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Foreign Policy By Federalism: The Reagan Years

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I. Introduction

The debate over the survival of federalism[1] has focused on defining the extent to which the tenth amendment has any real meaning after *Garcia v. San Antonio Transit Authority*.[2] The notion that Justice Powell's dissent in *Garcia* marked "federalism's obituary" must be weighed against the executive branch's increasing emphasis on state's rights.[3] The balance reveals that federal involvement in such areas as education, agriculture, commerce, and health care has hardly declined,[4] despite seven years of executive rhetoric calling for increased state autonomy.[5]

If states' rights are narrowing in the domestic sphere, they appear to be broadening in the realm of foreign policy. In an age when the President has sought to speak with one voice and the Congress with another, it is of no surprise that many states have unilaterally attempted to answer certain questions of international

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1. "Federalism" is the doctrine which embodies the distribution of powers between the states and the federal government. More often, however, it is used synonymously with the doctrine of "states' rights." For the purposes of this article, "federalism" will be used to connote a broader vision of state's rights perennially balanced against the interests of the federal government.

2. 469 U.S. 528 (1985).

3. Cooper & Schwartz, *Has the Supreme Court Destroyed Federalism?*, A.B.A. J., May 1, 1987, at 42.

4. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987), *reprinted in* 5 U.S.C.A. § 601 (West Supp. 1989). This order, entitled "Federalism Considerations in Policy Formulation and Implementation," lays out broad policy directives eliminating federal action, regulatory as well as legislative, in all circumstances where states can care for themselves. The order states that its purpose is to "restore the division of governmental responsibilities between the national government and the states that was intended by the Framers of the Constitution." The order's reach has yet to be fully tested, but critics of this new policy directive note that: "[T]he inability of this Administration to enact its federalism mandate into law is a reflection of the fact that when the political smoke cleared, congressional constituencies did not support the reduction of federal programs intended under the Administration's vision of federalism." *See* OMB Watch, "Federalism: A New Executive Order," Memorandum of January 6, 1988.

5. R. Berger, Federalism: The Founder's Design 164-65 (1987).

law.

The Constitution and custom preempt state action which affect foreign policy. Indeed one of the primary purposes of the Constitution was to provide for a unified voice in the area of foreign policy. Nevertheless, states have always exercised some influence in foreign relations.[6] Historically, this influence has been limited to areas such as jurisdiction over foreign corporations and regulation of aliens employed within a state's borders.[7] In the last decade, however, state involvement in foreign policy matters has extended well beyond the traditional areas of commerce and labor. Today states are actively seeking a role in policies on nuclear weapons, immigration, deployment of a state's militia abroad in peacetime, and negotiation of trade agreements with foreign governments. States are using the federal courts and the ballot box to challenge national foreign policy goals.[8] Hence a new federalism exists in the United States, and it is one that has manifested itself in foreign policy, an area that the Reagan Administration would have at least anticipated.

The states' expanded role in foreign policy is the subject of this article. Part II of this article will examine the traditional view of federal preemption of state involvement in foreign affairs. With regard to the making and implementation of foreign policy goals, Part III will outline the analytical framework which places state action vis-à-vis the federal government. Finally, Part IV will explore ways in which the courts have reviewed state intervention into foreign affairs and examine the congressional and executive power, if any, used to restrain this assertion of states' rights.

The new state activism in foreign affairs differs from earlier efforts because it makes broader use of state police powers and ballot initiatives. This article will examine whether increased state ac-

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6. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 228 (1972); P. HAY & R. ROTUNDA, THE UNITED STATES FEDERAL SYSTEM, LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE 76-77 (1982).

7. Foley v. Connelie, 435 U.S. 291 (1978).

8. Other examples of state activism in foreign affairs, to be discussed within this article, include the following: states acting in violation of United States treaty obligations, *e.g.*, United States v. City of Glen Cove, 322 F. Supp. 149 (E.D.N.Y. 1971), *aff'd*, 450 F.2d 884 (2d Cir. 1971); states making policy on deployment of the National Guard in peacetime, Perpich v. United States Dep't of Defense, 666 F. Supp. 1319 (D. Minn. 1987), *aff'd*, 880 F.2d 11 (8th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S. Ct. 715 (1990); and states making their own trade agreements with foreign governments in contravention of the Logan Act, ch. 645, 62 Stat. 744 (1948) (codified as amended at 18 U.S.C. § 953 (1988)). *See* Tolchin & Tolchin, *Cultivating Japan*, Wash. Post, Mar. 6, 1988, at C2, col. 1.

tivism in foreign relations has created fragmentary relief on some issues which affect both the states and the nation. Such activism may have also overshadowed a more strained relationship between the Executive and Congress in the area of foreign affairs in the post-Vietnam era. By reviewing the recent court decisions, newspaper articles, and other relevant literature one can begin documenting the states' realignment of their traditional role in the foreign policy process.

II. Supremacy in Foreign Affairs: Background

Traditional wisdom commits the foreign policy making powers of the United States to the federal government, with overlapping powers divided between Congress and the Executive.[9] In particular, the Constitution explicitly withholds important foreign affairs powers from the states. States are forbidden to make treaties, to impose duties on exports and imports, to maintain military forces, to engage in war, and to participate in separate alliances.[10]

Only Congress can regulate foreign commerce[11] and immigration;[12] only the President, with the advice and consent of the Senate, can ratify treaties.[13] The Supremacy Clause makes all legislation, as well as treaties with foreign nations which are entered into by the President and ratified by the Senate, binding on the states.[14]

The exclusive power of the federal government to conduct foreign policy predates the adoption of the Constitution. It is based "upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one."[15] Moreover, "as a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of

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9. *See* L. Henkin, *supra* note 6; L. Tribe, American Constitutional Law, § 4-6, at 230, § 5-16, at 353, § 6-21, at 468 (2d ed. 1988).

10. U.S. Const. art. I, § 10.

11. *Id.* art. I, § 8, cl. 3.

12. *Id.* art. I, § 8, cl. 4.

13. *Id.* art. II, § 2, cl. 2.

14. *Id.* art. VI, cl. 2. The Supremacy Clause also makes all federal legislation binding upon the states.

15. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936).

America."[16] Yet it was precisely the inability of the federal government to control the individual states vis-à-vis their relations with foreign nations that rendered the Articles of Confederation useless and prompted the drafting of a federal constitution.[17] Indeed, in the Federalist Papers, James Madison argued that the new nation should adopt a unified approach in the conduct of foreign affairs. He urged that "if we are to be one nation in any respect it clearly ought to be in respect to other nations."[18]

A. The Executive

History has underscored the need for a centralized approach to foreign policy. The Constitution of the United States provides various techniques for achieving this unified voice.[19] For example, the Executive, under Article II, retains a central voice in the articulation of foreign policy.[20] Executive supremacy in foreign affairs was also reinforced by the relationship between the President and Congress until the early 1970s.

Post-World War II America marked the ascendancy of the executive branch in the foreign policy process.[21] This bipartisan consensus set the tone for the President to use military force and to commit troops abroad without the consent of the Congress, as provided by our constitutional design. Some scholars consider the congressional passage of the Gulf of Tonkin Resolution in 1965 to

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16. *Id.* at 316.

17. L. HENKIN, *supra* note 6. "Even in the Articles of Confederation the states had left themselves little independent authority in foreign relations, and eliminating that little was a principal purpose of the Constitutional fathers." *Id.* at 227. *See also* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 16 (1976).

18. THE FEDERALIST no. 42, at 181 (J. Madison) (C. Beard ed. 1948). See *id.* nos. 3, 4, 5, 22 & 80 for discussions of the foreign affairs power of the new nation.

19. *See generally* Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248. *See also* U.S. CONST. art. I, § 8, cls. 3, 10; art. I, § 10, cls. 1, 3; art. II, §§ 2, 3; art. III, § 2; art. VI, cl. 2.

20. As enumerated in the Constitution, the presidential powers include receiving and appointing ambassadors, making treaties with the advice and power consent of the Senate, and a broad catchall derived from the "Necessary and Proper" Clause. *See generally* U.S. CONST. art. II.

21. For example, such policies as the Truman Doctrine, North Atlantic Treaty Organization (NATO), and containment were easily ratified by Congress. J. NATHAN & J. OLIVER, FOREIGN POLICY MAKING AND THE AMERICAN POLITICAL SYSTEM 106 (2d ed. 1987). "[T]here was a fairly widespread consensus in Congress as well as in successive presidencies that the checks and balances that were the essence of American Constitutional design were simply not adequate to the tasks of world leadership." *Id.*

mark the pinnacle of congressional deference.[22]

B. The Congress

To understand the roots of greater state involvement in the foreign policy process, one must examine the shift that occurred in the executive-legislative relationship in the early 1970s. Congress' attempt to reassert Article I powers over the foreign policy making process was evidenced by the War Powers Resolution of 1973.[23] This resolution, perceived as a statutory springboard to challenge executive actions, marked a high point of the reaction against executive adventurism.[24]

Where the War Powers Act failed to wrest foreign policy power from the Executive to Congress, the Watergate investigations and the elections of 1974 succeeded. The new Congress of 1974 ushered in a group of legislators no longer completely deferential to presidential leadership. The result was a Congress that was fragmented by the emergence of new committees, new leadership, and numerous autonomous policy making bodies. Fragmentation of policy was particularly apparent in the areas of foreign affairs and defense.[25] By the 1980s, Congress was deadlocked on matters of foreign policy due to a lack of consensus among the public and foreign policy experts.[26]

The executive branch also suffered from a lack of coherent vision of the foreign policy process. While the absence of a common ground with Congress created a divided voice in foreign affairs, the executive branch in the post-Vietnam decade was also challenged by an electorate that manifested a stronger interest in foreign policy. United States citizens were aware that policy differences existed between the Executive and Congress in areas such as deployment of nuclear weapons and sanctuary for refugees. They were also unwilling to see apartheid remain the *status quo* in South Africa. These issues as well as others have become prime targets of

22. *Id.* at 109.

23. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified as amended at 50 U.S.C. §§ 1541-1548 (1982 & Supp. V 1987)).

24. *Id.* at 114. The question of Congress' ability to use the War Powers act to thwart executive action draws attention to the political question doctrine. A hesitant Supreme Court has been reluctant to resolve controversies between the branches on domestic as well as foreign policy matters. *See* Baker v. Carr, 369 U.S. 186 (1962).

25. J. NATHAN & J. OLIVER, *supra* note 21, at 120-21.

26. *Id.* at 125.

state and local actions in the absence of executive or legislative initiative and in response to what some would perceive as wrong or failed initiatives. Cities and states are setting their own challenges to national policy through initiatives and referenda, through court challenges to federal law and through state police powers.[27]

C. The Courts

Courts reinforce federal supremacy in foreign relations. Some of the earliest cases deny states unilateral power to interact with foreign nations.[28] More recent pronouncements reiterate the need for the federal government to speak with one voice in the area of foreign relations. The Supreme Court buttressed this through decisions which effectively declare that states have little or no power to affect American foreign relations.[29] In *United States v. Belmont*,[30] the Court stated emphatically that "in respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."[31] This idea is reiterated in *United States v. Pink* which states that the foreign relations power is not shared by the federal government with the states.[32]

Despite case law and its doctrinal statements which favor the federal government's exclusive jurisdiction in foreign affairs, there still exists some uncertainty regarding the relationship between state policies and the national foreign relations power.[33] This situation is most evident where the federal courts have carved out exceptions for independent state action, in cases such as those involving the court created doctrines of the "dormant Commerce Clause" and "dormant Foreign Policy Clause."[34]

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27. *The States Passing the Buck*, ECONOMIST, Aug. 5, 1989, at 25-26.

28. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796)(the international agreement power is not limited by any powers reserved to the states).

29. L. HENKIN, *supra* note 6, at 228.

30. 301 U.S. 324 (1937).

31. *Id.* at 331.

32. "We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." United States v. Pink, 315 U.S. 203, 233 (1942).

33. Moore, *supra* note 19, at 249.

34. "But where foreign affairs begin to touch the States, whether in their particular economic interest (as in issues of free trade versus protectionism) or even in small matters of pride or prejudice or principle, the plenary powers of the national government take on all the colors of federalism." L. HENKIN, *supra* note 6, at 247.

The evolution of the Court's thinking about the state preemption of interstate commerce has given rise to the "dormant Commerce Clause." Under the Constitution, Congress has the power to regulate commerce with foreign nations and with states.[35] When Congress exercises its affirmative power, the Supremacy Clause voids conflicting state actions.[36] Congress' affirmative power to control interstate and foreign commerce contains an implicit authority to restrain state governments from interfering with the flow of interstate commerce.[37] What the courts have made clear to the states is that even in the absence of congressional legislation, "the Commerce Clause contains an implied limitation on the power of the states to interfere with or impose burdens on interstate commerce."[38]

The proscription of states' interference with interstate commerce, and foreign affairs, has a loophole. Congress cannot prevent states from exercising their police powers to protect the health and safety of its citizens.[39] Thus, statutes enacted under the guise of police power that impact on interstate commerce pose a difficult task for the Court.[40]

Since 1970 the Court has approached state regulation of interstate commerce by a balancing test described in *Pike v. Bruce Church*.[41] The most current doctrinal exposition of this test occurred in *Hughes v. Alexandria Scrap*.[42] In *Alexandria Scrap* the Court expounded a "market participant doctrine" governing state

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35. U.S. CONST. art. I, § 8, cls. 1, 3.

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

37. L. TRIBE, *supra* note 9, § 6-2, at 403.

38. Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 652 (1981). The Court tells us that the Constitution itself excludes such state intrusions even when the federal branches have not acted. "While political branches might prescribe for particular cases or even provide some guidelines, as under the Commerce Clause, it will be largely for the courts and will take many years and many cases to develop the distinctions and draw lines that will define the new limitations on the States." L. HENKIN, *supra* note 6, at 239.

39. Contributors to the Pa. Hosp. v. City of Philadelphia, 245 U.S. 20 (1917)(police powers of the states are inalienable).

40. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

41. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

42. 426 U.S. 794 (1976).

participation in the market place. The Court determined that the Commerce Clause did not prohibit a state from favoring its own citizens when it participates in the market.[43] This doctrine does not apply to foreign commerce.[44]

A similar doctrine which emerges for federal preemption of state actions in foreign affairs is the "dormant Foreign Policy Clause." Because the Constitution itself excludes such state intrusions, even when the federal branches have not acted, it would seem that the states are virtually powerless to express an independent course in foreign affairs.[45] Yet states have continued to enact laws which affect our foreign relations and it is the "dormant Foreign Policy Clause" that requires a court to determine the effect that a state statute will have.

Similar to the balancing tests developed for the "dormant Commerce Clause" cases, the Supreme Court has employed a balancing process for the "dormant Foreign Policy Clause" in two cases: *Clark v. Allen*[46] and *Zschernig v. Miller*.[47] Both cases deal with state laws affecting inheritance of real or personal property by aliens.[48] Out of *Zschernig* emerged a two part constitutionality test for state statutes with an impact on foreign policy: 1) the statute must constitute a proper response to the risks, financial and otherwise, distinctly affecting the locality; and 2) the statute must not interfere with the foreign affairs power of the federal government by providing for an evaluation of the conduct of a foreign government. If a state statute complies with both of these conditions, federal preemption under the "dormant Foreign Policy Clause" does not occur.[49]

Actions arising out of state law or out of a state's police power challenge the federal power to preempt a state's regulation of commerce or foreign affairs. Nowhere in the Constitution is the term

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43. *Id.* at 810.

44. Kenworthy, *The Constitutionality of State Buy-American Laws*, 50 UMKC L. REV. 1, 18-19 (1981).

45. L. HENKIN, *supra* note 6, at 239.

46. 331 U.S. 503 (1947).

47. 389 U.S. 429 (1968).

48. P. HAY & R. ROTUNDA, *supra* note 6, at 120.

49. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 509-12 (1987). "The dormant foreign policy power requires a court to determine the likely affect on foreign policy that a state statute will have." *Id.* at 509. *See also Zschernig, supra* note 47. Justice Douglas stated that "[I]t seems inescapable that the type of probate law that Oregon enforces *affects* international relations in a persistent and subtle way." *Id.* at 440 (emphasis added).

"police power" used, but the Supreme Court used the concept to legitimize state action vis-à-vis federal law. Under the test devised over a century ago in *Cooley v. Board of Wardens*,[50] the Supreme Court recognized that under certain circumstances exclusive congressional power is appropriate while at other times concurrent state regulation is acceptable.[51] This rule of "selective exclusiveness" adopted in *Cooley* set the standard of review for state legislation of commerce in the absence of federal legislation.[52]

The analytical standard for preemption when states attempt to regulate the conduct of foreign affairs through the use of state police powers is articulated in *Hines v. Davidowitz*[53] and *Zschernig*.[54] The problem in all cases involving preemption of commerce or foreign affairs powers is in the separation of state actions, which may be construed as legitimate exercises of state police powers, from those which are specific incursions into federal legislative territory. Often the subtle task is to define the bounds of police power where its exercise intrudes upon interstate commerce.[55]

The role that states have continued to play in the foreign relations of this nation appears to have expanded in the last decade.[56] If the 1960s called into question the efficacy of federal controls over foreign relations,[57] then the 1980s require a reexamination of how, in the absence of a strong federal leadership in foreign affairs, the states have been successful in asserting a true *vox populi* in matters of international concern.

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50. 53 U.S. (12 How.) 299 (1852).

51. P. HAY & R. ROTUNDA, *supra* note 6, at 80.

52. "The doctrine of selective exclusiveness in *Cooley* stipulates that if the item is such that national uniformity is necessitated, then Congressional power is exclusive. If, on the other hand, the item is representative of a peculiarly local concern (even though within the reach of the Commerce Clause) warranting a diversity of treatment, then concurrent state regulation is authorized in the absence of Congressional preemption." *Id.* at 81.

53. 312 U.S. 52 (1941).

54. *Zschernig*, *supra* note 47.

55. Lewis, *supra* note 49, at 476.

56. "Policy initiatives during the first four years of the Reagan administration, either by design or by accident, shifted the focus in certain policy areas to states and localities. . .Moreover, even areas of traditional or inherent national concern, such as arms control and foreign policy, received the attention of both states and localities. Whether through legislation or ballot measures, the states and localities focused on new areas of concern during Reagan's first term of office." Holcomb, *State and Local Politics During the Reagan Era: Citizen Group Responses*, in STATE POLITICS AND THE NEW FEDERALISM: READINGS AND COMMENTARY 121 (M. Gittell ed. 1986).

57. Moore, *supra* note 19, at 250-51.

III. The Analytical Framework: Three Ways the Federal Government Views State Behavior

Three modes of behavior define federal government reaction to state incursions into the area of foreign relations: the traditional mode, the activist mode, and the neutral mode. All three forms of behavior can be documented over time in the relations between the federal government and the states. There are no bright lines between any of the three behavioral modes. The federal government may shift back and forth from one form of behavior to another even though the merits of the issue being challenged may not change. Thus, where states have involved themselves in matters of foreign relations, the federal government's neutrality on a given issue can easily turn into either active support or active opposition depending on the timing and circumstances of a particular state's behavior.

A. The Traditional Mode

Within the traditional model of federalism, the role of the states in the conduct of foreign affairs has been so limited by the national government as to be almost non-existent.[58] Under the traditional mode, the response of the federal government is to consistently oppose unilateral state actions. In this mode, the executive branch maintains the strict constitutional formalism of the supremacy in foreign policy matters, with Congress deferring to the Executive so that the nation speaks with one voice. The Supreme Court has continued to strike down state laws that conflict with federal objectives or touch upon a dominant federal interest. Since 1936, supporters of the traditional interpretation of executive supremacy rely on *United States v. Curtiss-Wright Export Corp.*[59] as the basis for rejection of any unilateral action by the states or by Congress in the area of foreign affairs. Not surprisingly, most states' attempts to challenge the federal government are easily dismissed on political question grounds before ever reaching the merits.

A new trend within this traditional mode is for states to challenge particular federal actions by exploiting specific statutory obligations which inhibit federal action in certain areas of foreign af-

58. *See Belmont, supra* note 30, at 331.
59. 299 U.S. 304 (1936).

fairs. Such statutory loopholes provide states and citizen groups with a vehicle to voice broader foreign policy objections. In their consideration of such challenges as the federal government's failure to meet environmental impact reporting requirements or other obligatory standards, federal courts have heard issues that extend well beyond the mere violation of the specific law. Most recent examples of such activism can be seen in the lawsuits by anti-nuclear groups or by those who favor political asylum for refugees fleeing Central America. While these suits often fail to obtain relief in the form of changes in foreign policy, they do get a judicial forum because the cases involve a particular federal statute rather than a "political question" per se.

B. The Activist Mode

In cases where certain state actions may promote a foreign policy objective, the federal government has often given consent to state action.[60] Most cases falling into this category involve local reactions to Cold War politics. Although *Zschernig* might be the exception, in several cases states used their police power to lash out at international communism.[61] Such situations, especially in the controversial area of "Buy-American" laws, have created special problems for the courts.[62]

C. The Neutral Mode

Three trends embody the neutral mode of federal government response. In its general neutral stance, the federal government tolerates the state actions such as declaring celebrations in the name of foreign leaders or passing non-binding resolutions in support of opposition groups in countries where the United States retains diplomatic relations. These actions are deemed neutral in that the federal government neither supports nor prohibits this form of state intrusion in foreign affairs.

A second form of behavior is more troubling to the federal government in its neutral stance. State or local governments, under

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60. Moore, *supra* note 19, at 312-14.

61. *Zschernig*, *supra* note 47, must be compared with *Clark*, *supra* note 46, because of the nature of the type of wording and goal that each of these state inheritance statutes contained.

62. Lewis, *supra* note 49, at 485-86.

the guise of their police powers, actively embark on the promotion of policies which could affect the conduct of foreign affairs which, on their face, appear to be intrusions into the federal role in foreign policy. State and local actions regarding divestment of government funds from companies dealing with South Africa is one of the more recent examples of this trend. Another example is the creation of sanctuaries for refugees from Central America in cities or states. In the latter example, the federal government has been less willing to engage in court battles against community leaders, even though political asylum is a decision clearly delegated to federal authorities, specifically to the Department of State.

A third trend of state activity where the federal government is neutral has been through the ballot box. The 1980s have been a decade of increasing use of initiative and referenda procedures. Such ballot initiatives have given local communities an opportunity to vote on matters of foreign policy in non-binding resolutions. Foreign policy issues such as U.S.-Soviet arms control efforts (the nuclear freeze votes and the nuclear free zone movements), United States aid to the Nicaraguan opposition (the anti-Contra referenda), and United States policy toward apartheid in South Africa have all appeared on the ballots in state elections throughout the nation.

The importance of such grassroots movements is underscored by the neutral stance that the federal government has taken with regard to these activities. On the one hand, the ability of citizens to express support or opposition to foreign policy goals is a testimony to free speech and to the open society in which we live. On the other hand, such movements must still be examined within the framework of federalism so as to help understand the role states can and will play in the making of foreign policy at the end of this century.

IV. Case Studies of State Behavior

A. The Traditional Mode

In *United States v. Glen Cove*,[63] the tax commissioner of a small town on Long Island, New York, tried to assess property taxes on the residence of the Soviet Representative to the United

63. 322 F. Supp. 149 (E.D.N.Y. 1971), *aff'd per curiam*, 450 F.2d 884 (2d Cir. 1971).

Nations. The Court of Appeals for the Second Circuit enjoined the action,[64] affirming the district court which held that a municipality cannot collect property taxes on property which is owned by a foreign nation and which is used for purposes that render it exempt from taxation under a consular convention.[65]

Eighteen years have passed since *Glen Cove*, but cases in the intervening years have proven that executive supremacy is predominant when United States foreign policy objectives are challenged. Even the Senate, whose constitutional role of advice and consent in treaty making is so clearly defined, cannot override a presidential decision that abrogates a treaty approved earlier by that body.[66] The federal government and the courts retain the right to interpret whether a state's legislation is incidental to or has a direct impact on the conduct of foreign affairs. In the last decade, the states have exhibited a renewed interest in foreign affairs, exemplified by governors speaking out on national issues and local governments enacting their own laws which directly effect federal policies. The United States Congress has demonstrated a renewed activism in that Representatives have utilized the courts to challenge executive actions deemed contrary to congressional foreign policy goals. The courts have determined such actions to be non-justiciable on the basis of the political question doctrine. In all cases where states have initiated litigation to stop the implementation of federal policies, however, the states have lost.[67]

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64. 450 F.2d 884 (2d Cir. 1971).

65. "In the exercise of its constitutional responsibility for the conduct of foreign affairs, the United States may sue to prevent state action which would violate a treaty obligation of the United States." 322 F. Supp. at 152.

66. Goldwater v. Carter, 444 U.S. 996 (1979). The Court relied on the *Baker* analysis for political questions:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

The Court ruled that the President had the power to abrogate a treaty, notwithstanding the Senate's objection. This decision represents the most traditional way for the Court to avoid an inter-branch dispute.

67. In 1970, the State of Massachusetts sued the Secretary of Defense, Melvin Laird, to

During the 1980s, state and municipal government actions have challenged federal authority in the area of foreign policy.[68] These challenges made creative use of statutory requirements unrelated to foreign policy that provide a jurisdictional opening for such challenges. Thus, in these cases, the courts are less likely to invoke the political question doctrine to avoid judicial review. Instead, based on the merits of the particular case, the courts maintain the traditional result of federal supremacy.

1. United States Nuclear Policy

In the last eight years, the issue of United States nuclear policy has pitted state and local governments directly against the Executive and Congress. Under traditional constitutional law and legal history, state involvement in such an issue is automatically preempted by Congress' plenary power to declare war and the Executive's authority as Commander-in-Chief.[69] Nevertheless, through creative lawsuits that avoid the political question doctrine, grassroots organizations have been partially victorious in challenging the deployment of nuclear missiles. For example, the federal requirement that new arms procurements include an arms control impact statement has opened the door to new litigation.[70] Even more compelling are state challenges to deployment of the United States nuclear arsenal based on the Department of Defense's fail-

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obtain an adjudication of the constitutionality of the U.S. participation in the Indochina war. Massachusetts v. Laird, 400 U.S. 886 (1970). While the Court denied the state the opportunity to be heard, Justices Douglas, Stewart, and Harlan dissented. Douglas argued in his dissent that Massachusetts would have been granted standing and the matter at issue was justiciable. Douglas stated in this case:

> The rationale in cases such as the present is that the government cannot take life, liberty, or property of the individual and escape adjudication by the courts of the legality of its actions. This is the heart of this case. It does not concern the wisdom of fighting in Southeast Asia. Likewise, no question of whether the conflict is either just or necessary is present. We are asked instead, whether the Executive has power, absent a congressional declaration of war, to commit Massachusetts citizens to armed hostilities on foreign soil. Another way of putting the question is whether under our Constitution, presidential wars are permissible.

Id. at 896.

68. *See* Holcomb, *supra* note 56, at 121.

69. L. Henkin, United States Nuclear Defense Policy: The Constitutional Framework, (November 1987) (unpublished paper presented at National Defense University, Seminar on National Security, Ft. McNair, Washington, D.C.).

70. *See* Min, *Toward More Intelligent National Security Policy Making: The Case for Reform of Arms Control Impact Statements*, 54 GEO. WASH. L. REV. 174 (1986).

ure to include final environmental impact statements (FEIS) in proposed projects such as the MX missile.[71]

In *Lamm v. Weinberger*,[72] the Governor of Colorado, Richard Lamm, along with environmental and anti-nuclear groups,[73] challenged the adequacy of the MX missile project's FEIS, required by the National Environmental Policy Act (NEPA).[74] The United States District Court for the District of Nebraska held that the claims were barred by the political question doctrine.[75]

The Eighth Circuit heard two appeals in this particular case. In the first decision, the court held that the issue was justiciable. The court considered whether the Air Force was required to file a FEIS on three types of basing modes for all MX missiles. These modes included basing for immediate missile deployment, basing for missiles proposed for deployment, and alternative basing for alternative modes. The court was willing to grant declaratory and injunctive relief for the claims regarding the environmental impact of basing the 100 proposed missiles. It refused to consider the actual or alternative mode question. In justifying its decision, the court mentioned that some courts have refrained from issuing injunctions in cases where national defense was concerned, those cases were heard on the merits.

The Air Force petitioned for a rehearing of the *Lamm* decision, an *en banc* hearing was ordered, and the *Lamm* decision was vacated.[76] In the resulting case, *Romer v. Carlucci*,[77] the court reconsidered Colorado's challenges to the adequacy of an environmental impact statement for all three basing modes. In yet another decision in favor of Colorado, the *Romer* court sitting *en banc*, upheld the justiciability of two of the three basing mode questions, basing its decision on the requirements for a FEIS mandated by

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71. *Id.* at 178; *but cf.* Friends of the Earth v. Weinberger, 562 F. Supp. 265 (D.D.C. 1983), where a similar challenge based on an alleged violation of National Environmental Policy Act (NEPA) resulted in a motion to dismiss.

72. 819 F.2d 1145 (8th Cir. 1987). This case was withdrawn from the bound volume because rehearing *en banc* was granted and the opinion vacated. 825 F.2d 176 (8th Cir. 1987).

73. The groups included: Western Solidarity Tri-State MX Coalition, Friends of the Earth Committee for a Sane Nuclear Policy, Coalition for a Liveable World, and Environmental Action.

74. 42 U.S.C. §§ 4321-4347 (1982 & Supp. V 1987).

75. 847 F.2d 445, 447 (8th Cir. 1988).

76. 825 F.2d 176 (8th Cir. 1987).

77. 847 F.2d 445 (8th Cir. 1988).

the statute.[78] In *Romer*, the court's decision to remand differed from the willingness in *Lamm* to grant outright injunctive relief. The *Romer* court mandated that the claims of the state and environmental group be reviewed, "with all the rigor and scrutiny required by law."[79] The *Romer* court, in its rejection of the appellee's demands to review whether or not Congress had intended the FEIS to cover alternative basing modes, made an important distinction between international and wartime use of missiles. The majority decision that alternative basing was a non-reviewable area caused Judge Arnold and two other judges, in a partial dissent, to comment that in view of NEPA doctrine and policy, the language of the NEPA itself, fails to support such a conclusion.[80]

The significance of the *Romer* decision depends on its impact on a future plaintiff's ability to influence national security matters. If a court follows the dicta of Judge Arnold's concurrence in *Romer*,[81] it is clear that the decision breaks new ground in avoiding dismissal based on political question grounds.

In *Greenham Women Against Cruise Missiles v. Reagan*,[82] the court chose a more traditional approach to outsiders' ability to influence the foreign policy. The United States District Court for the Southern District of New York dismissed the complaint by the plaintiffs, who among others, consisted of an antinuclear group and two U.S. congressmen, alleging that the deployment by the United States of cruise missiles in England would create a substantial risk of a nuclear accident or nuclear war initiated by either the United States or the Soviet Union. The court held that this issue was nonjusticiable because it presented a political question and went on to state:

> [T] his court is not asked to determine the foreign policy of the United States. Plaintiffs do not ask this court to decide the wisdom, morality or efficacy of the decision to deploy cruise mis-

78. *Id.* at 463.

79. *Id.* at 447.

80. *Id.* at 471.

81. *Id.* at 464.

> I agree fully with much of the Court's opinion. Specifically, I agree that the political-question doctrine does not make this case non-justiciable. The case is nothing more than an exercise in statutory interpretation, the kind of work that courts routinely do every day. The outcome of the case will have national security and foreign policy implications, but that is true of many lawsuits that are undeniably well within the judicial purview.

Id.

82. 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

> siles at Greenham Common. The responsibility for that decision lies with the Executive and Legislative branches of government. Plaintiffs ask this court to determine the legality of the challenged action. In particular, they ask this court to adjudicate torts, to protect constitutional rights of citizens and non-citizens under United States control, and to enforce the constitutional mandate of separation of powers. The Constitution commits the resolution of these issues to the courts, and not to a coordinate political department.[83]

Despite this statement, the court, in a very circular opinion, returned to the six-part test of *Baker v. Carr*.[84] The *Greenham* court concluded that while the judiciary was the appropriate branch to create a remedy for this type of action, the remedy sought, an order enjoining the deployment of cruise missiles, would clearly impinge upon the national security and foreign policy powers of the President. According to the court, these powers are textually committed by the Constitution to the political branch of government.[85] While the court in *Greenham* did recognize the role of the judiciary in adjudicating torts and protecting citizens, its ruling could not reverse the foreign policy decision by the Executive and Congress to deploy cruise missiles.[86]

Greenham is difficult to reconcile with *Lamm*, in that the decisions adopt different approaches to the principle that the judiciary is not the forum to challenge the foreign policy powers of the Congress and the Executive. *Greenham* disallows such intervention, based on the traditional notion that the judiciary should not interfere with foreign policy powers textually committed to the President. *Lamm* and *Romer*, however, by granting the state governor an injunction against the deployment of MX missiles, expand the possibilities for the exercise of local control over questions concerning national defense.[87]

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83. *Id.* at 1336.

84. *See Baker, supra* note 24, at 217.

85. *Greenham*, 591 F. Supp. at 1335-39.

86. Citizen efforts to enjoin the executive or legislative branch from carrying out a nuclear weapons program is not a new issue. In Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964), over 100 citizens and eight Nobel laureates sought to enjoin the United States from nuclear weapons tests. The court dismissed the action as one where large matters of basic national policy, as of foreign policy, come into play. 331 F.2d at 798.

87. *Cf.* INS v. Chada, 462 U.S. 919, 942-43 (1983)("But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine.") In Jackson County, Missouri v. Jones, 571 F.2d 1004 (8th Cir. 1977) the

2. Cases Against Nuclear Protesters

Among the cases that have arisen from the anti-nuclear movement in the 1980s, *United States v. Dorrell*[88] stands out because of the court's discussion of alternative ways to change national policy without resorting to violence. In denying the defendant the use of a "necessity defense" for his destruction of government property, a nuclear missile assembly plant, the Ninth Circuit concluded that: "[t]he defense of necessity does not arise from a 'choice' of several sources of actions; it is instead based on a real emergency. . . . Consequently, if there was a reasonable, legal alternative to violating the law, the defense fails. . . ."[89] In *Dorrell*, the defendant had such an alternative.

Although it is doubtful that the defendant could have brought a legal challenge to United States nuclear policy, he did have recourse to the political process to redress his concerns regarding nuclear war. "There are thousands of opportunities for the propagation of the antinuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls, and by release of information to the media, to name only a few."[90]

While this case had the expected outcome (*i.e.*, the defendant was convicted for willfully injuring property of the United States), the court's discussion of grassroots alternatives to voice opposition to national policies is notable. It is almost prescient that the court should enumerate this list, given that the 1980s have witnessed all of the above listed methods of allowing the public to have a voice in the foreign policy of the United States.

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court held that "there was no national defense exemption from NEPA." *Id.* at 1007. The issue in *Jackson County* however, concerned the relocation of a military installation, not the deployment of nuclear missiles.

88. 758 F.2d 427 (9th Cir. 1985).

89. *Id.* at 431.

90. *Id.* at 432. (quoting United States v. Quilty, 741 F.2d 1031, 1033 (7th Cir. 1984)). Other cases against the MX missile include: United States v. Allen, 760 F.2d 447 (2d Cir. 1985) where the plaintiffs argued that nuclearism is a religion, and thus United States policy which establishes nuclearism violates the first amendment; United States v. Kabat, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) where the plaintiffs argued that their Christian faith requires them to accept personal responsibility for ending the cycle of violence in the world.

3. United States Policy in Central America

Aggressive United States foreign policy goals, such as the response to a communist threat in Central America, have colored this nation's approach to hemispheric relations in the 1980s. In order to displace corrupt regimes where violations of human rights are common, members of Congress have sought to enjoin the executive branch from military actions in Central America. In *Crockett v. Reagan*,[91] members of Congress sought declaratory judgments of the actions of the President and the Secretaries of State and Defense in supplying military aid to El Salvador. The plaintiffs alleged violations of the War Powers Resolution and the Foreign Assistance Act. The court held that the War Powers violation was non-justiciable as a political question and that the Foreign Assistance Act issue was non-justiciable under the "equitable discretion" doctrine.[92] It was not unusual for the court to dismiss this action as partially implicating a political question, nevertheless, by invoking the "equitable discretion" doctrine, the court was sending a clear message that it would entertain a similar action if the matter could not be resolved through the legislative process or if the plaintiffs could prove an unconstitutional action.[93] In this instance, the court was unwilling to involve itself in a dispute among legislators on what the correct policy should be.

One of the most serious challenges to the Reagan Administration's actions in Central America was launched by a group of governors. In *Perpich v. United States Department of Defense*,[94] the Governor and the State of Minnesota attacked the federal deployment of state National Guards to Central America for training purposes. The issue in the case was whether, under Sections 672(b) and 672(d) of the Armed Forces Reserve Act of 1952, as amended in 1986 by the Montgomery Amendment,[95] Congress could authorize such training missions of the Guard without the consent of the state's governor.[96] Specifically, the governor claimed that the Montgomery Amendment, which restricts the power of state gover-

91. 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). *Cf.* Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

92. Crockett v. Reagan, 720 F.2d at 1357.

93. *Id.*

94. *See Perpich*, 666 F. Supp. at 1319.

95. 10 U.S.C. §§ 671-689 (1982), *amended by* 10 U.S.C. § 672(f)(1988).

96. *See supra* note 94, at 1321.

nors to withhold consent to federal deployment of the National Guard of the United States, impinged on a state's authority to train its own militia.[97] The federal district court granted summary judgment for the Department of Defense, finding that Congress' authority to train the National Guard while the Guard is in active federal service arises under the militia clause[98] and preempts the states' veto that arises under Sections 672(b) and 672(d). This decision was reversed on appeal, but was vacated shortly thereafter for a rehearing *en banc*. Subsequently, the United States Court of Appeals for the Ninth Circuit held that the Montgomery Amendment is a constitutional exercise of plenary and exclusive congressional power over the Army.[99]

In *Dukakis v. United States Department of Defense*,[100] Massachusetts Governor Michael Dukakis also challenged the order to deploy the state's militia for a training mission in Central America. The United States District Court in Massachusetts, like the Minnesota district court in *Perpich*, upheld the constitutionality of the Montgomery Amendment. The Massachusetts district court was more reluctant than the Minnesota district court to declare the Militia Clause as "never in any circumstances [limiting] Congress' power . . . to call militia units to active duty."[101] Nevertheless, it is noteworthy that the decision still followed the traditional approach by barring state intervention in foreign policy matters.[102]

The restriction of federalism in foreign policy has not halted the use of the judiciary to review claims by states and individuals on such matters.[103] The willingness of some federal courts to review matters integrally tied to U.S. foreign policy goals, particularly if the challenges to such goals enter a court's jurisdiction as

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97. *Id.* at 1322.

98. U.S. CONST. art. I, § 8, cls. 12, 16.

99. *Perpich*, 880 F.2d at 11. *See also* U.S. CONST. art. I, § 8, cls. 12, 16.

100. Dukakis v. United States Dept. of Defense, 686 F. Supp. 30 (D. Mass. 1988).

101. *Id.* at 36.

102. In *Dukakis*, which was joined to *Perpich* for purposes of appeal, the court stated:

> One more point—implicit in all that has been said above—is best made explicit. In general, disputes are to be resolved through political processes (rather than in courts) where in essence they are disputes as to whether particular calls of units of the militia to temporary active duty, and the locations to which units are sent and during such a period, do or do not serve national interests. . . . The record before this court falls short of presenting a case in which judicial intrusion would be appropriate.

686 F. Supp. at 38.

103. *Control of National Guard a Federalism Issue*, NAT'L J., Feb. 14, 1987, at 388.

federal questions, becomes apparent from the above cases. Courts are more likely to review the merits of these challenges if the implementation of foreign policy goals involve statutory schemes. Whether the Air Force can base its MX missiles in Colorado is as much a question of interpreting NEPA as it is a question of United States national defense policy. The same can be said with regard to the National Guard training questions. The court was asked to pass judgment upon the constitutionality of an act of Congress vis-à-vis a state's second amendment right to maintain a militia in peacetime.

Many of these cases served a subsidiary goal, even though the courts failed to grant the remedies plaintiffs sought. They brought issues of national concern to public attention. Each governor, by questioning the use of the state militia, raised doubts as to the wisdom of United States policies in Central America. Through this state-led notoriety, the objectives of the traditional mode of action where the federal government successfully defeats a state's challenge to a national foreign policy objective, is only partially fulfilled. Defeat in the courtroom appears not to have deterred the states from seeking some voice in the foreign policy-making process, whether the process results in an actual voice or merely the public's general awareness of misguided federal policies.

Ironically, Congress has opened the door to the challenges states and citizen groups have raised to federal policies. One unintended outcome of the congressional reforms of the 1970s has been the increased protection against executive adventurism in the guise of foreign policy that legislators have built into different types of laws.[104] It has been precisely these protective actions, such as the NEPA and the Arms Control and Disarmament Act,[105] that have made executive conformity to such statutes a federal question and made possible judicial review of otherwise nonjusticiable foreign policy issues.[106] Even if the federal courts possess no particular expertise in resolving specific questions of foreign policy,[107] their role in analyzing the actions of those charged with the implementation of U.S. policies can only increase in the years to come.

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104. B. SHEPPARD, RETHINKING CONGRESSIONAL REFORM: THE REFORM ROOTS OF THE SPECIAL INTEREST CONGRESS 313 (1985).

105. Pub. L. No. 87-297, tit. I, § 2, 75 Stat. 631 (1961) (codified as amended at 22 U.S.C. §§ 2551-2591 (1988)).

106. B. SHEPPARD, *supra* note 104, at 317-18.

107. Crockett v. Reagan, 720 F.2d at 1356.

B. The Activist Mode

The history of state interference in foreign affairs has taken a new twist since the Cold War politics of the 1950s.[108] While federal supremacy in foreign affairs remains a pillar of state-federal relations, the active or behind the scenes encouragement by federal authorities to support unilateral foreign policy decisions by the states is well documented. In particular, the State Department has been supportive of activism where a state's action is in retaliation to a communist country's policies. In times of strained relations between the United States and the Soviet Union, there is an increased tendency to tolerate such aggressive state behavior against a communist foe.[109]

The State of Florida, in an effort to show its displeasure with Cuban leader Fidel Castro's dependence on the Soviet Union, enacted legislation permitting the seizure and detention of foreign fishing vessels in Florida waters if they sailed under the flag of a communist state.[110] "The pursuit of Cuban fishing vessels created a diplomatic flap, but Florida's laws were never challenged by the United States government."[111] It remains in force today, although it raises serious questions of potential violations of international law.

More recently, collaboration between the federal government and the States of New York and New Jersey occurred in 1983. In response to the downing of a South Korean passenger airplane by a Soviet military jet, the Governors of New York and New Jersey ordered the port authorities of their respective states to refuse clearance for landing of the Soviet airplane carrying Soviet Foreign Minister Andrei Gromyko to a meeting of the United Nations General Assembly.[112] The United States took no action to prevent the implementation of these orders which violated both the United

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108. *Cf.* Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 265-66 (1922)(expounding the more traditional view, but also noting past activist positions).

109. *Cf.* Zschernig v. Miller, 389 U.S. at 437-38 (professing that a state's foreign policy attitude, the freezing or thawing of the "cold war" are matters for the federal government, not for the local probate courts). *See also* P. HAY & R. ROTUNDA, *supra* note 6, at 122.

110. Florida Territorial Waters Act, Fla. Stat. § 370.21 (1963).

111. Moore, *supra* note 19, at 316. "The timing of the act further supports the conclusion that it largely serves a political purpose and is a product of the Cuban problem, for it was enacted in early 1963, during a period of severe tension between Cuba and the United States." *Id.*

112. *See* Note, *Acts by State Governments Affecting Foreign Relations*, 25 HARV. INT'L L.J. 200 (1984).

States Constitution and the United Nations Headquarters Agreement.[113]

The actions of the two governors clearly intruded upon the foreign relations power of the federal government, and were motivated, not by the states' police powers, but by foreign policy concerns. As such, their actions violated Article I, Section 10 of the Constitution.

A more recent example of a state and federal conflict concerned the child of a United Nations diplomat from Zimbabwe. The Commissioner of Social Services for the city of New York confronted the Department of State on whether New York's child protection laws could prohibit the return of child who had been the victim of physical and mental abuse to his parents, who were covered by diplomatic immunity.[114] In a decision eventually reviewed by the Supreme Court,[115] the Family Court, City of New York, Queens County held that the city was forbidden to detain the child, and that neither the court nor the city government had jurisdiction over the diplomat's child. While achieving a judicial victory, the Department of State demonstrated its respect for New York's activism by ensuring that: 1) the father would leave the country before the City turned over the child to the State Department; 2) the State Department would only hand over the child to the Permanent Representative of the Republic of Zimbabwe at the United Nations; 3) the Government of Zimbabwe would keep the child under protective custody while bringing child protective proceedings against the father under Zimbabwe law; and 4) Zimbabwe law contained comparable procedures to New York law in child abuse cases.[116] Only after such assurances did New York decide not to approve the State Department's motion to dismiss and did the

113. *Id.* at 201. Article IV, Section 11 of the Headquarters Agreement states that between the United States and the United Nations, "federal, state or local authorities shall not impose any impediments to transit" to or from "United Nations Headquarters on representatives to the United Nations." Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, United Nations-United States, 61 Stat. 3416, T.I.A.S. No. 1676.

114. In the Matter of Terrence K., 138 Misc. 2d 611, 524 N.Y.S.2d 996 (Fam. Ct. 1988).

115. Pending appeal of the court's order, the Legal Aid Society as Law Guardian for Terrence moved in the Appellate Division, Second Judicial Department, for a stay of the order and to enjoin the transfer of the child's custody. On December 31, 1987, the Appellate Division denied the Law Guardian's motion. *See* In the Matter of Terrence K., 135 A.D.2d 857, 522 N.Y.S.2d 949 (App. Div. 1987).

116. 524 N.Y.S.2d. at 999.

Family Court actually dismiss the action.[117]

Since the late 1950s, state legislatures have enacted various forms of "Buy-American" statutes.[118] The possible preemption of these laws by the Commerce Clause[119] makes them a ripe source of litigation. Although in 1876 the Supreme Court established that the Commerce Clause protects a commodity from any burdens imposed by reason of its foreign origins,[120] many courts continue to uphold state actions, such as requiring the labeling of foreign goods, finding that the state is merely exercising its police powers.[121]

The federal government, however, often argues that states, by discriminating against foreign merchandise, are engaged in the conduct of foreign relations.[122] Yet more recently, the Supreme Court upheld state procurement policies that give statutory preference to domestic products.[123] Underlying the case is the emergence of the "market participant" exception to the Commerce Clause, first articulated in *Alexandria Scrap.*[124] and later refined in *White v. Massachusetts Council of Construction Employers.*[125] This rule allows immunity from the Commerce Clause where the state acts in its proprietary capacity.[126] A state, when acting like a private corporation, should enjoy the same freedoms that corporations do.[127] The market participant exception operates only in the absence of congressional action. Thus, by analogy, a state's Buy-American statute will remain constitutional as long as no federal

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117. *Id.* at 1000.

118. Note, *Ordinances Restricting the Sale of "Communist Goods"*, 65 COLUM. L. REV. 310 (1965).

119. U.S. CONST. art I, § 8, cl. 3.

120. Welton v. Missouri, 91 U.S. 275, 282 (1875).

121. *See, e.g.*, Parrott and Company v. Benson, 114 Wash. 117, 194 P. 986 (1921); Territory v. Ho, 41 Haw. 565 (1957)(a Hawaii statute which required labeling on eggs as violating U.S. commitments under the GATT was invalidated).

122. Frequently, the Department of State will send a letter to the governor of a state where a conflict exists between state law and American foreign policy. Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism*, 12 STAN. L. REV. 355, 382 (1960).

123. *See* Reeves v. Stake, 447 U.S. 429, 439 (1980).

124. Hughes v. Alexandria Scrap, 426 U.S. 794 (1976).

125. 460 U.S. 204 (1983).

126. *See* Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 168 (1971).

127. "[T]he entry by the state itself into the market as a purchaser, in effect, of a potential article of interstate commerce. . ., triggers the market participant exception and cuts off any further commerce clause inquiry." *Alexandria Scrap*, 426 U.S. at 808. *See also White*, 460 U.S. at 209-10.

law preempts it.[128] However, another school of thought suggests that the Court would not allow a market participant exception for foreign commerce.[129]

The existence of an overwhelming number of state provisions in this area, coupled with few federal challenges, suggests at least some support of such state activities by the federal government. More importantly, the record concerning such laws at the state court level is mixed. For example, a California appeals court struck down a state Buy-American statute as violating the Commerce Clause and the exclusive federal foreign affairs power.[130] On the other hand, a New Jersey court, relying on *Alexandria Scrap*, upheld a Buy-American statute against Commerce Clause attack.[131]

One reason why these cases on Buy-American laws are so interesting is because of their analogous legal relationship to the current wave of divestment statutes promulgated in many jurisdictions. Yet unlike Buy-American statutes, which have come under federal and state court scrutiny, the divestment statutes have not been tested within the context of federalism. A more detailed discussion of this issue appears in Part III, Section C which considers neutral behavior modes.

If Buy-American statutes have produced mixed judicial results in the area of federal preemption, a more recent area of state activism has not been challenged in the federal courts. States are conducting their own foreign trade policies by using their governors, high-ranking state officials, and private citizens to negotiate commercial agreements with foreign governments and private corporations. These private negotiations with foreign governments are actions clearly proscribed by the Logan Act.[132] This statute, which dates back to 1799, has been breached by state governments in pursuit of new markets for their products and increased foreign

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128. *See* Kenworthy, *supra* note 44, at 20.

129. Note, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Policy*, 72 VA. L. REV. 813, 840 (1986).

130. Bethlehem Steel Corp. v. Board of Comm'rs, 272 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).

131. KSB Technical Sales Corp. v. North Jersey District Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774 (1977).

132. 18 U.S.C. § 953 (1988) states:

> Any citizen of the United States . . . who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer . . . shall be fined. . . . *Id.*

investment in their state.[133] As two analysts of foreign investment in the United States have noted, "[it] is the conundrum of the American federal system that the states have taken the lead on the issue of foreign investment while at the national level public policy makers remain curiously inactive."[134] Still, clearly the federal government has been supporting such efforts from behind the scenes, rather than applying any proscriptions to this type of local trade policy. Such negotiations are an example of state activism at its best, and a type of activism the federal government tacitly encourages. However, if the activities of the individual states were to be considered troublesome to either Congress or the Executive, the policy could shift from federal encouragement or tolerance of this situation to outright prohibition.

C. The Neutral Mode

The neutral mode for analyzing state behavior encompasses those types of state activities which neither promote nor contradict a federal policy as it relates to the conduct of foreign affairs. The neutral mode contains in it grassroots elements which reflect a growing demand by the states for a greater role in the making of foreign policy. In this case, resolutions by a state legislature or a city council to speak its mind on human rights or to divest local government pension funds from companies dealing with South Africa have been voted on with increasing frequency in the last decade. In particular, the most obvious manifestation of this "direct democracy" during the Reagan years was the use of state and local initiatives and referenda to do what the Congress and the executive branch failed to accomplish through legislation or policy making.

1. Purely Neutral Acts

Many states and local governments have paid tribute to other nations and foreign citizens through non-binding resolutions, commemorative holidays, and specific laws that recognize the diversity of their citizens and their concern for the freedom of others. Such

133. For example, Virginia Governor Gerald L. Baliles who was on his eighth overseas trip while in office, has made improving international trade a major goal of his administration. He was recently in Brussels with officials of the European Economic Community. Wash. Post, July 7, 1989, at B6, col. 3.

134. S. Tolchin & M. Tolchin, *supra* note 8, at C1, col. 1.

legislative expressions of opinion on United States foreign policy do not warrant interference by the federal government. These actions fall within the foreign policy exceptions of the "dormant Foreign Policy Clause."[135]

For example, the New York City Council renamed an intersection near the Soviet United Nations Mission "Sakharov-Bonner Corner."[136] Such an act, on its face legitimate under notions of federalism, clearly held a larger political message. The City Council sought to embarrass the Soviet Union for its harsh treatment of two human rights activists.[137]

Declaring commemorative holidays for certain groups of oppressed people is another example of local activism in foreign policy matters.[138] Massachusetts has mandated such observances as "Social Justice Day for Ireland," "Lithuanian Independence Day," and "Armenian Martyrs Day."[139] The County Executive of Erie County, New York, on a tour of Poland, declared his support for the independent Polish Labor movement.[140] In Boston, Mayor Flynn sent President Reagan a public document decrying British repression in Northern Ireland.[141] Former Chicago Mayor Jane Byrne also got into the foreign policy game when she lamented conditions in communist Poland in a newspaper interview.[142] In all these cases, appeal to local constituencies was at the root of such actions. The underlying rationale for these acts was local politics, more than intentional meddling in United States foreign relations. But even if such actions were troublesome to foreign governments, state and city governments are, absent consent, immune to lawsuit by foreign governments.[143] In all cases, local intrusions into the nation's foreign affairs is considered *de minimis*.

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135. *See supra* notes 47-49 and accompanying text.

136. *Human Rights Reminder Posted Near Soviet Mission*, N.Y. Times, Aug. 10, 1984, at B3, col. 1.

137. The United States Congress also changed the address of the Soviet Embassy in Washington to Andrei Sakharov Plaza. *Home Rule Proviso Becomes Law*, Wash. Post, Oct. 13, 1984, at C4, col. 5.

138. Governors of all 50 states and over 150 mayors commemorated the fiftieth anniversary of Kristallnacht, November 9-10, at the request of the U.S. Holocaust Council. The decrees urged constituents to "always strive to overcome prejudice and inhumanity through understanding, vigilance and resistance." Wash. Jewish W., Nov. 10, 1988, at 17, col. 1.

139. 1B MASS. GEN. LAWS ANN. ch. 6, §§ 15U, 12GG & 15II (West 1986).

140. N.Y. Times, Sept. 14, 1981, at C18, col. 3.

141. Boston Globe, Apr. 23, 1984, at 19, col. 1.

142. Chicago Tribune, Dec. 15, 1981, at A15, col. 5.

143. *See* Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

2. Police Power Actions

a) Divestment

The anti-apartheid movement's greatest victories have occurred through the local legislative process. In cities and states around the country, divestment legislation has been enacted as a method of retaliation against the racist policies of the South African government.[144] The activity at the local level has also been viewed as a challenge to the Reagan Administration's approach of "constructive engagement" in our relations with South Africa. For many local leaders, the use of a boycott as a weapon against the South African Government's racial policies has become more powerful because states and cities are arguably more easily able to enforce their actions than the federal government.[145]

In the last five years, hundreds of state and local governments have imposed various forms of restrictive policies regarding the investment of state pension and education funds in corporations doing business in South Africa. Whether such laws are a valid exercise of a state's proprietary function, as defined under the market participant exception to the Commerce Clause, is yet to be decided in federal court. At best, the various divestment ordinances and statutes reflect the inherent tension between the foreign commerce power and the legitimate exercise of state police power.[146]

Public pressure to deal with South African apartheid also forced the hand of Congress in 1985. By mid-year, a package of sanction legislation which sought to ban loans to the South African government, restrict exports and new American investment, and ban the sale of South African Krugerands within the United States, was making its way through the legislative process.[147]

The Reagan Administration, however, supported a program of "constructive engagement." This policy, which highlighted the con-

144. Over $5 billion of holdings from state pension funds have been divested. Note, *supra* note 129, at 817.

145. For example, the District of Columbia has a total divestment act. D.C. Council Committee on Consumer and Regulatory Affairs Report, Bill 5-18, at 2 (1983); D.C. Act 5-76. Neighboring Prince George's County, Maryland passed a divestment measure that is similar to actions in other jurisdictions around the country. Res. C.R. 190-1985 (Nov. 19, 1985). *See also* Wash. Post, Dec. 2, 1984, at F4, col. 1.

146. *See* Note, *supra* note 122, at 357.

147. H.R. REP. No. 1460, 99th Cong., lst Sess., 131 CONG. REC. H7049-54 (daily ed. Aug. 1, 1985) (conference version of the bill).

structive role U.S. corporations in South Africa could play to counter apartheid, was not supported by the United States Congress.[148] Fearing the passage of the more restrictive divestment legislation, President Reagan invoked the International Emergency Economic Powers Act (IEEPA)[149] to push forward a less restrictive sanction package. This package, which also banned any United States export assistance to U.S. firms operating in South Africa, did not adhere to the Sullivan Principles.[150]

When President Reagan signed the executive order imposing these sanctions under the IEEPA, his message admonished Congress on the need to present a unified front in foreign relations. President Reagan's message stated that "[i]n order for this Nation successfully to influence events in [South Africa], it is necessary for the United States to speak with one voice and to demonstrate our opposition to apartheid by taking certain actions directed specifically at key apartheid policies and agencies."[151]

In spite of this plea for a united front against apartheid, the weakness of administration sanctions has only led to a series of state and local government actions dealing with the apartheid issue. The popularity of divestment of financial holdings has become a symbol of local action in the face of slower federal actions in this area.[152]

How long will local divestment legislation remain a "neutral act"? One analysis suggests that under the framework of *Garcia v. San Antonio Metropolitan Transit Authority*,[153] Congress could enact legislation preventing states from taking divestment action.[154] Yet another view is that under the police power function, such action constitutes legitimate state regulation of interstate commerce by expanding the market participant doctrine, although courts have made it clear that the doctrine is not normally applica-

148. *Id.* Presumably Congress could act under *Garcia*, to pass legislation denying the states a right to divestment actions.

149. 50 U.S.C. §§ 1701-1706 (1982). The IEEPA was passed to deal with the threat to national security, foreign policy and economic order of the United States.

150. *See* Note, *supra* note 129, at 830.

151. Economic Sanctions Against South Africa, 21 WEEKLY COMP. PRES. DOC. 1054, 1055 (Sept. 9, 1985).

152. As of 1987, 47 cities had adopted divestment ordinances as had six counties. Lewis, *supra* note 48, at 474. This type of local action is not limited to South Africa. In 1986, the New York City Council president called for divestment of holdings in firms doing business in Libya. N.Y. Times, Jan. 4, 1986, at 1, col. 1.

153. *Supra* note 2.

154. *See* Note, *supra* note 129, at 841.

ble to foreign commerce.[155]

Moreover, there has been discussion of the important moral character of divestment, which legitimizes the police power of the state. The argument suggests that to not divest is to risk local social unrest because of popular dissatisfaction with public monies going to support a racist social policy.[156] Counter to this reasoning, however, is the long-term effect such morally based local legislation has on the conduct of foreign relations at the national level, which runs counter to most constitutional theory.[157]

Whether a federal court will ultimately declare that state divestment measures are preempted by the Constitution is currently moot. Until now, no private corporate challenges have attempted to check state divestment laws, mainly because corporations fear that initiating such lawsuits would result in more bad publicity than the damages sought.[158] But just as the neutral mode reflects federal tolerance of actions which clearly infringe on the foreign affairs powers, it also implies that the time may come when Congress acts to reflect the popular will already reflected in the state's actions. Ending commercial relations with a nation whose policies are so distasteful to our own public policy may warrant such federal legislation.

b) Sanctuary

One of the more controversial uses of state police power involves the sanctuary movement. The sanctuary movement shelters Central Americans who have come to the United States as a result of the civil wars in their region.

City councils in Los Angeles, Seattle, and Atlanta have passed resolutions declaring those cities sanctuaries.[159] The State of New Mexico, by resolution of its former Governor, Toney Anaya, has

155. *See* Bob-Excursion Co. v. Michigan, 338 U.S. 28 (1948). *See also* New York Times v. City of New York Comm'n on Human Rights, 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977) (when the New York City Council tried to ban advertisements for employment in South Africa based companies, the state supreme court viewed that action as an "infringement on an authority vested conclusively in the federal government.").

156. *See* Lewis, *supra* note 49, at 516.

157. "This state and local legislation, if unchecked by the courts, could tie the hands of the federal government. . . ." Note, *supra* note 129, at 849. "Any legislation that purposely undermines federal policy within the realm of foreign affairs should be struck down." *Id.*

158. *Id.*

159. Wash. Post, Nov. 28, 1985, at A51, col. 1.

also been declared a sanctuary.[160]

Declaring sanctuaries of cities and states through the police power function differs from legislation which supports divestment. Supporters of divestment argue that the policy to sell securities of corporations which have holdings in South Africa is one which affects local monies and, therefore, falls clearly within the state's "market participant" power. The sanctuary movement conflicts with federal law and policies in a way which is far more problematic than divestment.[161] In particular, critics of the sanctuary movement cite the efforts of local governments to circumvent congressional powers to regulate immigration, clearly one of Congress' plenary powers.[162] While no statutory limit exists on the number of refugees that can be admitted into the United States in any year, as a matter of executive policy, the President does determine the actual number to be admitted.[163] The presidential determination for refugee admissions is so limited for Central America (4,000 in 1987 out of an annual ceiling of 75,000 set by the President) that an alien fleeing that region has little chance of being admitted to the United States with refugee status.[164]

The whole problem of the sanctuary movement merely reflects the broader policy questions of illegal immigration from Central America that arise out of our failed foreign policy approach to that region. As one commentator noted: "Sadly, American refugee policy is being reflected through an ideological prism, with this bottom line result. If you are fleeing a regime that the current administration does not like, your chances of being allowed to stay in the U.S. are good."[165] Refugees fleeing countries with political regimes supported by the United States, such as El Salvador, Honduras, and Guatemala, encounter more problems than persons fleeing Communist or other totalitarian states.[166]

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160. Anaya, *Sanctuary: Because There Are Still Many Who Wait for Death*, 15 HOFSTRA L. REV. 101 (1986).

161. Some observers argue that the federal government, by not offering sanctuary to Central American refugees, violates U.S. obligations under international law. *Id.* at 104.

162. U.S. CONST. art. I, § 8, cl. 4. *See also* Fiallo v. Bell, 430 U.S. 787 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1914)("Over no conceivable subject is the legislative power of Congress so complete.").

163. 8 U.S.C. § 1157(a)(2) (1988).

164. Schmidt, *Refuge in the U.S.: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79, 81 (1986).

165. Anaya, *supra* note 160, at 104-05.

166. According to the statistics on different nationalities' request for political asylum in the United States, 49% of Poles were granted asylum and 66% of Iranians, compared to 7%

What is most surprising about the sanctuary movement is the federal government's restraint in pursuing illegal aliens seeking refuge in sanctuary areas. "The government has not sought to enter churches to arrest aliens believed to be in the United States illegally."[167] However, this neutral stance by the federal government, in the face of clear violations of federal immigration powers by state and municipal governments, can also shift to a more traditional, preemptive stance when individuals involved in the sanctuary movement actively engage in smuggling illegal aliens.[168] Like cases involving nuclear protestors, it is clear that there is a fine line between neutral behavior by the federal government and the traditional stance in federal predominance in foreign affairs.

The government's tolerance of sanctuary cities (which are open violations of the federal power to regulate foreign affairs) while prosecuting some of the sanctuary movement's leaders, reflects the executive agencies' reluctance to challenge state police powers. It is this double standard that makes the sanctuary and divestment movements so representative of the new federalism of the 1980s.[169]

3. Initiatives and Referenda

When citizens of Chicago went to the polls in March 1988 to select a presidential nominee, they also had an opportunity to vote on United States foreign policy in Central America. An advisory referendum[170] on the local ballot asked: "Considering the current state of civil unrest occurring in Central America, should the Illinois National Guard troop training in Central America be halted"? This question passed by a two to one margin in the primary.[171]

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for Nicaraguans and 2% of Salvadorans. *Id.* at 105.

167. Schmidt, *supra* note 164, at 98. *See also* San Francisco Chron., Mar. 28, 1986, at 11, col. 1 (quoting Allan Nelson, INS Commissioner: "The agency does not request search warrants to enter churches suspected of sheltering Central Americans who claim that they have entered the United States to escape death, arrest or torture in their native countries.").

168. United States v. Merkt, 794 F.2d 950 (5th Cir. 1986), *cert. denied*, 480 U.S. 945 (1987).

169. Schmidt, *supra* note 164, at 99.

170. A referendum is a bill passed by a state legislature, or other local legislative body, and referred to a public vote by citizen petition. The bill cannot go into effect until and unless, approved by the majority of voters casting ballots on the proposition. An initiative is a proposed ordinance, city or county charter amendment, statute or state constitutional amendment, placed on the ballot by citizen petition. INITIATIVE PROCEDURES: A FIFTY STATE SURVEY 15 (D. Schmidt ed. 1983).

171. 9 INITIATIVE & REFERENDUM RPT., Mar.-Apr. 1988, at 19.

Those who supported this referendum believed that a disproportionate number of blacks and hispanics from Chicago were being sent to train in Honduras.[172]

Such an exercise of direct democracy[173] comes at the end of a decade marked by local involvement in areas traditionally within the domain of the federal government.[174] Cities and states have used the initiative and referenda process to bring national issues to the attention of local constituents.[175]

One of the most recent efforts to bring foreign policy debates to a local resolution occurred on November 8, 1988, in cities in California and Massachusetts in ballot propositions relating to United States policy in the Middle East. In San Francisco, "Proposition W" called for the United States to recognize the Palestinian "right to self-determination and statehood in the occupied territories of the West Bank and Gaza. . . ." In Berkeley, "Measure J" called for a sister-city relationship between Berkeley and the Palestinian refugee camp of Jabaliya in Gaza. The Berkeley City Council defeated the measure in March, but proponents of the measure were successful in getting the initiative on the November ballot. Both initiatives were defeated.[176]

In Cambridge, Massachusetts, "Question 5" called for a public referendum on the establishment of an independent Palestinian state in the West Bank and Gaza, as well as the severance of U.S. aid to Israel. Although this initiative was successful, obviously its implementation is doubtful. A similar referendum on the ballot in Newton, Massachusetts, calling on the United States Government to support "the principles of self-determination for the Israeli and Palestinian people; the creation of a Palestinian state in the West Bank and Gaza Strip next to Israel; and security for Israel and the

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172. *Id.*

173. *See* D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984) (describing, in detail, the nature of direct democracy in the United States).

174. Holcomb, *supra* note 56. "Not only did legislative activity in the states pick up after 1980, but the number of state initiatives, a favorite tool of citizen groups, also increased substantially. In the 1982 elections, almost 200 ballot propositions were voted on in all 50 states." *Id.*

175. P. MCGUIGAN, THE POLITICS OF DIRECT DEMOCRACY IN THE 1980S: CASE STUDIES IN POPULAR DECISIONMAKING 23 (1985).

176. Correspondence with the Joint Action Committee for Political Affairs, Highland Park, Illinois (Oct. 26, 1988); Telephone interview with staff member from the America Israel Public Affairs Committee (AIPAC), Washington, D.C., (Nov. 10, 1988).

Palestinian state," was defeated.[177]

With the exception of the Berkeley resolution to create a sister-city program, the other ballot questions crossed the line into powers reserved for the President and Congress in the conduct of United States foreign policy. Nevertheless, the grassroots efforts to bring the question of Middle East policy to a local vote presents a citizens' call to the foreign policy elite and to members of Congress to alleviate a festering situation that threatens global security.

While the majority of initiatives focused on purely domestic issues, foreign policy and arms control matters figured prominently in local campaigns during the 1980s.[178] The nuclear freeze movement spread as a national referendum on arms control. "The nuclear freeze initiative won in nine of ten states where it was on the ballot in 1982; nuclear freeze resolutions passed in 320 city councils and fifty-six county councils, as well as eleven state legislatures and hundreds of town meetings."[179] These non-binding resolutions had a powerful impact on federal lawmakers.[180] In 1983, Congress proposed similar resolutions that would freeze the production and testing of all nuclear weapons.[181] Some analysts believe this "trickle up" approach to arms control reflected the high level of public anxiety over the deterioration of negotiations with the Soviets over nuclear weapons during the first Reagan term.[182] By 1984, the freeze movement had shifted its attention to the creation of "nuclear free zones." By the spring of 1986, 110 localities in the United States had declared themselves nuclear free zones.[183]

Even though grassroots concerns about foreign relations lay at the heart of the nuclear freeze movement, such manifestations of free speech did come under state judicial scrutiny. In a 1984 decision, the Nebraska Supreme Court ruled that the nuclear weapons freeze concept was not an appropriate subject for popular consider-

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177. P. MCGUIGAN, *supra* note 175.

178. Holcomb, *supra* note 56, at 124.

179. P. MCGUIGAN, *supra* note 175, at 13-14. The freeze was defeated only in the State of Arizona.

180. Pierce & Anderson, *Nuclear Freeze Proponents Mobilize on Local Referenda House Elections*, NAT'L J., Sept. 18, 1982, at 1602-05.

181. Towell, *H.J. Res. 13: After 13 Hours of Debate Nuclear Freeze not Resolved*, CONG. Q., Mar. 19, 1983, at 546-48. H.J. Res. 13 addressed a freeze on testing, production or deployment of nuclear weapons or the delivery vehicles.

182. Towell, *Reagan Arms Control Policy Faces Two Hill Challenges*, CONG. Q., Feb. 19, 1983, at 369.

183. P. MCGUIGAN, *supra* note 175, at 20. Two towns in Maryland and one in Oregon declared themselves nuclear free zones. N.Y. Times, Mar. 13, 1986, at A15, col. 1.

ation through the initiative process.[184] The court upheld an administrative ruling issued the previous fall by the Nebraska Secretary of State which had prohibited a vote on the nuclear freeze.[185]

A similar lawsuit was filed in New York City to prevent a referendum on a nuclear free zone from appearing on the ballot.[186] In 1985, the New York Court of Appeals issued an injunction to the Board of Elections prohibiting the referendum. Underlying this referendum was an effort by some city council members to amend the portions of the city's charter authorizing the disposition of city property and thus preventing federal military installations "designed to carry and store nuclear weapons"[187] from being located in New York. According to the court, the proposed ballot referendum "would interfere with the federal government's power to provide for the defense of the nation and thus would be unconstitutional under the United States Constitution, article I, section 8."[188]

These challenges to state court decisions on initiative and referendum efforts were exceptions. The distinguishing factor in each of the above challenges was the specificity of the language of the referenda to bind localities to commit unconstitutional acts. What is more impressive is the number of initiatives relating to foreign policy matters that did reach voters in states and cities across the country.

Some observers are not convinced that the intervention of the judiciary in such matters is over.[189] The involvement of state courts in the political processes of initiatives and referenda is not a hopeful sign. Since late 1983, courts have intervened to remove ballot items before elections on such diverse issues as redistricting, abortion, constitutional conventions, and tax reduction on the basis of separation of powers. Apparently, at stake is whether ballot initiatives can replace legislative action.[190]

Whether the federal government will intervene to challenge these expressions of local opinion in foreign affairs is highly doubt-

184. Brant v. Beermann, 217 Neb. 632, 350 N.W.2d 18 (1984).

185. *Id.*

186. Fossella v. Dinkins, 66 N.Y.2d 162, 485 N.E.2d 1017, 495 N.Y.S.2d 352 (1985).

187. *Id.* at 163, 485 N.E.2d at 1018, 495 N.Y.S.2d at 353.

188. *Id.*

189. McGuigan, *Direct Democracy and the 1984 Election*, 2 ELECTIONS & POL. 21 (1984-85).

190. *Id.* at 24.

ful. With regard to non-binding resolutions, an aggressive federal reaction to prevent such questions from appearing on ballots would be subject to strict scrutiny by the courts on first amendment grounds. Barring compelling reasons by the federal government to prevent an initiative from going forward (national security reasons would be the most obvious grounds for intervention) it seems such grassroots commentary on national policy will continue. It seems unlikely that any administration would be willing to risk a confrontation on basic constitutional principles for the sole benefit of speaking with one voice in foreign affairs.

4. Summary

The 1980s were a boom period for the use of the ballot box to express local sentiments on such wide ranging issues as environmental quality, social justice, and United States-Soviet relations.[191] Some politicians concede that in 1982 the United States actually had a national referendum on the nuclear freeze, since eleven states and thirty-two local jurisdictions passed ballot initiatives on this issue.[192] This action has been taken in the area of foreign relations despite case law that suggests that no state may act to exacerbate relations with foreign nations.[193]

The fine line between an activist mode and a neutral mode is often determined by current events. Public opinion can frequently turn a state's action under its police powers into a national *cause célèbre* if the situation suits the broad goals of our foreign relations. Thus, such state actions as divestment of state pension funds in corporations doing business with South Africa and the federal government's refusal to take action against a state or city whose legislature declares its entire territory a sanctuary for refugees demonstrate the fluidity of federal tolerance of a state's independent voice in foreign affairs.

V. Conclusion

Have we entered a new age of state involvement in foreign policy which contradicts traditional theory that the federal government alone is supreme in the conduct of foreign relations? The ex-

191. Wall St. J., Nov. 8, 1988, at A1, col. 1.
192. P. McGuigan, *supra* note 175, at 67.
193. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

amples discussed suggest a new activism on the state and local level to speak out on current international affairs. The actual success of challenges to the federal government's supremacy is less apparent. Court cases reveal a tremendous deference to the federal power in general and the executive in particular, when it comes to questions of foreign policy. What has yet to be challenged is a state or municipality's ability to conduct an independent foreign policy through a state's use of its police power. Clearly the cases of divestiture of investments from South African companies, the nuclear free zone ordinances, and the recognition of sanctuary for political refugees by cities and states, point to a different approach to an old problem. Is this mere free expression, or is it a new wrinkle in the conduct of foreign affairs in the last decades of this century?

Thus far, the tolerance for actions in such matters suggests that certain areas of foreign relations may lie with the states. An alternative explanation would equate these actions by state governments with the role of surrogate legislators for a Congress that has often been unable to reach a consensus on controversial issues that relate to foreign policy. By expressing discontent with the actions of other nations or governments or by taking actions affecting foreign policy decisions of the federal government, the state action takes on additional importance in the way our nation interacts with other nations. The theory being that if Congress will not act, at least the grassroots will attempt to address pressing issues such as South African apartheid, the civil wars in Central America, and the proliferation of nuclear weapons. Of course, these state and local actions are non-binding on the federal government.

What role the federal judiciary will ultimately play in this debate depends on whether the executive or the legislative branches choose to quash the independent actions of state and municipal governments through the courts. Currently, the record of federal opposition to state incursions into foreign affairs has been mixed. It is often limited to violations of treaties or questions of preemption.

Whether the federal government supports, opposes or remains neutral toward a given state or local action depends on the extent to which such an action promotes or hinders national foreign policy goals. What is becoming more evident in the 1980s is an expanding range of issues where the federal government is either indifferent or neutral to such actions. Through clever use of police powers, states are making headway in promoting an independent

voice in foreign affairs.

How troublesome is this trend? At present, grassroots initiatives and legislative referenda, while binding only at the local level, in some cases have material consequences at the national level. They reflect an increased awareness of national policies in foreign relations and an important adjunct to the policy-making process. Rather than viewing these state actions as confrontations with the federal authorities, these acts may actually be perceived as a way of bringing the policy process back to the people. Such interest at the local level may also provide an additional impetus to legislators who may, in the future, need to pay closer attention to their constituents' views on matters which extend beyond the geographic confines of the congressional districts they represent.