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Foreign Affairs Power -- The Massachusetts Burma Law is Found to Encroach on the Federal Government's Exclusive Constitutional Authority to Regulate Foreign Affairs. -- National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998)

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RECENT CASES

FOREIGN AFFAIRS POWER — THE MASSACHUSETTS BURMA LAW IS FOUND TO ENCROACH ON THE FEDERAL GOVERNMENT'S EXCLUSIVE CONSTITUTIONAL AUTHORITY TO REGULATE FOREIGN AFFAIRS. — *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998).

Courts have traditionally placed the regulation of foreign affairs within the exclusive jurisdiction of the federal government. Recently, twenty-three cities and one state have challenged the exclusivity of this jurisdiction by enacting selective purchasing laws that prohibit local governments from conducting business with companies that "do business" with the Union of Myanmar ("Myanmar").[1] Most notable of these laws is the Massachusetts Burma Law ("Burma Law").[2] Considering the constitutionality of such selective purchasing laws for the first time, the United States District Court for the District of Massachusetts in *National Foreign Trade Council v. Baker*[3] correctly held that the Burma Law "unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs."[4] However, by failing to articulate the specific ways in which the Burma Law had "more than an incidental or indirect effect in foreign countries,"[5] the court missed an opportunity to clarify when state regulation becomes unconstitutional involvement in foreign affairs.

On June 25, 1996, the Massachusetts General Assembly enacted legislation prohibiting the Commonwealth of Massachusetts and its agents "from purchasing goods or services from anyone doing business with [Myanmar]."[6] The Burma Law authorized the Operational Services Division (OSD)[7] to establish a "restricted purchase list," which contained the names of companies that met the statutory definition of "doing business with Burma."[8] Once a company's name appeared on

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[1] *See Burma Law Ruling May Affect 46 States*, BOSTON GLOBE, Nov. 6, 1998, at C3. The Nation of Burma became known as the Union of Myanmar in 1989. *See* Colin Bessonette, *Q & A on the News*, ATLANTA J. & CONST., Aug. 18, 1998, at A2.

[2] MASS. GEN. LAWS ch. 7 §§ 22G–22M (West 1996). According to Representative Byron Rushing, the sponsor of the Burma Law, 13 companies have pulled out of Myanmar since Massachusetts enacted the law. *See* Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction at 8–9, National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998) (No. 98-CV-10757-JLT).

[3] 26 F. Supp. 2d 287 (D. Mass. 1998).

[4] *Id.* at 291.

[5] *Id.* (quoting Zschernig v. Miller, 389 U.S. 429, 434 (1968)) (internal quotation marks omitted).

[6] *Id.* at 289.

[7] The OSD is a state agency within the Executive Office of Administration and Finance. *See id.*

[8] *Id.* (internal quotation marks omitted).

the restricted purchase list, the Commonwealth could purchase goods from that company only in limited circumstances.[9]

The National Foreign Trade Council (NFTC)[10] sought a declaratory judgment that the Burma Law was unconstitutional, arguing that the law "intrudes on the federal government's exclusive power to regulate foreign affairs," "is preempted by a federal statute and an executive order imposing sanctions on Myanmar," and violates the Foreign Commerce Clause by discriminating against and burdening international trade.[11]

Chief Judge Tauro struck down the Burma Law as an infringement of the federal government's exclusive authority to regulate foreign affairs.[12] He applied the test for foreign affairs regulation established in *Zschernig v. Miller*,[13] which he interpreted as requiring state laws that affect "significant issues of foreign policy" to be voided.[14] Finding such an effect, Chief Judge Tauro held that the Burma Law did not pass the *Zschernig* test and was therefore unconstitutional.[15]

By failing to articulate the specific ways in which the Burma Law had "more than an incidental or indirect effect in foreign countries,"[16] the court missed a crucial opportunity to clarify current jurisprudence regarding state involvement in foreign affairs. Although *Zschernig* es-

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[9] These circumstances included instances when the procurement was essential and the restriction would have eliminated the only bid or would have given rise to inadequate competition; for example, when the state purchased particular medical supplies or when no unrestricted bidder had made a "comparable low bid or offer." *Id.* (internal quotation marks omitted); *see also* MASS. GEN. LAWS ch. 7, §§ 22H(b), 22I, 22H(d) (West 1996).

[10] The NFTC is a nonprofit organization comprised of 550 U.S. companies involved in international trade and investment. The organization works to influence policy decisions about international trade and commerce. *See National Foreign Trade Council*, 26 F. Supp. 2d at 290; *Profile of the National Foreign Trade Council* (visited Mar. 15, 1999) <http://usaengage.org/background/nftc.html> (on file with the Harvard Law School Library).

[11] *National Foreign Trade Council*, 26 F. Supp. 2d at 289.

[12] *See* Zschernig v. Miller, 389 U.S. 429, 432, 436 (1968) (stating that "the Constitution entrusts [the field of foreign affairs] to the President and the Congress" and that foreign affairs and international relations are "matters which the Constitution entrusts solely to the Federal Government"); United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); United States v. Belmont, 301 U.S. 324, 330 (1937) ("Governmental power over external affairs is not distributed, but is vested exclusively in the national government."). Because Chief Judge Tauro did not find the preemption or Foreign Commerce Clause arguments dispositive, he did not address them in detail. *See National Foreign Trade Council*, 26 F. Supp. 2d at 293.

[13] 389 U.S. 429 (1968); *see National Foreign Trade Council*, 26 F. Supp. 2d at 291. *Zschernig* involved an Oregon statute that conditioned the ability of a nonresident to inherit property from an Oregon resident upon three factors relating to the reciprocal rights of U.S. citizens in the nonresident's country of origin. *See Zschernig*, 389 U.S. at 430–31. The Supreme Court found that the Oregon decisions were primarily motivated by foreign policy attitudes, and it was this motivation that the Court held was a matter "for the Federal Government, not for local probate courts." *Id.* at 438.

[14] *Id.* at 291.

[15] *See id.*

[16] *Id.* (quoting *Zschernig*, 389 U.S. at 434–35) (internal quotation marks omitted).

tablished the framework by which courts can test the constitutionality of state laws, it did not determine the scope or requirements of this framework.[17] The need for courts to "draw the lines"[18] made it important for Chief Judge Tauro to specify what level of generality he used in applying *Zschernig*'s effect inquiry. The vagueness within this area of jurisprudence fosters inconsistent judicial determinations as to which state laws infringe upon the federal government's exclusive foreign affairs power. Such inconsistency threatens to grant constitutional validation of some state laws that interfere with a unified national foreign affairs agenda.

Chief Judge Tauro's opinion relies heavily on *Zschernig*, the only Supreme Court opinion to invalidate a state law as an impermissible infringement upon the federal government's exclusive authority to regulate foreign affairs.[19] *Zschernig* held that a state law intrudes into foreign affairs regulation when it has more than "some incidental or indirect effect in foreign countries" or a "great potential for disruption or embarrassment."[20] The existence of a foreign affairs purpose[21] underlying a state law is often strong evidence of an unacceptable effect on foreign affairs. Consequently, the case law since *Zschernig* has distinguished between laws with and without a foreign affairs purpose.[22] Because the Burma Law had a facial foreign affairs purpose[23] and the

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[17] Consequently, "it will be largely for the courts . . . to develop the distinctions and draw the lines that will define the *Zschernig* limitations on the states." LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (1996); *see also id.* at 163–65, 240–41; Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 825–26 (1989) ("But scholars and judges have continued to puzzle over [*Zschernig*'s] reasoning and scope, and, in particular, over precisely where and how the courts should draw the line between constitutionally permissible and prohibited state and local action."); Carlos M. Vazquez, Verlinden B.V. v. Central Bank of Nigeria*:* *Federal Jurisdiction Over Cases Between Aliens and Foreign States*, 82 COLUM. L. REV. 1057, 1071 (1982) ("[*Zschernig*] leaves unclear whether the Oregon statute was invalid because it evinced hostility to certain states, because it affected foreign relations purposefully rather than incidentally, or for some other reason.").

[18] HENKIN, *supra* note 17, at 164.

[19] *See id.* at 165.

[20] *Zschernig*, 389 U.S. at 434–35 (internal quotation marks omitted).

[21] A foreign affairs purpose exists in laws that are enacted with the intent to comment on the domestic policy of a foreign nation. *See id.* at 437 ("[I]t seems that foreign policy attitudes . . . are the real desiderata. Yet they of course are matters for the Federal Government . . . .").

[22] Cases without a facial foreign affairs purpose generally involve state laws that require the use of local or national products in fulfilling government contracts. *See* Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990); K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n of New Jersey, 381 A.2d 774 (N.J. 1977); North Am. Salt Co. v. Ohio Dep't of Transp., 701 N.E.2d 454 (Ohio Ct. App. 1997). Chief Judge Tauro stated that these precedents were not persuasive because "they did not single out a specific foreign country for particular treatment, as does the Massachusetts Burma Law," essentially holding that the lack of a foreign affairs purpose caused the cases to be less analogous. *National Foreign Trade Council*, 26 F. Supp. 2d at 292.

[23] The Burma Law was "enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policies," a clear foreign affairs purpose. *National Foreign Trade Council*, 26 F. Supp. 2d at 291.

effects of the law were indeterminate, this Comment focuses on those cases that involve state acts with a foreign affairs purpose and ambiguous effects.

These cases illustrate two different and inconsistent approaches for applying the *Zschernig* effects test: formulating the effects inquiry at either a high or low level of generality. Inquiries at a high level of generality examine any potential effects that the statute could have on U.S. foreign relations. The mere intention of a state to affect a foreign country's domestic policies, when examined from a high level of generality, would be seen as potentially affecting foreign affairs because of the possibility that a foreign country could react to a state's commentary. Alternatively, when framing the effects question at a low level of generality, courts focus on the actual effects a statute has on a foreign country. It is this inconsistency of interpretive approach that Chief Judge Tauro failed to address in *National Foreign Trade Council*, thus maintaining the confusion regarding state involvement in foreign affairs.

The level of generality that the court applies to its effects inquiry is particularly important because the validity of a statute turns on the finding of foreign affairs effects as defined by *Zschernig*. If courts were to examine state laws or other legal acts at a high level of generality, all acts that have a facial foreign affairs purpose could be found invalid. Alternatively, if the effects inquiry is at a low level of generality, it will be significantly more difficult to find that state legal acts actually or potentially affect foreign affairs.

The cases examined below involve laws or state actions that have a clear foreign affairs purpose; a desire to note disapproval of a foreign country's domestic policy motivated each of the laws or state actions. Some of the cases implicitly suggest that once a foreign affairs purpose is identified, a "great potential for disruption or embarrassment of United States foreign policy"[24] is automatic. Alternatively, another case requires a direct showing of effect within a foreign country.[25]

Courts have generally examined the *Zschernig* effects inquiry at a high level of generality and have consequently found the state action in question invalid. In *New York Times Company v. New York Commission on Human Rights*,[26] the Court of Appeals of New York upheld the New York Times's practice of running employment notices submitted by South African employers.[27] The court found that the Republic

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[24] *National Foreign Trade Council*, 26 F. Supp. 2d at 290 (quoting *Zschernig*, 389 U.S. at 434–35) (internal quotation marks omitted).

[25] *See* Board of Trustees v. Mayor of Baltimore, 562 A.2d 720 (Md. Ct. App. 1989).

[26] 361 N.E.2d 963 (N.Y. Ct. App. 1977).

[27] *See id.* at 964–65. The Commission on Human Rights had ordered the New York Times "to cease and desist from printing advertisements" for employment in the Republic of South Africa in part because the Commission found that the State of New York created a boycott against South

of South Africa could have been offended by the Commission's inquiry and that it "might have been an embarrassment to those charged with the conduct of our Nation's foreign policy."[28] In *Tayyari v. New Mexico State University*,[29] the Regents of New Mexico State University passed a motion denying the admission or readmission of students whose "home government holds or permits the holding of U.S. citizens hostage."[30] The United States District Court for the District of New Mexico concluded that the motion's "potential effect on this nation's management of immigration and foreign affairs would dictate its demise."[31] *Springfield Rare Coin Galleries, Inc. v. Johnson*[32] involved an Illinois statute that exempted "gold or silver coinage issued by . . . any foreign country, except the Republic of South Africa" from the state occupation and use tax.[33] The Illinois Supreme Court held that the statute encroached on the federal government's exclusive foreign affairs power because the statute "creates a risk of conflict between nations, and possible retaliatory measures."[34] In framing the *Zschernig* effects test at a high level of generality, the courts in *New York Times*, *Tayyari*, and *Springfield Rare Coin Galleries, Inc.* addressed not only the possible consequences of the legal decisions, but also the possible consequences of the political decisions that led to the legal decisions.

Alternatively, one court has applied the effects inquiry at a low level of generality. In *Board of Trustees v. Mayor of Baltimore*,[35] a Baltimore city ordinance required the city to divest all funds invested in "banks or financial institutions that make loans to South Africa or Namibia or companies 'doing business in or with' those countries."[36] The court examined the effects of the Baltimore ordinance[37] at a particularly low level of generality, looking to the specific effects that the divestment would have in South Africa. The court found that divestment "has no immediate effect on foreign relations between South Africa and the United States" and "that divestment alone would not cause companies to leave South Africa and that the divestment move-

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African employers to express the State's disapproval of South Africa's apartheid regime and to attempt to persuade South Africa to change its apartheid policies. *Id.* at 965; *see id.* at 968.

28 *Id.* at 969.

29 495 F. Supp. 1365 (D.N.M. 1980).

30 *Id.* at 1368.

31 *Id.* Chief Judge Campos's opinion did not cite evidence that the Regents' motion actually caused or could cause strained diplomatic relations with Iran, the plaintiffs' country of origin. Instead, the court simply asserted that it disagreed with the defendant's contention that the motion "will not interfere with federal policy." *Id.*

32 503 N.E.2d 300 (Ill. 1986).

33 *Id.* at 302.

34 *Id.* at 307.

35 562 A.2d 720 (Md. Ct. App. 1989).

36 *Id.* at 724.

37 The city ordinance was an official statement condemning South Africa's domestic policy, which caused the ordinance to have a foreign affairs purpose. *See supra* note 21.

ment does not create political instability in that country."[38] These findings led the court to conclude that "the Ordinances' impact in South Africa is clearly minimal."[39]

Once a court has determined that a law, commission ruling, or ordinance has a foreign affairs purpose, framing the *Zschernig* effects inquiry at a high level of generality makes it nearly impossible to find that the act does not affect foreign relations. When investigating at a low level of generality, however, courts will be less likely to find unconstitutionality. High level of generality inquiries are normatively better in this context because they better protect the federal government's exclusive authority to regulate foreign affairs. The United States of America operates in the international community as one nation. The Constitution supports this strategy by granting the federal government the exclusive authority to make treaties and regulate foreign commerce.[40] Decisions regarding relationships with other nations must be made with the interest of the United States as a whole in mind and federal control over this process best facilitates that goal. Given increasing globalization, however, international issues are becoming more important at the local level. While finding better ways to infuse local voices into the creation of the national foreign affairs agenda is important, increased local interest does not justify allowing states to make and enforce their own foreign affairs agendas.

Although Chief Judge Tauro relied on the *Zschernig* test and correctly decided the case, he did not clarify the manner in which the test was applied. The opinion merely noted that the Burma Law commented on the domestic policy of Myanmar and that the European Union and Association of South East Asian Nations voiced their opposition to the law in the World Trade Organization.[41] However, at no point in the opinion did the court clarify that the constitutional status of the Burma Law hinged on either of these findings. By failing to articulate the level of generality at which he applied the *Zschernig* effects test, Chief Judge Tauro simply added another imprecise decision to an already confusing jurisprudence addressing state actions and federal foreign affairs power.

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[38] *Board of Trustees*, 562 A.2d at 747.

[39] *Id.* Had the court examined the effects at a high level of generality, it is likely that the court would have found the ordinance invalid.

[40] *See* U.S. CONST. art. I, § 10, cl. 1; *id.* § 8, cl. 3.

[41] *See National Foreign Trade Council*, 26 F. Supp. 2d at 291.