

PERSPECTIVES: Think Globally, Act Locally ¹: The Role of State and Local Ballot Initiatives in *International* Environmental Law

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LexisNexis Summary

... In modern times, few Americans can act locally without having an impact globally. ... Because the ballot initiative process originated in response to governments that did not reflect the people's will, it may be an especially useful tool while President George W. Bush is in office heading an administration less willing to take an active role in protecting the environment. ... When satellite photos showed environmental damage sweeping into and beyond neighboring countries, the United States began to understand the impacts of pollution on the global environment. ... In addition, having a boundary with another nation would not necessarily be a prerequisite for finding that an initiative had *international* impacts. ... This environmental initiative could have an *international* impact because it affects wildlife management and the wolf population that may cross Alaskan borders into Canada. ... Crosby v. National Foreign Trade Council may shed light on how the Supreme Court will deal with an *international* environmental initiative. ... An *international* environmental initiative that survived preemption scrutiny might still fail under Commerce Clause analysis. ... Similarly, an *international* environmental initiative with economic effects could be invalidated even in the absence of a conflicting federal statute or treaty to preempt the measure. ...

Text

[*25]

Introduction

In modern times, few Americans can act locally without having an impact globally. Guilt over drinking a latte or eating a burger is no longer confined to concerns over weight or a heart condition. Instead, the personal choice to indulge has worldwide repercussions. For example, your morning latte: growing the coffee beans may have required the destruction of "cloud forests" in Columbia; transporting them by ship to the United States may have required the production of steel in Japan and the mining of iron in Australia; and finally, preparing the coffee may have required the manufacture of a grinder in Taiwan and assembly of the coffeemaker in Germany. ³

Thus, individuals can play a significant role both in destroying and [*26] in saving the earth. ⁴ Some individuals resort to monkey-wrench tactics ⁵ to address *international* and environmental concerns. ⁶ Legal alternatives are petitions, peaceful demonstrations, and letters to newspapers or representatives. ⁷ The ballot initiative ⁸ can serve as an additional tool for *international* environmental activism.

¹ This admonition is credited to Rene Dubos, an ecologist and microbiologist who believed that science, technology, and social institutions could save the earth from an ecological crisis. The belief that man could avert disaster through the wise use of technology was the central theme of the 1972 United Nations Conference in Stockholm and the 1992 United Nations Conference on Environment and Development in Rio de Janeiro. Philip Shabecoff, *A Fierce Green Fire* 93-94 (1993).

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³ See *Escape from Affluenza* (Bullfrog Films 1998).

⁴ See, e.g., The Earth-Works Group, *50 Simple Things You Can Do To Save The Earth* (1989).

⁵ The use of guerilla tactics to stop environmental destruction was touted in a popular novel: Edward Abbey, *The Monkey Wrench Gang* (1975).

Through the ballot initiative process, individuals vote directly on specific issues that concern them. Since its introduction, the initiative process has been a major factor in forming state and national policy. For example, the initiative process has been credited with the following statewide reforms: women's suffrage, direct election of U.S. Senators by the people instead of by the state legislature, the eight-hour workday and term limits.⁹ The top ten issues addressed by initiatives in the 2000 general election were: (1) animal protection; (2) drug policy reform; (3) vouchers and charter schools; (4) gun control; (5) health care reform; (6) tobacco settlement money; (7) physician-assisted suicide; (8) same-sex [*27] marriage; (9) taxes; and (10) bi-lingual education.¹⁰

Initiatives have also been used to promote environmental causes.¹¹ For example, growth limits, genetically altered foods,¹² and pesticides were top environmental ballot issues in the November 2000 elections.¹³ In prior years, initiatives have been introduced to regulate hog farms,¹⁴ to direct moneys to environmental causes,¹⁵ and to regulate air pollution, oil drilling, and marine water quality.¹⁶ Because the ballot initiative process originated in response to governments that did not reflect the people's will, it may be an especially useful tool while President George W. Bush is in office heading an administration less willing to take an active role in protecting the environment.

Ballot initiatives are generally seen as a local phenomenon, and consequently have rarely been examined from an *international* perspective. Thus, the subcategory of *international* environmental initiatives is small. However, in the last thirty years, the use of ballot initiatives has increased in the United States.¹⁷ With the expanding globalization of

⁶ Some groups plant metal rods in trees to disable chainsaws used to cut down old growth forests in the northwestern United States. Ten French farmers used their farm equipment to dismantle a McDonald's under construction in Millau, France to protest surtaxes backed by the World Trade Organization (hereinafter "WTO"). Angela Doland, Protestors Back French Farmer, AP, Feb. 16, 2001, available in 2000 WL 13673803. During the December 1999 WTO meeting in Seattle, Washington, some protestors ransacked businesses as a protest against WTO policies that they believed contributed to international environmental destruction such as the elimination of protections for sea turtles. David Moberg, For Unions, Green's Not Easy, The Nation, Feb. 21, 2000, at 17, available in 2000 WL 17718481. The WTO protests also addressed the anti-democratic nature of international economic decision-making. Richard Falk & Andrew Strauss, On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty, *36 Stan. J. Int'l L.* 191, 213 (2000).

⁷ See George W. Pring & Penelope Canan, *Slapps Getting Sued for Speaking Out 1* (1996).

⁸ The generic term "initiative" is used throughout this Article to describe measures placed on a ballot by citizen petition. Other terms commonly used for citizen-initiated measures are "ballot proposal," "ballot measure," "proposition," "plebiscite," and if the measure is for a constitutional amendment, "amendment." See K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, *63 U. Cin. L. Rev.* 1185, 1187 (1995)

⁹ See Initiative & Referendum Institute, *A Century of Citizen Lawmaking, An American Experiment in Self-Governance 9-10* (visited Dec. 5, 2000) <<http://www.iandrinstitute.org/indpeth/The%20Centennial%20Report1.htm>> [hereinafter Iandr].

¹⁰ See Initiative & Referendum Institute, *IRI 2000 General Election Pre Election Report 1* (visited Feb. 10, 2001) <<http://www.ballotwatch.org/2000ballots.htm>> [hereinafter Ballotwatch Report].

¹¹ Telephone conversation with United States Public Interest Research Group (USPIRG). The Colorado Public Interest Research Group (CoPIRG) was one of the driving forces behind Amendment 24, a growth limit initiative that failed in the November 2000 election.

¹² See, e.g., Ved Nanda, *Genetically Modified Food and International Law*, *28 Den. J. Int'l L. & Pol'y* 235, 247 (2001).

¹³ Multistate Associates Incorporated, *2000 Ballot Initiatives* (visited Dec. 8, 2000) <<http://www.multistate.com>> (copy of 2000 Ballot Initiatives available in author's files).

¹⁴ Colorado Amendment 14 passed in 1998.

¹⁵ Number 5 in Florida in 1998 created a Fish and Wildlife Conservation Commission. Measure 66 in Oregon in 1998 dedicated lottery funds to parks and beaches habitat and watershed protection. See generally Iandr, *supra* note 9.

¹⁶ Proposition 128, also called "Big Green," was a comprehensive environmental initiative on the California statewide ballot in 1990, but it did not pass. Secretary of State of Cal. *California Ballot Pamphlet 18-23* (1990). If it had, it might have violated California's single-subject rule. Cal. Const. art. II, 8(d) (1996) ("An initiative measure embracing more than one subject may not ... have any effect."). See also Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, *66 U. Colo. L. Rev.* 47, 84-91 (1995).

¹⁷ Ballot initiatives seemed to enjoy a dramatic resurgence in the 1970s. DuVivier, *supra* note 8, at 1188. This resurgence is consistency with the "rebirth" of other forms of political activism in the 1960s and 1970s. Pring & Canan, *supra* note 7, at 3.

society, more and more ballot initiatives may have an impact on *international* environmental issues. Some of these *international* environmental ballot initiatives will pass and may become [*28] enforceable laws. Others may be invalidated if they are preempted, either by federal laws or by the federal government's control over the field of foreign affairs, or if they violate the dormant commerce clause. However, even those *international* environmental initiatives that fail or are invalidated may serve the useful function of raising public awareness and energizing citizens to take action.

I. BACKGROUND OF THE INITIATIVE PROCESS

A. History of the Initiative

Even before the United States became a separate nation, citizens in the 1600s used an initiative and referendum¹⁸ process to introduce issues at New England town meetings.¹⁹ Yet, the framers of the Constitution rejected a direct democracy model and instead opted for a representative form of government with checks and balances between the legislative, judicial, and executive branches.²⁰ At that time, the primary forum for direct citizen participation was discussing and ratifying constitutions.²¹

The modern initiative process was not introduced until the late 1800s, when proponents of the Progressive movement decided that the nation's representative form of government, with its checks and balances, was not sufficient to reign in legislatures that were either out-of-touch with citizens or controlled by special interests.²² One of the [*29] Progressives' main arguments for the initiative process, still echoed today,²³ is that elected representatives have been corrupted by the influence of moneyed interests.²⁴ Another argument for the initiative process was that it forced legislatures to act when the party system reached a deadlock and the legislature became "paralyzed by inaction."²⁵

The modern form of the initiative process was borrowed from Switzerland. In the 1830s, several Swiss cantons adopted the constitutional initiative, and during the 1860s, several cantons adopted the legislative initiative as well.²⁶ In the late 1890s, the Progressives introduced the initiative process in the United States as part of their platform of reform.²⁷ In 1898, South Dakota became the first state to approve of a statewide procedure for enacting citizen-initiated measures.²⁸ Between 1898 and 1918, nineteen other states followed South Dakota's lead and adopted a statewide initiative process.²⁹ Since 1918, four states have adopted the initiative process. In 1959, Alaska's constitution

¹⁸ This article will not distinguish between referendums and citizen initiatives. Referendums are measures placed on the ballot by a state or local government. Referendums still require approval by the voting public and, once passed, they are generally treated in the same way as initiated measures. See DuVivier, *supra* note 8, at 1187.

¹⁹ See Alexis de Tocqueville, *Democracy in America* 69-79 (Phillips Bradley ed., 1945).

²⁰ See *The Federalist* Nos. 10, 55, 63 (James Madison); Charles Sumner Lobingier, *The People's Law* 137-87 (1909).

²¹ See Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 12-22, 41 (1989); David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 5 (1984).

²² Iandr, *supra* note 9. In California, the initiative was introduced to wrest control of the state government from the Southern Pacific Company. See Governor Hiram Johnson, *Inaugural Address* (Jan. 3, 1911), in Franklin Hichborn, *The Story of The Session of The California Legislature of 1911* app. at ii-iii (1911), cited in James E. Castello, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, [74 Cal. L. Rev. 491, 503 \(1986\)](#).

²³ See Charles M. Price, *Initiative Qualifying in the States, 1898-1989: Variations in Usage*, *Fam Law & Democracy Rep.*, Feb. 1990, at 4.

²⁴ See Cronin, *supra* note 21, at 54-57; Magleby, *supra* note 21, at 21-25.

²⁵ Iandr, *supra* note 9. The initiative process was introduced in Oregon when the legislature divided three ways and representative government broke down.

²⁶ See Kris W. Kobach, *The Referendum: Direct Democracy in Switzerland* 18-30 (1993).

²⁷ Cronin, *supra* note 21, at 50-51.

²⁸ See William B. Munro, *The Initiative Referendum and Recall* 9 (1912).

²⁹ These include Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Utah, Washington, Wyoming.

included an initiative for enacting statutes in its constitution.³⁰ Illinois adopted the statewide initiative in 1970, and Florida followed suit in 1972.³¹ In 1992, Mississippi became the most recent state to adopt the process.³² A total of twenty-three states and the District of Columbia currently have some form of statewide initiative for constitutional amendment or statutory enactment.³³

In addition to these statewide initiative processes, several local governments also permit initiatives.³⁴ However, initiatives have [*30] remained a state-by-state phenomenon because there is no national level initiative process. Legislation to create a federal initiative was introduced in the late 1970s,³⁵ and although opinion polls have backed the concept of a national initiative, disfavor with the process seems to make it unlikely a national initiative will become law.³⁶

Initiative use has been sporadic since the process was first introduced over a hundred years ago. They were used extensively in the early part of the twentieth century,³⁷ but their use declined substantially from the early 1940s through the 1960s.³⁸ There was a dramatic resurgence in the 1970s.³⁹

The resurgence that began in the 1970s has continued until today. In the November 7, 2000 election, American citizens voted on over seventy-one statewide initiative measures.⁴⁰ Historically, Oregon, California, Colorado, North Dakota, and Arizona have used the initiative process most extensively.⁴¹ California and Oregon alone accounted for nearly one-third of all qualifying initiatives in the 1980s, and the five high-use states have accounted for nearly sixty percent.⁴²

B. Characteristics of the Ballot Initiative

Ballot initiatives are a form of direct democracy.⁴³ Through an initiative, citizens can vote directly on a statute or constitutional amendment,⁴⁴ circumventing the legislative process. Sometimes an issue [*31] is too politically sensitive to get legislative support; sometimes the legislature is deadlocked; sometimes moneyed interests dominate the political process: in these situations, the initiative provides alienated voters with a new choice. It gives individuals a sense of control and purpose that they may not experience in electing a representative. When a voter chooses a representative, that representative may or may not agree with the voter's position on a particular issue. The voting process becomes more personalized when the voter can voice his or her exact sentiments on specific issues by voting on

³⁰ See [Alaska Stat. 15.45.010-45.245](#) (1988).

³¹ See Iandr, *supra* note 9 .

³² *Id.*

³³ See Thomas M. Durbin, Congressional Research Serv., Report No. 81-63A, Initiative, Referendum and Recall: A Resume of State Provisions (1981).

³⁴ See, e.g., San Francisco and Boulder ordinances. Discussion of these local initiatives is beyond the scope of this article, which will concentrate primarily on the statewide initiative process.

³⁵ See generally Ronald J. Allen, The National Initiative Proposal: A Preliminary Analysis, 58 Neb. L. Rev. 965 (1979).

³⁶ See Magleby, *supra* note 21, at 7, 12-14; Cronin, *supra* note 21, at 4-5, 157-195.

³⁷ See Price, *supra* note 23, at 4.

³⁸ See *id.*

³⁹ Note that, other than Alaska, all of the states that have adopted the initiative process recently have done so since 1970. Cf. note 17 and related text.

⁴⁰ Approximately 35% were placed on the ballot by the people using the initiative process and approximately 65% were placed on ballots by the legislature. See Ballotwatch Report, *supra* note 10.

⁴¹ Oregon has proposed 314 measures, California: 260, Colorado: 174, North Dakota: 165, and Arizona: 144. See Iandr, *supra* note 9.

⁴² Price, *supra* note 23, at 4.

⁴³ Ballot initiatives are often called "direct democracy" as distinguished from "representative democracy."

⁴⁴ This article does not distinguish the states that have just statutory initiative provisions from those that also have constitutional initiative provisions. See DuVivier, *supra* note 8 (for a list of the specific provisions).

an initiative.⁴⁵

Not only do citizens vote directly on initiatives, but initiatives are created and placed before the electorate by citizens rather than by representatives. Any individual⁴⁶ or citizen group can draft its own initiative. Next, the initiative is printed up on petitions, and if enough signatures are gathered,⁴⁷ the measure is then placed on the ballot.

Another characteristic of the initiative process is its ability to reenergize apathetic voters. Initiatives are traditionally seen as grass-roots efforts,⁴⁸ and the initiative process aims to promote the involvement [*32] of individual citizens in government.⁴⁹

II. INITIATIVES AND THE AMERICAN ENVIRONMENTAL MOVEMENT

While initiatives played a minor role in the early history of this country,⁵⁰ the *development* of land and natural resources was one of the dominating factors in U.S. law and politics.⁵¹ Some of the first "rudimentary environmental groups" may have been farmers who banded together to fight the devastation of the land caused by the "49ers searching for gold in California."⁵² Yet these groups had little impact at a time when the common vision of America was of a land of boundless resources.

Because the nation's lands were its basic resource, no political voices called for their protection.⁵³ Yet, the lands did find champions during the first half of the nineteenth century in writers, artists, and activists such as Ralph Waldo

⁴⁵ The initiative becomes law if a majority of the voters cast their ballots for the measure. Most often, a measure passes with a simple majority, but some reformers have called for a supermajority of 2/3rds. This article will not address the debate of what a majority means. See generally DuVivier, *supra* note 8, at 1200-04.

⁴⁶ Douglas Bruce is famous in Colorado for almost single-handedly placing nine initiatives on ballots (six statewide and three local) over the last twelve years. His most successful initiative was the Taxpayers' Bill of Rights (TABOR) that passed statewide in 1992. Telephone Interview with Douglas Bruce (Apr. 23, 2001.)

⁴⁷ The number of signatures gathered is usually a percentage of the voting public of the state. For example, the Colorado Constitution requires signatures from 5 percent of the total vote for all candidates for secretary of state in the most recent election. Because the voter turnout was so high in the November 2000 election, that means initiative proponents must get 80,571 signatures on their petitions to qualify a statewide initiative. Because of lower voter turnout in prior years, only 62,438 signatures were required from 1997 to 2000. Furthermore, this requires that campaigners get more than the additional 29% required because approximately 50% of the signatures are thrown out as duplicates or non-registered voters. Fred Brown, *Getting on Ballot to Get Tougher Hefty Turnout Means More Signatures Needed*, *Denv. Post*, Dec. 6, 2000, at B4, available in 2000 WL 25836498.

⁴⁸ This article will not attempt to explore the topic of the "professionalism" and corruption of the initiative process itself that has occurred since 1978. See DuVivier, *supra* note 8, at 1206. Initiatives have been criticized as being proposed not "because some other citizen thought this was a good idea," but instead they are driven by groups and individuals "who are not even residents of the states whose laws or constitutions they are rewriting through the initiative process." David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (2000). Initiatives have become a lucrative business for signature-collectors, lawyers, campaign consultants, and media spinners. See *id.*; Interview with Stateline.org in May, 2000 (mentioned in Jason White, *Forest of Ballot Initiatives Being Readied for November*, Stateline.org (July 10, 2000) <<http://www.stateline.org/story.cfm?StoryID=84685>>; Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. Rev.* 505, 546-47 (1982). For example, in 1998 unions in California spent over \$ 23 million to oppose a measure that would have limited their ability to use mandatory union dues for political purposes. Proposition 226, the "paycheck protection" initiative, would have required unions to obtain authorization before dues could be used for campaigns. Unions, financed with mandatory dues, defeated the measure by a 53% to 47% margin. See Iandr, *supra* note 9, at 2. In the November 7, 2000 election in Colorado, opponents of Amendment 24, which would slow growth across the state, raised a record \$ 4.6 million to combat the measure. Jennifer Hamilton, *Taking on ballot initiatives*, *Boulder Daily Camera*, Nov. 12, 2000, at B1.

⁴⁹ Cronin, *supra* note 21, at 4, 11, 198, 202; Magleby, *supra* note 11, at 2, 21-25, 28, 181-84; Geoffrey De Q. Walker, *Initiative and Referendum: The People's Law* 52-54 (1987).

⁵⁰ See *supra* note 19 and related text.

⁵¹ Celia Campbell-Mohn, et al., *Environmental Law from Resources to Recovery* 7 (1993).

⁵² See Shabecoff, *supra* note 1, at 35-36.

⁵³ Campbell-Mohn, *supra* note 51, at 11.

Emerson,⁵⁴ Henry David Thoreau,⁵⁵ Ansel Adams, and John Muir.⁵⁶ In 1872, conservationists successfully lobbied [*33] Congress to create the world's first national park at Yellowstone.⁵⁷

However, the second half of the nineteenth century was marked more with the disposal of public lands than the creation of parks. After the Civil War, the federal government launched a program allowing rapid disposal of lands. Starting in 1863, Congress gave away more than 130 million acres in railroad grants⁵⁸ and then disposed of minerals with the mining laws of 1866, 1870, and 1872, and timber with the Timber Culture Act and the Timber and Stone Act.⁵⁹

Some argue that "organized political resistance to the "exploitation and misuse of the continent's resources""⁶⁰ started in 1907 with Gifford Pinochet. While horseback riding near Washington, D.C., Pinochet suddenly had a revelation. The use of the land he was riding through was not an isolated issue, but one linked to the use of resources in other parts of the country.⁶¹ Thus, "all these separate questions fitted into and made up the one great central problem of the use of the earth for the good of man."⁶² Pinochet's insight was adopted fervently by Teddy Roosevelt, and when Roosevelt became president, he aggressively pursued environmental objectives such as multiplying the number of national parks and reserving an extensive national forest system.⁶³

The American environmental movement and the initiative process have followed similar paths since Teddy Roosevelt's presidency. Teddy Roosevelt was a champion of the Progressive movement, and this movement's platform at the turn of the century supported both the ballot initiative and environmental conservation.

After initial enthusiasm, both the initiative and the environmental movement lost ground when Roosevelt, who was regarded as "an outrageous maverick by many in the Republican Party,"⁶⁴ left office. The environmental movement rebounded briefly under Franklin D. Roosevelt (FDR), Teddy Roosevelt's second cousin. FDR "believed that the private special interests must be subordinated to the general [*34] interest."⁶⁵ FDR's programs, such as the Civilian Conservation Corps, the Soil Conservation Corps, and the Tennessee Valley Authority sought to serve both the people and the land⁶⁶ by "conserving both the natural resources and the moral values of America."⁶⁷

Two world wars and the Roaring Twenties eclipsed the drive for public participation in politics and diverted the nation's attention from the environmental issues Teddy Roosevelt championed.⁶⁸ Although early water pollution control legislation was enacted in 1948, this period was labeled the "Silent Decade."⁶⁹ The environment did not return to

⁵⁴ Ralph Waldo Emerson, *Nature* (1836).

⁵⁵ Henry David Thoreau, *Walden* (1854).

⁵⁶ See Campbell-Mohn, *supra* note 51, at 11. However, John Muir did not found the Sierra Club until 1892.

⁵⁷ The act stated that Yellowstone National Park was "dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people" John F. Barber, *Old Yellowstone Views* (1987, 2d printing 1990)

⁵⁸ Lawrence Friedman, *A History of American Law* 415 (2d ed. 1985).

⁵⁹ Campbell-Mohn, *supra* note 51, at 13.

⁶⁰ Shabecoff, *supra* note 1, at 66 (quoting Stewart L. Udall, *The Quiet Crisis* 105-06 (1963)).

⁶¹ See Shabecoff, *supra* note 1, at 66.

⁶² *Id.* (quoting Udall, *supra* note 60, at 105).

⁶³ See Shabecoff, *supra* note 1, at 68.

⁶⁴ *Id.* at 67.

⁶⁵ James Macgregor Burns, *Roosevelt: The Lion and The Fox* 155 (1956).

⁶⁶ Shabecoff, *supra* note 1, at 81.

⁶⁷ Burns, *supra* note 54, at 155 (1956).

⁶⁸ See Campbell-Mohn, *supra* note 51, at 23. For a discussion of the dissimilarity between the environmental movement of the present and the earlier conservation movement, see Samuel P. Hays, *Three Decades of Environmental Politics: The Historical Context*, in *Explorations in Environmental History: Essays by Samuel P. Hays* (1998).

⁶⁹ See Campbell-Mohn, *supra* note 51, at 28.

the forefront of the nation's political agenda until the 1960s⁷⁰ when the government finally began to respond to the public's increasing alarm. In 1962, Rachel Carson's book *The Silent Spring*⁷¹ alerted the public to the dangers of pesticides.⁷² In 1963, David Brower mobilized the Sierra Club to oppose damming the Colorado River to flood parts of the Grand Canyon. By the late nineteen sixties, oil spills had soiled the coasts in Santa Barbara and other regions.⁷³ The federal government responded with legislation such as the 1960 Motor Vehicle Act, the 1963 Clean Air Act, the 1965 Water Quality Act, the 1965 Land and Water Conservation Fund,⁷⁴ and the 1967 Air Quality Act.⁷⁵ In 1970, the first Earth Day was celebrated, and it is still celebrated today.

The 1970s marked a growing distrust of government at the same [*35] time that more environmental regulation was becoming federalized.⁷⁶ One of the themes of Teddy Roosevelt's Progressive movement was to "redress[] the social, economic, and political imbalances caused by industrialization, urbanization, and the concentration of economic power within hitherto unrestrained corporations."⁷⁷ This theme is similar to that of many environmental groups today. Corporate globalization has contributed to an increasingly depersonalized world. The initiative process gives individuals a sense of significance and purpose. The initiative process also gives individuals the power to work around their distrust of government to address urgent environmental problems. Consequently, it seems logical that the initiative process has reentered the political consciousness at the same time that the environmental movement has gained renewed momentum.

III. THE GLOBAL IMPACTS OF ACTING LOCALLY

Because ballot initiatives are a predominantly local or state mechanism, some may argue that they have no role in the arena of *international* environmental law. However, many environmental issues have a predominantly local focus. In *Silent Spring*, Rachel Carson used the setting of a small "town in the heart of America" to describe the destructive effects of synthetic chemicals.⁷⁸ The Environmental Defense Fund (EDF) was organized by a group of concerned scientists from the university at Stony Brook, New York, who wanted to ban DDT spraying in nearby Long Island waters.⁷⁹ Landfill issues became problems when some cities ran out of space for dumping their wastes.⁸⁰ Even environmental disasters were often limited to a particular locality, such as when heavy concentrations of oil in the waters of the Cuyahoga River in Cleveland caused it to burst into flames.⁸¹

On the first Earth Day, April 22, 1970, over 20 million Americans joined demonstrations to register their distress over the state of the environment.⁸² Although the name "Earth Day" might suggest this was [*36] global event, the focus in 1970 was first on localized problems within the United States. Garrett Hardin's essay *Tragedy of the Com-*

⁷⁰ See Shabecoff, *supra* note 1, at 83.

⁷¹ Rachel Carson was a well-recognized biologist with the United States Fish and Wildlife Service. Carson decided to write a book. Because magazines refused to publish articles she had written about DDT and other pesticides because they feared that food and chemical companies would retaliate by withdrawing their advertising. The *New Yorker* first published excerpts of *A Silent Spring* in 1962. Rachel Carson, *Silent Spring* 1 (1962).

⁷² See, e.g., Appelgate, et al., *The Regulation of Toxic Substances and Hazardous Wastes* 1 (2000); Rercival, et al., *Environmental Regulation* 3 (2d ed. 1996).

⁷³ See Percival, *supra* note 72, at 3.

⁷⁴ [16 U.S.C. 460](#) (2000).

⁷⁵ See, e.g., Campbell-Mohn, *supra* note 51, at 30-31. See also Shabecoff, *supra* note 1, at 91.

⁷⁶ See Campbell-Mohn, *supra* note 51, at 30-34.

⁷⁷ Shabecoff, *supra* note 1, at 67.

⁷⁸ See Carson, *supra* note 71 and related text.

⁷⁹ See Percival, *supra* note 72, at 4 (also some details from a personal conversation with George Pring who worked for EDF).

⁸⁰ See [City of Philadelphia v. New Jersey](#), 437 U.S. 617 (1978).

⁸¹ See Shabecoff, *supra* note 1, at 111.

⁸² See Diane Carman, "Father of Earth Day" still an eco-warrior, at 84, *The Denver Post*, April 22, 2001, at 1B. Some of the first Earth Day coverage did focus on global concerns; for example, the *Denver Post* ran a front page story on global warming. Yet, Gaylord Nelson, the "father of Earth Day," acknowledged the power of the people when he stated that he "knew all along that [with respect to environmental concerns] the public was way ahead of the political establishment." *Id.*

mons⁸³ used the overgrazing of the commons, a publicly owned pasture in the middle of a small town, as a symbol for the incentive to overuse environmental resources. In the 1970s, the commons was still a local phenomenon that people could see and experience personally.

Concern for the environment has continued to grow so that now it has an *international* focus. On April 22, 1990, people on every continent, more than 200 million in all, turned out to observe Earth Day.⁸⁴ Although the 1972 United Nations Conference on the Environment in Stockholm was the largest gathering of *international* groups at its time, only eleven nations had a governmental environmental agency to send.⁸⁵ Also in 1972, the United Nations was just launching its Environment Program.⁸⁶ Ten years later, 106 countries sent environmental agencies to the United Nations conference, leading the North American Director of the United Nations Environmental Program to declare, "In ten years, environmentalism has become a global value."⁸⁷

Furthermore, the focus on particular types of environmental challenges had changed. Some of the early concerns were purely local in nature, such as the disposal of wastes, air pollution, and water pollution from particular point sources.⁸⁸ The new emphasis is on global concerns: global warming, acid rain, biological diversity, and ozone depletion.⁸⁹ [*37] "It was apparent that damage to the environment had become of global concern and environmentalism was well on its way to becoming a global movement."⁹⁰

Local environmental issues can become *international* transboundary issues when they cross national boundaries. Consequently, Europeans, because of their close proximity to neighboring countries, more quickly realized that the commons they share is a global commons. The fact that the first U.N. conference regarding the environment was held in 1972 in Stockholm is some testimony to this awareness.⁹¹ A massive spill of chemicals in the Rhine impacted countries downstream. Air pollution easily wafted across *international* boundaries; consequently, it is not surprising that European governments signed the Convention on Long Range Transboundary Air Pollution as early as 1979.⁹² And by the late 1980s, environmental issues had taken a prominent place in both national and *international* politics because "environmental strains that transcend national borders [were] already beginning to break down the sacred boundaries of national sovereignty."⁹³

In North America, *international* environmental management has traditionally been bilateral. Surrounded by oceans on the east and the west, the continent is divided along its north and south axis into three distinct countries: Mexico, the United States, and Canada. With the exception of Alaska and a few other borders, each country covers a fairly neat block of territory, like the three separate swaths of color in the Mexican flag. These "boundaries are drawn in a

⁸³ A parable about abuse of the environment that discussed how an individual profited by overgrazing the publicly owned pasture, the commons, because the grass was free, and thus there was an incentive to overgraze and destroy the pasture for users in the future. See Garrett Hardin, *Tragedy of the Commons*, 162 *Science* 1243 (1968).

⁸⁴ See Shabecoff, *supra* note 1, at 188.

⁸⁵ See *id.* at 191.

⁸⁶ See Campbell-Mohn, *supra* note 51, at 46.

⁸⁷ Shabecoff, *supra* note 1, at 191.

⁸⁸ In the 1972 Amendments to the Clean Water Act, point source effluent standards assumed a dominant role. William H. Rodgers, Jr., *Environmental Law* 260 (2d ed. 1994). The 1987 amendments to the Clean Water Act finally moved to place a higher priority on nonpoint source pollution. See also Olga L. Moya & Andrew L. Fono, *Federal Environmental Law the User's Guide* 342-43 (2d ed. 2001). The Clean Air Act was "virtually unenforceable against stationary sources" until the 1990 Amendments permitted control at the source. Rodgers at 135.

⁸⁹ See Shabecoff, *supra* note 1, at 196; see also, *Environmental Politics in the International Arena: Movements, Parties, Organizations, and Policy* 3 (Sheldon Kamieniecki ed., 1994) [hereinafter Kamieniecki].

⁹⁰ Shabecoff, *supra* note 1, at 196 ("Until the late 1980s, ecological issues had been on the periphery of international politics. Almost overnight, it seemed, global warming, acid rain, the ozone shield, biological diversity, and other environmental issues had moved to the center of the diplomatic stage.")

⁹¹ Shabecoff, *supra* note 1, at 93.

⁹² *Id.*, at 191.

⁹³ Jessica Tuchman Mathews, *Foreign Affairs* (1989) (vice-president of the World Resources Institute and former member of the National Security Council staff) (quoted in *Environment: Traditional Definitions of National Security Are Shaken by Global Environmental Threats*, *N.Y. Times*, May 3, 1982, at A10; Shabecoff, *supra* note 1, at 189).

straightforward fashion, are fixed, largely undisputed, and binary.”⁹⁴

Yet pollution does not respect clear national boundaries. In the Trail Smelter⁹⁵ case, acid rain taught the United States that despite its [*38] relative geographic isolation, it was susceptible to air pollution that drifted across its borders from Canada.⁹⁶ When satellite photos showed environmental damage sweeping into and beyond neighboring countries, the United States began to understand the impacts of pollution on the global environment.

In the past, the northern boundary of the United States was controlled by the Great Lakes Water Quality Agreement of 1978 and the *international* Joint Commission that was a product of the 1909 Boundary Waters Treaty.⁹⁷ To the south, many environmental concerns were within the jurisdiction of the *International* Boundary and Water Commission, a mandate of the 1944 U.S. - Mexico Water Treaty.⁹⁸ In 1983, the U.S. - Mexico Border Environment Cooperative Agreement (a/k/a the “La Paz Agreement”), preserved the IBWC’s role in water quality, but also provided for more comprehensive management of the border environment.⁹⁹ Side agreements resulting from the debate on the North American Free Trade Agreement (NAFTA)¹⁰⁰ added new environment related institutions to manage transboundary environmental affairs in North America and have moved some of the environmental focus to trilateral and *international* issues.¹⁰¹

The potential for a state initiative to have impacts across *international* boundaries is extensive. Six initiative states border or share lake waters with Canada.¹⁰² Four initiative states share borders or gulf waters with Mexico.¹⁰³ In addition, three initiative states border the Atlantic Ocean¹⁰⁴ and four border the Pacific Ocean.¹⁰⁵ Furthermore, these bordering states include four of the five most active initiative states,¹⁰⁶ and the environmental movement is very strong in several of [*39] them.¹⁰⁷

In addition, having a boundary with another nation would not necessarily be a prerequisite for finding that an initiative had *international* impacts. In the increasingly global economy, laws that restrict trade, even if only within one state or country, have become *international* issues.¹⁰⁸ For example, a measure that limited the sale of genetically al-

⁹⁴ Stephen P. Mumme, NAFTA and North American Transboundary Environmental Management, in *International Boundaries and Environmental Security* 250 (Blake et al. eds., 1998).

⁹⁵ Trail Smelter, 3 R. Int’l Arb. Award 1905 (1941).

⁹⁶ For additional discussion of the Trail Smelter case, see Percival, *supra* note 72, at 127.

⁹⁷ See Treaty Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, U.S.-U.K., 36 Stat. 2448.

⁹⁸ See Treaty Regarding Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219.

⁹⁹ See Mumme, *supra* note 80, at 250-51.

¹⁰⁰ North American Free Trade Agreement, Dec. 17, 1992, Can.-U.S.-Mex., 32 I.L.M. 289 (1992).

¹⁰¹ Three institutions: the Commission on Environmental Cooperation (CEC); the North American Development Bank (NAD-BANK), and the Border Environment Cooperation Commission (BECC). See Mumme, *supra* note 80, at 252.

¹⁰² Alaska, Washington, Montana, North Dakota, Michigan, and Ohio.

¹⁰³ California, Arizona, Mississippi, and Florida.

¹⁰⁴ Maine, Massachusetts, and Florida.

¹⁰⁵ Alaska, Washington, Oregon, and California.

¹⁰⁶ Oregon, California, North Dakota, and Arizona. Of the top five high-use states, only Colorado does not border another nation. Although 24 states have some form of statewide initiative, as of 1998, approximately 56% of all initiative activity had taken place in just five states: Oregon (105 adopted), California (92 adopted), Colorado (72 adopted), North Dakota (77 adopted), and Arizona (58 adopted). See Iandr, *supra* note 9.

¹⁰⁷ Oregon, California, and Washington.

¹⁰⁸ The Massachusetts Burma law, which only prohibited Massachusetts state entities from purchasing goods from companies that did business with the country of Burma, interfered with international policy. *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). This case will be discussed in more depth *infra*. See also WTO Report, United States - Import Prohibition on Certain Shrimp and Shrimp Products, Special Studies 4: Trade and Environment (Oct. 18, 1999) <<http://www.wto.org>> (IED d.2) (The WTO determined that the U.S. law banning shrimp imports from countries without adequate sea turtle conservation policies unfairly discriminated against imports from several Asian countries).

tered foods in one state could have *international* impacts if it were viewed as restricting trade.¹⁰⁹

Many environmental initiatives have the potential for sparking *international* conflict. Local issues, such as growth control, probably will remain localized to a community or individual state. However, other initiatives attempt to be global in scope. For example, a Washington state initiative proposed for the fall 2000 ballot declared, "half of the planet's oxygen has been depleted since 1850 and that oxygen is the most important product to come from trees. Therefore, this measure would require that all trees growing and producing oxygen on publicly owned lands be forever preserved to supply voters with essential life-sustaining oxygen."¹¹⁰ While the measure did not gather enough signatures to make it to the ballot, the global scope is clear.

The more common situation is an environmental initiative that has unintended *international* impacts. For example, ballot measure No. 6, which passed in Alaska during the November 2000 election, reenacted a ban on land-and-shoot wolf hunting.¹¹¹ This environmental initiative could have an *international* impact because it affects wildlife [*40] management and the wolf population that may cross Alaskan borders into Canada.¹¹²

The management of marine resources raises significant transboundary issues. Problems are exacerbated when the ecological ranges of fish and other marine living resources do not coincide with legal or political boundaries.¹¹³ Washington state voters proposed an initiative in 1999 that would have prohibited commercial net, troll, and trawl fishing in Washington's fresh and marine waters.¹¹⁴ Proponents argued that commercial fishing severely depleted Washington's fish stocks, leading several species to be officially listed as endangered. Opponents argued that the initiative, which by its very nature limited the activities of Washington fishermen alone, would cost thousands of jobs and not help the endangered fish because it would not limit fishing in Alaskan and Canadian waters that share the salmon runs.¹¹⁵ The measure did not pass, but it clearly would have impacted U.S. fisherman as well as fishermen from Canada and other countries that engage in commercial fishing in these waters.¹¹⁶

IV. LIMITATIONS ON THE USE OF *INTERNATIONAL* ENVIRONMENTAL INITIATIVES

Ballot initiatives may serve a useful role in energizing citizens and focusing attention on environmental issues. However, they may encounter significant challenges when they cross into national and *international* arenas.

Because there is no federal ballot initiative process,¹¹⁷ most [*41] initiatives result in state statutes or state constitutional amendments. Generally, state statutes and constitutions are purely state issues. Only a handful of federal cases have addressed the validity of state ballot initiatives.

As a general rule, those ballot initiatives that have undergone Constitutional scrutiny in federal courts have not fared well.¹¹⁸ For example, the Eighth Circuit found that a Missouri ballot initiative that limited campaign contribu-

¹⁰⁹ See generally Nanda, *supra* note 12 .

¹¹⁰ Washington proposed initiative 740.

¹¹¹ Alaska Ballot Measure No. 6. In 1996 Alaskan voters banned land-and-shoot wolf hunting through a ballot initiative. The pro-hunting state legislature put a referendum on the 2000 ballot that would relax this ban and a proposed constitutional amendment that would ban all initiatives dealing with wildlife. The ban was upheld.

¹¹² Similarly, Initiative 713, that passed in Washington State during the November 2000 election, prohibited certain methods of trapping animals, which could affect wildlife in Canada as well.

¹¹³ Marcus Haward, Management of Marine Living Resources International and Regional Perspectives on Transboundary Issues, in *International Boundaries and Environmental Security* 41 (Blake et al. eds., 1998).

¹¹⁴ Shall commercial net, troll, and trawl fishing be prohibited in Washington state fresh and marine waters, except tribal fisheries conducted under a valid treaty right?" Washington I-696.

¹¹⁵ Iandr, *supra* note 9.

¹¹⁶ Norway and other countries have significant fishing interests in these areas. Telephone Interview with Sharon Gilpin of Standard Communications (December 19, 2000).

¹¹⁷ Cf. notes 35 and 36, *supra*, and related text.

¹¹⁸ However, some initiatives have prevailed. For example, Proposition 13, a California constitutional amendment that capped real property taxes, did not violate equal protection and thus was upheld by the Supreme Court. See [Nordlinger v. Hahn, 505 U.S. 1 \(1992\)](#).

tions was unconstitutional under the First Amendment.¹¹⁹ The U.S. Supreme Court found that a state constitutional amendment that prohibited state and local governments from naming homosexuals as a protected class violated the equal protection clause because it lacked a rational relationship to legitimate state interests.¹²⁰ In addition, the U.S. Supreme Court found unconstitutional a 1992 state constitutional amendment adopted by Arkansas voters that would have imposed term limits on Arkansas' representatives to Congress.¹²¹ The remainder of this article will focus on non-initiative cases because so few U.S. Supreme Court cases have addressed ballot initiatives, and none have addressed environmental initiatives.

Before it was nationalized in the 1970s, environmental regulation was traditionally a local function because of its impacts on individual health, safety, and welfare.¹²² The tension between federal supremacy and state sovereignty over its traditional functions sometimes has been reconciled by "a presumption in favor of the validity of concurrent regulation by both the federal and state governments."¹²³ However, this presumption may not prevail if an *international* environmental initiative is preempted, by a federal law or the federal foreign affairs power, or if it [*42] is found to violate the Commerce Clause.¹²⁴

A. Preemption

Traditional Supremacy Clause¹²⁵ analysis is appropriate to determine whether an *international* environmental initiative is preempted. First, "express preemption" applies when Congress expressly states that only federal law will control.¹²⁶ In the environmental field, express preemption has been used predominantly in nuclear regulation.¹²⁷ Second, "field occupancy preemption" occurs when congressional legislation is so extensive as to presume that Congress intended to leave no part of the field unregulated.¹²⁸ The third category of preemption of state law is "conflict" preemption. Conflict preemption applies when "compliance with both federal and state regulations is a physical impossibility"¹²⁹ or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³⁰ Conflict preemption is more prevalent than express or field-occupancy preemption in environmental cases.¹³¹

Crosby v. National Foreign Trade Council¹³² may shed light on how the Supreme Court will deal with an *interna-*

¹¹⁹ See [Shrink Mo. Gov't PAC v. Adams](#), 161 F.3d 519, 520 (8th Cir. 1998). The Supreme Court later upheld a statute that was later passed by the Missouri legislature that restricted the amounts of campaign contributions. [Nixon v. Shrink Missouri Government](#), 528 U.S. 377 (2000).

¹²⁰ See [Romer v. Evans](#), 517 U.S. 620 (1996).

¹²¹ Section 3 of Amendment 73 to the Arkansas Constitution impermissibly added qualifications for congressmen and senators outside of the powers reserved to the states under the Tenth Amendment. See [U.S. Term Limits, Inc. v. Thornton](#), 514 U.S. 779, 802 (1995).

¹²² Zygmunt J.B. Plater et.al., *Environmental Law and Policy: Nature, Law, and Society* 327 (2d ed. 1998).

¹²³ *Id.*

¹²⁴ The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States" U.S. Const., art. I, 8.

¹²⁵ This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI.

¹²⁶ See Plater et. al., *supra* note 122, at 328.

¹²⁷ See *id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 329 (quoting [Florida Lime & Avocado Growers, Inc. v. Paul](#), 373 U.S. 132, 142-43(1963)).

¹³⁰ *Id.* (quoting [Hines v. Davidowitz](#), 312 U.S. 52 (1941)).

¹³¹ Plater, *supra* note 122, at 328-29.

¹³² [530 U.S. 363 \(2000\)](#).

tional environmental initiative. Crosby addressed "the Massachusetts Burma Law,"¹³³ a statute enacted by the legislature, rather than by citizen initiative. The Massachusetts Burma Law barred state entities from buying goods from companies doing business with the country of Burma, now called Myanmar. The statute was a political statement, meant to protest the military government in Burma. Its impact was arguably local because it [*43] only applied to contracts with Massachusetts state entities.¹³⁴

Three months after Massachusetts enacted its Burma law, Congress also passed a statute related to trade with Burma.¹³⁵ The Crosby Court held unanimously¹³⁶ that a state law will be "preempted to the extent of any conflict with a federal statute." This was true even though the federal Burma statute did not contain any "express provision for preemption."¹³⁷ Much of the federal Burma act delegated authority to the President, who in turn delegated much of his authority to the Secretary of State and the related administrative personnel. The power the act delegated was to develop a strategy to bring democracy and human rights to Burma.¹³⁸ The Court concluded that Massachusetts's efforts to set up an alternative statute with the same goals¹³⁹ were "at odds with the President's intended authority to speak for the United States among the world's nations... ." ¹⁴⁰ Consequently, the Court held that the provisions in the Massachusetts Burma Law conflicted with the related federal statute. Therefore, the Massachusetts Burma Law was preempted and its application held unconstitutional under the Supremacy Clause.¹⁴¹

The United States' interactions with other countries are highly regulated by agreements and treaties.¹⁴² The Crosby reasoning could be used to argue that most *international* environmental initiatives, even when they seem to be local in focus, conflict with one of these agreements or treaties, and thus the initiative would be preempted.

[*44]

B. Dormant Commerce Clause

An *international* environmental initiative that survived preemption scrutiny might still fail under Commerce Clause¹⁴³ analysis. Preemption applies when there is a Congressional act or treaty that addresses the same topic as the initiative measure. The dormant commerce clause¹⁴⁴ has been applied in the absence of any action by Congress and has been used for at least half a century to strike down environmental measures that courts have determined might place a burden on interstate commerce.¹⁴⁵ Similarly, an *international* environmental initiative with economic effects could be invalidated even in the absence of a conflicting federal statute or treaty to preempt the measure.

¹³³ 1996 Mass. Acts 239, ch. 130 (codified as Mass. Gen. Laws 7:22G-7:22M, 40F. 1/2 (1997)).

¹³⁴ At least nineteen municipal governments had enacted analogous laws. Crosby, *supra* note 118, at 15 n.5 (citing N.Y.C. Admin. Code, Art. 12, 10.38 et seq. (1999); Philadelphia Code 17-104(b) (1999); Vermont H.J. Res. 157 (1998); 1999 Vt. Laws No. 13).

¹³⁵ Foreign Operations, Export Financing, and Related Programs Appropriations Act, 570, 110 Stat. 3009-166 to 3009-167 (1997) (enacted in the Omnibus Consolidated Appropriations Act, 101(c), 110 Stat. 3009-121 to 3009-172 (1997)).

¹³⁶ Seven justices joined the majority opinion. Justice Scalia wrote a concurring opinion in which Justice Thomas joined. [Crosby v. National Foreign Trade Council, 530 U.S. 363, 388 \(2000\).](#)

¹³⁷ *Id.* at 372.

¹³⁸ *Id.* at 369.

¹³⁹ The Court stated that "the fact of a common end hardly neutralizes conflicting means." *Id.* at 379-380.

¹⁴⁰ *Id.* at 380.

¹⁴¹ *Id.* at 388.

¹⁴² This article will not attempt to list all of these agreements. But as an example, ballot initiative restrictions on marine fishing, such as Washington's I-696, might be preempted by the 1982 Law of the Sea Convention and the United Nations Agreement on Straddling and Highly Migratory Fish Stocks. Restrictions on wildlife management, oil drilling, or pesticides near international boundaries might conflict with similar transboundary agreements.

¹⁴³ The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States U.S. Const., art. I, 8.

¹⁴⁴ Even when the Commerce Clause has not been applied, courts have used its dormant power to strike down laws that potentially interfere with commerce.

¹⁴⁵ Plater, *supra* note 122, at 345.

The Supreme Court has recognized that some incidental burdens on commerce may be unavoidable, but the Court is vigilant in preventing "'economic isolation' and protectionism."¹⁴⁶ In these dormant commerce clause cases, the presumption in favor of concurrent regulation is reversed: a state measure will be invalidated if it adversely affects the national interest.¹⁴⁷

In Crosby, the Supreme Court rested its decision solely on preemption grounds. Thus, the opinion could be read narrowly as limiting state and local sanctions only when there is a competing federal statute.¹⁴⁸ However, the Court of Appeals for the First Circuit also found that the Massachusetts Burma law violated the commerce clause.¹⁴⁹

Furthermore, even though the Supreme Court rested its decision solely on preemption grounds, the broad language used in the Crosby opinion suggests that the Court also could have based its conclusion on commerce clause grounds. The Crosby court's analysis presumes state laws that may interfere with presidential diplomacy are impermissible:

[*45]

The state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.¹⁵⁰

Thus, even in the absence of a federal statute or treaty, any *international* environmental initiative measure might not survive if it "threatens to complicate"¹⁵¹ the president's diplomatic discussions with other countries on *international* issues.

CONCLUSION

Because many of the world's environmental problems were created by the collective destructive action on the part of individuals, many believe that the solutions also lie in the hands of individuals. Some have resorted to civil disobedience as a way for individuals to have an impact on *international* environmental issues. Yet, the ballot initiative is a legal and potentially more powerful alternative.

The ballot initiative is readily accessible to the average citizen in those states that recognize it. At best, a ballot measure may pass and become enforceable law if it survives preemption and commerce clause scrutiny. At the least, a ballot initiative, like civil disobedience, can draw attention to environmental issues and mobilize individuals and their representatives to take action. Thus, the ballot initiative can be the ideal tool for affecting a environmental change in one small corner of the earth that may make a significant difference internationally. In short, it allows individuals to act locally while thinking globally.

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¹⁴⁶ [City of Philadelphia v. New Jersey, 437 U.S. 617 \(1978\)](#) (holding that New Jersey could not prohibit the importation of wastes into its boundaries).

¹⁴⁷ Plater, supra note 122, at 349.

¹⁴⁸ International Trade: Legal Experts Say Burma Law Opinion Left Activists With Sub-Federal Sanction Options, Daily Report for Executives, Regulation, Law & Econs, June 29, 2000, at 126 DER A-33.

¹⁴⁹ [National Foreign Trade Council v. Natsios, 181 F.3d 38 \(1st Cir. 1999\)](#). The First Circuit also found that the Massachusetts Burma Law was an unconstitutional exercise of the foreign affairs power. However, this article will not address the foreign affairs power argument.

¹⁵⁰ [Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 \(2000\)](#) (emphasis added).

¹⁵¹ Id.