalls the concept of "Dialogic Federalism"<sup>325</sup> or "Dialectical Federalism."<sup>326</sup> On this theory of the Constitution,

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<sup>321</sup> See Cleveland, *supra* note 6, at 1001–02 (discussing legislative history of the CAAA).

<sup>322</sup> Comprehensive Anti-Apartheid Act, *supra* note 74, § 606:

Notwithstanding . . . any other provision of law—(1) no reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and (2) no other penalty may be imposed by the Federal government, by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after the date of enactment of this Act.

<sup>323</sup> See *Baltimore Board of Trustees*, 562 A.2d at 740–44 (rejecting the argument that the CAAA preempts Baltimore's divestment ordinances); see also *Sanctions Against South Africa—Senate Bill Does Not Preempt State and Local Action*, 132 CONG. REC. S12,534 (1986) (statement of Laurence H. Tribe, Professor, Harvard Law School).

<sup>324</sup> Resnik, *supra* note 16, at 80 (capitalization omitted).

<sup>325</sup> See Powell, *supra* note 14 (explaining Powell's choice of the adjective "dialogic" to describe federalism).

<sup>326</sup> Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). Although Cover and Aleinikoff focus solely on inter-judicial dialogue, in the context of federal *habeas* review of state criminal convictions, their concept of federalist conversation readily extends to the political branches as well.

federalism is more than a dualist, vertical division of legal authority between the national and state governments, with each occupying “exclusive and non-overlapping spheres of authority.”<sup>327</sup> It is a conversation. This conversation takes place amongst governments that share concurrent authority in many areas,<sup>328</sup> sometimes cooperatively and other times contentiously.<sup>329</sup> This conversation serves constitutional values, including at least the hope that conversation will improve policy through competition in the marketplace of ideas. This is all familiar in domestic matters, where Justice Brandeis famously described state legislatures as laboratories of democracy, but it clearly breaks from the one-voice approach to foreign relations.<sup>330</sup>

Unlike the baton-passing laws, SADA invites the states to continue a dialogue with Congress about Darfur. It internationalizes Brandeis’ laboratories, allowing experimentation by the states without—in Congress’ judgment—“risk to the rest of the country.”<sup>331</sup> It enables the states to ensure that Congress attends adequately to Darfur, to create political conditions for additional, stronger federal action should the horrors persist. This may serve an internal function within Congress, like a “tickler” system to jog Congress’ memory both to contemplate further legislation and to oversee Executive efforts on Darfur. So

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<sup>327</sup> See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246–50 (2005) (criticizing “dual federalism” and advancing “interactive federalism” as a better alternative, descriptively and normatively).

<sup>328</sup> See *id.* at 246:

In many realms, from narcotics trafficking to securities trading to education, federal and state laws regulate the very same conduct. The United States Supreme Court long ago blessed this arrangement, and, occasional rumblings to the contrary notwithstanding, the Court has shown no inclination to attempt to recreate a dual federalist system.

<sup>329</sup> See *id.* at 249 (“Unlike a purely cooperative model of federalism, a polyphonic conception recognizes an important role for competition among states and between states and the federal government. The relationship of the states and the federal government may indeed be confrontational rather than cooperative. Polyphony accepts a substantial role for dissonance as well as harmony.”).

<sup>330</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“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 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.”).

<sup>331</sup> *Id.*

understood, SADA may also signal to the President, Sudan, and other audiences, domestic and foreign, that Congress (and likely the President) will continue to act on Darfur—the same signal sent when, for example, the U.N. Security Council ends a resolution on Darfur with a public declaration of its “deci[sion] to remain actively seized of the matter.”<sup>332</sup>

Finally, from the perspective of dialogic federalism, one provision of SADA is especially noteworthy. Section 3(c) expressly requires divesting states to give prompt written notice to the Justice Department.<sup>333</sup> This provision proves that the Bush Administration was incorrect when it stated that SADA might “immuniz[e]” or “insulat[e]” state divestment from “federal oversight” or “federal intervention.”<sup>334</sup> To the contrary, this notice affords the Executive the opportunity to review each state’s actions, to raise any concerns directly with the state, and—if necessary—to seek further “intervention” from Congress or the courts. It creates a mechanism for each divesting state to engage in a federalist dialogue about Sudan divestment.

## 6. CONCLUSION

Nearly six years have passed since the atrocities began in Darfur. More than four years have passed since the Bush Administration identified these horrors as genocide. Two years have passed since Kofi Annan gave his farewell address as U.N. Secretary-General at Harry Truman’s Presidential Library, declaring:

[A]s Truman said, “If we should pay merely lip service to inspiring ideals, and later do violence to simple justice, we would draw down upon us the bitter wrath of generations yet unborn.” And when I look at the murder, rape and starvation to which the people of Darfur are being subjected, I fear that we have not got far beyond “lip service.” The lesson here is that high-sounding doctrines

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<sup>332</sup> S.C. Res. 1755, ¶ 6, U.N. Doc. S/RES/1755 (Apr. 30, 2007).

<sup>333</sup> SADA, *supra* note 9, § 3(c).

<sup>334</sup> SADA Signing Statement, *supra* note 286 (“This Act risks being interpreted as insulating from Federal oversight state and local divestment actions that could interfere with implementation of national foreign policy.”); Benczkowski Letter, *supra* note 12, at 67 (“purports to immunize from Federal oversight State and local divestment actions that could interfere with national foreign policy . . .”).

like the “responsibility to protect” will remain pure rhetoric unless and until those with the power to intervene effectively—by exerting political, economic or, in the last resort, military muscle—are prepared to take the lead.”<sup>335</sup>

Yet, as this Article is completed, the ICC Prosecutor states simply: “Genocide continues.”<sup>336</sup> Once again, the political will has fallen short of the promise of “Never again.”

The Darfur divestment movement should be understood in this context. It is an effort by citizens of the several states to communicate audibly with the national government that acquiescence in mass slaughter is intolerable, and to use the mechanisms available in our federalist society to build the necessary political will in the national government. Deployed wisely, and not too frequently, divestment is capable of attention-getting, norm-changing, and door-opening. SADA’s encouragement of divestment helps Congress remind itself to continue to prioritize Darfur amongst the many issues demanding its attention, by extension also prioritizing Darfur for the Executive and the international community. We can imagine the possibility of the incoming Obama Administration working with supportive state officials to enable President-elect Obama to build a Congressional coalition in support of his stated goal “to end the genocide in Darfur.”<sup>337</sup>

Divestment is costlier than sense-of-the-legislature resolutions. It embodies a bottom-up approach to foreign-policy formulation that is messy and noisy, posing coordination problems for our national leadership. But the horrors of Darfur make a particularly compelling demand for more forceful than normal state speech.

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<sup>335</sup> Kofi Annan, Former U.N. Sec’y Gen., Address at the Truman Presidential Museum and Library (Dec. 11, 2006) (transcript available at <http://www.trumanlibrary.org/annan.htm>) (last visited Feb. 22, 2009).

<sup>336</sup> Int’l Criminal Court [ICC], Office of the Prosecutor, *Eighth Report of the Prosecutor of the International Criminal Court to the U.N. Security Council Pursuant to UNSCR 1593* (2005), at 10 (Mar. 12, 2008), available at [http://www2.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/eight%20report%20of%20the%20prosecutor%20of%20the%20icc%20to%20the%20un%20security%20council%20pursuant%20to%20unsc%201593%20\\_2005\\_](http://www2.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/eight%20report%20of%20the%20prosecutor%20of%20the%20icc%20to%20the%20un%20security%20council%20pursuant%20to%20unsc%201593%20_2005_) (last visited Feb. 22, 2009).

<sup>337</sup> See Obama-Biden, Foreign Policy: On Africa, [http://origin.barackobama.com/issues/foreign\\_policy/#onafrika](http://origin.barackobama.com/issues/foreign_policy/#onafrika) (last visited Feb. 22, 2009) (promising to take “immediate steps” to end the genocide in Darfur).



Nearly forty years after the International Court of Justice declared genocide (and a small number of other gross human rights abuses) to be an *erga omnes* concern of *all nations*,<sup>338</sup> it may be that genocide and crimes against humanity (and perhaps a larger number of other gross human rights abuses) have emerged as *erga omnes* concerns of *all people*.<sup>339</sup> The perpetrator of genocide or crimes against humanity (or perhaps other gross human rights abuses), “has become,” as a landmark case describes a torturer, “like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”<sup>340</sup> Indeed, this is consistent with the literal wording of the Genocide Convention, which requires the criminal punishment of all “[p]ersons committing genocide . . . whether they are constitutionally responsible rulers, public officials or private individuals”<sup>341</sup>—that is, the obligation not to commit genocide falls “on everyone.”<sup>342</sup>

Successive Presidents have failed to stop genocide. Political will failed even in this unique moment when the United States officially recognizes for the first time the applicability of its duty under the Genocide Convention to prevent an ongoing genocide.

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<sup>338</sup> See *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5), reprinted in 64 AM. J. INT’L L. 653, 673 (1970) (“By their very nature, the [outlawing of genocide, aggression, slavery, and racial discrimination] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosn. & Herz. v. Yugo.)*, 1996 I.C.J. 595, 616 (July 11) (“the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*.”).

<sup>339</sup> Cf. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 564 (Oxford 2006) (“The increasing reliance on complicity as a central concept in human rights complaints reflects, in my view, an increased sense of solidarity with the victims of human rights abuses in other countries. It reflects a sense that the complainer recognizes that there are now increased responsibilities which stretch across borders and that the bearers of those responsibilities are not simply a rarefied group of temporary leaders. The responsibility extends to all of us.”).

<sup>340</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (holding, in the first modern case under the Alien Tort Claims Act, that torture violates the “law of nations”).

<sup>341</sup> Genocide Convention, *supra* note 22, art. IV.

<sup>342</sup> Hans-Heinrich Jescheck, *Genocide*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW—HUMAN RIGHTS AND THE INDIVIDUAL AND INTERNATIONAL ECONOMIC RELATIONS, 255, 258, 266 (Installment 8, 1985). John Knox describes the Genocide Convention as the “paradigmatic example” of international law placing horizontal duties that “directly bind private actors as a matter of international law, rather than indirectly bind them through the operation of domestic law.” John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1, 27–28 (2008).

This failure poses an early test of the measure of commitment to the new “responsibility to protect.” We are at risk of seeing our national commitment to “Never again” give way to resignation to “Yet again.”

Proponents of divestment urge our national leadership to stiffen their spines and find the will to stop the barbarity in Darfur. The goal of the divestment movement, then, may be seen as its own obsolescence. It is simply a means to an end: peace in Darfur.