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Federalism and Foreign Affairs: Toward a Dormant Foreign Affairs Doctrine

> For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power. Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.[1]

I. INTRODUCTION

Current state and local divestment legislation, aimed at South Africa's system of apartheid,[2] has renewed the debate over constitutional limitations on state actions affecting foreign affairs.[3] The legislative enactments vary in scope. Some call for complete disassociation of the governmental entity from companies doing business in South Africa, while others condition sanctions upon a company's non-adherence to basic civil rights principles.[4] However, it is generally acknowledged that such legislation has a common purpose: to register a moral protest against the system of apartheid, and to pressure the South African government to abolish it.[5] While it is generally acknowledged that these "ends" are noble, the question remains as to whether the "ends" or the "means" employed are

1. Zschernig v. Miller, 389 U.S. 429, 442-43 (1968) (Stewart, J. concurring) (citations omitted).

2. Apartheid ("separateness" in Afrikaans) stands for the policy of strict racial segregation and discrimination practiced by the minority government in South Africa. For an overview of the debate on South Africa, see *South Africa: Is There a Peaceful Path to Pluralism? A Symposium*, 57 BUS. & SOC'Y REV. 4 (1986).

3. *See, e.g.*, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, (1986); Comment, *The Constitutionality of State and Local Governments' Response to Apartheid: Divestment Legislation*, 13 FORDHAM URB. L.J. 763 (1985); Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987); *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 CIN. L. REV. 543 (1985).

4. *See, e.g.*, The Sullivan Principles, *reprinted in*, Exec. Order 12,532, 50 Fed. Reg. 36861, § 2(c) (1985).

5. *See* Note, *supra* note 3, at 822-24, which cites introductory language of various statutes which describes the purpose of the legislation.

constitutional.[6]

The constitutional debate centers around the perceived exclusivity of federal power in the area of foreign affairs. As Madison observed in the Federalist Papers, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[7] Madison's advice takes on additional meaning in today's interdependent world where the acts of a single state, or states in the aggregate, arguably have an increasing effect on foreign nations.[8] The federal government must come to terms with this growing problem if it is to "speak with one voice"[9] in foreign affairs. At the same time, the government must insure that, in fashioning a remedy, it does not unduly restrict the freedom of individuals or the sovereignty of the states.

This Comment will explore the various remedies available. The first section begins with a structural overview of the United States Constitution and examines how this particular problem fits within that structure. The second section examines current approaches to the problem and their potential shortcomings. The third section proposes a model for analyzing state and federal conflicts in the area of foreign affairs. This model is based on the structural theories discussed in section one, with an eye toward avoiding the shortcomings discussed in section two. The final section examines the application of the proposed model to the divestment legislation enacted by California in 1986.

II. STRUCTURAL OVERVIEW

Generally speaking, the Framers of the Constitution created the federal government to perform those functions which the states alone

6. The question of whether or not divestment is an effective means is beyond the scope of this article. For an analysis of the impact of divestment legislation, see Note, *supra* note 3, at 824-27. For a debate on the merits of divestment, see *Discerning the Divestment Debate* by Mangosuthu G. Buthelezi (leader of South Africa's 7 million Zulus and chairman of the South African Black Alliance, speaking against divestment), 57 BUS. & SOC'Y REV. 79 (1986), and *A Plea for International Sanctions* by Desmond Tutu (Bishop of Johannesburg and Nobel Peace Prize winner, speaking for divestment), 57 BUS. & SOC'Y REV. 66 (1986).

7. THE FEDERALIST NO. 42, at 264 (J. Madison) (Mentor ed. 1961).

8. For example, California, if viewed as an independent nation, would rank among the world's top ten economic powers. NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ATLAS OF THE WORLD, 68-69 (5th ed. 1981). Consequently, California, whether alone or in addition to other states, has the potential to significantly influence the activities of foreign nations.

9. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979).

were incompetent to perform.[10] While defining those functions was the source of much debate, there was general agreement that one such function was the conduct of foreign affairs.[11] Unfortunately, this sentiment did not find its way into the specific language of the Constitution.

However, there are a number of enumerated powers which suggest that such a sentiment did exist. For example, Congress is authorized to regulate foreign commerce and the value of foreign coin, to declare war, and to lay and collect duties.[12] In addition, the Executive is authorized to make treaties, appoint ambassadors, and to receive ambassadors and other public ministers.[13] Finally, the Judiciary is given exclusive jurisdiction over admiralty and maritime cases.[14] On the other hand, the states are prohibited from engaging in many of the same functions.[15] These specific examples, in conjunction with the basic structure of the Constitution, suggest that the area of foreign relations is controlled exclusively by the federal government. Indeed, the courts have reached this conclusion in a number of cases, the most prominent of which is *United States v. Curtiss-Wright Export Corp.*[16]

In *Curtiss-Wright*, Justice Sutherland contended that the states never had "international powers" and thus there was no need to enumerate them in the Constitution as being "given" to the federal government; such powers were "necessary concomitants of nationality."[17] The following year, in *United States v. Belmont*,[18] Justice Sutherland again addressed the federal government's exclusive power over foreign relations, holding that "[i]n respect of . . . our foreign relations generally, state lines disappear. As to such purposes

10. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 77 (1962).

11. *Id.* at 47. "The least that could be done was to establish a stong central government which should have control of all foreign relations. These things were self-evident and there seems to have been a general unanimity of sentiment in favor of the reforms proposed." *Id.*

12. U.S. CONST. art. I, § 8.

13. U.S. CONST. art. II, §§ 2, 3.

14. U.S. CONST. art. III, § 2, cl. 1.

15. U.S. CONST. art. I, § 10.

16. 299 U.S. 304 (1936). The Court upheld a Joint Resolution of Congress which delegated power to the President to ban arms sales to countries involved in the Chaco conflict in South America. Curtiss-Wright had made such sales.

17. *Curtiss-Wright*, 299 U.S. at 318.

18. 301 U.S. 324 (1937) The Court upheld the assignment of funds, by the Soviet Union to the United States, which had been deposited in a New York bank by a Russian corporation prior to the Russian Revolution. *Id.* at 332. The bank had refused to recognize the expropriation of the funds by the Soviet Union. *Id.* at 326.

the state of New York does not exist."[19]

While Justice Sutherland's analysis has received some criticism,[20] his conclusion that states have no direct interest in foreign relations is generally accepted and has been followed in subsequent Supreme Court rulings. For example, in a case similar to *Belmont*, *United States v. Pink*,[21] Justice Douglas noted that the states have no concurrent powers in the area of foreign affairs. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."[22]

Thus, the issue of whether the federal government has exclusive power over foreign affairs appears well settled.[23] As one commentator observed: "even at the height of state power, no role was sought or suggested for the States in regard to United States international affairs. The States have never existed where relations with other nations were involved. There have been few 'States righters' in foreign affairs."[24] It follows, then, that states are constitutionally prohibited from engaging in such affairs, and further, that states should likewise be prohibited from enacting legislation which unduly interferes with the federal exercise of foreign affairs powers.

III. CURRENT CONSTITUTIONAL APPROACHES

Recent analysis of the problems raised by state divestment legislation has focused on three constitutional approaches.[25] First, and

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19. United States v. Belmont, 301 U.S. 324, 331 (1937).

20. *See* Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

21. United States v. Pink, 315 U.S. 203 (1942). The Court upheld the assignment of assets by the Soviet Union to the United States, involving a Soviet insurance company based in New York which had been nationalized following the Russian Revolution. *Id.* at 234. Under New York law, the assets would have gone to the state for distribution. *Id.* at 210.

22. *Id.* at 233.

23. *See generally*, HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); THE FEDERALIST NO. 3 (J. Jay); NO. 4 (J. Jay) NO. 5 (J. Jay) NO. 22 (A. Hamilton); NO. 42 (J. Madison); NO. 80 (A. Hamilton).

24. Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 936 (1959). Some commentators have suggested that the major proponents and opponents of "states' rights" have switched sides on the divestment question for transient political purposes. *See, e.g.*, Lewis, *supra* note 3. However, at least for those "states righters" who base their beliefs on notions of federalism, there is nothing inconsistent with asserting state sovereignty in certain domestic affairs and federal sovereignty in the area of foreign affairs; both positions speak to the structural integrity of the government as established by the Constitution.

25. *See supra* note 1.

perhaps most popular, is the dormant commerce clause doctrine,[26] applied in this case to foreign commerce. Arguably, under this theory, the economic ramifications of divestment legislation may conflict with the dormant power of the federal government to regulate foreign commerce. Second is the doctrine of preemption, under which courts may invalidate state laws which conflict with actions taken by the federal government.[27] Under this doctrine, some state divestment legislation may conflict with the policy of "constructive engagement" established by President Reagan.[28] Third is the relatively undeveloped doctrine of dormant foreign affairs powers. Under this doctrine, states are precluded from usurping or unduly interfering with the federal government's power to conduct foreign affairs.[29]

A. Dormant Commerce Clause

Under the dormant commerce clause doctrine, the judicial branch can overturn state laws which interfere with interstate commerce in areas the federal government has left unregulated.[30] After finding that the state law affects interstate commerce, the court does not automatically strike it down. Instead, if certain criteria are met, the court applies a balancing test known as the *Pike* test to determine whether or not the resulting burden on interstate commerce renders the law unconstitutional:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[31]

One potential version of a dormant foreign commerce test could

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26. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), where the court first acknowledged its own power to void state laws affecting interstate commerce, even in areas where the federal government had been silent.

27. *See* G. GUNTHER, CONSTITUTIONAL LAW 324-27 (1986).

28. Executive Order No. 12,532, 3 C.F.R. 387 (1985).

29. *See* Zschernig v. Miller, 389 U.S. 429, 440 (1968), where the Court holds that state regulations "must give way if they impair the effective exercise of the Nation's foreign policy."

30. *See supra* note 23.

31. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted). The test is known as the "*Pike* balancing test."

be formulated by simply substituting "foreign" for "interstate" in the *Pike* test cited above. However, the major cases involving foreign commerce issues suggest that a dormant foreign commerce clause analysis calls for greater scrutiny than its domestic counterpart.

For example, in *Japan Line, Ltd. v. County of Los Angeles*,[32] the Supreme Court struck down a state property tax on foreign cargo containers because the tax conflicted with the federal power to regulate foreign commerce. The Court not only found that dormant powers applied to foreign commerce, but that they were more extensive than those in the domestic area.[33] Further, the rationale offered by the Court supports the notion that foreign commerce is a subset of foreign affairs.

> Foreign commerce is pre-eminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'[34]

In a similar case, *Container Corp. of America v. Franchise Tax Bd.*,[35] the Supreme Court reviewed California's unitary business tax on a Delaware corporation doing business in California and overseas. In upholding the tax, Justice Brennan found no discrimination against foreign commerce[36] and no implication of foreign policy issues.[37] However, he did recognize the inherent problem with state laws which create the possibility of retaliation by a foreign government against the nation as a whole.[38] Further, he reiterated the concerns expressed in *Japan Line* regarding the "one voice" issue.

> Thus, a state tax at variance with federal policy will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive. The second of these considerations is, of course, essentially a species of pre-emption analysis.[39]

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32. 441 U.S. 434 (1979).

33. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979). "Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Id.*

34. *Id.* (quoting Board of Trustees v. United States, 284 U.S. 48, 59 (1933); *see also id.*, at n.13.

35. 463 U.S. 159 (1983).

36. Container Corp. of America v. Franchise Tax Bd., 463 U.S.159, 184 (1983).

37. *Id.* at 197.

38. *Id.* at 194.

39. *Id.* at 194 (emphasis in original).

The differences between *Container Corp.* and *Japan Line* help to define the point beyond which states may not venture in the area of foreign commerce. In terms of foreign policy implications, one significant distinction between *Container Corp.* and *Japan Line* appears to be the subject of the tax. In *Japan Line,* the tax was levied on a foreign company, thus creating the possibility of retaliation against the nation as a whole.[40] However, in *Container Corp.*, the tax was levied on a United States corporation and was not directed at any specific foreign nation.[41] Consequently, the Court found the threat of retaliation "attenuated at best."[42] In addition, the tax in *Japan Line* posed a greater threat to uniformity in international tax matters because it created a "multiple tax" on foreign property.[43] In contrast, the taxing scheme in *Container Corp.* created occasional multiple taxation,[44] but was found to be generally fair[45] and not in an area calling for uniform federal regulation.[46] These distinctions seem to place *Container Corp.* squarely in the "balancing area" of commerce clause analysis,[47] whereas the tax in *Japan Line* ran afoul of the "one voice" standard, both in terms of foreign commerce and foreign affairs, thus never reaching a balancing test.[48]

However, the Court in both cases refers to the increased scrutiny afforded foreign commerce clause problems as well as the tendency of such problems to implicate foreign policy matters.[49] These considerations suggest that a threshold question in foreign commerce cases ought to be whether foreign policy issues are implicated. If so, a separate foreign affairs analysis should be applied; if not, a more rigorous version of the domestic commerce clause should be applied.

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40. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 450 (1979).
41. Container Corp. of America v. Franchise Tax Bd., 463 U.S.159, 195 (1983).
42. *Id.* at 195.
43. *Japan Line,* 441 U.S. at 451-52.
44. *Container Corp.*, 463 U.S. at 193.
45. *Id.* at 184.
46. *Id.* at 193-94.
47. Justice Brennan's opinion appeared to apply the *Pike* balancing test to the tax in *Container Corp.* For example, he found that the tax was based on a legitimate local interest which only had an incidental impact on foreign affairs. Container Corp. of America v. Franchise Tax Bd., 463 U.S.159, 195-96 (1983). Further, he found the primary alternative to the state's tax legislation would have had a similar impact on foreign affairs. *Id.* at 192. For a discussion of the *Pike* balancing test, see *supra* note 31 and accompanying text.
48. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453-54 (1979).
49. *Japan Line,* 441 U.S. at 448; *Container Corp.*, 463 U.S. at 185-86.

B. Preemption Doctrine

An alternate approach which has been applied to both foreign commerce and foreign affairs is the preemption doctrine. Preemption occurs whenever a state law (1) intrudes in an area wholly occupied by the federal government, (2) conflicts with a specific federal regulation, or (3) frustrates the purpose of a federal policy.[50] The problem with using preemption is that it presumes the states have concurrent power to regulate in the given area. Such is not the case with foreign affairs. Thus, preemption would apply only in situations where a legitimate state law, operating in an area where the federal and state government have concurrent power, indirectly affects foreign policy, and then only as an alternate ground for review.[51]

For example, in *Hines v. Davidowitz*[52] the Supreme Court held that registration of aliens may be a concurrent power, albeit a narrowly defined one, because of the state's interest in gathering information about the composition of its resident population.[53] The Court then turned to a preemption analysis, finding that Congress had clearly manifested its intent to establish a comprehensive system of alien registration, a system which precluded enforcement of the conflicting state law.[54]

Notably, Justice Black's decision in *Hines* was devoted largely to a discussion of federal foreign affairs powers.[55] But, rather than finding that the state had no power to register aliens within its borders, Justice Black relied on the broad (as opposed to exclusive) constitutional authority of Congress in the area and found the state law preempted.

One potential problem with this analysis is that by avoiding the "state power" question, while at the same time emphasizing federal foreign affairs power under the rubric of preemption, the *Hines* deci-

50. Pacific Gas & Elec. Co. v. State Energy Comm'n, 461 U.S. 190, 203-04 (1983).

51. One source of confusion may be that balancing tests applied to legitimate state laws which indirectly affect foreign commerce or policy may involve weighing the federal interest in a particular area. Such an analysis would be similar to that employed under the preemption doctrine.

52. 312 U.S. 52 (1941).

53. Hines v. Davidowitz, 312 U.S. 52, 68 (1941); *see also id.* at 68 n.22 (comparing the limited state power to that which exists in the area of interstate commerce, *e.g.*, where states are allowed to restrict the introduction of diseased livestock even though such a restriction directly regulates interstate commerce. Reid v. Colorado, 187 U.S. 137 (1902)).

54. *Hines*, 312 U.S. at 74.

55. *Id.* at 62-9.

sion seems to retreat from the concept of dormant foreign affairs powers, or at the very least, to confuse the two doctrines.

However, twenty-seven years later, the Supreme Court did address the state power question in *Zschernig v. Miller*,[56] laying the foundation for a dormant foreign affairs power similar to that applied in the commerce clause area.

C. *Dormant Foreign Affairs Powers*

In *Zschernig*, the United States Supreme Court examined an Oregon statute which required that certain conditions be met before allowing non-resident aliens to take property by succession or testamentary disposition. The case involved an East German next of kin who was denied certain property belonging to an Oregon citizen who died intestate. The property in question escheated to the state.[57]

The main conditions of the statute were: 1) reciprocal laws of succession in the foreign country, and 2) proof that the foreign heirs would receive the property without threat of confiscation by the foreign government.[58] The Supreme Court of Oregon found the second requirement unsatisfied because of the political system in East Germany.[59]

Justice William O. Douglas, writing for the majority, found that state officials had gone beyond the "routine reading of foreign laws" which the Court had, in the past, recognized as legitimate.[60] Instead, he found that probate courts had "launched inquiries into the type of governments that obtain in particular foreign nations . . . ."[61] Such inquiries had more than an "incidental" effect on foreign affairs and had "great potential for disruption or embarrassment."[62] Further, after reviewing past Oregon decisions applying the statute, Douglas concluded "that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts."[63]

Despite the traditional regulation by states of descent and distri-

56. 389 U.S. 429 (1968).
57. Zschernig v. Miller, 389 U.S. 429, 430 (1968).
58. ORS § 111.070.
59. Zschernig v. Miller, 243 Or. 567, 412 P.2d 781, 792 (1968).
60. *Zschernig*, 389 U.S. at 433 (citing Clark v. Allen, 331 U.S. 503 (1947)).
61. *Id.* at 434.
62. *Id.* at 435.
63. *Id.* at 437-38.

bution, the Court found the law as applied exceeded the boundaries of state power because it interfered with the United States' exclusive control over the conduct of foreign relations.[64] However, the majority did not strike the law down because of any direct conflict with a treaty provision or other federal law. Rather, the law was stricken because its operation took it within the exclusive domain of the federal government. In this sense, the invalidation of the Oregon statute takes on the appearance of preemption, with a valid succession law being stricken because it intrudes in an area wholly occupied by the federal government.

However, the distinction is that the succession law did not intrude on any federal "succession policy." Rather, it indirectly affected the ability of the Executive to conduct foreign affairs. Accordingly, the discussion was about exclusive rather than concurrent powers and the preemption doctrine did not apply. The Court's power to invalidate the law in this case is based on the same "dormant" powers theory used in commerce clause analysis.[65] Thus, it is of no consequence that the federal government had not spoken directly on the succession question raised in *Zschernig*. This was brought out more clearly in the concurring opinion where Justice Stewart held the statute invalid on its face.[66] He pointed out that the issue was one of power, and in resolving it, the Court found that Oregon did not have the power to engage in, or directly affect, foreign relations, regardless of whether or not the statute was in conflict with State Department policy.[67]

The test applied by the majority in *Zschernig* seemed to focus primarily on the *impact* of the law on foreign relations. Even though the purpose (regulating succession) was arguably legitimate rather than pretextual, the potential impact of the law as applied was enough to render it an invalid intrusion upon the federal foreign affairs powers.[68] However, the test was never clearly delineated. Rather, the Court made passing reference to "forbidden" inquires into the nature of particular foreign governments, and suggested that such inquiries create "great potential for disruption or embarrassment."[69]

64. *Id.* at 440.

65. *See supra* notes 43-44 and accompanying text.

66. Zschernig v. Miller, 389 U.S. 429, 442 (1968) (Stewart, J. concurring, with Brennan, J., joining)).

67. *Id.* at 442-43.

68. *Id.* at 434-35.

69. *Id.* at 434-36.

Nonetheless, *Zschernig* appears to present serious problems for state and local divestment legislation. For even if one accepts the purpose of divestment laws as legitimate, as opposed to pretextual, the potential—and actual—impact of the laws would seem to place them at odds with the Constitutional division of powers seen in *Zschernig*. As with the law in *Zschernig*, divestment laws involve inquiries into the inner workings of particular foreign nations—in this case, one foreign nation: South Africa. And in *Zschernig*, it was the *potential* impact which was found unduly burdensome—the State Department did not object to the law, nor were there any diplomatic protests over Oregon's succession decisions.[70] In contrast, the impact of divestment legislation has clearly passed the "potential impact" level,[71] although the degree of actual impact is debatable. Thus, the circumstances under which the court struck down the law in *Zschernig* would appear to be less compelling than those found in the case of divestment legislation. This would suggest that divestment legislation would be unconstitutional under the rule of *Zschernig*. However, as mentioned above, the rule in *Zschernig* needs further clarification.

IV. Proposed Model for Analyzing State Laws Affecting the Foreign Affairs Powers

A. *Initial Considerations*

One initial consideration is: why create an additional model or test for analyzing conflicts between states and the federal government concerning foreign affairs? What is wrong with the current approaches? First, as discussed above, the preemption doctrine is rarely applicable to these conflicts because states simply do not have concurrent powers in most areas which come within the rubric of foreign affairs. The *Hines* case is an exception. However, even in *Hines*, the Court discussed at length the federal foreign affairs powers and flirted with a dormant foreign affairs analysis.[72] Since the Court in *Zschernig* subsequently picked up the dormant foreign affairs theme and gave it legitimacy,[73] there seems little reason to rely on the familiar, but in this instance limited, doctrine of preemption. In addition, reliance on preemption would allow states to indirectly pursue foreign

70. *Id.* at 460 (Harlan, J., concurring).

71. *See, e.g.*, Barratt, *Can External Leverage Pressure South Africa?*, 57 Bus. & Soc'y Rev. 68, 72 (1986).

72. Hines v. Davidowitz, 312 U.S. 52, 62-69 (1941).

73. 389 U.S. at 441.

policy goals in any area where Congress or the Executive remains silent, or where the state law is generally in accord with federal purposes.[74] Such a state of affairs is in obvious conflict with the Court's repeated emphasis on the need to "speak with one voice" in matters of foreign affairs.[75]

Second, the distinction between foreign commerce and foreign affairs seems somewhat artificial in modern times. For example, modern tools of diplomacy range from economic boycotts on the one hand, to favored nation status on the other; from granting access to United States' markets to restricting United States investment or sales in foreign countries. All of these commercial decisions are inextricably bound to foreign affairs matters. They are, in essence, a subset of foreign affairs.[76] Further, using foreign commerce clause tests to determine the validity of state enactments which affect both foreign commerce and foreign policy may result in needless confusion. While foreign commerce and foreign policy are interrelated, it is conceivable that a given state law may have varying effects on each. Consequently, each deserves separate consideration.

Further, assuming the test under the foreign commerce clause approach would be less strict than the one under the foreign affairs powers approach,[77] reliance on the foreign commerce clause could encourage states to couch foreign policy related laws in economic terms, thereby setting up a pretext to avoid added judicial scrutiny.[78] In other words, without a dormant foreign affairs power, states could couch foreign policy initiatives in economic terms to avoid prima facie invalidity, pass the less strict foreign commerce clause test, and un-

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74. *See generally,* Moore, *Federalism and Foreign Relations,* 1965 DUKE L.J. 248, 256 (1965).

75. *See supra* note 9.

76. *See generally* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448-451 (1978) (where the Court includes "speaking with one voice" as an added factor when dealing with foreign commerce clause cases as opposed to domestic commerce clause cases). *See also supra* notes 47-48 and accompanying text.

77. Since states operate in foreign commerce on a regular basis, whereas they are precluded from conducting foreign affairs, it seems likely that the constitutional test of laws dealing with the former would be less strict; possibly somewhere between domestic commerce clause cases and foreign affairs cases in terms of the court's level of scrutiny. That the level of scrutiny would be greater than that in domestic commerce clause cases has already been determined in *Japan Line* and elsewhere. *See also* THE FEDERALIST NO. 42, at 279-283 (J. Madison) (J. Cooke ed. 1961).

78. *See, e.g.,* Comment, *Federal Preemption and the South African Sanctions: A Survival Guide for States and Cities,* 10 LOY. L.A. INT'L & COMP. L.J. 693, 739 (1988) (suggesting that a state's ficsal concerns serve to legitimize state divestment legislation).

dermine the federal governments ability to exercise its foreign affairs powers—without ever having to justify the law in terms of its indirect impact on such powers.

In developing a model for analyzing state laws which might infringe upon exclusive federal foreign affairs powers, we will rely primarily on the factors discussed above in *Zschernig*, *Hines*, and *Japan Line*. Included among these factors are: 1) whether the state law concerns a legitimate or traditional state function;[79] 2) the impact of the law on the ability of the executive to function in the area of foreign affairs, including the ability to "speak with one voice;"[80] 3) whether the law conflicts with any federal policy or law;[81] and 4) whether the law discriminates against particular foreign nations, or requires states to inquire into the nature of foreign governments, such that there exists the possibility of retaliation against the nation as a whole.[82] The first factor deals with the source of power[83] and the purpose of the law, while the remaining three factors involve the "impact" of the law.

Thus, the first part of the test asks whether or not the state law was enacted for a legitimate purpose. In this case, the illegitimate purpose would be to influence the internal affairs of a foreign nation or to otherwise engage in foreign affairs activities.[84] The second part of the test, using the latter three factors, would involve balancing putative benefits of the law against the potential burdens placed on foreign affairs. After *Zschernig*, the balancing test would have to include "potential," as well as actual impact.[85] Also, in view of *Wickard v. Filburn*,[86] the effect of the law "in the aggregate" would have to be considered to some degree.

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79. Zschernig v. Miller, 389 U.S. 429, 440 (1968).

80. *Id.* at 440-41; *Japan Line*, 441 U.S. at 448-49.

81. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

82. *Id.* at 63-64; *Zschernig*, 389 U.S. at 441; Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453 (1978).

83. Normally, the "power" issue arises only in federal action cases since federal powers are enumerated. Conversely, when examining the validity of state action, the inquiry normally begins with limitations on state power because the source of power, the sovereign state, is seldom at issue. However, as discussed in the opening section of this Comment, foreign affairs may be one area in which states have no inherent power. See, for example, Justice Stewart's concurring opinion in Zschernig, where he finds that Oregon does not have the power to enact such legislation and consequently, the legislation is invalid "on its face." *Zschernig*, 389 U.S. at 442.

84. *See* Zschernig v. Miller, 389 U.S. 429, 442-43 (1968) (Stewart, J., concurring).

85. *Id.* at 435.

86. 317 U.S. 111 (1942).

Fortunately, in fashioning a test using the above factors, we need not start from "scratch." Because the dynamics involved in dormant commerce clause cases are essentially the same as in dormant foreign affairs cases, such a test could be patterned after the *Pike* test mentioned earlier.[87] This would be accomplished by simply adding some "teeth" to the variables and substituting "foreign relations" for "interstate commerce." To wit, once foreign relations issues have been implicated, the following test would apply:

1) If the primary purpose of the statute is to affect the internal politics of a foreign nation or to otherwise engage in foreign affairs, the statute is void.[88]
2) If the primary purpose of the statute is to promote legitimate local public interests, it will be upheld unless the *potential* burden imposed on foreign relations *outweighs* the putative local benefits.
3) In weighing the benefits and burdens, major factors include: 1) the nature of the local interest; 2) the availability of less burdensome alternatives; 3) the degree to which the statute, in effect, impairs the federal government's ability to "speak with one voice" in its conduct of foreign affairs; and 4) the degree to which the statute, in effect, discriminates against a specific nation or group of nations such that it raises the possibility of retaliation against the United States.

The first prong of the test addresses the constitutional structure of our nation, recognizing that States have no power in the area of foreign affairs, that foreign affairs are within the exclusive domain of the federal government, and that any laws promulgated to effectuate foreign policy goals of state officials are necessarily void.[89] The "primary purpose" language addresses the problem of pretext. Thus, a statute could not be saved by the mere presence of a legitimate purpose or by post hoc rationalizations; the legitimate purpose must be primary.

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87. *See supra* text accompanying notes 30-31.

88. *See Zschernig*, 389 U.S. at 442 (Stewart, J., concurring).

89. This not only makes sense in terms of the need to act as one nation with respect to other nations, but also in terms of our democratic processes. When people vote for state officials they are apt to consider local issues such as property taxes, mass transit, and crime. When voting for federal officials, people are apt to consider national and international issues such as social security, welfare, defense, and foreign policy. In other words, the electorate did not elect state officials because of their foreign policy experience or lack thereof, and in that sense, they are not authorized to speak on such issues.

The second prong of the test is fashioned after the *Pike* test, with some changes made to increase the level of scrutiny.[90] The "potential burden" language reflects the holding in *Zschernig* which was based, in part, on the Oregon statute's "great potential for disruption and embarrassment."[91] "Clearly excessive in relation to" is replaced by "outweighs," thus reducing the plaintiff's burden of proof.

The *Pike* test language regarding "incidental effects" was dropped because it suggests categories of effects, some being less than incidental and some being more than incidental. Rather than attempt to compartmentalize the varying degrees by which foreign relations are affected, a sliding scale approach would seem more appropriate. For example, a potential incidental effect might only require a legitimate state interest and a lack of comparable alternatives; a potential significant effect might require a substantial state interest and a lack of viable alternatives; and an actual significant effect might require a compelling state interest and no less burdensome alternatives.

The third "prong" is simply a list of relevant factors which appeared in the main cases discussed above: *Japan Line*, *Hines*, and *Zschernig*.

Perhaps the best way to examine the dynamics of the proposed model is to apply it to an existing state statute. California's divestment legislation, Assembly Bill 134 (hereinafter AB 134), will be used for purposes of illustration.[92]

V. DORMANT FOREIGN AFFAIRS MODEL APPLIED

California's divestment legislation, signed into law on September 26, 1986, requires that:

> On or after January 1, 1987, state trust moneys shall not be used to make additional or new investments or to renew existing

90. Given the structural mandate of the Constitution regarding the exclusivity of foreign affairs power, and the practical problems inherent in allowing fifty states to participate in setting foreign policy, a reasonably strict test would seem appropriate. Additionally, the Supreme Court has already recognized that, because of the foreign affairs implications, the foreign commerce power is greater than the domestic commerce power. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1978). It would seem to follow that the proposed dormant foreign affairs powers would likewise be greater.

91. Zschernig v. Miller, 389 U.S. 429, 435 (1968)

92. CAL. GOV'T CODE §§ 16640-16650 (West Supp. 1987). For a general discription of AB 134, see *Review of Selected 1986 California Legislation*, 18 PAC. L.J. 543 (1987). *See also Challanges to the Constitutionality of the California Divestment Statute*, 19 PAC. L.J. 217 (1987) (questioning the constitutionality of the law based on preepmtion, foreign commerce clause, and California's State Constitution).

> investments in business firms that have business operations in South Africa, or business arrangements with the government of South Africa . . . [nor] to make additional or new investments in financial institutions that make loans to any South African corporation, or with the government of South Africa.[93]

On its face, the law implicates foreign affairs issues, thus triggering an application of the dormant foreign affairs test. The threshold question of purpose is discussed in section 1 of AB 134, which is devoted largely to a discussion of the repugnant practices of apartheid in South Africa.[94] The section concludes that state money should be divested for two reasons: first, such investments are "fiscally imprudent, given the political and economic instability of South Africa;" and second, they are "inconsistent with the moral and political values of the people of California."[95]

Despite the reference to fiscal policy, the plain language of the act suggests that its primary purpose is to protest against apartheid and influence businesses to pull out of South Africa. Another factor in support of this interpretation is that most United States companies targeted by divestment laws[96] have less than one percent of their operations in South Africa[97] and would not suffer significant losses, even in the worst case scenario.[98]

Consequently, AB 134 fails the first prong; it is an indirect economic boycott of South Africa, and its primary purpose is to force the

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93. CAL. GOV'T CODE §§ 16641, 16642 (West Supp. 1987).

94. CAL. LEGISLATIVE COUNSEL'S DIGEST AB 134, ch. 1254, section 1 (1986).

The Legislature hereby finds and declares that:

> (a) The Country of South Africa is the only political system on this planet which constitutionally enshrines a political system whereby a small minority of the population has the power and authority to separate, discriminate against, and deny fundamental political, social, and economic rights to, 83 percent of its population solely on the basis of race . . . .
>
> (e) Californians of all races, creeds, and religions regard the policies and practices of apartheid in South Africa, as they do repressive policies and practices in other countries, as repugnant to the priciples of individual liberty, social justice, and political and social enfranchisement, which are fundamental to free societies everywhere. The opposition of Californians to apartheid reflects the deep and long-standing opposition of the American people to inequality and injustice wherever it may be found.

Id. at 101.

95. CAL. LEGISLATIVE COUNSEL'S DIGEST AB 134, ch. 1254, section 1 (1986).

96. For a description of the activities of major companies and the extent of their operations in South Africa, see Moskowitz, *Company Performance Roundup*, 57 BUS. & SOC'Y REV. 125 (1986).

97. N.Y. Times, Aug. 2, 1985 at D4, col. 3.

98. *See* Note, *supra* note 3, at 822-24.

current government of South Africa to change its internal policies of apartheid. The inclusion of a legitimate, but secondary, purpose does not serve to validate the statute.

Even assuming that AB 134 passed the first prong and that economic concerns were the primary factor in passing the statute, the Act arguably would not fair well in the balancing test. If the nature of the state interest is sound investing, it is doubtful that withdrawing investments from General Motors, Ford, IBM, and other major companies operating in South Africa is the only viable way, or even a reasonable way, to promote that interest.[99]

In terms of "speaking with one voice," AB 134 and similar legislation in other states established policies at state and local levels which were at odds with President Reagan's program of "constructive engagement," which called for a series of economic sanctions but also allowed for continued presence by United States companies on the theory that they are a positive force for change.[100] More recently, Congress overrode the President's veto to pass the Comprehensive Anti-Apartheid Act of 1986,[101] which established broader sanctions. However, in passing the Act, Congress chose not to include a provision in the House version which would have required all U.S. companies to withdraw from South Africa within six months.[102] Thus, to the extent that AB 134 indirectly encourages businesses to leave South Africa, it may not be consistent with federal policy. Rather, it may be undermining U.S. foreign policy by adding to the cacophony of "voices" emanating from this country.

The final factor, the prospect of retaliation against the nation as a whole, would also appear to militate against upholding AB 134. This is because the discriminatory effect of AB 134 and similar legislation is focused on one country, rather than on economically unstable countries generally.

In conclusion, AB 134 would probably fail both prongs of the proposed dormant foreign affairs test. First, it is a direct intrusion

99. There is some concern that selling stock in such companies as part of the divestment plan would expose state agencies to liability for breach of fiduciary obligation. In other words, such sales would hurt state portfolios rather than help them, and by divesting for political reasons, states would be reducing the value of pensions for state employees. A number of states have included immunity provisions to preclude such a possibility. *See* CAL. GOV'T CODE §§ 16649, 16650 (West Supp. 1987).

100. *See* Exec. Order No. 12532, 50 Fed. Reg. 36861 (1985).

101. Pub. L. No. 99-440, 100 Stat. 1086 (1986).

102. *See* Felton, *'Less Than Brilliant' Administration Role Contributed to Momentum for Sanctions*, 44 CONG. Q. WEEKLY REP. 2340, 2341 (1986).

upon the federal government's foreign affairs powers. Second, even in terms of indirect effects, the burden it places on the nations ability to conduct foreign policy arguably outweighs the putative local benefits.

VI. CONCLUSION

The development of a dormant foreign affairs doctrine is needed to ensure that our government can speak clearly and authoritatively in the international setting. Allowing states to engage in foreign policy, directly or indirectly, creates the potential for confusion and impairs the performance of federal officials whose duty it is to conduct such policies. The Constitution provides citizens of the various states with a mechanism for influencing foreign policy through the election of members of Congress and the Executive branch. It is these elected officials, and not those at the state and local levels, who have been empowered by the people to speak for this nation.

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