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National Foreign Trade Council v. Natsios and the Foreign Relations Effects Test: Searching for a Viable Approach

I. INTRODUCTION

The Massachusetts Burma¹ Law² marked a significant development in the foray of U.S. states and other subnational entities into the realm of foreign affairs. As its sponsor, State Representative Byron Rushing, noted, the Massachusetts Burma Law (the first state statute of its kind) “brought state government into the international movement to support democracy in Burma”³ by imposing on Burma economic sanctions intended to “vigorously combat well-documented [governmental] repression and intolerance.”⁴ More

1. The country of Burma derives its name from the Burman ethnic group that constitutes the majority of the population living in the region between India and Thailand. *See Myanmar or Burma?*, in BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE vii, vii (Robert I. Rotberg ed., 1998). The name Burma has been associated with this area since the nineteenth century, when the area was divided into Upper Burma, Lower Burma, and the hill territories. *See id.* In the late nineteenth century, British colonial rule consolidated the three sectors into one country called Burma. *See* MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY 40 (2d ed. 1999). Following independence from Great Britain in January 1948, the country retained the name Burma until the present military regime changed it to Myanmar in June 1989. *See Burma Takes Another Name: Now, the Union of Myanmar*, N.Y. TIMES, June 20, 1989, at A5. The name “Myanmar” is a contraction of the Burmese name for the country: “Myanmar naing-ngan,” meaning “nation of the swift and strong people.” *See* U Kyaw Win, *Brutality in Burma*, L.A. TIMES, Feb. 25, 1992, at A10.

In keeping with the prevalent scholarly practice of not using a name “invented by a regime that has no national legitimacy,” this Note will use the name Burma instead of Myanmar. *Myanmar or Burma?*, in BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE, *supra* at vii; *see also* Rudy Guyon, Comment, *Violent Repression in Burma: Human Rights and the Global Response*, 10 UCLA PAC. BASIN L.J. 409, 410 n.1 (1992) (supporting the use of the name Burma “out of deference to the viewpoint that to [refer to the country as Myanmar] lends legitimacy to a military junta whose thuggery and innumerable violations of human rights law continue to bring suffering to all the peoples of Burma”).

2. *See* MASS. GEN. LAWS ANN. ch. 7, § 22(G)-(M) (West 1999). For a more detailed explanation of the statute’s provisions, see *infra* Part II.B.

3. Frank Phillips, *Weld Expected to Sign Bill to Avoid Firms with Burma Ties*, BOSTON GLOBE, June 21, 1996, at A30.

4. Letter from Representative Byron Rushing to Representative Christopher Hodgkins and Senator Warren Tolman, Committee of State Administration (Feb. 28, 1995) [hereinafter

specifically, the Massachusetts Burma Law sought to pressure Burma's ruling military regime into ending its repressive practices and making democratic reforms. The law established so-called "selective-purchasing" regulations⁵ that would bar the state from buying goods and services from companies doing business in Burma. In effect, such regulations would function as a secondary boycott against the Burmese government that would encourage companies falling within the regulations' scope to desist their operations in Burma and thereby deprive the regime of badly needed foreign investment.⁶ Due to the law's potential to "affect millions of dollars in state business"⁷ and act as an example for Congress and other states to follow, the law's supporters considered it "more than symbolic action"⁸ in their efforts to "assist[] fledgling, democratic movements throughout the world."⁹

Rushing Letter], *quoted in* Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443, 462 (1998).

5. Selective-purchasing laws and regulations, also known as "selective contracting laws," Frank Phillips, *Mass. Poised to Act on Burma Sanction Bill Said to Interest Weld*, BOSTON GLOBE, June 11, 1996, at A33 [hereinafter *Mass. Poised to Act*], attempt to use state or local governments' economic influence to protest the practices and policies of foreign nations. In brief, such laws "either preclude companies that do business with a targeted regime from bidding on government contracts, or award bidding preferences to companies that do not do business with the regime." Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 6 (1999) (footnote omitted). The Massachusetts Burma Law falls into the first category of selective purchasing laws. *See infra* Part II.B (discussing the provisions of the Massachusetts Burma Law).

6. *See* Frank Phillips, *Apple Cites Mass. Law in Burma Decision*, BOSTON GLOBE, Oct. 4, 1996, at B6 (quoting Representative Byron Rushing's comment that Apple Computers' decision to end its operations in Burma due to the Massachusetts Burma Law accomplished "exactly what we want[ed] this law to do"); *see also* Jon Marcus, *Massachusetts Legislators Call for Ban on Burma Business*, Assoc. Press Pol. Service, June 11, 1996, available in Westlaw, Wires File, 1996 WL 5388343 (quoting Representative Byron Rushing's statement that "[o]ne of the reasons [selective purchase requirements have] become such an important strategy . . . is that the government [of Burma] is running out of money so they have started to try to increase foreign investment").

7. Meg Vaillancourt, *Mass. Becomes First State to Boycott Burma Business*, BOSTON GLOBE, June 26, 1996, at A27 (quoting Massachusetts Governor William F. Weld); *see also* Phillips, *supra* note 5, at A33 ("[State Representative Rushing] said that despite the modest amount of funds involved in a Massachusetts sanctions bill on Burma, [approximately \$1 million in state contracts,] it would have far-reaching impact, including reviving efforts in Congress to pass a similar national 'selective contracting' bill on Burma.").

8. Vaillancourt, *supra* note 7, at A27.

9. Rushing Letter, *supra* note 4, at 462.

Unfortunately for the Commonwealth of Massachusetts, two Article III courts have declared the Massachusetts Burma Law to be an unconstitutional usurpation of federal authority, particularly in the domain of foreign affairs. In November 1998, a federal district court judge in Massachusetts awarded a declaratory judgment against Massachusetts, holding the law to be unconstitutional under the United States Supreme Court's 1968 decision in *Zschernig v. Miller*,¹⁰ because the Massachusetts Burma Law "impermissibly infringe[d] on the federal government's power to regulate foreign affairs."¹¹ Then, in *National Foreign Trade Council v. Natsios*,¹² the First Circuit Court of Appeals, in June 1999, affirmed the district court's decision by agreeing that under *Zschernig* the Massachusetts "law interferes with the foreign affairs power of the federal government."¹³ Moreover, in reviewing alternative arguments not reached by the trial court, the First Circuit also found that the Massachusetts Burma Law unconstitutionally encroached on federal authority by violating the Foreign Commerce Clause and was preempted by existing federal sanctions against Burma.¹⁴ Notably, however, the First Circuit's decision to affirm the trial court's ruling rested on its interpretation and treatment of the federal government's authority over foreign affairs rather than its conclusions regarding the law's validity under the Foreign Commerce Clause or federal preemption arguments.¹⁵

Though the First Circuit's opinion in *Natsios* appears to reject emphatically the validity of state-imposed economic sanctions while simultaneously severely constricting subnational entities' ability to participate in the international arena, the fact that the United States Supreme Court recently granted both parties' petitions to review the case¹⁶ suggests that the decision still contains some unsettled issues,

10. 389 U.S. 429 (1968).

11. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 289 (D. Mass. 1998), *aff'd*, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, __ U.S. __, 120 S. Ct. 525 (1999).

12. 181 F.3d 38 (1st Cir. 1999), *cert. granted*, __ U.S. __, 120 S. Ct. 525 (1999).

13. *Id.* at 45.

14. *See id.*

15. *See id.* at 77.

16. *See Natsios v. National Foreign Trade Council*, __ U.S. __, 120 S. Ct. 525 (1999); *see also 14 States Ask U.S. High Court to Restore 'Burma Law'*, PROVIDENCE J., Oct. 21, 1999, at D7 (reporting that Massachusetts, supported by fourteen other states, asked the Supreme Court to hear the case and restore the Massachusetts Burma law); *Group Opposed to Burma Law Doesn't Oppose Supreme Court Hearing*, Associated Press Newswires, Oct. 28, 1999,

particularly with respect to the constitutional relationship between federalism and foreign affairs.¹⁷ Indeed, a close examination of the First Circuit's analysis of the case's foreign affairs-related arguments reveals that the court's construction of the federalism-foreign affairs relationship is flawed in several significant ways. For example, the court's analysis of the federalism-foreign affairs relationship fails to give definite guidance for determining the scope of the connection between federalism and foreign affairs.¹⁸ Moreover, the court's approach fails to incorporate, or at least adequately account for, recent trends in the law with respect to federalism, the end of the Cold War, and global interdependence. Though it remains unclear whether the First Circuit would have upheld the Massachusetts Burma Law under a construction that accounted for such factors, the court's failure to employ such an approach in this case preserves the "vagueness within this area of jurisprudence [that] fosters inconsistent judicial determinations as to which state laws infringe upon the federal government's . . . foreign affairs power."¹⁹

This Comment contends that in *National Foreign Trade Council v. Natsios*, the First Circuit construed the federalism-foreign affairs relationship too broadly to effectively determine the constitutionality

*available in Westlaw, APWIRES File, 10/28/99, APWIRES 23:28:00 [hereinafter *Group Opposed to Burma Law*] (noting that the NFTC asked the Supreme Court to hear the case for the benefit of international trade concerns "if [the Court] believes the issues it raises are unsettled"); Frank Phillips, *Court to Rule on Mass. Law Targeting Ties with Burma*, BOSTON GLOBE, Nov, 30, 1999, at B2 ("In a move that could have far-reaching implications for states that seek to punish human rights abuses abroad, the US Supreme Court yesterday agreed to review the Massachusetts law that restricts state purchases from companies doing business in Burma.")*

17. See *Group Opposed to Burma Law*, *supra* note 16, at 23:28:00 ("[In asking the Supreme Court to hear the case,] [t]he NFTC further argued that the case of Massachusetts' Burma law would be an appropriate vehicle for resolving questions of whether state and local governments have the right to forbid trade with companies doing business with selected foreign governments."). In other words, the NFTC asked the Supreme Court to hear the case in part because, even though the First Circuit declared the Massachusetts law to be unconstitutional, the court failed to provide a definite rule as to whether federalism endows subnational entities with a constitutional right to engage in foreign affairs and foreign policymaking by imposing economic sanctions on selected foreign countries.

18. One commentator made a similar criticism about the district court's decision in *National Foreign Trade Council v. Baker*. See *Recent Cases*, 112 HARV. L. REV. 2013, 2014 (1999) ("By failing to articulate the specific ways in which the Burma Law had 'more than an incidental or indirect effect in foreign countries,' the court missed a crucial opportunity to clarify current jurisprudence regarding state involvement in foreign affairs.").

19. *Id.* at 2015.

of state-imposed economic sanctions.²⁰ Part II summarizes the political and human rights situation in Burma that prompted the enactment of the Massachusetts Burma Law, the law's provisions, and the law's relationship to "constituent diplomacy"²¹ and related jurisprudence. Part III discusses the facts of *Natsios* and the First Circuit's reasoning therein. Part IV analyzes the First Circuit's construction of the federalism-foreign affairs relationship and determines that (1) in light of both globalization and the Supreme Court's recent views of federalism, the First Circuit's narrow approach is flawed and (2) the First Circuit should have employed a limited balancing approach that determines whether a subnational entity provides the appropriate political context in which decisions relating to foreign affairs can be made.

20. Thus, unlike the majority of scholarship dealing with either the Massachusetts Burma law or subnationally-imposed economic sanctions, this Comment will not explore the constitutionality of either the Massachusetts Burma Law or state-imposed sanctions in general. Examples of works that do explore such topics include: Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307 (1999) (arguing that state-imposed sanctions are unconstitutional); Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563 (1993) (discussing the inappropriateness and unconstitutionality of local sanctions); Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373 (1999) (supporting the constitutionality of the Massachusetts Burma law); Price & Hannah, *supra* note 4 (arguing that state and local sanctions are unconstitutional); 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 (1997); Joel P. Trachtman, *Nonactor States in U.S. Foreign Relations?: The Massachusetts Burma Law*, 92 AM. SOC'Y INT'L L. PROCEEDINGS 350 (1998) (leaning toward the view that the Massachusetts Burma law is constitutional); Alejandra Carvajal, Note, *State and Local "Free Burma" Laws: The Case for Sub-National Trade Sanctions*, 29 LAW & POL'Y INT'L BUS. 257 (1998); Jay A. Christofferson, Comment, *The Constitutionality of State Laws Prohibiting Contractual Relations with Burma: Upholding Federalism's Purpose*, 29 MCGEORGE L. REV. 351 (1998) (arguing that state sanctions are constitutional); Shawna Fullerton, Note, *State Foreign Policy: The Legitimacy of the Massachusetts Burma Law*, 8 MINN. J. GLOBAL TRADE 249 (1999) (defending the Massachusetts Burma law as constitutional); Jennifer Loeb-Cederwall, Note, *Restrictions on Trade with Burma: Bold Moves or Foolish Acts?*, 32 NEW ENG. L. REV. 929 (1998) (arguing that the Massachusetts Burma law is unconstitutional).

21. John Kincaid, *Constituent Diplomacy: U.S. State Roles in Foreign Affairs, in CONSTITUTIONAL DESIGN AND POWER-SHARING IN THE POST-MODERN EPOCH* 107, 107 (Daniel J. Elazar ed., 1991).

II. BACKGROUND

A. Military Rule and Human Rights in Burma

Burma has endured the harshness and brutality of authoritarian military rule for the majority of its existence as an independent state. The current regime, which calls itself the State Peace and Development Council (SPDC),²² is the target of the Massachusetts Burma Law. The SPDC came to power in September 1988, succeeding the twenty-one-year authoritarian reign of General Ne Win.²³ In the months preceding the SPDC's ascent to power, widespread pro-democracy protests had prompted Ne Win to step down as head of the military-dominated government, resulting in the appointment of a civilian in his stead. As protests continued, the SPDC led a savage coup to restore military control, killing thousands of people in the process.

According to one scholar, the SPDC's authoritarian methods of governance are best described as "a throwback to an earlier, more

22. In late 1997, the regime changed its name from the State Law and Order Restoration Council (SLORC) to the State Peace and Development Council (SPDC). *See* Carvajal, *supra* note 20, at 257 (footnote omitted).

23. After staging a "constitutional coup" and ruling Burma through a caretaker government from 1958 to 1960, General Ne Win returned to power in 1962 through a coup d'état and established an authoritarian, military-dominated socialist government. MYA SAW SHIN & TOM L. WILSON, *BURMA/MYANMAR: U.S. POLICY AT THE CROSSROADS* 5 (1996), reprinted in *The Burma Freedom and Democracy Act of 1995: Hearing on S. 1511 Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 115 (1996). As mentioned above, in 1988, Ne Win stepped down in response to protests originating from a growing pro-democracy movement within Burma. Though scholars disagree as to his precise relationship with the present regime, they agree that Ne Win exerts at least some degree of influence on the SPDC. *Compare* Guyon, *supra* note 1, at 416 (The SPDC "coup was a façade; Ne Win maintained control of government . . . from behind the scenes.") (footnote omitted), *with* Robert I. Rotberg, *Prospects for a Democratic Burma*, in *BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE*, *supra* note 1, at 3 ("Now nearly ninety, [Ne Win] still wields occasional authority from the background."); *see also* Andrew Selth, *The Armed Forces and Military Rule in Burma*, in *BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE*, *supra* note 1, at 100-01 ("To a large extent, the aging Ne Win no longer exercises day-to-day control over the government and armed forces, and his standing among the younger generation in the tatmadaw is nowhere near as great as it may have once been. As an historical figure prominent in Burma's early struggles against ethnic and ideological insurgents, however, and later chief of the country's armed forces, the 'Old Man' still commands a degree of respect and loyalty in military circles. More importantly, he has for many years seeded the army with like-minded proteges. . . . Ne Win is now old and infirm, and his power is on the wane. Until his death, however, he will continue to exercise influence over the [SPDC's] policies and act to protect his favorites from jealous rivals.") (footnote omitted).

nakedly brutal period of dictatorial excess.”²⁴ A number of international bodies (including the United Nations) and human rights organizations “consistently rank the [SPDC] as among the worst regimes for its lack of respect for human rights.”²⁵ Reported human rights violations include “[m]urder and [s]ummary [e]xecution,”²⁶ “[s]ystematic [r]acial [d]iscrimination,”²⁷ forcible eviction and population relocation,²⁸ “[p]rolonged [a]rbitrary [d]etention,”²⁹ torture,³⁰ rape,³¹ and “[p]ortering,”³² among other forms of forced labor.³³ In all, the SPDC’s human rights practices violate the human rights provisions of the United Nations Charter and five other international treaties considered legally binding on Burma, as well as established norms of customary international law.³⁴

Although the United Nations and many countries have repeatedly and firmly condemned the SPDC’s human rights abuses, the overall “international response [to the situation] has at best been mixed”:³⁵ some nations have imposed economic sanctions against the regime while others have maintained or expanded their economic activities with or in Burma.³⁶ In 1996 and 1997, the United States

24. Rotberg, *supra* note 23, at 1.

25. SHIN & WILSON, *supra* note 23, at 14, reprinted in *The Burma Freedom and Democracy Act of 1995: Hearing on S. 1511 Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 124 (1996).

26. Guyon, *supra* note 1, at 424.

27. *Id.* at 425.

28. *See id.* at 426.

29. *Id.* at 426.

30. *See id.* at 427.

31. *See id.* at 427-28.

32. *Id.* at 428. “Portering” involves the abduction of civilians, usually of minority ethnic groups, to physically carry ammunition and supplies for army units. *See id.*

33. *See* SHIN & WILSON, *supra* note 23, at 13, reprinted in *The Burma Freedom and Democracy Act of 1995: Hearing on S. 1511 Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 115 (1996).

34. *See* Guyon, *supra* note 1, at 428-37 (examining the manner in which Burma’s human rights practices violate the United Nations Charter, the Convention on the Prevention of Genocide, the Protocol Amending the Slavery Convention, the ILO Convention Concerning Forced Labour, the ILO Convention Concerning the Rights of Association and Combination of Agricultural Workers, the Convention Concerning Freedom of Association and Protection of the Right to Organize, and precepts of customary international law).

35. *Id.* at 444.

36. *See id.* at 444-58 (examining the manner in which various countries (especially Asian countries), international organizations, and multinational corporations have maintained or increased their economic ties with, and calling for the imposition of more and stronger sanctions against, Burma).

joined the ranks of those countries using economic sanctions by barring financial assistance to Burma and prohibiting all future United States investment there.³⁷ As the First Circuit observed in its discussion of federal preemption in *National Foreign Trade Council v. Natsios*,³⁸ the federal government's measures were less severe in their scope than those established by the Massachusetts Burma Law.³⁹

B. The Massachusetts Burma Law

Signed into law some three months before Congress approved national sanctions against Burma,⁴⁰ the Massachusetts Burma Law⁴¹ sought to “vigorously combat well-documented [governmental] repression and intolerance in Burma”⁴² while encouraging Congress to impose similar measures.⁴³ Notably, the law received such strong support from both houses of the Massachusetts state legislature “that it [would] likely [have] become law [through a veto override], even if [Governor William F.] Weld [had] vetoed it.”⁴⁴

On account of its status as a selective purchasing law, the Massachusetts Burma Law severely restricted the ability of both the Commonwealth of Massachusetts and its agents to procure approximately one million dollars worth of goods or services⁴⁵ from individuals or companies engaged in business in or with Burma. Simply put, the law prohibited state entities and agents from making such purchases from any entity included on a state-maintained⁴⁶ “restricted purchase

37. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570(a), 110 Stat. 3009, 3009-166 to -167 (1996) (barring United States assistance to Burma); Exec. Order No. 13,047, 31 C.F.R. pt. 537 (1999) (prohibiting “United States persons” from making, approving, or facilitating for non-United States persons new investment in Burma). In issuing the Executive Order, President Clinton acted pursuant to authority granted him by Congress to impose conditional sanctions on Burma. See § 570(b), 110 Stat. at 3009-167 (authorizing the president to impose conditional sanctions on Burma).

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

39. See *id.* at 75 (“Some actions lawful under federal law would be unlawful under the state statute.”).

40. Massachusetts Governor William F. Weld signed the Burma bill into law on June 25, 1996. See Vaillancourt, *supra* note 7, at A27.

41. See MASS. GEN. LAWS ANN. ch. 7, § 22(G)-(M) (West 1999).

42. Rushing Letter, *supra* note 4, at 462.

43. See Phillips, *supra* note 5, at A33.

44. *Id.*

45. See *id.* (quoting State Representative Rushing's estimate that the Massachusetts Burma Law will not affect much more than \$1 million in state contracts).

46. The law requires the state Secretary of Administration and Finance to compile the

list,”⁴⁷ comprised of individuals or corporations determined to be “doing business with Burma (Myanmar).”⁴⁸ As defined by the law, “doing business in Burma” embraced a broad range of activities, including:

- (a) having a principal place of business, place of incorporation or . . . corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned 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).⁴⁹

Notably, the state could purchase goods or services from a party found to be “doing business in Burma” when “the procurement [was] essential”⁵⁰ *and* compliance with the general rule “would [have] eliminate[d] the only bid or offer, or would [have] result[ed] in inadequate competition.”⁵¹ However, the procurement contract could be awarded to such a party “only if there [were] no

restricted purchase list and update it every three months using various public and private reports and similar sources. *See* ch. 7, § 22(J)(a)-(c). The Secretary must also provide copies of the list to all state entities. *See id.* at § 22(J)(d).

47. *Id.* at § 22(H)(a).

48. *Id.* at § 22(J)(a).

49. *Id.* at § 22(G).

50. *Id.* at § 22(H)(b)(1).

51. *Id.* at § 22(H)(b)(2).

comparable low bid or offer by a person who [was] not on the restricted purchase list.”⁵²

With respect to relevant procedural norms, the law obligates state entities to provide advance notice of the law’s requirements to all parties that desire to bid on state contracts.⁵³ Moreover, prior to reviewing multiple bids or awarding a contract to an only bidder, the awarding entity needs to receive a declaration from the bidder’s/offeree’s “authorized representative” stating “the nature and extent to which [the bidding party was] engaging in activities which would subject said person to inclusion on the restricted purchase list.”⁵⁴

C. *“Constituent Diplomacy,”⁵⁵ Federalism, and Foreign Affairs*

Despite its status as the first state statute to impose economic sanctions on Burma, the Massachusetts Burma Law itself cannot be considered an innovation in the relationship between federalism and United States foreign affairs law. During the past thirty years, state and local governments have substantially increased their participation in “foreign affairs activities conducted by constituent governments and subnational entities,” a phenomenon aptly dubbed “constituent diplomacy.”⁵⁶ In 1986, one report estimated that “more than 1000 U.S. state and local governments of all political stripes are participating in foreign affairs, and their numbers are expanding.”⁵⁷ Today, thanks in part to such factors as heightened subnational desire for constituent autonomy,⁵⁸ increasing global interdependence,⁵⁹ the growing complexity of the international arena,⁶⁰ and the governmentalization of the international marketplace,⁶¹ constituent diplomacy touches a wide range of activities, including efforts to pursue interna-

52. *Id.* at § 22(H)(d).

53. *See id.* at § 22(H)(c).

54. *Id.*

55. Kincaid, *supra* note 21, at 107.

56. *Id.*

57. Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 115, 115 (Louis Henkin et al. eds., 1990) (footnote omitted).

58. *See* Kincaid, *supra* note 21, at 108-11.

59. *See id.* at 111-13.

60. *See id.* at 113-15.

61. *See id.* at 115-17.

tional trade and investment,⁶² expressing opinions on national foreign policy,⁶³ and, “[p]erhaps most dramatically,” imposing “economic sanctions on foreign governments. . . through, for example, selective purchasing laws.”⁶⁴ The Massachusetts Burma Law, therefore, cannot be considered more than constituent diplomacy in action.

“Somewhat surprisingly,” one scholar noted, “despite the scope and extent of this recent state and local involvement in foreign affairs, it has occasioned little reaction from Congress or the Executive and few cases in the courts.”⁶⁵ The lack of federal resistance has undoubtedly benefited constituent diplomacy efforts by allowing them to proceed uninhibited. At the same time, however, the lack of federal involvement—especially the lack of cases challenging the validity of these constituent diplomacy endeavors—has allowed the jurisprudence delineating the constitutional relationship and boundaries between federalism and foreign affairs to remain vague,⁶⁶ “uncertain,”⁶⁷ and “amorphous.”⁶⁸ Consequently, there exists a very real risk that inconsistent judicial conclusions regarding which state actions unlawfully encroach on the federal government’s foreign affairs power could “grant constitutional validation of some state laws that interfere with a unified national foreign affairs agenda.”⁶⁹

D. Supreme Court Precedent: *Zschernig v. Miller*

Courts and scholars agree that the Supreme Court’s opinion in *Zschernig v. Miller*,⁷⁰ though decided in 1968, “most directly considered the boundaries of permissible state activity in the foreign affairs context.”⁷¹ In *Zschernig*, the Court invalidated an Oregon statute that allowed nonresident aliens to inherit real property from a state

62. See Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1097-98 (1999).

63. See *id.*

64. *Id.* at 1098.

65. Bilder, *supra* note 57, at 117.

66. See *Recent Cases*, *supra* note 18, at 2015.

67. A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 27 (1995).

68. Loschin & Anderson, *supra* note 20, at 400.

69. *Recent Cases*, *supra* note 18, at 2015.

70. 389 U.S. 429 (1968).

71. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 51 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, ___ U.S. ___, 120 S. Ct. 525 (1999).

resident only if (1) the alien's country permitted United States citizens to inherit real property and (2) the alien beneficiaries enjoyed the right to have the property without the risk that their country might confiscate the inheritance.⁷² In holding the Oregon statute invalid, the Court distinguished the case before it from *Clark v. Allen*,⁷³ a previous decision in which the Court had upheld a similar California reciprocity statute.⁷⁴ The difference between the two cases, according to the Court, stemmed from "the posture of the present [*Zschernig* case]":⁷⁵ *Clark* focused on the statute's facial validity, but the [*Zschernig*] challenge to the Oregon statute involved "the manner of [the statute's] application."⁷⁶

To support its holding that the Oregon statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress,"⁷⁷ the Court determined that the statute "ha[d] more than 'some incidental or indirect effect in foreign countries,' and . . . great potential for disruption or embarrassment" of national foreign policy.⁷⁸ Though the Court failed to define the precise parameters of this so-called "foreign relations effects test,"⁷⁹ the Court identified several facts that, in its view, either directly affected foreign countries or exposed U.S. foreign policy to potential embarrassment or disruption. These factors included the fact that (1) the efforts of the Oregon courts to apply the Oregon law had led state court judges to criticize foreign governments, statements of foreign diplomats, and the administration of foreign law,⁸⁰ (2) probate courts of various states also had made disparaging comments about foreign governments while deciding cases involving similar inheritance statutes,⁸¹ and (3) in a separate case, the government of Bulgaria had contacted the State Department and objected to the Oregon law.⁸² Significantly, the Court held the Oregon stat-

72. See *Zschernig*, 389 U.S. at 430-31.

73. 331 U.S. 503 (1947).

74. See *id.* at 516-17.

75. *Zschernig*, 389 U.S. at 433.

76. *Id.*

77. *Id.* at 432.

78. *Id.* at 434-35.

79. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1396 (1999).

80. See *Zschernig*, 389 U.S. at 434-36.

81. See *id.* at 438 n.8.

82. See *id.* at 437 n.7. Interestingly enough, commentators such as Professor Harold G.

ute unconstitutional even though the statute pertained to probate matters, an area traditionally left to the state; conflicted with no treaty or federal law; and had been characterized by the Justice Department as not “unduly interfer[ing] with the United States’ conduct of foreign relations.”⁸³

Zschernig thus established a general framework for analyzing the propriety of state involvement in foreign affairs by establishing a factually specific “foreign relations effects test”⁸⁴ to be applied to the state action in question. The overall value of the framework, however, remains debatable, because *Zschernig* failed to determine the framework’s scope or requirements. In effect, *Zschernig* is the cause of much of the confusion relating to the federalism-foreign affairs relationship. Consequently, as might be predicted, courts have varied in their approach to how the foreign effects test should be construed under *Zschernig*.⁸⁵

Maier have argued the *Zschernig* Court erred in its application of these factors to the facts of the case: “No one of these conclusions is effectively supported by the facts in the *Zschernig* case. There was no showing of an adverse effect on relations with East Germany and no evidence of overt or implicit criticism of the East German Government by any of the Oregon courts . . .” Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832, 836 (1989).

83. *Zschernig*, 389 U.S. at 434.

84. See Goldsmith, *supra* note 79, at 1396.

85. Compare, e.g., Board of Trustees v. Baltimore, 562 A.2d 720 (Md. 1989) (upholding the constitutionality of a municipal ordinance requiring divestment by city workers’ pension fund of investments in companies doing business in South Africa), with Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300 (Ill. 1986) (invalidating an Illinois state statute that excluded South African coins from state tax exemptions applying to coins and currency circulated by other countries). See also Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990) (upholding a Pennsylvania state “Buy American” statute under *Zschernig* because the law did not require state officials or judges to appraise the policies of other nations, and treated all foreign countries in the same fashion); Bethlehem Steel Corp. v. Board of Comm’rs, 80 Cal. Rptr. 800 (Ct. App. 1969) (declaring a California “Buy American” statute unconstitutional under *Zschernig* because the law presented “great potential for disruption” with established federal trade policies); K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm’n, 381 A.2d 774 (N.J. 1977) (holding a New Jersey state “Buy American” law to be constitutional under *Zschernig* because the law did not involve any criticism of foreign governments).

III. NATIONAL FOREIGN TRADE COUNCIL V. NATSIOS

A. *The Facts*

In the trial court phase of *Natsios*,⁸⁶ the National Foreign Trade Council (NFTC), a nonprofit, Washington, D.C.-based organization with over 600 corporate members,⁸⁷ brought suit against Charles D. Baker, then Secretary of Administration and Finance of the Commonwealth of Massachusetts, and other state officers in their official capacity as state officials, claiming that the Massachusetts Burma Law was invalid.⁸⁸ The NFTC specifically claimed that the law “(1) intrudes on the federal government’s exclusive power to regulate foreign affairs; (2) discriminates against and burdens international trade in violation of the Foreign Commerce Clause; and (3) is preempted by a federal statute and an executive order imposing sanctions on Myanmar.”⁸⁹ The defendants challenged the NFTC’s claims, arguing that the case should be dismissed because no members of the NFTC had been injured by the Massachusetts Burma Law and therefore the NFTC lacked standing to sue.⁹⁰ Even if the NFTC had standing to sue, the defendants argued that the Massachusetts Burma Law was not invalid because (1) it did not intrude on the federal government’s federal affairs power,⁹¹ (2) federal law imposing sanctions on Burma did not conflict with and preempt the Massachusetts Burma Law,⁹² and (3) Massachusetts’ status as a market participant removed the law from under the Foreign Commerce Clause.⁹³

86. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998), *aff’d*, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, ___ U.S. ___, 120 S. Ct. 525 (1999).

87. *See Group Opposed to Burma Law*, *supra* note 16.

88. *See Baker*, 26 F. Supp. 2d at 289. Like the district court in *Baker* and the First Circuit in *Natsios*, this Note will refer to the defendant as the Commonwealth of Massachusetts rather than Mr. Baker or Mr. Natsios.

89. *Id.*

90. *See id.*

91. *See id.* at 291.

92. *See id.* at 293.

93. *See id.*

After finding that plaintiff NFTC had standing to sue,⁹⁴ the district court granted summary judgment to NFTC based on the court's interpretation of the Supreme Court's decision in *Zschernig v. Miller*, which, according to the district court, held that state laws are invalid if they have "more than 'some incidental or indirect effect in foreign countries,' or . . . 'great potential for disruption or embarrassment' of United States foreign policy."⁹⁵ In justifying its decision under *Zschernig*, the district court stated that the Massachusetts statute "unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs [because it] has more than an 'indirect or incidental effect in foreign countries,' and a 'great potential for disruption or embarrassment.'"⁹⁶ Notably, the district court declined to include in its holding any reference to NFTC's Foreign Commerce Clause and federal preemption claims, noting that "neither argument is dispositive in this case."⁹⁷ On behalf of the Commonwealth of Massachusetts, Andrew S. Natsios, Baker's successor as Secretary of Administration and Finance, appealed the district court's ruling to the First Circuit Court of Appeals.⁹⁸

B. The Court's Reasoning

In affirming summary judgment, the First Circuit upheld the district court's ruling under three separate analyses.⁹⁹ The court first sustained the district court's finding that the law was invalid under *Zschernig* because it unconstitutionally encroached on the federal government's foreign affairs authority.¹⁰⁰ Then, accepting the opportunity to review the alternative claims deemed "not dispositive" by the district court, the First Circuit also found the law to be invalid

94. *See id.* at 289-90 (concluding that NFTC satisfied the Supreme Court's three-part test for organizational standing as outlined in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

95. *Id.* at 290 (quoting *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968)).

96. *Id.* at 291 (citation omitted).

97. *Id.* at 293.

98. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 44-45 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, __ U.S. __, 120 S. Ct. 525 (1999).

99. *See id.* at 44.

100. *See id.*

because it violated the Foreign Commerce Clause¹⁰¹ and was preempted by existing federal law.¹⁰²

1. The federal government's foreign affairs power

In sustaining the district court's holding that the Massachusetts Burma Law unconstitutionally infringed on the federal government's authority over foreign affairs, the First Circuit divided Massachusetts' assertions into two sets of arguments: "preliminary arguments" relating to the district court's interpretation of *Zschernig*¹⁰³ and "[a]dditional [a]rguments [r]egarding the [f]oreign [a]ffairs [p]ower."¹⁰⁴

a. Arguments relating to Zschernig. With respect to Massachusetts' *Zschernig*-related "preliminary arguments," the court first rejected Massachusetts' argument that the district court incorrectly interpreted *Zschernig*. Contrary to Massachusetts' claims, the court stated, *Zschernig* does not "instruct[] courts to balance the nation's interests in a unified foreign policy against the particular interests of an individual state. Instead, *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."¹⁰⁵

The court then proceeded to refute Massachusetts' argument that *Natsios* should be distinguished from *Zschernig* due to alleged key factual differences. Rejecting Massachusetts' assertion that the Massachusetts Burma Law did not establish the level and frequency of scrutiny found in the law in question in *Zschernig*, the First Circuit employed the *Zschernig* court's approach of identifying various factors that, in its view, either directly affected foreign countries or exposed national foreign policy to potential embarrassment or disruption.¹⁰⁶ As the court noted,

The conclusion that the Massachusetts law has more than an incidental or indirect effect on foreign relations is dictated by the combination of factors present here: (1) the design and intent of the law is to affect the affairs of a foreign country; (2) Massachusetts,

101. *See id.*

102. *See id.*

103. *See id.* at 52-59.

104. *Id.* at 59.

105. *Id.* at 52.

106. For a list of the factual factors identified by the *Zschernig* court, see *supra* Part II.D.

with it \$2 billion in total annual purchasing power by scores of state authorities and agencies, is in a position to effectuate that design and intent and has had an effect; (3) the effects of the law may well be magnified should Massachusetts prove to be a bellwether for other states (and other governments); (4) the law has resulted in serious protests from other countries, ASEAN, and the European Union; and (5) Massachusetts has chosen a course divergent in at least five ways from the federal law, thus raising the prospect of embarrassment for the country.¹⁰⁷

It should be emphasized that the only factor common to the findings of both the First Circuit and the *Zschernig* court involved the existence of foreign countries' objections to the law at issue.

After briefly demonstrating how its approach in *Natsios* "is largely consistent with that taken by the few other courts that have considered challenges to state and local laws brought under *Zschernig*,"¹⁰⁸ the First Circuit denied Massachusetts' final *Zschernig*-related argument: the Supreme Court's decision in *Barclays Bank PLC v. Franchise Tax Board*¹⁰⁹ "means that only Congress, not the courts, should ever determine whether a state law interferes with the foreign affairs power of the federal government."¹¹⁰ In *Barclays*, the Supreme Court upheld a California state law establishing reporting requirements to be used in calculating corporate franchise taxes of multinational corporations, holding, in part, that only Congress has the authority "to evaluate whether the national interest is best served by tax uniformity, or state autonomy."¹¹¹ The First Circuit, however, held that *Barclays* does not apply to the foreign affairs power analysis because (1) the absence of both a state law that targeted another nation and a claim that a state "was engaging in foreign policy"¹¹² distinguished *Barclays* from *Natsios* and (2) "the Supreme Court did not cite to *Zschernig* in *Barclays*, thus keeping separate the analyses that apply when examining laws under the Foreign Commerce Clause and under the foreign affairs power."¹¹³

107. *Natsios*, 181 F.3d at 53.

108. *Id.* at 55.

109. 512 U.S. 298 (1994).

110. *Natsios*, 181 F.3d at 58.

111. *Barclays*, 512 U.S. at 331.

112. *Natsios*, 181 F.3d at 59.

113. *Id.*

b. Arguments relating to the foreign affairs power. Having disposed of Massachusetts' *Zschernig*-based arguments, the First Circuit then quickly rejected several arguments that attempted to shield the Massachusetts Burma Law under three weighty constitutional doctrines. First, the court dismissed the "novel argument" that "the Massachusetts Burma Law can be upheld by applying a market participant exception"¹¹⁴ to the foreign affairs power as interpreted in *Zschernig*.¹¹⁵ In declining to accept Massachusetts' contention that the market participant exception to the dormant Commerce Clause should be extended to the Foreign Commerce Clause and then to the foreign affairs power, the court noted that not only did the idea lack direct precedential support but it also ran contrary to the Supreme Court's decisions regarding the market participant exception.¹¹⁶

Second, the court then ruled that the Tenth Amendment does not protect the Massachusetts Burma Law. Massachusetts, the court concluded, had waived any direct Tenth Amendment claim it might have had by raising the argument only in a short footnote.¹¹⁷ However, even if Massachusetts had not waived such a claim, the court found that the Tenth Amendment still did not apply to *Natsios* because (1) the district court's decision did not, contrary to Massachusetts' suggestion, compel the state to do business with members of the NFTC and (2) even if such compulsion existed, it was "not similar to the federal government compulsion of states found impermissible" under the Tenth Amendment.¹¹⁸

Lastly, the First Circuit rejected the argument that the First Amendment should shield the Massachusetts Burma Law. Rather than suggesting that the First Amendment protects the Massachu-

114. *Id.* The "market participant exception" is a judicially-created exception to the dormant Commerce Clause, see LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 430-34 (2d ed., 1988), which is itself a judicial creation that prevents states from unduly burdening or discriminating against interstate commerce. *Id.* at 404-08. One of several exceptions to the dormant Commerce Clause, the "market participant exception," simply states that if a state, in enacting a law or regulation that favors in-state interests or burdens interstate commerce, acts as a market participant instead of a market regulator then the dormant Commerce Clause does not apply, and the state may favor its own citizens. *Id.* at 430. For more information regarding the scope of the exception, see *id.* at 430-34.

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

116. See *id.* at 59-60.

117. See *id.* at 60-61.

118. *Id.* at 61.

setts Burma Law or that Massachusetts has First Amendment rights at stake in the case, Massachusetts asserted “that First Amendment values should weigh in favor of a finding that Massachusetts has significant interests at stake . . . that should be considered under *Zschernig*.”¹¹⁹ The court refused to adopt this view, noting that (1) “the First Circuit has expressed doubt” that local governments have First Amendment rights,¹²⁰ and (2) “[n]othing in *Zschernig* suggests that a state government’s First Amendment interests, if any, should weigh into a consideration of whether a state has impermissibly interfered with the federal government’s foreign affairs power.”¹²¹

2. *The Foreign Commerce Clause*

In a claim not addressed by the district court,¹²² the “NFTC argue[d] that, regardless of whether the Massachusetts Burma Law violates the foreign affairs power, the law violates the dormant [Foreign] Commerce Clause.”¹²³ Massachusetts, however, maintained that (1) the law did not violate the Foreign Commerce Clause, and (2) even if the Massachusetts Burma Law did violate the Foreign Commerce Clause, Massachusetts’ status as a market participant shields the law because the market participant exception defense, recognized in domestic dormant Commerce Clause case law, should be extended to apply to the Foreign Commerce Clause.¹²⁴

Acting as the court of first impression, the First Circuit ruled against Massachusetts on all of the above issues, thereby invalidating the Massachusetts Burma Law under the Foreign Commerce Clause.¹²⁵ Though the court declined to decide whether the market participant exception indeed applied to the Foreign Commerce Clause,¹²⁶ the court ruled that under domestic dormant Commerce

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 293 (D. Mass. 1998), *aff’d*, National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, Natsios v. National Foreign Trade Council, __ U.S. __, 120 S. Ct. 525 (1999) (declining to decide the Foreign Commerce Clause issue because the argument “[was not] dispositive in this case”).

123. *Natsios*, 181 F.3d at 62.

124. *See id.*

125. *See id.* at 67.

126. *See id.* at 66. The court abstained from deciding the issue based on the fact that the Supreme Court has not yet addressed the issue. *See id.*

Clause analysis, the market participant exception did not protect the Massachusetts Burma Law because Massachusetts, by enacting the law, acted as a market regulator rather than a market participant.¹²⁷ Moreover, the court found that the Massachusetts Burma Law violated the Foreign Commerce Clause because (1) the law “‘facially discriminates against foreign commerce’”¹²⁸ while failing to “‘advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,’”¹²⁹ (2) the law “‘imped[es] the federal government’s ability to ‘speak with one voice’ in foreign affairs,’”¹³⁰ and (3) through the law, the Commonwealth of Massachusetts impermissibly “‘attempts to regulate conduct beyond its borders and beyond the borders of this country.’”¹³¹

3. Federal Preemption of the Massachusetts Burma Law

Moving to the second issue deemed nondispositive by the district court,¹³² the First Circuit finally examined the district court’s decision with respect to the NFTC’s claim that federal law preempted the Massachusetts Burma Law. In doing so, the court first reversed the district court’s nonbinding observation that “‘the NFTC ‘failed to carry [its] burden’ of showing ‘that Congress intended to exercise its authority to set aside a state law.’”¹³³ According to the First Circuit, this erroneous observation resulted from the district court’s misapprehension of the NFTC’s burden of proof and resultant application of the wrong legal standard to the facts.¹³⁴

The First Circuit then proceeded to determine that federal laws imposing sanctions on Burma preempted the Massachusetts Burma Law. Massachusetts contended that preemption had not occurred

127. *See id.* at 62-65.

128. *Id.* at 66 (quoting *Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue and Fin.*, 505 U.S. 71, 81 (1992)).

129. *Id.* at 70 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)).

130. *Id.* at 68 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979)).

131. *Id.* at 69.

132. *See* *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (1996), *aff’d*, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, __ U.S. __, 120 S. Ct. 525 (1999) (declining to decide whether federal law preempted the Massachusetts Burma Law due to the non-dispositive nature of the issue).

133. *Natsios*, 181 F.3d at 71 (quoting *Baker*, 26 F. Supp. 2d at 293).

134. *See id.*

because (1) Congress had impliedly permitted the Massachusetts Burma Law by failing to explicitly preempt the law when Congress knew about the law's existence¹³⁵ and (2) even if Congress had not implicitly permitted the Massachusetts Burma Law, the federal sanction laws had not preempted the Massachusetts Burma Law because Congress had not clearly manifested its intent that the federal laws do so.¹³⁶ The court, however, rejected Massachusetts' assertions, finding that (1) Congress did not implicitly approve the Massachusetts Burma Law by failing to explicitly indicate congressional intent for the federal sanctions to preempt the Massachusetts Burma Law¹³⁷ and (2) the federal Burma laws preempted the Massachusetts Burma Law because the federal laws sufficiently filled the foreign affairs field regarding the imposition of economic sanctions against Burma, and the Massachusetts Burma Law directly conflicted with the federal laws' strategy.¹³⁸

IV. ANALYSIS

As previously mentioned, the Massachusetts Burma Law marked a significant development in the evolution of constituent diplomacy. Not only did the Massachusetts Burma Law prevail as the first state law of its kind, but, as Part III reveals, the First Circuit's decision in *National Foreign Trade Council v. Natsios* raised various constitutional issues of potentially far reaching significance. Such issues include, for example, the constitutionality of state selective purchasing regulations under the foreign relations effects test established by the Supreme Court in *Zschernig v. Miller*,¹³⁹ the constitutional relationship and boundaries between federalism and United States foreign relations law,¹⁴⁰ the applicability of the First and Tenth Amendments to foreign relations law,¹⁴¹ the suitability of the market participant exception of the dormant Commerce Clause to both the foreign

135. *See id.*

136. *See id.* at 74.

137. *See id.* at 76.

138. *See id.* at 76-77.

139. *See supra* Part III.B.1.a.

140. *See supra* Part III.B.1.a-b.

141. *See supra* Part III.B.1.b.

relations effects test¹⁴² and the Foreign Commerce Clause,¹⁴³ and the scope of implied federal preemption of state law.¹⁴⁴

Despite the potential significance of these and other unspecified issues, this Part will focus exclusively on the First Circuit's construction of the relationship and boundaries between federalism and foreign affairs law as determined by the court's interpretation of the foreign relations effects test. Specifically, this Part will argue that the First Circuit's formulation of the foreign relations effects test is faulty, not only because it fails to provide a definite standard by which to measure the constitutionality of constituent diplomacy activities like the Massachusetts Burma Law, but also because it fails to take into account the manner in which various post-*Zschernig* international, technological, and constitutional developments have affected the relationship between federalism and foreign affairs. This Part will then explore several possible formulations of the foreign relations effects test, ultimately arguing that the First Circuit should have construed the test as an intermediate balancing test similar to the one proposed by Massachusetts in *Natsios*.

A. Problems with the First Circuit's Formulation of the Foreign Relations Effects Test in National Foreign Trade Council v. Natsios

The First Circuit's construction of the foreign relations effects test in *Natsios* suffers from four flaws. First, the court's formulation of the test fails to clearly define the test's criteria and limits, thereby continuing the imprecision and ambiguity that characterizes the *Zschernig* court's original conception of the test as well as existing jurisprudence regarding subnational involvement in foreign affairs. Second, the court's interpretation of the test departs from the *Zschernig* court's focus on application of the subnational regulation rather than the facial validity of the law. Third, the high level of generality used by the First Circuit in its construction of the test promotes federal exclusivity over foreign affairs at the expense of subnational involvement. Fourth, the First Circuit's approach fails to take into account the consequences of significant post-*Zschernig* developments in federal constitutional law, international relations, and global interdependence.

142. See *supra* Part III.B.1.b.

143. See *supra* Part III.B.2.

144. See *supra* Part III.B.3.

1. The court's failure to clearly define the test

The primary, if not most noticeable, defect of the First Circuit's formulation of the foreign relations effects test in *Natsios* is the court's failure to plainly articulate the test's criteria and standards. Though the First Circuit's approach to the effects test parallels that of the *Zschernig* court, the absence of definite standards and guidelines undermines the opinion's precedential value and perpetuates the ambiguity that has troubled federal courts' understanding of the relationship between federalism and foreign affairs since the Supreme Court's 1968 decision in *Zschernig*.

To its credit, the First Circuit did not receive much guidance from the *Zschernig* opinion regarding how to frame the foreign relations effects test. As originally presented in *Zschernig*, the foreign relations effects test consisted of a broad, case-by-case examination of whether a particular subnational entity's act impermissibly imposed on the federal government's authority over the nation's foreign affairs.¹⁴⁵ *Zschernig* thus presented the effects test as a factually specific, general framework with no definite criteria or standards.¹⁴⁶

In *Natsios*, the First Circuit attempted to follow the *Zschernig* court's general, fact-specific approach to the effects test. For example, the First Circuit correctly and clearly stated the effect's test's central question—whether the act in question “has more than an “indirect or incidental effect in foreign countries,” and has a “great potential for disruption or embarrassment””¹⁴⁷—and conforms with the *Zschernig* court's approach of identifying factual factors that presumably demonstrate the invalidity of the act under the effects test.¹⁴⁸ Also, the First Circuit clearly characterized the effects test's underlying “principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed.”¹⁴⁹ Moreover, the court's application of the test surpasses that of the district court by citing five as opposed to only two factors that, when

145. *See supra* Part II.D.

146. *See id.*

147. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 51 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, ___ U.S. ___, 120 S. Ct. 525 (1999) (quoting *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968)).

148. As previously noted, the only category of factor that appeared in the findings of both the *Natsios* and the *Zschernig* analyses involved the existence of foreign countries' objections to the law at issue. *See supra* Part III.B.1.a.

149. *Natsios*, 181 F.3d at 52.

combined, indicate that the Massachusetts Burma Law had a direct effect on foreign relations.¹⁵⁰

In the end, however, these measures serve only to restate the foreign relations effects test's outer framework rather than thoroughly delineating the framework's scope or requirements. For example, the court's discussion of the "threshold level of [subnational] involvement in and impact on foreign affairs" never identifies the dividing line separating permissible and impermissible acts.¹⁵¹ Similarly, in its examination of the various factors that presumably demonstrate the Massachusetts Burma Law's impermissible status under the effects test, the court fails to explain its criteria for selecting such factors and whether there exist any limits on what type of factors may or may not be considered in such an analysis.¹⁵² Moreover, the court does not attempt to explain or justify why four of the five factors it identifies to demonstrate the Massachusetts Burma Law's invalidity differ in nature from those used by the *Zschernig* court.¹⁵³

The First Circuit's formulation of the foreign relations effects test thus does little more than restate the test's outer framework and underlying principles, leaving undefined the framework's definite scope and requirements. To be sure, the First Circuit is not alone in its failure to clearly define the effects test's parameters and minimum standards; the same flaw can be found in both the Supreme Court's original formulation of the test in *Zschernig*¹⁵⁴ and the Massachusetts

150. See *supra* note 107 and accompanying text (listing five factors identified by the First Circuit as evidence of the Massachusetts Burma Law's direct effect on foreign relations); *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (1998) (identifying two factors that caused the Massachusetts Burma Law to impermissibly impinge on federal power over foreign affairs: the law's purpose of furthering democratic reforms in Burma and the fact that the European Union, Japan, and the Association of the South East Asian Nations (ASEAN) had formally informed the World Trade Organization and the United States government of their opposition to the law).

151. *Natsios*, 181 F.3d at 52-53.

152. See *id.* at 53-54.

153. See *id.* at 53. As previously noted, the only factor common to the analyses of both the *Natsios* and the *Zschernig* courts involved the existence of foreign countries' objections to the law at issue. See *supra* Part III.B.1.a.

154. See *supra* Part II.D. Somewhat ironically, the First Circuit noted the flaws with the Supreme Court's formulation of the effects test when it observed that "[t]he precise boundaries of the Supreme Court's [articulation of the effects test] in *Zschernig* are unclear." *Natsios*, 181 F.3d at 51-52 (footnote omitted).

district court's subsequent interpretation of the test in the trial court proceedings of *Natsios*.¹⁵⁵

The absence of such definite boundaries and standards undermines the First Circuit's holding regarding the invalidity of the Massachusetts Burma Law in two primary ways. First, due to the lack of definite criteria and standards, the court's holding appears to be extremely fact-specific, if not based on the court's opinion rather than established legal principles. Such flaws undermine the opinion's precedential value by limiting its applicability to a situation with similar factual circumstances and rendering suspect the legitimacy of the court's reasoning.

More importantly, the decision's lack of clearly defined requirements preserves the ambiguity and vagueness of the relationship between federalism and foreign affairs that has plagued federal jurisprudence since the Supreme Court's 1968 decision in *Zschernig*.¹⁵⁶ Consequently, the decision perpetuates the very real risk of inconsistent judicial conclusions regarding which state actions unlawfully encroach on the federal government's foreign affairs power. Therefore, if nothing else, the First Circuit's failure in *Natsios* to clearly define the criteria and standards applicable to the foreign relations effects test renders the court's decision another "missed . . . opportunity to clarify current jurisprudence regarding state involvement in foreign affairs."¹⁵⁷

2. *The court's departure from Zschernig's application-oriented focus*

Another significant flaw in the First Circuit's formulation of the foreign relations effects test involves the court's departure from the *Zschernig* court's focus on the validity of the application of a subnational act rather than the act's facial validity. As two commentators recently observed, "[o]ne fact about *Zschernig* that is often overlooked is that the Court only held the Oregon law unconstitutional as applied,"¹⁵⁸ and they distinguished the case from the Court's previous decision, *Clark v. Allen*,¹⁵⁹ where the Court had upheld a simi-

155. See *supra* note 18.

156. For a brief discussion of the ambiguity in federal jurisprudence regarding the relationship between federalism and foreign affairs, see *supra* Part II.D.

157. *Recent Cases*, *supra* note 18, at 2014.

158. Loschin & Anderson, *supra* note 20, at 403.

159. 331 U.S. 503 (1947).

lar California statute against a challenge to the statute's facial validity.¹⁶⁰ The Court's construction of the foreign relations effects test in *Zschernig*, therefore, focused on the application of the Oregon law rather than the law's facial validity. Indeed, Justice Douglas's opinion, "full of quotations from previous lower court rulings, seemed highly critical of probate judges who were willing to summarily discriminate against Soviet client states. It was not the state's laws that were unconstitutional, but the way judges discriminatorily applied them that created the potential international embarrassment."¹⁶¹

A close examination of the First Circuit's construction and discussion of the foreign relations effects test in *Natsios* reveals that the court deviated from Justice Douglas' focus on state officials' application of the state law at issue and focused instead on the facial validity of the law itself. As previously mentioned, the five factors cited by the court as evidence of the Massachusetts Burma Law's direct effect on foreign affairs include (1) the law's purpose to affect another country's affairs, (2) the fact that Massachusetts' economic power positioned the state so that the law could and has had an effect, (3) the possibility that the law's effects could be amplified if other subnational entities enacted similar regulations, (4) the fact that several foreign countries and regional organizations had protested the law, and (5) the fact that the law deviated from the federal Burma law in several ways.¹⁶² Conspicuously absent from the court's list are any factors that approximate Judge Douglas's concerns in *Zschernig* that state judges or (under a broader reading of *Zschernig*) other state officials may have applied the Massachusetts Burma Law in a discriminatory fashion. Instead, the list appears to emphasize purely facial concerns, such as the law's purpose or motive, as well as its deviation from the federal Burma law.

The First Circuit's facially-oriented formulation of the foreign relations effects test in *Natsios* thus remains inconsistent with the Supreme Court's application-oriented focus in *Zschernig*. Under an application-oriented effects test, the First Circuit arguably could have held the law unconstitutional if it had found that state officials, in fulfilling their duties to enforce the law or maintain the restricted purchasing list, had made "ad hoc decisions about foreign govern-

160. *See supra* Part II.D.

161. Loschin & Anderson, *supra* note 20, at 404 (footnotes omitted).

162. *See supra* note 107 and accompanying text.

ments' policies and credibility."¹⁶³ Regardless of how the court might have viewed the Massachusetts Burma Law under such an application-oriented construction of the effects test, the fact remains that the court's formulation of the test in *Natsios* departs from the test's original formulation in *Zschernig*.

3. *The court's formulation of the test at a high level of generality*

A third notable defect in the First Circuit's formulation of the foreign relations effects test concerns the court's construction of the test at a high level of generality that effectively bars any substantive involvement by subnational actors in foreign affairs. As one commentator recently observed, federal jurisprudence regarding the validity of acts of constituent diplomacy under *Zschernig* can be divided into "two different and inconsistent approaches for applying the [foreign relations] effects test: formulating the effects inquiry at either a high or low level of generality."¹⁶⁴ Significantly,

[i]nquiries at a high level of generality examine any potential effects that the statute could have on U.S. foreign relations. The mere intention of a state to affect a foreign country's domestic policies, when examined from a high level of generality, would be seen as potentially affecting foreign affairs because of the possibility that a foreign country could react to a state's commentary. Alternatively, when framing the effects question at a low level of generality, courts focus on the actual effects a statute has on a foreign country.¹⁶⁵

"The level of generality that the court applies to [the foreign relations] effects inquiry is particularly important because"¹⁶⁶ it effectively determines the validity of a statute: to date, those courts that have employed the effects test "at a high level of generality . . . have consequently found the state action in question invalid."¹⁶⁷

163. Loschin & Anderson, *supra* note 20, at 405 (citation omitted). Loschin and Anderson argue that *Zschernig*'s application-oriented focus on ad hoc decision making by subnational officials "does not apply to selective purchasing laws" because "[t]he legislature . . . makes a single decision that [the state] will not do business with certain companies" rather than "the same type of continuous credibility decisions" deemed impermissible in *Zschernig*. *Id.*

164. *Recent Cases*, *supra* note 18, at 2016.

165. *Id.*

166. *Id.*

167. *Id.*

Conversely, those that have applied a low level of generality have found the subnational actor's conduct to be constitutional.¹⁶⁸

In *Natsios*, the First Circuit followed the approach favored by the majority of the courts that have examined the validity of a subnational actor's actions under *Zschernig* and framed its formulation of the foreign relations effects test at a high level of generality.¹⁶⁹ Rather than investigating the effects that the Massachusetts Burma Law had generated within Burma, the court focused its inquiry on the potential effects that the law could have on United States foreign relations. Consequently, the court focused on such factual factors as the law's purpose to affect Burma's internal affairs and the manner in which Massachusetts' economic power positioned the state so that the law could exert an effect on Burma.¹⁷⁰

Two principal problems stem from the First Circuit's formulation of the foreign relations effects test at a high level of generality. First, as presently framed, the test essentially guarantees that virtually no subnational actions will be deemed valid under *Zschernig*. As one commentator observed, "framing the *Zschernig* effects inquiry at a high level of generality makes it nearly impossible to find that the act does not affect foreign relations."¹⁷¹ Though the effects test itself states that subnational actors should be allowed some level of involvement in foreign affairs, the fact that a test framed at a high level of generality permits courts to focus on factors not pertaining to the actual repercussions of a subnational entity's acts within the target state makes it extremely likely, if not impossible, for the court to uphold subnational acts. Though such a result is arguably "normatively better" because it protects the federal government's authority over foreign affairs from harmful subnational encroachment,¹⁷² it also prevents subnational actors from participating in foreign affairs in an era when globalization has intermingled local interests and international issues in an unprecedented manner.¹⁷³

168. *See id.* at 2017-18.

169. *See id.* at 2016-17 (demonstrating that most cases that have applied the foreign relations effects test at a high level of generality have declared the subnational actor's conduct to be invalid).

170. *See supra* note 107 and accompanying text.

171. *Recent Cases, supra* note 18, at 2018.

172. *See id.*

173. For a more in-depth discussion of globalization and subnational involvement in foreign affairs issues, see *infra* Part IV.A.4.c.

More importantly, any formulation of the foreign relations effects test at a high degree of generality potentially threatens the validity of subnational actions normally considered to be distinct from foreign affairs. As constitutional scholar Louis Henkin recently observed, such a formulation of the effects test “might cast doubts on the right of the states to apply their own ‘public policy’ in transnational situations.”¹⁷⁴ Moreover, “[i]t would presumably condemn also ‘sense resolutions’ on foreign policy by state legislatures though such resolutions are not law and could not be invalidated, and state legislatures presumably cannot be prevented or enjoined from adopting them.”¹⁷⁵

Thus, the First Circuit’s construction of the foreign relations effects test at a high level of generality is flawed for two principal reasons. First, it essentially precludes subnational involvement in foreign affairs. Second, it threatens the validity of subnational activities traditionally deemed outside the scope of foreign affairs and “intended primarily to raise public consciousness, stimulate public discussion, and persuade or influence the federal government to consider or re-examine particular policies.”¹⁷⁶

4. The court’s failure to account for post-Zschernig developments in U.S. constitutional law, geopolitical relations, and global interdependence

A final defect in the First Circuit’s construction of the foreign relations effects test involves the court’s failure to formulate the test in accordance with post-*Zschernig* developments regarding federal constitutional law, geopolitical relations, and global interdependence. As the discussion below demonstrates, despite the fact that these factors did not formally figure into the Supreme Court’s formulation or analysis of the foreign relations effects test in *Zschernig*, the principle of absolute federal exclusivity over foreign affairs that underlies both the Court’s holding and its construction of the effects test cannot be fully or accurately understood without them.

More importantly, however, the manner in which these factors have developed and changed since the Court decided *Zschernig* in

174. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996).

175. *Id.* at 164 n.*.

176. *Id.* (endnote omitted).

1968 has great significance for the way *Zschernig* and the foreign relations effects test should be understood and applied today. Specifically, the changes that have occurred during the past thirty years in federalism's importance in U.S. constitutional law, the development of geopolitical relations, and the increase in global interdependence indicate that absolute federal exclusivity over foreign affairs is no longer warranted, meaning that subnational actors should be permitted increased involvement in foreign affairs. *Zschernig* and the effects test thus should be construed in a way that provides an increased role for subnational interests and allows constituent diplomacy greater participation in the international arena.

The First Circuit's formulation of the foreign relations effects test in *Natsios* is therefore flawed because it continues *Zschernig*'s narrow focus on maintaining absolute federal exclusivity over foreign affairs and fails to allow subnational actors greater participation in foreign affairs. Consequently, the First Circuit's approach remains based on outdated, if not illegitimate, ideological underpinnings.

a. The importance of federalism in U.S. constitutional law. Since the early twentieth century, U.S. jurisprudence regarding foreign affairs has maintained the general principle that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."¹⁷⁷ Under this view (which carries such labels as the "exclusivity principle"¹⁷⁸ or the "twentieth-century view"¹⁷⁹), "the reserved powers of the states do not limit the federal government's exercise of foreign affairs powers, and states are broadly prohibited from engaging in foreign affairs activities."¹⁸⁰ According to the exclusivity principle's proponents, the virtual exclusion of subna-

177. *United States v. Pink*, 315 U.S. 203, 233 (1942); *see also* *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear.").

178. Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1224 (1999).

179. Bradley, *supra* note 62, at 1093. Bradley recognizes federal exclusivity over foreign affairs as only one of three elements making up "the twentieth century view" of United States foreign affairs. The other two components include the supremacy of the executive branch in foreign relations matters, *see id.* at 1091, and "the notion that federal courts should make law when necessary to protect the national government's prerogatives in foreign affairs," *id.* at 1095.

180. *Id.* at 1093.

tional actors from the international relations arena is justifiable, if not necessary, because “foreign affairs concern the interests of the entire nation and thus are not the province of the constituent states,”¹⁸¹ and, “[w]ithout constraints on state power, . . . one state will take action for which other states or the whole nation will suffer the adverse consequences.”¹⁸² Federalism and states rights concerns are therefore irrelevant due to the prevailing need for the country to “speak with one voice.”¹⁸³

Scholar Peter J. Spiro recently observed that the Supreme Court’s decision and creation of the foreign relations effects test in *Zschernig* coincided with, and possibly contributed to, “the high mark of federal exclusivity.”¹⁸⁴ As previously discussed, the *Zschernig* court’s construction of the effects test focused on the Oregon law’s potential for “direct[ly] impact[ing] . . . foreign relations and . . . adversely affect[ing] the power of the central government to deal with those problems”¹⁸⁵ rather than the law’s actual effects within East Germany.¹⁸⁶ Thus formulated at a high level of generality, the *Zschernig* construction of the effects test established the absolute character of federal exclusivity by virtually guaranteeing that any subnational act would be struck down as violating the federal government’s authority over foreign affairs.¹⁸⁷ Moreover, in framing the test, the Court justified federal exclusivity by assuming that the Constitution’s allocation of “certain specific powers regarding foreign affairs to Congress and to the President implies a general federal foreign affairs power that is both penumbral (i.e., broader and less determinate than the specific foreign affairs power delegated to the federal government [by the Constitution]), and dormant (i.e., preclusive of inconsistent state legislation).”¹⁸⁸ The *Zschernig* court’s construction of the foreign relations effects test thus established absolute federal exclusivity over foreign affairs, “effectively

181. *Id.*

182. Spiro, *supra* note 178, at 1225 (footnote omitted).

183. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *see also* *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

184. Spiro, *supra* note 178, at 1241.

185. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

186. *See supra* notes 79-81 and accompanying text.

187. *See* *Porterfield*, *supra* note 5, at 10.

188. *Id.* (footnotes omitted).

abandon[ing] the view that our system of federalism imposes certain limits on the federal government's authority over the states."¹⁸⁹

In recent years, the continued legitimacy of absolute federal exclusivity in contemporary United States foreign affairs law has been indirectly brought into question by the Supreme Court's "revival of federalism restrictions"¹⁹⁰ on federal government authority. During "the past decade, the Supreme Court has shown a willingness to impose federalism restrictions on the national government, both in the form of limitations on the scope of the federal government's delegated powers and in the form of independent sovereignty restraints on the exercise of these powers."¹⁹¹ For example, in *United States v. Lopez*,¹⁹² the Court struck down a national law prohibiting the possession of firearms in school zones, holding that the law exceeded congressional authority to regulate interstate commerce under the Commerce Clause.¹⁹³ In support of its decision, the Court emphasized the importance of not interpreting the enumerated powers granted by the Constitution to the federal government so broadly as to destroy the "healthy balance of power between the States and Federal Government."¹⁹⁴ Though the Constitution granted Congress the authority to regulate interstate commerce, the Court noted that the need to protect state control over education from congressional intrusion required that Congress's authority be interpreted narrowly so as to not intrude on state sovereignty.¹⁹⁵ Federalism's interest in preserving state authority and sovereignty thus required that federal authority be construed in a restricted manner.

Though *Lopez* and the Court's other federalism-related decisions¹⁹⁶ have occurred primarily in the domestic context, Professor

189. *Id.* at 2 (footnote omitted).

190. Bradley, *supra* note 62, at 1100-01 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992)).

191. *Id.* at 1100.

192. 514 U.S. 549 (1995).

193. *See id.* at 567-68.

194. *Id.* at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

195. *See id.* at 566.

196. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (invalidating, under the Tenth Amendment, a federal law directing state and local executive officials to assist in implementing a federal gun control scheme involving background checks of gun purchasers); *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994) (holding in part that Congress, not the courts, possesses the authority to determine whether state autonomy or tax uniformity best serves the national interest); *New York v. United States*, 505 U.S. 144 (1992) (striking

Curtis A. Bradley noted that the Court's recent decision in *Breard v. Greene*¹⁹⁷ constitutes a "sign that this revival of federalism restrictions will indeed spill over to foreign affairs."¹⁹⁸ In *Breard*, the Court declined to grant a stay of execution to a Paraguayan citizen executed by the Commonwealth of Virginia in 1998.¹⁹⁹ The Court justified its decision on federalism grounds, affirming that the "prerogative" of whether or not to stay the execution belonged to the state governor, not the Court.²⁰⁰ It should be noted that the Court maintained its profederalism rationale despite the fact that Virginia officials' conduct in arresting Breard violated the requirements of an international treaty to which the United States is a party, and the International Court of Justice had issued an order requiring the U.S. government to delay the execution.²⁰¹

So what does the Court's newfound affinity for federalism mean for absolute federal exclusivity in general and the First Circuit's approach to the foreign relations effects test in particular? First, it indicates that the principle of absolute federal exclusivity over foreign affairs no longer applies to United States foreign relations law. To be sure, "[t]he persistent potential for subfederal action to disrupt national foreign relations"²⁰² still maintains the necessity for federal supremacy over foreign relations. Supremacy, however, is not the same as exclusivity and can be construed so as to allow subnational entities greater access to, and participation in, the foreign affairs arena. As Professor Harold G. Maier asserted,

The principle of federalism echoes a fundamental principle of democracy: that governmental decisions made at the local level are more likely to reflect the will of the people most directly affected by them. As long as the United States continues to exist as a federal nation, decisions in cases involving possible state intrusion into foreign affairs must continue to strike an appropriate balance between

down, under the Tenth Amendment, a federal law requiring states to regulate low level radioactive waste in a manner specified by Congress).

197. 523 U.S. 371 (1998).

198. Bradley, *supra* note 62, at 1101.

199. 523 U.S. at 378-79.

200. *See id.*

201. *See* Bradley, *supra* note 62, at 1101.

202. Spiro, *supra* note 178, at 1247.

preservation of the values of local self-government and the need for national uniformity in matters of international affairs.²⁰³

Federalism, therefore, requires that the principle of federal exclusivity be replaced by a more moderate principle of federal supremacy (or “limited federal exclusivity”) that allows the federal government to have the final say in foreign affairs while simultaneously providing subnational entities broader involvement.

Second, given the illegitimacy of federal exclusivity under federalism, the Supreme Court’s recent revival of federalism means that the First Circuit’s formulation of the foreign relations effects test in *Natsios* must be considered defective to the degree it perpetuates federal exclusivity and unduly prohibits subnational involvement in foreign affairs. A careful examination of the First Circuit’s formulation of the test indicates that the test fails under this rationale. As previously demonstrated, the First Circuit’s construction of the test at a high level of generality vigorously and effectively promotes federal exclusivity by prohibiting virtually all subnational participation in foreign affairs.²⁰⁴ The First Circuit’s construction of the foreign relations effects test in *Natsios*, therefore, is flawed because its vigorous promotion of federal exclusivity over foreign affairs fails to account for the Supreme Court’s recent revival of federalism as a limit on federal authority.

b. Geopolitical relations and the end of the Cold War. In general, scholars and commentators agree that both the Supreme Court’s decision in *Zschernig* and its formulation of the foreign relations effects test should be understood as “a judicial reaction to a state’s contributions to the Cold War.”²⁰⁵ According to this view, the highly polarized international climate and very real potential for retaliation that accompanied the U.S.-Soviet geopolitical rivalry necessitated the

203. Maier, *supra* note 82, at 837.

204. *See supra* Part IV.A.3.

205. HENKIN, *supra* note 174, at 165. *See also* Goldsmith, *supra* note 79, at 1408-09 (asserting that the Court’s establishment of the foreign relations effects test during the Cold War made sense due in part to the flexibility and control that the test offered to the judiciary); Spiro, *supra* note 178, at 1242 (“[*Zschernig*] seems both explained and justified (at least at the time) by its Cold War context.”); Carvajal, *supra* note 20, at 268 (asserting that “[b]ecause . . . *Zschernig* [was] decided in the midst of . . . the Cold War, . . . the Court was concerned primarily with the international consequences of angering a foreign nation”). *But see* Denning & McCall, *supra* note 20, at 323 n.83 (labeling the statement that *Zschernig* “should be read against, and limited by, a Cold War backdrop” as “a *non sequitur*” and arguing that “[c]oncerns with state conduct of foreign policy predated the Cold War”).

extreme variety of federal exclusivity over United States foreign affairs promoted by the Court's formulation of the foreign relations effects test in *Zschernig*.²⁰⁶ As Professor Spiro observed,

In the tinderbox world of superpower competition, the potential consequences of giving offense were obviously profound. One could not expect the Soviets necessarily to understand that when a state official spoke, it was not for the nation; or at least one would not want to risk error in assessing that perception. At the very least, there was the specter of state action upsetting the elaborately choreographed relationship between East and West Blocs; at worst, one could plausibly draw a scenario in which offense caused by state action lit the fuse to World War III. Nor against this backdrop could one rely on the political branches to beat back state action before the damage was done; the context, in other words, supported the strict application of a dormant federal power.²⁰⁷

The Cold War period thus “represented a justifiable zenith for the exclusivity” of federal power over foreign affairs.²⁰⁸

Against this background that emphasized the need for federal exclusivity over foreign affairs, “[t]he rise of the foreign relations effects test . . . ma[de] sense.”²⁰⁹ As articulated by the Court in *Zschernig*, the effects test sought to protect against “the dangers which are involved if each State . . . is permitted to establish its own foreign policy”²¹⁰ by establishing the superiority of federal control over foreign affairs in all instances where state action could arguably affect the nation's foreign relations in a direct manner.²¹¹ According to Professor Jack L. Goldsmith, the effects test's case-by-case approach likely appealed to the Court due to the fact that “any errors of under- or overinclusiveness [that might have resulted from a rule-like approach] were thought to be unacceptably costly in the Cold War world.”²¹² Moreover, the “effects test might have seemed to allow the Court more flexibility in avoiding costly foreign relations errors

206. See Spiro, *supra* note 178, at 1227-28. For a brief discussion on federal exclusivity and the *Zschernig* court's construction of the foreign relations effects test, see *id.* at 1231-32.

207. Spiro, *supra* note 178, at 1242 (footnotes omitted).

208. *Id.* at 1228.

209. Goldsmith, *supra* note 79, at 1409.

210. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

211. See *id.*

212. Goldsmith, *supra* note 79, at 1409.

and in shaping its judgments to the wishes of the Executive in crisis.”²¹³

Regardless of the precise reasons why the Court adopted the foreign relations effects test in *Zschernig*, the need for strict federal exclusivity ended with the conclusion of the Cold War in the early 1990s. Simply put, the end of the Cold War thus signaled “a reduced need for the national government to speak with one voice in international relations.”²¹⁴ As Professor Goldsmith observed,

It was plausible to think in 1964—less than two years after the Cuban missile crisis—that the adjudication of a Cuban expropriation of American property might produce a foreign relations crisis that literally threatened the nation’s existence. It is easy to understand a similar reaction to Oregon’s retaliatory legislation against East Germany in 1968. When formally analogous situations arise in our post-Cold War world—for example, when a court adjudicates the validity of a Russian act of state, or when Massachusetts sanctions [Burma] for human rights violations—the consequences for U.S. foreign relations and for the survival of the nation cannot be compared to the Cold War period. They are from any perspective much less significant.²¹⁵

The conclusion of the Cold War thus discontinued the need for federal exclusivity over foreign affairs.²¹⁶ Moreover, without a need for federal exclusivity, the end of the Cold War indicated the demise of *Zschernig* and its broad formulation of the foreign relations effects test, leading one scholar to surmise that “[o]ne would be bold to predict that [*Zschernig*] has a future life; might it remain on the Supreme Court’s pages, a relic of the Cold War?”²¹⁷

Thus, any broad, *Zschernig*-like post-Cold War formulation of the foreign relations effects test must be considered defective to the degree it promotes federal exclusivity. Under this reasoning, the First Circuit’s construction of the effects test in *Natsios* once again should be considered flawed because its high level of generality effectively

213. *Id.* (footnote omitted).

214. Bradley, *supra* note 62, at 1105.

215. Goldsmith, *supra* note 79, at 1412 (footnotes omitted).

216. See Spiro, *supra* note 178, at 1247 (“[P]erhaps the best argument for softening the rule of federal exclusivity highlights the end of the Cold War and the diminished ultimate dangers of foreign retaliation.”).

217. HENKIN, *supra* note 174, at 165 n.**.

promotes federal exclusivity by prohibiting virtually all subnational participation in foreign affairs.²¹⁸

c. The growth of global interdependence. Since early twentieth century, the principle of federal exclusivity over foreign affairs has “rested on the proposition that . . . the ‘internal’ and ‘external’ affairs of the United States were essentially different.”²¹⁹ As G. Edward White observed, Americans have perceived the relatively peaceful state of domestic politics to be fundamentally different from the

unstable world of international geopolitics whose sovereign actors [have] seemed to behave in incomprehensible but threatening ways. Policymaking in that realm [has] seemed to bear little relationship to policymaking in the still peaceful, democratic, capitalist American domestic arena. As such, foreign relations policymaking [has] appeared to be a natural province of specialists who [can] respond to internationally generated threats to American security with swift and flexible diplomatic or military actions.²²⁰

Federal exclusivity, therefore, has resulted from the perception that the federal government, rather than any state or subnational actor, possesses the knowledge, skill, and capacity to properly confront and deal with the “alien, delicate, and dangerous” international arena.²²¹

Notably, the manner in which global interdependence has evolved and grown in the decades since the Supreme Court decided *Zschernig* has greatly undermined, if not abolished, the validity of these arguments in support of federal exclusivity. Specifically, the distinction between domestic and foreign affairs has eroded in an unprecedented fashion in recent years due to three general developments. First, there no longer exists a “rigid separation between foreign and domestic affairs”;²²² rather, they have become intertwined into “‘intermestic’ affairs.”²²³ For example, issues such as “trade, investment, tourism, immigration, drug trafficking, . . . corporate chartering, crime control, public health and welfare, land use, labor relations, and the regulation of banking, insurance, telecom-

218. See *supra* Part IV.A.3.

219. G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1114 (1999) (citing GEORGE SUTHERLAND, THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT, S. DOC. NO. 61-417 (2d Sess. 1909)).

220. *Id.* at 1121.

221. *Id.* at 1122.

222. Kincaid, *supra* note 21, at 121.

223. *Id.* (citation omitted).

munications, professional activity, wildlife, and the environment”²²⁴ all have become significant domestically as well as internationally. Moreover, traditionally “foreign” and “domestic” areas of law have become “domesticized” (or “internationalized,” depending on one’s point of view) as “the scope of international law has broadened substantially, both covering many areas that were formerly regulated only by domestic law and governing the rights and duties not only of nation-states, but also of individuals.”²²⁵

Second, in addition to participating in many “international” activities that require little or no experience or expertise,²²⁶ subnational actors have become increasingly more familiar with international issues and foreign practices as they have participated in the international arena. Most subnational entities “have experienced the new interdependence quite directly, and it reaches into virtually every sector of [subnational] life.”²²⁷ In addition, as subnational entities have dealt with similar foreign entities, they have opened new “channels of contact across national boundaries,” thereby facilitating a new and deeper “understanding of the internal allocation of authorities in other nations.”²²⁸

Third, subnational entities and their constituencies (the infamous “public”) have become better equipped to participate in traditionally “international” matters as technological advances have made relevant information increasingly more timely, more accessible, and less costly to obtain. As one commentator affirmed,

From the technological advances in communications alone, Americans have access to massive amounts of timely information, and indeed can monitor diplomatic events visually. While the public may, with good reason, be denied access to certain data because of its sensitivity, the willing citizen or group can become sufficiently versed in matters that are or should be unclassified to make

224. *Id.*

225. Bradley, *supra* note 62, at 1105 (footnote omitted).

226. See Bilder, *supra* note 57, at 123 (“[T]he kinds of international matters and issues with which state and local governments are concerned do not require special expertise or information. One does not have to be a foreign relations expert to have a sister city, promote trade in local products or reach sensible opinions on the need for arms control or the undesirability of apartheid.”).

227. Kincaid, *supra* note 21, at 122.

228. Spiro, *supra* note 178, at 1224.

educated judgments about the basic substance of most foreign affairs problems.²²⁹

Made in 1976, only eight years after the Court's decision in *Zschernig*, these statements have become much more pertinent thanks to recent communications-related technological developments involving computers, the Internet, more sophisticated communications satellites, and other similar technology. Due to such developments in communications technology, the "metaphor of the global village, a place where incidental, even random international contacts are routine" has become reality for many, if not most Americans.²³⁰

Together, these three factors indicate that the traditional "external/internal" rationale supporting federal exclusivity over federal affairs no longer applies to United States foreign affairs law and that, by extension, federal exclusivity ranks as an illegitimate objective. Also, these factors strongly suggest that constituent diplomacy efforts should be permitted greater involvement in the international arena because subnational groups now possess the experience, contacts, and information to make proper decisions and act responsibly. Admittedly, this does not mean that states should be granted free reign; as previously mentioned, there still exists some need for national uniformity in foreign affairs. Nevertheless, these factors indicate that any doctrine that supports federal exclusivity and severely limits subnational participation in foreign affairs, such as the First Circuit's construction of the foreign relations affairs test, should be considered outdated or even invalid.

d. Summary and conclusion. The final flaw in the First Circuit's formulation of the foreign relations effects test in *Natsios* concerns the court's failure to adequately account for post-*Zschernig* developments in U.S. constitutional law, geopolitical relations, and global interdependence, and their effect on the legitimacy of the federal exclusivity principle. Both individually and collectively, the Supreme Court's recent commitment to federalism, the end of the Cold War, and the ever-increasing phenomenon of global interdependence sup-

229. Richard A. Frank, *Public Participation in the Foreign Policy Process*, in *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY: AN INQUIRY BY A PANEL OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 66, 71 (Francis O. Wilcox & Richard A. Frank eds., 1976). Frank suggested increased public involvement through such means as administrative proceedings, advisory committees and delegations, and public congressional hearings rather than constituent diplomacy. *See id.* at 74-81.

230. White, *supra* note 219, at 1122-23.

port the proposition that federal exclusivity over foreign affairs is no longer a desirable or legitimate principle. Accordingly, these factors indicate that *Zschernig* and its foreign relations effects test should be construed narrowly to prevent federal exclusivity while providing an increased role for subnational interests and allowing constituent diplomacy greater participation in the international arena. Unfortunately for the First Circuit, its formulation of the effects test in *Natsios* must be considered defective under the above rationale because the test employs a high level of generality that promotes federal exclusivity and severely restricts subnational involvement in foreign affairs, and it fails to account for the pro-constituent diplomacy principles established by the post-*Zschernig* developments discussed above.

B. Options on Review: Proposed Approaches and the Appeal of a Limited Balancing Test

Given the First Circuit's flawed formulation of the foreign relations effects test in *National Foreign Trade Council v. Natsios*, what approach should the courts adopt in the future to achieve a permissible construction of the test? Admittedly, the question of how the effects test should be framed is not easily answered and has been the subject of much scholarly commentary and debate ever since the Supreme Court first ambiguously articulated the test in *Zschernig v. Miller*.²³¹ However, a close review of the lessons derived from the First Circuit's defective approach in *Natsios* and the strengths and weaknesses of several potential approaches suggests that the most suitable construction of the effects inquiry would be a limited balancing test similar to the three-part analysis suggested by Harold G. Maier.

231. See, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1699-711 (1997) (discussing the advantages and disadvantages of categorical rules, executive suggestion, and motive review, and concluding that the foreign relations effects test should be abandoned); HENKIN, *supra* note 174, at 164 (listing different possible approaches to, and formulations of, the effects test); Maier, *supra*, note 82, at 838-39 (suggesting a three-part analysis based on the considerations addressed by *Zschernig* and related cases); Weisburd, *supra* note 67, at 59-60 (proposing a three-factor, categorically-oriented test).

I. Lessons from Natsios

As an example of a defective construction of the foreign relations effects test, the First Circuit's formulation of the test in *Natsios* illustrates several requirements that any construction of the test must follow. First, a proposed formulation of the test should clearly set forth the test's requirements and scope, not just its outer framework.²³² In other words, the test needs to distinctly explain the threshold separating permissible and impermissible subnational acts, identify its minimum standards, and define the criteria that will be considered in its analysis. As previously demonstrated, failure to take such steps affects the apparent legitimacy of a court's holding by both making the court's test appear to be based on opinion rather than established legal principles and perpetuating the real risk of inconsistent judicial conclusions regarding the types of subnational actions that should be considered permissible.²³³

Second, a proposed test should focus on the validity of the application of a subnational act rather than the act's facial validity.²³⁴ A facial inquiry remains inconsistent with the application-oriented approach adopted by the Supreme Court in *Zschernig*.

Third, a proposed formulation of the test should not be framed at a high degree of generality.²³⁵ Again, this simply means that a test should analyze the actual effects of the subnational action in question within a particular country rather than the potential effects that the law could have on United States foreign relations.

Finally, a proposed construction of the test should not directly or indirectly promote federal exclusivity over foreign affairs.²³⁶ Such a result or objective remains clearly inconsistent with post-*Zschernig* developments in U.S. constitutional law, global geopolitical relations, and global interdependence.²³⁷

In conclusion, it should be remembered that any proposed formulation of the foreign relations effects test must satisfy all of the above requirements. Failure to fulfill any of them will render the

232. *See supra* Part IV.A.1.

233. *Id.*

234. *See supra* Part IV.A.2.

235. *See supra* Part IV.A.3.

236. *See supra* Part IV.A.4.a-d.

237. *See id.*

proposed approach to the test markedly less effective, if not defective.

2. *Strengths and weaknesses of proposed approaches*

As previously mentioned, scholars and commentators have suggested numerous possible constructions of the foreign relations effects test. Examples of proposed approaches include framing the test as categorical rules,²³⁸ allowing the executive branch to prescribe which subnational activities should be considered impermissible,²³⁹ asking whether a subnational action requires a subnational actor to “sit in judgment” on a foreign government’s policies or practices,²⁴⁰ examining the motive of a subnational activity to determine whether it intends to affect a foreign government’s domestic agenda,²⁴¹ and balancing federal and subnational interests to determine whether a particular subnational activity discriminates against or unduly burdens the federal government’s conduct of foreign relations.²⁴² Though most of these suggested approaches provide a readily workable formula, a brief examination of them reveals that all are unacceptable due to their failure to satisfy the *Natsios* requirements or some other internal defect or inconsistency.

a. Categorical rules. One relatively common proposed approach to the foreign relations effects test involves framing the test as rules that categorically define what types of subnational actions constitute permissible acts with indirect effects. One commentator, for example, suggested that subnational actions be considered to have direct effects on foreign affairs (and therefore to be impermissible) “in only three types of cases”: (1) when the subnational action involves “any matter that requires a prior decision about what counts as a foreign state,”²⁴³ (2) when the subnational action subjects “a foreign state’s public policy . . . to formal judicial evaluation,”²⁴⁴ and (3) when the subnational action involves “immigration matters.”²⁴⁵ This approach,

238. *See infra* Part IV.B.2.a.

239. *See infra* Part IV.B.2.b.

240. *See infra* Part IV.B.2.c.

241. *See infra* Part IV.B.2.d.

242. *See infra* Part IV.B.2.e.

243. Weisburd, *supra* note 67, at 59.

244. *Id.*

245. *Id.*

he argued, “makes sense as a matter of principle”²⁴⁶ because it gives subnational entities authority over categories that “fail to implicate a federal interest”²⁴⁷ while preserving federal authority over more sensitive and problematic issues.²⁴⁸

In an era when there exists pressure for the courts to draw bright lines around acceptable and unacceptable conduct, the proposal to frame the effects test as categorical rules has great appeal. Not only would categorical rules be justiciably manageable, they would also present subnational entities and their respective constituencies with advance knowledge of the varieties of diplomatic activities in which they may participate. Furthermore, a categorical approach would be able “to make wider, and hopefully more informed, predictions about the aims of the political branches” than does case-by-case analysis under a broader standard.²⁴⁹

Unfortunately, the benefits that might accrue from a categorical approach do not outweigh “the fundamental problem of deciding which narrowly defined categories warrant judicial preemption.”²⁵⁰ The process of determining which actions should be classified in which category remains open to various criticisms and problems: “the uncertain need for such law, [the] courts’ relative incompetence to choose the appropriate category of preemption and the content of this law, [the] asymmetry in political branch incentives to revise judicial errors,” to name a few.²⁵¹ Also, categories “are bound to be over- and underinclusive with respect to the purposes of the foreign relations doctrines.”²⁵² Moreover, “as the scope of [constituent diplomacy activities] expands to include nontraditional [subnational] foreign relations activities that require more fine-grained contextual assessments, a rule-based approach will be much harder to craft, and error costs of any such rule will likely be significant.”²⁵³

Thus, despite a categorical approach’s appeal and potential benefits as a method of creating bright-line rules, it must be deemed an

246. *Id.*

247. *Id.*

248. *See id.* at 60.

249. Goldsmith, *supra* note 79, at 1431.

250. Goldsmith, *supra* note 231, at 1706 (emphasis omitted).

251. *Id.*

252. Goldsmith, *supra* note 79, at 1431.

253. Goldsmith, *supra* note 231, at 1708.

unacceptable formulation of the foreign relations effects test due to its internal flaws and difficulties.

b. Executive suggestion. Another proposed approach to formulating the foreign relations effects test entails treating all subnational activities that violate boundaries suggested by the executive branch as having a direct effect on foreign affairs.²⁵⁴ According to this approach, the executive branch should be permitted to officially prescribe to the courts what types of subnational actions ought to be prohibited.²⁵⁵ The executive branch's recommendation, therefore, "would constitute case-specific federal law binding on courts."²⁵⁶

On one hand, the "executive suggestion"²⁵⁷ approach appears to offer a more professional approach to defining the line between impermissible and permissible subnational involvement in foreign affairs. Unlike the judicial branch, the executive possesses "the expertise, the democratic accountability, and the centralized decision-making capabilities"²⁵⁸ to formulate effective and proper boundaries for subnational actors' participation in the international arena.

On the other hand, the executive suggestion approach contains several fatal flaws. For example, the executive branch lacks the constitutional authority to engage in this sort of lawmaking, and it seems unlikely that Congress would delegate such authority.²⁵⁹ Similarly, "case-specific federal lawmaking without notice, opportunity to be heard, or appellate review does violence to basic notions of due process."²⁶⁰ Finally, granting the executive branch the authority and responsibility to determine the scope of permitted subnational foreign affairs-related activities would almost certainly weigh down the executive's other responsibilities by consuming important resources

254. *See id.* It should be noted that Professor Goldsmith's focus and description of this approach deviates slightly from the manner in which I have presented it. Goldsmith focuses primarily on the question of when the judicial branch should engage in making foreign relations law rather than that of what approach should be taken. *See id.* ("Another intermediate solution is that courts should make federal foreign relations law only when the executive branch officially suggests . . . that the foreign relations interests of the United States require such law.")

255. *See id.*

256. *Id.*

257. *Id.*

258. *Id.* at 1709.

259. *See id.*

260. *Id.*

and politicizing previously nonpolitical issues.²⁶¹ Therefore, the executive suggestion approach to construing the foreign relations effects test should also be avoided due to internal defects and weaknesses.

c. Sitting in judgment. The “sitting in judgment” approach constitutes a third possible manner of framing the foreign relations effects test. Under this approach, subnational activities are considered to have impermissible direct effects on foreign relations if they require subnational officials to “sit in judgment” on foreign governments’ policies and practices.²⁶² Notably, the Supreme Court’s construction of the effects test in *Zschernig* heavily incorporated this approach into its general framework.²⁶³

At first glance, this approach appears to offer a straightforward, judicially manageable method of defining permissible subnational participation in foreign affairs. Upon closer inspection, however, the sitting in judgment formula also suffers from a significant internal inconsistency. Simply put, prohibiting subnational actors from sitting in judgment on foreign nations’ policies and practices in the foreign affairs context directly conflicts with their ability to engage in such conduct in other contexts. For example, in their respective concurring and dissenting opinions in *Zschernig v. Miller*,²⁶⁴ Justices Harlan and White objected to the majority’s application of the “sitting in judgment” standard to invalidate the Oregon law because states were authorized to make critical judgments of foreign nations in other contexts.²⁶⁵ As Justice Harlan stated:

[T]he Uniform Foreign Money-Judgments Recognition Act provides that a foreign-country money judgment shall not be recognized if it “was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” When there is a dispute as to the content of foreign law, the court is required under the common law to treat the question as one of fact and to consider any evidence presented as to the actual administration of the foreign legal system. And in the field of choice of law there is a nonstatutory rule that the tort

261. *See id.*

262. *See* HENKIN, *supra* note 174, at 164.

263. *See supra* notes 79-80 and accompanying text.

264. 389 U.S. 429 (1968).

265. *See id.* at 461-62 (Harlan, J., concurring); *id.* at 462 (White, J., dissenting).

law of a foreign country will not be applied if that country is shown to be “uncivilized.”²⁶⁶

“Surely,” Justice Harlan concluded, “all of these rules possess the same ‘defect’ as the [Oregon] statute now before us. Yet I assume that the Court would not find them unconstitutional.”²⁶⁷

As Louis Henkin points out, a similar contextual inconsistency exists with respect to a Florida state statute.²⁶⁸ The Florida Territorial Waters Act of 1963 required aliens to receive a license to fish in the state’s territorial waters, but it denied such licenses to vessels owned by Communist states, “an alien Communist, . . . [and] other alien vessels ‘on the basis of reciprocity or retorsion’ unless the State Department transmitted a formal suggestion that the state of the vessel [was] a friendly ally or neutral.”²⁶⁹ In a case tried under the Act, the court sustained the Act despite the fact that it required state officials to “sit in judgment” on foreign governments in the process of determining whether to award a license to a Communist- or alien-owned vessel.²⁷⁰

The “sitting in judgment” approach to construing the foreign relations effects test thus should be considered defective because its prohibitions on subnational actors’ ability to judge foreign nations’ policies and practices in the foreign affairs context directly conflicts with their ability to engage in such conduct in other contexts.

d. Motive review. A notable element of the First Circuit’s formulation of the foreign relations effects test in *Natsios*, the motive review approach asks whether “the design and intent of [a particular subnational action] is to affect the affairs of a foreign country.”²⁷¹ If found to have such a purpose, the action would be deemed to have a direct effect on foreign affairs, thereby rendering it impermissible.

Like several of the other approaches already presented, the impermissible purpose or motive approach offers the advantage of being easily administered by the courts.²⁷² Moreover, the motive ap-

266. *Id.* at 461-62 (Harlan, J., concurring) (footnotes omitted).

267. *Id.* at 462.

268. See HENKIN, *supra* note 174, at 437 n.66.

269. *Id.* (citations omitted).

270. See *id.* (citation omitted).

271. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 53 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, __ U.S. __, 120 S. Ct. 525 (1999).

272. See Goldsmith, *supra* note 231, at 1711 (“[The motive review test] would also be easier for courts to administer than an open-ended effects test. As many have pointed out,

proach potentially narrows the scope of subnational activities subject to proscription because most subnational acts “are facially neutral and were not designed with the purpose of influencing U.S. foreign relations.”²⁷³

Regardless of these potential benefits, however, the motive review approach suffers from several significant defects that render it unserviceable in this context. First, motive review fails to satisfy the requirements derived from the First Circuit’s formulation of the effects test in *Natsios*. Contrary to those requirements,²⁷⁴ motive review focuses on the facial validity of a subnational regulation rather than the subnational actor’s application of the regulation. Moreover, motive review that focuses on a regulation’s effects due to the presence of facial neutrality involves an inquiry made at a high level of generality, a type of inquiry prohibited by the requirements.²⁷⁵

Second, the courts do not always favor employing motive review. Though an impermissible motive may be obvious in some instances, it is frequently not in others.²⁷⁶ Consequently, the courts “ha[ve] been reluctant to probe legislative purpose” in other contexts.²⁷⁷

Motive review thus prevails as a flawed rather than beneficial approach to formulating the foreign relations effects test due to its failure to comply with the “*Natsios* requirements” as well as its own internal defects.

e. Balancing federal and state interests. In *Natsios*, the Commonwealth of Massachusetts urged the court to adopt a fifth possible approach to the foreign relations effects test: “balance the nation’s interests in a unified foreign policy against the particular interests of an individual state.”²⁷⁸ Under such a balancing test, subnational actions would be permitted where the subnational interest underlying the action outweighed the national interest in maintaining a unified foreign policy.

courts are much better at smoking out impermissible purpose than they are at identifying, weighing, and accommodating the effects of government action.” (footnote omitted).

273. *Id.*

274. *See supra* Part IV.B.1.

275. *See id.*

276. *See* HENKIN, *supra* note 174, at 437-38 n.67.

277. *Id.* at 438 n.67 (citing *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *United States v. Kahriger*, 345 U.S. 22 (1953); *Marchetti v. United States*, 390 U.S. 39 (1968); *Tayyari v. New Mex. State Univ.*, 495 F. Supp. 1365 (D. N.M. 1980)).

278. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, ___ U.S. ___, 120 S. Ct. 525 (1999).

The balancing approach proposed by Massachusetts presents several advantages that, at least initially, support its adoption. For example, a balancing test theoretically would allow subnational actors to participate in international activities in which they have a direct and substantial interest, while reserving those areas in which subnational interest is not as strong to federal control. Also, the U.S. judiciary is familiar with using balancing tests and currently employs such tests to decide such complex issues as the applicability of the dormant Commerce Clause²⁷⁹ and, as Justice Scalia has noted,²⁸⁰ the constitutionality of state acts that affect individual liberties.²⁸¹

Despite these apparent advantages, Massachusetts' balancing approach ultimately fails for several important reasons. First, as the First Circuit correctly determined in *Natsios*, the Supreme Court's construction of the foreign relations effects test remains incompatible with balancing state and national interests. Rather than permitting such balancing, the First Circuit observed, "*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."²⁸²

Second, as Justice Scalia noted in the dormant Commerce Clause context, the balancing of subnational and federal interests "is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."²⁸³ Notably, this disparate and noncomparable relationship also exists between subnational interests in participating in the international arena and the federal interest in promoting national uniformity in foreign policy.

Third, though the courts may "make . . . 'balancing' judgments in determining how far the needs of the State can intrude upon the liberties of the individual,"²⁸⁴ inquiries that involve balancing subnational and federal interests relating to foreign affairs are, similar to the dormant Commerce Clause analysis, "ill suited to the judicial

279. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

280. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

281. See, e.g., *Boos v. Barry*, 485 U.S. 312, 324 (1988).

282. *Natsios*, 181 F.3d at 52.

283. *Bendix Autolite Corp.*, 486 U.S. at 897 (Scalia, J., concurring in judgment).

284. *Id.* (citation omitted).

function and should be undertaken rarely if at all.”²⁸⁵ By nature, issues relating to foreign affairs are political and thus should be resolved by political processes. This seems to be the central message of the Supreme Court’s statement in *Barclays Bank PLC v. Franchise Tax Board*:²⁸⁶ “Congress—whose voice . . . is the Nation’s—[has the responsibility] to evaluate whether the national interest is best served by tax uniformity, or state autonomy.”²⁸⁷ Regardless of the internationally-oriented course of action taken by a subnational entity, Congress has the discretion to preempt that action as well as the experience in weighing disparate state and federal interests in political issues. Balancing state and federal interests in foreign affairs generally should be left to Congress rather than the courts.

Fourth, the fact that a balancing test would require courts to weigh individual state interests as they arose on a case-by-case basis violates the *Natsios* requirement that the foreign relations effects test be framed definitely and in a rule-like manner. As Justice Scalia noted in the dormant Commerce Clause context, such methodology lacks predictability, particularly in respect to issues that remain to be decided.²⁸⁸ Thus, due to the fact that a balancing test by nature requires case-by-case analysis and gives little instruction as to how a particular issue should be decided, the proposed balancing test fails to meet the criteria established through the above critique of *Natsios*. Massachusetts’ suggestion that the foreign relations effects test be framed as a pure balancing test thus fails due to internal inconsistencies and defects.

3. *A proposal with potential: the Maier limited balancing test*

As the preceding discussion indicates, the majority of proposed formulations of the foreign relations effects test should be considered flawed because they either violate the requirements derived from the First Circuit’s defective construction of the effects test in *Natsios* or suffer from a separate, internal failing. Significantly, however, there exists one promising proposal, suggested by Professor Harold G.

285. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in judgment).

286. 512 U.S. 298 (1994).

287. *Id.* at 331.

288. *See Bendix Autolite Corp.*, 486 U.S. at 897-98 (Scalia, J., concurring in judgment) (“[T]he outcome of any particular still-undecided issue under the current [dormant Commerce Clause balancing] methodology is in my view not predictable . . .”).

Maier, which lacks such flaws and therefore should be adopted as the standard by which courts determine the validity of subnational involvement in foreign affairs.

Unlike the previously discussed proposals, Maier's formulation of the foreign relations effects test purports to be based on a "careful examination" of *Zscherig* and related cases dealing with "the allocation of [state and federal] authority when the state and federal governments have concurrent constitutional authority to deal with the same subject matter."²⁸⁹ The following three-factor test resulted from his investigation:

- (1) Does the limited constituency of the state provide an appropriate political context in which to make the policy judgment required to reach a decision?
- (2) Is the pertinent information that must be weighed to determine the wisdom of the policy decision available to the state decision maker(s)?
- (3) Will any possible adverse effects of the decision fall upon the entire nation or be localized within the state making the decision?²⁹⁰

"[T]aken together," Maier asserted, these three questions "consolidate all the pertinent considerations alluded to by the courts during the past 200 years in determining the exclusivity of national authority in state law cases touching on foreign affairs where there is no direct preemption by federal law."²⁹¹ Moreover, they "recognize[] the importance of centralized decision making where national interests must be protected from local influences, while preserving appropriate residual state Tenth Amendment power in the particular field."²⁹²

The Maier test thus frames the foreign relations effects test as a three-factor analysis that deems subnational foreign affairs-related activities to have an impermissible direct effect on national foreign affairs if (1) the subnational constituency does not provide an appro-

289. Maier, *supra* note 82, at 838. Specifically, Maier derived his test from a comparison of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *Hines v. Davidowitz*, 312 U.S. 52 (1941), *De Canas v. Bica*, 424 U.S. 351 (1976), and "numerous other cases that address this issue." *Id.*

290. *Id.*

291. *Id.* at 839.

292. *Id.* at 838.

appropriate political context in which to make a particular internationally-related policy decision, (2) the subnational constituency and/or policymaker lacks sufficient information to make an informed judgment regarding that internationally-related policy decision, or (3) adverse effects from the subnational actor's activities affect the nation at large rather than just the subnational actor. Admittedly, these determinations are not as easy to apply as several of the other proposed approaches. It will require the courts to establish some further requirements regarding whether a subnational forum constitutes an appropriate political context for a policy decision or whether subnational decision makers possess sufficient information to engage in a particular area of policy making. Also, to avoid being fatally framed at a high level of generality, the test needs to limit its examination of possible adverse effects to those that might result from the country or countries against which a particular subnational action is directed rather than from the international community at large.

Nevertheless, the strengths of the Maier approach stem from two sources. First, the manner in which the test is formulated sets category-like limits on excessive subnational participation in foreign affairs while simultaneously balancing the subnational actor's interest in the international subject matter and ability to make proper decisions against the national need for uniformity. Second, the Maier approach satisfies the requirements derived from *Natsios* and lacks internal defects that would warrant its being discarded.

Thus, the Maier approach's construction of the federal relations effects test prevails as the approach that the First Circuit should have adopted in *Natsios*—and that the Supreme Court should adopt when reviewing *Natsios*. Significantly, the Court's adoption of this approach will “ensure that the values of local self-government that inform the federal structure can be effectively maintained without undue interference with the national conduct of foreign affairs.”²⁹³

V. CONCLUSION

The Massachusetts Burma Law constitutes one of the most significant developments to date in the evolution of constituent diplomacy and the foray of subnational actors into the arena of foreign affairs. Not only did the Massachusetts Burma Law enact the first state

293. *Id.* at 839.

selective purchasing law of its kind but the First Circuit Court of Appeals' recent decision in *National Foreign Trade Council v. Natsios*,²⁹⁴ which declared the Massachusetts Burma Law to be an invalid usurpation of federal authority over foreign affairs, has accentuated constitutional questions regarding the relationship between federalism and foreign affairs and other related issues.

Perhaps the most significant question raised by the First Circuit's decision in *Natsios* involves the manner in which courts should construe the foreign relations effects test established by the Supreme Court in *Zschernig v. Miller* to determine the constitutionality of subnational activities in foreign affairs. In *Natsios*, the First Circuit formulated the effects test at a high degree of generality that focused on various factual factors that, in the court's view, demonstrated that the Massachusetts Burma Law exerted an impermissibly direct effect on United States foreign relations. However, a careful examination of the court's construction of the test and the ramifications of post-*Zschernig* developments in U.S. constitutional law, global geopolitics, and global interdependence reveals that the court erred by construing the test too broadly and at a high level of generality that erroneously promoted exclusive federal authority over foreign affairs.

The major question derived from *Natsios*, therefore, is how courts should formulate the foreign relations effects test so as to allow greater subnational participation while protecting national interests and preventing absolute federal exclusivity. Though scholars and commentators have suggested various possible approaches, only Professor Harold G. Maier's three-part, limited balancing test adequately accomplishes the task. The courts, therefore, should adopt the Maier construction of the foreign relations effects test as the proper standard by which to judge the validity of subnational forays into foreign affairs like the Massachusetts Burma law.

Patrick J. Thurston

294. 181 F.3d 38 (1st Cir. 1999), *cert. granted*, *Natsios v. National Foreign Trade Council*, __ U.S. __, 120 S. Ct. 525 (1999).