

**LIMITING STATES' ROLES IN FOREIGN
COMMERCE: TEACHING OLD-WORLD
DOGS NEW-WORLD TRICKS**

I. INTRODUCTION	350
II. TEXTUAL ORIGINS OF THE FEDERAL GOVERNMENT'S POWER	352
III. SAMPLE LEGISLATION.....	353
A. <i>Massachusetts Law</i>	353
B. <i>California Law</i>	354
C. <i>Buy-American Laws</i>	355
D. <i>Anti-Iranian Student Policy</i>	356
IV. SUPREME COURT PRECEDENTS.....	358
A. <i>Zschernig v. Miller</i>	358
B. <i>Barclays Bank PLC v. Franchise Tax Board</i>	359
C. <i>Comparison</i>	360
V. THE CIRCUITS IN CONFLICT.....	362
A. <i>First Circuit</i>	362
B. <i>Second Circuit</i>	363
C. <i>Third Circuit</i>	365
D. <i>Fourth Circuit</i>	366
E. <i>Seventh Circuit</i>	368
F. <i>Ninth Circuit</i>	369
G. <i>Tenth Circuit</i>	370
H. <i>Eleventh Circuit</i>	372
VI. PUBLIC POLICY CONSIDERATIONS	373
A. <i>National Objectives at Stake</i>	373
1. <i>Appearance of Unity</i>	373

350	<i>HOUSTON JOURNAL OF INTERNATIONAL LAW</i> [Vol. 23:2	
	2. <i>Uniformity</i>	375
	3. <i>Undiluted ability to exert pressure, earn favor, or levy sanctions</i>	375
	B. <i>Local Objectives at Stake</i>	376
	1. <i>Political Statements</i>	376
	2. <i>Free ability to enter into business contracts</i>	377
	3. <i>Reserved rights</i>	378
	C. <i>The United States' Legitimacy in an International Marketplace</i>	378
	D. <i>The Political Solution</i>	379
	VII. THE SUPREME COURT CONSIDERS <i>NATSIOS</i>	380
	VIII. CONCLUSION.....	384

I. INTRODUCTION

Cities and states are taking more initiative in the domain of foreign commerce.¹ Over forty states have buy-American laws.² Since 1992, twenty-five local governments have enacted laws restricting trade with certain countries.³ Constitutionally, the federal government manages relationships between the United States and other sovereignties.⁴ The U.S. Constitution reserves the powers to regulate foreign commerce and to make treaties with other countries to the federal government.⁵ When local legislation conflicts with this reserved power, courts have

1 See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 47 (1st Cir. 1999), *aff'd sub nom.* *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (noting at least nineteen municipal governments have enacted laws restricting purchases from companies that do business in Burma and others have similar laws against China, Cuba, and Nigeria).

2 Lorraine Woellert, *Maryland Weighs Bill for Boycott of Nigeria*, WASH. TIMES, Mar. 20, 1998, at C9.

3 *Id.* (describing local laws targeting trade with Cuba, Nigeria, and Burma).

4 See U.S. CONST. art. I, § 8 (delegating to Congress the power to "regulate Commerce with foreign Nations").

5 *Id.*

2001] *LIMITING STATES' ROLES IN FOREIGN COMMERCE* 351

disagreed on the resolution of the conflicts.⁶ At stake are national unity, federalism, the nation's legitimacy as a trade partner, and state autonomy.

This comment examines the various considerations and factors relevant to local legislation inasmuch as they may conflict with the national government's power over foreign policy. Part II of this comment provides a basic introduction into the origins of the federal foreign policy and commerce power. Part III looks at some examples of the state and municipal legislation in question. The various federal circuits have considered many different laws. From buy-American laws to restrictions on bidding, Part III provides background through examples typical of this category of laws. Part IV looks to the U. S. Supreme Court for relevant controlling precedents. There are at least two lines of conflicting Supreme Court cases regarding these laws.⁷ After laying the constitutional, legislative, and judicial background, Part V then considers the principal cases in the several circuits, which conflict with each other. Their arguments are evaluated against the background painted in Parts II, III, and IV.

Part VI considers the strongest arguments in light of public policy factors. The arguments of yesterday must be tempered with the quick-changing world in which the United States conducts business.⁸ As the United States looks to reap the profits from a brave new world of consumers, it can no longer consider the values of federalism and state sovereignty without deference to the good of the nation.

Part VII looks at the Court's recent decision in *Crosby v.*

6 Compare *Nat'l Foreign Trade Council*, 181 F.3d at 76, *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1380 (D.N.M. 1980), and *R.G. Indus., Inc. v. Askew*, 276 So.2d 1, 3 (Fla. 1973) (all striking down state action), with *Board of Trs. v. Mayor of Baltimore*, 562 A.2d 720 (Md. 1989), *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill.2d 221, 238 (Ill. 1986), and *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1310 (2d Cir. 1989) (upholding state action).

7 See *supra* note 6 and accompanying text.

8 See Paul R. Michel, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Foreword: The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenge Ahead*, 48 AM. U. L. REV. 1177, 1184 (1999); see also Alan Tonelson, *Globalization: The Great American Non-Debate*, 96 CURRENT HIST. 353 (1997) (arguing that American thinking has not incorporated the idea of globalization).

National Free Trade Council.⁹ It looks to the analysis used and more particularly, the analyses avoided by the Court.

II. TEXTUAL ORIGINS OF THE FEDERAL GOVERNMENT'S POWER

The federal government's power over foreign affairs originates in the U.S. Constitution.¹⁰ The framers of the Constitution gave Congress the power to "regulate Commerce with foreign Nations."¹¹ They gave the president authority "with the Advice and Consent of Senate, to make Treaties"¹² and "appoint Ambassadors."¹³ As a hermeneutic exercise, it appears that this enumeration applies to the federal government to the exclusion of the states.¹⁴ When the text of the Constitution is considered against the disorder fostered by the Articles of Confederation, the Supreme Court logically concluded that matters involving foreign nations are intended to be the exclusive domain of the federal government as a necessary aspect of nationhood.¹⁵

This power must be reconciled with the First Amendment guarantee of free speech¹⁶ and the amorphous Tenth Amendment.¹⁷ Parts III and IV examine the states' and cities' uses of these provisions in their arguments. These parts will also consider more fully the judicial interpretation of this text.

9 120 S. Ct. 2288 (2000).

10 U.S. CONST. art. I, § 8.

11 *Id.*

12 U.S. CONST. art. II, § 2.

13 *Id.*

14 See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000).

15 See *id.*; see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-16 (1936).

16 U.S. CONST. amend. I

17 U.S. CONST. amend. X (reserving to the states and people all rights not delegated or prohibited by the Constitution).

III. SAMPLE LEGISLATION

A. *Massachusetts Law*

In *National Foreign Trade Council v. Natsios*,¹⁸ the First Circuit considered the constitutionality of the Massachusetts Burma Act.¹⁹ This law prohibited the state purchasing agent from awarding contracts to vendors who also engaged in commerce with Burma.²⁰ The people of Massachusetts objected to Burma's lack of a free government.²¹

This law prevented the state purchasing agent from conducting business with vendors when those vendors engage in commerce with Burma.²² The state maintained a restricted purchase list containing any businesses with principal places of business in Burma and businesses providing goods and services to the Burmese government.²³ The state would not consider bids from businesses on this list unless no other compliant bid was within ten percent of the bid from the restricted business or unless the restricted purchase list bid was the only bid.²⁴ Massachusetts's list included major companies such as Caterpillar, Federal Express, Mobil, Texaco, Sony, Toshiba, Guinness, Unilever, and Procter & Gamble.²⁵

While Massachusetts conceded that the law would have a negligible effect, it defended the Commonwealth's right to protest.²⁶ Sanctions imposed for political ends are typically

18 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288 (2000).

19 *Id.* at 49; *see also* MASS. GEN. LAWS ANN. ch. 7, § 22G–M (West 2000). Although the nation formerly known as Burma is now called Myanmar, the Massachusetts law and related commentary refer to the country as Burma. For consistency, this paper follows the language of the legislation and uses the name Burma.

20 MASS. GEN. LAWS ANN. ch. 7, § 22H (West 2000).

21 *See Nat'l Foreign Trade Council*, 181 F.3d at 46–47 (arguing that the law “expresses the Commonwealth’s own disapproval of the violations of human rights committed by the Burmese government . . .”).

22 MASS. GEN. LAWS ANN. ch. 7, § 22H (West 2000).

23 *Id.*

24 *Id.* § 22G–H.

25 William H. Lash III, *States Should Butt Out of Trade Deals*, B. HERALD, Mar. 2, 1997, at 21.

26 *See Nat'l Foreign Trade Council*, 181 F.3d at 46 (commenting that “[o]ne law

ineffective.²⁷ The Massachusetts law was not a buy-American law because it did not prefer goods of American origin over goods of foreign origin.²⁸ Instead, it was more like a “don’t-buy-Burmese” law.²⁹ It preferred all other goods over goods of Burmese origin.³⁰ Thus, absent any other legislation, domestic products enjoy no advantage over foreign products generally.³¹

B. California Law

California imposes a corporate tax on multinational corporations with branches within the state.³² The federal government also imposes a corporate tax on these same corporations.³³ However, the California scheme differs from the federal plan in how it calculates corporate taxes.³⁴ It uses a different formula from that of the federal government.³⁵

California looks first to the worldwide income of the entire business.³⁶ Then, the state determines a figure representing the average of the proportions of worldwide payroll, property, and sales located in California.³⁷ California taxes the corporation’s worldwide income at a rate represented by the average proportions.³⁸ In comparison, the federal government treats each corporate entity in a multinational corporation separately for

passed by one state will not end the suffering and oppression of the people of Burma”).

27 Lash, *supra* note 25.

28 See MASS. GEN. LAWS ANN. ch. 7, § 22H (West 2000).

29 See *id.*

30 See *id.* § 22H–M (West 2000); see also Warren Richey, *Case Tests the Legality of State Boycotts*, CHRISTIAN SCI. MONITOR, Mar. 22, 2000, at 2.

31 See MASS. GEN. LAWS ANN. ch. 7, § 22H (West 2000).

32 See CAL. REV. & TAX. CODE § 25128 (West 2000) (taxing businesses with more than fifty percent of its business in-state).

33 See I.R.C. § 882 (2000) (imposing taxes on “foreign corporation[s] engaged in trade or business within the United States . . . on . . . income which is effectively connected with the conduct of a trade or business within the United States”); see also *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 305 (1994) (noting the United States uses the “separate accounting method”).

34 See *Barclays Bank PLC*, 512 U.S. at 304.

35 See *id.* at 304–05; compare I.R.C. § 882 (2000) with CAL. REV. & TAX. CODE § 25128 (West 2000).

36 See *Barclays Bank PLC*, 512 U.S. at 304–05.

37 See *id.*

38 See *id.*

determining tax liability.³⁹

While states undoubtedly have wide discretion to tax entities within their jurisdiction, the different schemes may implicate national unity issues when the taxes are imposed upon multinational entities that are already under a federal tax scheme.⁴⁰

C. *Buy-American Laws*

In 1978, Pennsylvania passed the Steel Products Procurement Act.⁴¹ The Act requires that every public works contract include a clause mandating that any steel used be a U.S. steel product.⁴² To comply with the law, a product of mixed origin must consist of at least seventy-five percent American steel.⁴³ Contractors who violate this law forfeit payment.⁴⁴ Additionally, those who violate the law are barred from bidding on state contracts for five years.⁴⁵ Pennsylvania passed this law under its police power to protect the general health, safety, and welfare of the Commonwealth.⁴⁶

Though politicians tout buy-American laws as ways to create jobs and save money, some economists think it accomplishes neither.⁴⁷ The laws only transfer resources already in the United States to different people.⁴⁸ When trade occurs internationally, it has the potential to bring more resources into our system.⁴⁹

39 I.R.C. § 882 (2000); *Barclays Bank PLC*, 512 U.S. at 304–05.

40 *See Barclays Bank PLC*, 512 U.S. at 304.

41 73 PA. CONS. STAT. ANN. §§ 1881–87 (West 2000).

42 *See id.* § 1884.

43 *See id.* § 1886.

44 *See id.* § 1885.

45 *Id.*

46 *Id.* § 1882.

47 Virginia Ellis, *California and the West; Chinese Steel Sparks Backlash in Capitol Imports: Union's Complaint Inspires 'Buy American' Bill in Legislature. Some Worry It Could Increase Construction Cost.*, L.A. TIMES, Sept. 5, 1999, at A18 (quoting Stanford University economics professor Tom MaCurdy).

48 *See id.*

49 *See* Jon L. Roberts, *Cross-Border Issues in the Imaging Trade, or What Color is Your Jail Cell?*, ADVANCED IMAGING, Aug. 1998, at 78; *see also* Mary Beth Double, *High Growth Rate Creates U.S. Business Opportunities; Portugal*, BUS. AM., Apr. 6, 1992, at 14.

Additionally, when the use of American products comes at a higher cost compared to foreign products, less money is available for other programs.⁵⁰

D. Anti-Iranian Student Policy

In response to the Iran hostage crisis during 1979 and 1980, the Board of Regents of New Mexico State University passed a motion denying enrollment to students whose home governments permit holding U.S. hostages.⁵¹ The policy would remain in effect until the hostages were released.⁵² The district court found that federal control over the treatment of aliens was exclusive and preempted the state university's policy regarding Iranian students.⁵³ Unmoved by the Regents' perverted patriotic provocation, the court found that the Iran hostage crisis emphasized the need for coordinated action in the delicate matters of foreign policy.⁵⁴ The need for one voice in international relations prevailed over the urge to express beliefs—especially when those beliefs bear the official color of government conduct rather than private expression.⁵⁵

These local actions all share the effect of putting transactions involving foreign entities at a disadvantage when compared to the analogous transaction performed with domestic partners or goods.⁵⁶ The Massachusetts law put Burmese goods

⁵⁰ See Ellis, *supra* note 47.

⁵¹ *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1368 (D.N.M. 1980) (quoting the motion: "any student whose home government holds, or permits the holding of U.S. citizens hostage will be denied admission or readmission to New Mexico State University commencing with the Fall 1980 semester unless the American hostages are returned unharmed by July 15, 1980.").

⁵² *Id.*

⁵³ See *id.* at 1367.

⁵⁴ *Id.* at 1378 (quoting an affidavit from David D. Newsom, the Undersecretary for Political Affairs, United States Department of State: "The situation in Iran is a vivid illustration of the need for centralized authority in foreign relations of the need for the United States to be able to speak with one voice in its dealings with other nations.").

⁵⁵ See *id.* at 1376 (observing that "[the Board of Regents'] action is cloaked with the power of the State, and they have entered the arenas of foreign affairs and immigration policy, interrelated matters entrusted exclusively to the federal government.").

⁵⁶ See MASS. GEN. LAWS ANN. ch. 7, § 22H (West 2000); CAL. REV. & TAX. CODE § 25128 (West 2000); 73 PA. CONS. STAT. ANN. §§ 1881–87 (West 2000); see also *Tayyari*,

and services at an artificial disadvantage.⁵⁷ The California law imposes a burden upon multinational corporations with operations in its state that domestic corporations do not bear.⁵⁸ Buy-American laws put foreign goods and services at a competitive disadvantage against domestic goods and services.⁵⁹ The anti-Iranian student motion put a specific category of foreign students in a position different from other students.⁶⁰

However, these laws differ as to how and why the distinctions exist.⁶¹ The Massachusetts law protested human rights conditions in Burma and sought to change them through economic pressure.⁶² This law specifically targeted one foreign nation by name.⁶³ The California tax scheme provided revenue to the state from companies that conducted business in California and enjoyed the taxpayer provided benefits of the state.⁶⁴ California did not target any particular nation but created a scheme of taxation for a potentially problematic category.⁶⁵ Buy-American laws encourage local spending for the benefit of domestic companies and their employees.⁶⁶ These laws generally do not target any specific country, but merely distinguish foreign from domestic.⁶⁷ The anti-Iranian motion tried to create a safer campus.⁶⁸ Although it did not name a specific country, the

495 F. Supp. at 1368.

57 MASS. GEN. LAWS ANN. ch. 7, § 22G-H (West 2000).

58 CAL. REV. & TAX. CODE § 25128 (West 2000). This is not to say that domestic companies are not taxed, or taxed any less than multinational companies. California merely puts a different burden on the two categories of companies. Although the tax rates are similar, the California law makes a distinction based on the corporation's foreign or domestic status. *See id.*

59 73 PA. CONS. STAT. ANN. §§ 1881-87 (West 2000).

60 *See Tayyari*, 495 F. Supp. at 1368.

61 *See* MASS. GEN. LAWS ANN. ch. 7, § 22H (West 2000); CAL. REV. & TAX. CODE § 25128 (West 2000); 73 PA. CONS. STAT. ANN. §§ 1881-87 (2000); *Tayyari*, 495 F. Supp. at 1368.

62 *See* MASS. GEN. LAWS ANN. ch. 7, § 22G-H (West 2000).

63 *See e.g.*, MASS. GEN. LAWS ANN. ch. 7, § 22G (West 2000).

64 CAL. REV. & TAX. CODE § 25128 (West 2000).

65 *See id.*

66 *See* 73 PA. CONS. STAT. ANN. § 1883 (West 2000).

67 *See, e.g.*, 73 PA. CONS. STAT. ANN. §§ 1881-1887 (West 2000).

68 *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1375 (D.N.M. 1980); *see also* discussion *infra* Part V. G.

context, timing, and effect indicated that action targeted Iran.⁶⁹ While there are many ways to create distinctions that affect foreign affairs and foreign commerce, the difference in the constitutionality of these methods demonstrates that the effect is not itself fatal.⁷⁰ The constitutionality probably involves inquiries into the differences of intent as well as objective.

IV. SUPREME COURT PRECEDENTS

A. *Zschernig v. Miller*⁷¹

In 1957, Oregon passed a law that conditioned a devise to a foreign heir on the existence of a reciprocal right in the foreign heir's home country.⁷² If the foreign heir failed to make a showing of compliance with this statutory condition to inheritance, the estate would escheat to the state of Oregon.⁷³ Oregon did not want property devised to heirs whose governments would not allow them to enjoy their inheritance.⁷⁴ While states have a recognized right to determine schemes of inheritance,⁷⁵ Oregon's law required the state to inquire into the laws of foreign jurisdictions.⁷⁶

In 1962, an Oregonian died intestate.⁷⁷ The sole heirs

⁶⁹ *Id.* at 1368.

⁷⁰ Compare MASS. GEN. LAWS ch. 7, § 22H (West 2000) (prohibiting the state from procuring goods or services from persons on restricted list) and 73 PA. CONS. STAT. ANN. §§ 1881–87 (West 2000) (requiring the state to purchase only steel made in the United States) with CAL. REV. & TAX. CODE ANN. § 25128 (West 2000) (requiring apportionment of business income for tax purposes) and *Tayyari*, 495 F. Supp. at 1368 (university denying admission to students whose home countries held Americans hostage).

⁷¹ 389 U.S. 429 (1968).

⁷² OR. REV. STAT. § 111.070 (1957) (repealed 1969).

⁷³ See *id.* § (c)(3).

⁷⁴ *Zschernig*, 389 U.S. at 437–39 (describing “cold war” foreign policy attitudes as the “real desiderata” because earlier Oregon court decisions raised concerns of foreign government confiscation); see also *Clostermann v. Schmidt*, 332 P.2d 1036, 1041 (Or. 1958).

⁷⁵ *Zschernig*, 389 U.S. at 440 (observing that states have traditionally regulated the distribution of estates, but that those regulations must yield to foreign policy).

⁷⁶ *Id.* at 435 (describing “minute inquiries” of foreign law jurisdiction, and foreign diplomatic statement credibility).

⁷⁷ *Id.* at 430.

resided in East Germany.⁷⁸ The Oregon law required the probate court to make a detailed inquiry into the laws and mechanics of foreign governments to determine whether those governments met the conditions for inheritance.⁷⁹ Following such a determination, the state court would either allow the devise or order that the estate escheat to the state.⁸⁰ The Supreme Court ruled that this action, which actively criticized and penalized foreign citizens and governments, had “more than ‘some incidental or indirect effect in foreign countries,’ and its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle.”⁸¹ The Court rejected the argument that in the absence of a conflicting treaty, no state policy could interfere.⁸²

The Court adopted the language originally found in *Clark v. Allen*, which upheld a California law similar to Oregon’s.⁸³ The California Probate Code conflicted with an existing treaty that governed devises of real property but not personal property.⁸⁴ In *Clark*, the Court held that the part of the California law affecting personal property did not offend the Constitution because it only had an “incidental or indirect effect in foreign countries.”⁸⁵

*B. Barclays Bank PLC v. Franchise Tax Board*⁸⁶

The federal government taxed multinational corporations by treating each corporate entity separately.⁸⁷ Barclays argued that

⁷⁸ *Id.*

⁷⁹ See OR. REV. STAT. § 111.070 (1957) (repealed 1969) (placing the burden on the nonresident heir to establish the existence of reciprocity).

⁸⁰ *Id.*

⁸¹ *Zschemig*, 389 U.S. at 434–35.

⁸² *Id.* at 441.

⁸³ See *Clark v. Allen*, 331 U.S. 503, 506 n.1 (1947) (upholding a California statute that required a reciprocal right of inheritance in the devisee’s nation before the devise would be made to a foreign national).

⁸⁴ *Id.* at 507 (noting a conflict with the “Treaty of Friendship, Commerce and Consular Rights” with Germany).

⁸⁵ *Id.* at 517 (indicating that many state laws have an incidental effect in foreign countries without crossing “the forbidden line”).

⁸⁶ 512 U.S. 298 (1994).

⁸⁷ *Id.* at 305 (using the “separate accounting” method instead of a combined

California's tax scheme "distinctively burdened foreign-based multinational corporations" and imposed double international taxation in violation of the commerce clause.⁸⁸ It also argued that California's differing scheme frustrated the United States' ability to speak with one voice.⁸⁹ Unlike *Zschernig*, the Supreme Court interpreted Congress's silence on the matter to indicate a lack of preemptive intent and upheld the California tax.⁹⁰ The Court made a negative implication from the federal government's silence as acquiescence to state intrusion in this area.⁹¹ Absent any contrary action from Congress, the court upheld the California tax scheme inasmuch as it complied with other constitutional considerations.⁹²

C. Comparison

Barclays made no mention of *Zschernig* and did not engage in any consideration of whether the California law had a more than incidental effect in foreign countries.⁹³ Perhaps the Court felt that the topic of taxation of foreign corporations was presumably permissible under state concerns notwithstanding any effect in foreign countries. Of course, that begs the question, "How intrusive may a state action be when the state acts under the guise of taxation?"

Further, the Court may have been more suspicious of the laws in *Zschernig* and *Clark* because they occurred against the political backdrop of the Cold War and World War II

reporting approach).

88 *Id.* at 302.

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

90 *See id.* at 329 (reasoning that Congress' failure to outlaw the state practice is evidence that it decided to "yield the floor to others").

91 *See id.* at 322-23 (adopting the reasoning in *Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) which said, "[b]y negative implication. . . , the United States has at least acquiesced in state taxation").

92 *See id.* at 330-31 (noting the state tax must still (1) apply to an activity with a substantial nexus to the taxing state; (2) be fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the state provided services); *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

93 *See Barclays Bank PLC*, 512 U.S. 298 (1994).

respectively.⁹⁴ Perhaps courts should look more closely when states engage in practices which select and scrutinize unpopular countries in their application.⁹⁵ Where the law and its application are indifferent to any particular country, as in a tax scheme, the court may be less suspicious of state meddling.⁹⁶

Unlike *Barclays*, *Zschernig* did not deal with a tax law, nor did it deal with a politically innocuous area.⁹⁷ The other state laws discussed above also do not deal with taxes.⁹⁸ The laws also seem reactionary, protectionist, and motivated by issues other than commerce itself.⁹⁹ A lawmaker could argue that although a law is protectionist, that protectionism is for the health, safety, and welfare of the citizens by preserving a taxpayer base through employment.

Maybe the likelihood of embarrassment to the United States is directly related to the level of scrutiny. Taxes are so common, necessary, and universally comprehensible that nuances between jurisdictional schemes hold little potential for an international flap. Conversely, state grandstanding may not be tolerated beyond the floor of Congress. Perhaps the patterns evident in the Supreme Court's precedents may provide insight into predicting the aggressiveness of future jurisprudence and

94 See *Zschernig v. Miller*, 389 U.S. 429, 437 (1968) (indicating "that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata"); see also *Clark v. Allen*, 331 U.S. 503, 510 (1947) (arguing that the California reciprocal inheritance law does not conflict with the Trading with the Enemy Act).

95 See *Zschernig*, 389 U.S. at 430; and *Clark*, 331 U.S. at 506 (both targeting Germany); see also *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2289 (2000) (dealing with Burma); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1367 (D.N.M. 1980) (targeting Iran); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 302 (Ill. 1986) (targeting South Africa).

96 See *Barclays Bank PLC*, 512 U.S. at 302 (involving application of a tax scheme to all foreign multinational companies).

97 See *Zschernig*, 389 U.S. 430 (reviewing Oregon probate law as it applies to German devisees).

98 See *Clark*, 331 U.S. at 505 (discussing probate law); see also *Crosby*, 120 S. Ct. at 2291 (addressing foreign purchase restrictions); *Tayyari*, 495 F. Supp. at 1367 (involving higher public education).

99 See *Zschernig*, 389 U.S. at 437 and *Clark*, 331 U.S. at 505 (targeting Germany during the cold war and World War II, respectively); see also *Crosby*, 120 S. Ct. at 2289 (protesting human rights conditions in Burma); *Tayyari*, 495 F. Supp. at 1367 (concerning the Iran hostage crisis); *Springfield Rare Coin Galleries, Inc.*, 503 N.E.2d at 302 (targeting South Africa during apartheid).

the likely outcome of such scrutiny.

V. THE CIRCUITS IN CONFLICT

A. First Circuit

In *National Foreign Trade Council v. Natsios*, a trade association challenged the constitutionality of the Massachusetts Burma Law.¹⁰⁰ The First Circuit looked to *Zschernig* for a standard.¹⁰¹ In *Zschernig*, the Supreme Court found that the Oregon statute required scrutiny of foreign law and speculation of diplomatic credibility to determine the applicability of Oregon's own law.¹⁰² This amounted to more than an incidental or indirect effect on foreign affairs.¹⁰³ The First Circuit noted that *Zschernig's* holding was not restricted to measuring the degree of impact, but also demanded weighing of that impact against the state interest at issue.¹⁰⁴

The district court found that Massachusetts's interest was to sanction Burma and exert pressure on the Burmese government to change its domestic policies.¹⁰⁵ The state interest was strictly in protesting against the actions of the Burmese government, and was not concerned with the general health, safety, or welfare of the Commonwealth.¹⁰⁶ Balanced against this weak interest are the intended and potential impact of Massachusetts's boycott,¹⁰⁷ including (1) the possibility that "Massachusetts might prove to be a bellwether for other states";¹⁰⁸ (2) protests from other countries, ASEAN,¹⁰⁹ and the

100 *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 44–45 (1st Cir. 1999), *aff'd sub nom.* *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000).

101 *Id.* at 50–51.

102 *Id.* at 51.

103 *Id.*

104 *Id.* at 52.

105 *See Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998), *aff'd sub nom.* *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), *aff'd sub nom.* *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2290–91 (2000).

106 *Nat'l Foreign Trade Council*, 26 F. Supp. 2d. at 291.

107 *Nat'l Foreign Trade Council*, 181 F.3d at 53 (noting that Massachusetts has a two billion dollar purchasing budget).

108 *Id.*

European Union that Massachusetts diverges from federal law; and (3) the potential for national embarrassment.¹¹⁰ Under these factors, the Massachusetts law fails *Zschernig*.¹¹¹

The First Circuit addressed the Commonwealth's reliance on *Barclays*.¹¹² Because *Barclays* never referred to *Zschernig*, and because the cases were decided on different grounds, the First Circuit found no evidence for Massachusetts's argument that *Barclays* reduced the effect of *Zschernig*.¹¹³

Massachusetts also argued that the Tenth Amendment protected the law.¹¹⁴ The Commonwealth argued that the state's purchasing power was essential to state sovereignty and its expression was an important issue.¹¹⁵ As it had earlier, the court rejected the protest interest.¹¹⁶

The court applied previous First Circuit precedent, holding that states have no First Amendment rights.¹¹⁷ Therefore, the state's interest in expression is weak compared to the impact it could have with the law.¹¹⁸ Any First or Tenth Amendment rights of the state do not overcome this weakness.¹¹⁹

B. *Second Circuit*

In 1989, Suffolk County, New York sued the Long Island

109 Association of Southeast Asian Nations (established in 1967, its members currently include Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Laos, Myanmar (Burma), and Cambodia) at <http://www.asean.or.id/history/overview.htm>. (visited Nov. 6, 2000).

110 *Nat'l Foreign Trade Council*, 181 F.3d at 53.

111 *See Nat'l Foreign Trade Council*, 181 F.3d at 55; *see also* *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968).

112 *See Nat'l Foreign Trade Council*, 181 F.3d at 58–59.

113 *Id.* at 59.

114 *Id.* at 60–61.

115 *Id.* at 61.

116 *See id.*

117 *Id.* (citing *Student Gov't Ass'n v. Board of Trs. of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (holding that the legal services office of a state university lacks First Amendment rights)).

118 *See id.* (suggesting that even stronger state interests than the ones suggested by Massachusetts would “not make an otherwise unconstitutional law constitutional”).

119 *See id.*

Lighting Company under RICO.¹²⁰ The jury awarded Suffolk County \$22.9 million in damages.¹²¹ As an equitable defense, Long Island Lighting Company alleged that Suffolk County's actions in the events giving rise to the dispute caused Long Island Lighting Company to suffer far greater damages.¹²² Prior to the suit, Suffolk County petitioned the United States Nuclear Regulatory Commission to prevent Long Island Lighting Company from operating its power plant.¹²³ The district court dismissed the equitable defense on the grounds that Suffolk County had First Amendment rights, and that petitioning the Nuclear Regulatory Commission was protected behavior under those rights.¹²⁴

The court relied on a U.S. Supreme Court decision holding that held corporations have First Amendment rights, arguing that the rights arise out of the communication, notwithstanding the identity of the communicator.¹²⁵ While the Supreme Court did not apply this reasoning to government entities, the district court extended this reasoning to include Suffolk County.¹²⁶

This analysis contradicts the ruling reached by the First Circuit on the same matter.¹²⁷ The difference is more than trivial because in the First Circuit, Massachusetts was left with no tenable arguments while in New York, the plaintiff's claims were allowed to continue despite a potentially fatal equitable defense.¹²⁸

120 *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1389 (E.D.N.Y. 1989); *see also* Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (2000).

121 *County of Suffolk*, 710 F. Supp. at 1389 (trebling damages as required under RICO).

122 *Id.*

123 *See* Long Island Lighting Co., 6 N.R.C. 261 (1977).

124 *County of Suffolk*, 710 F. Supp. at 1390.

125 *See id.* (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–84 (1978)).

126 *See id.*

127 *Student Gov't Ass'n v. Board of Trs. of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (holding that the legal services office of a state university, as a state entity, has no First Amendment rights while private offices do).

128 *Compare Student Gov't Ass'n*, 868 F.2d at 481, *with County of Suffolk*, 710 F. Supp. at 1390.

C. Third Circuit

Trojan Technologies sued the Commonwealth of Pennsylvania to challenge the Pennsylvania Steel Products Procurement Act.¹²⁹ Trojan challenged on commerce clause, foreign affairs power, and equal protection grounds.¹³⁰

A state action can defeat a commerce clause challenge when the state is acting as a market participant and not as a market regulator.¹³¹ A market participant acts as a party to a commercial transaction rather than as a market regulator.¹³² An example of a market participant is when a state adopts a tax scheme.¹³³ The Supreme Court has not ruled on whether the market participant exception applies when foreign commerce is involved.¹³⁴ The circuit courts are split regarding this matter.¹³⁵

While the Supreme Court is undecided on the issue, the Third Circuit found that Pennsylvania's buy-American statute could not have a sufficient enough effect on foreign commerce to trigger further inquiry as to whether any effect was as a result of market participation or regulation.¹³⁶

The court also rejected the foreign affairs power challenge by distinguishing this case from *Zschernig*.¹³⁷ The Pennsylvania statute did not discriminate among foreign nations; it

129 See *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 904–05 (3d Cir. 1990); see also 73 PA. CONS. STAT. §§ 1881–87 (West 2000).

130 *Trojan Techs., Inc.*, 916 F.2d at 904.

131 *White v. Massachusetts. Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983); *Trojan Techs., Inc.*, 916 F.2d at 910.

132 *Trojan Techs., Inc.*, 916 F.2d at 910.

133 *Id.*

134 *Id.*

135 Compare *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 788 (N.J. 1977) (holding “[t]hat this case involves foreign commerce, and not interstate commerce, does not disturb our analysis.”), with *Bethlehem Steel Corp. v. Board of Comm'rs of Dep't of Water and Power of Los Angeles*, 80 Cal. Rptr. 800, 806 (Cal. Ct. App. 1969) (holding that “[t]he power to regulate commerce with foreign nations is an express grant by the people to the federal government.”).

136 See *Trojan Techs., Inc.*, 916 F.2d at 910 (evaluating 73 PA. CONS. STAT. §§ 1881–87 (2000)).

137 *Id.* at 913 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

discriminated against foreign nations as a whole.¹³⁸ There was no indication of selective application.¹³⁹ Therefore, the doctrine in *Zschernig* was restricted to background facts more similar to the original case.¹⁴⁰ The Pennsylvania law was saved by its own over-inclusiveness.¹⁴¹

Though *Trojan* also argued equal protection grounds, the court quickly dismissed this argument as meritless.¹⁴² Thus, the Third Circuit found buy-American laws fail to have any noteworthy effect.¹⁴³ Such laws also do not trigger any *Zschernig* concerns because the scope of application is broader.¹⁴⁴

D. Fourth Circuit

In 1986, the City Council of Baltimore passed an ordinance providing that no funds from the city-managed pensions could be invested in South Africa or companies doing business with South Africa.¹⁴⁵ This ordinance barred investments in 120 of the 500 companies on the Standard & Poor's 500 stock index.¹⁴⁶ The beneficiaries sued on grounds that the law impeded the trustee's duties to them and on foreign commerce grounds.¹⁴⁷

Although the court recognized the precedent set by *Zschernig*, it distinguished this case.¹⁴⁸ The Oregon law required intense scrutiny into the affairs of a foreign nation, while this

138 *Id.*

139 *Id.*

140 *See id.* at 913–14; *Zschernig*, 389 U.S. at 430.

141 *See Trojan Techs.*, 916 F.2d 903; 73 PA. CONS. STAT. §§ 1881–87 (West 2000). It appears that if a state chooses to act in a manner that has a broad categorical effect to achieve its goal, then that action is more likely to be found permissible than an action which is narrowly tailored to accomplish its targeted goal. An act that surgically achieves its objective without side-effects should be preferred to an act that affects many untargeted parties with its spillover effect. While it seems to be more fair when only the party deserving is the party burdened, in these cases, it seems “fair” means that all bear equally regardless of whether the burden is deserved or intended.

142 *Trojan Techs., Inc.*, 916 F.2d at 915.

143 *See id.* at 910.

144 *See id.* at 913; *see also Zschernig*, 389 U.S. at 440.

145 BALTIMORE, MD., ORDINANCES art. 22, §§ (7)(a), (35)(a) (1986).

146 *Board of Trs. v. Mayor of Baltimore*, 562 A.2d 720, 726 (Md. 1989).

147 *Id.* at 725.

148 *Id.* at 746 (holding the Ordinances represented a general decision by Baltimore requiring pension fund divestment and were “beyond the scope of *Zschernig*”).

2001] *LIMITING STATES' ROLES IN FOREIGN COMMERCE* 367

court found it important that the Baltimore ordinance required no such inquiry.¹⁴⁹ The court was unmoved by the fact that the law named and targeted a certain nation, South Africa.¹⁵⁰ The fact that the law was unlikely to have any economic effect helped its constitutionality because it was less likely to be deemed an intrusion.¹⁵¹ On the other hand, in *National Foreign Trade Council v. Natsios*, the Massachusetts Burma Law's impotence was found to be damning because it could not bring about any conceivable state interest.¹⁵² The Maryland court also distinguished this case from other cases because this law managed the relationship between the city government and another country, not the relationship between local residents and another country.¹⁵³ Because the law pertained only to the government, it fell within the permissible area of city management.¹⁵⁴ Though the Baltimore Ordinance closely resembles the Massachusetts Burma Law, challenges to each were decided differently.¹⁵⁵

The Maryland court allowed discussion of the market-participant exception and found it applicable to situations with foreign commerce, albeit under stricter scrutiny.¹⁵⁶ The court went on to hold that Congress was silent and presumably approved, and that divestiture was the act of a market-participant.¹⁵⁷ Further, unlike the line of cases rejecting any First Amendment rights owned by government, the court stated that Baltimore had a legitimate interest in investing the pension

149 *Id.* at 745–46.

150 *Id.* at 746–47 (citing *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

151 *Id.* at 747–48.

152 *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 70 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2290–91 (2000).

153 *Board of Trs.*, 562 A.2d at 747–48 (distinguishing this case from *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986); *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977); and *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980)).

154 *Board of Trs.*, 562 A.2d at 748.

155 *Compare Board of Trs.*, 562 A.2d 720 (upholding Baltimore's anti-South Africa law), *with Nat'l Foreign Trade Council*, 181 F.3d 38 (striking down Massachusetts's anti-Burma law).

156 *Board of Trs.*, 562 A.2d at 752.

157 *Id.* at 741, 753.

in a socially responsible manner.¹⁵⁸

E. Seventh Circuit

Illinois passed a law exempting all currency from occupation and use taxes except those issued by South Africa.¹⁵⁹ Springfield Rare Coin Galleries experienced a serious decline in trades involving South African coins in favor of non-taxed coins and challenged the Illinois law on foreign powers grounds.¹⁶⁰

Here, the Supreme Court of Illinois followed *Zschernig* by balancing incidental effects against impermissible intrusions.¹⁶¹ The court looked unfavorably upon Illinois's purpose of protesting South African policies.¹⁶² In addition, the court also considered the fact that the law targets one nation significant.¹⁶³ Unlike the Maryland court in *Baltimore Board of Trustees*, the court did not find the protest to be a legitimate state interest.¹⁶⁴ Despite Illinois protesting through taxation, the court still considered this law an impermissible intrusion into foreign affairs, market-participant exception notwithstanding.¹⁶⁵

This case presented an interesting intersection of factors

158 Compare *id.* at 755 (holding that "express[ing] the City's sensitivity" is a legitimate local interest), with *Nat'l Foreign Trade Council*, 181 F.3d at 61 (failing to find that Massachusetts has any First Amendment interests to expression), *Student Gov't Ass'n v. Board of Trs. of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (holding legal services office as a state office has no First Amendment rights or interests), *Tayyari*, 495 F. Supp. at 1367 (declaring Board of Regents' protest impermissible), and *Springfield Rare Coin Galleries, Inc.*, 503 N.E.2d at 308 (invalidating state tax based protest against South African apartheid).

159 120 ILL. COMP. STAT. ANN. 439.3-3 (1988); 120 ILL. COMP. STAT. ANN. 441-2 (1988).

160 See *Springfield Rare Coin Galleries, Inc.*, 503 N.E.2d at 303, 304-08 (claiming that Kruggerands were the most traded gold coins until the enactment of the tax against South African coins).

161 *Id.* at 306-07 (noting that although disapproval of a nation's policies may be justified, a single State creating a risk of conflict and potential retaliation against the entire nation is an impermissible intrusion).

162 *Id.* at 307.

163 *Id.* (noting the law compromises foreign policy relations when the federal government has no ability to modify or eliminate state sanctions).

164 Compare *Board of Trs. v. Mayor of Baltimore*, 562 A.2d 720, 754-55 (Md. 1989), with *Springfield Rare Coin Galleries, Inc.* 503 N.E.2d at 305.

165 *Springfield Rare Coin Galleries, Inc.*, 503 N.E.2d at 303.

typically weighed by the courts.¹⁶⁶ In its favor, the law relies on the device of taxation to achieve its goals.¹⁶⁷ By doing this, lawmakers have wide discretion to act in the best interests of the general health, safety, and welfare of Illinois, but this law also named and targeted a specific nation.¹⁶⁸ While the tax scheme in *Barclays* applied to all foreign companies as a category, this law made no such practical distinction and relied on a political one.¹⁶⁹ Perhaps the result here shows that even the device of taxation will not be automatically permissible if the intent or object is suspect.

F. Ninth Circuit

In addition to the alternative tax scheme for multinational corporations, California has a buy-American law similar to the one found in Pennsylvania.¹⁷⁰ California requires that contracts for the construction of public works or the purchase of materials for public use be awarded only to parties who agree to use materials substantially of U.S. origin.¹⁷¹ A California appellate court considered the California Buy-American Act to be an embargo on foreign products.¹⁷² This embargo, regardless of state interests, impermissibly intrudes into the federal domain of foreign trade policy.¹⁷³ The court did not wait for Congress to legislate in this area to indicate any preemptive intent.¹⁷⁴ The potential for conflict alone was enough.¹⁷⁵

166 *See id.* at 307 (balancing purpose and effect).

167 *See id.* at 305 (noting that State power over taxation is constitutional if the taxes are reasonable); *see also* *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 304 (holding that California taxation of foreign business was valid based on an adequate nexus with the State, fair apportionment, nondiscrimination, and no imposition of multiple taxation).

168 *See Springfield Rare Coin Galleries, Inc.*, 503 N.E.2d at 305.

169 *See id.* at 307.

170 *Compare* 73 PA. CONS. STAT. ANN. § 1881–85 (West 2000), *with* CAL. GOV'T CODE §§ 4300–4305 (West 1995).

171 *See* CAL. GOV'T CODE §§ 4300–4305 (West 1995).

172 *Bethlehem Steel Corp. v. Board of Comm'rs of Dep't of Water and Power of Los Angeles*, 80 Cal. Rptr. 800, 803 (Cal. Ct. App. 1969).

173 *See id.*

174 *Id.* at 804.

175 *Id.*

Contrary to the Third Circuit in *Trojan Technologies*, this court found that buy-American legislation has a more than incidental or indirect effect on foreign countries because the protectionist policy invites retaliation on our own trade.¹⁷⁶ The burden resulting from retaliation would be borne by all the states, not just California.¹⁷⁷ With these laws running rampant, they would greatly hamper the federal government's power to deal with foreign relations.¹⁷⁸

In an interesting concurrence, Justice Aiso adhered closely to the notion that the power of Congress over foreign commerce is plenary and exclusive.¹⁷⁹ According to Justice Aiso, the silence of Congress on these matters is not to be interpreted as permission for state action.¹⁸⁰ Instead, absence of congressional action is better deemed to be the equivalent to a declaration that commerce should be free and untrammelled.¹⁸¹

G. Tenth Circuit

During the Iran hostage crisis, the Board of Regents of New Mexico State University passed the anti-Iranian student motion.¹⁸² New Mexico State University denied continued enrollment to students of Iranian origin.¹⁸³

While the motion did not name Iran in particular, the conclusion that Iran was the target is inescapable considering the timing and because the motion specified any "government [that] holds, or permits the holding of U.S. citizens."¹⁸⁴

176 Compare *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 906-08 (3d Cir. 1990), with *Bethlehem Steel Corp.*, 80 Cal. Rptr. at 805.

177 See *Bethlehem Steel Corp.*, 80 Cal. Rptr. at 803.

178 See *id.*

179 *Id.* at 806 (noting that Congressional power over foreign commerce "is an essential attribute").

180 *Id.* at 807 (quoting *Welton v. Missouri*, 91 U.S. 275, 280 (1875)).

181 *Id.* (quoting *Welton*, 91 U.S. at 282).

182 *Tayyari v. New Mexico State Univ.*, 485 F. Supp. 1365, 1367-68 (D.N.M. 1980); see also *Iranians Wear Out Their U.S. Welcome*, U.S. NEWS & WORLD REPT., Nov. 19, 1979, at 11.

183 *Tayyari*, 485 F. Supp. at 1367-68.

184 *Id.* at 1368, 1373 ("[T]estimony and exhibits . . . show[ed] the clear purpose of [the] Regents was to exclude students of only one nationality: Iranian.").

2001] *LIMITING STATES' ROLES IN FOREIGN COMMERCE* 371

The court established alienage¹⁸⁵ and nationality as suspect categories.¹⁸⁶ As such, the appropriate standard of review was strict scrutiny.¹⁸⁷ Strict scrutiny demands that New Mexico State University's ("NMSU") motion closely relate to a compelling state interest.¹⁸⁸ NMSU first argued that their motivation was financial security.¹⁸⁹ The court rejected this argument as over-inclusive because it targeted Iranian students who were no threat to default.¹⁹⁰ This argument was also under-inclusive because Iranian students are not the only credit risks.¹⁹¹

The Board of Regents next played the safety card.¹⁹² The Board argued that tensions on campus necessitated the expulsion of Iranian students as a safety measure.¹⁹³ The court acknowledged that safety was a substantial interest.¹⁹⁴ It also commended the school for taking additional measures to protect the students' safety.¹⁹⁵ The court found the safety measures to be a permissible way to pursue that interest.¹⁹⁶ However, expulsion of a class of students based on nationality was not a legitimate way to facilitate safety.¹⁹⁷ To support the holding, Judge Campos recalled the desegregation of schools.¹⁹⁸ Thus, the Regent's action did not closely relate to the state's interest in either financial

185 *Id.* at 1372 (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

186 *Id.* at 1373 (citing *Hernandez v. Texas*, 347 U.S. 475, 479 (1954)).

187 *See id.* at 1372-73.

188 *See id.*

189 *See Tayyari*, 495 F. Supp. at 1373-74 (arguing that Iranians were a categorical credit risk because it would be difficult to collect Iranian debts with the Iranian embassy in the United States closed).

190 *See id.* at 1374.

191 *See id.* (describing Iranian student exclusion as "misdirected and extreme").

192 *Id.* at 1375.

193 *See id.* (describing an on campus demonstration related to American-Iranian relations).

194 *See Tayyari*, 495 F. Supp. at 1375 (recognizing the Regent's "duty to protect" students and property).

195 *Id.* (approving the school's development of contingency plans in response to tensions on the campus).

196 *Id.*

197 *Id.*

198 *Id.* (noting that despite racial tensions during desegregation, expulsion of black students as a group was not a permissible solution to the safety problems presented by the tension).

security or safety.¹⁹⁹

The court added that the federal government had already issued statements as to how Iranian students would be treated in the United States.²⁰⁰ Also, the NMSU motion conflicted with federal student visas.²⁰¹ Immigration is under the exclusive control of the federal government, with no room for the states to participate.²⁰² Though the Board did not argue First Amendment rights, the court frowned upon the Board using the cloak of state action and state authority to express personal views.²⁰³ This situation illustrated how a delicate diplomatic situation required united, federal action, and not the meddling of local governments.²⁰⁴

H. Eleventh Circuit

Florida has a law requiring that all handguns be assembled from American parts.²⁰⁵ Congress has also passed a law on the subject.²⁰⁶ The federal law forbids the importation of foreign guns that are not for sport.²⁰⁷ At first blush, it seems that the federal legislation preempts Florida's law.²⁰⁸ However, an exception applies because Congress specifically chose not to preempt the area of importing guns.²⁰⁹ This exception also has an exception.²¹⁰

199 See *id.* at 1373–75.

200 *Tayyari*, 495 F. Supp. at 1378 (noting that the federal government required all nonimmigrant alien post-secondary school students from Iran to report to INS for validating their student visas).

201 8 C.F.R. § 214.5 (1979); see also *Tayyari*, 495 F. Supp. at 1375 (noting that student visas are an immigration issue).

202 See U.S. CONST. art. I, § 8, cl. 4; see also *Tayyari*, 495 F. Supp. at 1377 (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) and *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941)).

203 See *Tayyari*, 495 F. Supp. at 1378.

204 See *id.* (describing Attorney General Civiletti's statement, "It is . . . my judgment that a failure to provide Iranian nationals lawfully in this country with fair and nondiscriminatory treatment and the assurance of the equal protection of United States laws could have a negative impact on prospects for securing the early and safe release of the hostages.").

205 FLA. STAT. ANN. § 790.26 (West 1992) (repealed 1983).

206 18 U.S.C. § 925(d)(3) (2000).

207 925(d)(3).

208 See *R.G. Indus., Inc. v. Askew*, 276 So. 2d 1, 2 (Fla. 1973).

209 18 U.S.C. § 927 (2000).

2001] *LIMITING STATES' ROLES IN FOREIGN COMMERCE* 373

The state may not arbitrarily discriminate against foreign commerce.²¹¹

Florida argued that their goal was to eliminate a source of cheap, dangerous handguns commonly known as “Saturday Night Specials.”²¹² However, the court rejected this argument because no connection has been established between foreign parts and such guns.²¹³ Furthermore, the law made no distinction between foreign parts for cheap guns and foreign parts for high-quality sporting weapons.²¹⁴

Given these unsubstantiated arguments, the court found that Florida’s law did not fall under the exception provided by Congress because it was arbitrary.²¹⁵ The court briefly considered the buy-American result of enforcing this law, but found that this alone was insufficient especially when not argued.²¹⁶ The court seemed to reject the buy-American argument and was satisfied to base their decision on striking down the more state-friendly safety argument.²¹⁷

VI. PUBLIC POLICY CONSIDERATIONS

A. *National Objectives at Stake*

1. *Appearance of Unity*

The appearance of national unity provides security to

210 See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960); see also *R.G. Indus., Inc.*, 276 So. 2d at 2 (recognizing the exception to Federal control of foreign commerce where Congress has not preempted state action).

211 See *Huron Portland Cement Co.*, 362 U.S. at 448; see also *R.G. Indus., Inc.*, 276 So. 2d at 2 (not addressing the issue as to how far the definition of general health, safety, and welfare can be stretched to overcome arbitrary discrimination against foreign commerce).

212 See *R.G. Indus., Inc.*, 276 So. 2d at 2 (describing Florida’s efforts to reduce violent street crime by controlling access to “Saturday Night Special” handguns, which are “cheap, dangerous, and easily concealed”).

213 *Id.* at 3.

214 *Id.*

215 See *id.* (holding the statute unconstitutional as an invasion of congressional power to regulate foreign commerce).

216 See *id.* (noting there was no evidence to indicate the average Floridian would be safer).

217 See *id.*

parties wishing to deal with the United States.²¹⁸ The value of a relationship with the federal government is based upon the assurance that when agreements are reached, they are valid regardless of the states involved.²¹⁹ Those on the outside looking in are unlikely to engage the United States in commerce out of fear and uncertainty.

Like any prospective shopper, a foreign trade partner would not only look for a favorable deal, but also prefers that the deal be free of any perceived weaknesses or instability. An appearance of unity is critical. While internal discord is unlikely to drive away all potential importers from our large consumer market, it certainly affects the nation's ability to negotiate terms favorable for all the states.²²⁰ It is unreasonable for an outsider to make sense of the approximately 39,000 governments below the federal level.²²¹ Because of that, the country should appear to others as unified in foreign affairs.

Embarrassment accompanies disarray. The *Zschernig* court noted that allowing this trend would result in great potential embarrassment.²²² This embarrassment would also likely detrimentally affect the United States' legitimacy among foreign trade partners.²²³ Investors and trade partners would likely be scared away by the impression that federal laws are impotent against renegade states. Foreign investors are unlikely to invest in the United States in general if they cannot predict how laws will affect their investments.

218 See *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2298–99 (2000); see also *Holmes v. Jennison*, 39 U.S. 540, 575 (1840); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

219 See *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (noting David D. Newsom's opinion that the discrimination against Iranian nationals violates a stated U.S. policy and could do harm to negotiations with Iran).

220 See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 54 (1st Cir. 1999) *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (noting that the Association of Southeast Asian Nations is "dismayed by this trend, because you cannot negotiate with states and provinces").

221 *Id.* at 53–54.

222 *Zschernig v. Miller*, 389 U.S. 429, 434–35 (1968).

223 See *Crosby*, 120 S. Ct. at 2299.

2. *Uniformity*

The reality of uniformity is just as important as the appearance of unity. While the appearance of unity makes the country an attractive trade partner, the actual presence of unity is crucial in maintaining the existing relationships. Angry trade partners are unlikely to be comforted by the federal government simply passing the blame to states. Also, when the federal government exercises its power to assume foreign trade obligations, national unity among the states is crucial to fulfilling those obligations.²²⁴ The nation cannot have its international presence crippled by litigation within the states.²²⁵ Instead, the lines should be more clearly delineated.²²⁶ Otherwise, the United States faces the risk of relapse into the chaotic mess that was once the Articles of Confederation.²²⁷ During that period when the states were the primary sovereigns, our nation had problems attaining international legitimacy.²²⁸

3. *Undiluted ability to exert pressure, earn favor, or levy sanctions*

The Iran hostage crisis, which provided the backdrop for *Tayyari v. New Mexico State University*, illustrates another compelling need for one voice on the international front.²²⁹ During the hostage crisis, the federal government was engaged in negotiations with Iran.²³⁰ The federal government used impounded Iranian assets located in the United States as

²²⁴ See *Nat'l Foreign Trade Council*, 181 F.3d at 49–50 (discussing the historical recognition of the importance of national unity in foreign relations).

²²⁵ See *id.*

²²⁶ See *id.* (noting that although the federal government has dominion over foreign affairs, states have a limited role to make agreements with foreign powers without Congressional approval).

²²⁷ See *id.*; see also THE FEDERALIST NO. 42, at 303 (James Madison) (B.F. Wright ed., 1996).

²²⁸ See *Nat'l Foreign Trade Council*, 181 F.3d at 50.

²²⁹ *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1367–68 (D.N.M. 1980); see also JAMES DAVID BARBER, THE PRESIDENTIAL CHARACTER 448–49 (4th ed. 1992) (describing the events leading up to the seizure of the American Embassy in Iran and the holding of American hostages).

²³⁰ See BARBER, *supra* note 229, at 450.

negotiating tokens.²³¹ In a situation as delicate as this, coordination and compliance from all the jurisdictions, not just the federal government, was both assumed and required for achieving a successful outcome.²³² Ham-fisted, grandstanding, egomaniacal charlatans legally bullying Iranian nationals in the United States could quickly erase any progress attained by the Carter administration.²³³ It is unlikely that Iran would wait for an explanation on the nuances of American federalism.

B. Local Objectives at Stake

1. Political Statements

One popular argument put forth by localities defending their meddling is that they are asserting their First Amendment right to express the sentiments of their citizens.²³⁴ Their expression usually takes the form of an economic boycott.²³⁵ As noted, however, the circuits are split as to whether government entities actually possess First Amendment rights.²³⁶

The prevailing view seems to be that states may act toward interests that fall under the general health, safety, and welfare of the public.²³⁷ However, few courts have spoken on this issue,

²³¹ See *id.* at 449.

²³² See *Tayyari*, 495 F. Supp. at 1378 (quoting David D. Newsom, Undersecretary for Political Affairs, United States Department of State).

²³³ See *id.* (describing a public statement made by Attorney General Civiletti that “failure to provide Iranian nationals lawfully in this country with fair and nondiscriminatory treatment and the assurance of the equal protection of the United States laws could have a negative impact on prospects for securing the early and safe release of the hostages.”).

²³⁴ See *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 (1st Cir. 1999), *aff’d sub nom.* *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (protesting human rights conditions in Burma).

²³⁵ See *id.* at 38; see also *Board of Trs. v. Mayor and City Council of Baltimore*, 562 A.2d 720 (Md. 1989) (banning investing in South African interests for a municipal pension plan); and *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (using a tax against South African currency).

²³⁶ Compare *Student Gov’t Ass’n v. Board of Trs. of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (holding that the legal services office of a state university, as a state entity, has no First Amendment rights while private offices do), with *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989).

²³⁷ See *Nat’l Foreign Trade Council*, 181 F.3d at 70.

2001] *LIMITING STATES' ROLES IN FOREIGN COMMERCE* 377

so any minority opinion must be looked at closely.²³⁸ The minority view is that local governments are analogous to corporations.²³⁹ Corporations have First Amendment rights and are free to express them in an economic fashion.²⁴⁰ According to this argument, local governments may also protest with their pocketbooks.²⁴¹ It is worth noting that in the current political climate, this argument may actually be preferred. Traditional conservative ideals such as smaller government, greater freedom for state and local governments, and moral self-righteousness put the sentimental advantage on the local lawmakers.

2. *Free ability to enter into business contracts*

Part of a state's sovereign power includes the power to spend its funds at will.²⁴² Without the discretion to spend its own money differently from others, the political boundaries seem meaningless. First, any state power must be balanced against the federal government's interest in governing foreign affairs.²⁴³ To the extent that the two oppose, the state interests must yield.²⁴⁴ Second, the government actor is always different from the individual. While the individual may be largely free to enter into contracts with mutually agreeable terms, the government must always temper its actions by considering how its acts conflict with the rights of people. Where governments are involved, their contracts may raise equal protection and due process issues. This is where the analogy between corporations and government appear suspect. When government actions affect other people, they must be in pursuit of some state

238 Only two circuits have addressed this issue. *See id.* at 61.

239 *See County of Suffolk*, 710 F. Supp. at 1390.

240 *See id.* (stating that the County's First Amendment rights are the same as an individual's rights).

241 *See id.*

242 *See Nat'l Foreign Trade Council*, 181 F.3d at 61 (using the state's purchasing power).

243 *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968); *see also Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2293–94 (2000).

244 *Crosby*, 120 S. Ct. at 2294.

interest.²⁴⁵

Further, notwithstanding the right to enter contracts, states have always been limited in their ability to affect commerce beyond their own borders.²⁴⁶ Borrowing from the area of domestic commerce clause jurisprudence, the Supreme Court has ruled that states rights are limited by the federal governments powers in areas of minimum wage²⁴⁷ and labor relations.²⁴⁸

3. *Reserved rights*

The Tenth Amendment reserves rights not granted to federal government to the states.²⁴⁹ Because the foreign commerce clause delegates the power to regulate such to Congress, it has been considered plenary and exclusive by necessity.²⁵⁰ The exclusive right to affect foreign commerce vests in the federal government.²⁵¹ Nothing is left over to be reserved to the states under the Tenth Amendment.²⁵²

C. *The United States' Legitimacy in an International Marketplace*

While these laws and cases reach the courts in the context of federalism and Constitutional law, the courts are no longer free to consider these fact patterns in a vacuum that stops at

245 *Nat'l Foreign Trade Council*, 181 F. 3d at 70 (acknowledging that government is generally allowed to act in pursuit of the general health, safety, and welfare of the public).

246 *See id.* at 50.

247 *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530–31 (1985) (applying minimum wage requirements to state and municipal employees).

248 *See United States v. Darby Lumber Co.*, 312 U.S. 100, 124 (1941); *and N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937) (both upholding national labor standards notwithstanding local manufacturing's indirect effects on interstate commerce).

249 U.S. CONST. amend. X.

250 *See Nat'l Foreign Trade Council*, 181 F.3d at 49; *see also United States v. Pink*, 315 U.S. 203, 233 (1942); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–16 (1936).

251 *See Curtiss-Wright Export Corp.*, 299 U.S. at 315–16.

252 *See id.*

America's borders.²⁵³ One critic has noted that Americans are unique among the world in our failure to assume global dimensions in our thought.²⁵⁴ Those who are amazed at the economy's inflation-free growth would be less amazed if they would only consider our economy as an open system.²⁵⁵ Our country is not only affected by unemployment within our shores, but unemployment on a world scale.²⁵⁶ This type of thinking is still very new to many policymakers.

Because the current body of legislation is ill adapted to the considerations of the modern economy, the courts must factor into their decision making process concerns on an increasingly international scope.²⁵⁷ This does not mean that courts should take an active part in foreign policy-making.²⁵⁸ Rather, until legislation catches up with the modern world, the courts should not adhere stringently to precedent which assumes no affect upon international commerce.²⁵⁹ The most prudent stance maintains judicial deference to ensure decisions interfere as little as possible with foreign policy and commerce.²⁶⁰

D. The Political Solution

The solution to this trend is already available. One of the arguments used by states in defending their actions is that they are asserting their First Amendment right to free expression.²⁶¹

253 See *Zschernig v. Miller*, 389 U.S. 429, 438 n.8 (1968).

254 See Alan Tonelson, *Globalization: The Great American Non-Debate*, 96 CURRENT HISTORY, 353, 355 (1997).

255 See *id.* at 358.

256 See *id.* at 355 (noting American wages are now determined by American employment as well as global unemployment rates).

257 See *Zschernig*, 389 U.S. at 438 n.8.

258 See *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (recognizing that it is the accepted view that the Executive has the responsibility for foreign policy).

259 See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 70 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000) (finding state actions that affect international commerce are scrutinized greater than state actions affecting interstate commerce).

260 See Karen DeYoung, *Appeals Court Won't Reconsider Elian Case*, WASH. POST, June 24, 2000, at A2.

261 See *supra* note 158 and accompanying text.

The trend already seems to be leaning against this argument.²⁶² If the Supreme Court determines that states are without First Amendment rights (as they should), then all is not lost. States need to remember that although they have no right to express their collective views when they interfere with foreign affairs, their citizens may still express themselves through their representatives in Congress, which number 435 district-based representatives and 100 senators.²⁶³ Congress is the body with authority to act in the area of foreign commerce.²⁶⁴ It is composed of representatives elected by citizens of their respective states.²⁶⁵ If the states' citizens have a need to express their opinions, they can do so through their senator or representative without conflicting with the Constitution. The elected officials are accountable to their constituency²⁶⁶ and are in the proper position to propose sanctions,²⁶⁷ embargoes,²⁶⁸ and other legislation.

VII. THE SUPREME COURT CONSIDERS *NATSIOS*

In 2000, the Supreme Court considered *National Free Trade Council v. Natsios*.²⁶⁹ This case had the potential to resolve much of the current split in the circuits.²⁷⁰ At issue was whether the

262 Compare *Student Gov't Ass'n v. Board of Trs. of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (holding that the legal services office of a state university, as a state entity has no First Amendment rights) with *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (holding that the County of Suffolk has a First Amendment Right).

263 Scott LeHigh, *Winner by a Little Takes A Lot*, BOSTON GLOBE, Oct. 22, 2000, at E5.

264 U.S. CONST. art. I, § 8 (delegating to Congress the power to "regulate Commerce with foreign Nations").

265 U.S. Const. art. I, §§ 2-3.

266 See Christi R. Martin, Note, *Preemption in the Age of Local Regulatory Innovation: Fitting the Formula to a Different Kind of Conflict*, 70 TEX. L. REV. 1831, 1843 (1992).

267 See *Fighting the Slave Trade*, WASH. POST, Apr. 10, 2000, at A20 (discussing proposed legislation dealing with imposing sanctions).

268 See Tom Plate, *Aim for Lasting Peace in Korea*, DESERET NEWS, June 27, 1999, at AA03 (highlighting that Congress maintains the power to propose embargoes).

269 See *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000).

270 Compare *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000); *Tayyari v.*

2001] *LIMITING STATES' ROLES IN FOREIGN COMMERCE* 381

Massachusetts Burma Law: 1) unconstitutionally interfered with the foreign affairs power of the National government under *Zschernig v. Miller*; 2) violated the dormant Commerce Clause; and 3) was preempted by the Congressional Burma Act.²⁷¹

All nine justices of the Supreme Court voted to affirm the appellate court's decision.²⁷² Justice Souter, writing for the court, held that federal law preempted the Massachusetts law on the issue of Burma.²⁷³ By relying on preemption to decide the case, the Court employed the tool of least friction.²⁷⁴ By extension, it also left the other issues undecided.²⁷⁵ Justices Scalia and Thomas concurred in the result but objected to Justice Souter's verbosity.²⁷⁶

No case law from the Supreme Court shows any movement away from the *Zschernig* test.²⁷⁷ Several lower courts have distinguished *Zschernig* from their own cases, but none have refused to apply it to the similar facts and arguments.²⁷⁸ Because the court has not disowned *Zschernig*, it would appear that the Justices would like to leave the precedent intact.

If the court had chosen to apply another test, what would it be? Current domestic commerce clause jurisprudence rests on the "stream of commerce" theory.²⁷⁹ This theory rejected the former distinction between manufacturing and commerce as

New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980); and *R.G. Indus., Inc. v. Askew*, 276 So. 2d 1 (Fla. 1973) (all striking down state action) with *Bd. of Trs. v. Mayor of Baltimore*, 562 A.2d 720 (Md. 1989); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986); and *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1989) (upholding state action).

271 *Crosby*, 120 S. Ct. at 2293.

272 *Id.* at 2290.

273 *Id.* at 2294.

274 *See id.*

275 *See id.*

276 *See id.* at 2302–04.

277 *See id.* at 2302 (holding the act unconstitutional because of the "conflict with Congress' specific delegation to the President").

278 *See Amarel v. Connell*, 248 Cal. Rptr. 276, 281 (Cal. App. 1988); *see also* *In re Leikind's Estate*, 239 N.E.2d 550, 552–53 (N.Y. 1968); *North Am. Salt Co. v. Ohio Dept. of Transp.*, 701 N.E.2d 454, 462–63 (Ohio Ct. App. 1997).

279 *See United States v. Lopez*, 514 U.S. 549, 572 (1995) (Kennedy, J., concurring) (citing *Swift & Co. v. United States*, 196 U.S. 375, 398–99 (1905)).

objects of Congressional regulation.²⁸⁰ Although manufacturing occurred completely within the borders of a state, it could be subject to federal legislation inasmuch as it affects the stream of commerce.²⁸¹ Perhaps the Court, if it found the *Zschernig* standard unsatisfactory, might spill this doctrine over to foreign commerce clause law. Given the right opportunity, the court should do so. First, with the globalization of trade, distinctions between national and international, domestic and foreign, become less meaningful. Rather than maintain a two-tiered body of commerce law that is unlikely to be feasible much longer, the Court should begin work on reducing the distinction. At the very least, it is simpler and therefore more elegant.²⁸² Second, the difference between “more than incidental and indirect effect on foreign commerce” and “stream of commerce” seems purely semantic in application.²⁸³ The Supreme Court’s change in language would not necessarily herald a break in jurisprudence. In fact, the same test applied would probably little disturb the case law. If the Court chooses to apply the “stream of commerce” test to foreign commerce clause law, it would only be for the sake of neatness and not for any failing in the *Zschernig* test.

In applying the *Zschernig* test, the district court found that the law had more than an “incidental or indirect” effect on foreign commerce.²⁸⁴ The Supreme Court did not review this finding.²⁸⁵ According to the Supreme Court, the district court judge applied the facts presented in court to the correct law and

280 See *id.* at 573 (Kennedy, J., concurring) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

281 See *id.* (Kennedy, J., concurring) (citing *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

282 Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263, 268 (1989). The idea that the simplest answer is usually the best is known as Ockham’s razor, after William of Ockham. *Id.*

283 See U.S. CONST. art. I, § 8; compare *Clark v. Allen*, 331 U.S. 503 (1947) (discussing a law with an incidental effect on foreign countries) with *Asahi Metal Indus. Co. v. Superior Ct. of California*, 480 U.S. 102 (discussing the stream of commerce theory).

284 See *Nat’l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998).

285 See *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288, 2294 n.8 (noting that some issues were not decided).

2001] *LIMITING STATES' ROLES IN FOREIGN COMMERCE* 383

arrived at this decision.²⁸⁶ This appears to be a fact finding that is largely beyond the review of appellate courts. Even if the court disagreed with this reasoning and determined that the courts ruling depended on an application or misapplication of the law, then the decision would nevertheless remain.²⁸⁷ The fact that laws, such as the Massachusetts Burma Law, target one particular country, provoke numerous protests, and invite retaliation, could have weighed in satisfaction of the *Zschernig* requirements.²⁸⁸

Though the political climate makes distinctions between foreign and domestic less relevant, the special facts that international commerce presents makes a market participant exception problematic.²⁸⁹ Because it was not argued, the Court did not answer the question.²⁹⁰ If the issue were presented, the diminished separation between foreign and domestic commerce might demand that the market participant exception apply to state actors affecting foreign trade. This would be consistent if the Court began moving away from separating foreign and domestic commerce clause law. While this undoubtedly creates some concern, the Court might do well to state that it would apply more rigorous scrutiny to laws defended under the market participant exception that affect the stream of international commerce.

The least interesting argument that Massachusetts presented relied on the Tenth Amendment.²⁹¹ By the text of the Constitution, Congress controls matters of foreign commerce.²⁹² Massachusetts would have been hard pressed to argue that their

286 *See id.* at 2293 (affirming both the district court and the First Circuit).

287 *See* Herbert C. Shelley, et al., *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summaries: The Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U. L. REV. 1749, 1755 n.21 (1996).

288 *See Crosby*, 120 S. Ct. at 2299–2300.

289 *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 59 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000).

290 *See id.* at 45 (addressing only whether the law interfered with the foreign affairs power of the federal government, if it violated the Foreign Commerce Clause, and if it violated the Supremacy Clause).

291 *Id.* at 60–61.

292 *See* U.S. CONST. art. I, § 8.

law had no effect on foreign commerce, and that somehow the authority to pass that law vests in the state through the Tenth Amendment. The position seems plainly untenable.

VIII. CONCLUSION

By agreeing to the terms of the World Trade Organization and the North American Free Trade Agreement, the federal government has taken positive action to indicate that it has a national plan of action in the area of foreign commerce. That these contracts provide rules regarding the effect of state tariffs and other trade barriers is a strong indication that states are clearly preempted in this area.

The U.S. Supreme Court's simple decision in *Crosby v. National Free Trade Council* betrays the complexity of the implicated matters. By granting certiorari, the Court recognized the disagreement among the circuits. Their resolution of this case was a small but firm step into a new era of global awareness. Perhaps they are hinting to Congress that it should take the initiative in the safe harbor of preemption. The Justices still must decide on issues of any First Amendment rights held by states and municipalities, any Tenth Amendment rights reserved, the vitality or reconciliation of *Zschemig* and *Barclays*, and the limits to state actions absent preemption. Hopefully, their decision will rely on precedent and prudence. While states have traditionally been considered the most efficient forum for experimentation, state experimentation in this area would be decidedly inefficient in the cost to America's trading power versus the mediocre effects. In the area of foreign affairs and commerce, the nation would be more effective as a single unit than as a platoon of smaller units.

*Anderson L. Cao**

* This comment won The James Skelton Writing Award. The author would like to thank James Skelton for his generous support and Jenny Phan.