Constitutionality of State and Local Selective Purchasing Legislation: A 9-0 Supreme Court Decision in Favor of and in Defeat of Plaintiff

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On June 19, 2000, the Supreme Court struck down Massachusetts' selective purchasing law (the "Massachusetts Law")[1], which had restricted that state's agencies' purchases from companies that do business with Burma.[2] All the Justices agreed that the Massachusetts Law was unconstitutional on the straightforward and narrow ground that it violated the Supremacy Clause of the U.S. Constitution.[3] Some had heralded this case as the one to decide the question of the legitimacy of states' and localities' actions in areas that have traditionally been considered governed by exclusive U.S. federal foreign affairs powers. The National Foreign Trade Council (the "NFTC"), which brought the suit against the Massachusetts Law, specifically requested the Supreme Court to decide these broader questions in order to give guidance to states and localities considering sanctions acts, thereby also clarifying the issue for businesses. However, the Justices declined to address the additional foreign

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1. Act of June 25, 1996, Ch. 10, § 1, 1996 Mass. Acts 210, *codified at* Mass Gen. Laws, Ch. 7, §§ 22G-22M (1996). The various statues and court opinions concerning the Massachusetts Law sometimes speak of "Burma" and sometimes speak of "Myanmar" as the subject of the legislation. The "Union of Myanmar" was formerly known as the Nation of Burma. This article uses the terms interchangeably.

2. *See* Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

3. Justice Scalia, with whom Justice Thomas joined, wrote a separate concurring opinion. *See id.* at 388.

affairs issues raised by the lower courts, and specifically restricted the Court's holding to the Supremacy Clause violation. The narrow scope of the decision leaves open the question of the legitimacy of state and local "sanctions" regulations affecting countries not currently subject to U.S. federal sanctions. Thus, at least in the near term, the decision is a hollow victory for the NFTC and for those orthodox theorists who advocate a broad interpretation of the foreign affairs powers of the federal government.

Following *Crosby*, it is clear where the United States has enacted unilateral or multilateral sanctions[4] against countries or organizations, state and local laws sanctioning those same entities are preempted by the federal action(s). However, other important foreign affairs and federalism questions remain open, including:

1. Are state and local sanctions laws concerning countries or organizations where the United States has *not* enacted unilateral or multilateral sanctions constitutional?

2. May states and localities take actions affecting foreign affairs that are not, strictly speaking, sanctions legislation? For example, may they direct government pension plans to divest from companies that do business with or in certain countries? Or, may they send foreign trade delegations abroad?

3. How should state and local actions be judged under the Foreign Commerce Clause?

4. To what extent do state or local actions addressing foreign affairs issues intrude on general notions of an exclusive federal area of foreign affairs power?

Although *Crosby* does little to illuminate the specific answers to these questions, it does shed some light on methods that may be used to evaluate such state and local actions. This article uses the court challenge to the Massachusetts Law to examine three of the main types of constitutional challenges to state actions in the foreign affairs arena:[5] the Supremacy Clause, the federal government's "exclusive" foreign affairs powers, and the Foreign Commerce Clause (with its

4. These include Angola, (UNITA) 31 C.F.R. Part 590 (2000); Cuba, 31 C.F.R. Part 515 (2000); Iran, 31 C.F.R. Part 560 (2000); Iraq, 31 C.F.R. Part 575 (2000); Libya, 31 C.F.R. Part 550 (2000); North Korea, 31 C.F.R. Part 500 (2000); Sudan, 31 C.F.R. Part 538 (2000); Taliban (Afghanistan), Exec. Order No. 13,129, 31 C.F.R. 538, 64 Fed. Reg. 36,759 (1999); and the Federal Republic of Yugoslavia (Serbia and Montenegro), Exec. Order No. 13,121, 31 C.F.R. 586 (1999); and OFAC General Licenses Nos. 2&3.

5. An additional important constitutional challenge is a claim that state action violates a specific clause of the Constitution other than the Supremacy Clause, such as the Article I, § 10, cl. 1 prohibition against states entering into "Treaties, Alliances or Confederations." U.S. CONST. art. I, § 10, cl. 1. This line of argument was not advanced in the court challenges to the Massachusetts Law and is not discussed in this article.

related market participant exception argument). It discusses the strengths and weaknesses of what I label "orthodox" and "revisionist" theoretical approaches to analyzing the constitutional law of foreign affairs and evaluates the strengths and weaknesses of each of the three main types of challenges in light of the *Crosby* opinion. After briefly presenting the background of the Massachusetts Law, this article examines the logic presented in the Supreme Court, court of appeals, and district court opinions[6] concerning federalism and foreign affairs from the perspective of both orthodox and revisionist approaches.

An orthodox view of the federal government's foreign affairs powers was manifested in the Federal District Court's approach to the Massachusetts selective purchasing case, where the court categorized the Massachusetts Law as an "unconstitutional infringement of [the] federal government's power over foreign affairs."[7] The *Baker* Court declined to decide whether the Massachusetts Law violated the Foreign Commerce Clause and discussed the issue of preemption in only very cursory terms, claiming that the NFTC's preemption argument was "not dispositive" because there was not "sufficient actual conflict" between the Massachusetts Law and the federal sanctions to support preemption.[8] The subsequent court of appeals opinion was much more expansive. On appeal from the *Baker* decision, *Natsios* cited federal preemption as well as the "foreign affairs power of the federal government" and the "Foreign Commerce Clause" as supporting both the federal government's constitutional superiority in all areas of foreign affairs,[9] and the underlying assumption that in the absence of controlling constitutional or enacted federal law, the *federal courts* are the appropriate branch of the U.S. federal government to address state actions that "interfere" with U.S. foreign relations. The *Natsios* court concluded that because Congress' Burma sanctions were "in the field of foreign relations, there is a strong presumption that it intended to preempt the field."[10] The Supreme Court's holding in *Crosby*

6. National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998), *aff'd*, NFTC v. Natsios, 181 F.3d 38 (1st Cir. 1999) *aff'd sub nom.*, Crosby v. NFTC, 530 U.S. 363 (2000). For ease of reference in this article, I refer to the District Court opinion as the "Baker Opinion," the subsequent Court of Appeals opinion as the "Natsios Opinion," and the Supreme Court opinion as the "Crosby Opinion."

7. *Baker*, 26 F. Supp. 2d at 293.

8. *Id.*

9. *Natsios*, 181 F.3d at 45.

10. *Id.* at 76.

addressed only the preemption argument.[11]

In contrast to the *Baker* and *Natsios* approaches, revisionist theorists, led by Jack Goldsmith,[12] believe that in the absence of enacted federal law or an explicit constitutional provision, the issues raised by state "foreign affairs" actions that implicate the "foreign affairs power of the federal government" should be resolved by the federal executive or legislature, not the judiciary.[13] Revisionists also note that the Constitution "did not exclude all state authority that might have an effect on foreign relations."[14] The revisionist theory thus "challenges the conventional wisdom concerning the allocation of state and federal power in the absence of . . . a controlling federal foreign relations enactment" and leaves open the question of under what conditions state actions affecting U.S. foreign relations might be permitted.[15] Even the limited scope of the *Crosby* opinion supports the legitimacy of the Revisionists' approach, because it serves as evidence that the mechanism Goldsmith and his colleagues advocate for remedying state or local intrusions into federal foreign affairs prerogatives can actually function. No expanded analysis of a general federal foreign affairs power is needed under this view. Where Congress identifies a foreign affairs issue it wishes to control on the national level, its legislation preempts sub-federal bodies from enacting conflicting legislation.

In contrast, theorists following a more traditional approach, such as Brannon P. Denning and Jack H. McCall, Jr., support an expansive grant of "foreign affairs powers" to the federal government as well as the appropriateness of the judiciary's power to enforce that grant.[16] Others, such as Peter J. Spiro, believe that the political branches of

11. *Crosby*, 530 U.S. at 374 n.8.

12. Associate Professor of Law, University of Chicago.

13. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1399 (1999).

14. Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L. L. 675, 677 (1998).

15. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620 (1997).

16. *See* 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, 336 (1999) Denning & McCall concluded that "Goldsmith's argument against *Zschernig*, and against an exclusive power of the federal government over foreign affairs, is forcefully presented, but unpersuasive[,]" relying in part on the Constitution's foreign affairs-related provisions that create a "structural or 'penumbral' restriction on state actions affecting foreign affairs, even in the absence of a congressional enactment." *Id.* at 338.

the federal government cannot adequately control disruptive state foreign affairs actions, but argue on other grounds that the states have a valid voice in foreign policy matters, and that federal exclusivity in that realm should be abandoned.[17] Although there is less disagreement among theorists concerning the extent of the power the Foreign Commerce Clause grants to the federal government, here, too, there are interconnections between the questions of federal preemption, general federal foreign affairs powers, and the Foreign Commerce Clause that implicate practical questions concerning the constitutionality of many state and local enactments.

I. Selective Purchasing Legislation

Selective purchasing legislation typically either bans companies with certain characteristics from participating in a jurisdiction's procurement process or places a premium on such participation. Massachusetts is by no means the only sub-federal jurisdiction to have passed selective purchasing legislation. At least eighteen jurisdictions have enacted selective purchase statutes, restricting procurement from companies doing business with Burma, Nigeria, China, Cuba, and Indonesia, among others.[18] Many of these countries are not subject to federal unilateral or multilateral sanctions. In 1998, the President's Export Council noted "the increasing use of secondary boycotts by state and local governments to sanction those who trade in or with certain foreign countries."[19]

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

18. *Baker,* 26 F. Supp. 2d at 291; *see also USA Engage State and Local Sanctions Watch List* (visited Feb. 23, 2001) <http://www.usaengage.org>, and is also on file with the author.

19. Letter From C. Michael Armstrong, Chairman of the President's Export Council to the Honorable William J. Clinton, President of the United States (June 2, 1998), available at <http://www.tia.doc.gov/pec/sanction.htm>, and is also on file with the author. (The President's Export Council (PEC) advises the President of government policies and programs that affect U.S. trade performance; promotes export expansion; and provides a forum for discussing and resolving trade-related problems among the business, industrial, agricultural, labor, and government sectors. The Council was established by Executive Order of the President in 1973, and includes twenty-eight private-sector members of the Council (appointed by the President), five United States Senators and five members of the House of Representatives (appointed to the Council by the President of the Senate and the Speaker of the House, respectively), the Secretaries of Commerce, Agriculture, Energy, Labor, State, and Treasury, the Chairman of the Export-Import Bank of the United States, the U.S. Trade Representative, and the Administrator of the Small Business Administration.).

II. The Massachusetts Selective Purchasing Legislation

In the case of the Massachusetts Law, enacted in June 1996, the Secretary of Administration and Finance was required to maintain a "restricted purchase list" of companies that do business with Burma.[20] The restricted purchase list contained the names of persons currently doing business with Burma, and was to be updated at least every three months.[21] The Massachusetts Law prohibited, except in very limited circumstances, "state agenc[ies], state authorit[ies], the house of representatives or the state senate [from] procur[ing] goods or services from any person on the restricted purchase list maintained by the secretary."[22]

State agencies and authorities were permitted to do business with companies on the restricted purchase list only in three limited circumstances: (1) where procurement of the bid was essential and there is no other bid or offer, (2) when the Commonwealth was purchasing certain medical supplies, or (3) when there was no "comparable low bid or offer."[23] A low bid or offer was defined as an offer equal to or less than ten percent above a low bid from a company on the restricted purchase list.[24] This amounted to a ten-percent surcharge placed on the bids of all companies in the Massachusetts state procurement process, which did business with Burma.[25]

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20. Mass. Gen. Laws ch. 7, § 22J (1996).

21. *See id.* at § 22J.

22. *Id.* at § 22H.

23. *Id.*

24. *See id.* at § 22G.

25. Doing business with Burma is defined as:

> (a) having a principal place of business, place of incorporation or its 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); or
>
> (d) providing any goods or services to the government of Burma (Myanmar).

Id.

Massachusetts Representative Byron Rushing, the statute's author, justified the measure, saying that rather than conducting foreign policy per se, the state was simply deciding "on moral grounds who we buy from, just like an individual can."[26] But the Massachusetts Law's legislative history makes it clear that at least some of the statute's supporters considered it to be a Massachusetts "foreign policy" measure with the goal of influencing Burma's domestic politics.[27] Furthermore, in the *Baker* case, attorneys for the Commonwealth admitted that the Massachusetts Law was passed "to sanction Myanmar for human rights violations and to change Myanmar's domestic policies."[28] On appeal, the *Natsios* Court noted that Massachusetts conceded that the Massachusetts Law "expresses the Commonwealth's own disapproval of the violations of human rights committed by the Burmese government" and reflects "the historic concerns of the citizens of Massachusetts" with human rights.[29]

A. Domestic and Foreign Opposition to the Massachusetts Law

In April 1998, the National Foreign Trade Council filed suit in federal district court to challenge the Massachusetts Law. The NFTC is a Washington, D.C.-based trade association for more than 550 American companies with foreign interests, including U.S. subsidiaries of foreign companies.[30] According to the NFTC, more than 30 of its member companies were listed on the Massachusetts restricted list because they had business ties with Burma.[31] Domestic opposition also included the Chamber of Commerce of the United States of America and the Organization for International Investment, which filed a joint amicus curiae brief in *Baker* in support of the

26. Michael S. Lelyveld, *Clinton Faces Constitutional Battle Over Myanmar Sanctions,* JOURNAL OF COMMERCE, March 6, 1998.

27. *See, e.g.*, Mass. House Debate on H2833, July 19, 1995, transcript at 4-5.

28. *Baker*, 26 F. Supp. 2d at 291.

29. *Natsios*, 181 F.3d at 46-47.

30. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction or, Alternatively, for Consolidation and Expedited Consideration of the Merits, at 16, *NFTC v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998). This Memorandum is available at: <http://usaengage.org/background/lawsuit/memo.html>, and is also on file with the author [hereinafter Memorandum of Points and Authorities].

31. *Id.* at 2.

NFTC.[32] These and similar parties also filed amicus curiae briefs in *Crosby*.[33]

In July 1997, the European Union (the "EU") issued its annual report on U.S. trade barriers. This report criticized the U.S. habit of passing domestic legislation that has significant extraterritorial effects, citing the Massachusetts Law as one example of such a law.[34] On July 30, 1997, the EU initiated World Trade Organization ("WTO") action, claiming the Massachusetts Law violated the WTO Government Procurement Act.[35] In addition to its specific claim of a WTO violation, the EU expressed its concern that a "potential proliferation of state and local efforts to conduct foreign policy would greatly increase the difficulties that the EU has encountered in dealing with the United States on policies toward third countries," and would "contradict and undermine the joint efforts of the EU and the U.S. Government" in negotiating mutually agreeable principles covering the use of sanctions.[36] The WTO suit, which was joined by Japan, was later suspended pending the outcome of the NFTC's suit against the Massachusetts Law.[37]

B. Federal Burma Sanctions

On May 20, 1997, President Clinton declared a national emergency with respect to Burma,[38] certifying that the Government of Burma had committed large-scale repression of the Democratic opposition in Burma and enacting U.S. federal sanctions under the authority of the International Emergency Economic Powers Act[39] ("IEEPA") and the Foreign Operations, Export Financing and

32. This Brief in Support of the National Foreign Trade Council is available at: <http://usaengage.org/background/lawsuit/burmabrief.html>, and is also on file with the author.

33. A list of the parties filing amicus briefs on behalf of both parties to the *Crosby* case is available at <http://usaengage.org>, and is also on file with the author.

34. *See* John R. Schmertz, Jr. & Mike Meier, *EU Publishes 1997 Report on U.S. Trade Barriers*, INTERNATIONAL LAW UPDATE, Aug. 1997. The EU Report is available at: <http://europa.eu.int/en/comm/dg01/eu-us.html>, and is also on file with the author.

35. Amicus Curiae Brief In Support Of Plaintiff National Foreign Trade Council at 3, Crosby v. NFTC, 120 S. Ct. 2288 (2000) (No. 99-474).

This brief is available at <http://usaengage.org/resources/nftcbrief.html>, and is also on file with the author.

36. *Id.* at 4.

37. *See Crosby*, 120 S. Ct. at 2299 n.19

38. *See* Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997).

39. 50 U.S.C. §§ 1701-1706 (2000).

Related Programs Appropriations Act of 1997 (the "Sanctions Act").[40] The federal sanctions imposed on Burma as a result of the President's certification (the "Federal Sanctions") include:

1. A prohibition on new investment in Burma by U.S. persons;[41]

2. A prohibition against U.S. persons from "facilitating" a foreign person's investment in Burma, if the foreign person's activity would constitute a prohibited investment if it were made by a U.S. person;[42] and

3. A prohibition on investment in foreign companies where the foreign company's profits are predominantly derived from the company's economic development of Burmese resources.[43]

The Federal Sanctions do not include any prohibition against the sale or purchase of goods or services to or from Burma if the transaction in question does not result in an American person's acquisition of an equity or income interest in a Burmese project.[44] The Federal Sanctions also exempt investment in Burma for non-profit, educational, health, or other humanitarian purposes.[45] The Federal Sanctions apply only to U.S. persons; foreign companies' actions are not specifically covered. Neither the Sanctions Act nor President Clinton's Executive Order refers to state or local sanctions against Burma.

C. The Legal Challenge to the Massachusetts Law

The Massachusetts Law was successfully challenged in federal court on the district court, court of appeals and Supreme Court levels. The district court decision relied solely on the exclusive foreign affairs powers of the federal government and discussed the NFTC's other claims only briefly. The court of appeals upheld the district court's reasoning, but also considered the Foreign Commerce Clause and preemption claims raised by the NFTC. The Supreme Court rested its decision on the Supremacy Clause of the Constitution, ruling that the Massachusetts Law was preempted by the Federal Sanctions. This

40. Although this legislation covered far more than Congress' sanctions legislation concerning Burma, for the purposes of this article, the relevant portions of this legislation are referred to as the "Sanctions Act." *See* Foreign Operations, Export Financing and Related Programs Act, Pub. L. 104-208, § 570 (1997).

41. 31 C.F.R. Part 537.201 (1999).

42. 31 C.F.R. Part 537.202 (1999).

43. 31 C.F.R. Part 537.405 (1999).

44. 31 C.F.R. Part 537.204 (1999).

45. 31 C.F.R. Part 537.403 (1999).

section examines the grounds on which the Massachusetts Law was declared unconstitutional and critiques the court opinions from the revisionist and orthodox points of view.

1. NFTC v. Baker *(Federal District Court)*

a. Exclusive Foreign Affairs Power and the "Effects Test"

In judging the constitutionality of the Massachusetts Law, the *Baker* Court relied on the premise that "the federal government has exclusive authority to conduct foreign affairs."[46] The court found support for this proposition in the "numerous constitutional provisions [that] evidence the *Framers' intent* to vest plenary power over foreign affairs in the federal government."[47] The court concluded that the "proper forum to raise . . . [concerns for the welfare of the people of Myanmar] is the United States Congress."[48] The *Baker* Court employed a classic orthodox approach in using an "effects test" to judge whether the Massachusetts Law was constitutional. Citing *Zschernig v. Miller,*[49] as the Supreme Court's declaration that state laws are invalid when they have more than "some incidental or indirect effect in foreign countries,"[50] the *Baker* Court said that "states and municipalities must yield to the federal government when their actions affect significant issues of foreign policy."[51] The *Baker* Court relied on the *Zschernig* effects test to judge the "substantive impact a state statute has on foreign relations."[52] However, in addition to finding that the Massachusetts Law had a "disruptive impact on foreign relations,"[53] the court also stated that the simple fact that the Massachusetts Law was "designed with the purpose of changing Burma's domestic policy" rendered the act "an unconstitutional infringement on the foreign affairs powers of

46. NFTC v. Baker, 26 F. Supp. 2d 287, 290 (D. Mass. 1998).

47. *Id.* (emphasis added.) The court cited Article I, § 8, cl. 1 & 3; Article II, cl. 2; Article I, § 10, cls. 1-3. Black's Law Dictionary defines "plenary" as "Full, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990).

48. *Baker,* 26 F. Supp. 2d at 293.

49. 389 U.S. 429 (1968).

50. *Id.* at 434-435.

51. *Baker,* 26 F. Supp. 2d. at 291.

52. *Id.* at 292.

53. *Id.* at 291.

the federal government."[54] Thus, it would appear that under *Baker* the mere intent to perform some arguably foreign affairs purpose can render a state act unconstitutional. No documented "impact" on U.S. foreign relations is required.

It may be argued that this standard appears to move beyond Justice Douglas' *Zschernig* opinion, which said that the traditional state actions in the area of descent and distribution of estates "must give way if they impair the effective exercise of the Nation's foreign policy."[55] Although Justice Douglas noted for the *Zschernig* majority that the effects of state action could be "persistent and subtle,"[56] it seems likely that he would have permitted state actions that do not have more than "some incidental or indirect effect in foreign countries."[57] His *Zschernig* decision reflects his conclusion that the Oregon statute created a "great potential for disruption or embarrassment."[58] Orthodox theorists such as Denning and McCall support a narrower interpretation of *Zschernig*, citing Justice Stewart's concurrence in *Zschernig* as providing a "better standard" of deciding the constitutionality of a state's action based on the "basic allocation of power between the States and the Nation."[59] Justice Stewart believed the federal government had an area of "exclusive competence" in foreign relations, which should be left "entirely free from local interference."[60] This line of interpretation would lead to the conclusion that federalism concerns, and not an "effects test" is the best way to justify restricting state actions in the foreign affairs area. However, it also begs the question of when state actions step over the line of permitted behavior; perhaps the effects test will nevertheless enter into the analysis.

Goldsmith's revisionist approach arguably takes a more pragmatic view of state actions, asserting that "states, like corporations, individuals, and federal government officials, can [legitimately] pursue self-interest to the detriment of U.S. foreign relations."[61] However, Goldsmith and the revisionists also believe that

54. *Id.* at 292.

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

56. *Id.* at 440.

57. *Id.* at 434.

58. *Id.* at 435.

59. Denning & McCall, *supra* note 16, at 331 (citing *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring)).

60. *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring).

61. Goldsmith, *supra* note 15, at 1689.

simply because a state action can affect U.S. foreign relations, such an effect does not necessarily lead to the conclusion that the federal Judicial Branch should overturn such actions based on the ground that they violate a general power of the federal government over foreign affairs matters. Instead, Goldsmith believes that in the event of a significant conflict, Congress or the Executive Branch should preempt the state action, recognizing that "the federal political branches always retain the power to [explicitly] preempt state law or activity."[62]

b. The Foreign Commerce Clause

The NFTC's second line of argument to the *Baker* Court was that the Massachusetts Law violated the Foreign Commerce Clause by discriminating against foreign commerce and inhibiting the federal government's ability to act in this area. Citing *Japan Line, Ltd. v. County of Los Angeles,*[63] the NFTC claimed the Massachusetts Law impeded the "federal government's ability to 'speak with one voice'" with respect to commercial relations with another country.[64] The *Baker* Court declined to examine the NFTC Foreign Commerce Clause argument on its merits, including any application of the market participant exception, stating that because the Massachusetts Law unconstitutionally infringed the federal government's foreign affairs power, it was unnecessary to consider a Foreign Commerce Clause analysis.[65] Thus, the *Baker* Court took the most complicated path to deciding that the Massachusetts Law was unconstitutional. Arguably a Foreign Commerce Clause decision would have been a narrower pronouncement of constitutionality because it rests on the textual (Article I, clause 3) power to regulate commerce with foreign nations, rather than requiring an analysis of original intent to determine the extent of the federal government's general "foreign affairs power." The Supremacy Clause argument that the Supreme Court ultimately adopted was similarly based in the text of the Constitution.

c. Preemption

62. *Id.*

63. 441 U.S. 434, 449 (1979).

64. *See* Memorandum of Points and Authorities, *supra* note 30, at 16.

65. *Baker*, 26 F. Supp. 2d at 293.

The *Baker* Court only briefly discussed the NFTC's argument that the Massachusetts Law was preempted by federal sanctions regulations, stating that the NFTC failed to prove "Congress intended to exercise its authority to set aside a state law."[66] The concept of preemption is often divided into three subcategories: express preemption, implied preemption, and conflict preemption. Occasionally, Congress may use explicit preemption language in the statute's text, creating a situation of "express preemption" by explicitly nullifying or modifying existing sub-federal law.[67] However, in the absence of clear-cut preemption language, a court must determine whether the statute provides evidence that Congress clearly (albeit implicitly) intended to preempt state law or whether the nature of the subject matter is such that the two statutes cannot co-exist without conflicting.[68] The Supreme Court's standards for determining whether a state action is preempted by an act of Congress include whether the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[69] whether the federal legislation "occupies the field" of commerce,[70] or whether it renders compliance with both pieces of legislation "physically impossible."[71] In circumstances where the subject matter of the legislation is traditionally left to federal regulation, preemption is more likely to be found.[72] Conversely, if the subject matter is one traditionally considered under local or state authority, preemption is less likely to be found.[73] But as the Supreme Court explained in *Hines*, there is no "rigid formula or rule, which can be used as a universal pattern to determine the meaning and purpose of every act of Congress."[74] In the end, the *Baker* Court simply concluded that the NFTC had failed to carry its burden of proving the Sanctions Act preempted the Massachusetts Act through implied preemption.[75]

66. *Id.* (citing *Phillip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 68 (1st Cir. 1997).

67. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

68. *See* Philip Morris, Inc. v. Harshbarger, 122 F.3d 58, 68 (1st Cir. 1997).

69. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

70. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

71. *See* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 143 (1963).

72. *See Hines*, 312 U.S. at 66.

73. *See* Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 715 (1985) (noting in the preemption context that the regulation of health and safety matters is primarily, and historically, a matter of local concern).

74. *Hines*, 312 U.S. at 67.

75. *Baker*, 26 F. Supp. 2d at 293.

2. NFTC v. Natsios *(Federal Court of Appeals)*

On appeal of the *Baker* decision, the First Circuit Court of Appeals took an expanded look at all three prongs of the NFTC claim, discussing in-depth the federal government's foreign affairs power, the Foreign Commerce Clause, and federal preemption under the Supremacy Clause. The *Natsios* decision specifically upheld all three NFTC claims and affirmed the *Baker* Court's injunction against enforcement of the Massachusetts Law[76] after reviewing the *Baker* Court's decision de novo.[77]

a. Exclusive Foreign Affairs Power and the "Effects Test"

In deciding whether the Massachusetts Law was an impermissible intrusion into the federal foreign affairs power, the *Natsios* Court considered the "central question [to be] whether the state law runs afoul of the federal foreign affairs power as interpreted by the Supreme Court in *Zschernig*."[78] The court explicitly recognized a "threshold level of involvement in and impact on foreign affairs, which the states may not exceed."[79] The Massachusetts Law crossed that threshold because:

> (1) the design and intent of the law is to affect the affairs of a foreign country; (2) Massachusetts, with its $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.[80]

76. *Natsios*, 181 F.3d at 45.

77. *Id.* at 49. The court determined that there were no contested issues of fact, but only issues of law. *See id.* Thus, it "[tried] the matter anew, . . . as if the case had not been heard before, and as if no decision had been previously rendered." BLACK'S LAW DICTIONARY 435 (6th ed. 1990) (definition of de novo).

78. *Natsios*, 181 F.3d at 50-51.

79. *Id.* at 52.

80. *Id.* at 53. The court declined to consider whether the Constitution would permit Massachusetts to pass a simple "resolution condemning Burma's human rights record but taking no other action with regard to Burma." *Id.* at 61 n.18.

The *Natsios* Court expressly considered the effect of similar laws proliferating in other state and local jurisdictions,[81] and conducted its "own inquiry" into whether the Massachusetts Law violated the general foreign affairs power.[82] In doing so, the court examined for itself the effects of the Massachusetts law on U.S. foreign affairs, and performed precisely the type of function for which revisionists consider the judicial branch least suited (of the three federal branches of government).[83]

The *Natsios* Court's foreign affairs powers analysis mirrored the *Baker* Court's approach to the issue. Sweeping in scope, it emphasized the effects test as the most important consideration in determining the constitutionality of state and local sanctions laws.[84] The "dormant"[85] foreign affairs power analysis is, however, intertwined with the court's preemption analysis for it cites the "significant potential for embarrassment" as one of the factors it considers in determining that the "Massachusetts Burma Law has more than an 'incidental or indirect effect' and so is an impermissible intrusion into the foreign affairs power of the national government."[86]

The *Natsios* Court implied that the preemption argument is not necessary to conclude that the Massachusetts Law passed the *Zschernig* effects test threshold, because the Law "target[ed] a foreign country, monitor[ed] investment in that country, and attempt[ed] to limit private interactions with that country, [thus going] far beyond the limitations of permissible regulation under *Zschernig*."[87] This analysis distinguished the Massachusetts Law from the various South Africa divestment statutes and cases (the court deemed such divestment actions to merely target a foreign country, rather than monitoring its actions and limiting private interactions with it), and noted that the sole case upholding such statues emphasized the extremely limited practical effect of the divestment

81. *Id.* at 53 (citing *Zschernig*, 398 U.S. at 433-434).

82. *Id.* at 54 n.9.

83. *See* Goldsmith, *supra* note 15, at 1623.

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

85. "Dormant" in the sense that it does not stem from any explicit provision in the Constitution.

86. *Natsios*, 181 F.3d at 55.

87. *Id.* at 56. Massachusetts argued a market participation exception both to the Foreign Commerce Clause and to the Foreign Affairs Power of the Federal Government. The *Natsios* Court found "no support for Massachusetts's contention that the exception should shield its law from challenges brought under the federal foreign affairs power as interpreted in *Zschernig*." *Id.* at 59.

law in question.[88] The *Natsios* decision also distinguished the Massachusetts Law from "Buy American" statutes, which, although the court acknowledged were not uniformly upheld by the courts, tended not to "single out or evaluate any particular foreign state . . . [or] involve state evaluations of political conditions abroad."[89] In comparison with both the South Africa Divestment statutes and the Buy American statutes, the *Natsios* Court determined that the Massachusetts Law was "aimed at a specific foreign state" (unlike the Buy American statutes), and had more than incidental effects (unlike the South Africa divestment statutes).[90]

b. The Foreign Commerce Clause

Although the *Baker* Court did not consider the NFTC's Foreign Commerce Clause argument in depth, the *Natsios* Court thoroughly discussed this claim, concluding that (1) even assuming that the market participant exception could be applied in the context of a Foreign Commerce Clause analysis, Massachusetts was not an exempt market participant when it acted pursuant to the Massachusetts Law, (2) as a legal matter, the market participant exception is probably not applicable to defend actions that otherwise would violate the Foreign Commerce Clause, and thus, (3) the Massachusetts Law violates the Foreign Commerce Clause.[91]

The Foreign Commerce Clause is based in the constitutional grant of power to Congress to "regulate Commerce with foreign Nations, and among the several States."[92] If the state action in question is "inimical to the national commerce," this power will often be extended to cover even those situations where Congress has not acted.[93] The NFTC argued that the Massachusetts Law violated the

88. *See id.* at 55.

89. *Id.*, at 55-56. *See* Bethlehem Steel Corp. v. Board of Commissioners, 276 Cal. App. 2d 221 (2d Dist. 1969) (invalidating the California Buy American Act for impermissible encroachment on the general federal foreign affairs powers); Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991) (deciding where Congress has not yet spoken and a state's actions do not require it to judge foreign nations' policies, a state's actions that touch on foreign affairs are not unconstitutional, for nothing in the Foreign Commerce Clause insists the Federal Government speak with any particular voice); K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 381 A.2d 774 (N.J. 1977).

90. *Natsios*, 181 F.3d at 56.

91. *Id.* at 62.

92. U.S. CONST. art. I, §8, cl. 3.

93. *Natsios*, 181 F.3d at 61-62 (citations omitted). Such an extension of power is

"Dormant Foreign Commerce Clause." In response, Massachusetts contended:

> (1) Massachusetts was acting as a market participant rather than as a market regulator, and thus was immune from claims that it had violated the Foreign Commerce Clause,
>
> (2) Even if it is not considered an immune "market participant," the Massachusetts Law still did not violate the Foreign Commerce Clause because:
>
> > (a) Congress implicitly permitted the Massachusetts Law by choosing not to explicitly preempt it in the text of the Sanctions Law; and
> >
> > (b) the Massachusetts Law does not discriminate against foreign commerce in favor of local interests, and
> >
> > (c) Massachusetts has a legitimate local purpose in reflecting its moral judgment not to associate itself or its tax dollars with amoral dictators, and
> >
> > (d) the extraterritorial effects of the Massachusetts Law are not so "profound and inevitable" as to invalidate the law on its face.[94]

The concept behind the market participant exception to the Commerce Clause is that when a state enters a market as a participant (for example, selling or purchasing goods) rather than as a regulator (for example, setting the conditions under which certain types of goods may be sold), its actions in the free market should not be judged by Commerce Clause standards.[95] The *Natsios* Court rejected Massachusetts' "market participant" argument, both by refusing to apply that exception (which has to date successfully been argued in domestic Commerce Clause decisions only) to the Dormant Foreign Commerce Clause, and by concluding that Massachusetts did not even meet the conditions for applying the exception on a purely domestic basis.[96] The court's opinion was that Massachusetts acted as a market regulator rather than as a market participant by "attempting

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commonly labeled the "dormant" foreign commerce clause.

94. Brief for Defendants-Appellants, at Section III, NFTC v. Natsios, 181 F.3d 38 (1st Cir. 1999)(No. 98-2304). [hereinafter Brief for Defendants-Appellants]. This Brief is available at <http://www.usaengage.org>, and is also on file with the author.

95. *See, e.g.*, White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 208 (1983) (finding a City of Boston requirement — that at least 50 percent of private employees working on construction projects funded by the city must be Boston residents — does not violate the Commerce Clause because the government was acting as a market participant rather than as a regulator); Reeves, Inc. v. Stake, 447 U.S. 429, 446-447 (1980) (upholding South Dakota's decision to sell cement from a state-owned plant only to state residents).

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

to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts."[97]

In addition, the *Natsios* Court felt it was unlikely that the market participation exception could be applied in the context of a Foreign Commerce Clause violation. Citing evidence that "'there is evidence that the Founders intended the scope of the foreign commerce power to be . . . greater' than that of the domestic commerce power," the court concluded that to weaken that power might impair the federal government's ability to "speak with one voice" in foreign affairs.[98] In the final analysis, although the court expressed its skepticism about the market participant exception, it declined to speak definitively on whether the exception applies in the foreign context.

Finally, the *Natsios* Court held that, absent an effective market participant defense, Massachusetts violated the Foreign Commerce Clause. As a result, the Commerce Clause jurisprudential standards by which the Massachusetts Law was judged included:

> (1) Whether the Massachusetts Law was "facially discriminatory" against foreign commerce; and
>
> (2) Whether the Massachusetts Law interferes with the federal government's ability to 'speak with one voice'; and
>
> (3) Whether Massachusetts was attempting to regulate conduct beyond its borders; and
>
> (4) Whether Massachusetts had legitimate local justification to support its law.[99]

The Massachusetts Law was deemed discriminatory on its face because it discriminated against foreign commerce as opposed to discrimination against foreign companies.[100] Throughout the progress of this case through the courts, Massachusetts never denied that a primary purpose in passing the Massachusetts Law was to affect Burma's domestic policy. The *Natsios* Court noted that local favoritism is not a necessary prerequisite to a finding of

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97. *Id.* at 63. The *Natsios* Court distinguished the case of the Massachusetts Law from *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983), saying that although the *White* case required companies to employ Boston residents in its city contracts, the government did not require the companies to employ Boston residents in other projects not related to the city. *See id.* The *Natsios* Court found the latter situation to be more analogous to the "regulation" imposed by the Massachusetts Law. *Id.*

98. *Natsios*, 181 F.3d at 66. (citing *Japan Line*, 441 U.S. at 448, 450-51; *South-Central Timber v, Wunnicke*, 467 U.S. 82, 96 (1984); *Reeves*, 447 U.S. at 437 n.9).

99. *Id.*

100. *Id.* at 68.

discrimination, and cited *Container Corp. of America v. Franchise Tax Board*[101] for the proposition that "state legislation that relates to foreign policy questions violates the Foreign Commerce Clause 'if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive.'"[102] The Massachusetts Law's foreign policy effects led the court to conclude that it was discriminatory.

The "one voice" argument is clearly similar to the general federal foreign affairs powers argument. However, it benefits from more case-law support than simply the *Zschernig* decision, because a strong line of cases including *Japan Line, Container Corp., Reeves,* and *South-Central Timber* have established the "one voice" argument in the context of a Foreign Commerce Clause challenge to state legislation. In response, Massachusetts contended that there is no requirement to necessarily speak with one voice, because Congress has the power to "establish uniformity when the national interest so requires."[103]

The *Natsios* Court concluded that Massachusetts intended to and succeeded in regulating "conduct beyond its borders" when it passed the Massachusetts Law.[104] The court reasoned that Massachusetts' stated intention to change corporate behavior and the fact that the ten percent bidding penalty was an "effective exclusion from the bidding process" meant that it not only intended to influence Burmese and corporate behavior, but also succeeded in influencing corporate behavior.[105]

Finally, Massachusetts was unable to convince the court that it had a legitimate local purpose in passing the Massachusetts Law. A Commerce Clause challenge can be successfully overcome if the jurisdiction in question can justify the legislation because it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[106] The *Natsios* Court noted that Massachusetts had not shown any precedent to demonstrate that moral outrage was a valid local purpose for overcoming a Commerce Clause challenge, much less a Foreign

101. 463 U.S. 159 (1983).

102. *Natsios*, 181 F.3d at 67-68 (citing *Container Corp.*, 463 U.S. at 194).

103. *See* Brief for Defendants-Appellants, *supra* note 94.

104. *Natsios*, 181 F.3d at 67, 69.

105. *Id.* at 69-70.

106. *Id.* at 70 (quoting New Energy Co. v. Limbach, 486 U.S. 269, 274, 278 (1988)).

Commerce Clause challenge, nor did it assert that the Massachusetts Law was the least discriminatory means of achieving that purpose.[107]

c. Preemption

The final ground for the *Natsios* decision invalidating the Massachusetts Law is perhaps the most narrow of the available constitutional arguments: preemption based on the Supremacy Clause. Although the *Baker* Court decided that the NFTC had not met its burden of proving implied preemption of the Massachusetts Law by the Sanctions Act, the *Natsios* Court reversed that ruling, stating that the lower court had applied an "erroneous legal standard to the facts."[108]

The disputed issue was whether, because the Massachusetts Law predated the Sanctions Act, Congress' failure expressly to preempt specifically the Massachusetts Law or generally all state and local sanctions regulations meant that Congress did not wish to preempt such measures. The court decided that the "real question" was not whether Congress had declined to preempt the Massachusetts Law, but to what extent existing federal Burma sanctions on their face preempted the field, thus superseding any state actions in that subject area.[109] Citing a strong presumption that Congress intends to preempt the field whenever it regulates a matter touching foreign relations, the *Natsios* Court held that the "reasonably comprehensive statute covering a field of foreign relations" preempted the Massachusetts Law.[110] The fact that the expressed goals of the state and federal laws were substantially similar could not overcome the fact that the means to the goals were quite different. For the *Natsios* Court, the "crucial inquiry is whether a state law impedes the federal effort."[111] Because of the court's factual finding that the Massachusetts Law upset Congress' "balanced, tailored approach to [the] issue," it was deemed unconstitutional because it was preempted under the Supremacy Clause by the Sanctions Act.[112]

107. *Id.*
108. *Id.* at 71.
109. *See id.* at 73.
110. *Id.* at 76.
111. *Id.* at 77.
112. *Id.*

3. Crosby v. NFTC *(Supreme Court of the United States)*

The Supreme Court granted certiorari in response to Massachusetts' appeal of the First Circuit's *Natsios* decision. The NFTC responded to Massachusetts' appeal by asserting that the First Circuit Court of Appeals' decision was correctly decided on all three constitutional grounds, presenting no conflict with any U.S. Supreme Court, state supreme court or court of appeals decision.[113]

Crosby found the Massachusetts Law to be unconstitutional under the Supremacy Clause, citing the Massachusetts Law's "conflict with Congress' specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act."[114] Even though the Sanctions Act did not specifically preempt sub-federal Burma sanctions such as the Massachusetts Law, the Court decided that the Massachusetts Law was "an obstacle to the accomplishment of Congress's full objectives under the federal Act,"[115] and thus was preempted because it conflicted with a federal statute.[116]

The majority opinion first stated that it "granted certiorari to resolve [the] important questions" of (1) the extent of the "foreign affairs power of the National Government under *Zschernig v. Miller,* 389 U.S. 429 (1968)," (2) whether the Massachusetts Law "violated the dormant Foreign Commerce Clause," and (3) whether the Massachusetts Law "was preempted by the congressional Burma Act."[117] Ultimately, however, *Crosby* addressed only the last of these issues, specifically "declin[ing] to speak to field preemption as a separate issue . . . or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause."[118] Thus, the opinion's holding leaves open several questions:

> (1) Is *Zschernig* still "good law?" That is, is there a valid "effects test," and, if so, where is the threshold for state action that infringes on the general foreign affairs powers of the federal government? How extensive are the general foreign

113. *See* Brief for Respondent at 12, Crosby v. NFTC, 530 U.S. 363 (2000) (No. 99-474). This brief is available at <http://www.usaengage.org>.

114. *Crosby*, 530 U.S. at 387.

115. *Id.* at 376.

116. *Id.* at 372.

117. *Id.* at 371.

118. *Id.* at 374 n.8.

affairs powers of the federal government?

(2) Is there a market participant exception to the Foreign Commerce Clause? Equally important, if there is such a valid exception, can "market participants" extend such an exception outside of Foreign Commerce Clause considerations to counter accusations that they have infringed on the general foreign affairs powers of the federal government?

(3) When Congress acts in the foreign affairs context, should its acts broadly preempt state or local actions in the same general subject area? That is, in those cases where actual conflict with the federal statute is not proven, should courts apply a lower standard in finding implied preemption or occupation of the field when foreign affairs matters are at issue than when purely domestic issues are in question?

Although *Crosby* professed not to address such questions, its conflict preemption analysis discussed many points that bear on these issues. In supporting the argument that the Massachusetts Law actually conflicted with the Sanctions Act, the Court advanced propositions that are relevant to the nature of the federal government's unenumerated foreign affairs powers. For example, the Court cites the "President's intended authority [under the Sanctions Act] to speak for the United States among the world's nations" in crafting a multilateral Burma policy.[119] Linking this authority to the President's Article II, Section 2, clause 2 constitutional power to make treaties and appoint Ambassadors and receive Ambassadors and other public Ministers (Section 3), the Court labeled the President's authority under the Sanctions Act as an exercise of an "exclusively national power."[120] Permitting the Massachusetts Act to stand would thus "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[121] Although the Court professed that this conclusion did not mean it was addressing "any general considerations of limits of state action affecting foreign affairs," it also cited its "similar concerns in . . . cases on foreign commerce and foreign relations" such as *Japan Line* and *Chy Lung*, as well as the concerns of Federalist Alexander Hamilton that "[t]he peace of the WHOLE ought not to be left to the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members."[122]

119. *Id.* at 380.

120. *Id.*

121. *Id.*

122. *Id.* at 382 n.16 (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), Chy Lung v. Freeman, 92 U.S. 275, 279 (1875) and THE FEDERALIST NO. 80, at

Thus, although one should take at face value the Supreme Court's pronouncement that the *Crosby* opinion does not address such general issues as the effect of state actions on foreign affairs, one is free to speculate that had Congress never considered or passed any federal sanctions against Burma, the Supreme Court would have given such considerations significant weight in a consideration of the Massachusetts Law.

III. Orthodox and Revisionist Theories and the Massachusetts Law Case

The *Baker*, *Natsios*, and *Crosby* opinions illustrate the post-Cold War tensions that plague constitutional foreign affairs jurisprudence. One critical difference between the "orthodox" and "revisionist" views arises in fundamental disagreements over basic terminology. Whether there is a role for states in "foreign affairs" depends on how one defines foreign affairs. If one defines "Foreign Relations" as the relations between nation-states, one reaches a very different conclusion concerning the scope of the federal foreign affairs power than if one defines "Foreign Relations" to cover more than just the relations between nation-states.

Of course, neither theoretical approach adopts such a clear-cut definition of foreign relations or foreign affairs, but they clearly take divergent poles on a continuum where formal diplomatic relations between nation-states lies at one end, and a plethora of semi-public and commercial foreign interactions lie at the other. In part, disagreements over this issue are framed in "practical terms" by each side, with revisionists stating that the interconnections are so complicated that it is disingenuous to formulate a doctrine banning states from any actions that have significant effects on U.S. foreign relations, and orthodox theorists citing the critical role of the courts in a time where such contacts are increasing the potential for embarrassing the U.S. as a nation if sub-federal actors are not kept under judicial control.

Thus, scholars' opinions concerning the effect of enhanced global communication and other foreign connections can often predict whether they are inclined to accept Goldsmith's view that "interdependence [between domestic and foreign actors] has reached such a level that a distinction between domestic and foreign relations

535-536 (Alexander Hamilton) (J. Cooke ed. 1961)).

is no longer feasible as a criterion for allocating jurisdictional authority"[123] between states and the federal government. This revisionist approach contrasts sharply with the *Natsios* Court's statement of an "alternative rational view," that "in an increasingly interdependent and multilateral world, *Zschernig's* affirmation of the foreign affairs power of the national government may be all the more significant."[124]

This fundamental disagreement sets the stage for a future Supreme Court decision concerning whether *Zschernig's* effects test and assertion of a general federal foreign affairs power remains "good law" in the post-Cold War world. In its certiorari brief, the NFTC asked the Supreme Court to speak to each of the three major constitutional issues raised in the *Natsios* opinion to the extent the Court felt any of the issues were unsettled.[125] The Supreme Court's holding addressed only conflict preemption, though, and the issues of the existence of or the extent of a general foreign affairs power or the scope of the dormant Foreign Commerce Clause remain open. The NFTC believed the "business community, the affected jurisdictions, and the public at large—are served by avoiding delay in [the Court's] consideration" of the Massachusetts Law because local sanctions are proliferating and businesses need to make "long-term investment and contractual decisions based on the assumed invalidity of these laws."[126] To the extent this contention was true at the time the NFTC made it, it is still true with respect to all local sanctions acts concerning countries that are not the subject of federal sanctions regulations because the *Crosby* opinion does not address such laws.

Professor Louis Henkin states as fact that although, "[i]n principle, all local contacts with foreign affairs might be brought under national control by federal law or international agreement,. . .Congress could not begin to do that in fact, and there has never been any disposition to attempt it."[127] His conclusion that Congress cannot, for practical reasons, regulate all such contacts seems quite reasonable, and raises the questions of whether, in the absence of Congressional or Executive Branch actions, the federal courts should step in to regulate such local contacts, and, if so, what

123. *See* Goldsmith, *supra* note 15, at 1671.

124. *Natsios*, 181 F.3d at 58 n.14.

125. *See* Brief for Respondent, *supra* note 113, at 12.

126. *Id.*

127. Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2d ed. 1996).

constitutional theories are available to courts wishing to regulate local actions. The Supreme Court's ruling in *Crosby* does not decide either of these issues. However, *Crosby* may be used by revisionists as evidence that the executive and legislative branches of the federal government do possess the institutional capacity to deal with damaging state encroachments on the national foreign relations interest, thus reducing a need for such judicial interventions.

IV. Conclusion

The dispute over the Massachusetts Law illustrates the strong disagreements among foreign affairs scholars concerning an appropriate, workable definition of "foreign relations" for the purpose of determining whether U.S. foreign policy is unacceptably affected by state and local authorities' selective purchasing legislation and other "foreign relations" statutes. There may be greater agreement among orthodox and revisionist theorists concerning the legitimacy of a dormant Foreign Commerce Clause analysis than there is concerning the continued validity of *Zschernig's* general foreign affairs power doctrine. However, to the extent the "one voice test" requires courts to analyze whether a state law offends foreign nations, the dormant Foreign Commerce Clause approach shares many characteristics with the weakest component of the *Zschernig* analysis and is open to criticism.

The Supreme Court's use of a conflict preemption analysis under the Supremacy Clause to invalidate the Massachusetts Law has only narrowly affected this fundamental debate. Although some of the language of its opinion implies a great degree of deference to the federal government in matters related to foreign affairs, the *Crosby* opinion's greatest effect on the orthodox/revisionist debate could be its status as an example of a situation where the national government effectively exercised its constitutional power to restrict state actions affecting foreign affairs. Thus, in some sense the case may actually be viewed as, at best, a quite limited victory for the NFTC because further rulings will be required to determine whether state and local sanctions are unconstitutional when Congress and the Executive have not combined to enact federal sanctions against a particular country. It can also be seen as at least an interim defeat from the perspective of the orthodox approach, because it is an example revisionists can use to support their contention that, in the absence of enacted federal law or an explicit constitutional provision, the issues raised by state

"foreign affairs" actions that implicate the important "foreign affairs power of the federal government" should be and *can be* resolved by the federal executive or legislature rather than by the judiciary.