

Genocide Funding: The Constitutionality of State Divestment Statutes

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NOTE

GENOCIDE FUNDING: THE CONSTITUTIONALITY OF STATE DIVESTMENT STATUTES

Sapna Desai[†]

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INTRODUCTION

Investment in Sudan “is a chain of cause and effect in which American money may finally objectively fund genocide—in which Americans may come to pay, through no fault or intention of their own, for crimes they abhor.”¹ On December 31, 2007, in an effort to condemn the Sudanese government’s funding of the genocide in Darfur, Congress enacted the Sudan Accountability and Divestment Act (SADA), which authorizes states to divest any state assets from companies doing business in Sudan.² As of January 2009, twenty-seven states had adopted statutes that mandate that their state money and state pension funds divest holdings in companies that perpetuate the genocide.³ Of those states, nineteen have adopted model legislation created by the Genocide Intervention Network’s Sudan Divestment Task Force (SDTF Model), and eight have adopted their own legislation.⁴ Because the Sudan divestment movement began recently,⁵ courts have had minimal opportunity to address the constitutionality of the state-created divestment statutes. In *National Foreign Trade Council v. Giannoulis*,⁶ a 2007 case decided before Congress’s recent authorization of state divestment statutes, a district court held that Illinois’ law ending *all* investments in Sudan was unconstitutional.⁷ Other states have taken a less restrictive approach than Illinois, including those that have adopted the SDTF Model;⁸ and even Illinois has since amended its original divestment statute.

Still, the National Foreign Trade Council (NFTC), which brought suit in *Giannoulis*, may bring suit against other state divestment statutes, even though the NFTC conceded some are “not as bad as Illi-

1 153 CONG. REC. S15, 373 (daily ed. Dec. 12, 2007) (statement of Sen. Dodd).

2 See Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516.

3 Sudan Divestment Task Force, Divestment Statistics, <http://sudandivestment.org/statistics.asp> (last visited Jan. 5, 2009) [hereinafter SDTF Divestment Statistics].

4 *Id.*

5 SUDAN DIVESTMENT TASK FORCE, FREQUENTLY ASKED QUESTIONS 3 (2008), available at <http://sudandivestment.org/docs/FAQs.pdf>.

6 523 F. Supp. 2d 731 (N.D. Ill. 2007).

7 *Id.* at 750.

8 See SDTF Divestment Statistics, *supra* note 3.

nois.’⁹ Furthermore, President George W. Bush included a signing statement with the bill indicating that the Executive Branch reserved the power to interpret state divestment statutes to be unconstitutional.¹⁰ President Bush’s signing statement—together with a memo from his Justice Department—outlines an argument that, notwithstanding the SADA, the state divestment statutes may still be unconstitutional.¹¹ Nonetheless, as this Note will explain, most state divestment statutes withstand constitutional scrutiny under the Supremacy Clause,¹² the dormant Foreign Commerce Clause,¹³ and the Foreign Affairs Power,¹⁴ which all aim to protect the federal government’s uniformity on foreign policy.

This Note examines the constitutionality of state divestment statutes aimed at Sudan in light of the SADA’s authorization, focusing on the SDTF Model and Illinois’ divestment statute. Part I provides a background on Sudan and the ongoing conflict in Darfur. Part II discusses the divestment movement, state policy on Sudan, including the SDTF Model legislation and Illinois’ 2005 and 2007 statutes, and federal policy for Sudan. It also looks at the scope of the SADA’s authorization, concluding that while the SADA authorizes divestments under the SDTF Model, it does not authorize the Illinois divestment scheme. Part III examines the SADA’s effect on the constitutionality of state divestment statutes under the Supremacy Clause and the dormant Foreign Commerce Clause, concluding that the Illinois scheme is invalid under either analysis, but that the SDTF Model remains constitutional. Part IV considers the constitutionality of the state divestment statutes in light of the Foreign Affairs Power, analyzing the separation and balance between Congress’s and the Executive’s power over Foreign Affairs. This Part contends that the Illinois scheme violates the Foreign Affairs Power, but that the SDTF Model does not. Finally, the

⁹ Kathleen Pender, *Cutting Business Ties to Sudan*, S.F. CHRON., Oct. 1, 2006, at C1, LexisNexis Academic (quoting William Reinsch, President, National Foreign Trade Council).

¹⁰ See George W. Bush, U.S. President, Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 WKLY. COMP. PRES. DOC. 1646 (Dec. 31, 2007) [hereinafter President Bush’s Statement].

¹¹ See *id.*; Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney Gen., to Richard B. Cheney, Vice President of the U.S. (Oct. 26, 2007) (on file with author) [hereinafter Justice Dep’t Memo] (“[T]he bill purports to transfer [to] State and local governments, in a way that raises both constitutional separation of powers and federalism questions, foreign policy authority that the Constitution places, for very good reasons, with the Federal government.”).

¹² U.S. CONST. art. VI, cl. 2.

¹³ U.S. CONST. art. I, § 8, cl. 3.

¹⁴ See generally *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49–52 (1st Cir. 1999) (describing the constitutional basis for the foreign affairs power), *aff’d in result sub nom. Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

Note concludes by exploring the broader implications of the constitutionality of state divestment statutes in light of the SADA.

I

BACKGROUND ON SUDAN AND THE PERSISTING CONFLICT

The conflict in Darfur, Sudan¹⁵ between African Muslim ethnic groups and Arab Muslim inhabitants began in the 1930s and resurfaced in the mid-1980s.¹⁶ Ethnic tensions, drought, competition for scarce resources, and a struggle for political power prompted armed conflict between the two groups.¹⁷ This armed conflict led to a civil war, which began in February 2003 and included violence against government property and troops in Darfur.¹⁸ In response, the Sudanese government recruited, armed, and compensated the Arab militia, known as the Janjaweed, to carry out an “ethnic cleansing” of the African civilian population.¹⁹

The conflict has cost the lives of approximately seventy thousand civilians and has resulted in two million displaced persons, including two-hundred thousand refugees who have fled to Chad.²⁰ The Sudanese government initially justified its assistance to the Janjaweed by citing a need to cease the rebellion.²¹ Not surprisingly, however, the Sudanese government has distorted the reality of the situation. In May 2006, an independent Sudanese government committee released a report concluding that no genocide had occurred, rape was not

¹⁵ The Government of National Unity (GNU) governs Sudan, a poverty-stricken country divided by race and religion. See HUMAN RIGHTS WATCH, VOL. 16, NO. 5(A), DARFUR IN FLAMES: ATROCITIES IN WESTERN SUDAN, 1–2, 6–8 (2004), available at <http://www.hrw.org/reports/2004/sudan0404/sudan0404.pdf>; CIA, THE 2008 WORLD FACTBOOK: SUDAN, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last visited Jan. 5, 2009) [hereinafter CIA WORLD FACTBOOK]. “[T]he National Congress Party (NCP) and Sudan People’s Liberation Movement (SPLM) formed a power-sharing government under the 2005 Comprehensive Peace Agreement,” which effectively ended the twenty-one year civil war between the northern and southern regions of Sudan. CIA WORLD FACTBOOK, *supra*; see Simon Roughneen, *Sudan: Unresolved North-South Conflict Risks New Crisis Beyond Darfur*, WORLD POL. REV., June 28, 2007, <http://www.worldpoliticsreview.com/Article.aspx?id=892>; BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, SUDAN: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES–2004 (2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm> (last visited Jan. 5, 2009).

¹⁶ TED DAGNE & BATHSHEABA EVERETT, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS ORDER CODE RL32643, SUDAN: THE DARFUR CRISIS AND THE STATUS OF THE NORTH-SOUTH NEGOTIATIONS 1 (2004), available at <http://www.fas.org/man/crs/RL32643.pdf>.

¹⁷ *Id.*

¹⁸ See HUMAN RIGHTS WATCH, *supra* note 15, at 9.

¹⁹ See *id.* at 22–24.

²⁰ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 15.

²¹ See HUMAN RIGHTS WATCH, DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN, § 5 (2004), available at <http://hrw.org/en/node/12133/section/1>.

widespread, and the number of deaths had been exaggerated.²² The international community rejected these conclusions, and the United Nations Secretary-General called upon Sudan to take action on every level of government to stop the violence in the region.²³ Feeling international pressure to resolve the conflict, the Sudanese government, the Sudan Liberation Army (SLA), and the Justice and Equality Movement (JEM) signed a humanitarian ceasefire agreement on April 8, 2004.²⁴ The agreement failed to create a timetable or structure to monitor the efforts, so the Abuja Protocol of November 9, 2004 hoped to address some of these concerns.²⁵ However, ceasefire violations and the parties' continuous development of their military positions prevented a peaceful resolution through these agreements.²⁶

Sudan's volatile political situation is closely linked to its economy. Although Sudan's economy is stalked by drought, civil war, and global competition,²⁷ its development of an oil-export pipeline in 1999 increased its crude oil exports and contributed to its now "booming" economy.²⁸ Increases in oil exportation since 1999 have led to increases in Sudan's military budget; Sudan's President Omar Al-Bashir stated, "Just when some countries gave us sanctions, God gave us oil."²⁹ The Sudanese government now spends approximately 80 percent of its oil revenues on military expenditures.³⁰

²² See United Nations Security Council, Report of the Secretary-General S/2005/68, ¶ 13 (Feb. 4, 2005), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/229/23/PDF/N0522923.pdf>.

²³ See *id.* ¶¶ 33–35.

²⁴ See DAGNE & EVERETT, *supra* note 16, at 8.

²⁵ Protocol Between the Government of the Sudan (GoS), The Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Enhancement of the Security Situation in Darfur in Accordance with the N'djamena Agreement 1 (Nov. 9, 2004), available at <http://www.unsudanig.org/> (search for "Protocol Sudan Liberation Movement" and follow the first link) ("Expressing our utmost concern over the repeated violations of the relevant provisions of the Humanitarian Ceasefire Agreement . . . and the prevailing insecurity in Darfur, notably the persistent attacks and other abuses against civilians and their property and livelihood . . ."). The protocol was followed by a Declaration of Principles between the Government of Sudan, the Sudan Liberation Movement, and the Justice and Equality Movement, which reaffirmed their commitment to previous ceasefire resolutions and other peace agreements. Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur (July 6, 2005), available at <http://www.issafrica.org/AF/profiles/sudan/darfur/declprinciplesjul05/pdf>.

²⁶ See United Nations Security Council, *supra* note 22, ¶ 35.

²⁷ CIA WORLD FACTBOOK, *supra* note 15.

²⁸ *Id.*

²⁹ SUDAN DIVESTMENT TASK FORCE, PETROCHINA, CNPC, & SUDAN: PERPETUATING GENOCIDE, 4 (2007).

³⁰ MICHAEL HOGAN, UNDERSTANDING SUDAN: FACT SHEET: CHINA & SUDAN, 2 (2007), available at <http://africa.berkeley.edu/Sudan/Oil/China-SudanFactSheet2007.pdf> (last visited Jan. 31, 2009).

II FEDERAL AND STATE POLICY IN THE SUDAN DIVESTMENT MOVEMENT

Frustration with the national government's attempts to resolve the conflict in Sudan³¹ and a desire to prevent investment in companies that provide financial support for genocide³² led to the Sudan Divestment Movement, which aims to decrease investment in Sudan, thus depriving the Sudanese government of funding for the genocide.³³ A majority of U.S. states have shown support for the divestment movement through the adoption or introduction of legislation that mandates divestment in companies affiliated with Sudan.³⁴ The Sudan Divestment Task Force (SDTF) created a model for state divestment statutes that balances the impact on the Sudanese government with protecting Sudanese civilians.³⁵ Of the twenty-seven states that have already adopted divestment legislation, nineteen have followed the Sudan Divestment Task Force, model and eight have passed their own state-specific statutes.³⁶ Two other states have initiated Sudan-divestment campaigns.³⁷ Historically, Sudan has been responsive to economic pressure, and companies have already reacted to the movement by ceasing operations in Sudan.³⁸ Accordingly, Sudan's dependence on foreign investment may promote peace in Sudan.³⁹

³¹ Greg Miller & Josh Meyer, *U.S. Relies on Sudan Despite Condemning It*, L.A. TIMES, June 11, 2007, at A1, available at <http://articles.latimes.com/2007/jun/11/world/fg-us-sudan11> ("President Bush has denounced the killings in Sudan's western region as genocide and has imposed sanctions on the government in Khartoum. But some critics say the administration has soft-pedaled the sanctions to preserve its extensive intelligence collaboration with Sudan."); see also Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245, 263 (2006).

³² See Sudan Divestment Task Force, <http://www.sudandivestment.org/home.asp> (last visited Jan. 5, 2009) [hereinafter SDTF Homepage].

³³ See *id.*

³⁴ See *infra* notes 36–38 and accompanying text. The United States does not stand alone in the divestment movement; eighteen other countries have also initiated Sudanese-divestment campaigns. See SDTF Divestment Statistics, *supra* note 3.

³⁵ See SDTF Homepage, *supra* note 32.

³⁶ SDTF Divestment Statistics, *supra* note 3. 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 have adopted the SDTF Model Legislation. *Id.* Arkansas, Connecticut, Illinois, Maine, Maryland, Missouri, New Jersey, and Oregon have adopted their own models. *Id.*

³⁷ See *id.*

³⁸ See SDTF Homepage, *supra* note 32. Companies including La Mancha Resources, CHC Helicopter, Siemens, Rolls Royce, ICSA of India, Weatherford International, Weir Group, and Schlumberger have ceased (or plan to cease) doing business in Sudan or have significantly changed their behavior in the country. See SDTF Divestment Statistics, *supra* note 3.

³⁹ See SDTF Homepage, *supra* note 32. Several of the companies that ceased operations in Sudan have acknowledged the influence of the Sudanese divestment movement upon their actions, though others have mentioned "humanitarian," "political," and even "moral" concerns related to Sudan. SDTF Divestment Statistics, *supra* note 3.

The majority of U.S. states have adopted some form of the SDTF Model, while others, including Illinois, have taken their own approach. Illinois' model, compared to the SDTF Model, mandates divestment in more cases, has fewer exceptions, and affects more companies. The federal government's authorization under the SADA does not provide a blanket authorization for these state divestment statutes. This Part explains that the SADA authorizes divestment legislation under the SDTF Model but does not authorize Illinois' state divestment scheme.

A. State Policy on Sudan Divestment

1. *The Sudan Divestment Task Force Model*

The Genocide Intervention Network (GIN) is working with the SDTF to facilitate the Sudan divestment movement.⁴⁰ The SDTF designed the SDTF Model statute to “maximize impact on the Sudanese government, while minimizing potential harm to both innocent Sudanese civilians and investment returns.”⁴¹ The sample legislation mandates divestment of state pension funds and other affected assets from certain companies.⁴² Generally, the SDTF Model concentrates on state pension funds investing in the worst of offending companies, defined as companies with these three characteristics: “1. Have a business relationship with the government or government-created project, 2. Impart minimal benefit to the country's underprivileged, and 3. Have demonstrated no substantial corporate governance policy regarding the Darfur situation.”⁴³ The SDTF Model only requires divestment from an offending company if that company does not change its behavior.⁴⁴ Finally, the Model has exceptions, which allow investment in companies, industries, and regions that benefit civilians.⁴⁵

The SDTF Model requires state-run funds to identify “Scrutinized Companies” and in some cases mandates divestment from these companies.⁴⁶ “Scrutinized Companies” include those that (1) contract directly with the government of Sudan or are involved in government-

⁴⁰ See SDTF Homepage, *supra* note 32.

⁴¹ *Id.* Cooley Godward Kronish LLP is the pro bono legal counsel for this project. Sudan Divestment Task Force, *Task Force Reports* (2007), <http://www.sudandivestment.org/position.asp> (last visited Jan. 5, 2009). For the text of the model legislation, see TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION (Sudan Divestment Task Force 2008), available at http://sudandivestment.org/docs/task_force_targeted_divestment_model.pdf.

⁴² TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION §§ 1(t), 2(n).

⁴³ See Sudan Divestment Task Force, *supra* note 41.

⁴⁴ See *id.* (“The targeted model *only* requires divestment from companies that are unresponsive to an expedited person of shareholder engagement.”); TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION § 4(a)(4).

⁴⁵ TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION § 2(o), (p).

⁴⁶ See *id.* § 4(a)-(b).

commissioned projects, and whose company revenue or assets are linked to oil-related activities, mineral extracting activities, or power production activities that have failed to take "Substantial Action,"⁴⁷ (2) supply military equipment in Sudan;⁴⁸ or (3) are complicit in the Darfur genocide.⁴⁹ A company can avoid divestment by taking "Substantial Action," which requires creating a plan to cease scrutinized business operations within one year.⁵⁰ Scrutinized companies do not include "Social Development Companies," which are companies that provide humanitarian, medicinal, or educational services.⁵¹

Once a state fund identifies a "Scrutinized Company," it must begin "engagement," which requires identifying the company, sending a written warning that it may be subject to divestment, and encouraging the company to cease the scrutinized operations.⁵² If the company ceases its scrutinized business operations within ninety days of initial notification to the company, then the state removes the company from the "Scrutinized Company" list.⁵³ Alternatively, if the company does not cease the operations, the state pension fund must divest itself of all publicly traded securities of that company.⁵⁴

The SDTF Model is carefully limited in scope and application. For example, it applies to companies engaged in scrutinized activity with the government in Khartoum, Sudan, but not to the regional government in southern Sudan.⁵⁵ Also, the definition of "Public Funds" includes only state pension fund systems and other affected assets,⁵⁶ and mandatory divestment is not required for the public funds' indirect holdings in actively managed investment funds, which include private equity funds.⁵⁷ Additionally, the SDTF Model expires when Congress or the President declares either that the genocide has ceased for at least twelve months or that the Sudanese government has honored its commitments to end the genocide, the United States withdraws all sanctions against the Sudanese government, or further legislation or an executive order declare that divestment is in conflict with U.S. foreign policy.⁵⁸ In fact, the legislation remains in effect only as long as it is "consistent with, and does not unduly interfere

47 *Id.* § 2(o)(1)(i).

48 *Id.* § 2(o)(3).

49 *Id.* § 2(o)(2).

50 *See id.* § 2(q).

51 *Id.* § 2(p).

52 *Id.* § 4(a)(1)–(2).

53 *Id.* § 4(a)(3)–(4).

54 *Id.* § 4(a)(4), (b).

55 *Id.* § 2(f).

56 *Id.* § 2(n).

57 *Id.* § 4(e).

58 *Id.* § 6.

with, the foreign policy of the United States.”⁵⁹ The SDTF Model also includes a severability clause, stating that if any particular portion is found to be “invalid, illegal, unenforceable or unconstitutional,” that particular clause can be severed and the rest of the legislation will remain operative.⁶⁰

2. *The Illinois Sudan Act*

Illinois adopted its own mandatory divestment statute in 2005, the Illinois Sudan Act (2005 Illinois Act), or the “Act to End Atrocities and Terrorism in the Sudan,” which consisted of two parts, the Deposit of State Moneys Act (2005 Illinois Moneys Act) and the Illinois Pension Code (2005 Illinois Pension Act).⁶¹ The 2005 Illinois Moneys Act mandated divestment of the state treasurer’s investments for all companies doing business with or in Sudan; the 2005 Illinois Pension Act mandated divestments for the entire Illinois pension system in all companies with ties to Sudan.⁶² In February 2007, an Illinois district court held in *NFTC v. Giannoulis* that the 2005 Illinois Act was unconstitutional.⁶³ Rather than strike down the 2005 Illinois Act as per se unconstitutional, the court specified boundaries for Sudan divestment statutes that Illinois had crossed.⁶⁴

The Illinois legislature responded by amending the 2005 Illinois Sudan Act and in 2007 signed into law an amended Illinois Sudan Act (2007 Illinois Act). Like the 2005 Illinois Act, the 2007 Illinois Act has two sections. The first section, the amended Deposit of State Moneys Act (2007 Illinois Moneys Act) mandates that the state treasurer divest from a narrower range of companies than the 2005 Illinois Moneys Act required.⁶⁵ Second, the amended Illinois Pension Code (2007 Illinois Pension Act) does not apply to the entire pension system and mandates that these more-limited state pension funds divest from a narrower range of companies.⁶⁶

⁵⁹ *Id.* § 1(s).

⁶⁰ *Id.* § 10.

⁶¹ Deposit of State Moneys Act, 15 ILL. COMP. STAT. ANN. 520/0.01 to 520/23 (West 2008), amended by Act to End Atrocities and Terrorism in the Sudan, Ill. Pub. Act No. 094-0079 (2006); Illinois Pension Code, 40 ILL. COMP. STAT. 5/1-101 to 5/1-120 (2007), amended by Act to End Atrocities and Terrorism in the Sudan, Ill. Pub. Act No. 094-0079 (2006). Note that much of the language of the Act to End Atrocities and Terrorism in the Sudan was repealed by Ill. Pub. Act 094-0079.

⁶² See generally sources cited *supra* note 61.

⁶³ See Nat’l Foreign Trade Council v. Giannoulis, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

⁶⁴ See *id.*

⁶⁵ See 15 ILL. COMP. STAT. 520/0.01 (2007).

⁶⁶ See 40 ILL. COMP. STAT. 5/1-101.

a. *Giannoulis and the Illinois Sudan Act of 2005*

In *NFTC v. Giannoulis*, the National Foreign Trade Council (NFTC), along with municipal pension funds in Illinois and public pension fund beneficiaries, brought a federal action against Illinois officials challenging the legality of the 2005 Illinois Act.⁶⁷ The case was brought in the U.S. District Court for the Northern District of Illinois, which held the act unconstitutional and permanently enjoined the defendants from enforcing it.⁶⁸ The court reasoned that the 2005 Illinois Moneys Act violated the Supremacy Clause and the Foreign Affairs Power,⁶⁹ and that the 2005 Illinois Pension Act violated the dormant Foreign Commerce Clause.⁷⁰

Giannoulis held that the first part of the 2005 Illinois Act, the 2005 Moneys Act, violated the Supremacy Clause because it conflicted with then-existing Federal law,⁷¹ which did not yet include the SADA.⁷² The 2005 Moneys Act mandated divestment of state-backed government bonds in Sudan and investments in certain “forbidden entit[ies].”⁷³ The court noted differences between the 2005 Illinois Moneys Act and federal policy and ultimately opined that the “lack of flexibility, extended geographic reach, and impact on foreign entities interferes with the national government’s conduct of foreign affairs.”⁷⁴ First, the 2005 Illinois Moneys Act did not contain provisions allowing for suspension or non-enforcement of the act and instead remained effective as long as Executive Order 13,067⁷⁵ was in place.⁷⁶ Second, the 2005 Illinois Moneys Act applied to foreign subsidiaries of U.S. companies, though existing federal law did not.⁷⁷ Third, the 2005 Illinois Moneys Act applied to the entire Republic of Sudan, but federal law excludes various areas, such as southern Sudan.⁷⁸ Fourth, the 2005 Illinois Moneys Act maintained a rather broad definition of a “forbidden entity,” which encompasses *any* company that the government of Sudan partially manages,⁷⁹ companies that do not certify under oath that they do not have ties to Sudan,⁸⁰ and includes any

⁶⁷ See *Giannoulis*, 523 F. Supp. 2d 731.

⁶⁸ See *id.* at 751.

⁶⁹ See *id.* at 741–42, 745.

⁷⁰ See *id.* at 750. See *infra* Parts III & IV for further discussion of the Court’s analysis.

⁷¹ *Giannoulis*, 523 F. Supp. 2d 731, 741–42 (N.D. Ill. 2007).

⁷² See Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516.

⁷³ 15 ILL. COMP. STAT. 520/22.5(2.5), (7) (2007).

⁷⁴ *Giannoulis*, 523 F. Supp. 2d at 741–42.

⁷⁵ For a discussion of Executive Order 13,067, see *infra* notes 104–06 and accompanying text.

⁷⁶ See *Giannoulis*, 523 F. Supp. 2d at 738.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See 15 ILL. COMP. STAT. 520/22.6(b)(2) (2007).

⁸⁰ See *id.* 22.6(b)(5).

company providing equipment or services to Sudan.⁸¹ In contrast, federal law more narrowly defined restricted companies; for example, by allowing non-lethal military equipment into southern Sudan.⁸² Finally, in contrast to the Illinois Sudan Act, federal policy regarding Sudan left much discretion to the President to determine when to impose sanctions.⁸³

The court also found that the 2005 Illinois Moneys Act violated the Foreign Affairs Power by hindering the President's ability to speak with "one voice" in matters of national affairs and that Illinois had taken a "different track from the one embodied in the federal policy."⁸⁴ Similar to its Supremacy Clause analysis, the court found problematic the Illinois statute's inflexibility and geographic reach.⁸⁵ The court did concede that although the act is inflexible, "it may be a stretch to say that the Act uses an iron fist where the national Sudan policy uses kid gloves," as the Supreme Court had previously said of a California law.⁸⁶ Furthermore, the court maintained that the Illinois statute had an actual impact on the federal government's implementation of foreign policy.⁸⁷ The act had already caused non-compliant banks to lose \$275 million, forcing banks to deny loan applications from companies doing business in Sudan and forcing bank customers to choose between business with the bank and business in Sudan.⁸⁸

The second part of the 2005 Illinois Act, the 2005 Illinois Pension Act, prohibited retirement systems from investing in companies with business in Sudan.⁸⁹ Under this Act, pension funds included more than just state funds; for example, the statute also prevented municipal pension funds from investing in Sudanese companies.⁹⁰ Lastly, the district court held that the 2005 Illinois Pension Act violated the dormant Foreign Commerce Clause.⁹¹ The 2005 Illinois Pension Act burdened foreign commerce by limiting banks and corporations from conducting business with companies tied to Sudan.⁹² The court rejected Illinois' argument that foreign commerce was "not implicated because a bank can forego accepting money from the state or a corpo-

81 See *Giannoulis*, 523 F. Supp. 2d at 738.

82 See *id.*

83 See *id.* at 741 ("Congress gave the president broad leeway to impose, or decide not to impose, an array of sanctions. The Illinois Sudan Act, however, does not allow for such flexibility. It does not allow for a temporary suspension of sanctions or a specific waiver, even if the president deemed such an action to be in the national interest.").

84 *Id.* at 744.

85 See *id.* at 741-42.

86 See *id.* at 744.

87 See *id.* at 745.

88 See *id.* at 746.

89 40 ILL. COMP. STAT. 5/1-110.5(a) (2007).

90 See *id.*; *Giannoulis*, 523 F. Supp. 2d at 734.

91 *Giannoulis*, 523 F. Supp. 2d at 747-50.

92 See *id.* at 747.

ration can forego having pension funds own its securities.”⁹³ Nevertheless, the court left open the possibility that a narrower amendment to the 2005 Illinois Pension Code could be constitutional.⁹⁴

b. *The 2007 Illinois Sudan Act*

After the *Giannoulis* decision, Illinois amended the 2005 Illinois Act, which resulted in the 2007 Illinois Moneys Act⁹⁵ and the 2007 Illinois Pension Act.⁹⁶ Geographically, the 2007 Illinois Act still applies to investments in the Republic of Sudan and to companies doing business in the Republic of Sudan.⁹⁷ Yet, the 2007 Act did make several changes to the 2005 Illinois Act. For one, the 2007 Act eliminated the procurement clause,⁹⁸ so although the previous Act applied to state contracts and investments, the 2007 Illinois Act does not apply to state contracts. Also, the 2007 Illinois Act only applies to five state pension funds or retirement systems and allows companies time to comply with its requirements before divestment occurs.⁹⁹

“Forbidden entities,” companies in which the Illinois Treasurer and pension funds may not invest, generally include publicly traded companies that independent research firms identify as owning or controlling assets, having distribution agreements with, issuing credits or loans to, or providing or receiving goods and services to the Republic of Sudan or companies domiciled in Sudan.¹⁰⁰ It also includes private market funds that fail to certify that they do not conduct transactions with Sudan.¹⁰¹

Lastly, the 2007 Illinois Act includes a clause that maintains its effectiveness so long as federal statutes or executive orders authorize sanctions¹⁰² and includes a severability clause stating that if any provision in the Act is held invalid, the valid portions of the Act remain unaffected.¹⁰³

⁹³ *See id.*

⁹⁴ *See id.* at 750 n.5.

⁹⁵ 15 ILL. COMP. STAT. 520/0.01 (2007).

⁹⁶ 40 ILL. COMP. STAT. 5/1-101. The 2007 Illinois Act makes it unlikely that *Giannoulis* will be directly appealed because the holding applied to the 2005 Illinois Act. *See* Illinois Venture Capital Association, *Illinois Sudan Divestment Legislation*, http://www.illinoisvc.org/pages/sudan_act/68.php (last visited Jan. 5, 2009).

⁹⁷ *See* 40 ILL. COMP. STAT. 5/1-110.6 (a)(1).

⁹⁸ *Cf.* 15 ILL. COMP. STAT. 520/22.6 (“[T]he State Treasurer shall not deposit any funds into or otherwise contract with any financial institutions . . .”). 15 ILL. COMP. STAT. 520/22.6 (2007) (repealing Section 22.6 of the 2005 Act).

⁹⁹ Illinois Venture Capital Association, *supra* note 96.

¹⁰⁰ 40 ILL. COMP. STAT. 5/1-110.6(b).

¹⁰¹ *See id.*

¹⁰² *See id.* 5/1-110.6(i).

¹⁰³ *See id.* 5/1-110.5.

B. Federal Policy on Sudan

The SADA was not the first action taken by the United States to demonstrate its disapproval of the Sudanese government. In response to Sudan's involvement in international terrorism and its human rights violations, President William J. Clinton issued an Executive Order¹⁰⁴ in 1997 to counter Sudan's threat to national security. The Executive Order blocked access to the United States for all property of the Sudanese government that was in U.S. control.¹⁰⁵ The Executive Order generally prohibits the following: (a) imports from Sudan to the United States, (b) exports to Sudan from the United States, (c) facilitation by a U.S. person of exports from Sudan, (d) the performance of a contract in support of certain projects in Sudan, (e) granting extensions of credit or loans by any U.S. person to the Sudanese government, (f) transactions relating to the transportation of cargo to or from the United States by a Sudanese person, and (g) transactions that intend to evade the above prohibitions.¹⁰⁶

Congress has also acted in response to the Sudanese genocide. The Sudan Peace Act in 2002 gave the President additional authority to use all means of pressure to help resolve the war in Sudan, including the denial of oil revenue to the Sudanese government.¹⁰⁷ In 2004, Congress passed the Comprehensive Peace in Sudan Act, giving the President additional authority to impose sanctions.¹⁰⁸ Finally, in 2006, Congress passed the Darfur Peace and Accountability Act (DPAA), which, among other things, authorized the President to provide assistance to the African Union Mission in Sudan and denied entry of certain ships to U.S. ports in an effort to deprive Sudan of oil revenue.¹⁰⁹

1. *Sudan Accountability and Divestment Act of 2007*

The Sudan Accountability and Divestment Act of 2007 (SADA),¹¹⁰ enacted on December 31, 2007, is an act "[t]o authorize State and local governments to divest assets in companies that con-

¹⁰⁴ See Exec. Order No. 13,067, 3 C.F.R. 230 (1997), *reprinted in* 50 U.S.C.A. § 1701 (2006). Although the Executive Order was set to last for only one year, both Presidents Clinton and Bush annually extended it so that it has not lapsed. For the most recent continuation, see Notice of President of the United States, 72 Fed. Reg. 62,407 (Nov. 3, 2007).

¹⁰⁵ See Exec. Order No. 13,067, § 1.

¹⁰⁶ See *id.* § 2.

¹⁰⁷ Sudan Peace Act, Pub. L. No. 107-245, § 6(b)(2), 116 Stat. 1504, 1508 (codified as amended at 50 U.S.C. § 1701).

¹⁰⁸ Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497, 118 Stat. 4012 (codified as amended at 50 U.S.C. § 1701).

¹⁰⁹ See Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344 § 6(e), 120 Stat. 1869, 1877 (codified as amended at 50 U.S.C. § 1701).

¹¹⁰ Pub. L. No. 110-174, pmb., 121 Stat. 2516, 2516 (codified at 50 U.S.C. § 1701).

duct business operations in Sudan, [and] to prohibit United States Government contracts with such companies.”¹¹¹ States acting under this specific authority are explicitly “not preempted by any Federal law or regulation.”¹¹² As Senator Christopher Dodd expressed, the act “allows divestment to take place in a unitary, federally sanctioned manner.”¹¹³

The SADA specifies the scope of authorized state divestment, which includes divesting state assets from and prohibiting state investment in business operations in Sudan related to “power production activities, mineral extraction activities, oil-related activities, or the production of military equipment.”¹¹⁴ The act, however, does create exceptions. For example, it permits investment in businesses that operate with the government in southern Sudan or provide goods to “marginalized populations”; the act also permits investment in peacekeeping or humanitarian organizations or those that promote health or education.¹¹⁵ The SADA places the following restrictions on states’ mandatory divestment: (1) the state must provide written notice to companies, (2) the state may not divest until 90 days after the notice, (3) the measure must not apply to companies with no direct investments in prohibited business operations, and (4) the state should make an effort to avoid incorrect divestitures.¹¹⁶

President George W. Bush signed the bill, but included a signing statement that the legislation “risks being interpreted as insulating from Federal oversight State and local divestment actions However, . . . the executive branch shall construe and enforce this legislation in a manner that does not conflict with [the President’s authority over foreign affairs].”¹¹⁷ In effect, the President was attempting to stamp onto the statute his interpretation that the statute was subject to the Executive Branch’s enforcement of the legislation.

2. *The Scope of the SADA’s Authorization*

The SADA is best read to authorize state divestment under the Sudan Divestment Task Force Model but not as authorizing divestment under the 2007 Illinois Act. The SADA explicitly authorizes state activity that meets four requirements: (1) the state or local government provides notice to the company, (2) divestment occurs 90

¹¹¹ *Id.*

¹¹² *Id.* § 3(g).

¹¹³ 153 Cong. Rec. S15,374 (daily ed. Dec. 12, 2007) (statement of Sen. Dodd).

¹¹⁴ Sudan Accountability and Divestment Act of 2007 § 3(d)(1), 121 Stat. at 2518.

¹¹⁵ *See id.* § 3(d)(2), 121 Stat. at 2518. The Act also provides exceptions for business operations with a license from the Office of Foreign Assets Control and business operations voluntarily suspended. *See id.*

¹¹⁶ *See id.* § 3(e), 121 Stat. at 2519.

¹¹⁷ President Bush’s Statement, *supra* note 10.

days after the written notice is provided, (3) divestment does not apply to companies that have demonstrated they do not have business operations in Sudan, and (4) the state does not adopt divestment measures unless they have direct investment in power production activities, mineral extraction activities, oil-related activities, or the production of military equipment.¹¹⁸ States must also have exceptions to allow investment in companies contracting with southern Sudan, providing goods to humanitarian organizations, and providing goods promoting health or education.¹¹⁹

States that have adopted the SDTF Model fall within the scope of the SADA's requirements for permissible divestment statutes. The SDTF Model meets these four requirements. It requires a written notice to companies possibly subject to divestment,¹²⁰ does not mandate divestment until 90 days after notifying the company,¹²¹ and provides companies the opportunity to cease its business with Sudan.¹²² Finally, just as the SADA narrowly defines prohibited business operations to four activities,¹²³ the SDTF Model similarly does not prohibit investments in all business operations but restricts investment to power production activities, mineral extraction activities, oil-related activities, or the production of military equipment.¹²⁴

Moreover, the SADA requires an exception for the southern region of Sudan,¹²⁵ and the SDTF Model's definition of the Sudanese government "does not include the regional government of southern Sudan."¹²⁶ Like the SADA,¹²⁷ the SDTF Model creates an exception and does not mandate state public-fund divestment for social development companies that provide humanitarian aid or benefit marginalized populations of Sudan.¹²⁸

In contrast, the SADA does not authorize the 2007 Illinois Act because although the 2007 Illinois Act meets some of the SADA's requirements, it still reaches a broader range of companies than the SADA's scope permits. The 2007 Illinois Act does comply with several of the SADA's requirements. For example, it imposes geographic re-

¹¹⁸ See *id.* § 3(d)(1), (e), 121 Stat. at 2518–19.

¹¹⁹ See *id.* § 3(d), 121 Stat. at 2518–19.

¹²⁰ TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION § 4(a)(2) (Sudan Divestment Task Force 2008).

¹²¹ See *id.* § 4(a)(4).

¹²² See *id.* § 4(a)(3).

¹²³ See Sudan Accountability and Divestment Act of 2007 § 3 (d), 121 Stat. at 2518.

¹²⁴ TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION § 2(o).

¹²⁵ See Sudan Accountability and Divestment Act of 2007 § 3(d)(2)(A), 121 Stat. at 2518.

¹²⁶ TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION § 2(f).

¹²⁷ See Sudan Accountability and Divestment Act of 2007 § 3(d)(2)(E), 121 Stat. at 2518.

¹²⁸ TARGETED SUDAN DIVESTMENT: MODEL LEGISLATION. § 2(p), (q).

strictions on its divestment provisions, requiring divestment only from companies investing in “those geographic areas of the Republic of Sudan that are subject to sanction . . . imposed by the United States Government.”¹²⁹ Additionally, like the SADA, Illinois excluded from its definition of forbidden activity investments in humanitarian organizations or those intended to relieve human suffering.¹³⁰ The 2007 Illinois Act does, however, fail the SADA’s requirement that states restrict divestment to companies investing in power production, mineral extraction, oil development, or the production of military equipment.¹³¹ Instead, forbidden entities under the 2007 Illinois Act consist of “any company” engaging in activity that Illinois prohibits.¹³²

III

CONGRESS’S POWER AND DIVESTMENT STATUTES: THE SUPREMACY CLAUSE AND THE DORMANT FOREIGN COMMERCE CLAUSE

State laws affecting foreign affairs can violate the Supremacy Clause and the dormant Foreign Commerce Clause. If Congress has affirmatively spoken and state law conflicts with federal law, then the Supremacy Clause invalidates the state law. Alternatively, if Congress has not directly spoken to an area of foreign affairs that deals with foreign commerce with other nations, then the dormant Foreign Commerce Clause can invalidate the state law if it impermissibly burdens foreign commerce and affects the nation’s ability to speak with one voice in foreign affairs. Under either analysis, if Congress authorizes the particular state action, then the state law is valid.

In this case, the SADA reflects Congress’s affirmative action in the area of Sudan state divestment statutes. The 2007 Illinois Act conflicts with the SADA, and is thus preempted under the Supremacy Clause. However, even if the SADA does not speak to the Illinois divestment scheme and thus does not preempt it, the 2007 Illinois Act is still unconstitutional under the dormant Foreign Commerce Clause. The SDTF Model is constitutional under both the Supremacy Clause and the dormant Foreign Commerce Clause because the SADA specifically authorizes state action under the Model.

¹²⁹ 40 ILL. COMP. STAT. 5/1-110.6(b) (2007).

¹³⁰ *See id.*

¹³¹ Sudan Accountability and Divestment Act of 2007 § 3(d), 121 Stat. at 2518.

¹³² 40 ILL. COMP. STAT. 5/1-110.6(b).

A. The Supremacy Clause

State laws that conflict with federal laws are preempted under the Supremacy Clause of the U.S. Constitution.¹³³ Preemption can occur in any of the following three circumstances: (1) if Congress expressly preempts state law, (2) if Congress implicitly preempts state law by occupying a field, and (3) if state law conflicts with federal law.¹³⁴ In general, to determine whether a state law is preempted, the “fundamental inquiry . . . is whether Congress intended to displace state law.”¹³⁵ Alternatively, the state law is not preempted if Congress has spoken to and authorized the state action.¹³⁶

In the second category, a state law is preempted if it is inconsistent with the federal law’s objectives and undermines uniformity in foreign affairs.¹³⁷ A state law that is “in concurrence” with an area in which the federal government has legislated does not lead to preemption.¹³⁸ Implied preemption should not operate as a restriction on states to legislate in areas traditionally left to the states.¹³⁹ In *Lodge 76 v. Wisconsin Employment Relations Commission*, the Supreme Court held that the National Labor Relations Act did not preempt state action in “peripheral” areas of labor law because the federal act left much to the states and labor relations were traditionally regulated by the states.¹⁴⁰ The mere existence of a federal statute in a field of law does not automatically preempt any state law in that field. However, if Congress has addressed a particular subject matter, the state law is not in accord with federal law if it “‘go[es] farther than Congress has seen fit

¹³³ 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.”); see *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000).

¹³⁴ See *Crosby*, 530 U.S. at 372. The Supreme Court acknowledged that the three categories of preemption are not “‘rigidly distinct.’” *Id.* at 372 n.6 (citations omitted).

¹³⁵ *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 6 (1986). Compare *Crosby*, 530 U.S. at 368–70, 373–74 (holding that the Massachusetts Burma Law conflicted with federal policy and was thus preempted, reasoning that the Massachusetts law “undermine[d] the intended purpose and ‘natural effect’” of existing federal law), with *Bd. of Trs. v. Mayor & City Council of Balt.*, 317 Md. 72, 131 (1989) (upholding a city ordinance requiring city pension funds to divest from companies doing business with South Africa, reasoning, in part, that the traditional prerogative of state and local governments to regulate pension funds creates a presumption against preemption). The federal statute’s delegation of discretion to the President in sanctioning Burma, its more limited scope than state law, and its express provision for the President’s authority in developing a multilateral strategy particularly impressed the *Crosby* Court. See *Crosby*, 530 U.S. at 373–74.

¹³⁶ See *Wardair*, 477 U.S. at 7.

¹³⁷ See *United States v. Locke*, 529 U.S. 89, 115 (2000).

¹³⁸ See *id.*

¹³⁹ See *Lodge 76 v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 136 (1976).

¹⁴⁰ *Id.*

to go.’”¹⁴¹ *United States v. Locke* held that a state law was preempted because it imposed more stringent language-proficiency tests on vessel operators than the federal government did.¹⁴² In the third category, state law “conflicts” with federal law if adherence to the state law would either make it impossible to follow federal law or create an obstacle to following federal law.¹⁴³

1. *The 2007 Illinois Act Violates the Supremacy Clause*

The 2007 Illinois Act violates the Supremacy Clause because it conflicts with the SADA. The Supremacy Clause analysis applies because Congress has spoken about states’ Sudan divestment statutes. The SADA demonstrates a congressional intention to occupy the field of Sudan divestment policy. Thus, the SADA and the other previous federal acts related to Sudan preempt Illinois’ divestment scheme. The SADA gives a clear, explicit statement that Congress authorizes a particular type of state divestment activity:

[A] State or local government may adopt and enforce measures that meet the requirements of [the SADA] 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 . . . are conducting or having direct investments in [certain] business operations [in Sudan].¹⁴⁴

As stated above, Congress’s grant of divestment authority is subject to certain requirements. Among these requirements is that states mandate divestment only for power production activities, mineral extraction activities, oil-related activities, or the production of military equipment.¹⁴⁵

The 2007 Illinois Act is preempted because Congress has spoken and Illinois legislated beyond what the SADA authorized. The 2007 Illinois Act mandates divestment in all companies with certain business in or with Sudan.¹⁴⁶ Furthermore, the SADA excludes certain

¹⁴¹ *Id.*; see *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

¹⁴² See *Locke*, 529 U.S. at 112–16.

¹⁴³ See *Crosby*, 530 U.S. at 372–73. Some courts separate preemption into “field preemption” and “conflict preemption.” See generally 81A C.J.S. *States* § 49 (2004 & Supp. 2008) (describing the scope of federal preemption of state laws) (citing *Bankwest, Inc. v. Baker*, 324 F. Supp. 2d 1333 (N.D. Ga. 2004)). “Field preemption” refers to the second case of preemption, when Congress intends to occupy an entire field, leaving no room for states to legislate. See *Bankwest*, 324 U.S. at 1345. “Conflict preemption” refers to the third case of preemption, cases in which one cannot comply with both federal and state law or compliance with state law creates an obstacle in complying with federal law. See *id.*

¹⁴⁴ See Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, § 3(b), 121 Stat. 2516, 2518 (codified at 50 U.S.C. § 1701 (2006)).

¹⁴⁵ See *id.* § 3(d)(1), 121 Stat. at 2518.

¹⁴⁶ See 40 ILL. COMP. STAT. 5/1-110.6(b) (2007) (defining a “Company” as “any entity capable of affecting commerce”).

regions from its divestment policy, including southern Sudan,¹⁴⁷ while the 2007 Illinois Act applies to the Republic of Sudan as a whole.¹⁴⁸ The Supreme Court dealt with a similar conflict in *Crosby v. National Foreign Trade Council*, reasoning that the Massachusetts “statute conflict[ed] with federal law . . . by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions.”¹⁴⁹ Massachusetts had imposed economic pressure on Burma through restrictions on state contracts with companies doing business in Burma. The federal government had also directed sanctions at Burma but limited economic pressure in a way that the state law had not.¹⁵⁰ Similarly, the 2007 Illinois Act penalizes conduct for certain industries and geographical regions that the SADA explicitly excepts.

Additionally, like *Crosby*, a conflict exists here even though the federal and state statutes “share the same goals and . . . some companies may comply with both sets of restrictions.”¹⁵¹ Congress’s goal in enacting the SADA is to prevent Sudan from using its financial dealings to facilitate genocide.¹⁵² Likewise, the 2007 Illinois Act was legislated in an effort to prevent the Sudanese government from using funds from forbidden entities to commit genocide and terrorism.¹⁵³ Yet, as *Crosby* noted, these similar aims are not enough to prevent preemption.

Both parts of the 2007 Illinois Act, the 2007 Illinois Moneys Act and the 2007 Illinois Pension Act, violate the Supremacy Clause. The 2007 Illinois Moneys Act conflicts with federal law, the SADA, as discussed above, by broadly covering geographical regions of Sudan that the SADA does not cover and by mandating divestment for industries that the SADA explicitly excludes. Even the district court in *Giannoulas* reasoned that these factors created a conflict between the 2005 Illinois Moneys Act and federal law,¹⁵⁴ which at the time did not include the SADA. With the introduction of the SADA into federal law, the argument for preemption is even stronger. Congress has expansively addressed this area of law by authorizing certain state divestments and clearly asserting that state legislation that meets these requirements “is not preempted by any Federal law or regulation.”¹⁵⁵

¹⁴⁷ See Sudan Accountability and Divestment Act of 2007 § 3(d)(2)(A), 121 Stat. at 2518.

¹⁴⁸ See 40 ILL. COMP. STAT. 5/1-110.6 (a)(1).

¹⁴⁹ 530 U.S. 363, 378 (2000).

¹⁵⁰ *Id.* at 376.

¹⁵¹ See *id.* at 379.

¹⁵² See Sudan Accountability and Divestment Act of 2007 § 7, 121 Stat. at 2522.

¹⁵³ See 40 ILL. COMP. STAT. 5/1.

¹⁵⁴ See *supra* Part II.A.2(a).

¹⁵⁵ See Sudan Accountability and Divestment Act of 2007 § 3(f)(2)(A), 121 Stat. at 2519.

The 2007 Illinois Pension Act also violates the Supremacy Clause because it conflicts with federal law, the SADA. Prior to the SADA, no federal law directly preempted pension fund investments.¹⁵⁶ *Giannoulis* held that the 2005 Illinois Pension Act did *not* violate the Supremacy Clause (although it did hold that it violated the dormant Foreign Commerce Clause) because no federal law mandated divestment of holdings in Sudan.¹⁵⁷ Now, with the introduction of the SADA, federal law gives direct, unambiguous directions about which companies a state may permissibly require state pension funds to divest.¹⁵⁸ As discussed above, the 2007 Illinois Pension Act exceeds this federal authorization by mandating divestments in various cases in which federal law does not mandate divestment. Thus, the 2007 Illinois Pension Act is in direct conflict with federal law.

2. *The SDTF Model Does Not Violate the Supremacy Clause*

The SADA does authorize the SDTF Model,¹⁵⁹ thus the SDTF Model does not violate the Supremacy Clause. Federal statutory authorization of state activity suggests that such state activity is not preempted under the Supremacy Clause.¹⁶⁰ For example, in *Wardair Canada, Inc. v. Florida Department of Revenue*, the Supreme Court upheld a Florida state law against a preemption challenge brought under the Federal Aviation Act, reasoning that because Congress seemed to “invite[]” the state action, it was “not the stuff of pre-emption.”¹⁶¹ In that case, the federal act had “expressly permit[ted]” states to legislate the taxes that were in question.¹⁶²

Here, Congress also expressly permitted states to legislate on Sudan divestment, so long as they met the SADA’s requirements. The SDTF Model’s satisfaction of those requirements is then activity invited, not preempted, by Congress. Preemption analysis under the Supremacy Clause looks to Congress’s intent,¹⁶³ and the SADA’s authorization of the SDTF Model is a clear indication of Congress’s intent not to preempt all state activity in this area.¹⁶⁴ Indeed, the SADA

¹⁵⁶ See *Nat’l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731, 742 (N.D. Ill. 2007).

¹⁵⁷ See *id.*

¹⁵⁸ See Sudan Accountability and Divestment Act of 2007 § 3(f)(2)(A), 121 Stat. at 2519 (“[T]he term ‘assets’ refers to public monies and includes any pension, retirement, annuity, or endowment fund, or similar instrument, that is controlled by a State or local government.”); *id.* § 3(e), 121 Stat. at 2519 (“Any measure taken by a State or local government . . . shall meet [certain] requirements.”).

¹⁵⁹ See *supra* Part III.A.

¹⁶⁰ See *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 7 (1986).

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.* at 6.

¹⁶⁴ See *id.* at 7 (asserting that state regulation is not preempted if Congress “expressly and unequivocally” invites it).

includes explicit language that “[a] measure of a State or local government authorized under [this Act] is *not preempted* by any Federal law or regulation.”¹⁶⁵ Moreover, the Justice Department under President George W. Bush conceded that the SADA may alleviate federal preemption concerns about state divestment statutes.¹⁶⁶

B. The Dormant Foreign Commerce Clause

The Commerce Clause of the U.S. Constitution grants Congress power to “regulate Commerce with foreign Nations, and among the several States.”¹⁶⁷ This affirmative allocation of power to the federal government restrains the states’ ability to regulate interstate and foreign commerce.¹⁶⁸ Under this so-called dormant Commerce Clause, state action that facially discriminates against interstate or foreign commerce is subject to strict scrutiny.¹⁶⁹ In such cases, the state action is valid only if the state has a legitimate purpose that it cannot otherwise achieve through non-discriminatory means.¹⁷⁰ The dormant Commerce Clause seeks to prevent states from “‘jeopardizing the welfare of the Nation as a whole’ by ‘plac[ing] burdens on the flow of commerce.’”¹⁷¹ If foreign, rather than interstate, commerce is implicated, an additional consideration exists: that state regulation of foreign commerce does not impede the nation’s ability to speak with “‘one voice’” in foreign policy.¹⁷²

States do not violate the dormant Foreign Commerce Clause if Congress affirmatively authorizes such state action. The dormant Foreign Commerce Clause bars states from acting in areas of foreign commerce where Congress has remained silent.¹⁷³ When the “actions taken by the federal government accept the authority of States,”¹⁷⁴ or

¹⁶⁵ Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, § 3(g), 121 Stat. 2516, 2519 (codified at 50 U.S.C. § 1701 (2006)) (emphasis added).

¹⁶⁶ Justice Dep’t Memo, *supra* note 11, at 3.

¹⁶⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁶⁸ See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹⁶⁹ See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

¹⁷⁰ See *id.* Cf. *Pike v. Bruce*, 397 U.S. 137, 142 (1970) (noting that in a dormant Commerce Clause analysis, if the state statute’s “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”).

¹⁷¹ *Am. Trucking Ass’ns v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005) (quoting *Okl. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)).

¹⁷² See *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 449 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

¹⁷³ *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 8 (1986).

¹⁷⁴ *Id.* at 9. In *Wardair*, The Federal Aviation Act made permissible “sales or use taxes on the sale of goods or services” for air commerce. *Id.* at 8. Congress had spoken on the issue through this Act, which took particular air commerce taxes out of the dormant Foreign Commerce Clause analysis. See *id.* at 9. The Court went further, noting that other forms of federal government action, such as foreign contracts indicating acquiescence to the state tax policy could constitute congressional action. See *id.* at 9–10. Instead the Flor-

authorize it, the nation is still speaking with "one voice" and the purpose behind the dormant Foreign Commerce Clause is still respected.¹⁷⁵ A long-held constitutional principle provides that Congress may grant states power over commerce, even in instances in which state action would otherwise violate the dormant Commerce Clause.¹⁷⁶ In *Wardair*, the Federal Aviation Act expressly permitted states to impose taxes, such as the Florida sales tax, which then did not violate the dormant Foreign Commerce Clause.¹⁷⁷ Rather, *Wardair* was an instance in which Congress affirmatively acted and was not a case of "governmental silence of the sort that triggers dormant Commerce Clause analysis."¹⁷⁸

In cases in which the dormant Foreign Commerce Clause applies (i.e., Congress has not affirmatively acted on the issue), the market participation doctrine may shield state activity from violating the dormant Foreign Commerce Clause.¹⁷⁹ The exception applies in cases where the state is acting as a private participant in the market.¹⁸⁰ To determine whether the state is acting as a market participant, rather than as a market regulator, the inquiry is whether the challenged activity constitutes direct or local participation in the market.¹⁸¹ For example, in *Reeves, Inc. v. Stake*, the market participation doctrine applied to South Dakota's sale of cement because the state was selling cement from its own state plants to its own citizens.¹⁸² The Supreme Court rationalized that if a state is acting as a private market participant, a state should not be subject to dormant Commerce Clause limitations and should have the freedom to favor its own citizens.¹⁸³ In contrast, if a state is acting as a market regulator, the market participa-

ida tax did not violate the Supremacy Clause because, although the Act "regulated aviation extensively," Congress did not intend to preempt; the Act instead expressly invited the activity. *See id.* at 6.

¹⁷⁵ *See Japan Line*, 441 U.S. at 451 (quoting *Michelin Tire Corp.*, 423 U.S. at 285) (internal quotation marks omitted); *see also* *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) ("[W]hen Congress acts, all segments of the country are represented . . .").

¹⁷⁶ *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945) ("Congress has undoubted power to redefine the distribution of power over interstate commerce.").

¹⁷⁷ *See Wardair*, 477 U.S. at 6-7, 9.

¹⁷⁸ *See id.* at 9.

¹⁷⁹ *See generally* *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (holding that South Carolina is a "market participant" to the extent that it sells goods to its own citizens).

¹⁸⁰ *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (rationalizing that when acting as proprietors, states should "share existing freedoms from federal constraints, including the inherent limits of the [dormant] Commerce Clause" (quoting *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 207-08 n.3 (1983))).

¹⁸¹ *White*, 460 U.S. at 204.

¹⁸² *See Reeves*, 447 U.S. at 446-47.

¹⁸³ *See id.* at 439.

tion doctrine does not shield a state's activity from the dormant Commerce Clause.¹⁸⁴

In many cases, state action will involve both market participation and regulation, in which case the market participation doctrine may still apply. The Supreme Court recently addressed this issue in *Department of Revenue of Kentucky v. Davis*.¹⁸⁵ In that case, Kentucky had adopted a rather common tax scheme, which exempted one from paying taxes on Kentucky-issued bonds, but taxed other types of state-issued bonds.¹⁸⁶ This particular tax scheme made state-issued bonds attractive in comparison to corporate bonds and, ultimately, the state-bond revenue financed two-thirds of Kentucky's capital expenditures.¹⁸⁷ The state played two distinct roles: one as a market participant in issuing bonds that would be competitive in a market with private bond issues, and another as a market regulator in setting taxes for the bonds.¹⁸⁸ The Court determined that in cases in which a state was acting solely as a market regulator, the traditional dormant Commerce Clause analysis applied.¹⁸⁹ But in cases where a state played a dual role as a participant and regulator, a state should get "exceptional treatment" for government activity in commercial markets. The market participation exception ultimately shielded Kentucky's tax scheme from a dormant Commerce Clause violation.¹⁹⁰ The Court then applied a balancing test to determine that the beneficial tax scheme for the municipal financial market outweighed concerns of private protectionism that are inherent to dormant Commerce Clause violations.¹⁹¹

Although the applicability of the market participant exception to the dormant interstate Commerce Clause is established, the Supreme Court has not decisively addressed its applicability to the dormant Foreign Commerce Clause,¹⁹² and federal circuit courts are split on the issue.¹⁹³ The Third Circuit, on the one hand, applied the market participant doctrine to the dormant Foreign Commerce Clause, noting no distinction between interstate and foreign commerce in applying

184 *See id.*

185 *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801 (2008).

186 *See id.* at 1804–05.

187 *See id.* at 1805.

188 *See id.* at 1812.

189 *See id.* at 1814.

190 *See id.*

191 *See id.* at 1817.

192 *Cf. Reeves, Inc. v. Stake* 447 U.S. 429, 437 n.9 (1980) (observing that the Court has had "no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause" and declining to resolve the issue).

193 *See Nat'l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731, 748 (N.D. Ill. 2007).

the exception.¹⁹⁴ In contrast, the First Circuit declined to apply the market participation exception on the grounds that foreign commerce warranted additional protection.¹⁹⁵

The Third Circuit's position, however, received support from the Reagan Administration's Office of Legal Counsel. Opposition to South Africa's apartheid government led to a similar state-divestment movement in the 1980s that also faced constitutional challenges.¹⁹⁶ The Justice Department during the Reagan Administration thoroughly addressed these legal issues and convincingly applied the market participant doctrine to dormant Foreign Commerce Clause issues in South African divestment statutes.¹⁹⁷ The Office of Legal Counsel report concluded that "state divestment statutes are plainly proprietary in nature" and that "the state as 'guardian and trustee for its people' in spending or investing their funds is as strong when the state's market participation affects foreign as when it affects interstate commerce."¹⁹⁸

1. *The 2007 Illinois Act Violates the Dormant Foreign Commerce Clause*

The dormant Foreign Commerce Clause is likely implicated in the case of the 2007 Illinois Act. Notably, Congress has affirmatively spoken about states' Sudan divestment statutes; therefore, preemption analysis under the Supremacy Clause is enough to invalidate the 2007 Illinois Act. However, even if the SADA did not preempt the 2007 Illinois Act, it would still violate the dormant Foreign Commerce Clause. The 2007 Illinois Act impermissibly burdens foreign commerce, impedes the nation's ability to speak with one voice, and is not shielded by the market participation exception.

The 2007 Illinois Act violates the dormant Foreign Commerce Clause by facially discriminating against foreign commerce by limiting trade with a specific nation.¹⁹⁹ The Supreme Court in *Crosby* did not address the dormant Foreign Commerce Clause claim, invalidat-

¹⁹⁴ *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 910 (3d Cir. 1990).

¹⁹⁵ *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd in result sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (affirming the result on Supremacy Clause grounds and declining to address the First Circuit's conclusions regarding the foreign affairs power or the dormant Foreign Commerce Clause).

¹⁹⁶ *See* Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal Counsel 49, 51–52 n.6 (1986).

¹⁹⁷ *See id.* at 52–59.

¹⁹⁸ *See id.* at 53–54. The report also goes through market-participation doctrine restrictions, concluding that these arguments do not apply to state divestment statutes. *See id.* at 56.

¹⁹⁹ *See Natsios*, 181 F.3d at 68.

ing the Massachusetts law instead on preemption grounds.²⁰⁰ Massachusetts had regulated state contracts that were doing business in Burma in order to support freedom and democracy in Burma.²⁰¹ The First Circuit decision in *Natsios* held that the Massachusetts law facially discriminated against foreign commerce because a “chief goal . . . [was] to affect business decisions pertaining to a foreign nation.”²⁰² The law impermissibly restricted both Burmese businesses and American businesses in Burma.²⁰³

The 2007 Illinois Act prohibits the state treasurer and state and municipal pension funds from investing in companies that are conducting certain business in or with Sudan.²⁰⁴ Similar to the state law in *Natsios*, Illinois’ chief goal is to affect business in Sudan, to decrease available funds for the Sudanese government’s genocide funding. Furthermore, the Supreme Court has held that the dormant Foreign Commerce Clause still applies in instances where the state law does not intend to favor in-state interests over out-of-state interests.²⁰⁵ Thus, Illinois’ intention to condone terrorism, rather than further the interests of Illinois businesses or contracts, does not shield the statute from the dormant Foreign Commerce Clause.

Additionally, Illinois impedes the nation’s ability to speak with “one-voice.”²⁰⁶ The 2007 Illinois Act restricts industries, regions, and companies in Sudan that go beyond the federal government’s restrictions laid out in the SADA. By potentially punishing companies that the federal government does not seek to punish, the 2007 Illinois Act prevents the federal government’s uniformity in dealing with Sudan.

A further consideration is whether the market participation exception permits Illinois’ actions. As discussed above, the applicability of the market participation exception to the dormant *Foreign Commerce Clause* is unclear. If the market participation exception does not apply to the dormant Foreign Commerce Clause, then Illinois’ burden on foreign commerce is not excepted, and the 2007 Illinois Act is unconstitutional under the dormant Foreign Commerce Clause.

Alternatively, even if the market participation exception does apply to the dormant Foreign Commerce Clause, it still is unlikely to permit the 2007 Illinois Act. Illinois restricts the choice of companies

²⁰⁰ See generally *Crosby*, 530 U.S. 363 (affirming the judgment of *Natsios* on preemption grounds and declining to address the dormant Foreign Commerce Clause issue).

²⁰¹ See *Natsios*, 181 F.3d at 45–46.

²⁰² See *id.* at 68.

²⁰³ See *id.* (“Long-standing Supreme Court precedent indicates that the Framers were concerned with ‘discriminations favorable or adverse to commerce with particular foreign nations [under] state laws.’”).

²⁰⁴ See 15 ILL. COMP. STAT. 520/0.01 (2007); 40 ILL. COMP. STAT. 5/1-101.

²⁰⁵ *New Energy Co. v. Limbach*, 486 U.S. 269, 276 (1988).

²⁰⁶ See *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 449 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

in which both state *and* municipal pension funds can invest. For state pension funds, Illinois is arguably acting as a market participant. Just as in *Davis*, where Kentucky exempted its own state bonds from taxes, the 2007 Illinois Pension Act places limitations on state-managed investments. In *Davis*, state action was justified as participation because it was affecting its competitive advantage in the bond market as compared to corporate bonds. For Illinois, its actions too can be justified as participation because of the effect it has on companies that take investment from Illinois pension funds over private investment funds. The distinction in Illinois' case is that, rather than create a competitive advantage for its state pension funds, it is instead creating a disadvantage for Illinois state pensions by restricting their investment options. Still, Illinois' action can be justified as private activity because Illinois is controlling its state pension fund in the same way that a private investment fund could control what investments it makes.²⁰⁷

However, Illinois' limitations on state pension fund investments can also arguably constitute market regulation. Illinois is limiting its state pension fund investments. But Illinois is also seeking to regulate the activity of the companies in which these state pension funds would invest. In *Natsios*, the First Circuit emphasized the state's role as a market regulator when regulating state contracts with companies doing business in Burma because of the state's attempt to change the behavior of the companies.²⁰⁸ Moreover, the companies' behavior that Massachusetts attempted to change was unrelated to the business it was doing with the state.²⁰⁹ Massachusetts had created a selective list and was monitoring the activity of *private* actors, not merely its own state actions as a private participant.²¹⁰ Illinois is similarly seeking to change the behavior of the companies with which the state pension funds conduct business and has created a list²¹¹ to monitor the activity of these private companies. Further, Illinois is regulating the companies' business with Sudan, which may likely be unrelated to the investment that the state pension funds are making with the company.

Hence, for state pension funds, Illinois is acting both as a market participant and a market regulator. Illinois acts as a market participant by placing limitations on its state pension funds, the same way that a private investment fund could limit its investment decisions. Illinois acts as a market regulator by attempting to regulate the behavior of the companies in which it invests, companies that the state could not regulate as a market participant. The Supreme Court in

²⁰⁷ See *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 55 n.10 (2d Cir. 1998).

²⁰⁸ See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 63 (1st Cir. 1999).

²⁰⁹ See *id.*

²¹⁰ See *id.* at 64.

²¹¹ 40 ILL. COMP. STAT. 5/1-110.6(b) (2007).

Davis held that when a state acts as both a market participant and a market regulator, the market participation doctrine may still shield its actions from the dormant Foreign Commerce Clause.²¹² Therefore, for state pension funds alone, Illinois may still be protected by the market participation doctrine.

For municipal pension funds, on the other hand, the market participation exception does not apply because the state is regulating investments of municipalities, not its own state investments. Illinois does not satisfy the test that its actions constitute participation in the municipal pension market because, as a private actor, Illinois would have no ability to limit the municipal pension funds.²¹³

Because the 2007 Illinois Pension Act is constitutional under the dormant Foreign Commerce Clause only as applied to state pension funds, and not to municipal pension funds, the statute as a whole is unconstitutional under the dormant Foreign Commerce Clause. The 2007 Illinois Act includes a severability clause, that the “provisions of this Act are severable” under Illinois law.²¹⁴ Illinois’ severability statute states that the invalidity of a portion of a statute does not invalidate other portions if those provisions “can be given effect without the invalid application or provision.”²¹⁵ The Court in *Giannoulis* determined that because the 2005 Illinois Pension Act applied to all code-defined “pension fund[s],” severing the statute would require rewriting the statute; the Supreme Court restricts courts from so doing.²¹⁶ Similarly, in the 2007 Illinois Pension Act, “pension fund” refers to benefit funds of the “State or of any county, city, town, municipal corporation . . . located in the State of Illinois.”²¹⁷ Thus, to sever the unconstitutional portion of the statute would require improperly rewriting municipalities out of the statute. Therefore, the 2007 Illinois Act is also unconstitutional in its entirety under the dormant Foreign Commerce Clause.

2. *The SDTF Model Does Not Violate the Dormant Foreign Commerce Clause*

The dormant Foreign Commerce Clause does not apply to the SDTF Model because Congress affirmatively authorized state action under the SADA, and the SDTF Model falls within this authoriza-

²¹² See discussion *supra* notes 185–91 and accompanying text.

²¹³ See *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 55 n.10 (2d Cir. 1998).

²¹⁴ 40 ILL. COMP. STAT. 5/1-110.6(b) § 97.

²¹⁵ 5 ILL. COMP. STAT. 70/1.31.

²¹⁶ See *Nat’l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731, 750 (N.D. Ill. 2007).

²¹⁷ 40 ILL. COMP. STAT. 5/22-401.

tion.²¹⁸ In areas of foreign commerce, the nation speaks with “one voice,” and Congress is that voice.²¹⁹ Inherent in this power is the ability to give states the power to regulate commerce.²²⁰ Foreign investment and divestment “unquestionably fall within Congress’s power to regulate foreign commerce.”²²¹ Here, the SADA authorizes state action under the SDTF Model that grants states power in an area where their activity may have otherwise violated the dormant Foreign Commerce Clause.²²² The SADA is clear: “the United States Government should support the decision of any State or local government” in its divestments from Sudan, so long as it meets the SADA’s requirements.²²³ Further, just as it did in the Supremacy Clause context, the Justice Department’s memo that questioned the constitutionality of the SDTF Model also conceded that the SADA may remove the threat of dormant Foreign Commerce Clause violations.”²²⁴

IV

THE PRESIDENT’S POWER AND DIVESTMENT STATUTES: THE FOREIGN AFFAIRS POWER²²⁵

A. The Foreign Affairs Power

The federal government maintains responsibility over foreign affairs, and although Congress has power over war and foreign commerce, the President has the authority to determine specific policies

²¹⁸ See *supra* Part II.B.1.

²¹⁹ See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994); Letter from Paul H. Schwartz, Legal Counsel, Sudan Divestment Task Force, to Richard B. Cheney, Vice President of the U.S. 3 (Nov. 7, 2007) (on file with author) [hereinafter Schwartz Memo].

²²⁰ See *id.*

²²¹ Schwartz Memo, *supra* note 219.

²²² Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, § 3(a), 121 Stat. 2516, 2518 (codified at 50 U.S.C. § 1701 (2006)).

²²³ See *id.*

²²⁴ Justice Dep’t Memo, *supra* note 11, at 3.

²²⁵ The Supreme Court has been relatively quiet about the foreign affairs power, addressing the issue in very few cases since 1968. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (reversing the Court of Appeals’ decision on agency deference grounds and failing to address the scope of the President’s foreign affairs power); *Republic of Austria v. Altmann*, 541 U.S. 677, 734 (2004) (Kennedy, J., dissenting) (“The question the Court seems inclined to resolve—can the foreign affairs power of the Executive supersede a statutory scheme set forth by Congress—is simply not presented by the facts of this case.”); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419–20 (2003) (addressing the foreign affairs power but not elaborating on its application absent affirmative federal action); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (affirming the First Circuit’s holding solely because of the Supremacy Clause and declining to discuss the foreign affairs power); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 292 (1989) (Brennan, J., dissenting) (noting a possible tension between the Fourth Amendment and the foreign affairs power if non-law-enforcement activities are directed against enemy aliens in non-wartime but nonetheless implicating national security).

with regard to foreign relations.²²⁶ In particular, the President has the power to make executive agreements with other countries.²²⁷ Just as congressional statutes dealing with foreign policy may preempt state laws through the Supremacy Clause and the dormant Foreign Commerce Clause, valid executive agreements with foreign nations may also preempt certain state laws through the Foreign Affairs Power.²²⁸ The dormant Foreign Commerce Clause prohibits state interference with Congress's power over foreign commerce, while the Foreign Affairs Power prohibits state interference with *any* federal law affecting foreign affairs. The Constitution does not expressly prohibit state action that may have some effect on the federal government's foreign affairs authority.²²⁹

The standard for invalidating a statute under the Foreign Affairs Power typically depends upon which of three different categories a state statute falls into. First, if an executive agreement expressly preempts a state action, a statute is invalid.²³⁰ Preemption in this circumstance is similar to preemption by congressional treaties or laws under the Supremacy Clause.

Second, if express preemption does not invalidate a state statute, but affirmative federal action exists, a state action may still be invalid as an interference with foreign affairs.²³¹ If evidence exists of a "clear conflict between the policies" adopted by the federal executive and a state, the state law is invalid. As recently as 2003, the Supreme Court in *American Insurance Association v. Garamendi* used the Executive's Foreign Affairs Power to invalidate a California state law that encouraged litigation by making it an unfair business practice to reject Holocaust survivors' valid insurance claims.²³² The state law conflicted with executive agreements with other foreign governments, which necessitated working with an international Holocaust commission to facilitate better relations through settling insurance claims.²³³ Ultimately, Cali-

²²⁶ *Garamendi*, 539 U.S. at 413–14. Compare U.S. CONST. art. I, § 8 (granting Congress the power to, *inter alia*, regulate foreign commerce, create naturalization rules, and declare war), and *id.* art. I, § 10, cl. 1 (prohibiting states from entering into treaties, alliances, or confederations), with *id.* art. II, § 2, cls. 1, 2 (granting the President power over the armed forces as Commander-in-Chief and authorizing the President to make treaties).

²²⁷ *Garamendi*, 539 U.S. at 414.

²²⁸ See *id.* at 416.

²²⁹ See U.S. CONST. art. I, § 10, cls. 1-3 (prohibiting states from entering into treaties, alliances, or confederations, from imposing duties on exports or imports without congressional consent, from imposing duties on war ships in time of peace without congressional consent, and from entering into agreements with foreign powers).

²³⁰ *Garamendi*, 539 U.S. at 416–17.

²³¹ See *id.* at 417.

²³² See *id.* at 420–26.

²³³ See *id.* The Court also emphasized that the executive agreements in this case were sufficient to preempt state law. See *id.* at 416–17.

fornia sought "to use an iron fist where the President has consistently chosen kid gloves."²³⁴

Under this second scenario, state laws that have only an "incidental or indirect effect" on foreign countries do not violate the federal government's exclusive power to handle foreign affairs.²³⁵ In *Clark v. Allen*, for instance, the Supreme Court upheld a state probate statute that gave certain rights to heirs in Germany.²³⁶ It had only an "incidental or indirect effect" on a foreign country because local law traditionally governed succession rights, no overriding federal treaty existed, and the state law was still compatible with federal law restricting money from American accounts to Germany.²³⁷ Subsequently, in *Zschernig v. Miller*,²³⁸ the Supreme Court *invalidated* an Oregon probate statute similar to the one in *Clark* as an intrusion into foreign affairs because it had "more than 'some incidental or indirect effect in foreign countries,' and . . . great potential for disruption or embarrassment."²³⁹ Justice Douglas, who wrote the majority opinion in both *Clark* and *Zschernig*, distinguished the two cases by indicating that the petitioner in *Clark* was challenging the statute on its face, rather than on grounds that the legislative motive was to prevent American assets from going to "hostile nations."²⁴⁰ The two cases, however, are arguably the same and have created confusion among courts applying the "incidental or indirect effect" standard.²⁴¹

Third, consistent with the Supreme Court's position is that states may legislate in an area of their "traditional competence" *even if* it has more than an incidental and indirect effect on foreign policy, as long as there has been no affirmative federal action.²⁴² The Court in *Garamendi* presented this view through Justice Harlan's concurrence in *Zschernig*: prior Supreme Court decisions indicated that "in the absence of a conflicting federal policy . . . the States may legislate in

²³⁴ See *id.* at 427.

²³⁵ *Clark v. Allen*, 331 U.S. 503, 517 (1947).

²³⁶ See *id.* at 510.

²³⁷ See *id.* at 517.

²³⁸ 389 U.S. 429 (1968).

²³⁹ See *id.* at 434-35 (quoting *Clark v. Allen*, 331 U.S. at 517).

²⁴⁰ See *id.* at 433 n.5.

²⁴¹ See Dhooze, *supra* note 31, at 284-85 (pointing out that "the First Circuit specifically noted that '[t]he precise boundaries of the Supreme Court's holding in *Zschernig* are unclear' and that '[s]ubsequent Supreme Court decisions have done little to clarify the reach of the Court's holding'" (quoting *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 51-52 (1st Cir. 1999)).

²⁴² The Court leaves this is as a "further question." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-20 & n.11 (2003). Nonetheless, as Professor Robert Strumberg remarks, a substantial amount of scholarship exists, which argues that "absent a clear conflict or statement of congressional intent to preempt state or local law, the federal foreign affairs power alone does not render a state or local law unconstitutional." Robert Strumberg, *Preemption & Human Rights: Local Options After Crosby v. NFTC*, 32 LAW & POL'Y INT'L BUS. 109, 111 (citing an extensive list of scholarship).

areas of their traditional competence even though their statutes may have incidental effect on foreign relations.”²⁴³ Accordingly, when ruling on the validity of state statutes that affect foreign affairs, courts should consider the state’s interest in relation to the effect on foreign policy.²⁴⁴ In *Garamendi*, the Court refrained from a decision on the matter, but opined in dicta that under this view “it might make good sense to require a conflict.”²⁴⁵

Courts also look for the state law’s actual hindrance of U.S. foreign policies in analyzing the impact of the national government’s ability to implement its foreign policy for purposes of a Foreign Affairs Power analysis. In *Giannoulas*, for instance, the court maintained that the 2005 Illinois Moneys Act “would have an impact . . . that is at least equal to or greater than the impact of the state laws in *Zschernig* and *Garamendi*.”²⁴⁶ Indeed, the Act had already caused non-compliant banks to lose \$275 million and “[t]he risk of losing state deposits could, as the Illinois legislature hoped, pressure banks to stop accepting loan applications from entities doing business in Sudan.”²⁴⁷ The fact that bank customers knew the Act had caused them to lose this money forces them to choose between cutting ties to Sudan and continuing doing business with the bank.²⁴⁸ The court opined that the federal government, not state governments, has the authority to create foreign policy in relation to Sudan, and therefore the federal government should create that policy.²⁴⁹

Moreover, the court in *Giannoulas* held that the amendment to the 2005 Illinois Pension Act did not violate the Foreign Affairs Power because it lacked an actual impact on the federal government’s foreign affairs policy for Sudan.²⁵⁰ Rather, the reduced demand for a particular stock created a decrease in the stock price, producing only

²⁴³ *Zschernig v. Miller*, 389 U.S. 429, 458–59 (Harlan, J., concurring); *accord Garamendi*, 539 U.S. at 418–19. Justice Harlan concurred in *Zschernig* because the state statute at issue in that case conflicted with a federal treaty. *Zschernig*, 389 U.S. at 457 (Harlan, J., concurring). The competing view, implied by the *Zschernig* majority, is that a state law is preempted if it has more than an incidental effect on foreign affairs. This view does not require either that the federal government have taken affirmative action in the area or that a conflict between federal and state law exists. *See Garamendi*, 539 U.S. at 419–20 & n.11. Both views agree that preemption occurs in the presence of conflict between federal and state law. *See id.*

²⁴⁴ *See id.* at 420. Even under the view that considers a state’s interest, the *Garamendi* court leaves open the question of whether this would support consideration of a federal interest. *See id.*

²⁴⁵ *See id.* 419 n.11.

²⁴⁶ *Nat’l Foreign Trade Council v. Giannoulas*, 523 F. Supp. 2d 731, 745 (N.D. Ill. 2007).

²⁴⁷ *Id.*

²⁴⁸ *See id.* at 746.

²⁴⁹ *See id.*

²⁵⁰ *See id.* at 745–46.

a “hypothetical impact” on foreign policy.²⁵¹ The court emphasized that these potential decreases in stock prices did not indicate that the companies would decide not to do business in Sudan.²⁵² Unlike the Illinois State Moneys Act, the “inability to offer debt or equities to Illinois public pension funds” under the 2005 Illinois Pension Act creates a burden that “is entirely speculative.”²⁵³

1. *The 2007 Illinois Act Violates the Foreign Affairs Power*

The 2007 Illinois Act interferes with the federal government’s power, which includes the SADA and the Executive Order issued by President Clinton. The Executive Order generally prohibits exports and imports with Sudan, the performance of certain contracts with Sudan, and transactions relating to the transportation of cargo with Sudan.²⁵⁴ It does not explicitly deal with state divestment statutes targeted at Sudan, nor does it explicitly preempt state divestment activity. The SADA, conversely, does unambiguously authorize particular state divestment activity targeted at Sudan, which the 2007 Illinois Act exceeds.²⁵⁵ The 2007 Illinois Act falls under the second scenario of Foreign Affairs Power violations. In this case, no express preemption by federal law of the Illinois divestment scheme has occurred; however, the federal government has affirmatively acted in the area of state divestment directed at Sudan in a way that conflicts with Illinois policy.

The actual conflict between the SADA and the 2007 Illinois Act²⁵⁶ is similar to that in *Garamendi*. In *Garamendi*, the state law encouraging litigation of Holocaust survivor claims conflicted with express federal policy that encouraged settlement of these claims.²⁵⁷ Here, the federal policy through the SADA requires state divestment statutes to exclude certain business operations in an apparent effort to reduce the impact on Sudanese civilians while still having an effect on the government of Sudan.²⁵⁸ The Illinois statute violates this federal requirement by mandating pension fund divestment from companies that the federal government has made a policy to exclude.²⁵⁹ Illinois

²⁵¹ See *id.* at 745.

²⁵² See *id.*

²⁵³ See *id.* at 746.

²⁵⁴ See Exec. Order No. 13,067, 3 C.F.R. 230 (1997), reprinted in 50 U.S.C.A. § 1701 (2006).

²⁵⁵ See *supra* Part III.B.2.

²⁵⁶ See also *supra* notes 214–17 and accompanying text.

²⁵⁷ See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420–26 (2003).

²⁵⁸ See Sudan Divestment UK, FAQ’s, <http://72.167.8.38/faqs.html> (last visited Jan. 5, 2009) (stating that agriculture is specifically excluded from the SDTF Model Legislation because agriculture employs 80 percent of the Sudanese workforce).

²⁵⁹ *Nat’l Foreign Trade Council v. Giannoulias*, 523 F. Supp. 2d 731, 745 (N.D. Ill. 2007).

then is using an “iron fist” where the SADA is using “kid gloves.”²⁶⁰ As a result, just as in *Garamendi*, the state’s actual conflict with the express federal policy is “alone enough to require state law to yield.”²⁶¹

Still, there is more than merely an incidental and indirect effect on Sudan. *Zschering* and *Clark*’s seemingly different applications of the incidental and indirect effect standard do create confusion.²⁶² However, the very purpose behind the Illinois statute is to reduce the Sudanese government’s funds for genocide. *Giannoulis* held that the 2005 Illinois Act had already created at least a \$275 million loss for banks that did not abide by the Act and that the very direct choice between business in Sudan and receiving investments from state and municipal pension funds had an actual incidental and indirect effect.²⁶³ The 2007 Illinois Act creates the same effect on companies doing business in Sudan. If companies opt to receive investments from state and municipal pension funds, they must cut business ties with Sudan.

B. Congress’s Authorization and the Foreign Affairs Power

A federal statute authorizing certain state activity should shield states from violating the executive’s Foreign Affairs Power for that particular activity, unless the federal statute itself is unconstitutional. The Executive Branch and the Justice Department under George W. Bush contend that a federal authorizing statute does not remove constitutional concerns under the Foreign Affairs Power, arguing that “the President’s general Article II foreign affairs power can trump an otherwise proper federal statute.”²⁶⁴ Consequently, the balance of the separation of powers between Congress’s Article I power and the President’s Article II power then comes into question.

The President’s power to issue an order “must stem either from an act of Congress or from the Constitution itself.”²⁶⁵ The rather cryptic nature of Article II of the Constitution has led to two schools of thought regarding the power of the Executive in foreign relations, espoused by Alexander Hamilton and James Madison.²⁶⁶ Hamilton interpreted Article II as granting the President exclusive authority over foreign affairs, because although Article I gives Congress authority “herein granted”²⁶⁷ and enumerates specific powers—power over

²⁶⁰ See *Garamendi*, 539 U.S. at 427.

²⁶¹ See *id.* at 425.

²⁶² See *supra* notes 235–41 and accompanying text.

²⁶³ *Giannoulis*, 523 F. Supp. 2d at 745.

²⁶⁴ Schwartz Memo, *supra* note 219, at 2.

²⁶⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

²⁶⁶ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 39–40 (2d ed. 1996).

²⁶⁷ U.S. CONST. art. I, §1.

foreign affairs not among them—Article II states that “[t]he executive Power shall be vested in a President of the United States of America.”²⁶⁸ Therefore, the President’s powers would extend beyond those explicitly enumerated in the subsequent clauses of Article II.²⁶⁹ Madison disagreed, believing this would “import into the Constitution British monarchical prerogatives.”²⁷⁰

Justice Jackson’s well-known²⁷¹ concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*²⁷² laid out three categories by which to evaluate the President’s authority vis-à-vis Congress.²⁷³ The first category applies if Congress has, either expressly or impliedly, authorized the President’s actions; this category is where the President has the greatest power.²⁷⁴ The second category applies if the President acts in the absence of congressional authorization or denial of his actions.²⁷⁵ If operating in the “zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain,”²⁷⁶ the President’s authority is not as broad as in the first category. The third category is one in which the President acts contrary to a federal statute.²⁷⁷ Here, the President’s power “is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”²⁷⁸ The President’s actions are only justified if Congress exceeded its own Article I power.²⁷⁹ *Youngstown* fell into the third category.²⁸⁰ The Supreme Court held President Truman’s Executive Order directing seizure of steel mills during the Korean War unconstitutional because statutes granted Congress the authority to seize property in wartime.²⁸¹ The President’s order had attempted to direct Congress to execute policy as prescribed by the President.²⁸² In actuality, “[t]he Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.”²⁸³

²⁶⁸ *Id.* art. II, § 1; see also HENKIN, *supra* note 266, at 40.

²⁶⁹ See HENKIN, *supra* note 266, at 39.

²⁷⁰ *Id.* at 40.

²⁷¹ Discussions about congressional limitations on executive authority frequently cite the framework Justice Jackson created in his *Youngstown* concurrence. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.28 (2006); *id.* at 638 (Kennedy, J., concurring), *id.* at 680 (Thomas, J., dissenting); HENKIN, *supra* note 266, at 40.

²⁷² 343 U.S. 579 (1952).

²⁷³ See *id.* at 635–38 (Jackson, J., concurring).

²⁷⁴ See *id.* at 635–36.

²⁷⁵ See *id.* at 637.

²⁷⁶ *Id.*

²⁷⁷ See *id.* at 637–38.

²⁷⁸ See *id.* at 637.

²⁷⁹ See *id.* at 637–68.

²⁸⁰ *Id.* at 639–40.

²⁸¹ See *id.* at 585–89.

²⁸² See *id.* at 588.

²⁸³ See *id.*

A more recent Supreme Court decision, *Hamdan v. Rumsfeld*,²⁸⁴ drew on Justice Jackson's framework in *Youngstown* to emphasize that the President may not disregard congressional limitations on executive powers.²⁸⁵ In that case, President George W. Bush had used his Article II powers to create a military commission to try an alien, Salim Ahmed Hamdan, whom the U.S. military had captured in Afghanistan and transported to Guantanamo Bay, Cuba.²⁸⁶ The military commission violated substantive and procedural requirements set up by the statutes in the Uniform Code of Military Justice (UCMJ)²⁸⁷ and the Geneva Conventions.²⁸⁸ The President was acting "in a field with a history of congressional participation and regulation," bringing the inquiry into category three of Justice Jackson's framework.²⁸⁹ All eight of the participating justices²⁹⁰ seemed to agree that the President does not have the authority to override Congress.²⁹¹ The justices seemed to disagree, however, about whether a statute subsequent to the UCMJ and the Geneva Conventions had given the President express authority to act.²⁹² If the UCMJ and the Geneva Convention had authorized the President's actions, then Hamdan's prosecution would have fallen into category one of *Youngstown* and changed the constitutional analysis. Ultimately, the Justices unanimously recognized congressional limits on the President's Article II powers.

1. *The SDTF Model Does Not Violate the Foreign Affairs Power*

State activity under the SDTF Model comports with the SADA's authorization of state divestment statutes and does not violate the Foreign Affairs Power. The SADA clearly authorizes state divestment statutes under the SDTF Model, and Congress was clear that statutes legislated under the SADA's requirements are not preempted by *any* federal law.

²⁸⁴ 548 U.S. 557 (2006).

²⁸⁵ See *id.* at 593 & n.23.

²⁸⁶ See *id.* at 566.

²⁸⁷ See *id.* at 567.

²⁸⁸ See *id.*

²⁸⁹ See *id.* at 638 (Kennedy, J., concurring).

²⁹⁰ Chief Justice Roberts recused himself from the decision because he was involved in the case at the appellate level. See Bill Mears, *High Court Blocks Gitmo Military Tribunals*, CNN, Aug. 28, 2006, <http://www.cnn.com/2006/LAW/06/29/scotus.tribunals/index.html>.

²⁹¹ See *Hamdan*, 548 U.S. at 591–92 (“But neither can the President . . . intrude upon the proper authority of Congress . . .”) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866)); *id.* at 636 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here.”); *id.* at 636–37 (Kennedy, J., concurring) (“Congress . . . has . . . set limits on the President’s authority.”); *id.* at 798 (Thomas, J., dissenting) (noting that “procedural regulations promulgated by the Executive must not be ‘contrary to’ the UCMJ”).

²⁹² See *id.* at 655 (Scalia, J., dissenting).

The current Executive Order on Sudan is limited to prohibitions on exports, imports, credit and loan extensions, and transactions related to cargo transportation. As discussed above, it does not expressly preempt or even discuss state divestment activity. Any future executive order that would expressly preempt state divestments under the SADA does not invalidate the SDTF Model as is because the Model includes a provision that it expires when further legislation or an executive order declares it in conflict with U.S. foreign policy.

President George W. Bush's signing statement that accompanied the SADA declared that state divestment statutes under the SADA could still be unconstitutional under the Executive's authority. President Bush described the "risk[]" that the SADA would be interpreted as "insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy."²⁹³ This position indicates that he could have issued an executive order creating an express conflict between the Executive and state policy. In fact, it is unlikely that the Executive has such power. An executive order that is "incompatible with the expressed or implied will of Congress"²⁹⁴ would fall under Justice Jackson's third scenario, in which the President cannot use his Article II powers to exceed Congress's explicit authorization, unless Congress exceeded its own power in granting authorization.²⁹⁵ The SADA is within Congress's authority because Article I grants Congress authority over foreign commerce, and "[i]nvestment in and divestment from foreign companies unquestionably fall within Congress's power to regulate foreign commerce."²⁹⁶ Congress has also found authority in the Commerce Clause to "impose embargoes on unfriendly countries" and has legislated sanctions on other countries in the past.²⁹⁷ Although the President and the Justice Department argue that authorization of state divestment statutes weaken the President's Article II authority to "speak for the Nation with 'one voice' on issues of foreign policy,"²⁹⁸ this position underestimates Congress's role in foreign affairs.²⁹⁹

A challenge to a California franchise tax calculation presented a similar argument in *Barclays Bank PLC v. Franchise Tax Board*³⁰⁰—that the tax weakened the federal authority's ability to speak with one

²⁹³ See President Bush's Statement, *supra* note 10.

²⁹⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

²⁹⁵ See *supra* notes 277-79 and accompanying text.

²⁹⁶ Schwartz Memo, *supra* note 219.

²⁹⁷ HENKIN, *supra* note 266, at 66.

²⁹⁸ Justice Dep't Memo, *supra* note 11, at 3 (quoting *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)); see also President Bush's Statement, *supra* note 10.

²⁹⁹ See Schwartz Memo, *supra* note 219.

³⁰⁰ 512 U.S. 298 (1994).

voice on foreign affairs.³⁰¹ The Court rejected the argument because “Congress implicitly ha[d] *permitted* the States” to calculate the franchise tax in that manner.³⁰² “Congress, not the President, [has] the power to ‘regulate Commerce with foreign Nations’” and the President is the “preeminent speaker” for foreign commercial issues.³⁰³ The President “*cannot render unconstitutional [a state’s] otherwise valid, ‘congressionally condoned actions.’*”³⁰⁴ Thus, the current federal policy under the SADA ensures that the SDTF Model is constitutional, with or without an executive order expressing Presidential disapproval.

CONCLUSION

The introduction of the SADA on December 31, 2007 changed the legal environment for recent questions of constitutionality of state divestment statutes directed toward Sudan. The SADA does not provide blanket authorization for all state divestment statutes; more specifically, although it does authorize the SDTF Model, it does not authorize Illinois’ divestment scheme. The 2007 Illinois Act, therefore, violates the Supremacy Clause, the dormant Foreign Commerce Clause, and the Foreign Affairs Power because Congress affirmatively stated the permissible scope of state divestment statutes and the Illinois scheme exceeded this scope, thus creating a conflict with federal policy.

The SDTF Model statutes adopted in nineteen states are constitutional, however, because the SADA does authorize these state divestment schemes. Explicit congressional authorization protects these state divestment statutes from violating the Supremacy Clause, the dormant Foreign Commerce Clause, and the Foreign Affairs Power, as the state statutes fall within the scope of the SADA. Congressional authorization through the SADA more obviously shields state statutes that fall within its scope from potential violations of the Supremacy Clause and dormant Foreign Commerce Clause, which derive from Congress’s Article I powers. The Foreign Affairs Power, in contrast, includes the President’s Article II powers. The SADA still protects the SDTF Model from the Foreign Affairs Power because no executive order currently overrides the Sudan divestment statutes, and with President Obama now in office, the situation is likely to remain this way. Even so, the President cannot act contrary to the SADA, as Congress had the authority through its dormant Foreign Commerce Power to enact the legislation.

³⁰¹ See *id.* at 320.

³⁰² *Id.* at 326 (citation omitted); see Schwartz Memo, *supra* note 219.

³⁰³ *Barclays Bank PLC*, 512 U.S. at 329 (quoting U.S. CONST. art. I, § 8, cl. 3).

³⁰⁴ Schwartz Memo, *supra* note 219 (quoting *Barclays Bank PLC*, 512 U.S. at 330).

The constitutionality of these state divestment statutes under congressional authority has important implications for state activity in other foreign countries, as states are following the Sudan Divestment Movement to divest assets from countries such as Iran, North Korea, Syria, and Cuba. At the same time, the Bush Administration had pushed a broad interpretation of the Executive's Article II powers, dismissing the Legislative and the Judicial Branches' limitations on the Executive Branch's authority. Given the complexity and globalization of foreign policy and commercial relations, states may have a more active role in implementing the federal government's foreign policy. This implementation does not immediately suggest that states are creating their own policy that will detract from the United States' foreign policy. Rather, if states remain faithful to what the federal government deems their permissible role in foreign affairs, this approach strengthens the country's impact on foreign relations and the ability of the United States to condemn human rights violations such as those in Sudan.