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THE MASSACHUSETTS BURMA LAW—THE FIRST CIRCUIT'S  
DECISION TO STEM THE TIDE OF INCREASING SUB-NATIONAL  
ACTOR PARTICIPATION IN THE FIELD OF FOREIGN RELATIONS  
IN *NATIONAL FOREIGN TRADE*  
*COUNCIL v. NATSIOS*

“A house divided against itself cannot stand.”<sup>1</sup>

I. INTRODUCTION: A STATE OF FLUX

In recent decades, few have challenged the notion that states have little business meddling in the arena of international affairs.<sup>2</sup> Nevertheless, with the end of the Cold War and the move toward democracy in all major quadrants of the world, recent cases and commentators have pulled back from this position and increasingly have supported sub-national actor participation in the field of foreign relations.<sup>3</sup> Despite this movement, the Supreme Court of the United States has interpreted the Constitution as

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1. Abraham Lincoln, Acceptance Speech for Republican Nomination for U.S. Senate (June 1858), *available in* CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 2 (Paul M. Angle ed., Chicago: Univ. of Chicago Press 1958).

2. *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1224 (1999) (noting that foreign affairs power is intimately related with federalism issues). Indeed, the Cold War years represented an era where federal exclusivity in foreign affairs matters ruled the day. *See id.* at 1228. Moreover, as some commentators acknowledge, at the end of the twentieth century, much like the end of the eighteenth century, states do not appear to exist. *See, e.g.*, Joel P. Trachtman, *Nonactor States In U.S. Foreign Relations?: The Massachusetts Burma Law*, 92 AM. SOC'Y INT'L L. PROC. 350, 350 (1998) (discussing lack of state involvement in U.S. foreign relations).

3. *See* Spiro, *supra* note 2, at 1223-24 (noting that end of Cold War has considerably diminished probable magnitude of retaliation and national security concerns). Some commentators argue that the “chang[ing] global dynamic” should support the abandonment of federal exclusivity over foreign affairs, and allow for greater state and local participation. *Id.* at 1226; *see* Trachtman, *supra* note 2, at 350 (noting that present state of foreign relations includes more topics keenly relevant to state and local governments).

Likewise, some commentators urge that states have not been adequately represented in the negotiation of international instruments that are extremely important to state governance. *See generally* Robert Stumberg, *Sovereignty By Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491 (1998) (noting that proposed Multilateral Agreement on Investment (“MAI”) will limit states' governing power in area of international trade). For example, Professor Stumberg argues that the proposed MAI, would take away crucial lawmaking authority from the states. *See id.* at 585 (noting that MAI would alter delicate balance of power between state and federal governments). In addition, Professor Stumberg argues that proposed international agreements, such as the MAI, do not adequately recognize state interests at a time of increased globalization. *See id.*

vesting exclusive control over foreign relations in the federal government.<sup>4</sup>

With the threat to national security at a minimum, relative to the Cold War era, and the diminished risk of international retaliation flowing therefrom, it is time for a definitive answer to the question of permissible state involvement in foreign affairs.<sup>5</sup> The oft-criticized standard, enunciated by the Supreme Court in *Zschernig v. Miller*,<sup>6</sup> coupled with its dilution in recent years, illustrates the need for resolution in these areas of constitutional and international law.<sup>7</sup>

In 1996, the Commonwealth of Massachusetts injected itself into the ongoing debate over the proper level of state and local involvement in foreign affairs by enacting a law that effectively prohibited the Commonwealth from doing business with companies engaged in business relations with Burma (Myanmar).<sup>8</sup> In challenging this law, the National Foreign Trade Council ("NFTC") used the opportunity to urge the judiciary to settle definitively the issue of the permissible level of sub-national actor participation in foreign affairs.<sup>9</sup> Accordingly, *National Foreign Trade Council v. Natsios*<sup>10</sup> presented itself to the Supreme Court as the first opportunity since its decision in *Zschernig* to address the issue in light of the increasingly expanding global stage.<sup>11</sup>

4. See *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding that Oregon statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (noting that federal power in foreign relations should be left free from local interference).

5. See Thomas E. L. Dewey, *Can U.S. Have 50 Foreign Policies?*, NAT'L L.J., Aug. 16, 1999, at A19 (recognizing need for definitive answer to permissible level of state involvement in foreign affairs). For a further discussion of factors influencing support for increased state participation in foreign affairs, see *supra* note 3 and accompanying text.

6. 389 U.S. 429 (1968).

7. See Spiro, *supra* note 2, at 1225 (noting that subsequent Supreme Court decisions have diluted effect of *Zschernig*); see also Dewey, *supra* note 5, at A19 (calling upon Supreme Court for definitive resolution of threshold level of permissible state involvement in foreign relations).

8. See Ch. 130, 1996 Mass. Acts 239 (codified at MASS. GEN. LAWS ch. 7, §§ 22G-22M (West Supp. 1998)) [hereinafter "Massachusetts Burma Law" or "Massachusetts law"]. In 1989 Burma changed its name to Myanmar. Nonetheless, because the name "Burma" is referred to in the legislation at issue and all the relevant commentary, Burma will be used throughout this Note.

9. See Brief of Plaintiff-Appellee at 65, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), cert. granted, 1220 S. Ct. 525 (U.S. Nov. 29, 1999) (No. 98-2304) (asking First Circuit to affirm judgment of district court that Massachusetts Burma Law unconstitutionally infringes upon federal government's exclusive foreign affairs power).

10. 181 F.3d 38 (1st Cir. 1999), cert. granted, 120 S. Ct. 525 (U.S. Nov. 29, 1999).

11. See *id.* at 56-57 (noting that "*Zschernig* remains '[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power' of the federal government") (quoting *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998)) (emphasis added).

This Note discusses the development of the law regarding the permissible level of state involvement in foreign affairs.<sup>12</sup> Part II summarizes the constitutional and policy-related issues associated with sub-national actor participation in international affairs.<sup>13</sup> Part III outlines the facts and events giving rise to *Natsios*, in which the United States Court of Appeals for the First Circuit struck down the Massachusetts Burma Law as unconstitutional.<sup>14</sup> Part IV addresses the reasoning of the First Circuit and the propriety of its decision.<sup>15</sup> Part IV also discusses how the First Circuit, mindful of the international ramifications of its decision, championed the causes of federalism and federal exclusivity in the arena of foreign affairs, when state involvement places the United States in the uncomfortable position of breaching its international obligations.<sup>16</sup> Part V of this Casenote focuses on the practical effects of the First Circuit's decision, as it pertains to both domestic and international affairs.<sup>17</sup>

## II. BACKGROUND

### A. *The Zschernig Pronouncement*

The Supreme Court's decision in *Zschernig* followed a long line of decisions upholding the primacy of the federal government's power in the foreign affairs arena.<sup>18</sup> In *Zschernig*, the appellants, residents of East Ger-

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12. For a discussion of the development and current status of the law regarding the permissible level of sub-national actor participation in foreign affairs, see *infra* notes 17-174 and accompanying text.

13. For a discussion of the constitutional and policy-related issues flowing from the increasing incidence with which state and local actors are venturing into the field of foreign affairs, see *infra* notes 18-64 and accompanying text.

14. For a discussion of the facts of *Natsios*, see *infra* notes 65-78 and accompanying text.

15. For a discussion and critique of the court's rationale in *Natsios*, see *infra* notes 79-152 and accompanying text.

16. For a discussion of the impact that state and local selective purchasing laws could have on the federal government's ability to conduct foreign affairs, see *infra* notes 153-74 and accompanying text. See *Natsios*, 181 F.3d at 51 (recognizing that requiring state court inquiries into types of governments of foreign nations "affect [ ] international relations in a persistent and subtle way," and thus "may well adversely affect the power of the central government to deal with" problems of international affairs) (quoting *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968)); Paven Malhotra, *Cities and States: Local Actors in US Foreign Policy*, HARV. INT'L REV. Spring 1999, at 39, 41 (noting probability of state action inviting international indignation and subjecting U.S. to actions for breach of international obligations).

17. For a discussion of the possible impact of the *Natsios* decision, see *infra* notes 153-74 and accompanying text.

18. See *Zschernig*, 389 U.S. at 441 (recognizing that Oregon statute intrudes on federal government's power over foreign relations). In 1937, the Supreme Court authoritatively stated that the federal government exercised complete and exclusive control over the foreign affairs of the United States. See *United States v. Belmont*, 301 U.S. 324, 330 (1937). Five years later, the Court again recognized that the broad authority of the federal government over foreign affairs was exclusive. See *United States v. Pink*, 315 U.S. 203, 233 (1942) (citing *Belmont* as controlling precedent); see also *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (same).

many and the sole heirs of an American citizen who died intestate in Oregon, challenged the constitutionality of an Oregon law that denied inheritance rights to nonresident aliens if they lived in countries that did not provide reciprocal rights to citizens of the United States.<sup>19</sup> Specifically, the statute barred a nonresident alien from taking property by testamentary disposition or succession unless he or she showed the existence of three conditions, all of which required some degree of reciprocity between the rights guaranteed by the United States and those recognized by the foreign country.<sup>20</sup> The Supreme Court held that as applied by Oregon, the three provisions in question involved the state in foreign affairs and international relations, matters that the Constitution entrusts solely to the federal government.<sup>21</sup> The statute provided that if these conditions were not met, and there were no other heirs, devisees or those eligible to take the property, the estate would escheat to the state.<sup>22</sup>

Accordingly, the Court held that the Oregon law was unconstitutional because it required Oregon probate courts to launch delicate inquiries into the types of governments of foreign nations.<sup>23</sup> Such evaluations, the Court said, “inescapab[ly] . . . affect[ ] international relations in a persistent and subtle way,” and thus, “may well adversely affect the power of the central government to deal with those problems.”<sup>24</sup> Although *Zschernig* presented the first opportunity for the Court to confront the question of

19. See Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT’L L.J. 443, 457 (1998) (noting reciprocity requirement of section 111.070 of the Oregon Revised Statutes).

20. See *Zschernig*, 389 U.S. at 430-31 (discussing Oregon statute). Section 111.070 of the Oregon Revised Statutes provided for escheat to the state in cases where a nonresident alien claimed property unless the following three conditions were met:

- (1) [T]he existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;
- (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and
- (3) the right of the foreign heirs to receive the proceeds of Oregon estates “without confiscation.”

OR. REV. STAT. § 111.070 (1957).

The *Zschernig* Court noted that the Oregon decisions interpreting these sections made clear that courts were inquiring into the types of governments of foreign nations and were being driven by foreign policy attitudes regarding the continuance of the “Cold War.” See *Zschernig*, 389 U.S. at 437-38. The Court continued by explaining that such matters are for the federal government, not local probate courts. See *id.*

21. See *Zschernig*, 389 U.S. at 429 (distinguishing *Clark v. Allen*, 331 U.S. 503 (1947), and striking down Oregon law as unconstitutional infringement on foreign affairs power of federal government).

22. See *id.* at 430 (noting that Oregon statute provided for escheat to state of property unless reciprocity requirements were met).

23. See *id.* at 434 (noting that inheritance statutes required probate courts to launch delicate inquiries into types of governments that obtain in foreign nations).

24. *Id.* at 440-41.

whether a state or local law could be violative of the Constitution's foreign affairs provisions in the absence of federal preemption, the Court nonetheless based its reasoning on the logic of its earlier foreign affairs jurisprudence.<sup>25</sup>

As the seminal case on this issue, *Zschernig* provided guidelines to aid in determining whether a local law unlawfully infringes on the foreign affairs power of the federal government.<sup>26</sup> Unfortunately, a number of commentators have questioned the utility of *Zschernig*, referring to it as

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25. *See id.* at 441 (recognizing that Oregon statute intrudes on federal government's power over foreign relations); *see also* *United States v. Pink*, 315 U.S. 203, 233 (1942) (stating that "[p]ower 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) (stating that field affecting foreign relations be left entirely free from local interference); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (noting federal government's dominion over foreign affairs).

26. *See Price & Hanna, supra* note 19, at 457-59 (discussing guidelines enunciated by Court in *Zschernig*). Several aspects of *Zschernig* bear heavily on subsequent interpretations of its holding. First, the Court struck down the Oregon law despite the fact that the Executive Branch, on brief for amicus curiae, argued that the law did not interfere with the federal government's power over foreign affairs. *See id.* at 457 (citing *Zschernig*, 389 U.S. at 434). For a discussion of congressional acquiescence in *Natsios*, *see infra* note 81 and accompanying text. Thus, it appears from the Court's response that the Executive Branch's view on the matter is not dispositive. *See Price & Hannah, supra* note 19, at 457 (noting that executive branch view is not dispositive). Indeed, in his concurrence in *Zschernig*, Justice Stewart treated the issue in the following manner:

We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may.

*Zschernig*, 389 U.S. at 438 (Stewart, J., concurring).

Second, the Court also noted that, in at least one instance, the law prompted a foreign government to lodge a complaint with the State Department. *See Price & Hanna, supra* note 19, at 457-58 (citing *Zschernig*, 389 U.S. at 437 n.7). Again, although not dispositive, the Court's treatment of this issue leaves open the opportunity for courts to consider the concerns of foreign governments when determining the extent to which a state law encroaches on the powers of the federal government. *See id.* For a further discussion of how the opinion of foreign governments weighed on the minds of the First Circuit in *Natsios*, *see infra* notes 113-15 and accompanying text.

Third, in assessing the possible implications of the Oregon law—should it be allowed to stand—the Court looked to the prevalence of similar laws in New York, Pennsylvania and Montana to determine the cumulative effect that a legion of similar laws would have on the federal government's ability to maintain a consistent foreign policy. *See Price & Hannah, supra* note 19, at 458 (discussing Court's analysis of cumulative effect of similar laws in other jurisdictions). For a discussion of the existence of state and local laws akin to the Massachusetts Burma Law, *see infra* notes 67, 69-70 and accompanying text.

Fourth, the Court struck down the Oregon statute, despite the fact that probate law was traditionally an area of state concern. *See Price & Hannah, supra* note 19, at 458 (noting Court's decision to strike down statute despite fact that probate law was traditional area of state concern). Nonetheless, the Court made clear that such concerns "must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* (quoting *Zschernig*, 389 U.S. at 440).

both an ambiguous pronouncement on foreign affairs jurisprudence and an inapplicable relic of the Cold War era.<sup>27</sup> As an off-shoot of this reasoning, many contend that *Zschernig*'s effect has been diluted in recent years by a number of subsequent Supreme Court proclamations.<sup>28</sup>

## B. SUBSEQUENT SUPREME COURT DECISIONS AND THEIR EFFECT ON *Zschernig*

### 1. *The Barclays Decision*

In *Barclays Bank PLC v. Franchise Tax Board*,<sup>29</sup> the Supreme Court upheld a California corporate tax system against challenges claiming that the system's worldwide combined reporting requirement was violative of the Commerce and Due Process Clauses.<sup>30</sup> The Petitioner, Barclays, argued that the law burdened foreign-based multinational corporations and impeded the ability of the federal government to "speak with one voice when regulating commercial relations with foreign governments."<sup>31</sup> The *Barclays* Court noted that, besides the ordinary domestic Commerce Clause

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Lastly, *Zschernig* does not stand for the proposition that any statute that has some effect on foreign affairs is unconstitutional. *See id.* (discussing limitations on *Zschernig*'s holding). Nonetheless, when a law has more than an "indirect or incidental effect in foreign countries," and when it creates "great potential for disruption or embarrassment" to United States foreign policy, it must be struck down. *Id.* (citing *Zschernig*, 389 U.S. at 434-35).

27. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 165 n.2 (2d ed. 1996) (noting that *Zschernig* may merely become relic of Cold War, with no future value); Curtis A. Bradley, *A New American Foreign Affairs Law*, 70 U. COLO. L. REV. 1089, 1105 (1999) (noting that *Zschernig* "clearly seem[s] to be a product of the Cold War era"); Alejandra Carvajal, Note, *State and Local "Free Burma" Laws: The Case For Sub-National Trade Sanctions*, 29 LAW & POL'Y INT'L BUS. 257, 267 (1998) (noting that *Zschernig* was decided at height of Cold War).

In addition to those who argue that *Zschernig* is limited by the era in which it was decided, many commentators also note that the precise holding of *Zschernig* is unclear. *See* National Foreign Trade Council v. Natsios, 181 F.3d 38, 51-52 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (U.S. Nov. 29, 1999) (stating that precise boundaries of holding in *Zschernig* are unclear); *see also* Geraldo Pascual, Note, *State Buy American Laws In a World of Liberal Trade*, 7 CONN. J. INT'L L. 311, 323 (1992) (noting that "exact holding of *Zschernig* is ambiguous").

28. *See* Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 404 (1999) (noting that Supreme Court's decision not to strike down any other state laws on *Zschernig* grounds suggests that *Zschernig* is limited); Trachtman, *supra* note 2, at 356 (noting that *Barclays Bank PLC v. Franchise Tax Bd.* 512 U.S. 298 (1994), "illustrates a shift toward greater deference to state law"); *see also* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1700-01 (1997) (contending that *Barclays* undercuts *Zschernig*). *But see* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1848 (1998) (arguing that it would be wrong to overstate influence of *Barclays*).

29. 512 U.S. 298 (1994).

30. *See id.* at 298-99 (upholding California corporate tax system against Commerce and Due Process Clause challenges).

31. *Id.* at 302-03 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979)).

analysis announced in *Complete Auto Transit, Inc. v. Brady*,<sup>32</sup> state regulation of foreign commerce gives rise to two ancillary issues: first, an “enhanced risk of multiple taxation,”<sup>33</sup> and second, the risk of impinging on the “[f]ederal [g]overnment’s ability to ‘speak with one voice when regulating commercial relations with foreign governments.’”<sup>34</sup> Nonetheless, in the absence of action taken by Congress or the Executive challenging the California law as a violation of federal policy, the Court could not “conclude that ‘the foreign policy of the United States . . . [was] so seriously threatened’ by California’s practice as to warrant [its] intervention.”<sup>35</sup>

## 2. *Other Decisions Under Zschernig*

In a line of cases following *Zschernig*, courts split as to its interpretation when faced with challenges to state and local laws brought under its mandate.<sup>36</sup> These cases fall into two categories: “challenges to the application of laws targeting specific foreign states, and challenges to state ‘buy-American’ laws.”<sup>37</sup> Of those, cases appear on both ends of the judicial spectrum.<sup>38</sup> Some courts find the challenged state and local laws to be impermissible encroachments on the foreign affairs power of the central government.<sup>39</sup> Conversely, some courts permit a greater degree of state and local involvement in similar ventures.<sup>40</sup>

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32. 430 U.S. 274, 279 (1979).

33. *Barclays*, 512 U.S. at 311 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 185 (1983)) (internal quotation marks omitted).

34. *Id.* (quoting *Japan Line*, 441 U.S. at 449) (internal quotation marks omitted).

35. *Id.* at 327 (alteration in original) (citation omitted) (quoting *Container Corp.*, 463 U.S. at 196).

36. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 55-56 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (U.S. Nov. 29, 1999) (noting split between courts on interpretation of *Zschernig*).

37. *Id.*

38. See *id.* (discussing cases that appear on both ends of judicial spectrum).

39. See *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (holding tax exemption to be impermissible encroachment on foreign affairs power of federal government); *New York Times Co. v. City of New York Comm’n on Human Rights*, 361 N.E.2d 963, 969 (N.Y. 1977) (holding New York law impermissible under *Zschernig*).

40. See *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3d Cir. 1990) (upholding state “buy-American” statute); *Board of Trustees of the Employees Retirement Sys. v. Mayor & City Council of Baltimore*, 562 A.2d 720, 746 (Md. 1989) (upholding local divestment ordinances as permissible involvement in foreign affairs). See generally *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm’n*, 381 A.2d 774 (N.J. 1977) (holding that state “buy-American” statute is permissible under *Zschernig*).



a. Cases Striking Down State and Local Laws as Impermissible Encroachments on the Nation's Foreign Policy

In *New York Times Co. v. City of New York Commission on Human Rights*,<sup>41</sup> the Court of Appeals of New York held that New York could not enforce local antidiscrimination laws that prohibited the *New York Times* from running an advertisement for employment opportunities in South Africa.<sup>42</sup> Under *Zschernig*, the court said that even longstanding state regulation must give way if its enforcement would "impair the effective exercise of the nation's foreign policy."<sup>43</sup>

Likewise, in *Springfield Rare Coin Galleries, Inc. v. Johnson*,<sup>44</sup> the Illinois Supreme Court struck down a law excluding only South African coins from state tax exemptions.<sup>45</sup> The Illinois court held that the law was enacted for the sole purpose of boycotting the South African Krugerrand because of the state's displeasure with South Africa's apartheid policies.<sup>46</sup> Such measures, the court held, were "outside the [scope] of permissible state activity."<sup>47</sup>

b. Cases Permitting Greater State and Local Involvement in Foreign Affairs

At the other end of the spectrum are cases that support the view of increased sub-national actor participation in arenas that touch upon the sensitive nature of foreign relations.<sup>48</sup> For example, in *Board of Trustees of the Employees' Retirement System v. Mayor & City Council of Baltimore*,<sup>49</sup> the Maryland Court of Appeals found that local divestment ordinances did not interfere with the Nation's ability to achieve its foreign policy directives,

41. 361 N.E.2d 963 (N.Y. 1977).

42. *See id.* at 969 (finding that New York could not apply local antidiscrimination laws to prohibit *New York Times* newspaper from advertising employment opportunities in South Africa).

43. *Id.* at 968 (quoting *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)).

44. 503 N.E.2d 300 (Ill. 1986).

45. *See id.* at 307 (holding that disapproval of political or social policies of foreign nation does not provide valid basis for tax classification). In this instance, the tax exemption applied equally to coins and currency issued by all other countries. *See id.* at 302 (noting South African coins' exclusion from tax exempt status and inclusion of all other countries' currencies).

46. *See id.* (noting discriminatory purpose of Illinois statute). The Krugerrand is a gold coin issued by the Republic of South Africa. *See id.* at 302.

47. *Id.* The federal courts have similarly held that where laws go too far in addressing sensitive issues that could adversely affect international relations, they must be held unconstitutional. *See, e.g., Tayari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376-80 (D.N.M. 1980) (holding that state university's policy of barring admission or readmission of Iranian students could adversely affect international relations, and as such, was impermissible).

48. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 55-57 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (U.S. Nov. 29, 1999) (noting loose interpretations of *Zschernig*).

49. 562 A.2d 720 (Md. 1989).

and thus, were not unconstitutional under *Zschernig*.<sup>50</sup> The Maryland court reasoned that even though *Zschernig* circumscribes a state's ability to take actions involving substantive judgments about foreign nations, it does not per se prohibit such forays.<sup>51</sup>

In two cases involving "buy-American" statutes, the court in each instance upheld the law, at least in part because the statutes did not require state governments to inquire into the policies of foreign nations, and because the laws treated all foreign nations equally.<sup>52</sup> Regardless of which position each of the preceding cases espouses, they all endeavor, under the command of *Zschernig*, to find a threshold level of permissible state involvement in the field of foreign relations.<sup>53</sup>

### c. The History of the Massachusetts Burma Law

In 1996, the Commonwealth of Massachusetts enacted "an Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)."<sup>54</sup> The law restricts the ability of Massachusetts and its agencies to purchase goods or services from any entity engaging in business

50. *See id.* at 746.

51. *See id.* (discussing what First Circuit believes to be limits on *Zschernig's* holding).

52. *See Natsios*, 181 F.3d at 56 (giving reasons why courts upheld state "buy-American" statutes). *See generally* *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3d Cir. 1990) (upholding statute in part because it provides no opportunity for state officials "to comment on, let alone key their decisions to, the nature of foreign regimes"); *K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977) (holding that state "buy-American" statute does not discriminate against different foreign nations). In *Trojan Techs.*, the United States Court of Appeals for the Third Circuit commented that in upholding the statute, it was clear that the buy-American statute "provide[d] no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes," and there was no "indication . . . that the statute [had] been selectively applied according to the foreign policy attitudes of the Commonwealth courts or . . . Attorney General." *Trojan Techs.*, 916 F.2d at 913.

53. *Compare* *Tayari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376-80 (D.N.M. 1980) (holding that university policy was impermissible because it could affect international relations), *and* *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800, 800 (Ct. App. 1969) (invalidating California Buy American Act as impermissible encroachment on foreign affairs power of federal government), *and* *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (finding Illinois law "outside the realm of permissible state activity"), *and* *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963, 968 (N.Y. 1977) (holding that New York law was impermissible under *Zschernig*), *with* *Trojan Techs.*, 916 F.2d at 913-14 (upholding "buy-American" statute as permissible state activity), *and* *Board of Trustees of the Employees' Retirement Sys. of Baltimore v. Mayor & City Council of Baltimore*, 562 A.2d 720, 757 (Md. 1989) (finding Baltimore ordinance permissible under *Zschernig*), *and* *K.S.B. Technical*, 381 A.2d at 782-84 (concluding that "buy-American" provisions do not represent kind of intrusion into foreign affairs condemned in *Zschernig*). As the preceding cases illustrate, recognizing the precise scope of *Zschernig* has not been an easy task.

54. Ch. 130, 1996 Mass. Acts 239 (codified at MASS. GEN. LAWS ch. 7, §§ 22G-22M (West Supp. 1998)).

with Burma.<sup>55</sup> Moreover, the law requires the Secretary of Administration and Finance to compile and update a “restricted purchase list,” comprised of all companies engaged in business relations with Burma.<sup>56</sup>

Under the law, three situations, if present, afford Massachusetts the opportunity of doing business with a “restricted company.”<sup>57</sup> Practically speaking then, a company on the restricted purchase list can sell to the Commonwealth only if its bid is ten percent lower than the otherwise lowest bid of a company not on the list.<sup>58</sup> Before a company can pursue a contract with the Commonwealth, it must provide an affidavit disclosing any business ties it may have with Burma.<sup>59</sup> The law defines “doing business with Burma” to include a variety of economic relationships, making rare exceptions for entities “with operations in Burma (Myanmar) for the sole purpose of reporting the news, or solely for the purpose of providing goods or services for the provision of international telecommunications.”<sup>60</sup> The law does not restrict the ability of private citizens or local

55. *See id.*; *see also Natsios*, 181 F.3d at 45 (discussing Massachusetts Burma Law).

56. MASS. GEN. LAWS ch. 7, § 22J. Although the Act restricts the ability of Massachusetts to do business with firms on the restricted purchase list, it does not entirely prohibit it. *See id.* § 22H (listing three situations where Massachusetts can lawfully contract with company on restricted purchase list).

57. *See id.* § 22H (listing three situations that afford Massachusetts opportunity of doing business with company on restricted purchase list). Massachusetts may, in its discretion, do business with any company on the “restricted purchase list” “when: (1) the procurement of the bid or offer is essential and there is no other bid or offer; (2) when the Commonwealth is purchasing certain medical supplies; or (3) when there is no comparable low bid or offer.” *Id.* The law defines “comparable low bid or offer” as an offer equal to or less than 10% above a low bid from a company on the restricted purchase list. *Id.* § 22G.

58. *See Natsios*, 181 F.3d at 46 (discussing practical effect of Massachusetts Burma Law),

59. *See* MASS. GEN. LAWS ch. 7, § 22H (noting requirement that company disclose any business ties it has with Burma before doing business with Massachusetts); *see also Natsios*, 181 F.3d at 46 (discussing requirement that company provide “a sworn declaration disclosing any business it is doing with Burma”).

60. MASS. GEN. LAWS ch. 7, § 22G. “[D]oing business with Burma” includes:

- (a) [H]aving a principal place of business, place of incorporation or . . . corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owner subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;
- (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;
- (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);
- (d) providing any goods or services to the government of Burma (Myanmar).

municipalities to enter into business relations with companies doing business with Burma.<sup>61</sup> Nevertheless, the law effectively forces businesses to choose between doing business with Burma and availing themselves of Massachusetts's two billion dollar procurement market.<sup>62</sup>

Noticeably absent from the law is an express statement of purpose. Nonetheless, the bill's cosponsor, Representative Byron Rushing, stated that the law establishes a selective purchase program, which has as its "identifiable goal" the pursuit of "free democratic elections in Burma."<sup>63</sup> Indeed, Massachusetts argued to the District Court for the District of Massachusetts that the law was enacted to express the Commonwealth's disapproval of the human rights violations committed in Burma, and not as a measure designed to benefit the Commonwealth economically.<sup>64</sup>

### III. FACTS: THE EVENTS GIVING RISE TO *National Foreign Trade Council v. Natsios*

On April 30, 1998, the NFTC filed suit, seeking declaratory and injunctive relief against two Massachusetts officials.<sup>65</sup> At the time the NFTC filed its complaint there were 346 companies on the restricted purchase list, 44 of which were United States companies.<sup>66</sup> Coinciding with protests

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*Natsios*, 181 F.3d at 46 (quoting MASS. GEN. LAWS ch. 7, § 22G).

61. See Petition for Certiorari at 6-7, *Natsios*, 181 F.3d 38 (No. 98-2304) (noting that Massachusetts Burma Law does not apply to private citizens).

62. See *Natsios*, 181 F.3d at 46 (noting practical effect of Massachusetts Burma Law).

63. See *id.* (recounting statements of Massachusetts Burma Law sponsor as he introduced bill to legislature). In his signing statement, then-Lieutenant Governor Cellucci stated that he believed that the "steady flow of foreign investments, including those of . . . United States companies [into Burma]" enabled the junta in Burma to procure weapons and establish itself as the legitimate government of Burma. *Id.*

Additionally, then-Governor Weld commented that although one act by one state alone (referring to the enactment of the Massachusetts Burma Law) would not end the oppression and suffering of the Burmese people, it was his sincere hope that other states and Congress would follow in Massachusetts' footsteps. See *id.* (emphasis added). As a corollary, Congress indeed did follow suit when, three months after the passage of the Massachusetts Burma Law, Congress enacted a law imposing sanctions on Burma. See *id.* at 47 (citing Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by Omnibus Consolidated Appropriations Act, 1997, Pub.L. No. 104-208, § 101(c), 110 Stat. 3009-121 to 3009-172 (1996)) ("Federal Burma Law")). For a discussion of Congressional preemption of the Massachusetts Burma Law, see *infra* note 78 and accompanying text.

64. See *Natsios*, 181 F.3d at 46 (noting consistency of Massachusetts' contentions that law was enacted to disavow human rights violations and presence of military junta in Burma).

65. See *id.* at 48. The NFTC, founded in 1914 is a nonprofit corporation, which has "long represented its members in foreign-trade matters." Brief for Appellee at 11, *Natsios*, 181 F.3d 38 (No. 98-2304). At the time the complaint was filed the NFTC represented over 540 member companies that engage in foreign trade. See *Natsios*, 181 F.3d at 48.

66. See *Natsios*, 181 F.3d 38, 47.

from several of the United States' trading partners, a number of companies withdrew their enterprises from Burma, with at least three citing the Massachusetts Burma Law as the principal consideration in their decision.<sup>67</sup> In addition to Massachusetts, nineteen municipal governments enacted similar laws restricting business associations with companies doing business with Burma—although Massachusetts remains the only state to have enacted a selective purchasing law aimed at companies doing business in or with Burma.<sup>68</sup>

On the international level, several foreign nations expressed objections to the Massachusetts Burma Law.<sup>69</sup> Although the Association of South East Asian Nations ("ASEAN") and Japan outwardly expressed their concern to the federal government regarding the Massachusetts law, the European Union and Japan were even more proactive, lodging complaints with the World Trade Organization ("WTO"), condemning the law as a violation of the United States' international obligations.<sup>70</sup>

At the district court level, the NFTC challenged the Massachusetts Burma Law on three grounds.<sup>71</sup> First, it claimed that the law unconstitutionally interfered with the federal government's foreign affairs power.<sup>72</sup> Next, it maintained that the law violated the Foreign Commerce Clause.<sup>73</sup> Lastly, it argued that the Massachusetts law was preempted by the Federal Burma Law.<sup>74</sup> Although the district court found that the Massachusetts

67. *See id.* Protests have been forthcoming from a number of integral trading partners, including the EU, Japan and the ASEAN. *See id.* at 47 (noting foreign protests). For example, one EU executive noted the arrival of selective purchasing laws on the scene as "an unwelcome development." *E.U. Still Concerned Over U.S. Trade Barriers*, THE XINHUA NEWS AGENCY, Sept. 9, 1999, at 1, available in LEXIS, News Group File, Xinhua file. The official added that "this situation is not in line with the open market access policy advocated by the U.S." *Id.*

68. *See Natsios*, 181 F.3d 38, 47. Moreover, a number of local jurisdictions have enacted similar laws pertaining to China, Cuba, Nigeria and other countries. *See id.*; *see also* Appellee's Brief at 10, *Natsios*, 181 F.3d 38 (No. 98-2304) (noting that at present time, Massachusetts is only state or commonwealth to enact selective purchasing law pertaining to companies engaged in business in or with Burma).

69. *See Natsios*, 181 F.3d at 54 (considering protests received from EU and ASEAN); *see also* Appellee's Brief at 10, *Natsios*, 181 F.3d 38 (No. 98-2304) (discussing objections of several foreign governments and entities who have expressed dismay over Massachusetts Burma Law); Malhotra, *supra* note 16, at 40 (discussing problems negotiating with allies created by Massachusetts Burma Law). For a further discussion of the objections expressed by United States trading partners, *see supra* note 67, *infra* note 70 and accompanying text.

70. *See* Appellee's Brief at 10, *Natsios*, 181 F.3d 38 (No. 98-2304) (noting complaints filed by EU and Japan with World Trade Organization ("WTO")); *see also* Price & Hanna, *supra* note 19, at 445, 499 n.7 (same) (citing United States—*Measures Affecting Government Procurement, Request for Consultations by the European Communities*, WTO Doc. WT.DS88/1 (circulated June 26, 1997)).

71. *See Natsios*, 181 F.3d at 48 (discussing challenge to Massachusetts Burma Law in district court).

72. *See id.*

73. *See id.*

74. *See id.*

Burma Law impermissibly encroached upon the foreign affairs power of the federal government, it held that the NFTC had not met its burden of showing that Congress preempted the Massachusetts Burma Law by enacting the Federal Burma Law.<sup>75</sup> The district court did not pass on the argument advanced by the NFTC that the Massachusetts law violated the Foreign Commerce Clause.<sup>76</sup> The First Circuit affirmed the district court's ruling that the Massachusetts Burma Law unconstitutionally encroached on the federal government's exclusive power over foreign affairs.<sup>77</sup> It further held that the law violated the Foreign Commerce Clause and was preempted by federal law imposing sanctions on Burma.<sup>78</sup>

#### IV. ANALYSIS

##### A. *Narrative Analysis: A Unanimous Three-Judge Panel Advances the Cause of Federalism*

In striking down the Massachusetts Burma Law, the First Circuit began its analysis by reviewing Supreme Court precedent regarding the permissible level within which states may legislate in the foreign affairs arena.<sup>79</sup> Next, the court addressed the constitutionality of the Massachusetts Burma Law under the Foreign Commerce Clause.<sup>80</sup> Thereafter, the

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75. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 289, 293 (D. Mass. 1998) (holding that Massachusetts Burma Law impermissibly encroached upon foreign affairs power of federal government and that NFTC had not met its burden of showing that Federal Burma Law preempted Massachusetts Burma Law).

76. See *id.* at 293 (declining to consider NFTC's argument that Massachusetts law violates Foreign Commerce Clause).

77. See *Natsios*, 181 F.3d at 45 (holding that Massachusetts law interfered with foreign affairs power of federal government).

78. See *id.* (holding that Massachusetts law violated Foreign Commerce Clause and was preempted by Congress).

79. See *id.* at 49-61 (analyzing whether Massachusetts Burma Law impermissibly impinges on foreign affairs power of federal government and concluding that it does).

80. See *id.* at 61-71 (analyzing constitutionality of Massachusetts Burma Law under Foreign Commerce Clause). Because a textual discussion of this aspect of the court's holding is beyond the scope of this Note, the court's treatment of the Foreign Commerce Clause challenge will accordingly be dealt with in this footnote.

Massachusetts argued that it is a market participant (and not a regulator), and that the market participant exception, as recognized by the Supreme Court in dormant domestic Commerce Clause jurisprudence, should be applied to the Foreign Commerce Clause. See *id.* at 62. Even if this exception does not apply, Massachusetts argued, the Massachusetts Burma Law is still not violative of the Foreign Commerce Clause. See *id.*

In its analysis, the court first found that Massachusetts was not acting as a market participant when it acted pursuant to the Massachusetts Burma Law. See *id.* at 62 (distinguishing *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983)). In distinguishing *White*, the court noted that while *White* involved an attempt to dictate the employment of Boston residents in projects funded by the city, Massachusetts was attempting to impose on companies with which it does busi-

ness conditions unrelated to the companies' business relationship with Massachusetts. *See id.* at 62-63. Moreover, the court stated that the market participant exception is a narrow one and should not be applied too broadly. *See id.* at 63 (citing *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 594 (1997)).

After concluding that Massachusetts was not acting as a market participant when acting pursuant to the Massachusetts Burma Law, the court then stated that it is unlikely that the exception even applied to the Foreign Commerce Clause. *See id.* at 65. Nonetheless, the court left the conclusive resolution of this issue to another day. *See id.*

In concluding its Foreign Commerce Clause analysis, the court found that the critical inquiry was whether the Massachusetts Burma Law facially discriminated against foreign commerce. *See id.* at 66. In support of its holding that the law was facially discriminatory, the court relied on Supreme Court precedent to advance the notion that a law need not be designed to further local economic interests in order to run afoul of the Commerce clause. *See id.* at 67 (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 276 (1988), and *Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue & Fin.*, 505 U.S. 71, 79 (1992) (rejecting argument that local favoritism is crucial to finding that law is facially discriminatory)). The court further found that the law was a clear attempt to regulate the flow of foreign commerce. *See id.* at 67-68 (stating that Massachusetts Burma Law discriminated against foreign commerce in two ways: by discriminating against companies or persons organized or operating in Burma and against companies or persons doing business in Burma); *see also* *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (stating that law would not be held invalid if it *only* had "foreign resonances") (emphasis added); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979) (stating that "[f]oreign commerce is preeminently a matter of national concern" and recognizing need for "federal uniformity"). Using the above cases as a foundation, the court found that Massachusetts' attempt to compel political change in Burma through regulating the flow of foreign commerce was clearly more than just resonances. *See Natsios*, 181 F.3d at 68. Following this line of reasoning, the court held that the Massachusetts Burma Law was facially discriminatory. *See id.*

The court further held that the Massachusetts Burma Law interfered with the ability of the central government to speak with one voice. *See id.* Citing *Container Corp.* and *Japan Line* as direct precedent, the court distinguished the "one voice" test of Foreign Commerce Clause analysis from the similar, but distinct "one voice" test used under *Zschernig's* foreign affairs power analysis. *See id.* In so holding, the court found that the above cases "make clear that a state law can violate the dormant Foreign Commerce Clause by impeding the federal government's ability to 'speak with one voice,' . . . because such state action harms 'federal uniformity in an area where federal uniformity is essential.'" *Id.* (quoting *Japan Line*, 441 U.S. at 448-49); *see also* *Container Corp.*, 463 U.S. at 193. The court explicitly rejected the Commonwealth's argument that the Massachusetts Burma Law did not violate the Foreign Commerce Clause because the law did not distinguish between domestic and foreign companies. *See Natsios*, 181 F.3d at 67. Moreover, the court rejected Massachusetts' argument that *Barclays* severely undercuts, if not completely disposes of the Commerce Clause "one voice" test. *See id.* at 68-69. Finally, the court found that in light of the findings above, Massachusetts failed to put forth a legitimate local justification in support of its law. *See id.* at 70. Because it found that the Massachusetts law discriminated on its face against foreign commerce, the court noted that the law could survive constitutional scrutiny only if it "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable non-discriminatory alternatives.'" *Id.* (quoting *New Energy Co.*, 486 U.S. at 278 (1988)). The court found Massachusetts' argument that the expression of moral outrage served this purpose to be unpersuasive, and it held that the Commonwealth had failed to advance a legitimate local justification to save its law from constitutional scrutiny. *See id.*

court discussed whether Congress preempted the Massachusetts law by imposing its own sanctions on Burma.<sup>81</sup> Finally, the court held that the law

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81. *See id.* at 71-77 (analyzing whether Congress preempted Massachusetts Burma Law by imposing its own sanctions on Burma). Like the court's holding that the Massachusetts Burma Law violated the Foreign Commerce Clause, the holding that the law was also preempted by the passage of the Federal Burma Law is also beyond the scope of this Note. Therefore, the issue of federal preemption will be discussed in this footnote.

In treating the issue of preemption, the court considered the NFTC's argument that the Massachusetts Burma Law was preempted by the Federal Burma Law, and thus, a violation of the Supremacy Clause. *See Natsios*, 181 F.3d at 71. The court also considered the Commonwealth's response that Congress had implicitly permitted the law, and regardless, that the federal sanctions did not preempt its law. *See id.* The court rejected Massachusetts' claim that Congress acquiesced to its law and found that Congress indeed preempted the Massachusetts Burma Law. *See id.*

In arguing that Congress implicitly permitted its law because of its failure to explicitly preempt it, the Commonwealth relied on *Barclays* to advance its argument that when Congress is fully aware of a state's law, and fails to explicitly preempt it, it has acquiesced to the validity of the law in question. *See id.* (citing *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 326-29 (1994)). In rejecting the Commonwealth's argument, the court stated that "the posture of Congress here is nothing like the position of Congress recounted in *Barclays*." *Id.* at 72. Moreover, the court discounted Massachusetts' reliance on *Barclays*, distinguishing the facts of *Barclays* from the facts present in this case. *See id.* The court gave a number of reasons for believing that *Barclays* did not apply to the facts of this case. *See id.*

First, the court noted that the discussion of preemption in *Barclays* came as part of a Commerce Clause inquiry. *See id.* Unlike here, the court in *Barclays* did not have occasion to discuss how courts should address Supremacy Clause challenges to state and local laws that impact on foreign affairs. *See id.* Second, the court found that while *Barclays* involved an area of traditional state activity—income taxation of companies that do business in the state and elsewhere—the law in question had few direct foreign policy implications and was not designed to affect conduct beyond the borders of the state. *See id.* The court's final reason for distinguishing *Barclays* from this case is that although *Barclays* involved congressional silence, Congress has not been silent with respect to Burma. *See id.* at 73. Therefore, the court stated, the real question is not what is to be inferred from the lack of congressional activity in the present case, but how to interpret what Congress has already done with respect to Burma. *See id.*

In endeavoring to answer this question, the court examined the "usual indicia of congressional intent" where Congress has failed to explicitly address the issue of preemption. *Id.* The court determined that "[p]reemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and . . . where state laws touch on foreign affairs." *Id.* The test the court espoused can be found in *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941), and developed in later cases. *See id.* The court interpreted the test to stand for the proposition that when an act of Congress touches a field in which the federal interest is so dominant it will be deemed to preclude enforcement of similar state laws on the same subject. *See id.* at 74 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (noting that federal system precludes, in such instances, enforcement of state laws on same subject); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (same); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (same)).

The court rejected Massachusetts' argument that it was acting under its traditional state police powers, and it found that under *Hines* and its progeny, Congress had preempted the Massachusetts Burma Law. *See id.* at 76 ("[W]hen Congress



impermissibly encroached on the exclusive foreign affairs power of the federal government, violated the Foreign Commerce Clause and was preempted by Congress.<sup>82</sup>

Laying the groundwork for its foreign affairs power analysis, the court cited Article I, Section 8, Clause 3 of the United States Constitution for the proposition that the Constitution granted Congress the power “[t]o regulate commerce with foreign Nations.”<sup>83</sup> The court further cited a myriad of other clauses that make up the foreign affairs provisions of the Constitution.<sup>84</sup> In interpreting that language, the court concluded that the Constitution’s foreign affairs provisions have long been understood to vest power over foreign affairs solely in the federal government.<sup>85</sup> Indeed, as the

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legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern”). In so holding, the court considered, but apparently attached little weight to, amici curiae members of Congress, who contended that “Congress [was] well aware of the criticism being directed at the Massachusetts law and other state and local purchasing measures,” but that Congress’ failure to address such measures, either when enacting federal sanctions against Burma, or when it considered reforming federal sanctions law, was intentional. *See id.* at 72 (citing H.R. 2708, 105th Cong. (1997)).

82. *See Natsios*, 181 F.3d at 45 (holding, after de novo review, that Massachusetts Burma Law unconstitutionally encroached upon foreign affairs power of federal government, violated Foreign Commerce Clause and had been preempted by Congress).

83. *Id.* at 49 (citing U.S. CONST. art. I, § 8, cl. 3).

84. *See id.* (citing U.S. CONST. art. I, § 8, cls. 1, 4, 10 & 11 to demonstrate powers granted to Congress by Constitution in matters relating to foreign affairs). In addition, the court cited sections of Article II to note the foreign affairs power bestowed on the President by the Constitution. *See* U.S. CONST. art. II, § 2, cls. 1 & 2; *Natsios*, 181 F.3d at 49 (citing U.S. CONST. art. I, § 2, cls. 1 & 2). Collectively, the court endeavored to show the broad power conferred on the federal government in the foreign affairs arena. *See id.* at 49 (discussing foreign affairs power vested in federal government under Constitution).

Additionally, the court attempted to show the limited and restricted power given to the states by the Constitution. *See id.* (citing U.S. CONST. art. I, § 10, cls. 1, 2 for proposition that states may not act in specific foreign affairs matters without consent of Congress).

85. *See Natsios*, 181 F.3d at 49. From a historical perspective, James Madison commented that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.” *See id.* (citing THE FEDERALIST NO. 42, at 302 (James Madison) (B.F. Wright ed., 1996)). In its ambitious attempt to trace the power of the federal government over foreign affairs back to the Framers, the First Circuit cited Alexander Hamilton, who gave the following thoughts, discussing state regulation of foreign commerce:

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have . . . given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between different parts of the [Nation].

*Id.* at 49-50 (quoting THE FEDERALIST NO. 22, at 192 (Alexander Hamilton) (B.F. Wright ed., 1996)).

court noted, in the field of foreign affairs, state lines disappear and we are but one nation.<sup>86</sup> Nevertheless, the court recognized that a limited role in foreign affairs is conferred on the states by the Constitution.<sup>87</sup> Still, such roles are narrowly defined and limited in both scope and subject matter.<sup>88</sup> Although states may make some agreements and compacts with foreign governments without Congress' approval, they cannot do so where those agreements may infringe upon the authority or foreign relations power of the United States.<sup>89</sup>

Thus, the central question the court considered was whether the Massachusetts law runs contrary to the federal foreign affairs power as interpreted in *Zschernig*.<sup>90</sup> Although the court cited numerous cases supporting its finding that the Massachusetts Burma Law impermissibly encroaches on the federal government's foreign affairs power, no other case was as instrumental in this part of the court's opinion as the *Zschernig* decision.<sup>91</sup> After recognizing that the "precise boundaries" of *Zschernig*

86. See *United States v. Pink*, 315 U.S. 203, 233 (1942) ("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) (stating that interest of entire citizenry "imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936) (recognizing that foreign affairs power of federal government is not limited).

87. See *Natsios*, 181 F.3d at 50 ("Federal dominion over foreign affairs does not mean that there is no role for the states."). For example, states may, with the consent of Congress, "lay any Imposts or Duties on Imports or Exports" when they are "absolutely necessary for executing [their] inspection Laws." U.S. CONST. art. I, § 10, cl. 2. Moreover, states may, with the consent of Congress, "enter into any Agreement or Compact with another State, or with a foreign Power . . ." U.S. CONST. art. I, § 10, cl. 3. Indeed, Massachusetts maintains in excess of 20 bilateral agreements with sub-national foreign governments and trade organizations. See *Natsios*, 181 F.3d at 50. As one scholar notes, states will inevitably encroach upon, at least to some degree, the foreign relations power of the central government. See *id.* (citing LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 162 (2d ed. 1996)).

88. See *Natsios*, 181 F.3d at 50 (noting that under Constitution, states may make agreements with foreign nations both with and without consent of Congress in limited instances and confined subject matter) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 reporter's note 9 (1986)).

89. See *id.* (commenting that states may make some agreements with foreign governments without Congress' consent, provided they do not encroach on authority or foreign relations power of United States).

90. See *id.* at 50-51.

91. See *id.* (noting that central question is whether state law is inconsistent with federal foreign affairs power as interpreted in *Zschernig*); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties With Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175, 198-99 (1997) (discussing *Zschernig* as landmark case on subject of foreign affairs power); David R. Schmahmann et al., *Off the Precipice: Massachusetts Expands its Foreign Policy Expedition From Burma to Indonesia*, 30 VAND. J. TRANSNAT'L L. 1021, 1025 (1997) (same). Nonetheless, *Zschernig* has routinely been the subject of much

are ambiguous, the court proceeded to consider the parties' arguments in detail.<sup>92</sup> In agreeing with the district court that the Massachusetts Burma Law is unconstitutional under *Zschernig*, the court disposed of the Commonwealth's two lines of attack challenging the lower court's ruling.<sup>93</sup>

Massachusetts first advanced the argument that *Zschernig* can be distinguished from this case based on their incongruous facts.<sup>94</sup> As a corollary to this argument, Massachusetts argued that the *Zschernig* Court recognized the need to balance the local state interests against the relative possibility of harm flowing from state intrusion into foreign affairs.<sup>95</sup> The Commonwealth's next argument challenged *Zschernig* itself, effectively arguing that it is weak precedent.<sup>96</sup> More specifically, Massachusetts contended that the Court's decision in *Barclays* undercuts *Zschernig* and renders it limited in scope.<sup>97</sup>

In treating the Commonwealth's first argument, the court agreed with Massachusetts that *Zschernig* left intact *Clark v. Allen*.<sup>98</sup> The court then decided whether the Massachusetts Burma Law had more than an "incidental or indirect effect in foreign countries."<sup>99</sup> After stating that the Massachusetts law clearly had more than an "incidental or indirect effect in foreign countries," the court declined to read *Zschernig* as requiring courts to balance the nation's interests in a uniform foreign policy against the interests of an individual state.<sup>100</sup>

Instead, the court asserted, *Zschernig* stands for the principle that "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed."<sup>101</sup> In concluding that the Massachusetts law has more than an incidental or indirect effect on foreign relations, the

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scholarly debate. See Loschin & Anderson, *supra* note 28, at 403-04 (noting that commentators have searched for *Zschernig*'s meaning since it was decided).

92. See *Natsios*, 181 F.3d at 51-52. Because the district court ruled on cross-motions for summary judgment, based on stipulated facts and uncontested affidavits, the decision turned entirely on questions of law. As such, the First Circuit reviewed the district court's determinations de novo. See *id.* at 49. Because the parties' arguments raised issues of first impression, the First Circuit discussed them in great detail. See *id.* at 52.

93. See *id.* at 52-59 (addressing, then subsequently disposing of Massachusetts' arguments that lower court erred below).

94. See *id.* at 52.

95. See *id.* Of course, Massachusetts further argued that under this test the balance favors the Massachusetts Burma Law withstanding constitutional scrutiny. See *id.*

96. See *id.*

97. See *id.* (citing *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994)). The NFTC countered by claiming that the Massachusetts Burma Law is a far greater intrusion into foreign affairs than the law at issue in *Zschernig* and that Massachusetts is, for all practical purposes, asking the First Circuit to overrule *Zschernig*. See *id.*

98. 331 U.S. 503 (1947).

99. *Natsios*, 181 F.3d at 52 (quoting *Clark*, 331 U.S. at 517).

100. *Id.*

101. *Id.* As the Court in *Zschernig* stated:

court cited a combination of factors that lead to this result.<sup>102</sup> First, the court noted that the design and intent of the Massachusetts law is to affect the affairs of a specific foreign country (Burma).<sup>103</sup> Second, the Commonwealth of Massachusetts is in a position to effectuate that design and intent and, in fact, has had an effect.<sup>104</sup> Third, the effects of the law may prove even greater if Massachusetts ends up being a “bellwether” for other states and local governments.<sup>105</sup> Fourth, the law has been the subject of repeated complaints from foreign governments, the ASEAN and the European Union (“EU”).<sup>106</sup> Finally, Massachusetts has charted a course divergent from the federal law in at least five ways, creating the potential of embarrassment for the United States.<sup>107</sup>

In discussing the preceding factors, the court initially noted that the first two factors are evident from its recitation of the facts of the case.<sup>108</sup> The court then stated that the fifth factor is treated adequately in its preemption analysis.<sup>109</sup> The court then turned its discussion to the third and fourth factors mentioned above.<sup>110</sup>

In combining the two factors, the court determined that the threat to the foreign affairs power of the federal government is amplified when the Commonwealth is viewed as only a small part of a “broader pattern of state and local intrusion.”<sup>111</sup> The court concluded that under *Zschemig*, the effect of state and local laws cannot be viewed in isolation; courts con-

The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. . . . [E]ven in absence of a treaty, a State's policy may disturb foreign relations.

*Id.* at 52-53 (citing *Zschemig v. Miller*, 389 U.S. 429, 440-41 (1968)). The court went on to note that *Zschemig* did not hold, contrary to Massachusetts' contention, that a strong state interest could overcome an otherwise impermissible encroachment on the federal government's foreign affairs power. *See id.* at 53.

102. *See id.* at 52-53 (concluding that Massachusetts Burma Law fails effects test of *Clark* and *Zschemig*).

103. *See id.* at 53.

104. *See id.* For a discussion of the effects of the Massachusetts Burma Law, see *supra* notes 54-62 and accompanying text.

105. *See Natsios*, 181 F.3d at 53.

106. *See id.*

107. *See id.* This and the above four factors should be considered together, and their cumulative effect is determinative of whether the law has more than an incidental or indirect effect on foreign relations. *See id.*

108. *See id.* (disposing of first two factors as apparent from discussion of facts). For a further discussion of the facts of this case, see *supra* notes 65-78 and accompanying text.

109. *See Natsios*, 181 F.3d at 53. For a discussion of the court's preemption analysis, see *supra* note 81 and accompanying text.

110. *See Natsios*, 181 F.3d at 53-54 (discussing effects of Massachusetts Burma Law acting as “bellwether” for other state and local governments, and effect of foreign protests having potential to create disruption or embarrassment for United States).

111. *Id.* at 53. Additionally, the court noted that other municipalities have passed similar laws, whether targeting Burma or another country. *See id.* More-

ducting this analysis should consider the cumulative effects of similar laws in other jurisdictions.<sup>112</sup> The court also considered the protests raised by the EU, the ASEAN and other foreign governments.<sup>113</sup> In response to these types of protests, the court concluded that such objections are evidence of the “great potential for disruption or embarrassment caused by the Massachusetts law.”<sup>114</sup> This potential for embarrassment, together with the other factors mentioned above, drove the court to conclude that the Massachusetts Burma Law has more than an “incidental or indirect effect” on foreign relations and, as such, is an impermissible intrusion into the foreign affairs power of the federal government.<sup>115</sup>

In considering Massachusetts’ second argument, that *Zschernig* has been undercut by subsequent Supreme Court decisions, in particular the *Barclays* decision, the court reviewed the cases cited by Massachusetts and found that no decision by the Court, including *Barclays*, suggested that *Zschernig* is not fully binding on the present case.<sup>116</sup> In setting forth its argument, the Commonwealth relied on a wide range of authority, includ-

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over, the court stated, “amici inform us that other states and large cities are waiting in the wings.” *Id.*

112. *See id.* (announcing standard mandated by *Zschernig* for conducting effects test).

113. *See id.* at 54 (citing protests from United States’ allies and trading partners). An EU official commented that the Massachusetts Burma Law is “an attack on international law.” *Id.* Similarly, an ASEAN official remarked that the ASEAN is “dismayed by this trend [of sub-national laws targeting Burma], because you cannot negotiate with states and provinces.” *Id.*

114. *Id.* In giving credence to the potential for embarrassment to the United States that these protestations evince, the court concurrently rejected Massachusetts’ claim that such statements should be ignored. *See id.* In *Zschernig*, statements akin to the current ones were made by Bulgaria, to which the Court issued weight as evidence that the law was affecting foreign relations, and posing a “great potential for disruption or embarrassment.” 389 U.S. 429, 435, 436-37 (1968).

In support of its claim that the court should ignore foreign government objections, Massachusetts noted that the federal law implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) denies foreign governments the right to challenge state laws based on the GATT. *See Natsios*, 181 F.3d at 54. The court found this argument misplaced, because this case was not brought pursuant to the GATT, or any other WTO agreement. *See id.*

Massachusetts also contended that *Barclays* rejected the need to rely on the views of trading partners. *See id.* The court rejected this argument, concluding that although the Court in *Barclays* found foreign government views to be unpersuasive, it still considered them. *See id.* at 54-55. Reading *Zschernig* and *Barclays* together, the court determined that they stand for the proposition that “foreign government views, although not dispositive, are one factor to consider in determining whether a law impermissibly interferes with the federal government’s foreign affairs power.” *Id.* at 55.

115. *See Natsios*, 181 F.3d at 55 (concluding that because Massachusetts Burma Law has more than incidental or indirect effects, it is impermissible under *Zschernig*’s effects test).

116. *See id.* at 56-59 (finding that no subsequent Supreme Court opinions, including *Barclays*, undercuts *Zschernig* and suggests that it is not binding on this case).

ing cases and academic commentary.<sup>117</sup> Despite recognizing the ambiguity of *Zschernig*, the court concluded that neither post-*Zschernig* cases nor scholarly debate excuse lower courts from applying opinions that are still good law.<sup>118</sup>

In interpreting the subsequent case law that Massachusetts cited in support of its argument, the court noted that *Zschernig* is most often cited for the proposition that the federal government's foreign affairs power is plenary, or that cases in United States courts that involve foreign governments "raise sensitive issues of foreign affairs."<sup>119</sup> Although *Zschernig* has been distinguished by the Court on at least one occasion, the First Circuit believed that such action by the Court did not dilute the holding in *Zschernig*.<sup>120</sup> Indeed, as the court explained, "*Zschernig* remains '[t]he only

117. *See id.* The court framed the debate in the following manner:

One commentator . . . contends that *Barclays* stands for the proposition that courts should not weigh the effects of a state law on foreign relations, that *Barclays* undercuts claims that Massachusetts is interfering with the federal government's ability to speak with one voice, and that *Barclays* indicates that the Court will presume congressional tolerance of laws that touch on foreign affairs issues, in particular if foreign governments object to the state law in question.

*Id.* at 58 n.13 (citing Goldsmith, *supra* note 28, at 1700-01). On the other hand, the court cited Professor Koh, who contested Professor Goldsmith's interpretation, and argued that it would be a mistake to read too much into *Barclays*. *See id.* (citing Koh, *supra* note 28, at 1848 for proposition that it would be wrong to read too much into *Barclays*). Professor Koh noted that "the Solicitor General backed California's argument that there was no conflict between the state's tax laws and federal policy." *Id.* (citing Koh, *supra* note 28, at 1848). "Thus, the case reveals less about the Supreme Court's view of federalism than about the Court's traditional judicial deference to the executive branch in foreign affairs." *Id.* (quoting Koh, *supra* note 28, at 1848).

118. *See id.* at 59. In recounting the role of the lower federal courts in the judicial process, the court reported with force its mandate to follow Supreme Court precedent. *See id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (stating that lower courts have been "admonished . . . to follow [the Court's] directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions'")).

119. *Id.* at 57. In analyzing the effect subsequent decisions have had on *Zschernig*, the court referred to a representative sampling of cases that cited to *Zschernig*. *See id.* (looking to impact subsequent Supreme Court decisions have had on *Zschernig*); *see, e.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning . . . foreign relations . . . , and the primacy of federal concerns is evident.").

120. *See Natsios*, 181 F.3d at 57 (stating that although *Zschernig* had been distinguished, its holding was not diluted). Although the Court distinguished *Zschernig* in *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), the Court apparently considered it to have left the pertinent part of *Zschernig* intact. *See id.* (stating that plurality distinguished *Zschernig* by noting that in *Zschernig* "the Court struck down an Oregon statute that was held to be 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress'") (plurality opinion, Rehnquist, J.) (quoting *Zschernig v. Miller*, 389 U.S. 429, 432 (1968)).

case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power' of the federal government."<sup>121</sup>

In analyzing the effect of *Barclays* on *Zschernig*, the court stated that *Barclays* is inapplicable to the foreign affairs power argument because it did not consider the reach of the foreign affairs power and did not cite *Zschernig* at all.<sup>122</sup> Moreover, *Barclays* reaffirmed that the primacy of the federal government's ability to speak with one voice on foreign affairs does not mean that Congress is obliged to act, or similarly, that states can never act in an area as circumscribed as foreign affairs.<sup>123</sup> Massachusetts further contended that *Barclays* stands for the principle that Congress, and not the courts, is the only body that should ever determine whether a state law interferes with the foreign affairs power of the federal government.<sup>124</sup> The court rejected Massachusetts' interpretation of *Barclays*' impact in the foreign affairs power analysis for two reasons.<sup>125</sup> First, the court found that *Barclays* did not involve a state law targeting any foreign nation or nations, and there was no claim that the state in *Barclays* was engaging in foreign policy through its tax system.<sup>126</sup> Indeed, as the court stated, *Barclays* merely involved claims that the state law at issue violated the Commerce and Due Process Clauses.<sup>127</sup> The court contrasted this scenario with the present case, which involved a law impacting one foreign nation,

121. *Id.* (quoting *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998)).

122. *See id.* (stating that Massachusetts' reliance on *Barclays* to support its argument that its law does not impermissibly encroach upon foreign affairs power of federal government is misplaced). Also, the First Circuit emphasized that the Court in *Barclays* did not cite to *Zschernig* at all, even though the parties themselves cited it repeatedly in their briefs and at oral argument. *See id.* at 59.

123. *See id.* at 57 (noting that federal dominion over foreign affairs does not demand that Congress act, nor does it preclude states from acting). The court further alluded to a similar line of reasoning, present in *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986), where the Court found that a state tax law did not impede the federal government's ability to speak with one voice. *See id.* In *Wardair*, the Court stated:

[T]he Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority. [W]e never suggested in [Japan Line] or in any other [case] that the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.

*Natsios*, 181 F.3d. at 58 (quoting *Wardair*, 477 U.S. at 12-13).

124. *See Natsios*, 181 F.3d at 58. The court noted that this argument, advanced by the Commonwealth, "echoes academic debate over whether *Barclays* undercuts *Zschernig* or not." *Id.* For a further discussion of this scholarly debate, see *supra* notes 28 & 117 and accompanying text.

125. *See Natsios*, 181 F.3d at 59.

126. *See id.*

127. *See id.* (stating that *Barclays* did not reach foreign affairs question). The court continued, stating that the Court's discussion of congressional inaction was treated only with respect to the "'speak with one voice' prong of the Foreign Commerce Clause analysis, a prong that the court reached only after concluding that the law was not otherwise unconstitutional." *Id.* For a further discussion of the Court's treatment of congressional inaction in this context, see *supra* note 123 & *infra* note 150 and accompanying text.

and a claim that the Massachusetts law violated the foreign affairs power of the federal government.<sup>128</sup>

The second reason the court rejected Massachusetts' interpretation of *Barclays*' impact involved the lack of reference to *Zschernig* in *Barclays*.<sup>129</sup> The court interpreted this omission to signify the Court's desire to keep separate the "analyses that apply when examining laws under the Foreign Commerce Clause and under the foreign affairs power."<sup>130</sup> In short, the court rejected the remainder of Massachusetts' preliminary arguments, and it found that *Zschernig* remained directly applicable to the facts of this case and was not diluted by subsequent Supreme Court decisions.<sup>131</sup> As such, the court found that the Massachusetts Burma Law impermissibly encroached upon the foreign affairs power of the federal government and, thus, was unconstitutional.<sup>132</sup>

B. *Critical Analysis: The First Circuit Emerges Triumphantly After a Long and Torturous March Through Ambiguous Supreme Court Precedent*

After ciphering through a train of Supreme Court ambiguity, the First Circuit reached the most reasonable decision possible to protect the integrity of the federal government in controlling the foreign affairs of the United States.<sup>133</sup> Although the First Circuit's constitutional analysis can

128. See *Natsios*, 181 F.3d at 59 (noting differences between *Barclays* and present case).

129. See *id.* (discussing Supreme Court's decision to omit from *Barclays* any references to *Zschernig* holding).

130. *Id.*

131. See *id.* (stating that *Zschernig* remains good law and binding on lower courts). The court further rejected Massachusetts' contention that the market participant exception applies to the foreign affairs power. See *id.* at 59-60. Similarly, the court summarily disposed of the Commonwealth's argument that the Tenth and First Amendments shield the Massachusetts Burma Law from constitutional scrutiny. See *id.* at 60-61. Unfortunately, all three arguments, and their treatment thereof by the court, are beyond the scope of this Note.

132. See *id.* at 45 (holding that Massachusetts Burma Law unconstitutionally impinges on federal foreign affairs power).

133. See *Dewey*, *supra* note 5, at A19 (noting that First Circuit "interprets not one, but several, ambiguous Supreme Court decisions"). One of the most vexing aspects of increased involvement in international affairs by state and local governments is the practical problems it raises for the United States in striving to put forth a uniform foreign policy. See *Malhotra*, *supra* note 16, at 41 (noting that state and local forays into domain of foreign affairs have implications for relationship between United States and world at large); see also *Schmahmann & Finch*, *supra* note 91, at 204-07 (stating that "[t]here are at least three major problems with local governments in the United States purporting to make and implement the nation's foreign policy"). First, the United States, in the aggregate, has diverse and varied concerns that could be affected by state and local legislation—legislation that has repercussions far beyond the "localities" in which it was enacted. See *id.* at 204. Second, although the federal government makes foreign policy decisions only after consultation with a variety of organizations and networks designed to handle such issues, it is doubtful whether state and municipal governments have at their side the expert resources with which to make an informed, calculated deci-



be justified as internally accurate, the *Barclays* decision creates troubled waters, through which the court must wade to find the only sensible resolution to this question.<sup>134</sup> If *Zschernig* had a clear and definite scope, and subsequent cases and commentary did not question its precedential value, the court would have had the overwhelming support of both law and policy on its side.<sup>135</sup>

Although cases such as *Barclays* make for a more challenging legal analysis than the tenor of the First Circuit alludes, as a matter of constitutional dogma, the court's analysis is proper.<sup>136</sup> Although the court's result appears compelled by factors not explicitly denoted by its opinion, the holding was rightly crafted to conform to prior Supreme Court precedent.<sup>137</sup> In distinguishing *Barclays* and other post-*Zschernig* decisions, the court took the necessary step in striking down a law, which if allowed to stand, could have spelled chaos for the federal government's ability to satisfy its international obligations.<sup>138</sup>

Despite the *Natsios* court's appropriate determination that the Massachusetts Burma Law impermissibly encroached upon the foreign affairs power of the federal government, as interpreted in *Zschernig*, the court's analysis was not without its share of deficiencies.<sup>139</sup> One of the most vexing problems the court aimed to deal with, but inevitably perpetuated, was clarifying the scope of the *Zschernig* effects test.<sup>140</sup> In adjudging that the

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sion. *See id.* at 205. These, and other factors, lead to the conclusion that "state and local governments are inappropriate bodies for foreign policymaking." *Id.* at 204.

134. *See* Trachtman, *supra* note 2, at 356 (noting that *Barclays* "illustrates a shift toward greater deference to state law"); *see also* Goldsmith, *supra* note 28, at 1700-01 (contending that *Barclays* undercuts *Zschernig* and claiming that Massachusetts is interfering with federal government's ability to speak with one voice). *But see* Koh, *supra* note 28, at 1848 (arguing that it would be erroneous to read too much into Court's statements in *Barclays*).

135. For a discussion of the policy supporting the First Circuit's decision in *Natsios*, *see infra* notes 158, 160, 168-169 and accompanying text.

136. For a further discussion of the First Circuit's analysis, *see supra* notes 79-135 & *infra* notes 137-52 and accompanying text.

137. For a further discussion of the First Circuit's treatment of directly applicable precedent, *see supra* note 18 and accompanying text.

138. *See* Malhotra, *supra* note 16, at 39 (noting that "selective purchasing laws" undermine agreements United States made with foreign governments under GATT). For example, as the EU and Japanese protests illustrate, laws of this nature violate the Government Procurement Agreement that prohibits any sort of discriminatory action against foreign companies that is not based solely on performance or cost. *See id.*

139. For a further discussion of the deficiencies of the First Circuit's analysis of *Zschernig*'s effects test, *see infra* notes 140-46 and accompanying text.

140. *See* Dewey, *supra* note 5, at A19 (stating that First Circuit "may fairly be criticized for articulating a broad rule that would bar virtually any substantive involvement by states in foreign affairs"). The Supreme Court's decision in *Zschernig* has long been criticized for its ambiguity. *See* National Foreign Trade Council v. Natsios, 181 F.3d 38, 51-52 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (U.S. Nov. 29, 1999); *see also* HENKIN, *supra* note 27, at 164 (illustrating ambiguity of *Zschernig*); Dewey, *supra* note 5, at A19 (noting ambiguous Supreme Court precedent). As Professor Henkin remarks:

Massachusetts Burma Law had more than an incidental or indirect effect in foreign countries, the court considered five factors, the analysis of which bore heavily on the court's conclusion.<sup>141</sup> Although the analysis of these factors attempted to demystify the line between permissible and impermissible sub-national actor involvement in foreign affairs, it is questionable whether it accomplished this goal.<sup>142</sup>

First, the factors that the court considered can be summarized in the following manner: (1) intent to affect the affairs of a foreign country; (2) ability to effectuate that intent and actual evidence that such an effect has been realized; (3) the cumulative effect that a law may have if proven to be a "bellwether" for other states and local governments; (4) protests of foreign governments and entities; and (5) prospects of embarrassment for the United States.<sup>143</sup> The court suggested that a combination of these factors dictates whether the Massachusetts law has more than an incidental or indirect effect on foreign relations.<sup>144</sup> Unfortunately, the court did not make clear the relative weight to be attached to each individual factor, or the number of factors that need to be present to support a finding that the law has more than the permissible effect on foreign relations.<sup>145</sup> This lack

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It may prove that *Zschemig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve "sitting in judgment" on them. . . . Or was the Court suggesting different lines—between state acts that impinge on foreign relations only "indirectly or incidentally" and those that do so directly or purposefully?

HENKIN, *supra* note 27, at 164.

141. See *Natsios*, 181 F.3d at 53, 55 (listing five factors it considered and concluding that Massachusetts Burma Law had more than "incidental or indirect effect" on foreign relations).

142. See *id.* at 51-52 (noting *Zschemig's* ambiguity, but nonetheless finding Massachusetts Burma Law unconstitutional under its presumed mandate). At the district court level, the court failed to articulate the manner in which the Massachusetts Burma Law ran afoul of *Zschemig's* effects test. Specifically, the court failed to note the various ways in which the law had more than an incidental or indirect effect in foreign countries. See Recent Cases, *Foreign Affairs Power—The Massachusetts Burma Law is Found to Encroach on the Federal Government's Exclusive Constitutional Authority to Regulate Foreign Affairs*—National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998), 112 HARV. L. REV. 2013, 2014 (1999) (discussing missed opportunity to clarify current foreign affairs jurisprudence regarding state and local involvement in foreign relations). Although the First Circuit improved upon the district court's decision to some extent by listing the factors it considered in determining that the Massachusetts Burma Law had more than an incidental or indirect effect, these factors did little more to elucidate *Zschemig's* effects test than did the district court's analysis. For a further discussion of the shortcomings of the factors considered by the First Circuit, see *supra* notes 140-41, & *infra* notes 143-46 and accompanying text.

143. See *Natsios*, 181 F.3d at 53 (stating that conclusion that Massachusetts Burma Law has more than incidental or indirect effect on foreign relations is dictated by combination of five factors "present here").

144. See *id.*

145. See generally *id.* A careful review of the record indicates the First Circuit's decision to exclude from its analysis the relative weight it attached to the above mentioned factors, when deciding that the Massachusetts Burma Law had more than an incidental or indirect effect on foreign relations. See *id.*

of clarity may adversely affect future applications of *Zschemig's* effects test, creating a blanket rule eliminating virtually all state participation in foreign affairs—a conclusion clearly contrary to the spirit of *Zschemig*.<sup>146</sup>

Nevertheless, the court's treatment of the third and fourth factors mentioned above recognized the critical need to preclude the advancement of state and local laws that creep alarmingly close to a level of involvement in international affairs that subjects the federal government to the risk of breaching its international obligations.<sup>147</sup> Although the court did not expressly quantify the importance it placed on such practical matters, the opinion is replete with signals that evince the court's concern with the frequency with which similar laws have been fashioned and the form that foreign protests could take.<sup>148</sup> Notwithstanding the opinion of some commentators that the court's opinion turns on its preemption analysis, this interpretation is misplaced.<sup>149</sup> Although congressional action in

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146. See HENKIN, *supra* note 27, at 165 n.2 (stating that *Zschemig* may have no future value); see also Dewey, *supra* note 5, at A19 (stating that First Circuit's analysis can be fairly criticized as creating overly broad rule, effectively prohibiting all state and local involvement in foreign relations). Even commentators opposed to legislation such as the Massachusetts Burma Law recognize that states do indeed have a role to play in the conduct of the nation's foreign affairs. See Price & Hannah, *supra* note 19, at 458 ("*Zschemig* makes clear that simply because a statute has some collateral effect on foreign affairs does not mean it will automatically be invalidated.").

147. For a discussion of the risk to the United States of breaching its international obligations, see *supra* notes 133 & 138, & *infra* notes 160-70 and accompanying text.

148. See generally *Natsios*, 181 F.3d 38. The court specifically addressed the harm that could result if the Massachusetts law proved to be a precursor of similar laws in other jurisdictions. See *id.* at 53-54 (discussing threat to federal foreign affairs power magnified when Massachusetts is viewed as part of broader pattern of state and local intrusion). Moreover, the court considered in detail the protests received from foreign governments and organizations. See *id.* (noting that protests are evidence of potential for disruption or embarrassment caused by Massachusetts Burma Law). An example of the force of foreign protests can be seen from threats by the EU and Japan to file complaints with the WTO, challenging the law as a violation of the Government Procurement Agreement of the GATT treaty. See Malhotra, *supra* note 16, at 40 (discussing possible impact of state and local intrusion into foreign affairs arena); Price & Hannah, *supra* note 19, at 499 n.7 (discussing impact and citing United States—*Measures Affecting Government Procurement, Request for Consultations by the European Communities*, WTO Doc. WT.DS88/1 (circulated June 26, 1997)). For a further discussion of the risk that such laws pose to the United States' international obligations, see *supra* notes 133 & 138, & *infra* notes 160-70 and accompanying text.

149. See Dewey, *supra* note 5, at A19 (stating that "[p]erhaps most important . . . the court believed that the Burma Law conflicted with the federal sanctions regime"). Although obviously a significant part of the First Circuit's opinion, the most lengthy and first treated basis for its holding was the contention that the Massachusetts Burma Law impermissibly encroached on the foreign affairs power of the federal government. See generally *Natsios*, 181 F.3d 38 (treating foreign affairs power issue for 13 pages and preemption analysis for only 6 pages). Moreover, the court below felt it adequate to dispose of the case by reaching only the foreign affairs power issue, finding that the NFTC did not meet its burden of proving preemption. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287,

this case was important, it is only one factor the court considered in applying *Zschernig's* effects test.<sup>150</sup>

Even though the court's application of *Zschernig's* effects test is problematic, the result obtained is proper. The problems associated with analyzing whether a law has an incidental or indirect effect on foreign relations are a product of the inherent ambiguity of *Zschernig* itself.<sup>151</sup> The First Circuit's analysis, though flawed, may be the most powerful evidence that a definitive resolution to the issue of the permissible level of sub-national actor participation in foreign affairs is necessary.<sup>152</sup>

V. IMPACT: THE UNITED STATES CAN ILL-AFFORD STATE INVOLVEMENT  
IN FOREIGN AFFAIRS TO JEOPARDIZE ITS  
INTERNATIONAL OBLIGATIONS

In striking down the Massachusetts Burma Law, the First Circuit protected the integrity of the federal government in managing the nation's foreign relations and set a clear example that state legislation that creates needless risks to the United States' performance of its international obligations will not be tolerated.<sup>153</sup> Although increased globalization ostensibly creates the inference that states should have more maneuverability in the international arena, that conclusion is misplaced and overly broad.<sup>154</sup>

293 (D. Mass. 1998) (finding that Massachusetts Burma Law unconstitutionally infringed on foreign affairs power of federal government).

150. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994) (reaffirming that congressional action is not necessary to support finding that state or local law impermissibly impinged on foreign affairs power of federal government); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 12-13 (1986) (finding that "Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority," but such action is not necessary to support finding that legislation unconstitutionally interferes with federal government's foreign affairs power). These cases appear to suggest that although congressional action is to be considered as part of the foreign affairs analysis, the lack thereof is not dispositive.

151. For a discussion of *Zschernig's* ambiguity, see *supra* notes 133-34 and accompanying text.

152. See Dewey, *supra* note 5, at A19 (noting that whether Massachusetts or any state or municipality can engage in foreign policy is question that deserves definitive answer). Moreover, Frank Kittredge, president of the NFTC, said that if the Supreme Court grants Certiorari, "then that has very serious implications," and they are "looking forward to seeing how it comes out." *State Attorney General Seeks Review of Burma Trade Ruling*, BOSTON GLOBE, July 13, 1999, at B5. Massachusetts' Attorney General, Thomas F. Reilly commented that "it's important to continue to defend the law, [because it is] about the state's right to choose who it does business with." *Id.* Given the rise in the number of state and local governments involved in the foreign affairs arena, a Supreme Court decision could affect scores of sub-national actors with economic boycotts aimed at protesting perceived social or political inequities around the world. See *id.*

153. For a further discussion of the potential harm to the United States' foreign relations created by the Massachusetts Burma Law, see *infra* notes 158 & 160-70 and accompanying text.

154. For a further discussion of the detrimental effects of increased state and local participation in foreign affairs, see *infra* notes 158-74 and accompanying text.

Although there remains the need for sub-national actor participation in foreign affairs, once it surpasses the threshold of permissible involvement, it goes too far.<sup>155</sup> When the foreign policy of state and local actors subject the nation to the risk of breaching its international obligations, there can be no doubt that such activism must be quashed.<sup>156</sup>

Perhaps the best way to illustrate the possible impact of the First Circuit's decision in *Natsios* is to explore the possible ramifications of the contrary holding.<sup>157</sup> Commentators are split as to the proper role of state and local actors in international affairs.<sup>158</sup> Although some view *Zschernig* as a product of the Cold War era and inapplicable to a modern society with increased globalization, others argue that state involvement in sensitive issues of foreign affairs creates the risk that one or more state actors may unilaterally induce the entire country to breach its international obligations.<sup>159</sup> Despite the fear of imminent hostilities that plagued the era in which *Zschernig* was decided, today's realities call even more earnestly for a

155. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 50 (1st Cir. 1999), cert. granted, 120 S. Ct. 525 (U.S. Nov. 29, 1999) (noting limited role for states in foreign affairs, but state law that runs afoul of federal foreign affairs power as interpreted in *Zschernig* must give way to power of federal government).

156. For a discussion of the risk that the United States faces of breaching its international obligations, created by increased state and local actor involvement in foreign affairs, see *infra* notes 160 & 168 and accompanying text.

157. For a discussion of the possible impact of holding that the Massachusetts Burma Law and similarly situated laws are permissible under *Zschernig*, see *infra* notes 158-74 and accompanying text.

158. See, e.g., Malhotra, *supra* note 16, at 38-41 (arguing that rapid expansion of states' roles in foreign policy not only complicates and confuses federal foreign policy, but undermines U.S. relations with other nations as well); Price & Hannah, *supra* note 19, at 499 (concluding that in matters of foreign affairs, "experimentation by states poses serious risks"). But see Carvajal, *supra* note 27, at 274 (stating that "[a]s spenders of . . . taxpayer's dollars, states and localities have the constitutional right to decide how and with whom to participate in the market . . ."). Nonetheless, Carvajal concedes that the exercise of this right is unclear. See *id.* (stating that "[t]hough the extent of this right is unclear, it cannot automatically be foreclosed"). It merits mentioning, however, that those who oppose state involvement in foreign affairs, do so only when such involvement passes the threshold of permissible participation. See Schmahmann & Finch, *supra* note 91, at 199 (noting that local action may pass constitutional muster if it has legitimate purpose and only has incidental or indirect effect on foreign relations). For a further discussion supporting the constitutionality of selective purchasing laws, see generally Loschin & Anderson, *supra* note 28.

159. See Spiro, *supra* note 2, at 1223-27 (stating that since end of Cold War and institution of democratic peace worldwide, "the stakes have diminished," making reliance on threats to national security unacceptable basis for arguing that foreign affairs power vests exclusively in federal government). For a discussion concerning commentators who feel that increased state and local involvement in the foreign affairs arena will pose an increased risk to the United States' ability to fulfill its international obligations, see *supra* note 158, & *infra* notes 160-70 and accompanying text.

doctrine that precludes the fashioning of laws, such as the Massachusetts Burma Law, which put the Union at risk of international humiliation.<sup>160</sup>

To understand the magnitude of the potential impact that state and local actions may have, it is necessary to appreciate the reach of such laws.<sup>161</sup> To be sure, these statutes are not simply vehicles through which "paltry" governments express their dismay with the policies of certain foreign governments.<sup>162</sup> On the contrary, they are persuasive legislative tools that have the potential to foster real change.<sup>163</sup> Indeed, some sub-national measures are realizing their goals of creating social and political change through altering economic activities within the foreign nations that are the subject of the legislation.<sup>164</sup> The potential consequences for

160. See Malhotra, *supra* note 16, at 40 (discussing detrimental effects state and local actions are having on U.S. foreign policy). For example, when Undersecretary for Economic Affairs, Stuart Eizenstat, attempted to discuss measures against Burma with EU officials recently, he received a less than warm reception. See *id.* (illustrating EU's disapproval of Massachusetts Burma Law by showing less than warm reception for Undersecretary Eizenstat). Indeed, some EU officials refused even to discuss the issue until the federal government "disposed of the Massachusetts law." *Id.* Moreover, local actions have the potential to adversely affect arenas "wholly unrelated to the nation or problem targeted." *Id.* For instance, recent talks about holding a new round of negotiations to expand the coverage of the GATT might deteriorate if foreign governments feel that such agreements will not be enforced within states or municipalities. See *id.* at 40-41. As a more general matter, the U.S. has repeatedly sought to shore up rules of international trade in an effort to protect U.S. companies from discrimination. See *id.* at 41 (stating irony that U.S. has sought to obtain favorable international trade laws to protect U.S. companies from discrimination). But, if state and local laws start "demanding exceptions to established rules," it may prove exceedingly difficult for the U.S. to obtain leverage in its pursuit to protect U.S.-based companies. *Id.*

161. See Malhotra, *supra* note 16, at 40 (noting potential of such laws to drive change in international arena). In looking at the Massachusetts Burma Law alone, the law compelled companies such as Kodak, Hewlett-Packard and Apple Computers to terminate their operations in Burma. See *id.* (discussing impact of Massachusetts Burma Law on highly visible companies' decisions to withdraw operations from Burma). Additionally, the recent \$1.25 billion settlement between the Swiss Banks and Holocaust victims was believed to be partially in response to punitive measures threatened by New York City. See *id.* As these examples illustrate, a number of state and local actions are enjoying increasing success, as their reach continues to expand. See Spiro, *supra* note 2, at 1249 (noting that "subfederal governments now have clout").

162. See Malhotra, *supra* note 16, at 40 (noting that state and local actions are not just token measures of condemnation). For a discussion of the possible impact and far-reaching effects such laws may have on U.S. foreign relations, see *supra* notes 158-61, & *infra* notes 163-70 and accompanying text.

163. See Malhotra, *supra* note 16, at 40. For a further discussion of the potential reach of such laws, see *supra* notes 155-58, & *infra* notes 161-67 and accompanying text.

164. See Malhotra, *supra* note 16, at 40 (stating that some sub-national measures "are already enjoying success in altering the economic activities in foreign nations or inducing foreign actors to actually change their policies"). In fact, Secretary of State Madeleine Albright has even argued that states have a responsibility to consider morality in developing their investment policies. See *id.* Nevertheless, statements by any government representative regarding the precise issues presented in this case should be taken with a grain of salt. See Dewey, *supra* note 5,

the operation of United States foreign policy could prove disastrous if laws akin to the Massachusetts Burma Law are allowed to develop around the country.<sup>165</sup> With foreign governments already complaining of inconsistencies in United States foreign policy, “the emergence of multiple, perhaps contradictory, foreign policies” will likely “invite further international indignation.”<sup>166</sup>

Moreover, state and local involvement in matters best left to the federal government has the potential to dilute the effectiveness of federal policies in the same or similar arenas.<sup>167</sup> The encroachment by states and local actors into foreign affairs gives rise not only to international disapproval, but also threatens to compromise international trust and cooperation.<sup>168</sup> International consternation is driven not merely out of the fear that state and local actions will steer contrary to federal policies, but also by the “frustration and complications posed by the possibility of autonomous international actors within each state and city.”<sup>169</sup> Consequently, the increase in sub-national actor participation in the foreign policy arena

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at A19 (noting that Clinton administration has not taken stance on issue, “reportedly because of a disagreement between the State Department and the National Security Council . . .”). To illustrate the executive discord in this area, consider the statements of Undersecretary of State, Stuart Eizenstat, issued during congressional testimony, in light of the above statement of Secretary Albright:

[A]d hoc and scattered actions at various levels of government, however well-intentioned, can do more harm than good in achieving the desired objective and impede the President’s and the Secretary of State’s conduct of foreign policy.

*Use and Effect of Unilateral Trade Sanctions: Hearing Before the Trade Subcomm. of the House Ways and Means Comm.*, 105th Cong. 34 (1997) (statement of Undersecretary of State Stuart Eizenstat).

165. See Malhotra, *supra* note 16, at 40 (noting that state and local laws have potential to drive real change); see also Spiro, *supra* note 2, at 1258-59 (noting that “state interests of any magnitude are unlikely to justify the potentially high national costs of a disrupted foreign policy”). For a further discussion of the consequences to U.S. foreign policy that laws like the Massachusetts Burma Law create, see *supra* notes 158-64, & *infra* notes 166-70 and accompanying text.

166. Malhotra, *supra* note 16, at 40 (discussing existing tense relationship with foreign nations and likelihood that increased state and local participation in foreign affairs will lead to further international indignation over U.S. foreign policy).

167. See *id.* (stating that local activities have potential to create conflicting foreign policies and “ultimately to dilute the effectiveness of the policies themselves”).

168. See *id.* at 41 (noting that absence of assurances that international agreements will be enforced within states and municipalities has “potential to undermine international trust and cooperation”).

169. *Id.* It is already difficult for foreign governments to deal effectively with the sea of bureaucrats at the national level. See *id.* With increased sub-national actor participation in foreign affairs comes yet another level of government; but one that is devoid of a bureaucratic structure capable of sustaining international negotiations. See *id.* Indeed, the level of accountability that is present at the national level is considerably lacking at the state and local level. See *id.* For example, while international agreements can be “contested and compromised” at the national level, through vehicles such as ambassadors and embassies, state and local governments lack such an “institutional framework” that is necessary for the effective resolution of policy disputes. *Id.*

ultimately prevents the federal government from putting forth a united front and hampers its ability to cooperate with its allies to foster positive change in the international community.<sup>170</sup>

The First Circuit's decision to stem the tide of sub-national actor participation in foreign affairs bodes well for the interests of the federal government, and the country at large. Nevertheless, the line between permissible and impermissible state and local actor involvement in this arena remains unclear.<sup>171</sup> Without a definitive pronouncement on the acceptable level of sub-national actor participation in foreign affairs, state and local governments could significantly interfere with matters best left to the federal government.<sup>172</sup>

Given the current composition of the Supreme Court and the emphasis the Court is placing on circumscribing the current debate over states' rights, the resolution of this issue may prove quite interesting.<sup>173</sup> Nonetheless, even a Court as cognizant of states' rights as the current Court should recognize the dangers that the Massachusetts Burma Law and similarly situated laws pose to the nation's foreign policy.<sup>174</sup> In this vein, the Court should affirm the First Circuit's opinion in *National Foreign Trade Council v. Natsios* and breathe new life into a doctrine that is both outdated and overly ambiguous.

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170. *See id.* (noting that expanding role of sub-national actors in foreign policy arena prevents central government "from sending a convincing and cohesive message and hinders its ability to enlist the support of its allies").

171. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 51-52 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (U.S. Nov. 29 1999) (stating that precise boundaries of holding in *Zschernig* are unclear); *see also* Pascual, *supra* note 27, at 323 (noting that exact holding of *Zschernig* is ambiguous). As the preceding sources intimate, cases and commentators alike have questioned the actual point of demarcation between permissible and impermissible state and local actor participation in foreign affairs. *See Dewey, supra* note 5, at A19 (stating that First Circuit's decision interprets train of ambiguous Supreme Court precedent).

172. *See Dewey, supra* note 5, at A19 (calling for definitive answer to whether Massachusetts or any other state or municipality can have foreign policy).

173. *See CNN Today* (Cable News Network television broadcast, Oct. 4, 1999) (noting that several states' rights cases are high on Court's agenda for October term).

174. *See Dewey, supra* note 5, at A19 (noting that "[e]ven a Supreme Court as respectful of states' rights as the current court is likely to recognize . . . dangers [of state involvement in foreign affairs] and conclude that . . . Massachusetts should step aside").



