

# World War II Compensation and Foreign Relations Federalism

By  
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In the past several years, numerous suits have been filed in U.S. courts seeking compensation for personal injury or loss of property relating to events associated with World War II. These suits have been brought against sovereign defendants, such as Germany and Japan, as well as private companies, such as companies that allegedly used slave labor during the War. In this essay, I consider some of the implications of this litigation for the relationship between federalism and foreign relations.

The starting point for my analysis is an article by Justice William Brennan that, at first glance, might seem to have little relevance to the topic. This article, published in the *Harvard Law Review* in 1977, is entitled *State Constitutions and the Protection of Individual Rights*.<sup>1</sup> Brennan argued in that article that, notwithstanding the dramatic expansion in federal rights during the Warren Court era, the protection of individual rights should not be viewed as the exclusive province of the national government. State constitutions, he argued, should be viewed as a source of independent—and potentially broader—individual rights. Under our federalist system, it is entirely proper, said Brennan, for the states to “thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”<sup>2</sup> This aspect of federalism was becoming increasingly important, Brennan explained, because the Supreme Court—by that time the Burger Court rather than the Warren Court—was becoming increasingly restrictive in its construction of federal rights.<sup>3</sup>

The conception of federalism outlined in Justice Brennan’s article, pursuant to which the states can take a more progressive role than the federal government in protecting rights, is relevant to a growing conflict in modern foreign relations

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1. See William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. *Id.* at 503.

3. *Id.* at 495-98. In a later article, Justice Brennan approvingly noted that “the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by decisions of the Supreme Court majority.” William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986).

law. This conflict concerns two commitments, which I will call “one voice nationalism” and “human rights internationalism.” Many international lawyers and scholars purport to adhere to both of these commitments. These commitments, however, are increasingly at odds with one another, a phenomenon evident in some of the World War II compensation cases, especially the cases litigated in California.

I begin this essay by describing one voice nationalism and some of the Founding and Supreme Court materials often cited in support of it. I then describe two of the doctrinal components of this view—dormant foreign affairs preemption and the federal common law of foreign relations. As I explain, these doctrines have little support in the text and structure of the Constitution, the actual practices of the political branches, and Supreme Court precedent. Next, I describe human rights internationalism, and I explain how proponents of this view traditionally also have been committed to one voice nationalism. I then use the World War II compensation cases to illustrate a growing conflict between these two commitments. Drawing on Brennan’s conception of federalism, I conclude by suggesting several reasons why proponents of human rights internationalism might want to reconsider their allegiance to one voice nationalism.

## I.

### ONE VOICE NATIONALISM

Many foreign affairs scholars believe that federalism is, or at least should be, irrelevant to foreign affairs.<sup>4</sup> Under this view, the nation must speak with one voice, not fifty voices, if it is to operate effectively in the international realm. In addition, if individual states are allowed to engage in foreign affairs activities, the argument goes, they will be in a position to impose harmful externalities on the entire nation—for example, by triggering retaliatory sanctions against the United States. For these reasons, as Professor Louis Henkin contends in his influential book on foreign affairs law, “Foreign relations are national relations.”<sup>5</sup> This is the view I am calling “one voice nationalism.”

Proponents of one voice nationalism often rely on broad statements made during the Founding period.<sup>6</sup> The constitutional Founders generally agreed that, during the Articles of Confederation period, the national government had not

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4. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149-69 (2d ed. 1996); Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or a Sorry State of Affairs?*, 26 *HASTINGS CONST. L.Q.* 307 (1999); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 *U. COLO. L. REV.* 1277 (1999); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 *MICH. L. REV.* 1075 (2000); Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824 (1998); Gerald Neuman, *The Global Dimension of RFRA*, 14 *CONST. COMMENT.* 33 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393 (1997).

5. HENKIN, *supra* note 4, at 149-50.

6. See, e.g., Denning & McCall, *supra* note 4, at 307, 325, 370; Golove, *supra* note 4, at 1319; Koh, *supra* note 4, at 1861; Stephens, *supra* note 4, at 404-08.

been given sufficient power to conduct foreign relations.<sup>7</sup> The Founders thus often referred to the need for more national control in this area. In defending the constitutional grants of foreign affairs powers to the national government, James Madison stated in *The Federalist* that, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations."<sup>8</sup> Similarly, in defending certain grants of federal court jurisdiction over foreign affairs matters, Alexander Hamilton stated that "the peace of the WHOLE ought not to be left at the disposal of a PART."<sup>9</sup> These statements are often quoted out of context to suggest that the Constitution disallows the states from doing anything that might affect foreign relations.

Supporters of one voice nationalism also typically rely on broad Supreme Court dicta from decisions during the late nineteenth century and the early to mid-twentieth century.<sup>10</sup> They rely on the Court's statement in the 1889 *Chinese Exclusion Case* that, "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."<sup>11</sup> And they quote *United States v. Belmont*, decided in 1942, for the proposition that, "in respect of our foreign relations generally, state lines disappear. As to such purpose . . . the State does not exist."<sup>12</sup> Professor Henkin, for example, ties this quotation from *Belmont* to the broad statements from the Founding, stating that, "At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states 'do not exist.'"<sup>13</sup> The broad statements in these decisions, however, were all made in the context of applying federal enactments, such as a treaty, executive agreement, or statute, rather than some sort of dormant federal preemption.

Some aspects of national supremacy in foreign affairs are uncontroversial, in large part because they are supported by the text of the Constitution. Essentially everyone agrees that Congress has broad authority to regulate in the foreign affairs area, based on, among other things, its power to regulate foreign commerce, its power to define and punish offenses against the law of nations, and its power to do what is necessary and proper to carry into execution both its powers and the powers vested in the other branches.<sup>14</sup> Thus, for example, Congress has, in the Foreign Sovereign Immunities Act, strictly limited the ability of

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7. See generally BRADFORD PERKINS, *THE CREATION OF A REPUBLICAN EMPIRE, 1776-1865* (1993); FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973).

8. THE FEDERALIST, No. 42, at 264 (Madison) (Clinton Rossiter ed., 1961).

9. *Id.*, No. 80, at 476 (Hamilton).

10. See, e.g., HENKIN, *supra* note 4, at 149; Golove, *supra* note 4, at 1319; Koh, *supra* note 4, at 1847; Stephens, *supra* note 4, at 438-40.

11. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

12. *United States v. Belmont*, 301 U.S. 324, 331 (1937). See also *United States v. Pink*, 315 U.S. 203, 233 (1942) (stating that "power over external affairs is not shared by the States; it is vested in the national government exclusively"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

13. HENKIN, *supra* note 4, at 150.

14. See U.S. Const. art. I, § 8, cls. 3, 10, 18.

litigants to bring claims in either state or federal courts against foreign sovereigns.<sup>15</sup> Similarly, although there is debate over the precise scope of the treaty power,<sup>16</sup> essentially everyone agrees that the President and Senate have broad authority to make international agreements, which, if self-executing, operate as supreme federal law.<sup>17</sup> Finally, everyone agrees that states are forbidden from engaging in the foreign affairs activities expressly prohibited to them under Article I, Section 10 of the Constitution, such as entering into treaties and engaging in war.<sup>18</sup>

But one voice nationalism goes much further than this. Under this view, the national government has supremacy in foreign affairs matters even in the *absence* of a statute, treaty, or express constitutional prohibition. This view has many doctrinal components, only two of which I discuss here. First, one voice nationalists argue that state actions that intrude on foreign affairs should be invalidated by the federal courts on the ground that they are preempted by the dormant foreign affairs powers of the national government. Second, they argue that cases implicating foreign affairs should be heard by the federal courts, even if the cases do not involve diverse parties or federal claims, on the theory that these cases implicate a federal common law of foreign relations.

Neither of these doctrines—dormant foreign affairs preemption or the federal common law of foreign relations—is an inevitable reading of the Constitution, federal statutory law, or Supreme Court precedent. As for dormant foreign affairs preemption, the constitutional text does not contain any general foreign affairs power akin to the general commerce power granted to Congress. Moreover, as noted above, the Constitution expressly identifies the state foreign affairs activities that are prohibited and gives Congress and the federal treaty makers broad power to preempt other state foreign affairs activities if they so choose. A natural implication of this structure is that state foreign affairs activities are not preempted unless they are in conflict with a constitutional prohibition, a federal statute, or a treaty. This implication makes sense from a federalism standpoint, because the states are represented in Congress but not in the federal courts.<sup>19</sup>

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15. A number of World War II compensation cases have been dismissed on the basis of the Foreign Sovereign Immunities Act. *See, e.g.,* *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001); *Haven v. Polska*, 215 F.3d 727 (7th Cir. 2000); *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001); *Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001); *Wolf v. Fed. Republic of Germany*, 1995 U.S. Dist. LEXIS 5860 (N.D. Ill. 1995).

16. For a recent debate over whether the treaty power should be subject to federalism limitations, compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998), and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000), with Golove, *supra* note 4.

17. *See* U.S. Const. art. II, § 2, cl. 2; *see also id.* art. VI, cl. 2. For the requirement of self-execution, *see Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

18. *See* U.S. Const. art. I, § 10, cls. 1, 3.

19. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317 n.19 (1981) (noting that “the States are represented in Congress but not in the federal courts”).

Furthermore, recent scholarship suggests that historical materials relating to the constitutional Founding support this structural implication.<sup>20</sup>

Nor is there much precedent supporting the dormant preemption doctrine. The Supreme Court has recognized dormant foreign affairs preemption only once, in its 1968 *Zschernig* decision, in which it invalidated an Oregon inheritance statute that in effect barred inheritance of Oregon property by heirs in Communist countries.<sup>21</sup> Although the Court was unclear about the precise test for dormant foreign affairs preemption, it did state that the Oregon statute had “more than ‘some incidental or indirect effect in foreign countries,’” and that the statute had “great potential for disruption or embarrassment.”<sup>22</sup> As many scholars have noted, the *Zschernig* decision created new constitutional doctrine.<sup>23</sup> The Supreme Court has not applied this doctrine in the thirty-three years since *Zschernig*, and its 1994 international tax decision, *Barclays Bank*, contains reasoning that is at least in tension with the reasoning of *Zschernig*.<sup>24</sup> In particular, the Court in *Barclays Bank* suggested that arguments about the need for “one voice” in foreign relations should generally be directed at Congress, not the courts. As the Court stated, “we leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.”<sup>25</sup>

There is similarly little textual or historical support for the so-called federal common law of foreign relations. Unlike some areas of federal common law, such as admiralty law and the law governing disputes between states, the federal common law of foreign relations is not tied to any particular grant of Article III jurisdiction. Nor was “foreign relations” recognized as a distinct body of federal common law throughout most of U.S. history. In addition, this doctrine appears to conflict with the Supreme Court’s longstanding construction of the federal question jurisdiction statute,<sup>26</sup> pursuant to which the federal law issue in a case must appear on the face of the plaintiff’s well-pleaded complaint.<sup>27</sup> That a case implicates foreign relations does not by itself show that the plaintiff’s case arises under federal law.<sup>28</sup>

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20. See, e.g., Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999).

21. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

22. *Id.* at 434-35 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

23. See, e.g., HENKIN, *supra* note 4, at 163; Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L L. 821, 825 (1989); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1649 (1997).

24. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

25. *Id.* at 330.

26. 28 U.S.C. § 1331.

27. See *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908).

28. See *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001); *In re Tobacco/Governmental Health Care Costs Litigation*, 100 F. Supp. 2d 31, 34-38 (D.D.C. 2000). There is a “complete preemption” exception to the well-pleaded complaint rule. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22-24 (1983); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968). The Court in *Zschernig* did not hold, however, that all state laws implicating foreign affairs are preempted. Moreover, the decisions invoking the federal common law of foreign relations for jurisdictional purposes do not appear to be applying *any* preemption; rather, they are simply holding that the case belongs in federal court.

The Supreme Court decision that one voice nationalists typically cite in support of the idea of a federal common law of foreign relations is the 1964 *Sabbatino* decision.<sup>29</sup> The federal common law holding in *Sabbatino*, however, was limited to the act of state doctrine, a doctrine that the Court concluded was based on “‘constitutional’ underpinnings.”<sup>30</sup> The Supreme Court has subsequently limited even the act of state holding of *Sabbatino*.<sup>31</sup> Moreover, there was diversity jurisdiction in *Sabbatino*, and the Court had no reason to suggest, and did not suggest, that a case implicating foreign affairs automatically falls within federal question jurisdiction. The *Sabbatino* decision therefore does not provide support for a jurisdictional federal common law of foreign relations.

One voice nationalism is also inconsistent with the actual practices of the federal political branches. In many foreign relations situations, the political branches have given significant weight to federalism and states’ rights concerns. For example, when ratifying human rights treaties, the President and Senate routinely attach federalism understandings providing that the treaties will be implemented in a manner consistent with our federal system of government.<sup>32</sup> They also attach non-self-execution declarations, thereby preventing the treaties from directly preempting state law.<sup>33</sup> Similarly, in a recent case involving a Paraguayan on death row in Virginia who was claiming that his rights had been violated under a treaty, both the State Department and Justice Department maintained that principles of federalism limited the ability of the national government to override state decisions on criminal punishment, even to enforce a treaty.<sup>34</sup> To take another recent example, the statutes implementing the General Agreement on Tariffs and Trade (“GATT”) and the North American Free Trade Agreement (“NAFTA”) provide that no state law may be declared invalid because of a conflict with these treaties except in a suit brought by the federal government.<sup>35</sup> As these examples demonstrate, federalism has a significant effect on U.S. foreign relations law.

Finally, it is far from clear that the federal courts have the necessary information, expertise, and democratic accountability to make the foreign relations judgments called for by these doctrines. Federal courts may not be well-situated, for example, to determine whether a state activity or lawsuit is likely to

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29. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). See, e.g., Koh, *supra* note 4, at 1833-34; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 375-76 (1997); Stephens, *supra* note 4, at 440-45.

30. *Banco Nacional de Cuba*, 376 U.S. at 423.

31. See, e.g., *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990).

32. See, e.g., U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, S. Res. 102d Cong., 138 *CONG. REC. S 4784(II)(5)* (1992) (stating that “the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments”).

33. See, e.g., *id.* at (III)(1).

34. See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 *STAN. L. REV.* 529, 562 (1999).

35. See 9 U.S.C. § 3512 (1994) (implementing GATT); 19 U.S.C. § 3312 (1994) (implementing NAFTA).

undermine the national government's conduct of foreign relations. From the perspective of separation of powers, therefore, a strong argument can be made that the jurisdictional and preemption decisions implicated by these doctrines should be left to Congress in the first instance.

## II.

### CONFLICT WITH HUMAN RIGHTS INTERNATIONALISM

Proponents of one voice nationalism are also typically proponents of broad domestic enforcement and promotion of international human rights standards, a view that I am calling "human rights internationalism." Under this view, the United States should ratify the major human rights treaties, and allow private enforcement of these treaties in its courts. Proponents of this view therefore criticize the United States' attachment of non-self-execution declarations to its ratification of the human rights treaties, which prevent these treaties from being judicially enforceable.<sup>36</sup> In addition, under this view the United States should allow for broad judicial enforcement of customary norms of human rights law, with respect to human rights abuses both inside and outside the United States.<sup>37</sup>

At least until recently, academic commentators have perceived one voice nationalism as generally in alignment with human rights internationalism. Indeed, many academic proponents of human rights internationalism have invoked the tenets of one voice nationalism to argue for the preemption of state laws that are inconsistent with customary international human rights standards.<sup>38</sup> Other commentators have argued for a broad reading of federal court jurisdiction under the Alien Tort Statute,<sup>39</sup> pursuant to which federal courts would have jurisdiction over international human rights claims from around the world, regardless of any connections to the United States.<sup>40</sup> And still other commenta-

36. See, e.g., Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991). For a defense of the non-self-execution declarations and other conditions that the United States has imposed on its ratification of human rights treaties, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

37. See, e.g., Koh, *supra* note 4; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Stephens, *supra* note 4.

38. See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Henkin, *supra* note 37; Koh, *supra* note 4; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999); Stephens, *supra* note 4.

39. 28 U.S.C. § 1350.

40. See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Ken-

tors invoke one voice nationalism to argue that there are neither subject matter nor federalism limits on the treaty power, such that there are effectively no limits on the ability of the treaty makers to regulate matters beyond the scope of Congress' regulatory powers.<sup>41</sup>

In recent years, however, there have been increasing strains between one voice nationalism and human rights internationalism. This is so for two reasons. First, whether constitutionally authorized to do so or not, neither the political branches nor the courts have shown much inclination to intrude on state prerogatives in an effort to enforce international human rights standards. The U.S. treaty makers, for example, have declined to give human rights treaties the status of preemptive federal law. And courts have not been willing to give preemptive force to customary international law. As a result, one voice nationalism is not, in fact, advancing the cause of domestic enforcement of international human rights standards.

Second, and more importantly, some states have shown more inclination than the federal government to promote international human rights standards. The federal government has declined to ratify a number of important human rights treaties and has declined to pass implementing legislation for some of the human rights treaties that it has ratified.<sup>42</sup> In addition, it has often responded to human rights problems around the world in limited and muted ways.

Some states and local governments, by contrast, have taken a more aggressive position on international human rights issues. This phenomenon was evident in a recent case involving sanctions imposed by the Commonwealth of Massachusetts. In response to human rights violations in Burma (now called Myanmar), Massachusetts enacted a statute generally prohibiting its state government from purchasing goods or services from anyone doing business with that country. Relying on *Zschernig*, as well as the above-discussed Founding rhetoric and Supreme Court dicta, the U.S. Court of Appeals for the First Circuit held that this state statute was preempted by the dormant foreign affairs powers of the national government.<sup>43</sup> The Supreme Court subsequently affirmed the First Circuit on narrow grounds, concluding that the Massachusetts statute was preempted by a more limited federal Burma sanctions statute.<sup>44</sup> The Court ex-

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neth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985).

41. See, e.g., Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012 (1968); Flaherty, *supra* note 4; Golove, *supra* note 4; Neuman, *supra* note 4; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmts. c, d (1987).

42. For example, the United States has not ratified the International Covenant on Economic, Cultural, and Social Rights, the Convention on the Rights of the Child, or the Convention on the Elimination of All Forms of Discrimination Against Women. Although it has ratified the International Covenant on Civil and Political Rights, it has not enacted any legislation to implement that treaty.

43. National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999).

44. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). For discussions of the Supreme Court's statutory preemption holding, see Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175; Edward Swaine, *Crosby as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA



pressly declined to reach the dormant preemption issue,<sup>45</sup> so the scope of *Zschernig* remains unsettled.<sup>46</sup>

The Massachusetts case illustrates how one voice nationalism can conflict with human rights internationalism. In particular, the broad exclusion of state and local governments from foreign affairs that is envisioned by one voice nationalism may prevent them from acting more progressively than the federal government in protecting international human rights standards and promoting human rights reform.

### III.

#### WORLD WAR II COMPENSATION CASES

This phenomenon—more progressive enforcement of human rights standards at the state and local levels than at the federal level—is also evident in some of the recent World War II compensation cases. A few years ago, for example, a number of U.S. states and municipalities threatened to impose sanctions on Swiss banks unless they resolved pending lawsuits involving holocaust-era accounts. In the face of this pressure, the banks agreed to settle the suits for \$1.25 billion.<sup>47</sup> More recently, in 1999, California enacted two sets of statutes relating to World War II reparations. One statute creates a right of compensation for slave and forced labor during World War II, and extends the statute of limitations period for seeking such compensation until the end of 2010.<sup>48</sup> The other statute, the Holocaust Victim Insurance Relief Act of 1999 and related provisions, requires insurance companies doing business in California to report on any policies they issued in Europe between 1920 and 1945, gives Holocaust victims and their heirs residing in California a right to sue under the policies, and extends the statute of limitations period for recovering under such policies until 2010.<sup>49</sup>

A number of cases have been brought in California state court under the slave and forced labor statute. These cases, which involve claims by former

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L.J. 11 (2000); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001); see also *Symposium, New Voices on the New Federalism*, 46 VILL. L. REV. 907-1395 (2001) (containing several essays discussing *Crosby*).

45. 530 U.S. at 374 n.8.

46. A precursor to the debate over the validity of the Massachusetts Burma statute was a similar debate in the 1980s over the validity of various state and local sanctions against South Africa. Approximately twenty-three states and eighty municipalities during this period enacted laws either restricting government investment in corporations doing business in South Africa, or restricting government purchases from companies doing business in South Africa. The Supreme Court never addressed the validity of these measures, and the lower courts were divided on the issue. See generally Bilder, *supra* note 22; Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987); Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986).

47. John J. Goldman & Henry Weinstein, *2 Swiss Banks to Pay 1.25 Billion in Holocaust Suits*, L.A. TIMES, Aug. 13, 1998, at A1; Amy Waldman, *Holocaust Accord Ends Plan for Sanctions*, N.Y. TIMES, Aug. 14, 1998, at A1.

48. CAL. CIV. PROC. CODE § 354.6.

49. CAL. INS. §§ 13800-13807, and accompanying regulations, CAL. CODE REGS. tit. 10 §§ 2278-2278.5; CAL. CIV. PROC. CODE § 354.5.

prisoners of war against Japanese companies, have often been removed by the defendants to federal court. The theory behind the removal is that, even though these cases involve state law claims, and even though a federal defense is not enough for removal, the cases implicate the federal common law of foreign relations and thus fall within the statutory subject matter jurisdiction of the federal courts. At least two federal district courts in California have accepted this removal argument.<sup>50</sup> These courts have reasoned that these cases implicate important foreign relations interests of the United States and thus should be deemed to fall within federal question jurisdiction. As one court explained: "If an examination of the complaint shows that the plaintiff's claims necessarily require determinations that will directly and significantly affect United States foreign relations, a plaintiff's state law claims should be removed."<sup>51</sup>

Some of the removed cases were consolidated before a single district judge, and the judge subsequently dismissed the claims. The judge first dismissed claims by plaintiffs who were American or Allied soldiers in World War II and were held as Japanese prisoners of war, on the ground that their claims were preempted by the 1951 peace treaty with Japan, which broadly waives reparations claims of the Allied powers and their nationals relating to actions taken by Japan and its nationals during the war.<sup>52</sup> In a subsequent opinion, the judge dismissed claims by Filipino prisoners, finding that these claims also were preempted by the 1951 treaty, because the Republic of the Philippines had ratified the treaty and was specifically named in it.<sup>53</sup> Finally, the judge dismissed the remaining claims—by former prisoners of war from Korea and China—on the ground that the claims were subject to dormant foreign affairs preemption.<sup>54</sup> Neither Korea nor China were signatories to the 1951 treaty, so the court concluded that these plaintiffs' claims, unlike the claims of the U.S., Allied, and Filipino prisoners, were not subject to treaty preemption. Relying on *Zschernig*, however, the court concluded that the California slave and forced labor statute was "unconstitutional because it infringes on the exclusive foreign affairs power of the United States."<sup>55</sup>

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50. See *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000); *Poole v. Nippon Steel Corp.*, No. 00-0189 (C.D. Cal. Mar. 17, 2000). In at least one of the cases, removal was not allowed. See *Jeong v. Onoda Cement Co.*, 2000 U.S. Dist. LEXIS 7985 (C.D. Cal. May 18, 2000). The court reasoned that the well-pleaded complaint rule was not satisfied because "no element of [the plaintiff's] claims depends on federal law." *Id.* at \*20.

51. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 943.

52. *Id.* at 948.

53. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1153 (N.D. Cal. 2001).

54. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal., 2001). A somewhat similar pattern is evident in some of the recent international environmental law cases. These cases are brought in state court under state law theories, removed by the defendants on the basis of a federal common law of foreign relations, and then often dismissed by federal judges under doctrines that might not have been available in state court, such as a federal *forum non conveniens* doctrine or a vague "comity of nations" doctrine. See, e.g., *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

55. *In re World War II Forced Labor Litigation*, 164 F. Supp. 2d at 1168.

A federal district court also accepted the dormant preemption argument with respect to the reporting provisions of the California insurance statute.<sup>56</sup> Citing the broad one voice nationalism rhetoric from the Founding and Supreme Court dicta, as well as the First Circuit's decision in the Massachusetts Burma case, the court enjoined enforcement of the California statute. Among other things, the court concluded that the statute "interferes with the national government's exclusive power over external affairs."<sup>57</sup> The Ninth Circuit, however, recently reversed this decision.<sup>58</sup> Among other things, the Ninth Circuit adopted a narrow view of dormant foreign affairs preemption, in part because of the Supreme Court's decision in *Barclays Bank*.<sup>59</sup> Although distinguishable in some ways, the Ninth Circuit's decision is in tension with the First Circuit's decision in the Massachusetts Burma case. More importantly, the Ninth Circuit's decision confirms that there is nothing inevitable about one voice nationalism; it is quite plausible, as the Ninth Circuit recognized, to allow the states a role in foreign affairs, subject to the preemptive actions of Congress and the treaty makers.

These cases, like the Massachusetts Burma case, show how increased state involvement in international human rights issues has created a conflict between human rights internationalism and one voice nationalism. Lawyers are making one voice nationalism arguments in this context in an effort to override state efforts to address international human rights issues. One voice nationalism may thus have the effect of undermining rather than promoting domestic incorporation and enforcement of international human rights standards.

#### IV.

##### RECONSIDERING ONE VOICE NATIONALISM

Given this conflict, human rights advocates may want to take a cue from Justice Brennan. Now that the Executive Branch and the Supreme Court are relatively conservative on international human rights issues, those who favor broad domestic enforcement of international human rights standards may not want to look solely to Washington. Just as Justice Brennan encouraged advocates of domestic individual liberties to look to the states in the face of increasing conservatism in Washington, advocates of international human rights may want to do the same.

This is not to say that the California statutes should be found valid. As noted above, the federal government has broad power to preempt state laws relating to foreign affairs. Perhaps the treaty makers, Congress, or the President have preempted the California statutes—through, for example, the 1951 peace

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56. See *Gerling Global Reins. Corp. of America v. Quackenbush*, 2000 U.S. Dist. LEXIS 8815 (E.D. Cal. June 9, 2000).

57. *Id.* at \*30.

58. See *Gerling Global Reins. Corp. of America v. Low*, 240 F.3d 739, 753 (9th Cir. 2001). In that decision, the Ninth Circuit disagreed with the district court's dormant preemption holding, but it left the district court's preliminary injunction in place pending the district court's consideration on remand of the defendants' due process challenge to the California statute.

59. See *id.*; see also *id.* at 746-48 (discussing *Barclays Bank*).

treaty with Japan. In addition, states are obligated to comply with the federal Constitution, and there may be due process problems associated with certain state efforts to regulate human rights practices in other countries.<sup>60</sup> Indeed, a district court recently concluded that the California Holocaust insurance statute violates due process,<sup>61</sup> and the Eleventh Circuit found a violation of due process with respect to a Florida insurance statute.<sup>62</sup> Regardless of the validity of these particular statutes, many state laws that aim to protect international human rights will not be subject to treaty, statutory, or constitutional preemption.

If these state human rights protections do create foreign relations problems, Congress is fully equipped to preempt them. Although many legislative needs may escape Congress' attention, state activities that generate foreign relations difficulties are not likely to be one of them, since both foreign nations and the Executive Branch can be counted on to inform Congress of their concerns. Even when Congress does act to preempt, the state or local measure may have had the useful effect of putting a human rights issue on the national agenda, as may have happened with respect to South Africa, the Massachusetts Burma statute, and the World War II compensation cases.

There is of course one key difference between the situation I have outlined and the one addressed by Justice Brennan: states cannot give less individual rights protection than is required by the Constitution, but nothing in what I have said would preclude states from giving less international human rights protection than is required by international law. This likely would have been an important distinction to Justice Brennan. Indeed, he emphasized in his 1977 article that his vision of federalism was one in which there can be "a *double* source of protection for the rights of our citizens."<sup>63</sup>

That is an important distinction, but it is not necessarily a compelling reason for human rights advocates to continue embracing one voice nationalism. Most obviously, Brennan was focused on constitutional rights, but international human rights standards do not have the status in the United States of constitutional rights. Almost all scholars agree, for example, that, for purposes of U.S. domestic law, these standards can be overridden by a federal statute. Thus, we should not necessarily be surprised if these international standards do not operate in the same one-way fashion in the United States as constitutional rights.

More importantly, in allowing for the possibility that states could violate international human rights standards without facing judicial preemption, human rights internationalists would not actually be giving up much. Unlike judicial enforcement of the Constitution, there is little reason to believe that courts will enforce international human rights standards against the states in the absence of preemptive action by Congress or the treatymakers. For example, despite claims

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60. The Supreme Court has indicated that there are due process limits, for example, on the ability of states to regulate conduct outside their borders. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

61. *Gerling Global Reins. Corp. v. Low*, 2001 U.S. Dist. LEXIS 16072 (E.D. Cal. Oct. 1, 2001).

62. *Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

63. Brennan, *supra* note 1, at 503 (emphasis added).

by many scholars that customary international law has the status of preemptive federal law, there are essentially no decisions in U.S. history actually using customary international law to preempt state law.

In addition, as both the Massachusetts Burma case and the World War II compensation litigation confirm, there is nothing in the logic of one voice nationalism that ensures that it will lead to pro-human rights outcomes. Unlike the Warren Court nationalism that served as the backdrop to Justice Brennan's article, it is difficult to ensure that one voice nationalism has a consistently rights-protective effect. As a result, by embracing one voice nationalism, human rights advocates may end up bolstering doctrines that are used to restrict progressive state and local protections of human rights.

Furthermore, one voice nationalism has other effects that proponents of human rights internationalism might find undesirable. In particular, it tends to centralize and enhance power in the Executive Branch. By excluding states from foreign affairs activities, one voice nationalism essentially gives the President a free hand—the President need not obtain the cooperation of Congress or the Senate to implement his or her views of foreign policy.<sup>64</sup> One voice nationalism is also used to justify broad abstention on international issues, including international human rights issues, through such devices as the political question doctrine and the act of state doctrine.<sup>65</sup> Advocates of human rights internationalism have often been critical of these doctrines.<sup>66</sup>

Even without the dormant preemption and federal common law doctrines associated with one voice nationalism, the national government still has substantial power to override state violations of international human rights standards.<sup>67</sup> Thus, there are means other than judicial preemption for addressing state violations of international human rights standards. In any event, these one voice nationalism doctrines also are predicated on a sharp distinction between foreign and domestic affairs, a distinction that is becoming increasingly difficult to maintain in this age of globalization.<sup>68</sup>

For these reasons—the low probability of courts using international human rights standards to override state prerogatives, the potential of one voice nationalism to undermine state and local efforts to protect human rights, and the broad power of the national government to preempt state foreign affairs activities that

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64. See Ramsey, *supra* note 20, at 374-79. See also *Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (relying on political question doctrine as alternate ground for dismissal).

65. For example, several of the European World War II compensation cases have been dismissed under the political question doctrine. See, e.g., *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999).

66. See Bradley, *supra* note 34, at 555 (documenting this point).

67. See Goldsmith, *supra* note 23. It is also arguable that national preemption of state foreign affairs activities is less necessary today, given the ability of foreign nations to target their reaction to sanctions at the state and local levels. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1266-68 (1999).

68. See, e.g., Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1468 (1994). If anything, the war on terrorism triggered by the attacks on the United States on September 11, 2001—including the new emphasis on “homeland security”—is likely to erode further the domestic versus foreign distinction.

conflict with the national interest—the preemption and jurisdiction doctrines associated with one voice nationalism may be both unnecessary and legally problematic. Proponents of human rights internationalism may want to reconsider their allegiance to these doctrines.