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The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions

*Howard N. Fenton, III**

I. INTRODUCTION

State and local foreign trade restrictions represent the convergence of two main threads of the globalization of the U.S. experience, and raise a serious challenge to the historic allocation of foreign policy responsibility to the federal government. The internationalization of state and local economies is the first thread. The second is the heightened efforts of state, city and county governments to play a role in foreign affairs and foreign policy decisions. Where they meet finds states and cities using their new-found international economic leverage to influence not only United States' foreign policy, but the domestic policies of foreign nations as well. At a time when economic sanctions are emerging as the weapons of choice in maintaining international order, these state and local efforts threaten to undermine the authority and effectiveness of United States' foreign policy.

During the last 10 years the significance and profile of international commerce in state and local economies has dramatically increased. Foreign companies' facilities have become a much sought-after part of the domestic landscape. Likewise, overseas markets, international trade agreements and foreign economic policy have become staples of the local news because they impact directly and immediately on the local economy. At the same time, local governments have begun to concern themselves with global political developments. Arms control and nuclear "freezes," Central American economic, military, and refugee questions,

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and international environmental concerns have all earned substantial local legislative attention.¹

While many of the state and local actions involve precatory resolutions, sister-city relationships, or aid and assistance arrangements, the highest profile measures have involved forms of local economic coercion directed at South Africa and more recently, Northern Ireland. States, cities and counties have restricted the investment of their funds or awarding of their contracts to firms conforming to specified practices or policies in trade with specified foreign nations. These state and local trade restrictions have been roughly modelled after the rather substantial efforts of the United States government to influence international behavior through trade controls. While the state and local measures have both anticipated and followed federal actions, what is most striking is the frequent inconsistency in both means and objectives of these efforts with federal policy, creating two or more versions of "United States" foreign policy.

Nowhere has this been more apparent than with regard to sanctions against South Africa. The more than 140 city and state restrictions, affecting over \$20 billion in economic leverage,² anticipated the 1986 passage of the Comprehensive Anti-Apartheid Act by several years. The policy objectives of these state and local laws were generally far broader than those of the federal act, and have for the most part survived the 1991 lifting of the federal sanctions. This has raised fundamental questions about the United States' basic policy toward South Africa and the reforms of the minority white government. While the freeing of Nelson

¹ See Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 FOREIGN POL'Y 158 (1992):

The explosive growth of municipal foreign policy in the past decade has been impressive: As of 1991, more than 900 localities passed resolutions supporting a "freeze" in the arms race; 197 demanded a halt to nuclear testing; 120 refused to cooperate with the Federal Emergency Management Agency's nuclear-war exercises; 126, plus 27 states, divested more than \$20 billion from firms doing business in South Africa; 86 formed linkages with Nicaragua and, along with grassroots activists, provided more humanitarian assistance to the Nicaraguan people than all the military aid Congress voted for the *contras*; 80, along with the U.S. Conference of Mayors, demanded cuts in the Pentagon's budget; 73 formed sister-city relationships with Soviet cities (roughly 50 more are pending); 29 provided sanctuary for Guatemalan and Salvadoran refugees; 20 passed stratospheric protection ordinances phasing out ozone-depleting chemicals; and at least 10 established funded offices of international affairs—in essence municipal state departments.

For an example of the potential divisiveness of some of these efforts, see Anti-Defamation League of B'nai B'rith, *Propaganda by Initiative: Middle East Ballot Resolutions* (Dec. 1988) (discussions of four 1988 local ballots initiated condemning Israel for its policy towards Palestinians and the West Bank).

² Am. Comm. on Africa, State and Municipal Governments Take Aim at Apartheid, Briefing Paper at 1 (May 1991). See also A GUIDE TO AMERICAN STATE AND LOCAL LAWS ON SOUTH AFRICA 1-4 (William F. Moses, ed., 1991) [hereinafter IRRC SOUTH AFRICA].

Mandela and the reforms of 1990 and 1991 earned South Africa the removal of sanctions by most western powers, including the United States, only one of the over 140 local or state laws has been repealed, leaving most U.S. companies subject to very substantial restrictions if they venture into the South African economy,³ and South Africa subject to the same pressure in any attempt to encourage U.S. investment.

South African sanctions are by no means the only area of conflict, as localities in recent years have focused on Soviet bloc nations, Arab states, Iran, and most recently British treatment of Northern Ireland. Fourteen states and 34 local jurisdictions have sought to intercede on behalf of the Catholic minority in Ulster, a policy issue largely avoided by the federal government. The increasing clashes among nationalities in Eastern Europe and the former Soviet states raises the possibility of even more local and state action because of the large ethnic Eastern European populations of many U.S. communities.

The growing popularity of these laws has thus far overrun the fundamental question of their validity under the Constitution of the United States. Only one state court has specifically addressed this question,⁴ and while some notable commentators have asserted the constitutionality of these laws,⁵ extremely serious questions exist about both the legality and the wisdom of imposing a state or local government's ideas of appropriate international behavior through trade restrictions.⁶

³ *U.S. Businesses Awaiting Resolution of Issues Before Return to South Africa*, WALL ST. J., March 23, 1992, at A7.

⁴ The Maryland Court of Appeals affirmed a trial court decision upholding the constitutionality of the Baltimore divestment law. *Board of Trustees of the Employees' Retirement System of City of Baltimore v. Mayor and City Council of Baltimore City*, 562 A.2d 720 (1989), cert. denied sub nom. *Lubman v. Mayor and City Council of Baltimore City*, 493 U.S. 1093 (1990) [hereinafter *Board of Trustees v. City of Baltimore*]. A Michigan divestment law was struck down, but on state constitutional grounds. *Regents of Univ. of Mich. v. State*, 419 N.W.2d 773 (Mich. App. 1988). An Illinois statute denying a tax exemption for the sale of South African coins was also found invalid on state constitutional grounds. *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986).

⁵ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 469, 480 n.12 (2d ed. 1988); Richard B. Bilder, *Special Issue: The United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: The Role of States and Cities in Foreign Relations* 83 AM. J. INT'L L. 821 (1989). See also Laurence H. Tribe, *Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 Upon State and Social Measures*, 132 CONG. REC. S12534 (daily ed. Sept. 15, 1986).

⁶ States have been recently rebuffed in two other areas of foreign policy intervention. Two U.S. Courts of Appeal and the Supreme Court ruled against the purported authority of state governors to prevent their state national guard units from participating in training in Central America. *Perpich v. United States Dep't. of Defense*, 880 F.2d 11 (8th Cir. 1989); *aff'd*, 110 S.Ct. 2418 (1990); *Dukakis v. United States Dep't. of Defense*, 859 F.2d 1066 (1st Cir. 1988). In *United States v. City of Oakland, Cal.*, D.C. No. CV-89-03305-JPV (N. D. Cal. 1990), *aff'd*, 958 F.2d 300 (9th Cir. 1992), the federal district court granted the United States' motion for summary judgment against the City of Oakland's nuclear-free zone ordinance. For a disapproving discussion of these cases, see Shuman, *supra* note 1.

Inasmuch as trade relations are now an inseparable part of U.S. foreign relations, the proliferating state and local views expressed and promoted through even the indirect trade restrictions have the potential to seriously disrupt U.S. foreign policy. They may also interfere with the ability of U.S. firms to pursue trade opportunities around the globe. Working through the maze of federal trade controls is difficult enough without having to consider the foreign policy goals of 50 states and hundreds of local jurisdictions.

This article describes the nature of state and local trade restrictions and discusses constitutional and statutory barriers to their legitimacy. The article suggests why states are not good laboratories for the creation of foreign policy and why the federal model is not appropriate for economic sanctions. It also describes the strong appeal these laws have for local governments, the relatively small chance of federal legislative relief, and the importance of a definitive judicial statement of their status.

II. THE NATURE OF STATE AND LOCAL TRADE CONTROLS

States⁷ have historically made few efforts to regulate directly the international trade activities of their residents for political purposes.⁸ In the 1960's, a number of jurisdictions adopted laws banning the sale of goods from communist countries.⁹ Although only one of the laws was ever challenged and struck down in a local court,¹⁰ this effort died out. New York State and New York City unsuccessfully attempted to apply

For a detailed argument for the invalidity of nuclear-free ordinances, see Patrick J. Borchers & Paul F. Daver, *Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components*, 40 HASTINGS L.J. 87 (1988).

⁷ The constitutional position of state and local governments with regard to foreign affairs is virtually identical. Therefore references to states throughout this material include their subordinate jurisdictions unless otherwise indicated.

⁸ States have been more inclined to legislate for economic purposes, chiefly to preclude or restrict foreign goods and services under "Buy America" laws. These laws raise some of the same issues as the political trade restrictions. While there has been more litigation over the "Buy America" laws, there is no agreement as to their validity, and the United States Supreme Court has not addressed the question. Compare *Bethlehem Steel Corp. v. Los Angeles*, 276 Ca. App. 2d 221 (1969) (California statute unconstitutional) with *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977) (New Jersey law valid in part as state market participation) and *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), cert. denied, 111 S.Ct. 2814 (1991) (Pennsylvania law not preempted, and valid under the Commerce Clause as state market participation). See generally Note, *Buy-American Statutes — An Assessment of Validity Under Present Law and a Recommendation for Preemption* 23 RUTGERS L.J. 137 (1991).

⁹ See Richard B. Bilder, *East-West Trade Boycotts: A Study in Private, Labor Union, State and Local Interference With Foreign Policy*, 118 U. PA. L. REV. 841, 882-86 (1970).

¹⁰ *City of Columbus v. McGuire*, 195 N.E.2d 916 (Columbus Mun. Ct. 1963); *City of Columbus v. Miqdadi*, 195 N.E.2d 923 (Columbus Mun. Ct. 1963).

their civil rights laws to South African entities,¹¹ and Florida enacted a ban on licensing communist-owned fishing vessels which continues in force.¹² It was not until the early 1970's, however, that states made a major legislative effort at direct regulation of trade activities.

As part of a widespread response to the 1970's petrodollar enhanced Arab boycott of Israel, 13 states enacted antiboycott laws between 1974 and 1978.¹³ While these laws addressed a number of different manifestations of the Arab boycott, they generally sought to ban certain conduct by state residents relating to commercial transactions with Arab state customers. What all of these laws had in common was that they directly regulated the international business activities of state residents. This approach would appear to be the one most easily rejected by federal courts as violative of constitutionally mandated federal prerogatives, but these laws were never tested in court.

In 1977, Congress enacted the antiboycott provisions of the Export Administration Act (EAA), and expressly preempted these state laws.¹⁴ Since that time, the focus of state legislation has been on the indirect use of economic leverage on U.S. firms trading abroad. Under this approach, the states seek to compel certain behavior from businesses and individuals through use of the states' economic leverage. While states are not significant international traders themselves — i.e., they do not sell or buy extensively in world markets — they are significant domestic buyers and investors. Consequently, while they have virtually no ability to influence a particular foreign nation through curtailing or eliminating their own international trading activities (a primary economic boycott), they exercise their domestic leverage over firms with which they do business in a manner designed to influence foreign nations (a secondary economic boycott).

A. Divestment

By far the most common form of state trade restriction is divestment. Almost 200 jurisdictions have adopted some form of law restricting investments in companies doing business with South Africa, Northern Ireland, and other nations.¹⁵ Because states control a substan-

¹¹ *South African Airways v. New York State Division of Human Rights*, 315 N.Y.S.2d 651 (N.Y. Sup. Ct. 1970); *New York Times v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977).

¹² FLA. STAT. ANN. § 370.21(3) (1988).

¹³ See Eric L. Hirschhorn and Howard N. Fenton III, *States' Rights and the Antiboycott Provisions Of the Export Administration Act*, 20 COLUM. J. TRANSNAT'L L. 517, 522-23 (1981).

¹⁴ 50 U.S.C. app. § 2407(c) (1988).

¹⁵ IRRS SOUTH AFRICA, *supra* note 2, at 1. (143 states or localities); Welsh, A GUIDE TO U.S.

tial volume of funds through their normal revenue-raising efforts as well as through special accounts such as education trust funds and employee retirement accounts, their investment decisions can have a considerable impact on banks or corporations seeking depositors and investors. For example, anti-apartheid divestment action by the California and New Jersey employee retirement funds affected an estimated \$8 billion in investments.¹⁶

The anti-apartheid divestment laws operate in a variety of different ways and set a wide range of standards for the behavior of companies.¹⁷ At one extreme, they require divestment of all interest in firms doing business with or in South Africa,¹⁸ or ban new investment in firms doing business there.¹⁹ The other principal variation limits investment to firms operating in South Africa that subscribe to the employment standards contained in the Sullivan Principles.²⁰ Even among these particular laws, however, there is substantial diversity, with some laws limiting investments to firms that have been judged as highly successful in implementing these employment-related principles, while others only limit investments to firms that have promised to adhere to the principles.²¹ Other laws impose limitations on bank deposits or obtaining financial services from banks that do business with South Africa or make loans to certain South African Government agencies.²²

Since 1985, a number of states and cities have sought to influence another foreign issue, the perceived employment discrimination against the Catholic minority in primarily Protestant Northern Ireland.²³ This is only one issue in the broader conflict between the Protestant and Catholic factions in Ulster that has been the source of violence and contro-

LAWS AND LEGISLATION IN SUPPORT OF THE MACBRIDE PRINCIPLES I (1992) [hereinafter IRRC MACBRIDE PRINCIPLES] (46 states and localities).

¹⁶ Am. Comm. on Africa, *supra* note 2, at 1.

¹⁷ See IRRC SOUTH AFRICA, *supra* note 2, at 2-3; see also Howard N. Fenton III, *State and Local Anti-Apartheid Laws: Misplaced Response to a Flawed National Policy on South Africa*, 19 N.Y.U.J. INT'L L. & POL'Y 883, 889-93 (1987).

¹⁸ See IRRC SOUTH AFRICA, *supra* note 2, at 99-105.

¹⁹ *Id.*

²⁰ These standards were designed to provide black employees of U.S. firms in South Africa with training, employment, and supervisory and managerial opportunities. See Rev. Leon Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 L. & POL'Y. INT'L BUS. 427, 428-35 (1983). Ironically, Rev. Sullivan abandoned advocacy of these measures in favor of total disengagement by U.S. firms from South Africa. See *American Investment in South Africa: After Sullivan*, ECONOMIST, June 13, 1987, at 71.

²¹ See IRRC SOUTH AFRICA, *supra* note 2, at 99-105.

²² *Id.*

²³ See Evelyn Ellis, *Equal Opportunity in Employment in Northern Ireland: The Government's Proposal*, 16 PUB.L. 40 (1987).

versy in that country for many years.²⁴ Fourteen states, including Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, and 34 cities have enacted advisory or mandatory divestment laws directed towards firms that have business relationships with Northern Ireland. Other jurisdictions are considering such rules.²⁵

The divestment laws directed towards Northern Ireland have been more uniform than the anti-apartheid laws. These laws, as well as the contracting restrictions, all seek to promote adoption by U.S. firms operating in Ulster of the MacBride Principles, an employers' code patterned after the Sullivan Principles, which addresses discrimination against Catholics.²⁶ While some of the laws order divestment from firms that do not adopt the MacBride Principles,²⁷ most call for studies and reports on the levels of compliance among firms in the states' investment portfolios.²⁸

Massachusetts has adopted a somewhat different approach to the controversy in Northern Ireland. In addition to promoting the MacBride Principles, the state bans certain investments in firms that sell weapons or munitions that are used in Northern Ireland.²⁹ The law is implicitly directed at firms selling such items to the British military.

Finally, the former Soviet Union and Iran have been the targets of indirect state trade controls as well. Michigan enacted a divestment requirement for university funds that applies to firms trading with the Soviet Union,³⁰ while Connecticut adopted divestment rules against Iran.³¹ The Iranian restrictions illustrate the way in which intense, momentary public outcry can lead to local trade restrictions, since this law was a direct result of the 1989 U.S. embassy hostage crisis.

²⁴ See generally Comment, *Northern Ireland: The Anglo-Irish Treaty of 1985 - Protestant Opposition to Political Representation for the Catholic Minority: The Apartheid of the United Kingdom*, 10 SUFFOLK TRANSNAT'L L.J. 425 (1986).

²⁵ IRRIC MACBRIDE PRINCIPLES, *supra* note 15, at 1-2. See also *More Cities Sign on to MacBride Principles*, BULL. OF MUN. FOREIGN POL'Y., Summer 1989, at 33. This journal is published by the Center for Innovative Diplomacy of Irvine, California, a coordinating group for state and local foreign policy initiatives. See *City Activism: When Foreign Policy Begins at Home*, ECONOMIST, Sept. 9, 1989, at 28.

²⁶ IRRIC MACBRIDE PRINCIPLES, *supra* note 15, at 37.

²⁷ *Id.* at 33.

²⁸ *Id.*

²⁹ MASS. GEN. LAWS ANN. ch. 32, § 23 (1)(d)(iii) (West 1991).

³⁰ MICH. COMP. LAW § 37.2402(g) (1985). This provision, along with the South African Ban, *see id.* § 37.2402(f), was struck down by a Michigan appellate court on state constitutional grounds (separation of powers). *Regents of Univ. of Mich. v. State*, 419 N.W. 2d 773 (Mich. App. 1988).

³¹ CONN. GEN. STAT. ANN. § 3-13g (West 1987). State administrative action (denying university admission to Iranian students) directed against Iran was struck down on constitutional grounds by a federal district court in *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980).

B. Contract Debarment

The most direct way that a state can use its economic influence is to disqualify companies that refuse to comply with the state's international trade objectives from doing business with the state.³² Thus, when the New York state antiboycott law was preempted by the 1977 EAA amendments, both the state and New York City adopted laws barring firms found to have violated the federal antiboycott law from contracting with the state or city.³³ Following this example, the states of Maryland and North Carolina adopted legislation,³⁴ and the states of Michigan, Massachusetts, and New Jersey took administrative action,³⁵ to restrict purchases from U.S. firms that do business with South Africa if those firms fail to meet the conditions set forth in their respective directives. Over 50 local jurisdictions, including New York City, adopted similar contract disqualification legislation.³⁶ Nine local governments have more recently adopted contracting restrictions directed towards U.S. corporate actions in Northern Ireland.³⁷

The debarment laws are more focused than the divestment rules. Most of the laws directed towards South Africa bar public contracts with companies that maintain any trading relationship with South Africa.³⁸ Many statutes also ban the purchase of South African origin goods and services.³⁹ While many of the statutes contain exceptions for items deemed to be essential or unduly expensive as a result of the rule to the state or local contracting body, the objective of those laws has been disengagement rather than reform. Restrictions aimed at Northern Ireland, on the other hand, seek the commitment of U.S. firms to provide economic opportunities to Catholics through implementation of the Mac-

³² Contract debarment has been used to promote nuclear-free zones as well. Oakland's efforts rejected by the federal courts, *see supra* note 6, included contract debarment provisions.

³³ N.Y. LAB. LAW § 220-f (McKinney 1986); N.Y. STATE FIN. LAW § 139-h (McKinney 1989). N.Y.C. ADMIN. CODE tit. 6, § 114 (1986). These laws are almost certainly invalid now under the Supreme Court's decision expressly rejecting a Wisconsin debarment law based on violations of the National Labor Relations Act. *See Wisconsin Dep't. of Labor v. Gould, Inc.*, 475 U.S. 282 (1986). Interest in this approach to the boycott issue remains, however, as reflected by a Los Angeles City Council member's recent introduction of a contract debarment measure. *See Anti-Boycott Ordinance Proposed by L.A. Councilman*, BOYCOTT REPORT 4 (June-July 1992).

³⁴ MD. STATE FIN. & PROC. CODE ANN. §§ 14-501 to 504 (1991); N.C. GEN. STAT. § 153A-141 (1991).

³⁵ IRRS SOUTH AFRICA, *supra* note 2, at 108.

³⁶ *Id.*

³⁷ IRRS MACBRIDE PRINCIPLES, *supra* note 15, at 33.

³⁸ All five state restrictions take this approach. *See IRRS SOUTH AFRICA*, *supra* note 2, at 12-15, 18-19.

³⁹ *See IRRS SOUTH AFRICA*, *supra* note 2, at 99-105.

Bride Principles.⁴⁰ Depending on the size of the government procurement contracts involved and the market positions of the companies involved, these laws range from being mere nuisances to constituting virtual commands. The Eastman Kodak Company, for example, withdrew from South Africa altogether, allegedly in response to the threatened loss of its business with the New York City Government.⁴¹

As discussed in greater detail below, the debarment laws appear to be the most vulnerable of the state and local trade sanctions to legal challenges, especially in light of a 1986 decision, *Wisconsin Department of Industry, Labor, and Human Relations v. Gould, Inc.*,⁴² in which the Supreme Court invalidated a Wisconsin debarment law that penalized firms that had violated the federal National Labor Relations Act, 29 U.S.C. § 151.

III. THE VALIDITY OF STATE AND LOCAL TRADE CONTROLS: TWO CENTRAL ISSUES

The state and local trade restrictions are subject to challenge on three distinct grounds: federal statutory preemption; unconstitutional restrictions on foreign commerce; and unconstitutional interference in foreign policy under the supremacy clause. These arguments represent three distinct lines of authority establishing the preeminence of the federal role in the area of foreign trade controls, but they all involve the same two fundamental inquiries.

First, the tests examine the purpose of the state and local laws to determine whether they are designed to serve some legitimate local purpose or whether they are efforts to affect the foreign affairs of the United States or the internal affairs of a foreign state. Second, each test examines whether the controls at issue interfere with the current or prospective ability of the federal government to address the same issue. The best-known formulation of this inquiry is whether the laws limit the ability of the United States to speak with one voice on a matter of significant international concern. While focusing on the same two questions, the three tests frame the inquiries and weigh the answers somewhat differently. However, if the laws have no legitimate local purpose and impede the conduct of U.S. foreign policy, they would appear to be invalid under all three tests, as discussed below.

The statutory preemption test for state and local trade controls in-

⁴⁰ IRRIC MACBRIDE PRINCIPLES, *supra* note 15, at 1-2, 33.

⁴¹ *American Cities Take on Pretoria*, N.Y. TIMES, June 22, 1986, at C4.

⁴² 475 U.S. 282 (1986). The Court based its decision in that case on preemption of the state action by the National Labor Relations Act.

volves determining whether the Congress or the President intended to preempt state action through legislative or executive trade control regimes, since this intent is the "touchstone" of traditional preemption analysis.⁴³ Because the states and localities have little (if any) residual authority in the area of foreign relations, preemption would be easily found unless the state and local laws can be characterized exclusively or predominantly as exercises of spending or police powers.

The prospect of interference with foreign policy is more important to this preemption discussion because the preemption test focuses on the federal government's intent. If the Congress or the President has acted in a fashion inconsistent with the state action, or in a manner that indicates an intent to "occupy the field," the state laws will be preempted. With regard to foreign relations, the Supreme Court presumes such intent to occupy the field and has suggested that the government must affirmatively approve state actions in order to overcome the presumption.⁴⁴

The issue of the legitimate local purpose of these state and local laws is central to resolving the second major hurdle faced by these laws — namely, the challenge posed by the laws' apparent interference with the foreign commerce of the United States, contrary to the Commerce Clause of the Constitution.⁴⁵ The primary defense offered by proponents for these state and local trade controls is that they are shielded from scrutiny under traditional analyses of burdens placed on interstate or foreign commerce, because these laws merely reflect terms of the states' participation in the market for investments, goods or services. This characterization goes to both the purpose of the laws and the means of implementation, but the issues raised by this "market participation" defense are essentially issues of local purpose versus foreign goals.

If the laws fail to qualify for this market participation defense, and possess no other legitimate local purposes, then the burdens they place on foreign commerce are likely to be deemed to be intentional intrusions into the regulation of foreign trade. Moreover, even if the burdens imposed by such laws on foreign commerce were incidental to a legitimate local purpose, the impairment of the ability of the federal government to "speak with one voice" in the area of foreign policy could also invalidate the laws. This "one voice" test was first articulated by the Supreme Court in the foreign commerce cases,⁴⁶ and its resolution will probably

⁴³ *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 244 (1972).

⁴⁴ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 n.7 (1984). See also *Wardair Canada, Inc. v. Florida Dep't. of Revenue*, 477 U.S. 1, 9 (1986).

⁴⁵ U.S. CONST. art. I, § 8, cl. 3.

⁴⁶ *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

dictate the outcome of this inquiry into the Commerce Clause implications of state and local trade controls.

Finally, the question of the purpose of the state and local trade control laws holds a central place in the Supremacy Clause analysis under the Constitution as well.⁴⁷ Because the foreign policy of the United States has been reserved to the federal government, the Supreme Court has looked askance at state actions impinging on the exercise of foreign relations powers. The leading case struck down state action in an area of traditional state authority because it was taken in a manner calculated to communicate a hostile message to foreign governments.⁴⁸ To the extent the current wave of state and local trade restriction laws are designed to effect change or communicate disapproval of the policies of a foreign state, they may impermissibly impinge on the federal government's exercise of foreign relations powers. The one voice test appears less important to this analysis because the Supreme Court presumes that the United States only has one voice in the articulation of its foreign policy.

From the foregoing analysis, it is evident that resolving the questions about the actual purposes of the state and local trade controls and the extent to which they conflict (or have the potential to conflict) with federal law and policy will either resolve or dramatically narrow the legal inquiry relating to the three principal challenges to the laws. Because these two questions can be answered without regard to the test or tests they relate to, the factual and policy issues raised by the questions will be considered separately in some detail in the next section. Following that, the three tests will be reconsidered in light of the conclusions reached regarding questions of local purpose and policy conflict, to complete the evaluation of the legal and constitutional status of state and local trade controls.

A. The Purpose of State and Local Trade Control Laws.

In upholding the Baltimore divestment statute (in the only case litigated to date on local South Africa divestment statutes), the Maryland Court of Appeals maintained that the traditional state authority to regulate such investments provided the only local purpose necessary for the law. In the weakest part of its opinion, the court failed to discuss how the restrictions relating to South African investments furthered that local purpose other than on moral grounds.⁴⁹ The court concluded that the tradition of local regulation of investments created what it found to be a

⁴⁷ U.S. CONST. art. VI, cl. 2; see HENKIN, *supra* note 43, at 238-41.

⁴⁸ *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁴⁹ *Board of Trustees v. City of Baltimore*, *supra* note 4, at 741, 746-52.

strong presumption of legitimacy for the restrictions on South Africa.⁵⁰ But it is that foreign connection that must be expressly justified as to its local purpose, not the vehicle chosen for implementation of local sanctions.

The true question is whether a state is seeking to influence the attitudes of the companies in which it invests, and, through them, to change the racial policies of the South African Government or religious discrimination in Northern Ireland. Or is the state simply exercising sound fiscal or moral responsibility in its selective investment practices? Although somewhat simplified, these questions illustrate the debate over the purported local purposes of the state and local trade control laws. While proponents have defended the legitimacy of purportedly local fiscal and moral concerns, the weight of the evidence points toward a conscious, organized and concerted effort by interest groups and state and local governments to influence either national policy towards South Africa and Northern Ireland or the direction of events in those countries.

The subjects of the laws themselves demonstrate that the states are not in pursuit of local purposes in adopting such laws. A briefing paper of the American Committee on Africa, a group promoting state and local anti-apartheid laws, describes such measures as "people's sanctions," and states that "[t]he most effective actions taken to force U.S. Companies to end their South African business ties have been those taken at the state and municipal level."⁵¹

The local interest justifications offered for the laws seem to be an effort at *post hoc* rationalization. The public sentiment or political interest propelling the legislation relates directly to particular international issues.⁵² Outrage at the racial policies of South Africa or concern over religious problems in Ulster attracts the attention of lawmakers. The resulting statutes, restricting or conditioning state investment or spending on the basis of certain behavior in those nations, are calculated to have some influence on businesses actively involved in those areas. While the primary purpose of the laws might be an appeal to the sentiments of local voters, this type of "local purpose" is unlikely to be sufficient justification for state action deemed offensive to federal constitutional priorities.

One of the principal arguments offered by proponents in support of

⁵⁰ *Id.* at 741.

⁵¹ Am. Comm. on Africa, *supra* note 2, at 1.

⁵² Some argue that foreign policy concerns are legitimate local interests that should be encouraged. *See, e.g.,* Shuman, *supra* note 1, at 172: The underlying assumption of those who would exclude localities from foreign policy - that municipal foreign policy can only hurt U.S. foreign policies - is naive. There are literally hundreds of examples of municipal foreign policies that have benefitted U.S. foreign policy by making it more democratic, more accountable, and more effective.

a local purpose for these laws is the fiscal responsibility justification.⁵³ Under this theory, the states enact divestment or debarment laws to protect their investments from the risks attendant on participation in the South African economy. There are two apparent problems with this argument. First, many of the laws do not ban investments in firms active in South Africa; instead they seek to encourage certain types of behavior there. Similarly, none of the laws directed towards Northern Ireland bans investment there; they all seek to compel U.S. firms to behave in a certain manner. While a company may reduce its economic risks by leaving South Africa, remaining in the country and taking a progressive position on racial relations has no apparent or unambiguous effect on the economic risks involved with investment in that nation.

The second problem with the fiscal integrity argument is the implicit assertion that investments in South Africa or Northern Ireland are *per se* riskier than any other foreign investments. If foreign risk is to be a primary criterion for a state's investment policy, then scrutiny of state portfolios for companies involved in debt-ridden Latin American or African nations, or for those companies in any country engaged in a military action or fighting a substantial insurgency, for example, must also become targets for divestment. The fiscal policy argument was specifically rejected by the trial court in the Baltimore divestment statute case.⁵⁴ Such a highly selective concern about the risk of particular investments provides no rational local purpose for these laws.

The second primary justification offered by proponents of these controls is the states' interest in the moral integrity of their investments.⁵⁵ Do states have a legitimate interest in preventing state resources from being used in a manner repugnant to their citizens' moral standards? Furthermore, can the states legitimately use these resources themselves to attempt to influence change consistent with their citizens' moral (or ethnic or religious) views? When the particular conduct at issue is ultimately that of a foreign power, the question becomes a constitutional one regarding the appropriate role of the states.

The moral integrity argument seems to be a stronger rationale for local purpose when it is used to support pure divestment, *i.e.*, banning

⁵³ See Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 496-97 (1987).

⁵⁴ *Board of Trustees of Employees' Retirement System of Baltimore v. Mayor and City Council of Baltimore*, No. 863650651 CE-59858, slip op. at 14, n. 1 (Cir. Ct. for Balt. City July 17, 1987). See McArdle, *In Defense of State and local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMPLE L. REV. 813, 824-32 (1989) (a discussion and defense of the trial court decision).

⁵⁵ See Lewis, *supra* note 53, at 499-506.

investments in any enterprise doing any form of business with a repulsive foreign regime. The concerns of the public are resolved when the investments are eliminated. That such divestment may induce firms to abandon business with the foreign country may be dismissed as a possible, but by no means sought after, collateral effect of the decision. However, when the investment or contracting laws expressly focus instead on the continuing activities of firms doing business in the foreign countries at issue, in a manner that might be expected to bring about change in those regimes, the possibility of influencing reform in a foreign state cannot be so easily dismissed as an unanticipated or collateral side-effect.⁵⁶

In either case, however, the rationales generally set forth by supporters of the laws emphasize the objective of influencing change. The coordinated campaigns of various interest groups promoting these state and local laws tend to focus on the cumulative effect these laws have for promoting reform. To the extent that this goal is a primary purpose of the laws and not a mere collateral effect, the moral integrity basis for the local purpose argument is likely to fail.

An alternative argument offered by supporters seeking a legitimate local purpose for these laws is that when the actions of a foreign power are widely recognized to violate accepted standards of international behavior, states should be able to use their investments to promote international legal norms.⁵⁷ The readily apparent problem with this argument is determining when a nation reaches this level of egregious behavior. For example, there is certainly no consensus that the United Kingdom's actions in Ulster have become the moral equivalent of South African apartheid, yet states are directing their divestment laws at both governments. In addition, this argument, like the moral investing argument, requires the state and local governments to sit in judgment over foreign nations and take economic actions to illustrate, if not effectuate those

⁵⁶ This is another weakness in the Maryland Court of Appeals decision. The court concluded in part that the Baltimore divestment law was constitutional because it had such a minimal impact on South Africa, i.e. that it was not effective in influencing reform in South Africa. See *Board of Trustees v. City of Baltimore*, *supra* note 4, at 746-47. The trial court noted the anomalous nature of this reasoning:

Even though some of the supporters of the divestment movement may have hoped to exert economic and political pressure on the government of South Africa in order to bring an end to apartheid, that aspiration has not been realized. Perhaps ironically, the more successful that aspiration would be, the closer the Ordinance would come to encroaching on an area reserved exclusively for the Federal government. *Board of Trustees v. Mayer and City Council of Baltimore*, No. 863650651/CE-59858, slip op. at 15-16 (Cir. Ct. for Balt. City July 17, 1987).

The weakness of this justification has been noted by proponents of state and local laws. "In other words, the Maryland judges declared that municipal foreign policy is legal only if it is ineffectual." Shuman, *supra* note 1, at 160.

⁵⁷ See generally Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153, 155-64 (1978).

judgments. This local purpose, as a matter of constitutional law, has been determined to be illegitimate.⁵⁸ The states simply do not have a role under the constitution in articulating and executing independent foreign policies.

B. The Impact of State and Local Laws on the Ability of the United States to Speak with One Voice in Matters of Foreign Policy

The discussion of the effect of state and local trade controls on the ability of the U.S. to speak with one voice is based on three fundamental assumptions: (1) that foreign policy formulation is the constitutional preserve of the federal government; (2) that the federal government on occasion implements foreign policy through the use of trade controls; and (3) that the divestment and debarment laws of the state and local governments have an impact on the behavior of targeted companies. The first two assumptions need no discussion.⁵⁹ However, the third assumption is frequently disputed by many defenders of the state and local laws. Paradoxically, they maintain that these laws have no influence on the companies affected and that the objective of the laws is merely to communicate a moral or philosophical community position.⁶⁰ The Maryland Court of Appeals decision upholding Baltimore's divestment law adopted this argument in stating that the ordinances did "not attempt to impose sanctions on South Africa,"⁶¹ and finding them without significant impact under preemption, foreign policy or foreign commerce scrutiny.

As indicated above, the total value of assets now subject to some form of state and local South Africa divestment or debarment law exceeds \$20 billion. Those jurisdictions and organizations promoting the sanctions generally do so on the basis of their presumed or potential impact on the target firms. The specific requirements of many of these laws point clearly toward individual reforms that the jurisdictions desire to see

⁵⁸ *Zschernig v. Miller*, *supra* note 48. See also notes 115-26, *infra*, and accompanying text.

⁵⁹ Proponents of state and local foreign policy actions will take issue with the first statement that foreign affairs are the preserve of the federal government. See Shuman, *supra* note 1, at 158. From a legal perspective advocates of municipal foreign policy initiatives have had to argue for narrow exceptions or negligible impact to defend state and local actions. The prevailing view is still that expressed by Professor Louis Henkin:

By *Curtiss-Wright [U.S. v. Curtiss-Wright Export Corp.]*, 299 U.S. 304 (1936) the Federal Government would have all the foreign relations powers, and the states none, even if the Constitution said nothing. In fact, the Constitution explicitly denies the states the principal foreign affairs powers, other limitations are clearly implied, and still others have been distilled by the Courts.

HENKIN, *supra* note 43, at 228.

⁶⁰ See McArdle, *supra* note 54, at 833-44 (suggesting cities and states have a separate First Amendment right to express their views on foreign policy matters).

⁶¹ *Board of Trustees v. City of Baltimore*, *supra* note 4, at 743.

implemented.⁶² Businesses themselves have indicated that their decisions about business with South Africa have been directly influenced by these laws.⁶³ It is illogical to argue that state or local governments would craft such precise laws without intending any effects, when enacting simple resolutions of condemnation would communicate the same messages.

Given the three assumptions set forth above, any deviation by subordinate jurisdictions from federal foreign trade restrictions will limit the clarity and force of the federal directives. Because there is no mechanism in the constitutional system to ensure that the state and federal governments respond uniformly to foreign nations, deviation from the federal position will almost certainly be the normal outcome of state and local initiatives. Large or small, the deviations will detract from the impact of U.S. foreign policy. In the worst case, the differences will communicate a *national* foreign policy substantially at odds with the articulated policy of the *federal* government.

Nowhere is this more apparent than the history of state and local sanctions against South Africa. While the Reagan Administration in the 1980's steadfastly resisted imposing sweeping sanctions against the white-minority government in South Africa, the initiative was taken by states and cities across the country. By 1986, when Congress passed the Comprehensive Anti-Apartheid Act over Reagan's veto,⁶⁴ over 100 local jurisdictions had adopted some form of divestment or contract debarment law aimed at companies doing business in South Africa.⁶⁵ Many of these laws were aimed at forcing companies to completely disengage from South Africa, while the federal law sought to use the presence of U.S. firms as leverage for change.

The federal law did not expressly preempt the state and local measures, and jurisdictions continued to enact trade restrictions at odds with the Anti-Apartheid Act.⁶⁶ In 1991, President Bush exercised his option under the Act and ended most sanctions.⁶⁷ Only one state has repealed its divestment law, however; thus, the situation has returned to one of minimal federal restrictions on South African trade and extensive state and local restrictions with significant cumulative effect. What "voice" of

⁶² See, e.g., R.I. GEN. LAWS § 35-10-12(A) (1987) (defines four progressive phases of divestment for companies doing business in South Africa, depending on adoption and implementation of the Sullivan Principles). See generally IRRIC SOUTH AFRICA, *supra* note 2. Actions directed toward Northern Ireland also reflect the goal of reform. See IRRIC MACBRIDE PRINCIPLES, *supra* note 15.

⁶³ See *Business Quits South Africa While the Going is Bad*, ECONOMIST, Nov. 29, 1986, at 65-66.

⁶⁴ Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C.A. §§ 5001-5117 (West Supp. 1991).

⁶⁵ See IRRIC SOUTH AFRICA, *supra* note 2, at 99-105.

⁶⁶ See *id.*

⁶⁷ *Id.* at 1.

U.S. policy toward South Africa does U.S. business or the South African Government listen to?

The distinctions need not be so extreme to be troubling. U.S. companies have been encouraged to invest in Northern Ireland as a matter of federal policy.⁶⁸ The United States position on the issue of religious discrimination in Ulster has not been sharply defined, however, out of deference to our relationship with the government of the United Kingdom.⁶⁹ Due to influence from local Irish groups, 14 states and 34 cities or counties have adopted laws directed towards forcing U.S. companies active in Northern Ireland to adopt employment practices purportedly designed to end discrimination against Catholics.⁷⁰ The British Government has identified some of these practices as illegal under British law.⁷¹ Under these circumstances, to which voice does a U.S. firm considering investment in Northern Ireland listen: to the encouragement of the federal government or the threats of divestment by the states for failure to conduct their activities in a certain way? To which voice does the British Government pay heed? These questions demonstrate why the courts consistently focus on the need for the United States to speak with only one voice in matters of foreign affairs.

As this discussion illustrates, the state and local trade restrictions are more than narrowly tailored laws designed to achieve purely local purposes. They are aimed at altering the international conduct of U.S. target companies as well as the behavior of the particular foreign governments. They may communicate messages inconsistent with federal policies or laws. Following these two conclusions, the analysis below of the validity of these laws under the preemption test, or the foreign commerce or supremacy clause review, is much simpler. The laws cannot be sustained.

IV. STATUTORY PREEMPTION OF STATE AND LOCAL TRADE CONTROLS

If an international issue is volatile enough to generate state or local

⁶⁸ Northern Ireland Statement on U.S. Policy, PUB. PAPERS, Aug. 30, 1977, at 1524.

⁶⁹ *Id.* ("However, we have no intention of telling the parties how it might be achieved"). See generally JOSEPH E. THOMPSON, UNITED STATES - NORTHERN IRELAND RELATIONS, 146 WORLD AFF. 318 (1984).

⁷⁰ See IRRRC MACBRIDE PRINCIPLES, *supra* note 15, at 1.

⁷¹ See Fair Employment Agency for Northern Ireland, *Religious Equality of Opportunity in Employment: Guide to Effective Practice* ¶ 3.14 (1987). But see *New York City Employees' Retirement System v. American Brands, Inc.* 634 F. Supp. 1382 (S.D.N.Y. 1986), where the federal district court found a likelihood that the affirmative action requirements of the MacBride Principles would be upheld under British law.

intervention through trade restrictions, there is almost certain to be some corresponding federal policy or action directed towards that same issue. This raises the question of whether the federal action preempts these state efforts, which has traditionally depended upon Congressional intent.⁷² In ordinary circumstances, federal preemption of state action relating to foreign relations is simple to find because the states have no inherent or residual powers in the area that create any presumptions in favor of state actions.⁷³ The Supreme Court has even suggested that state action dealing with foreign affairs requires specific Congressional affirmation to survive preemption scrutiny.⁷⁴ The following discussion examines an instance of express preemption by the Congress, the general test for implied preemption in the foreign affairs context, and the somewhat heated debate over the preemptive effect of the federal Comprehensive Anti-Apartheid Act on the state trade restrictions.

A. Express Preemption — Antiboycott Provisions of the Export Administration Act

When states adopt trade restrictions that threaten significant disruption of international commerce, Congress can avoid the delay of judicial review and piecemeal disapproval by expressly preempting such state actions. The most striking contemporary example is the preemption provision of the 1977 antiboycott amendments to the Export Administration Act:

The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.⁷⁵

The 13 states that had adopted direct restrictions on their residents' compliance with the Arab boycott were viewed as a substantial burden to foreign commerce by the Congress.⁷⁶ Thus, from the outset of consideration of a federal response, preemption of the state actions was almost a given. The language ultimately adopted was broad and categorical, leaving little room to argue that states had room to legislate in this area.⁷⁷

⁷² *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

⁷³ *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941); see also HENKIN, *supra* note 43, at 236, 244.

⁷⁴ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 n.7 (1984).

⁷⁵ 50 U.S.C. § 2407(c) (1987).

⁷⁶ See *Arab Boycott: Hearings on S.69 and S.92 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 421-24 (1977).

⁷⁷ But see notes 9-11 *supra*.

Two significant factors facilitated the adoption of the express preemption of state antiboycott laws. First, the federal law was written in large part under the immediate influence of two powerful and well-organized interest groups: the major U.S. Jewish organizations and the Business Roundtable.⁷⁸ Because these groups agreed that the federal law should preempt the state laws, there was no significant opposition to preemption. Second, the federal statute the two groups helped to develop was stronger and broader than the cumulative effect of all of the state statutes. Thus, not only did the business community achieve a uniform set of rules, but the Jewish groups also obtained a stronger law than the states had been able to adopt. The lack of a similar consensus and cooperative relationship was a significant reason for the failure of Congress to expressly preempt state and local anti-apartheid laws when it adopted federal legislation in 1986.

B. Implied Preemption: The General Standard

In *Hines v. Davidowitz*, Justice Hugo Black wrote:

Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.⁷⁹

This decision overturned a Pennsylvania alien registration statute based on preemption by the federal Alien Registration Act. It stands as one of the most significant cases in the general preemption area, and as the single most important decision on the issue of federal preemption of state laws in the area of foreign affairs.⁸⁰

While the federal system plainly presumes national, state and local governments exercising authority over the same constituents, the Constitution and the federal courts have provided operating guidelines to delineate respective spheres of power. Controversies arise when different levels of government seek to exercise power concurrently in matters over which they possess recognized authority. State exercise of police power, for example, is a well-recognized legitimate action. Federal preemption in such areas will not be lightly implied.⁸¹ The inquiry in such cases

⁷⁸ See generally KENNAN L. TESLIK, CONGRESS, THE EXECUTIVE BRANCH, AND SPECIAL INTERESTS: THE AMERICAN RESPONSE TO THE ARAB BOYCOTT OF ISRAEL (1982).

⁷⁹ *Hines v. Davidowitz*, *supra* note 73, at 63.

⁸⁰ States have not been completely precluded from legislating on the subject of aliens. See *De Caras v. Bica*, 424 U.S. 351, 361 (1976) (upholding California law limiting employment of illegal aliens against pre-emption and supremacy clause challenges, in part because of finding of Congressional authorization).

⁸¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

focuses on Congressional intent to preempt state action⁸² and whether the state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸³ Because states enjoy paramount control of their investment and contracting policies, local jurisdictions have sought to benefit from this higher shield against federal preemption. This approach, of course, ignores the obvious overriding international purpose of such divestment or debarment laws.

Where the state has little or no recognized authority, however, the standard for finding federal preemption is much lower. Thus, in the area of foreign relations, traditionally regarded as an almost exclusively federal domain, "[a]ny concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as its power to tax."⁸⁴ Or, one might add, on its power to spend. Thus, when states enact laws designed to influence foreign relations, they are acting only by the grace and approval of the federal government.⁸⁵

Where Congress has adopted a comprehensive system of trade controls, there is little room for state actions and it is unlikely that the courts would sustain such state efforts absent an indication of Congressional approval.⁸⁶ Where Congress has not acted, but the President has articulated a national policy, the courts should similarly bar state actions.⁸⁷ While this appears evident from the Supreme Court's few decisions in this area, it was sufficiently unclear when Congress enacted the 1986 anti-apartheid law and a heated exchange of views over Congressional intent ensued.

C. Preemption Applied: The 1986 South Africa Legislation

The Comprehensive Anti-Apartheid Act of 1986⁸⁸ incorporated a wide range of measures designed to apply economic pressure on South Africa in order to encourage moderation of its racial policies. These measures included restrictions on certain exports and imports and on new investments and deposits, as well as a code of conduct for U.S. firms doing business within South Africa.⁸⁹ The law incorporated specific provisions for moderating or tightening the sanctions based on the response

⁸² *Id.*

⁸³ *Hines v. Davidowitz*, *supra* note 73, at 67.

⁸⁴ *Id.* at 68.

⁸⁵ See HENKIN, *supra* note 43, at 237, 241.

⁸⁶ *Id.* at 237.

⁸⁷ *Id.* at 244.

⁸⁸ 22 U.S.C. §§ 5001-5116 (1988).

⁸⁹ *Id.* § 5035. This code closely resembles the Sullivan Principles.

of the South African government.⁹⁰ In 1991, President Bush exercised this authority to lift the majority of the restrictions.⁹¹

At the time the law was adopted, the chairman of the Senate Foreign Relations Committee observed that the act should preempt the state and local anti-apartheid laws already enacted.⁹² Several other members of the Senate strongly disagreed,⁹³ and the House of Representatives adopted a resolution following passage of the law stating the House view that the law did not in fact preempt the state and local statutes.⁹⁴ Congress declined to preempt expressly these laws the way the state anti-boycott laws were preempted in 1977 in the Export Administration Act Amendments. The anti-apartheid law reflected more of a compromise position, imposing sanctions well short of the total disengagement sought by some of the state and local laws. Thus, express preemption would have actually weakened the sum total of U.S. sanctions, an effect the proponents of tighter South African controls wanted to avoid. On the other side, there was no group pressing for express preemption as the Business Roundtable had done during the 1977 negotiations for the anti-boycott law. Without express preemption of state anti-apartheid laws, the matter is left to the courts to decide.⁹⁵

A preemption determination appeared inevitable even prior to the 1991 removal of sanctions under the traditional standards of review. The 1986 Act was a very complete treatment of U.S. economic relations with South Africa, representing the kind of regulatory scheme that traditionally displaces state action.⁹⁶ Furthermore, the objectives of the federal plan could have been frustrated by the effect of the state rules that en-

⁹⁰ *Id.* § 5061(b).

⁹¹ Implementation of Section 311(a) of the Comprehensive Anti-Apartheid Act, Exec. Order No. 12709, 3 C.F.R. § 342 (1992), reprinted in 22 U.S.C.A. § 5061 (West Supp. 1992).

⁹² 132 CONG. REC. S12533 (daily ed. Sept. 15, 1985) (statement of Sen. Kennedy).

⁹³ See, e.g., 132 CONG. REC. S11817-18 (daily ed. Aug. 15, 1986) (statement of Sen. Lugar).

⁹⁴ H.R. Res. 549, 99th Cong., 2d Sess. (1986).

⁹⁵ Congressional action dealing with the impact of debarment laws on federally funded local transportation projects may have some impact on the debate. At the time the Act was passed, Congress said that after 90 days states could not violate federal competitive bidding requirements because of their anti-apartheid debarment rule. 22 U.S.C. § 5116 (1988). The Maryland Court of Appeals used that provision to argue that Congress only preempted state laws to that extent; *i.e.*, where such laws impacted federally financed projects subject to competitive bidding. *Board of Trustees v. Mayor and City Council of Baltimore City*, *supra* note 4. In June of 1989, Congress revised its position and permanently waived the competitive bidding requirement on federally funded transportation projects when it conflicts with state debarment laws. Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, Ch. IX, 103 Stat. 97, 109 (codified at 22 U.S.C. § 5117 (1990)).

⁹⁶ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.")

courage total disengagement and deprive the federal plan both of executive branch flexibility and of the leverage afforded by continued presence of U.S. business in South Africa. These two factors alone pointed toward preemption, especially in light of express statements of the Supreme Court in recent cases involving states' use of economic leverage.

Both cases involved state limits on contracting in an effort to further other goals. In *South-Central Timber Development, Inc. v. Wunnicke*, the state of Alaska required that any timber it sold had to be processed within the state.⁹⁷ Alaska argued that this restriction was permissible because it was consistent with federal policy on timber sales. In a plurality opinion, the Court said the state had to show more than consistency with a federal policy in taking steps so intrusive in the area of foreign commerce.⁹⁸ In elaborating on this point, the Court said:

The need for affirmative approval is heightened by the fact that Alaska's policy has substantial ramifications beyond the Nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the necessity that congressional authorization not be lightly implied.⁹⁹

It is difficult to see how the ambiguous legislative debate about preemption under the Comprehensive Anti-Apartheid Act could provide the state and local anti-apartheid laws the affirmative Congressional approval they would need under this standard.

In the second case, *Wisconsin Department of Industry, Labor, and Human Relations v. Gould, Inc.*, the Court expressed another concern that directly affected the state and local laws at issue: namely, the proliferation of local sanctions, even where they were perfectly consistent with the federal rules.¹⁰⁰ In *Gould* the Court ruled that Wisconsin's law barring firms that violated the National Labor Relations Act from state contracts was preempted by the NLRA "and thus further detracts from the 'integrated scheme of regulation' created by Congress."¹⁰¹ In the instant circumstance, the inconsistency of the state trade controls, coupled with the vastly greater control problems represented by over 100 local jurisdictions taking action, pose a far more serious problem for the federal government in an area (foreign policy) far more sensitive to interference than domestic labor law.

The decision of President Bush to lift South African sanctions in

⁹⁷ See *supra* note 74.

⁹⁸ *Id.* at 90.

⁹⁹ *Id.* at 92 n.7.

¹⁰⁰ See *supra* note 42.

¹⁰¹ *Id.* at 288-89. See also *Zschernig v. Miller*, *supra* note 48, at 437 n.8 (1968) (Court expressed concern over the number of states limiting the succession rights of aliens of communist countries).

July of 1991 brings into high relief the importance of federal preemption. Under the terms of the Comprehensive Anti-Apartheid Act, the president is authorized to relax some or all of the sanctions as South Africa makes progress towards reform.¹⁰² While the situation there is extremely volatile, the law was written in a way to permit the President to respond to major reforms and retrenchment. Bush made the requisite findings under the act that permitted him to lift the restrictions. The statute remains in force, however, along with authority to reimpose the sanctions should that become necessary. Compare this flexible regulatory regime with the plethora of state and local laws enacted over the last 10 years. Only Oregon has responded to events in South Africa by lifting its restrictions. Its law was directly tied to federal sanctions.¹⁰³ The Congressional goal of a flexible sanctions program that could encourage reform appears in sharp contrast to what is happening at the state and local level.

An eventual federal judicial determination that the state and local South Africa laws have been preempted by the federal government appear strong, notwithstanding the Maryland court decisions, if other challenges are brought. While there is no federal legislation comparable to the comprehensive Anti-Apartheid Act affecting Northern Ireland, the executive branch actions point towards preemption there as well. Given the general predisposition of the Supreme Court to avoid deciding cases on constitutional grounds, this approach seems the most likely for invalidating the laws. Such a decision would still enable Congress to approve state actions of this nature if the Congress decided it was appropriate, a policy option the Court would likely wish to preserve for the federal government.

V. CONSTITUTIONAL INVALIDATION: IMPOSITION ON FOREIGN COMMERCE

In *Japan Line Ltd. v. County of Los Angeles*, the Supreme Court said that state actions affecting foreign commerce (in that case, state tax laws) would be given closer scrutiny than those affecting interstate commerce.¹⁰⁴ The Court further stated that these state actions would be ex-

¹⁰² 22 U.S.C.A. § 5061(b) (West 1990).

¹⁰³ OR. REV. CODE § 293.830, § 293.867(2)(1991). See *Keeping the Pressure on South Africa*, GOVERNING, Dec. 1991, at 14-15. Localities are not totally unresponsive. Over 30 governments have eliminated references in their trade restrictions to Namibia since its independence from South Africa. IRRC SOUTH AFRICA, *supra* note 2, at 107. However, at least 20 governments still had sanctions in place 2 years after Namibian independence from South Africa, *U.S. Businesses Awaiting Resolution of Issues Before Return to South Africa*, WALL ST. J., March 23, 1992, at A8.

¹⁰⁴ 441 U.S. 434, 446 (1979).

amined to see if they interfered with the ability of the United States to "speak with one voice" in matters affecting relations with foreign governments.¹⁰⁵ The Court later said in *Container Corp. of America v. Franchise Tax Board* that a state law could be sustained only if it "merely has foreign resonances, but does not implicate foreign affairs."¹⁰⁶ The Court thus refined the one voice test by stating that a state law would be invalid "if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive."¹⁰⁷ As indicated above, the implications of state and local trade control laws for U.S. conduct of foreign affairs are substantial. They plainly fail the "one voice" test.

The laws also fall short under the standard analysis of the impact of state action on interstate commerce,¹⁰⁸ which requires a balancing of the legitimacy of the local purpose with the minimal impact on commerce. As the discussion above also indicates, the local purposes of the laws plainly are overshadowed by their international objectives.

Perhaps the strongest argument in support of the state and local laws is that they are simply exercises of the states' market or purchasing powers, and are exempt from commerce clause scrutiny under the "market participation" exemption.¹⁰⁹ Beginning with *Hughes v. Alexandria Scrap Corp.*,¹¹⁰ the Supreme Court has decided in a number of cases that when states act as buyers or sellers they can impose restrictions that would be impermissible if they were acting as regulators. If the Court

¹⁰⁵ *Id.* at 449 quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

¹⁰⁶ 463 U.S. 159, 194 (1983).

¹⁰⁷ *Id.*

¹⁰⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁰⁹ The market participation exemption has generated some significant scholarship. *See, e.g.*, Dan T. Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). There has been little focus on the application of the exemption to foreign commerce activities however, and that work has been oriented towards state natural resource and environmental controls. *See, e.g.*, Note, *The Foreign Commerce Clause and the Market Participant Exemption*, 25 VANDERBILT J. TRANSNAT'L L. 257 (1992). Several articles have looked at the market participation exemption as applied to state and local South African sanctions: Lewis, *supra* note 53, at 478-87 (arguing that it would not apply); Note, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 838-41 (1986) (arguing that the exemption will probably not be available for activities affecting foreign commerce); Note, *State and Municipal Governments React Against South African Apartheid. An Assessment of the Constitutionality of the Divestment Campaign*, 54 CINN. L. REV. 543, 549-66 (1985) (extended defense of application of exemption to state and local sanctions); Note, *The Constitutionality of State and Local Governments' Response to Apartheid: Divestment Legislation*, 13 FORDHAM URB. L.J. 763, 789-92 (1985) (suggesting exemption is unavailable to state actions in foreign commerce). *See also* Fenton, *supra* note 17 at 900-10 (extended argument that state and local restrictions do not qualify for the exemption).

¹¹⁰ 426 U.S. 794 (1976).

determines that the state is acting in the role of market participant, the Court will not scrutinize the state's actions for the burden they may impose on interstate commerce.¹¹¹ The Maryland courts upheld the Baltimore divestment ordinance in part on this ground.¹¹²

However, it is unlikely that the foreign trade conditions the states are imposing with their South African and Northern Ireland laws will be exempted from Commerce Clause scrutiny under this test. In the first place, the Supreme Court has never used the test to exempt state action from scrutiny for impact on foreign commerce, although it has only faced the question in one case, the *South Central Timber* case discussed above.¹¹³ In that decision, the Court indicated that a higher standard of review would be required for application of the purchase exemption to legislation affecting foreign commerce, although the Court was not required to reach that question in that case.¹¹⁴ Given the sensitivity of the Court to the impact of state actions on foreign commerce, as embodied in the "one voice" test, it is unlikely that the Court would permit states to insulate their actions from judicial review by imposing them through the states' economic leverage rather than through political power.

The second reason that the market participation exemption is unavailable for these statutes is because the trade controls lack the direct, local, economic advancement objectives that are integral to the activities previously recognized as permissible under the market participation test.¹¹⁵ In each of the cases that allowed state restrictions to continue pursuant to the market participation exemption, the states were attempting to provide economic advantages to local residents through direct actions, such as limiting sales of state-produced cement to residents¹¹⁶ or requiring local laborers on city projects.¹¹⁷ As the discussion of (the absence of) legitimate local purposes above indicates, the state and local trade controls have very different aims. If the market participation exemption is not available, these laws will be subjected to the scrutiny of

¹¹¹ *Id.* at 809-11. See also *L. TRIBE*, *supra* note 5, at 469.

¹¹² *Board of Trustees v. City of Baltimore*, *supra* note 4, at 749-51.

¹¹³ 467 U.S. 82 (1984).

¹¹⁴ *Id.* at 95-96.

¹¹⁵ The Maryland Court of Appeals found that the exemption applied even where the city was not seeking a local benefit (beyond moral investing) and argued that courts had not limited the market participation exemption to state actions aimed at economic benefits to state residents. *Board of Trustees v. City of Baltimore*, 562 A.2d 720, 749-52 (1989). All of the Supreme Court decisions applying the exemption have involved state actions designed to promote some economic benefit for state residents. See Fenton, *supra* note 17, at 908-09. See also Coenen, *supra* note 109, at 441-46 (outlining his framework for applying the exemption). Curiously, Coenen does not consider the foreign commerce implications in his thoughtful and detailed discussion of the exemption.

¹¹⁶ *Reeves v. Stake*, 447 U.S. 429 (1980).

¹¹⁷ *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

the traditional Foreign Commerce Clause review, a scrutiny they cannot be expected to survive.

VI. CONSTITUTIONAL INVALIDATION: FOREIGN AFFAIRS POWERS AND THE SUPREMACY CLAUSE

The most apparent constitutional defect of these state and local trade measures is their interference with the foreign policy making authority of the federal government. The states' accession of authority over foreign affairs to the central government was one of the foundational elements of the Constitution.¹¹⁸ While states inevitably take actions that have some impact on foreign affairs, attempts to direct or influence the foreign policy of the nation are not acceptable.

While there are few cases on this point, the leading Supreme Court decision, *Zschernig v. Miller*,¹¹⁹ leaves little room to argue that the state and local trade laws are permissible. In that 1968 decision, the Court struck down an Oregon statute that denied inheritance rights to residents of nations that the Oregon courts determined would not grant reciprocal rights.¹²⁰ The Court had earlier approved an almost identical California statute, but reversed the Oregon court and invalidated the statute in the *Zschernig* decision. The Court based its decision squarely on the Constitution rather than any preemptive federal position,¹²¹ and focused on the critical implications of the law towards foreign nations.¹²²

Under the Oregon law, Oregon courts were forced to determine whether a foreign government granted residents enforceable property rights in inherited property or engaged in any form of confiscation.¹²³ Involved in these decisions were judgments about the veracity of diplomatic statements regarding property rights in certain (primarily Communist) nations and speculation about the political nature of those governments.¹²⁴ The Court said about the law that "it seems that foreign policy attitudes, the freezing or thawing of the 'cold war', and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts."¹²⁵

On the premise that the state and local foreign trade control laws are reactions to the conduct of foreign nations and designed to influence

¹¹⁸ See THE FEDERALIST No. 42 (James Madison); see also HENKIN, *supra* note 43, at 227-249.

¹¹⁹ 389 U.S. 429 (1968).

¹²⁰ *Id.* at 430-32.

¹²¹ *Id.* at 432.

¹²² *Id.* at 437.

¹²³ *Id.* at 433-34.

¹²⁴ *Id.*

¹²⁵ *Id.* at 437-38.

U.S. policy toward those nations, the invalidating impact of *Zschernig* seems clear. However, the two Maryland state courts considering the Baltimore divestment law distinguished this case in upholding the statute. The trial court wrote that because the law did not require the government officials to make any potentially critical inquiry into the activities of the government of South Africa, the type of activity the *Zschernig* Court found improper was not present in the Baltimore city ordinance. That court also said that the action challenged in *Zschernig* had a much greater impact on the foreign nation because it dealt with the rights of citizens of that nation. The court found that the main impact of the Baltimore divestment law fell on U.S. firms, and affected South Africa only very indirectly because divestment laws played little role in forcing U.S. firms out of that country.¹²⁶

The Maryland Court of Appeals agreed with the trial court's reasoning, emphasizing that, unlike the situation in *Zschernig*, the Baltimore law "requires no continuing investigation, assessment, or commentary by local government officials or employees into the laws or operations of the South African government."¹²⁷ On that basis, the court found the ordinance outside the scope of *Zschernig's* restrictions.

However, it is unlikely that the Supreme Court would find a neutral law compelling government officials to make what might be a critical evaluation of foreign states invalid, as it did in *Zschernig*, yet approve a law explicitly critical of a foreign nation that reflects the judgment of the entire elected government of a jurisdiction. If *Zschernig* reflects concern over state actions that are critical of foreign governments, as some commentators believe,¹²⁸ the Maryland courts' distinction is one without a difference.¹²⁹

Further, the Maryland court's argument that the laws have only a negligible impact on foreign relations is similar to other efforts to distinguish *Zschernig*.¹³⁰ The concrete impact of the law struck down in *Zschernig* was the loss of inheritance by one citizen of a foreign nation, hardly a dramatic effect on a geopolitical scale. Instead, it was the communication of criticism to a foreign nation by a subordinate jurisdiction of the U.S. inherent in that loss that caused the Supreme Court to strike down the Oregon law. It is unlikely that the Court will adopt a factual test to measure the precise impact or efficacy of state laws expressly di-

¹²⁶ See *Board of Trustees v. Mayor and City Council of Baltimore*, *supra* note 54, at 13-16.

¹²⁷ See *supra* note 4, at 746.

¹²⁸ See HENKIN, *supra* note 43, at 824-29.

¹²⁹ But see McArdle, *supra* note 54, at 824-29.

¹³⁰ See Lewis, *supra* note 53, at 514-16.

rected against foreign nations.¹³¹ Because the reservation of foreign policy powers to the federal government is absolute under the Constitution, the Supreme Court is unlikely to review state laws interfering with the exercise of that power on the basis of how successful the states are in implementing the foreign policies they have chosen to adopt.

VII. THE NEED FOR A DEFINITIVE JUDICIAL STATEMENT

Although the legal arguments against state and local political trade controls appear compelling, these laws have continued to proliferate over the past five years and escaped serious challenge. The political popularity of the laws probably accounts for both phenomena, and presents the greatest obstacle to prompt resolution of the conflicts these laws are creating.

For local political leaders, adoption of a contract debarment or divestment law directed against unpopular activity of a foreign government is a high-visibility, low-risk venture. Constituent groups advocating the measures are well-focused and have an issue — racial, ethnic or religious discrimination — that commands broad sympathy. This issue draws the attention of the local press, is more substantive than adoption of a precatory resolution of censure or disapproval, and presents little economic risk to the jurisdiction. Potential costs of divestment include fees or commissions for selling securities, and loss of earnings through investment in lower-yielding stocks. The transaction costs can be minimized through a gradual program of divestment, while the earnings loss is so speculative as to be a negligible factor.

Indeed, the potential costs of divestment are so indirect that as a political matter the action appears to be virtually cost free. Debarment laws create a measurable detrimental impact only if they prevent the jurisdiction from obtaining important goods or services. While this is unlikely, given the wide range of suppliers available, most laws have provisions providing exceptions for critical requirements.¹³² Thus, from the local political leader's perspective, passage of divestment or debarment laws is a popular decision with little or no economic risk.

The popularity of the measures makes challenges to the laws correspondingly unpopular. What U.S. company wants to be portrayed as a

¹³¹ See *Zschernig v. Miller*, 389 U.S. at 441:

[T]he present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact on foreign relations and may well adversely affect the power of the central government to deal with these problems.

¹³² See, e.g., MD. STATE FIN. & PROC. CODE ANN. § 14-505 (Supp. 1990) (Waiver of requirements).

proponent of the white South Africa government or anti-Catholic discrimination because of a legal challenge to a divestment or debarment law? Given the political mileage a local jurisdiction can obtain out of fighting a protracted legal battle over the laws, what U.S. firm has a sufficient economic stake in defeating any single statute to finance the fight? The most significant challenge to these laws thus far was brought by the Trustees of the City of Baltimore's pension fund, challenging their instructions under city law to divest South African related shares.¹³³ The trustees had a politically defensible rationale for questioning the legality of the mandate, and access to fund resources to finance the litigation.

The political and financial obstacles to challenges of these laws also highlight one of the fundamental weaknesses of permitting local jurisdictions to adopt foreign trade controls. The fragmentation of policy formulation enables local groups with strongly held views to obtain local legislation unreflective of the national consensus. Broader-based or more diffuse groups with opposing or more moderate viewpoints cannot intervene at every level. The result is a potential distortion of U.S. foreign policy views. For while there was a national consensus against South African apartheid, there is nothing in the premises underlying the state and local laws that restricts them to such widely held views.¹³⁴ Concerns about religious discrimination in Northern Ireland, for example, are much more localized. The renewal of centuries old ethnic hostilities in Eastern Europe resonate strongly throughout many older ethnic neighborhoods in U.S. cities. The growing political influence of the newer Asian and Hispanic speaking populations from other strife-ridden parts of the world will further expand the sensitivity of local governments to international conflicts. It takes little imagination to envision a combination of local religious, ethnic, or nationalistic groups and opportunistic local politicians leading to a true balkanization of U.S. foreign policy.

The political pressures that result in these local laws will also discourage Congressional action to preempt such laws in the near term. The constituent groups and popular appeal propelling these laws through city councils and state legislatures do not go unnoted by representatives and senators representing those jurisdictions. Moreover, at the national level, opposition to the measures is likely to be perceived more as a de-

¹³³ See *Board of Trustees v. City of Baltimore*, *supra* note 4.

¹³⁴ Virtually all of the analysis and commentary about these laws has been in the context of the struggle against apartheid in South Africa. Denying the right of states and cities to join this struggle has proven as difficult for legal scholars as it has been for legislators. There has been little or no discussion of the application of the principles behind these rules to other international conflicts.

fense of the foreign conduct rather than as a statement about constitutional prerogatives.

Judicial invalidation is the only realistic option for correction of this problem. There has been only one major challenge mounted to any of the laws, and, as noted above, the Maryland state court decisions upholding divestment laws have not been thorough or well-reasoned. With rapid change underway in South Africa, the prospect for additional challenges seems unlikely. The issue at stake, however, is the fundamental authority of the United States government to exercise control over its foreign policy. The nation has entered an era in which trade controls have become an integral part of its own foreign policy as well as of the United Nations. While the appropriateness and effectiveness of trade control tools can be argued, all such tools must be in the hands of the federal government if they are to be used at all. It will ultimately be up to the courts to restore the constitutional balance of the state and federal powers.