MORE THAN AN INCIDENTAL EFFECT ON FOREIGN AFFAIRS: IMPLEMENTATION OF HUMAN RIGHTS BY STATE AND LOCAL GOVERNMENTS

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"Local treaty implementation is an innovative strategy that enables activists to bypass federal resistance to international human rights standards, and instead focuses on putting these standards to work right in our own communities by making local governments accountable to them."[1]

INTRODUCTION

Adopted in the wake of the Second World War, the Universal Declaration of Human Rights[2] was the first step toward a solemn international recognition of fundamental human dignity and equality. Thereafter came the International Bill of Human Rights,[3] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[4] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[5] and others. These treaties articulate a broad range of rights that nations have committed to protect, respect, and fulfill through their own domestic legal systems.[6] While the United States is

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1. Amnesty International USA, Women's Human Rights: Making Human Rights Meaningful in Our Communities, http://www.amnestyusa.org/women/interact/cerd_cedaw.html (last visited Apr. 25, 2006).

2. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. X, U.N. Doc. A/810 (Dec. 10, 1948).

3. International Bill of Human Rights, G.A. Res. 217 (III), at 71, U.N. Doc. A/810 (Dec. 12, 1948 refers to the Universal Declaration of Human Rights, *id.*, together with the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR], and the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

4. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

5. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

6. States Parties to human rights treaties are required to give effect to the protected rights within their own domestic systems, though how they implement the treaties is usually discretionary. *See, e.g.*, CERD, *supra* note 4, art. 2 (requiring states Parties to use "all appropriate means" to eliminate racial discrimination).

a signatory to all of the major human rights treaties,[7] it has failed to ratify many significant human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),[8] the Convention on the Rights of the Child (CRC),[9] and CEDAW.[10]

A myriad of complex political and cultural struggles—too complex to discuss in depth here—underlies the United States' refusal to ratify these treaties. Some general observations, however, are worth noting. For example, opposition to the ICESCR is rooted in the United States' denunciation of so-called "positive rights,"[11] such as rights to education, housing, food, and water.[12] Instead, the United States has tended to prioritize "negative rights," usually considered civil and political rights such as the right to be free from torture, fair trial rights, and the right to vote, claiming that these rights provide adequate protection for individuals and may, in and of themselves, lead to better economic and social conditions.[13] Failure to ratify the CRC, however, is linked to apprehension about the scope of the treaty's obligations as well as fear that the convention would diminish parental rights.[14] In the case of CEDAW, former

7. In order to create international legal obligations under a treaty, the United States, with certain exceptions not relevant here, must sign and ratify the treaty. Ratification of a treaty requires the consent of two-thirds of the United States Senate. U.S. CONST. art. II, § 2, cl. 2. For a general explanation of the process by which a nation state consents to be bound to an international treaty, *see* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 131–34 (7th rev. ed. 1997).

8. ICESCR, *supra* note 3.

9. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

10. Office of the United Nations High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (Jun. 9, 2004), *available at* http://www.unhchr.ch/pdf/report.pdf.

11. The term "positive rights" refers to rights that create affirmative state duties to provide a social or economic good or service. Positive rights are often contrasted with "negative rights," which generally refer to a state duty of non-intervention. *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS 35–40 (1999). This distinction, however, is artificial since all rights, including "negative rights," require affirmative state action for their implementation and enforcement, *id.* at 43–48, and positive rights may also imply a negative right of nonintervention, *see* Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233, 1236 (1995). *But see* Frank B. Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. REV. 857, 864–68 (2001) (arguing that there remains a practical distinction between negative and positive rights and that the judicial enforcement of positive rights is inherently problematic).

12. While many countries have been ambivalent about economic and social rights, "[t]he only open hostility to this group of rights has come from the United States." HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 249 (2d ed. 2000). For an example of the rejection of affirmative state duties in the context of Fourteenth Amendment due process protections, *see* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

13. For a general description of positive and negative rights, see STEINER & ALSTON, *supra* note 12, at 363.

14. *See* S. Res. 133, 104th Cong. (1995). Part of the opposition to the CRC includes resistance to perceived interference with state laws regarding minors, including laws related to the juvenile death penalty. *Id.* In 2005, however, the United States Supreme Court, referencing

U.S. Assistant Secretary of State Harold Hongju Koh explains that the United States' opposition is linked to concerns that CEDAW would promote stronger abortion rights, alter gender roles and destabilize families, decriminalize prostitution, prohibit same-sex education, authorize same-sex marriage, and undermine federal and state sovereignty by imposing international norms on states and their localities.[15] These concerns are mostly exaggerated, but they signal strong feelings that CEDAW would disturb some set or subset of cultural values.

Ratification of certain human rights treaties, therefore, is an uphill battle. But even when the United States has ratified these types of treaties, it is often with "RUDs"—reservations, understandings, and declarations.[16] RUDs limit the impact of human rights treaties on domestic law, usually by making treaties "non-self-executing"—in other words, the treaties do not automatically become part of U.S. law upon ratification or provide a cause of action.[17] RUDs undermine the potential force human rights treaties could have in securing human rights at home because they prevent ordinary citizens from using these documents to enforce their rights directly in courts. In addition, RUDs may signal to the international community that the United States does not fully support the human rights regime, calling the country's reputation as a human rights–promoting nation into question.[18]

The struggle to ratify human rights treaties is more than just an academic exercise. Many U.S.-based human rights advocates have pushed for the ratification of these treaties in order to open up avenues for legal and political change. In particular, some activists see CEDAW as a means to create positive *obligations* for the federal government to support affirmative action programs, stronger equal pay initiatives, more comprehensive anti–employment discrimination statutes, and programs to eliminate inequities in healthcare.[19]

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international standards, ruled that the Eighth Amendment prohibited the execution of individuals who committed crimes before they attained 18 years of age. Roper v. Simmons, 543 U.S. 551 (2005). It is unclear how this development will impact the United States' resistance to the CRC.

15. *Treaty Doc. 96-53; Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the S. Comm. on Foreign Relations*, 107th Cong. 34, 37–39 (2002) [hereinafter *Ratification Hearing*] (statement of Harold Hongju Koh, Professor, Yale Law School, Former Assistant Sec'y of State for Democracy, Human Rights, and Labor).

16. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 314 (1987) (explaining the effect of reservations and understandings in U.S. law).

17. *Id.* § 111(3)–(4).

18. For a critique of RUDs, *see* Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). *But cf.* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000) (arguing that RUDs represent a valuable compromise between "competing domestic and international considerations" on international law).

19. THE WORKING GROUP ON RATIFICATION OF THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, HUMAN RIGHTS FOR ALL: CEDAW: WORKING FOR WOMEN AROUND THE WORLD AND AT HOME 20–31 (Leila Rassekh Milani ed., 2001),

Ratification would also require the United States to submit reports to the CEDAW Committee, an expert body that evaluates a ratifying party's compliance with substantive CEDAW obligations.[20] After considering each country report, the Committee publishes concluding comments concerning compliance.[21] Domestic nongovernmental organizations (NGOs) may use these concluding comments as organizing tools and as leverage when proposing relevant legal or political reform. The United States, however, has shown no signs that it is prepared to ratify CEDAW.

Impatient with the federal government, some human rights activists in the United States have turned to state and local governments to implement international human rights standards. These activists are not merely concerned with promoting the ratification of human rights treaties per se. Instead, they want to promote the principles in these treaties, both in the United States and abroad, and they are becoming increasingly aware of how actions in the United States—even on the local level—may have broad impact on human rights situations globally.

So far, two different legislative strategies have emerged: one that I term "inward-looking" and one that I term "outward-looking." Although both strategies seek to encourage dialogue on human rights within the United States and internationally, the inward-looking strategy focuses on promoting the rights of people within the United States, while the outward-looking strategy focuses on promoting human rights in other countries. Of course, no local/global dichotomy is perfect,[22] and both strategies have inward-looking and outward-looking components. Nonetheless, it is helpful to think of these strategies separately because they differ in scope, effectiveness, and legality.

Despite their differences, however, both inward- and outward-looking human rights legislation promulgated at the state and local level have the potential to strengthen human rights norms, internationally and domestically, and increase compliance and enforcement. Inward-looking state and local legislation may increase the legitimacy of human rights in the United States by allowing a larger, more inclusive dialogue on human rights that may transform their broad language into specific norms.[23] Inward-looking legislation can also serve to

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http://www.legalmomentum.org/issues/whr/pdf/cedawbookbw.pdf (emphasis added).

20. CEDAW, *supra* note 5, arts. 17–18.

21. The CEDAW Committee's concluding comments are published by the United Nations' Division for the Advancement of Women. The comments are organized by country according to session numbers. *See* http://www.un.org/womenwatch/daw/cedaw/index.html.

22. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 621 (2001) (arguing that "categorical federalism," the simple categorization of activity as "truly" local, national, or global, is "an attempt to buffer the states from the nation, and this nation from the globe, [that] is faulty as a method and wrong as an aspiration").

23. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 279 (2001) (referring to the local implementation of CEDAW in San Francisco and noting that "local treaty work also helps to translate broad abstract principles contained in human rights treaties into concrete, definable

situate the United States differently in the international system by exposing our nation's shortcomings, demonstrating the American people's willingness to be held accountable for our human rights violations, and encouraging dialogue with other nations—through the discourse of human rights—on best practices, models, and solutions. Outward-looking state and local legislation enables communities to demonstrate support for the international human rights regime as well as international legal processes. This type of legislation also allows communities to respond to the ways in which they contribute to human rights violations abroad and to strengthen efforts by foreign legislators and activists to promote human rights in their home countries. Given the value of state and local human rights legislation, and the slow pace of human rights implementation at the federal level, activists should continue to use state and local initiatives as another strategy for promoting human rights.

This article examines the potential constitutional barriers to this particular strategy—specifically, the possibility that the federal foreign affairs power could preempt state and local governments from enacting either inward- or outward-looking human rights legislation. After an analysis of preemption doctrine, I argue that constitutional jurisprudence should develop in a way that allows state and local governments to enact both inward- and outward-looking human rights legislation. Even though inward-looking human rights legislation touches on foreign affairs, it satisfies the dictates of the Constitution and poses few doctrinal problems. Outward-looking human rights legislation, however, poses more problems because it specifically intends to affect foreign affairs directly—a domain usually left to the federal government. Despite the potential for conflict between state or local laws and federal law and policy, the United States Supreme Court should not hinder the creation of outward-looking initiatives since, as many commentators have noted, this legislation may confer significant benefits on the nation.[24] Instead, the Court should require that there be a positive conflict between federal and state or local law before states and local governments are excluded from the realm of foreign affairs.[25]

This article proceeds in two parts. Part I describes three examples of state and local inward- and outward-looking human rights legislation. The first is an inward-looking San Francisco ordinance that implements the principles of CEDAW; the remaining outward-looking initiatives include an attempt by the Massachusetts legislature to put pressure on Burma for democratic reform, as well as a California initiative to encourage Holocaust reparations. The part then sets out in more detail why both types of legislation are important for the development of human rights norms generally and for the creation of a human rights culture in the United States. Part II then examines the constitutional limitations on state and local implementation of international human rights and

standards on the ground"). *See also* discussion *infra* Part I.B.

24. *See* discussion *infra* part I.B.

25. *See* discussion *infra* part II.C.

argues for a narrow reading of the federal foreign affairs power in the context of both inward- and outward-looking human rights legislation.

I.
INWARD-LOOKING AND OUTWARD-LOOKING HUMAN RIGHTS LEGISLATION

"Far from . . . imposing unwanted obligations on local governments, local governments are in fact responding to the demands of their citizens, who have become impatient at the lack of federal action to implement these universal norms into American law."[26]

A. Content and Purpose

1. Inward-Looking Human Rights Legislation

Inward-looking human rights legislation aims primarily to improve human rights within the United States and "to get human rights respected . . . as not just something for the third world."[27] This type of legislation uses human rights discourse to link domestic rights-based struggles to global movements for social change. It also strives to refocus the country's attention on affirmative state duties, encourage broader definitions of discrimination, and create more proactive government solutions to systemic inequity. To some extent, this approach is succeeding.

In 1998, San Francisco, California passed a local ordinance implementing CEDAW within the city.[28] The ordinance articulates several "local principles," grounded normatively within CEDAW, in the areas of economic development, violence against women, and health care.[29] Under the ordinance, the local Commission on the Status of Women must train selected city departments in human rights with a gender perspective.[30] The departments must then undergo gender analyses using guidelines developed by a CEDAW Task Force and develop action plans for integrating human rights principles into city operations.[31] The ordinance, therefore, calls on the municipal government to take proactive steps to address discrimination rather than waiting to redress it through litigation. Consequently, individuals do not have a private right of action against the city. Instead, the CEDAW Task Force and the local Commission on the

26. *Ratification Hearing*, *supra* note 15, at 38–39 (statement of Harold Hongju Koh, Professor, Yale Law School, Former Assistant Sec'y of State for Democracy, Human Rights, and Labor).

27. Mark Sappenfield, *In One U.S. City, Life Under a UN Treaty on Women*, CHRISTIAN SCI. MONITOR, Jan. 30, 2003, at 2 (quoting Kim Slote of the Wellesley Centers for Women in Massachusetts).

28. S.F., CAL., ADMIN. CODE ch. 12K, § 12K.1–.6 (2001).

29. *Id.* § 12K.3.

30. *Id.* § 12K.4(a).

31. *Id.* § 12K.4(b).

Status of Women monitor city agencies' compliance with the law.

Since adopting the ordinance, San Francisco has engaged in positive measures to eradicate gender discrimination. Six city departments have carried out gender analyses and developed action plans to eliminate gender discrimination as defined by CEDAW and the local ordinance.[32] There is also some evidence that these analyses are translating into change on the ground. For example, after its review, the Department of Public Works created women's support groups, devised flexible schedules for working parents, and increased job training courses in areas where women are underrepresented.[33]

The San Francisco ordinance has also inspired several state and local jurisdictions, like Los Angeles, to undertake similar CEDAW implementation efforts.[34] Other jurisdictions combine the principles of CEDAW and CERD. New York City had its first public hearing on implementing CEDAW and CERD in April 2005,[35] and advocates in Massachusetts have formed the Massachusetts CEDAW Project to encourage state and city legislators to implement the two treaties.[36]

To date, the United States Supreme Court has not heard a constitutional challenge to this type of inward-looking legislation. Indeed, this legislation appears to rest securely within the broad regulatory powers enjoyed by state and local governments and does not impermissibly implicate foreign affairs. However, the local implementation of international treaties is not totally free from constitutional question. For example, while the immediate and intended effects of San Francisco's CEDAW ordinance are only citywide, CEDAW itself

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32. These departments include the Department of Public Works, the Juvenile Probation Department, the Adult Probation Department, the Arts Commission, the Department of the Environment, and the Rent Stabilization Board. THE CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT ON THE STATUS OF WOMEN, PROGRESS REPORT #6, CEDAW TASK FORCE GENDER ANALYSIS REPORT: AN OVERVIEW OF CEDAW IMPLEMENTATION IN THE CITY AND COUNTY OF SAN FRANCISCO (2001), http://www.sfgov.org/site/dosw_page.asp?id=20401 (last visited Apr. 25, 2006).

33. DEPARTMENT OF PUBLIC WORKS, SURVEY UPDATE (2001), http://www.sfgov.org/site/cosw_page.asp?id=11456 (last visited Apr. 25, 2006). Sappenfield, *supra* note 27, at 2 (quoting Jim Horan, Personnel Manager, San Francisco Dep't of Public Works).

34. Los Angeles, Cal., Ordinance 175,735 (Dec. 19, 2003), *available at* http://clkrep.lacity.org/councilfiles/00-0398-S2_ORD_175735_02-08-2004.pdf. These efforts are in addition to resolutions urging the United States to ratify CEDAW. *See, e.g.*, Cook County, Ill., Resolution 04-R-117 (Mar. 23, 2004), *available at* http://www.cookctyclerk.com/pdf/032304resdoc.pdf. The New York City Human Rights Initiative also provides a list of several state and local governments who have passed CEDAW-based resolutions. NEW YORK CITY HUMAN RIGHTS INITIATIVE, STATES, COUNTIES, AND CITIES WHO HAVE PASSED RESOLUTIONS ABOUT CEDAW (2005), http://nychri.org/documents/CEDAWRes_000.pdf (last visited Apr. 25, 2006).

35. New York City Human Rights Initiative, About Our Work, http://www.nychri.org (follow "About Our Work" hyperlink) (last visited Apr. 11, 2006). For general information on the city's initiative to implement CEDAW and CERD, *see id.* (follow "About Us" hyperlink).

36. Suffolk University: Center for Women's Health and Human Rights, The Massachusetts CEDAW Project, http://www.suffolk.edu/cwhhr/Mass_CEDAW.html (last visited Apr. 25, 2006).

is an international instrument setting forth agreements between nations. Furthermore, the United States Senate has rejected ratification of CEDAW. In this sense, local treaty implementation may be more than "an innovative strategy . . . to bypass federal resistance to international human rights standards," as advocates explain.[37] Instead, the CEDAW ordinance could be seen as an unconstitutional exercise of local power that tramples upon the United States' prerogative to reject a particular treaty and to speak with "one voice"[38] in the international arena. This view is explored further in part II of this article.

2. Outward-Looking Human Rights Legislation

Outward-looking human rights legislation seeks to effect change outside of the United States either by supporting international legal processes or by attempting to influence foreign governments. Oftentimes however, this legislation has inward-looking components that motivate the state legislature to pass these laws.

One example of outward-looking legislation was the Massachusetts Burma Law, which the United States Supreme Court later held unconstitutional.[39] In 1996, the Massachusetts state legislature enacted selective purchasing legislation that placed restrictions on state agencies' ability to contract with individuals or corporations doing business with Burma.[40] According to the state, the legislation was "justified by the legitimate state interest in disassociating from countries that deny human rights."[41] To avoid "moral taint,"[42] Massachusetts had chosen to use its public funds to promote a culture of human rights within the state. From this perspective, the Burma law was an inward-looking piece of legislation that fostered respect for human rights in Massachusetts by calling attention to the ways in which the state contributed to the perpetuation of military rule in Burma. But unlike the San Francisco initiative, the Burma law was also outward-looking: as the legislation's sponsor recognized, one "identifiable goal" of the Burma law was "free democratic elections in Burma."[43] Thus, the law's purpose was not just to promote human rights within

37. Amnesty International USA, *supra* note 1.

38. The United States Supreme Court has frequently used the "one voice" doctrine when it is confronted with the validity of state activities impinging on foreign relations. *See* Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 979–84 (2001) (summarizing the Court's use of the "one voice" doctrine).

39. MASS. GEN. LAWS ch. 7, §§ 22G–22M (1997), *invalidated by* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

40. *Id.*

41. Reply Brief for Petitioners at 17, Nat'l Foreign Trade Council v. Natsios, No. 99-474, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

42. *Id.*

43. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 46 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (quoting Rep. Byron Rushing, sponsor of Burma law in Massachusetts state legislature).

Massachusetts by avoiding "moral taint"; it was to put pressure on Burma to protect the human rights of Burmese citizens.

As an outward-looking measure, the Burma law was achieving its intended effect. "A number of companies" withdrew from Burma after the law's enactment and "at least three cited the Massachusetts law as among the reasons for their withdrawal."[44] However, there were also some unintended consequences. Several countries protested the legislation,[45] and Japan and the European Union both filed complaints against the United States with the World Trade Organization.[46]

After finding that the Burma law had more than an incidental effect on foreign relations, the First Circuit Court of Appeals ruled that it was unconstitutional because, among other reasons, it interfered with the federal government's *exclusive* power over foreign affairs.[47] The circuit court read the federal foreign affairs power broadly, relying on the United States Supreme Court's decision in *Zschernig v. Miller*, which had overturned a state law for impermissibly and directly impacting foreign relations.[48] On appeal however, the Supreme Court, in *Crosby v. Nat'l Foreign Trade Council*, made an arguably narrower ruling on the Burma law.[49] Instead of relying on *Zschernig*, the Court found that Congress had preempted Massachusetts by statute.[50] Thus, the Burma law could not survive. While some of the Court's reasoning suggested that it could have relied on the expression of dormant foreign affairs power in *Zschernig* to decide the case,[51] its decision rested squarely on statutory preemption, calling into question, but leaving open, the possibility that states could continue to create outward-looking human rights legislation.

Any enthusiasm felt by human rights activists, however, dampened after the Court decided *American Insurance Ass'n v. Garamendi*, striking down a California law requiring insurers operating within the state to disclose information about policies sold during the Nazi era.[52] The disclosure law could have helped individuals pursue claims, either in state courts or through a special international forum, against companies that failed to pay benefits to Holocaust survivors.[53] As in *Crosby*, the Court did not rule that the state law was unconsti-

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44. *Id.* at 47.

45. *Id.*

46. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 383 (2000).

47. Natsios, 181 F.3d at 49–61.

48. *See* Zschernig v. Miller, 389 U.S. 429, 432 (1968). *See also* discussion *infra* part II.A.

49. *Crosby*, 530 U.S. 363 (2000)

50. *Id.* at 373–74. *See also* discussion *infra* part II.A.

51. *See* David M. Golove, *The Implications of* Crosby *for Federal Exclusivity in Foreign Affairs*, 21 BERKELEY J. INT'L L. 152, 155–57 (2003) (arguing that while *Crosby* purported to be a narrow decision, its language and reasoning strongly approved dormant foreign affairs power). *See also* discussion *infra* part II.A.

52. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401 (2003).

53. California's Holocaust Victim Insurance Relief Act of 1999, CAL. INS. CODE §§ 13800–13807 (West 2005), *invalidated by* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

tutional because of the dormant foreign affairs power.[54] Instead, the Court found that the law was preempted by executive foreign policy rooted in a sole executive agreement.[55] In some ways, then, *Garamendi* continued to leave open the possibility that state and local governments could create outward-looking human rights legislation, but the Court also showed a ready willingness to find implied conflicts and give the executive wide leeway to override democratic decisionmaking by the states.

The fate of Massachusetts's and California's outward-looking human rights legislation makes clear that this type of human rights implementation strategy raises serious constitutional concerns to be discussed more fully in part II.

B. Benefits of State and Local Human Rights Implementation

Despite the legal challenges facing state and local implementation of human rights, both inward- and outward-looking human rights initiatives have the potential to convey significant benefits in the United States and globally.

First, inward-looking legislation may make human rights more legitimate in the United States. Opposition to human rights has hinged, in part, on the perception that international norms created by bodies not accountable to the American public are encroaching not only on the United States as a federal entity, but on individual state sovereignty.[56] The concern is especially acute since many believe that the activities addressed by international human rights treaties should be left to state (not international or federal) regulation.[57] Inward-looking legislation can help to allay these fears because this legislation would be the product of state and local legislatures; in essence, the people would have accepted these norms through localized processes of democratic deliberation.[58] Further, inward-looking state or local legislation can quell the fear that a minority of states will bind an unwilling majority of states to human rights norms (or vice versa) through federal implementation. Instead, each state or locality could decide whether and to what extent it would integrate human rights

54. *Garamendi*, 539 U.S. at 419–20.

55. *Id.* Note that the preemption in *Garamendi* (based on executive foreign policy) differed from that in *Crosby*, where a federal statute preempted the Burma law. *See* discussion *infra* part II.B.

56. *See* Powell, *supra* note 23, at 251 ("As a practical matter . . . international law is often viewed as an alien source of law, lacking democratic legitimacy.").

57. *See id.* at 247 (explaining the revisionist constitutional theory that "assumes a fragmentation and authority reserved to the states based on federalism and separation of powers limits on federal authority").

58. *See* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 531–32 (2004) ("By leaving much of the incorporation, implementation, and execution of international law to the states, the federal government can confer the greatest amount of political legitimacy on the new international law. Rather than international law imposed from above through questionable constitutional mechanisms, international law can be 'made' in a manner free from constitutional doubt—by the states.").

norms into its own laws.

Second, inward-looking legislation can help expose human rights violations within the United States and provide new ways of thinking about social problems. According to Cynthia Soohoo, Director of the Bringing Human Rights Home Project at Columbia Law School, one of the purposes of the proposed New York City CERD/CEDAW ordinance is to reopen a discussion on the United States' legal approach to discrimination.[59] Injecting the human rights framework into domestic law may encourage the American legal elite to reevaluate equal protection jurisprudence, to reconsider whether we are measuring success with the most appropriate indicators, and to examine alternative legal theories to combat discrimination. The inward-looking strategy also challenges local governments to educate themselves and the public about human rights, especially since "most people are not only unaware of which treaties their governments have adopted, they are unfamiliar with the basic rights to which they are entitled under international law."[60] Thus, this type of legislation has the potential to make human rights concrete to people living in the United States.[61] Human rights will no longer be something "out there," merely for the benefit of other people. Instead, inward-looking legislation may make human rights discourse relevant and meaningful within the United States not only as a mechanism to voice underlying social problems and inequities but also as a tool to forge proactive solutions.

Third, inward-looking human rights legislation may help to develop more concrete human rights norms.[62] Curtis Bradley and Jack Goldsmith have noted that the scope of international human rights treaties presents challenges for our constitutional system because they are too vague and open-ended.[63] They contend that the norms these treaties create are therefore too uncertain and support the idea that if incorporated into domestic law, these norms would lead to voluminous litigation.[64] Local implementation, however, offers an opportunity to give these broad norms concrete form.[65] After passage of the San Francisco CEDAW ordinance, for example, the city developed *Guidelines for a*

59. Cynthia Soohoo, Dir., Bringing Human Rights Home Project, Human Rights Inst., Columbia Law School, Remarks at the New York City Human Rights Initiative Panel Discussion: Bringing Human Rights Home: Implementing CEDAW and CERD Standards in New York City (Mar. 10, 2005).

60. Amnesty International USA, *supra* note 1.

61. *See* Powell, *supra* note 23, at 260–61 ("[A] more complete drawing down of international law depends on the development of more participatory mechanisms through which Americans can foster a deeper human rights culture. By cultivating and amplifying the voices of state and local governments in the adoption and implementation of human rights, dialogic federalism assists in widening the base of support for and increasing the legitimacy of these norms.").

62. *Id.* at 279 (arguing that local treaty implementation efforts have led to the translation of abstract norms into "concrete, definable standards" that could serve as precedent for national or international implementation).

63. Bradley & Goldsmith, *supra* note 18, at 400.

64. *Id.*

65. *See* Powell, *supra* note 23, at 279.

Gender Analysis in order to create mechanisms to evaluate gender discrimination as defined by CEDAW.[66] The San Francisco Commission on the Status of Women has also approved a *CEDAW Action Plan* that lists individual principles of CEDAW and then enumerates how the city will achieve those norms, thereby giving them distinct content.[67] Far from producing a less definite legal system, local implementation of CEDAW has forced city institutions to clarify their obligations to the public.[68]

Fourth, both inward- and outward-looking legislation provide ways for state and local governments to offset "bureaucratic inertia at the central level of governance."[69] According to Daniel Halberstam, state participation in foreign affairs challenges this inertia by allowing state and local governments to place foreign affairs issues on the federal government's agenda and pressure Congress or the executive to take action.[70] While Halberstam's point is well argued, he does not fully consider the unique role that state and local governments, rather than NGOs or other actors, can play in this type of dialogue with the federal government.[71] The specific benefit of state and local participation is that these actors, unlike NGOs, are better positioned to signal to the federal government the policy preferences of the citizens within their jurisdictions. Since the political and economic costs of legislating are more easily quantifiable and because legislation is the result of a political process, it is a better gauge of the strength and character of foreign policy preferences than the advocacy of specific NGOs. While it may be true that state and local legislatures could represent minority positions within the nation, there is no fear that radical minority views would overrun more temperate views since state and local agents cannot make foreign policy for the nation, and the federal government—both Congress and the executive—can preempt most state and local laws that touch on foreign affairs.[72]

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66. THE CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT ON THE STATUS OF WOMEN, GUIDELINES FOR A GENDER ANALYSIS: HUMAN RIGHTS WITH A GENDER PERSPECTIVE (2000), http://www.sfgov.org/site/uploadedfiles/dosw/projects/CEDAW/documents/guidelines.pdf.

67. THE CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT ON THE STATUS OF WOMEN, CEDAW ACTION PLAN (2003), http://www.sfgov.org/site/dosw_page.asp?id=20403 (last visited Apr. 25, 2006).

68. Note that the San Francisco ordinance does not contain a private right of action against the city. This, however, does not mean that there is no accountability mechanism. An eleven-member CEDAW Task Force, which includes six members of the community, monitors city compliance with the law. S.F., CAL., ADMIN. CODE ch. 12K, § 12K.5 (2001).

69. Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1017 (2001).

70. *Id.* at 1040. Halberstam assumes that in these cases, the federal government has no policy on the issue. *Id.* If there is an expressed foreign policy, however, he indicates that the benefit of state and local participation in foreign affairs disappears. *See id.* at 1062–68. Yet Halberstam does not adequately explain how to determine whether there is a foreign policy on a particular issue

71. In other words, Halberstam does not address why *states* per se are best equipped to pressure the federal government on foreign policy matters.

72. *See* discussion *infra* part II.A.2.

Lastly, both inward- and outward-looking legislation are means of linking the local with the global. In the process of developing international norms at the local level, activists can share their implementation strategies with their foreign counterparts through information and advocacy networks.[73] Already, domestic activists who did not traditionally consider themselves "international" are beginning to see the benefit of an internationalist view of social change. One such activist has commented, "Many of the problems facing individuals in our communities are directly linked to the same international economic, social, and political forces affecting others around the world. Yet we often are mired in domestic myopia, working with limited international consciousness, and in structural isolation from opposition movements elsewhere."[74] By using the discourse of human rights, however, domestic activists connect with these larger movements, share resources, and establish networks that strengthen activism within the United States and globally.

In addition to activists, state and local government officials can also use implementation of inward- and outward-looking human rights legislation to strengthen their own existing networks and to create new ones with their foreign counterparts. In her book *A New World Order*, Anne-Marie Slaughter observes that the international order is heavily dependent on the idea of a disaggregated, as opposed to a unitary, State that includes transnational networks of regulators, judges, and legislators who "promote convergence, compliance with international agreements, and improved cooperation among nations."[75] Recognizing the advantages of networks, Slaughter argues that a world order self-consciously fashioned around them could be a valuable and just way to promote a "global rule of law,"[76] as it would allow national government officials to be both domestic and international actors

> exercising their national authority to implement their transgovernmental and international obligations and representing the interests of their country while working with their foreign and supranational counterparts to disseminate and distill information, cooperate in enforcing national and international laws, harmonizing national laws and regulations, and addressing common problems.[77]

Of the three types of government networks, Slaughter argues that legislative networks, though difficult to form and maintain, can have unique benefits.[78]

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73. For a discussion of transnational advocacy networks, see MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

74. Barbara Schulman, *Effective Organizing in Terrible Times: The Strategic Value of Human Rights for Transnational Anti-Racist Feminisms*, 4 MERIDIANS: FEMINISM, RACE, TRANSNATIONALISM 102, 104 (2004).

75. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 261 (2004).

76. *Id.*

77. *Id.* at 7.

78. *Id.* at 15.

Legislators are theoretically more representative of the public than regulators or judges, and they are better positioned to translate norms into domestic law or to exert pressure, either internally or externally, to influence foreign policy goals, perhaps especially related to human rights.[79] Networked legislators can also act locally to support transnational goals, bolstering fledgling human rights initiatives abroad.[80] In addition, they may use shared models and information to improve human rights projects at home.[81] Further, legislators may coordinate their domestic efforts for "faster and more effective responses to transnational problems" than the traditional international treaty system.[82] Thus, while legislative networks are not as common as other types of transnational networks, they have significant potential as another point of entry for human rights promotion.

While Slaughter does not consider disaggregation of the State at a level beyond the national government, her analytic framework could support state and local implementation of human rights as an outgrowth of, or as an impetus for, networks between state and local legislators and their foreign counterparts.[83] More networking at this level may help local communities situate themselves in a global context, illuminate ways in which local actors may directly or indirectly contribute to human rights violations abroad, and lead to cooperation between cross-border local government units to encourage problem-solving at the domestic, national, or international level. This type of networking and its products are especially important as the linkages between the domestic and international spheres become more apparent.[84] Local communities tied to particular foreign regions or particularly affected by certain issues can influence state or local legislators to respond to events happening in other countries. Moreover, allowing state and local legislators to network with each other, and then to implement local actions as a result of transnational interaction, helps the United States participate fully in the project of global governance at each level of networked interaction.

As the above discussion shows, there are benefits to inward- and outward-looking, state and local human rights initiatives for both social change advocates as well as the nation as a whole. These benefits deserve due consideration by both academics and judges who endeavor to evaluate the constitutionality of state and local human rights initiatives.

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79. *See id.* at 105–06.

80. *Id.* at 126.

81. *Id.*

82. *Id.* at 237.

83. Several networks between state and local government officials and their foreign counterparts already exist. *See, e.g.*, National Conference of State Legislators, International Legislative Exchanges, http://www.ncsl.org/public/internat/exchange.htm; Sister Cities International, http://www.sister-cities.org/sci/partners/sponsors/current-partners.

84. *See* SLAUGHTER, *supra* note 75, at 233.

II.
CONSTITUTIONAL ANALYSIS OF STATE AND LOCAL HUMAN RIGHTS INITIATIVES

"For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[85]

A. Federal Foreign Affairs Power

The United States Constitution says surprisingly little about state and local governments' ability to implement legislation that may impact foreign affairs. Article I specifically forbids states from entering into treaties, alliances, or confederations,[86] or making agreements with foreign powers without the consent of Congress.[87] It forbids states from engaging in war, unless invaded,[88] and provides that only Congress may declare war.[89] Further, Article I limits states' ability to impose duties.[90] Article II directs that the President should be the Commander in Chief,[91] and gives her the sole power to appoint and receive Ambassadors,[92] as well as to enter into treaties after securing the advice and consent of the Senate.[93] Nowhere, however, does the Constitution expressly assert that the states shall not establish laws that may have an effect on external relations; yet, the Supreme Court has given the federal government exclusive, plenary power over foreign affairs.[94]

While it may now seem intuitive for the federal government to control foreign affairs, constitutional theory presupposes that the power of the federal government is limited—in other words, the federal government can do no more than what the Constitution enumerates.[95] Notwithstanding this principle, the Supreme Court has declared that constitutional limits on the federal government are "categorically true only in respect of our internal affairs."[96] The federal government's power over foreign affairs, according to the Court, has a different quality than its power over domestic affairs. The Court rationalizes that power over foreign affairs is inherent in sovereignty and therefore can vest only in the federal government.[97] Overturning a lower court ruling in favor of a New York

85. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 606 (1889).
86. U.S. CONST. art. I, § 10, cl. 1.
87. U.S. CONST. art. I, § 10, cl. 3.
88. *Id.*
89. U.S. CONST. art. I, § 8, cl. 11.
90. U.S. CONST. art I, § 10, cl. 2.
91. U.S. CONST. art. II, § 2, cl. 1.
92. U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art II, § 3.
93. U.S. CONST. art. II, § 2, cl. 2.
94. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–20 (1936).
95. *See id.* at 315–16.
96. *Id.* at 316.
97. *Id.* at 318 ("[T]he investment of the federal government with the powers of external sovereignty [does] not depend upon the affirmative grants of the Constitution . . . [instead they are]

state policy, rather than a federal diplomatic agreement, with respect to foreign debts, the Court made this now famous statement: "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."[98]

The impetus for exclusive federal foreign affairs power is the need for a coherent U.S. foreign policy, as well as the need to eliminate dangerous externalities caused by the actions of exceptional states. John Jay expressed these concerns cogently in Federalist No. 3 where he noted that much foreign aggression is the result of treaty violations.[99] According to Jay, giving the federal government exclusive control over foreign affairs would lead to greater consistency in the interpretation of foreign obligations and would protect the several states from the repercussions of any one state carrying out its own interests contrary to the best interests of the nation.[100] By speaking with "one voice,"[101] the United States could better protect itself in its interactions with other nations.[102] This conception of foreign affairs prohibits the states from having any separate, independent role in matters touching on external relations.[103]

Julian Ku, however, has pointed out that, in practice, states play a large role in implementing international obligations that have tremendous effects on the United States' foreign relations, especially in the context of human rights.[104] Ku notes that "non-self-executing" treaties and principles of federalism bestow some responsibility on the states to fulfill human rights treaties.[105] This practice could lead to a greater likelihood of compliance with some international human rights norms, contrary to Jay's view.[106] States may also make use of customary international norms when developing state common law, and can enact legislation that comports with international law,[107] as San Francisco did with CEDAW. According to Ku, "[s]tates do not merely carry out international obligations as the federal government commands. Instead they are independently employing the power that has been allocated to them (or left to

necessary concomitants of nationality.").

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

99. THE FEDERALIST NO. 3, at 10 (John Jay) (Clinton Rossiter ed., 1961).

100. *Id.* at 11–13.

101. *See* Cleveland, *supra* note 38 (summarizing the Court's use of the "one voice" doctrine).

102. *See also* THE FEDERALIST NO. 42, at 232 (James Madison) (Clinton Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

103. *See* Ku, *supra* note 58, at 460–61 (defining this concept as the "nationalist" perspective).

104. *Id.* at 462–64.

105. *Id.* at 462.

106. By attaching non-self-executing clauses and federalism understandings, the federal government may be signaling its unease with implementing certain norms that would require regulation in areas traditionally left to the states. *Id.* at 524–25. Because of the federal government's hesitance to act, giving states room to implement treaties and develop international norms may be one way to ensure greater U.S. compliance with human rights law in certain areas. *Id.* As an empirical claim, however, this assertion has yet to be proven.

107. *Id.* at 476–77.

them), which requires that they decide whether and how to comply with international law obligations."[108]

Ku is quite right: states are not totally absent from the field of foreign affairs.[109] However Ku's explanation of state implementation does not answer the central constitutional questions surrounding inward- and outward-looking legislation. Consider, for example, San Francisco's inward-looking CEDAW ordinance. While it could be seen simply as the enactment of laws consistent with international norms, one could also argue that such legislation has been preempted by the federal government through its failure to ratify CEDAW. Consider also that Ku does not make explicit mention of outward-looking legislation that focuses on the compliance of *other* nations with international law. This type of legislation could have grave consequences for foreign affairs, especially if countries feel that they are being subjected to discrimination or unfairly targeted.[110] While Peter Spiro has argued that in the age of globalization, aggrieved countries can "retaliate discreetly" against particular states,[111] there is no guarantee that they will.[112] The danger of externalities, therefore, remains high with outward-looking legislation, making appeals to "one voice" in foreign relations more attractive.

Whether implementing inward- or outward-looking human rights legislation,[113] then, state and local governments will have to confront the possibility of federal preemption. There are two types of preemption in the Supreme Court's foreign affairs jurisprudence: conflict preemption and field preemption (or the dormant foreign affairs power). What follows is a description and critique of both types of preemption and an analysis of inward- and outward-looking human rights legislation under each.

1. Field Preemption

Field preemption, the strongest expression of federal foreign affairs power, precludes a state from implementing any laws that would have more than an "incidental or indirect effect" on foreign affairs,[114] even if the federal government has not yet acted. In other words, the federal government occupies

108. *Id.* at 526.

109. *See also* Cleveland, *supra* note 38, at 991–95 (arguing that neither historical nor contemporary practice supports the "one voice" doctrine).

110. Note however that not all outward-looking human rights legislation will have this effect all the time. *See* discussion *infra* part II.C.

111. Peter Spiro, Crosby *as Way Station*, 21 BERKELEY J. INT'L L. 146, 150 (2003).

112. Golove, *The Implications of* Crosby, *supra* note 51, at 155–57 (responding to Professor Spiro's argument).

113. Recall that "inward-looking" and "outward-looking" are fluid categories. Whether or not something is characterized as "inward-looking" or "outward-looking," however, usually foretells whether the Supreme Court will find it constitutional or not. *See* discussion *infra* part II.A.2.

114. Zschernig v. Miller, 389 U.S. 429, 433 (1968).

the entire field of foreign affairs. Whether or not the federal government has passed a law or expressed a policy on a particular issue, the states cannot act in a way that directly affects foreign relations.

The leading case on field preemption is *Zschernig v. Miller*.[115] The case concerned an Oregon inheritance law providing for escheat to the State in cases where there were no U.S. heirs and no foreign heirs that could show, among other things, that their country of origin would not confiscate the inherited property.[116] Despite the Supreme Court's acknowledgement that inheritance law was traditionally a state matter,[117] and arguments from the United States Solicitor General that the statute did not conflict with federal foreign policy,[118] the Court still struck down the law. The Court found that, as applied, the no-confiscation clause was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress."[119] The Court based its ruling on the need to protect the nation as a whole from state actions that could adversely affect the nation's foreign relations.[120] In other words, the nation needed to speak with "one voice."[121] That the federal government had no specific agreement with foreign nations that touched on the particulars of the Oregon law—i.e., the federal government had not spoken—was irrelevant, for "even in the absence of a treaty, a State's policy may disturb foreign relations."[122]

Justice Harlan, concurring on other grounds in *Zschernig*, felt that the Court's opinion stripped the state of its traditional powers without the requisite showing that its law had more than minor effects on foreign affairs or interfered in any way with U.S. foreign policy.[123] Harlan rightly noted that "[p]rior decisions have established that in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an

115. 389 U.S. 429 (1968).

116. OR. REV. STAT. § 111.070 (1957), *invalidated by* Zschernig v. Miller, 389 U.S. 429 (1968).

117. *Zschernig*, 389 U.S. at 440.

118. *Id.* at 443 (Stewart & Brennan, JJ., concurring) ("The Solicitor General, as *amicus curiae*, says that the Government does not 'contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.' But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.").

119. *Id.* at 432 (majority opinion).

120. *Id.* at 440–41.

121. *See* Cleveland, *supra* note 38 (summarizing the Court's use of the "one voice" doctrine).

122. *Zschernig*, 389 U.S. at 441.

123. *See id.* at 458–61 (Harlan, J., concurring).

incidental effect on foreign relations."[124] Harlan would also have required the federal government to articulate a specific interest with which the state statute interfered before striking down the Oregon law.[125] The majority, however, saw foreign affairs as excluding the states *a priori*; therefore, the Court was not required to look for a *specific* federal interest.[126] In support of this proposition, the Court cited *Hines v. Davidowitz*,[127] but this case does not support such a broad reading of federal power.

In *Hines*, the issue was whether a federal alien registration law precluded Pennsylvania from enforcing its own registration law.[128] Finding an implied conflict, the Court struck down the law, but it expressly left open the government's claim that "the federal power in this field, *whether exercised or unexercised*, is exclusive."[129] The holding, therefore, does not support field preemption or stand for the idea that the Constitution entrusts foreign affairs solely to the President and the Congress, as *Zschernig* asserts. *Hines* merely stands for the uncontroversial claim that the federal government has supremacy over the states in the field of foreign affairs by virtue of Article VI, constitutional history, and Supreme Court precedent.[130] Since Congress had demonstrated its intent to have one system for alien registration,[131] there was no need for the Court to determine whether the federal power in foreign affairs was exclusive. Thus, the *Zschernig* Court was wrong to cite *Hines* as sanctioning an extension of federal power over all foreign affairs.

Zschernig is therefore a puzzle. Not only is it weakly rooted in constitutional text and precedent, but more than thirty-five years after the Supreme Court decided the case, commentators are still unsure of the constitutional scope of its holding.[132] For even if we can accept that the federal government has exclusive power in the field of foreign affairs, what are the boundaries of that field? This question raises three separate issues.

First, *Zschernig* does not provide a way to distinguish between "foreign" and "domestic" affairs. The ambiguity inherent in that determination makes

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124. *Id.* at 458–59.

125. *Id.* at 459–62.

126. *Id.* at 432 (majority opinion).

127. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52 (1941)).

128. PA. STAT. ANN. tit. 35, §§ 1801–1806, *invalidated by* Hines v. Davidowitz, 312 U.S. 52 (1941).

129. *Hines*, 312 U.S. at 62 (emphasis added).

130. *Id.* at 62–64.

131. *Id.* at 69–74. The point in controversy in *Hines* was whether a conflict must be express in order to preempt state action or whether the Court may infer a conflict, not whether an actual conflict was necessary or not. *See id.* at 77 (Stone, J. dissenting) (arguing that since the state law does not literally conflict with the terms of any federal law or treaty, it was not preempted).

132. *See, e.g.*, Brannon P. Denning and Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 925 (2004) (criticizing the Court's use of *Zschernig* in *Garamendi* because the Court did not clarify the constitutional grounding or scope of the earlier decision).

Zschernig a difficult case to apply to human rights initiatives, especially inward-looking legislation. This ambiguity may, in fact, give the Court too much power to delineate "foreign affairs." *Zschernig* may therefore raise critical separation of powers issues.[133]

A second and related problem is that the *Zschernig* Court did not appear to leave much room for states to participate in foreign affairs, even as an auxiliary to the federal government. For example, Justice Stewart, in his concurrence, made light of the fact that the State Department found no undue conflict between the application of the Oregon statute and the conduct of U.S. foreign affairs.[134] However, if the executive controls foreign policy, and the state law supported the policy that the executive articulated, then on what grounds did the Constitution call for the dismantling of the state law? The executive in this situation would still retain exclusive control over foreign policy and could still preempt states that interfered with it. This wrinkle suggests that the Court was not only restricting state foreign policy, but also may have been substituting its own policy for that of the executive. Alternatively, Justice Stewart may have been chastising the federal government for deputizing the states in the conduct of federal foreign affairs. However, neither Stewart's concurrence nor the majority opinion explain why the states cannot—in administering their own probate laws—also affect foreign affairs in ways that do not upset the conduct of foreign affairs as determined by the executive.

Third, the *Zschernig* Court did not provide an analytical structure for examining the legality of state actions that lay at the "outer limits" of the foreign affairs field. The Court did not provide a rule of recognition that would help determine when a state law ceased to have more than an "incidental affect" on foreign affairs, leaving unclear the scope of permissible state action.

Given the lack of clarity surrounding *Zschernig* as a case about federalism and foreign affairs, it may be better to think of it as a case about the proper judicial function, where the Supreme Court set out to discipline lower court judges. The majority opinion, for example, is littered with references to state court judges using ideology, instead of objective law, to decide cases.[135] The Court stated: "As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real

133. Note that the Court has other ways of addressing this problem, including the political question doctrine.

134. Zschernig v. Miller, 389 U.S. 429, 443 (1968) (Stewart, J., concurring).

135. *Id.* at 437 n.8 (majority opinion). Two pertinent examples that the Court notes come from New York and California state court judges. From New York: "'This court would consider sending money out of this country and into Hungary tantamount to putting funds within the grasp of the Communists,' and 'If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia.'" *Id.* (quoting Austin Heyman, *The Nonresident Alien's Right to Succession under the "Iron Curtain Rule,"* 52 NW. U. L. REV. 221, 234 (1957)). From California: "The judge took 'judicial notice that Russia kicks the United States in the teeth all the time.'" *Zschernig*, 429 U.S. at 437 n.8 (quoting Harold J. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 257 n.3 (1962)).

desiderata. Yet they of course are matters for the Federal Government, not for local probate courts."[136] State court judges are not to express personal opinions—which bear the gloss of official declarations—about the affairs of other countries. In addition to the appearance of impropriety, the Court suggested that this type of criticism may lead offended governments to retaliate against the nation.[137] Whether or not the Court rightly feared this type of externality, the executive surely did not. In the absence of this branch's cooperation, the *Zschernig* majority constructed a constitutional mechanism to curb state judges.[138] Perhaps because of *Zschernig*'s vague reasoning, the Supreme Court did not rely on it in any foreign affairs case until it decided *Garamendi*[139] in 2003.

2. Conflict Preemption

Conflict preemption is distinct from field preemption because it requires the federal government to exercise its foreign affairs power before state law can be displaced. The state is not constitutionally excluded from passing laws with an incidental affect on foreign affairs so long as there is neither an express nor an implied conflict between the state and federal law.[140] As explained in *Crosby*, there are two conditions that lead to conflict preemption: (1) "where it is impossible for a private party to comply with both state and federal law,"[141] and (2) where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[142]

In *Crosby*, the Court unanimously found that the Massachusetts Burma law failed the latter condition.[143] According to the Court, the law undermined the purpose of a federal Act that implemented a scheme of mandatory and conditional sanctions against Burma.[144] Under the federal law, the President had control over the imposition of the sanctions and could waive them if she made certain determinations.[145] The Massachusetts law did not have the same type of

136. *Zschernig*, 389 U.S. at 437–38 (footnote omitted).

137. Hines v. Davidowitz, 312 U.S. 52, 64 (1941).

138. Justice Harlan criticized the majority for taking this approach, reasoning that the Court should have avoided the constitutional issue by disposing of the case on other grounds. *Zschernig*, 389 U.S. at 444–45 (Harlan, J., concurring).

139. 539 U.S. 396 (2003).

140. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

141. *Id.* at 372.

142. *Id.* at 373 (alterations in original) (citations omitted).

143. *Id.* The Court also reasoned, however, that the Burma law would fail the first condition as well since "[s]anctions are drawn not only to bar what they prohibit but to allow what they permit." *Id.* at 380. Thus, even if some companies could comply negatively with both the state and federal sanctions by adhering to the prohibitions, they may not be able to comply positively by taking advantage of what the federal sanctions might permit (through Presidential discretion).

144. *Id.* at 373–74.

145. *Id.* at 374 (noting that the President could terminate sanctions if human rights and

flexible application as the federal statute and targeted many businesses and individuals not affected by the latter.[146] If both laws were to operate simultaneously, the coercive power inherent in the Congressional grant of Presidential discretion would be diluted. The Court remarked that the

> ... unyielding application [of the Massachusetts law] undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.[147]

The Court also rejected Massachusetts's "implicit permission" argument that Congress, which enacted its law three months after Massachusetts, did not expressly preempt the Massachusetts law.[148] The Court, citing to *Hines*, endorsed implied preemption, reasoning that preemptive effect should not depend on whether Congress used particular language or whether Congress recognized that a conflict would actually exist.[149]

Despite its earlier proclamation in *Zschernig* that strong, federal dormant foreign affairs power exists, the Supreme Court did not rely on that principle in *Crosby* even though the lower court had.[150] In fact, the Court cited to *Zschernig* only once in the entire opinion—and only then to describe the procedural history of the case at bar.[151] Daniel Halberstam, a proponent of state participation in foreign affairs, finds cause for optimism in the Court's unwillingness to use *Zschernig*, interpreting this move as a shift away from the traditional distrust of state participation in this area.[152] Halberstam's optimism aside, the Court did not overrule *Zschernig* and echoes of the dormant foreign affairs power abound in the *Crosby* opinion.[153] This type of ambivalence about the dormant foreign affairs power suggests the Court felt uneasy about two things. First, the Court did not want to authorize the states to pass legislation like the Burma law in

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democracy progressed in Burma or waive sanctions if their application would be contrary to U.S. national security interests).

146. *Id.* at 378–89.

147. *Id.* at 377.

148. *Id.* at 386–88.

149. *Id.* at 387–88.

150. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 50–61 (1st Cir. 1999). *See* discussion *supra* part I.A.2.

151. *Crosby*, 530 U.S. at 371.

152. Halberstam, *supra* note 69, at 1021–27.

153. *See, e.g.*, *Crosby*, 530 U.S. at 381 ("It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate [diplomatic] discussions; *they compromise the very capacity of the President to speak for the Nation with one voice* in dealing with other governments.") (emphasis added).

areas where the federal government had not acted, thereby forcing the federal government to play its hand in all cases. At the same time, however, the Court did not want to limit state autonomy, especially in an area that seemed central to state sovereignty—the choice of how a state will spend its money. Thus, even in the realm of conflict preemption, the dormant foreign affairs power is lurking.

The Court opined further on the dormant foreign affairs power when it decided *Garamendi*,[154] the latest of the federalism–foreign affairs cases, in 2003. In that case, a 5-4 majority appeared to endorse broad federal foreign affairs power, though again, the decision rested on a version of conflict preemption. As noted earlier,[155] the issue in *Garamendi* was a provision of the California Holocaust Victim Insurance Relief Act (HVIRA)[156] that forced insurance companies doing business in the state to disclose information regarding sales of insurance policies made during the Nazi period. Presumably, the disclosure helped interested parties in California file suit in state court against companies that had failed to pay Nazi-period claims.[157] Operating concurrently was an executive agreement forged as a response to lawsuits brought in U.S. courts against German businesses for Holocaust reparations.[158] According to the terms of the agreement, Germany would establish a foundation to compensate aggrieved individuals.[159] In return, the President agreed to provide German businesses with security against claims filed in U.S. courts.[160] Individuals would be able to press their claims with the International Commission on Holocaust Era Insurance Claims (ICHEIC), and the President would use best efforts to persuade state and local governments to respect this scheme as the sole mechanism for reparations.[161] In fulfillment of the agreement, the executive department would submit a statement to state courts explaining that it was the policy of the federal government that the ICHEIC hear all Holocaust reparations claims.[162] Government officials never expressed a belief that the statement could form a legal basis for state court dismissal of a properly filed claim, but they did communicate to California that its state law was interfering negatively with the ICHEIC scheme.[163]

Faced with these facts, the *Garamendi* majority struck down HVIRA,

154. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

155. *See supra* text accompanying notes 52–55.

156. Holocaust Victim Insurance Relief Act of 1999, CAL. INS. CODE § 13804 (West 2005), *invalidated by* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

157. The state legislature amended its Code of Civil Procedure to allow these suits and extended the governing statute of limitations. CAL. CIV. PROC. CODE ANN. § 354.5 (1999), *invalidated by* Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims, 34 Cal. Rptr. 3d 944 (2005).

158. *Garamendi*, 539 U.S. at 405.

159. *Id.*

160. *Id.* at 405–06.

161. *See id.* at 406–07.

162. *Id.* at 406.

163. *Id.* at 411.

analogizing the case to *Crosby*.[164] Like the Massachusetts Burma law, HVIRA was more stringent then the federal arrangement—it required insurance companies to disclose more information than the ICHEIC rules required.[165] HVIRA also mandated a harsher penalty for noncompliance with its disclosure laws and frustrated the executive branch's attempt to have claims resolved through the ICHEIC system.[166] "The basic fact is that California [sought] to use an iron fist where the President [had] consistently chosen kid gloves."[167] To the Court, this course of action meant that HVIRA, like the Burma law, interfered with the President's legitimate use of his discretion in foreign affairs.[168]

By finding that HVIRA interfered with federal foreign affairs and was therefore preempted, the Court disparaged an important distinction between *Garamendi* and *Crosby*. In *Crosby*, the Court balanced a federal Act against a state Act. Conversely, in *Garamendi*, the Court balanced a state law against an executive agreement, an agreement the President enters into without the advice and consent of the Senate or the cooperation of the entire Congress. *Garamendi* therefore expanded the test for conflict preemption articulated in *Crosby*: whether the state law is an obstacle to the accomplishment of the objectives of *Congress*.[169] After *Garamendi*, the President can preempt the states on her own accord; the constitutional balance of power rests, therefore, in the hands of one person. Citing to precedent regarding executive agreements, the Court was nonplussed about the significance of this expansive form of preemption, noting only that the President has power to conduct foreign affairs and that the practice of settling claims on behalf of U.S. nationals through executive agreements had deep historical roots.[170]

Given the Court's precedent allowing executive agreements to preempt state laws,[171] it is unlikely that the Court will revisit the question. However, the executive agreement at issue in *Garamendi* contained no preemption clause.[172] Rather, the Court inferred preemption from statements by members of the executive branch at Congressional hearings.[173] This fact split the Court.

Writing for the dissenters, Justice Ginsburg argued that an executive agreement could only preempt state law if the agreement expressly made that

164. *Garamendi*, 539 U.S. at 423–25.

165. *Id.* at 423.

166. *Id.* at 424.

167. *Id.* at 427.

168. *See id.* at 424.

169. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

170. *Garamendi*, 539 U.S. at 414–17.

171. *See* United States v. Belmont, 301 U.S. 324, 330–31 (1937) (holding that executive agreements enjoy supremacy over state laws); United States v. Pink, 315 U.S. 203, 230–34 (1942) (reiterating that state law must yield when it conflicts with federal foreign policy as expressed in a statute, treaty, or an executive agreement.).

172. *Garamendi*, 539 U.S. at 417.

173. *Id.* at 421–22.

intention clear.[174] In other words, there could be no implied executive preemption of state law. What Justice Ginsburg did not fully explain was why implied preemption was acceptable in *Crosby*, but not in *Garamendi*. Why does an executive agreement require express preemption, while a statute does not? Ginsburg seemed concerned that the majority was inferring foreign policy from "precatory" language in the executive agreement and from statements made by members of the executive branch.[175] However, this is exactly what the Court does in finding implied *statutory* preemption—it looks at ambiguous statements of individual members of Congress contained in legislative history as well as precatory government briefs claiming conflicts after the fact. Thus, Ginsburg's dissent seems disjointed: implied preemption is not appropriate in the context of executive agreements, but is appropriate in the context of federal statutes. What justifies this distinction?

One explanation could be that Justice Ginsburg and the other dissenters were attempting to stem the tide of doctrinal creep. In *Garamendi*, for the first time since it decided *Zschernig*, the Court relied on that opinion to decide a federalism–foreign affairs case. In *Zschernig*, there was no express preemption of state law; in fact, the state law did not conflict with any federal law.[176] Similarly, in *Garamendi*, the executive agreement did not conflict expressly with the state law; rather, the only issue in the case was the disclosure requirement of HVIRA. As Justice Ginsburg pointed out in her dissenting opinion, "[i]nformation published in the HVIRA's registry could, for example, reveal to a Holocaust survivor residing in California the existence of a viable claim, which she could then present to ICHEIC for resolution."[177]

Perhaps the inference of preemption in *Garamendi* seemed too strained for the dissenters, and they saw "implied preemption" in this case as opening the door to the strengthening of dormant foreign affairs powers. This fear may have been especially acute since the *Garamendi* majority approved the displacement of state power with scant evidence of an implied conflict between the operation of the California law and the executive agreement. Thus, even though *Garamendi* was a conflict preemption case, it still revealed a bias in favor of federal occupation of foreign affairs with only a limited role for the states. But most importantly, after *Garamendi*, it is even less clear how much (or how little) the federal government must do before it can preempt state action.

Another explanation for the dissenters' discomfort with implied preemption by executive agreement versus federal statute could be that the states have no way to protect their interests when they are preempted through the executive branch's unilateral actions. As noted above, the President need not consult with

174. *Id.* at 436–43 (Ginsburg, Stevens, Scalia & Thomas, JJ., dissenting).

175. *Id.* at 440 n.4.

176. *See supra* text accompanying notes 114–38.

177. *Garamendi*, 539 U.S. at 434.

states, nor gain their approval, to enter into an executive agreement.[178] Conversely, it is assumed that states can, and do, protect their own interests within the Congress. The threat of Presidential action that does not consider the legitimate interests of state governments in protecting what may be particular interests of their citizenries could be one reason for being more wary of implied preemption by executive agreement. Requiring express preemption, then, may work to ensure that the executive branch has appropriately weighed countervailing state interests.

The progression of Supreme Court jurisprudence in foreign affairs preemption, however, reveals the Court's tendency to favor the federal government over the states. In this area, the Court is willing to displace state laws based on express and implied conflicts not only with federal law but also with executive agreements, and even when the situs of the conflict is in the mere statements of federal policy surrounding an agreement. The states' area of action, therefore, seems to be shrinking despite the benefits of state participation, which the Court often overlooks. Perhaps emboldened by the Court, the federal executive branch is now claiming the unprecedented power to direct state court procedural rules through unilateral action by the President.[179] It remains unclear, however, whether the Court will expand *Garamendi*'s holding, since the case was a 5-4 decision.

In light of this discussion, I now turn to an analysis, under the preemption doctrines, of inward- and outward-looking human rights initiatives.

B. Inward-Looking Legislation and Preemption

Inward-looking legislation poses fewer preemption problems than outward-looking legislation. First, inward-looking legislation is directed at a particular state or locality. The San Francisco CEDAW ordinance, for example, regulates San Francisco only and critiques only the city government agencies.[180] Its

178. *See supra* text accompanying notes 154–70.

179. For example, in 2004 the International Court of Justice held that certain Mexican nationals on death row in the United States who were denied access to their consular officials pursuant to the Vienna Convention on Consular Affairs were entitled to have their cases reviewed to determine if their rights were prejudiced in their criminal trials. *See* Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 12 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm. In response, President Bush instructed state courts to give effect to *Avena* in accordance with general principles of comity. Memorandum from President George W. Bush for the U.S. Attorney General (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html. Jose Medellín, a Mexican national on death row in Texas who was denied access to consular officials after his arrest, used this memorandum to demand a new hearing, as per the *Avena* decision, despite the fact that Texas state law would prohibit it. Memorandum from President George W. Bush to the U.S. Attorney General (Feb. 28, 2005), *cited in* Brief for the United States as Amicus Curiae Supporting Respondent at app. 2, Medellín v. Dretke, 125 S.Ct. 2088 (2005) (No. 04-5928). The case is now in the Texas Court of Criminal Appeals. Mark Donald, *Medellín Returns*, TEX. LAWYER, Sept. 19, 2005, at 1.

180. *See* discussion *supra* part I.A.1.

purpose is to improve local government, not to affect international change. In this sense, inward-looking legislation does not implicate foreign affairs at all.

International human rights law, however, "regulate[s] the *intra*-national relations between nations and their citizens."[181] Human rights treaties are part of an international domestic project, one that exemplifies the blurred line between what is foreign and what is not. Thus, San Francisco's CEDAW ordinance purports to implement an instrument designed as an agreement among sovereign nations. Lastly, the federal government has refused to ratify CEDAW; though the United States is a signatory to the treaty, it is not a party.[182] In this light, the ordinance implicates foreign affairs.

But in order to be preempted, whether through the exercise of field or conflict preemption, a law must have more than an "incidental" effect on foreign affairs. The Court has never articulated the parameters of this standard. However, at least one lower court interpreting *Zschernig* and *Crosby* suggests that state laws that attempt to structure a relationship with a foreign nation or that are critical, offensive, or embarrassing to another country would surpass the "incidental" label.[183] Inward-looking legislation does neither: its primary goal is entirely domestic, and its execution does not call for comparison or inquiry into another country's government. While inward-looking legislation may reference international bodies like the U.N. CEDAW Committee, these bodies cannot "retaliate" against the nation. For example, if San Francisco does not adopt all of the U.N. CEDAW Committee's pronouncements, this body cannot complain to the United States because the United States is not a party to the treaty. Neither can the States Parties "retaliate" against the United States since the nation has not agreed to take on any obligations under the Convention. San Francisco's adoption of CEDAW, therefore, raises neither the concerns expressed by John Jay in Federalist No. 3[184] nor the primary concerns expressed by the Supreme Court in *Zschernig*.[185]

San Francisco's ordinance is also not preempted by a conflict with a federal law or policy, as expressed by either the Congress or the President. No agreement or law expressly precludes this type of ordinance. An implied preemption may be found in the Senate's refusal to recommend ratification of CEDAW; it could be the general foreign policy of the United States not to support the treaty for any one of the reasons discussed in part I.A. However,

181. Bradley & Goldsmith, *supra* note 18, at 400. *But see* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1302 (2000) ("The purpose [of human rights treaties] from [the U.S.] perspective is not to restrict our own liberty of action, but to restrict the liberty of our treaty partners.").

182. *See* MALANCZUK, *supra* note 7.

183. *See* Mukaddam v. Permanent Mission of Saudi Arabia, 111 F. Supp. 2d 457, 473 (S.D.N.Y. 2000) *rev'd on other grounds sub nom.* Kato v. Ishihara, 360 F.3d 106 (2d Cir. 2004).

184. *See supra* text accompanying notes 99–100.

185. *See supra* text accompanying notes 115–22.

outside of the human rights context, there are several examples of states implementing international uniform laws before Senate ratification,[186] and there is no reason why states could not apply foreign laws within their own jurisdictions if they choose.[187]

Inward-looking legislation that purports to implement treaties that the United States has ratified, like the proposed New York City ordinance to adopt the principles of CERD,[188] are also constitutionally unproblematic. Many ratified human rights treaties, including CERD, contain federalism understandings stating that the Senate's assessment of the treaty allows the federal government to implement the treaty to the extent of its powers and the state governments to the extent of theirs.[189] Louis Henkin has criticized these understandings, arguing that once the federal government ratifies a treaty it has exclusive power to implement it.[190] But these understandings, at a minimum, evince the federal government's belief that this division of labor is consonant with our constitutional structure. Given the Court's affinity for federalism in the context of rights-promoting legislation,[191] it is unlikely that federalism understandings are legally meaningless.[192]

With ratified treaties, however, comes another consideration. Since, in this case, the United States has taken on international obligations, it has much more of an interest in ensuring that the terms of the treaty are interpreted uniformly. This concern, however, would affect states that are not meeting the lowest level of compliance with the federal government's interpretation of the treaty norms. States electing to be more rights-protective, within the confines of the Constitution, would probably not invoke the ire of Congress or the President.[193] Further, states can act as laboratories for norm development, transforming vague

186. *See, e.g.*, Ku, *supra* note 58, at 504–05 (discussing the Uniform Probate Code and the Uniform Trust Code).

187. This practice is completely legitimate, so long as states do not adopt laws that controvert the Constitution. *See* U.S. CONST. art. VI.

188. *See supra* note 35.

189. *E.g.*, U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992), ¶ II(5) at S8071.

190. Henkin, *supra* note 18, at 345–46.

191. *See* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1315 (2004) ("[T]he Court is hiding its value choices to limit civil rights laws and to protect business from regulation in decisions that seem to be about very specific doctrines of constitutional law.").

192. *Contra* Henkin, *supra* note 18, at 346 (arguing that federalism clauses "serve no legal purpose").

193. It is theoretically possible that strong rights-protective state practices may inform treaty interpretation by the relevant U.N. treaty body. *See* Powell, *supra* note 23, at 279. However, it is arguable that, within limits, the U.S. government is free to accept or reject the interpretations of the treaty bodies. It is also unlikely that "interaction" between rights-protective states and the treaty bodies would lead to any serious repercussions for the nation as a whole, though strong rights-protective states may induce a domestic backlash, dissuading acceptance of human rights norms by more conservative states.

international human rights principles into concrete law and policy. State implementation therefore strengthens compliance with these ratified treaties, and for experiments that go awry, the federal government can always preempt the states by passing laws under its foreign affairs power.[194]

C. Outward-Looking Legislation and Preemption

Outward-looking legislation poses more difficult constitutional issues because by definition it has more than an incidental effect on foreign affairs: its primary purpose is to influence external affairs to promote human rights. However, not all outward-looking legislation should be found unconstitutional. State laws that purport to affect foreign affairs may reflect the deeply held beliefs of the state's citizens that human rights should be valued, or the belief that the state should avoid the "moral taint" of supporting countries that violate human rights.[195] From this perspective, the state's interest in self-definition and autonomy is high, as these values are central to state sovereignty. The countervailing federal interest is in protecting the nation from externalities wrought by states acting independently. But not all outward-looking legislation will exact dangerous externalities, and as noted in part I.B, some outward-looking legislation may benefit the nation as a whole. Given these potential benefits, the importance of providing for state autonomy,[196] and the absence of clear language in the Constitution forbidding states from having any role in foreign affairs, at least some outward-looking legislation should pass constitutional muster.

The most significant hurdle for outward-looking legislation, however, is field preemption. Under a broad reading of *Zschernig*,[197] outward-looking legislation appears unconstitutional. However, while the Court has not overruled

194. Note that a "bad experiment" would have to be one that had foreign affairs implications for the federal government to preempt. Golove, *Treaty Making and the Nation, supra* note 181, at 1287–88 ("[T]he object of the treaty power is to enable the federal government to protect and advance the national interests by obtaining binding promises from other states regarding their conduct. To be within the scope of the treaty power, therefore, the purpose of a treaty must be to advance those interests—that is, our foreign policy interests. This does not mean that treaties may not incidentally regulate domestic matters. That is often the price paid for obtaining equivalent concessions from the other side, and the Supremacy Clause specifically recognizes the necessity for permitting such concessions by making the obligations we undertake in treaties the supreme law of the land. Nevertheless, the purpose of a treaty cannot be to adopt domestic standards just because the President and Senate believe them to be laudable. *A treaty is unconstitutional if it does not serve a foreign policy interest or if it is concluded not to affect the conduct of other nations but to regulate our own.*") (emphasis added).

195. *See supra* text accompanying notes 39–43.

196. As Erwin Chemerinsky points outs, the importance of state autonomy is linked to "empowering government at all levels." Chemerinsky, *supra* note 191, at 1315. Therefore, "[s]tates' rights are not an end in themselves. They are a means to the crucial objectives of advancing freedom and enriching the lives of those in the United States." *Id.* at 1316.

197. 389 U.S. 429 (1968).

Zschernig, its status is still unclear. The *Garamendi*[198] majority cited to *Zschernig* but did not use it as a basis for its decision. Instead, the Court avoided reexamining the latter case by finding an implied conflict between an executive agreement and the California law.[199] The Court may therefore be open to considering challenges to the broadest readings of *Zschernig* that would constitutionally preclude the states from impacting foreign affairs in the absence of a conflict with a federal foreign policy.

At least four justices implied that they would limit the dormant foreign affairs power to situations where "a state action reflect[s] a state policy critical of foreign governments and involve[s] sitting in judgment on them."[200] Note, however, that not all outward-looking legislation necessarily critiques a foreign government, as the California HVIRA law showed.[201] Therefore, legislation that encourages international legal process[202] or puts pressure on governments to form, monitor, or enforce existing rights-protective agreements[203] should survive dormant foreign affairs power, so long as the legislation does not actually conflict with a federal statute or executive agreement. This type of legislation does not implicate the concerns of the *Zschernig* court,[204] and the possibility of federal preemption satisfies the concerns underlying Federalist No. 3.[205]

Applying this rubric, *Garamendi* was wrongly decided and HVIRA was constitutional state legislation since it appears to pass the *Crosby* conflicts test.[206] First, as Justice Ginsburg pointed out, nothing about the disclosure requirement prevented claimants from availing themselves of the ICHEIC process; therefore, it was possible to comply with both HVIRA and the executive agreement. The majority, however, found that the means chosen by the California legislature conflicted with the means employed by the federal government because California required insurers to disclose more information

198. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

199. *Garamendi*, 539 U.S. at 419–20 ("It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here.") (footnote omitted).

200. *Id.* at 439 (Ginsburg, Stevens, Scalia & Thomas, JJ., dissenting) (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996) (internal quotations omitted)).

201. According to California, one of the purposes of HVIRA was "to encourage the development of a resolution to [unpaid claims under Nazi-era policies] through the international process." *Garamendi*, 539 U.S. at 411 (majority opinion) (quoting CAL. INS. CODE § 13801(f) (West 1999)). The state never critiqued modern-day Germany. *Id.* at 440 (Ginsburg, J., dissenting).

202. For example, a state law that directs state court judges to recognize decisions of the International Court of Justice would be supportive of international legal process.

203. The HVIRA legislation may be interpreted as placing pressure on the United States and Germany to ensure the effectiveness of the ICHEIC generally. *See supra* note 201.

204. *See* discussion *supra* part II.A.1.

205. *See supra* text accompanying notes 99–112.

206. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000). *See also supra* text accompanying notes 140–42.

than the ICHEIC rules required. Thus, for the majority, HVIRA failed the second prong of *Crosby*. But while the means analysis may support a conflict, it is unlikely that, had California adopted the ICHEIC rules, the Court would have been satisfied. Indeed, the Court seemed preoccupied with whether or not HVIRA was fundamentally an appropriate piece of state, versus federal, legislation—regardless of the law's content.[207] Nor is it clear why California should be bound by the procedural rules of an international body, even if the United States has agreed to support that body. This situation is unlike *Crosby*, where the means adopted by Massachusetts conflicted with the means *statutorily* adopted by the United States. Nothing in the executive agreement prevented California from enacting the disclosure law—only the preferences of the executive department did. The majority's application of conflict preemption in *Garamendi* was therefore at best erroneous and at worst disingenuous.

Outward-looking legislation, like the Massachusetts Burma law, that critiques a foreign government or seeks to change its practice raises still more problems. Even the dissenters in *Garamendi* would apply *Zschernig* to this type of situation, foreclosing state action in this area because of the possibility for strong externalities. The Court, however, should not presuppose that all outward-looking legislation of this sort would have the same chance of producing dangerous externalities. In fact, these types of state laws may actually benefit the federal government, since states may be able to support positions that the United States would, but cannot, as a matter of international relations; they may be able to act as "test cases" for certain measures before the federal government adopts them; or, as Halberstam argues, they may signal to the federal government the foreign policy desires of the public, or at least of a strong minority, encouraging the executive or Congress to respond.[208] Because of the potential benefits of state participation in foreign affairs and because the judiciary is not institutionally competent to weigh the costs and benefits of a particular piece of foreign affairs legislation in the context of the larger picture of international relations, courts should not find preemption, even of outward-looking legislation directed at influencing foreign nations, unless the federal government has positively ousted the states, either explicitly or implicitly.[209]

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207. The majority noted that California did not have a proper interest in its legislation, for while consumer protection would have been within the state's traditional regulatory powers, the settlement of Holocaust-era claims—the real subject matter of HVIRA—was not. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 421 (2003) ("Vindicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.").

208. Halberstam, *supra* note 69, at 1040 ("By challenging the absence of federal foreign policy on an issue, state and local actors may raise national awareness of an issue, place issues on the agenda of federal officials[,] or even induce the federal government to take action on behalf of the Nation.").

209. Certain commentators would require express preemption. *E.g.*, Chemerinksy, *supra* note 191, at 1316. I can find no justification, however, for disallowing implied preemption in

This would, of course, place a heavy burden on the federal government, but this burden is not undue, especially given the benefits of state participation and the important state autonomy interests in enacting outward-looking legislation.[210]

Just as there are limits to the Court's power, however, there are limits to state power. In *Garamendi*, the Court began to delineate those limits in the context of foreign affairs. While the Court did not overturn *Zschernig*, it did make some attempt, in a footnote, to stake out a compromise position between field and conflict preemption that would afford greater respect to state interests.[211] Considering Justice Harlan's concurrence in *Zschernig*, Justice Souter, writing for the majority, posits that when a state, legislating in an area of "traditional competence," incidentally affects foreign affairs, the Court should utilize conflict preemption, rather than field preemption.[212] If, however, a state is not addressing a matter within its "traditional competence," but is only taking a position on foreign policy, then field preemption would be the appropriate doctrine.[213]

After *Garamendi*, then, if a state legislates outside of an area of "traditional competence" and that law affects foreign affairs, the Court will almost certainly find preemption. The majority cites *Hines* to support this result,[214] but the problems with citing *Hines* for this proposition as well as the textual problems with this assertion are discussed above.[215] Even the majority seemed unsure of whether field preemption would be the correct doctrine to apply, stating only hesitatingly that it "*might* be the appropriate doctrine," but not deciding the issue or strongly endorsing a conclusion.[216] Halberstam notes that field preemption is a product of federal distrust of state participation in foreign relations.[217] Yet as discussed above, state participation may produce benefits for the nation,[218] thereby presenting an argument against field preemption, especially given the doctrine's unclear constitutional grounding.

The question of whether the state is acting within its "traditional competence," however, still has resonance because it may strike the appropriate balance between state and federal interests. States have a legitimate interest in promoting the moral values of their constituents, fulfilling the political desires of their polities, and vindicating the rights of their citizens. While this may bleed

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cases where conflicts between state law and federal policy are clear yet not expressly stated, as in *Crosby*. While Chemerinsky may be correct that the Court uses federalism jurisprudence to mask its own value choices, *see id.* at 1315, it does not necessarily follow that the Court should be disciplined by curtailing its jurisprudential power rather than through any other means.

210. *See* discussion *supra* part I.B. and text accompanying notes 39–42.

211. *Garamendi*, 539 U.S. at 419 n.11.

212. *Id.*

213. *Id.*

214. *Id.*

215. *See supra* text accompanying notes 128–31.

216. *Garamendi*, 539 U.S. at 419 n.11 (emphasis added).

217. Halberstam, *supra* note 69, at 1021–26.

218. *Id.* at 1067. *See also* discussion *supra* part I.B.

into an interest in promoting human rights abroad, that interest is ancillary to how the state views itself as an autonomous unit or as an actor in the U.S. federal system trying to influence federal foreign policy. The federal government has an interest in maintaining good political and economic relations with other nations, promoting national security, and protecting the rights of U.S. citizens abroad. If states are given too much freedom to influence foreign affairs through laws critical of foreign governments, the federal government may find itself upstaged in the international arena. Too much plurality under these circumstances may lead to embarrassment and/or hostility. The "traditional competence" test may therefore be a useful proxy for determining the baseline, minimum strength of a state's interest in any particular piece of legislation. If the "traditional competence" test is not met, a presumption in favor of preemption may be appropriate.[219]

If "traditional competence" is met, the majority in *Garamendi* suggests "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[220] Again, this formulation accords greater respect to states since it does not presume that the existence of *any* conflict between the state and the federal government will be enough to override the state law. Instead, the greater the state's interest in a piece of legislation, the more substantial the conflict must be. Strong state interests may therefore require express conflicts whereas weaker state interests might be overcome by implied conflicts alone. Of course, the Court does not clarify the parameters or application of this particular balancing test, but it at least leaves possibilities for states interested in outward-looking legislation.

CONCLUSION

"[H]uman rights begin . . . [i]n small places, close to home. . . . Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."[221]

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219. Difficulties determining whether something is within a state's "traditional competence" may arise, but these cases would be on the margins. While it is true that the Court's resolution of the "traditional competence" question may reflect its ultimate judgment on whether the law is justifiable, as in *Garamendi*, there is no greater fear of this type of results-oriented reasoning in this situation than in any other situation where the Court must apply judicially crafted rules. Further, I would argue that any determination of what is in a state's "traditional competence" should be influenced by the continued blurring between "foreign" and "domestic."

220. *Garamendi*, 539 U.S. at 420. Note that Justice Souter does not explicitly abandon the "incidental effect" test. My proposal, however, is that the Court abandon the incidental effect test and use only a traditional competence test.

221. Eleanor Roosevelt, Remarks to the United Nations Commission on Human Rights (Mar.

At the end of World War II, the United States championed the creation of international human rights norms;[222] yet more than half a century later, it continues to ignore their implementation at home. Looking for solutions to persistent race and sex discrimination and disparities in health care, wages, and educational opportunities in the United States, domestic activists have seen international human rights norms as tools for rethinking and rearticulating social problems and re-imagining remedies for rights violations.

At the same time, transnational activism has alerted local communities to ways in which their actions at home can affect human rights situations abroad. As a result, some communities are attempting to use this knowledge reactively, as with the Massachusetts Burma law, and proactively, as with the California HVIRA. These initiatives are consequences of the increased blurring between what is foreign and what is domestic. So while I have termed them "outward-looking" strategies, it may be more accurate to see these initiatives as a challenge to what is, in fact, "inward-looking."

This article sought to examine the constitutional limits on state and local governments' ability to utilize both inward- and outward-looking human rights strategies. Through an analysis of foreign affairs preemption doctrine, I suggested that inward-looking initiatives raise fewer constitutional concerns than outward-looking initiatives, but that not all outward-looking initiatives—even though they may have more than an "incidental effect" on foreign affairs—should be deemed unconstitutional. Though these latter strategies may compromise the nation's ability to speak with "one voice," there is evidence that the unitary state is already a fanciful myth.[223] Further, there are several benefits to outward-looking legislation, including increased transnational networking between state and local legislators and their foreign counterparts, and more participatory, democratic deliberation in foreign policy as local communities signal their foreign policy preferences to the federal government.

Most importantly, however, from a human rights advocacy standpoint, both inward- and outward-looking strategies reveal the evolving construction of a human rights culture in the United States. The discourse of human rights is finally *beginning* to have meaning in small places close to home. Certainly more work must be done for international human rights to become truly incorporated into the U.S. public domain. However, state and local initiatives are helping to

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27, 1958), *in* RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 166 (Suzy Platt ed., 1989).

222. The United States, and in particular Eleanor Roosevelt, who chaired the first Human Rights Commission, was instrumental to the drafting and creation of the Universal Declaration of Human Rights. *See* Press Release, U.N. Department of Public Information, The Universal Declaration of Human Rights: A Magna Carta for All Humanity, U.N. DOC. DPI/1937/A (Dec. 1997), http://www.unhchr.ch/udhr/miscinfo/carta.htm.

223. *See* Ku, *supra* note 58, at 476–78 (arguing that states have always played a role in implementing international law in the United States). *See also* SLAUGHTER, *supra* note 75, at 12–13 (explaining that the idea of a unitary state in international law is also a myth).

make human rights more accessible to the ordinary person. They signify the creation of a human rights culture from the bottom up, one that has the potential to make human rights more legitimate, concrete, and ultimately, more real.