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IN THE WAKE OF *CROSBY V. NATIONAL FOREIGN TRADE COUNCIL*: THE IMPACT UPON SELECTIVE PURCHASING LEGISLATION THROUGHOUT THE UNITED STATES

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"If we are to be one nation in any respect, it clearly ought to be in respect to other nations."[1]

INTRODUCTION

On June 19, 2000, the U.S. Supreme Court, in *Crosby v. National Foreign Trade Council*, struck down a Massachusetts statute restricting its state entities from purchasing goods or services from any company doing business with Myanmar, formerly known as Burma.[2] The case was the first time the Supreme Court confronted the issue of whether the Constitution grants state and local governments the power to enact their own sanctions against certain foreign nations.[3] Such local devices arose from the 1980s sentiment against apartheid.[4]

In a unanimous opinion, the Court in *Crosby* held that the Massachusetts statute was invalid under the Supremacy Clause of the Constitution.[5] The Court explained that Congress had enacted sanctions against Burma three months after passage of the Massachusetts measures, and thus, the federal sanctions effectively preempted the Massachusetts statute.[6] "[W]e see the

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1. THE FEDERALIST NO. 42 (James Madison).

2. *See* Crosby v. National Foreign Trade Council, 530 U.S. 363, 365 (2000) (affirming the decisions of the U.S. District Court and the First Circuit Court that the Massachusetts-Burma statute was unconstitutional under the Supremacy Clause).

3. Peter J. Spiro, *U.S. Supreme Court Knocks Down State Burma Law*, ASIL INSIGHT, ¶ 6, *available at* http://www.asil.org/insigh46.html (last visited June 2000). "Although the decision puts similar state and local anti-Burma measures at least temporarily on ice, it is unlikely to emerge as the final word on foreign policymaking by state and local actors." *Id.* ¶ 1.

4. *Id.* ¶ 6.

5. *See generally Crosby*, 530 U.S. at 363 (holding that the Massachusetts-Burma law was preempted under the Supremacy Clause).

6. *Id.* at 387-88. "[T]he state Act undermines the President's capacity, in

state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal act," the Court declared, because "the state law undermines the intended purpose and 'natural effect' of . . . the federal Act."[7] The Court further stated that "the state [A]ct is at odds with the [P]resident's intended authority to speak for the United States among the world's nations in developing a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma."[8]

Before reaching the U.S. Supreme Court, both the U.S. District Court and the First Circuit Court of Appeals examined the Massachusetts statute and struck it down as unconstitutional.[9] Both courts held that the statute impermissibly infringed upon the

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this instance for effective diplomacy." *Id.* at 381. "It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* *See also* Edward Walsh, *Justices Limit States on Sanctions*, WASH. POST, June 20, 2000, at A10 (noting that the federal sanctions against Burma enacted by Congress effectively preempted not only the Massachusetts law, but also similar laws adopted by local governments across the United States).

7. *Crosby*, 530 U.S. at 373. The Court stated: "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law. . . [e]ven without an express provision for preemption." *Id.* at 372. State law must yield to a congressional act in two circumstances: (1) when Congress' intent was for the federal law to "occupy the field," and (2) when there is any conflict between state law and federal law. *Id.* Further, there is preemption when a private party cannot comply with state and federal law at the same time, and when "the state law interferes with the purposes intended by Congress." *Id.* *See also* Spiro, *supra* note 3, ¶ 4 (noting that Justice Souter highlighted evidence that state actions such as the Massachusetts law had in fact proved to be a distraction to international efforts on the Burma front).

8. *Crosby*, 530 U.S. at 380 (quoting Foreign Operations, Export, Financing, and Related Programs Appropriations Act, § 570 (c)(1997)). The Court held that Congress required the President to cooperate with member nations of the Association of Southeast Asian Nations (ASEAN) and other countries in developing a comprehensive strategy to bring democracy to Burma. *Id.* The Congress directed the President to encourage a dialogue between the government of Burma. *Id.* Further, Congress required the President to report to Congress on the progress of his diplomatic efforts. *Id.*

9. *See generally* National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998) (holding that the Massachusetts-Burma law was unconstitutional because the statute unconstitutionally impinged on the federal government's exclusive authority to regulate foreign affairs); National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999) (affirming the U.S. District Court's decision because: (1) the Massachusetts-Burma law encroached on the exclusive federal power over foreign relations; (2) Massachusetts was not a market participant; (3) the statute violated the Foreign Commerce Clause; and (4) federal sanctions against Burma preempted the Massachusetts-Burma law).

federal government's power to regulate foreign affairs.[10] The First Circuit Court further found that the statute was in violation of the Foreign Commerce Clause.[11] The National Foreign Trade Council ("NFTC") requested the United States Supreme Court to hear the *Crosby* case. The NFTC argued that the Massachusetts statute case would be an appropriate vehicle for resolving the question of whether state and local governments have the right to forbid trade with companies doing business with selected foreign governments.[12] However, crafting its opinion focusing only the Supremacy Clause and preemption,[13] the U.S. Supreme Court

10. *See Baker*, 26 F. Supp. 2d at 291 (quoting Zschernig v. Miller, 389 U.S. 429, 434-35 (1968), which stated that the Massachusetts-Burma Law has more than an "indirect or incidental effect in foreign countries," and a "great potential for disruption or embarrassment"); *Natsios*, 181 F.3d at 77 (stating that "the conduct of this nation's foreign affairs cannot be effectively managed on behalf of all of the nation's citizens if each of the many state and local governments pursues its own foreign policy."). "Absent express congressional authorization, Massachusetts cannot set the nation's foreign policy." *Id.*

11. *See Natsios*, 181 F.3d at 66-70 (finding that the Massachusetts law is discriminatory and violates the Foreign Commerce Clause because it discriminates against foreign commerce, impedes the federal government's ability to speak with one voice in foreign affairs, and amounts to an attempt to regulate conduct outside of Massachusetts and outside of this country's borders).

12. *Group Opposed to Burma Law Doesn't Oppose Supreme Court Hearing*, ASSOCIATE PRESS NEWSWIRES, Oct. 28, 1999, *available at* WL, APWIRES File, APWIRES 23:28:00. The business group that successfully asked a federal court to strike down a Massachusetts law asked the U.S. Supreme Court to hear the case if it believed that the issues it raised were unsettled. *Id.* NFTC further argued that "[i]t would be highly disruptive to effective international trade if some years in the future the court were to upset these expectations and hold that such laws are constitutional." *Id.* While local selective purchasing laws have gained considerable popularity in the 1990s, none of these laws have ever reached the court. Linda Greenhouse, *Supreme Court Says States May Not Interfere in Foreign Policy*, NEW ORLEANS TIMES-PICAYUNE, June 20, 2000, at A5. Because no U.S. company wanted to be portrayed as a proponent of the white South African government or of anti-Catholic discrimination, no one challenged the local sanctions until *Crosby*. Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 590-91 (1993).

13. *See generally Crosby*, 530 U.S. at 365 (discussing the preemptive powers of the Supremacy Clause). *See* Spiro, *supra* note 3, ¶ 6 (noting that *Crosby* was decided on narrow, non-constitutional grounds); Carter Dougherty, *Supreme Court Strikes Down Massachusetts Foreign Policy Law*, KNIGHT RIDER TRIB. BUS. NEWS, June 20, 2000, *available at* 2000 WL 22623024 (pointing out that the *Crosby* decision was so narrow that it would not affect the entire Washington anti-Burma law); Frank Philips, *Mass. Law on Burma Struck Down*, BOSTON GLOBE, June 20, 2000, at A1 (noting that the Massachusetts-Burma law was "preempted only because there was a federal statute addressing the same policy issue."). The U.S. Supreme Court struck down the Massachusetts law solely on the grounds that it conflicted with an existing federal statute. Doughterty, *supra*. However, the Court avoided

avoided answering the very question NFTC hoped to resolve.[14]

Considering the number of states and cities in the United States that have passed similar laws targeting various foreign nations, the constitutionality of such selective purchasing laws is uncertain in the wake of *Crosby*. This Comment supports the U.S. Supreme Court's decision in *Crosby* and discusses how a state oversteps its boundaries and infringes on the federal government's power by enacting local measures against various foreign nations. Further, this Comment argues that other local sanctions similar to the Massachusetts legislation are unconstitutional following *Crosby* and other considerations of the U.S. Constitution.

Part I of this Comment outlines the history of the Massachusetts-Burma legislation, beginning with a discussion of Burma's political situation. Part I also discusses the enactment of the Massachusetts law, and its application. Part II introduces similar selective purchasing laws passed by cities, municipalities, and states across the United States. Part III analyzes various selective purchasing laws under three constitutional theories. Finally, Part IV proposes that these selective purchasing laws should be struck down as unconstitutional following the *Crosby* decision.

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making a decision that would bar state and local governments from making their own foreign policy. *Id.* This "blanket decision" has resulted in an uncertain fate for thirty-six other state and municipal sanctions that NFTC has already voiced objections about. *Id.*

14. *See* Greenhouse, *supra* note 12, at A5 (stating that "the [Supreme Court] stopped well short of declaring that states have no constitutionally valid means of taking positions with foreign policy implications, as many did during years of protest against the apartheid regime in South Africa"); Walsh, *supra* note 6, at A10 (noting that the U.S. Supreme Court had never ruled on the constitutionality of state and local sanctions against South Africa, and had no guidance in determining the validity of the measures aimed at Burma). The Court rejected claims by Massachusetts that similar laws in the 1980s aimed at forcing changes in South Africa's apartheid system provided a legal defense for the Burma law. Dougherty, *supra* note 13. The Court stated that "[s]ince we never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter." *Crosby*, 530 U.S. at 388. *See also* Spiro, *supra* note 3, ¶ 6 (noting that the Court carefully refused to speculate on how it would have ruled on the laws aimed at South Africa); Patrick J. Thurston, *National Foreign Trade Council v. Natsios and the Foreign Relations Effects Test: Searching for a Viable Approach*, 2000 BYU L. REV. 749, 752 (2000) (stating that the First Circuit Court's analysis failed to provide a definitive rule in determining the scope of connection between federalism and foreign affairs).

I. BACKGROUND OF MASSACHUSETTS-BURMA LEGISLATION

A. Burma's Military Regime

Burma, a small Southeast Asian country, was granted independence from the British in 1948.[15] Burma experienced a brief period of parliamentary democracy when U Nu served as Prime Minister. In 1962, General Ne Win overthrew U Nu in a military coup.[16] Since the coup, the Burmese population has suffered under an oppressive government and the country has become isolated from the rest of the world.[17] In 1990, the people of Burma attempted to change their country's political situation by voting overwhelmingly for Nobel Peace Prize winner Daw Aung San Suu Kyi.[18] Although her National League for Democracy won approximately eighty-two percent of the seats in Parliament, the State Law and Order Restoration Council ("SLORC") thwarted the will of the voters by seizing power and conducting a reign of terror.[19] The government then banned opposition parties and public gatherings and arrested hundreds of activists.[20]

In addition to the pervasive violations of human rights in Burma, the opium and heroin business blossomed under the junta, a group of military officers ruling the country.[21] Burma derives its

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15. Reggie Ba-Pe Jr., *Profile of Burma*, *available at* http://members.tripod.com/Rbape/Bur_prof.htm (last visited June 3, 1998). Myanmar was first united in the year 1044 as a single kingdom. *Id.* After a series of wars in the nineteenth century, the country came under British control. *Id.* From 1887 to 1937, the British governed Burma as a province of India. *Id.* From 1942 to 1945, the Japanese occupied Burma, until British rule was restored in 1948. *Id.*

16. *What's the Story with Burma?*, *available at* http://www.ibiblio.org/freeburma/geninfo.html (last visited Oct. 4, 2000).

17. *Id.* After dissolving the parliament and abandoning the constitution, Ne Win began a policy of extreme isolationism, non-alignment and neutrality. *Id.* He rejected investments by Western and other foreign governments. *Id.* He also nationalized various industries, including banking, import-export trade, and retail business. *Id.* Under the 1974 constitution, Burma became a one-party socialist republic, with Ne Win as president. Ba-Pe Jr., *supra* note 15.

18. *Weld's Opportunity*, BOSTON GLOBE, June 19, 1996, at 14. Daw Aung San Suu Kyi is Burma's most prominent pro-democracy activist and the daughter of assassinated independence hero, Aung San. *What's the Story with Burma?*, *supra* note 16. Suu Kyi was under house arrest in Rangoon from 1989 to 1995. *Id.* Although she was released, she is not allowed to rejoin her political party. *Id.*

19. *Weld's Opportunity*, *supra* note 18, at 14; Ba-Pe Jr., *supra* note 15; *What's the Story with Burma?*, *supra* note 16.

20. Christine MacDonald, *U.S. May Soon Impose Limited Economic Sanctions on Burma*, DALLAS MORNING NEWS, July 28, 1996, at 14A.

21. Philip Bowring, *A Junta Linked to Drug Traffic*, INT'L HERALD TRIB., Jan. 16, 1997, *available at* http://www.ibiblio.org/freeburma/drugs/iht011697.txt. The junta is deeply

income primarily from drugs,[22] and according to some estimates, exports more than sixty percent of the heroin sold in America.[23] Forced labor is a common feature in Burma, and is prevalent among public works, railway construction, and in particular in the forced narcotics agriculture.[24] Although the United Nations Human Rights Commission and other countries firmly condemned the Burmese military regime for human rights abuses and imposed economic sanctions on Burma,[25] these actions have done little to eliminate the problem.[26]

B. Enactment of the Massachusetts Legislation and Its Effects

Suu Kyi, Burmese dissident leader and Nobel Peace Prize winner, prompted the Massachusetts legislature to enact selective purchasing legislation against Burma, and further encouraged international companies to seize investments in Burma until the political system improved.[27] On June 25, 1996, Massachusetts Governor William F. Weld signed the "so-called 'selective purchasing' bill," that Representative Byron Rushing sponsored. This made Massachusetts the first state in the nation to impose economic sanctions against Burma.[28] The Massachusetts

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involved with drug barons because drugs are the junta's lifeline. *Id.* Therefore, foreign investors have difficulty finding partners whose funds are not derived from drug trade. *Id.* As a result, drug trade as well as human rights violations in Burma could become the pivotal factor in U.S. relations with Southeast Asian countries. *Id.*

22. *Id.*

23. *Weld's Opportunity*, *supra* note 18, at 14.

24. Kanbawza Win, *Narcotics, SLORC and Constructive Engagement*, THAILAND TIMES, Oct. 6, 1996, *available at* http://www.ibiblio.org/freeburma/drugs/tt100697.txt.

25. Ba-Pe Jr., *supra* note 15; Thurston, *supra* note 14, at 755-56.

26. Ba-Pe Jr., *supra* note 15.

27. Meg Vaillancourt, *Mass. Becomes First State to Boycott Burma Business*, BOSTON GLOBE, June 26, 1996, at 27. "Critics of economic sanctions say that penalizing Burma's government. . .will only hinder dialogue." MacDonald, *supra* note 20, at 14A. Thomas Valley from the Harvard Institute for International Development said that, "for reasons of our national interest and theirs, it [may be] better to have more trade and more American investment in Burma." *Id.* However, Daw Suu Kyi rejected this view. *Id.* She has called on foreign investors "to wait for a democratic transition before investing in Burma." *Id.*

28. Vaillancourt, *supra* note 27, at 27. *See also* Frank Phillips, *Mass. Poised to Act on Burma; Sanction Bill Said to Interest Weld*, BOSTON GLOBE, June 11, 1996, at 33 (noting that the "selective contracting" bill is directed toward the Burmese military junta, which has been subject to repeated criticism for human rights violations); MacDonald, *supra* note 20, at 14A (noting that today Massachusetts, San Francisco, and seven other U.S. cities have similar "selective purchasing" legislation); *Global Move to Isolate Burma Sparks Pullouts*, TORONTO STAR, Nov. 23, 1996, at E2 (referring to the Massachusetts law as the first example of an American state imposing a sanction against Burma).

legislature modeled the new law after similar legislation that helped to eliminate apartheid in South Africa.[29] The new law prohibited all state entities from purchasing products or services from companies doing business with Burma.[30]

This state law had a significant effect on businesses operating in Burma. Only about a week after the new Massachusetts law became effective, Apple Computers announced that it had closed its operations in Burma, specifically citing the state regulation as the reason for its withdrawal from the market.[31] Other major United States companies followed.[32] Various municipal

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The U.S. cities, counties, or states with anti-Burma laws are (in chronological order of enactment): Berkeley, California; Madison, Wisconsin; Santa Monica, California; Ann Arbor, Michigan; San Francisco, California; Oakland, California; Commonwealth of Massachusetts; Takoma Park, Maryland; Carrboro, North Carolina; Alameda County, California; Boulder, Colorado; Chapel Hill, North Carolina; New York, New York; Santa Cruz, California; Quincy, Massachusetts; Palo Alto, California; Newton, Massachusetts; West Hollywood, California; Brookline, Massachusetts; Somerville, Massachusetts; Cambridge, Massachusetts; Portland, Oregon; and Los Angeles, California. *Free Burma Laws in the U.S.*, *available at* http://www.ibiblio.org/freeburma/boycott/sp/bsp_list. html (last visited Oct. 4, 2000).

29. *Weld's Opportunity*, *supra* note 18, at 14.

30. *Natsios*, 181 F.3d at 46.; Vaillancourt, *supra* note 27, at 27; *Weld's Opportunity*, *supra*, note 18, at 14. "This is more than symbolic action since we expect this bill will affect millions of dollars in state business," Weld stated. Vaillancourt, *supra* note 27, at 27. According to Weld, "[I]t is my hope that other states and the Congress will follow our example and make a stand for the cause of freedom[.]" *Id.*

31. *See* Frank Phillips, *Apple Cites Mass. Law in Burma Decision*, BOSTON GLOBE, Oct. 4, 1996, at B6 (noting that the Apple decision signifies the first time a company has pulled out of Burma as the result of a selective purchasing law); Sarah Jackson-Han, *Apple Computer Ends Business Ties to Burma*, AGENCE FR. PRESSE, Oct. 4, 1996, *available at* 1996 WL 12151772 (noting that the Massachusetts law is stringent, defining "doing business" as including franchise and licensing agreements, distribution arrangements, and contracts to provide goods or services to the Burmese junta); Pat Weinthal, *Boston Computer Society: Apple Drops Burma Business,* October 9, 1996, *available at* http://www.euroburma.com/asia/euro-burma/burmabiz/aoct12d=22oct96-7.html (last visited September 3, 2000) (noting that Apple's sales of Macintoshes to Burma's Ministry of Education were healthy, but that the company would have faced difficulties by "ignoring the political landscape").

32. *Global Move to Isolate Burma Sparks Pullouts*, *supra* note 28, at E2. Motorola and Phillips Electronics quietly joined a corporate pullout from Burma. *Id.* Although Philips stopped direct sales in Burma, it continued to trade with importers. *Id.* Likewise, PepsiCo abandoned its Burmese holdings, but continues to sell products in Burma through distributors. *Id.* The companies that have abandoned Burma include: Ericsson, ARCO, Compaq Computers, Royal Brunei Airlines, Texaco, Heineken, PepsiCo, Motorola, Levi-Strauss, Eddie Bauer, Liz Claiborne, Amoco, Reebok, Petro-Canada, Smith & Hawken, Carlsberg, Hewlett-Packard, Eastman Kodak, Walt Disney, Phillips Electronics, Apple Computer, Anheuser-Busch, Seagrams, Macy's, Oracle

governments throughout the United States have followed Massachusetts in enacting "selective purchasing" legislation, and these laws appear to be assisting in resolving the problem.[33]

Three months after Massachusetts enacted its selective purchasing law, Congress passed a statute imposing "a set of mandatory and conditional sanctions on Burma."[34] The federal Burma policy prohibited any new U.S. investments in Burma, but it permitted companies with existing contracts in Burma to complete their contracts.[35] The law further gave the President the

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Corp., and Columbia Sportswear. *Burma and the Investors in Terror*, *available at* http://www.geocities.com/CapitolHill/3108/ (last visited Dec. 24, 1998).

33. *Global Move to Isolate Burma Sparks Pullouts*, *supra* note 28, at E2. However, many businesses that were leaving Burma had little at stake there. *Id.* For example, Motorola had only one office in Rangoon, employing a single manager. *Id.* Indeed, Burma's economy is so small that Burmese imports from the entire world in 1995 amounted to only $2.1 billion dollars. *Id.*

34. *Crosby*, 530 U.S. at 358. The federal Act provides that "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government. . .sanctions shall be imposed on Burma." Omnibus Consolidated Appropriation Act, Pub. L. No. 104-208, § 579, 110 Stat. 3009-166 (1996). The Act suspends all "bilateral assistance" by the United States to the Government of Burma other than: (1) humanitarian assistance; (2) counter-narcotics assistance, or crop substitution assistance, if the Secretary of State certifies to the appropriate congressional committees; (3) assistance promoting human rights and democratic values. *Id.* The Act also bars every international financial institution from making "any loan or other utilization of funds. . .to or for Burma." *Id.* The Act further limits issuance of "visas to any Burmese government official" except when circumstances require the officials to have visas due to "treaty obligations or to staff the Burmese missions to the United States." *Id.* As "conditional sanctions," the Act grants the President authority "to prohibit. . .United States persons from new investments in Burma, if. . .the [g]overnment of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression. . .against the Democratic opposition." *Id.* The Act requires the President to "report to the Chairmen of the Committee on Foreign Relations, the Committee on International Relations and the House and Senate Appropriations Committees on the following: (1) progress toward democratization in Burma; (2) progress on improving the quality of life of the Burmese people, including progress on market reforms, living [and] labor standards, use of forced labor in the tourism industry, and environmental quality; and (3) progress made in developing the ['multilateral strategy']." Pub. L. No. 104-208, § 570, 110 Stat. at 3009-167.

35. Warren Richey, *States Barred from Boycotting Foreign Governments*, CHRISTIAN SCI. MONITOR, June 20, 2000, at 4. The Act defines "new investment" as "any of the following activities . . . undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma." § 570, 110 Stat. at 3009-167. It is worth noting that "new investment" includes "the entry into a contract providing for the participation in royalties, earnings, or profits in that development." *Id.*

authority to impose sanctions and "to develop a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma."[36]

C. Structure of the Massachusetts Selective Purchasing Law

In 1996, the Massachusetts legislature passed "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)."[37] Massachusetts enacted this law in order to restrict the state and its agencies and authorities from "purchasing goods or services from individuals or companies who engaged in business with Burma."[38] The law further required the Secretary of Administration and Finance to maintain a "restricted purchase list" of all companies engaged in business with Burma.[39] When the NFTC filed its complaint in *Natsios*, there were 346 companies on the restricted purchase list.[40] Forty-four of these companies were U.S. companies.[41]

Under the Massachusetts law, Massachusetts and its agencies and authorities could not contract with companies who were named on the restricted purchase list except in three circumstances: (1) when procurement of the bid was essential and there was no other bid or offer, (2) when the Commonwealth was purchasing certain medical supplies, or (3) when there was no "comparable low bid or offer."[42] The law defined a "[c]omparable

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36. *Crosby*, 530 U.S. at 359. The Act provides "multilateral strategy" in which "the President shall seek to develop. . .a comprehensive, multilateral strategy to bring democracy to and improve human rights practices. . .in Burma." § 570, 110 Stat. at 3009-166. The President is to coordinate such strategy "with members of ASEAN and other countries having major trading and investment interests in Burma." *Id.* The effort is to include "the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma." *Id.* at 3009-167.

37. Ch. 130, 1996 Mass. Acts 239 (codified as MASS. GEN. LAWS ch. 7, §§ 22G-M, 40F ½ (1996)).

38. *Natsios*, 181 F.3d at 45; MASS. GEN. LAWS ANN. ch. 7, § 22GM (West 2000). The Massachusetts statute defines "state agency" as "all awarding authorities of the commonwealth, including, but not limited to, all executive offices, agencies, departments, commissions, and public institutions of higher education, and any office, department or division of the judiciary." *Id.* The statute also lists thirty-six entities as "state authority." *Id.*

39. *Natsios*, 181 F.3d at 45; MASS. GEN. LAWS ANN. ch. 7, § 22J(a) (West 2000). The secretary is to consult United Nations reports and other reliable sources, and place the name of any person who declared that he meets the criteria for being on the restricted purchase list. *Id.* § 22J(b).

40. *Natsios*, 181 F.3d at 47.

41. *Id.*

42. *Id.* at 45-46; MASS. GEN. LAWS ANN. ch. 7, §§ 22H-I (West 2000). "A state agency may purchase medical supplies intended to preserve or prolong life or to cure, prevent, or ameliorate diseases, including hospital, nutritional, diagnostic, pharmaceutical and non-prescription products specifically

low bid offer" as an offer equal to or less than ten percent above a low bid from a company on the restricted purchase list.[43] Before a company could bid on a Massachusetts contract, the law required the company to provide a sworn declaration disclosing any business the company was doing with Burma.[44] The law effectively forced businesses to choose between doing business in Burma or with Massachusetts.[45]

II. SIMILAR LOCAL MEASURES AGAINST BURMA AND OTHER FOREIGN COUNTRIES

The circumstances surrounding the enactment of the anti-Burma selective purchasing law are somewhat similar to those of the anti-South African movement during the apartheid era.[46] Very few individuals thought that such laws would have any impact when the first South Africa selective purchasing law was passed by the city of Madison, Wisconsin, in 1976.[47] However, a number of states, cities, and municipalities followed the Madison movement and enacted laws barring companies with investments in South Africa from participating in contract bids.[48] The anti-South African laws resulted in withdrawal of major U.S. companies, such as Coca-Cola, IBM, and General Motors, from the

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manufactured to satisfy identified health care needs . . . ." *Id.* § 22I. Further, if a person is providing only medical supplies to persons in Burma, then the supply of goods or equipment to the commonwealth by that person is also exempted. *Id.* The exemption does not apply when the nature of any person's business dealings in Burma includes both medical and non-medical supplies. *Id.* The statute also excludes a person with operations in Burma "for the sole purpose of reporting the news, providing goods or services for the provision of international telecommunications." *Id.* § 22H(e).

43. *Natsios*, 181 F.3d at 46; § 22H.

44. *Natsios*, 181 F.3d at 46; § 22H(c). A state agency or authority must provide ample notice of the requirements of this section. § 22H(c). Prior to reviewing responses to bids or entering into any contract, the awarding state authority must obtain a statement declaring the nature and extent of a person's activities. *Id.* From this declaration, a person may be subject to inclusion on the restricted purchase list. *Id.* Any contract entered into in violation of these sections is void. *Id.* § 22L.

45. *Natsios*, 181 F.3d at 46. "Selective purchasing laws are designed to force companies to choose between bidding on often-lucrative state and local government contracts and operating in target countries." Jim Lobe, *Rights-Trade: Multinationals Win U.S. Court Victory over Activists*, INTER PRESS SERVICE, June 24, 1999, *available at* 1999 WL 5949362, at *5.

46. *Selective Purchasing: A Brief History*, *available at* http://www.geocities.com:0080/CapitolHill/3108/bsp_history.html (last visited Oct. 4, 2000); Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 378 (1999).

47. *Selective Purchasing: A Brief History*, *supra* note 46 (noting that the South Africa purchasing laws were enacted by nearly 150 cities, counties, and other local governments by 1990).

48. Lobe, *supra* note 45.

South African market.[49] Eventually, 164 cities and twenty-five states across the United States passed similar laws, and the anti-apartheid campaign effectively encouraged peaceful change to South Africa.[50] "[Sanctions] significantly dictated the form, substance, timing and pace of changes in South Africa."[51]

Since the anti-apartheid movement, a number of purchasing laws have been enacted, targeting certain foreign countries.[52] For example, the city of Berkley, California enacted a law in 1997 aimed at loosening China's grip on Tibet.[53] Since 1985, other cities and municipalities have enacted selective purchasing laws targeting Northern Ireland to enforce the "MacBride Principles," which focuses on eliminating discrimination against Roman Catholic workers in a primarily Protestant country.[54] The objective of these laws is to ensure that foreign enterprises provide fair and equal treatment to Roman Catholics.[55] In 1998, New York, California, Pennsylvania and other states and cities enacted laws compelling Swiss banks and insurance companies to reach a settlement with Nazi Holocaust victims and their families.[56] Other local selective purchasing laws have targeted such countries as Indonesia, Nigeria, Sudan, Saudi Arabia, Egypt, Pakistan, Turkey,

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49. *Id.*

50. Richey, *supra* note 35, at 4. The Massachusetts-Burma law was patterned after the South African purchasing laws enacted to encourage peaceful change in South Africa. *Id.*

51. *See Selective Purchasing: A Brief History*, *supra* note 46 (quoting a senior South African official, Les De Villiers, as stating that the anti-apartheid sanctions were successful).

52. *Id.*

53. Dougherty, *supra* note 13. The U.S. Supreme Court decision in *Crosby* affects only limited areas of the Massachusetts statute because of the ruling's narrow focus on sanctions. *Id.* Furthermore, the decision might not impact other selective purchasing laws to the extent that they do not conflict with the federal Burma law. *Id.* For example, the China law passed by Berkeley, California, might pass constitutional muster. *Id.*

54. John M. Kline, *Continuing Controversies Over State and Local Foreign Policy Sanctions in the United States*, PUBLIUS, March 22, 1999, at 111, *available at* 1999 WL 32443537. One of the selective purchasing laws involving Northern Ireland derived from the South Africa experience. *Id.* Four Irish and American human-rights activists, including Nobel Peace prize winner Sean McBride, formulated principles of business practices (the "McBride Principles"). *Id.* Companies were to observe these principles in Northern Ireland in order to eliminate discrimination and provide fair and equal treatment for Roman Catholic workers, a minority population within the country. *Id.* Subsequent to the introduction of the MacBride Principles, seventeen states and forty municipalities adopted provisions dealing with religious discrimination in Northern Ireland. Kline, *supra* note 54, at 111. New York City alone compelled thirty-eight companies to sign a fair employment pledge to secure business with the city. *Id.*

55. *Id.*

56. Lobe, *supra* note 45, at 5.

Tibet, Cuba, North Korea, Iraq, Morocco, Laos, and Vietnam.[57]

In 1995, the city of Berkley, California passed the first anti-Burma purchasing law in the United States.[58] The cities of San Francisco and Oakland, California followed Berkley in the anti-Burma movement.[59] The number of cities, states, and municipalities enacting selective purchasing laws targeting Burma has continued to increase.[60] Twenty-two jurisdictions as well as Massachusetts had enacted anti-Burma legislation as of the date of the *Crosby* decision.[61]

III. LEGAL ANALYSIS OF THE UNCONSTITUTIONALITY OF LOCAL SANCTIONS AGAINST FOREIGN COUNTRIES

In order to discuss the constitutionality of various selective purchasing laws enacted by various jurisdictions in the United States, three areas addressed by the District Court in *Baker*, the First Circuit Court of Appeals in *Natsios* and the U.S. Supreme Court in *Crosby* should be analyzed. The three areas are preemption, foreign commerce power, and foreign affairs power. Part A contains an analysis based on the Supremacy Clause and preemption theories. Part B discusses three aspects of foreign commerce power. Finally, Part C addresses the analysis of selective purchasing laws under the principles of the foreign affairs power.

A. Preemption under the Supremacy Clause

"A fundamental principle of the Constitution is that Congress has the power to preempt a state law" based on the Supremacy Clause.[62] A federal law can preempt a state law in two ways:

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57. Kline, *supra* note 54, at 111. States and localities have debated over whether to impose sanctions on many other nations, charging them with various human rights violations. *Id.* While some cities had proposed sanctions, state legislatures have not yet passed these proposals, with the exception of the anti-Burma laws. *Id.* Such local sanctions can complicate U.S. foreign policy, particularly because the federal government has been criticized for its increased use of international sanctions. *Id.*

58. *Selective Purchasing: A Brief History*, *supra* note 46.

59. *Free Burma Laws in the U.S.*, *supra* note 28.

60. *Selective Purchasing: A Brief History*, *supra* note 46.

61. Walsh, *supra* note 6, at A10. "The most successful of all these efforts, however, is the Free Burma movement . . . . New Free Burma laws continue to be introduced nearly every month." *Selective Purchasing: A Brief History*, *supra* note 46. The movement has since spread outside of the United States. *Id.* Marickville, a suburb of Sydney, passed the first Burma selective purchasing law in Australia on March 17, 1998. *Id.*

62. Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000). "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (stating that

express preemption and implied preemption.[63] Part A is divided into three sections. Sections 1 and 2 discuss the basic ways in which federal preemption occurs, by express preemption and implied preemption respectively. Section 3 explains how the *Crosby* court applied the preemption theory.

1. *Express Preemption*

Express preemption occurs where Congress expressly preempts a state law with "clear and manifest" language in the text of a federal law.[64] Without a clear manifestation of intent to supersede the exercise of state power, it is presumed that Congress did not intend to override state law.[65] In *Crosby*, the Court took the view that although explicit preemptive language was absent, there was an implied preemption.[66]

2. *Implied Preemption*

In the absence of clear language indicating congressional

"[t]he government of the United States . . . though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land . . .").

63. *See Crosby*, 530 U.S. at 373 (finding no express preemption in the federal law, the Court applied the standard of implied preemption). *See also* Hines v. Davidowitz, 312 U.S. 52, 68 n.20 (1941) (stating that "[f]or when the question is whether a Federal act overrides a state law, the entire scheme of the statute must . . . be considered, and that which needs must be implied is of no less force than that which is expressed") (citation omitted); Jones v. Rath Packing, 430 U.S. 519, 525 (1977) (stating that a federal enactment supersedes a state law when "Congress' command is explicitly indicated in the statute's language or implicitly contained in its structure and purpose.").

64. *See Natsios*, 181 F.3d at 73. *See also Jones*, 430 U.S. at 525 (holding that the Federal Fair Packaging and Labeling Act preempted a California statute and regulation governing the net weight labeling of flour and meat). *Id.* at 543. The federal statute contained clear language prohibiting imposition of any packaging and labeling requirements different from those in that Act. *Id.* at 530. Because the state law's labeling requirement was different from the federal requirement, the Court found that the federal Act preempted the California statute. *Id.* at 531-32.

65. Schwartz v. Texas, 344 U.S. 199, 202-03 (1952). *See, e.g.*, New York State Dept. of Soc. Servs. v. Dublino, 413 U.S. 405, 413-17 (1973) (holding that the Federal Work Incentive Program did not supersede New York Work Rules when the federal statute contained no "clear manifestation of congressional intention" to preempt state programs); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 70 (1993) (holding that the Container Conventions did not preempt Tennessee's sales tax on the lease of cargo containers in international shipping because the Court found no congressional intent to do so).

66. *Crosby*, 530 U.S. at 387-88. The Court rejected the state's argument that Congress implicitly approved the Massachusetts-Burma law by not expressly superseding it. *Id.* The Court concluded that such an implicit permission is unwarranted because "the silence of Congress is ambiguous." *Id.*

intent to preempt the state law, the question becomes whether the federal law implicitly preempts the state law.[67] In *Hines v. Davidowitz*, the Court stated that implied preemption occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[68] In cases where there is a conflict between state and federal law, the Act of Congress supersedes the state law, irrespective of whether the state exercised its uncontroverted powers.[69] Furthermore, implied preemption occurs when there is a concrete and actual conflict between state and federal laws rendering mutual compliance impossible.[70] In either case, federal law governs.[71]

3. *Implicit Preemption in Crosby*

The U.S. Supreme Court's decision in *Crosby* to invalidate the Massachusetts selective purchasing law hinged on the theory of implied preemption theory due to the fact that the federal and state Burma laws were concurrently in force.[72] Even though there

67. *See South-Central Timber Dev.*, 467 U.S. at 91 (relying generally on White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983), the state argued the implicit approval theory).

68. *Hines*, 312 U.S. at 67. The Court declared that the Federal Alien Registration Act preempted the Pennsylvania Alien Registration Act because "the Pennsylvania law stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67-68. The Court stated that a state could not conflict or interfere with federal law. *Id. See, e.g.*, Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 69 (1993) (finding that Tennessee's sales tax, generally applicable without discrimination, did not impede the federal objectives expressed in the Container Conventions or other federal laws); United States v. Locke, 529 U.S. 89, 109 (2000) (quoting California v. ARC America Corp., 490 U.S. 93, 100-01 (1989), that a conflict preemption occurs when it is impossible to comply with both state and federal law, or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress"); *Jones*, 430 U.S. at 543 (holding that the California statute and regulation governing the labeling of packaged food frustrated the congressional purpose of facilitating value comparisons by the consumer).

69. *Hines*, 312 U.S. at 66. *See Jones*, 430 U.S. at 525 (quoting United States v. Bass, 404 U.S. 336, 349 (1971) stating that preemption requires a clear congressional mandate in order to preserve the delicate federal-state separation of powers and avoid unintentional or unnecessary encroachment on states by the Courts or Congress).

70. *Locke*, 529 U.S. at 109; Hillsborough County v. Automated Med. Lab., 471 U.S. 707, 713 (1985). The court upheld county ordinances governing collection of blood plasma that allegedly imposed more stringent requirements than the federal regulations promulgated by the Food and Drug Administration. *Hillsborough County*, 471 U.S. at 720-22. The absence of a clear mandate of preemption by Congress and the lack of conflict between compliance with federal or state regulations precluded a finding of preemption. *Id.*

71. *Locke*, 529 U.S. at 109.

72. *See Crosby*, 530 U.S. at 363 (addressing "whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to

was no clear language in the federal Burma Act expressly preempting the state law, the Court found a direct conflict between the Massachusetts-Burma statute and the federal Burma Act. The Court found that the Massachusetts-Burma measures undermined "the intended purpose and natural effect" of the federal Burma Act.[73] Furthermore, the Court rejected Massachusetts' argument that Congress implicitly permitted the state Burma measures by failing to expressly preempt state and local sanctions.[74]

In addition, in the case of the Massachusetts-Burma law, Congress had passed federal sanctions against Burma three months after the enactment of the Massachusetts-Burma law.[75] Expedient federal action manifested a strong governmental interest in disseminating democratic values throughout Southeast Asia, especially the totalitarian state in Burma.[76] By taking such action, Congress made the issue of Burma a matter of national concern.[77] Therefore, upon enactment of federal Burma measures, sanctions against Burma were no longer a local concern.[78] Once Congress had taken the Burma issue in its hand and decided to "occupy the field," the Massachusetts law in the same area was implicitly preempted.[79]

B. Foreign Commerce Power

The Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[80] Ostensibly, the Framers intended

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purchase goods or services from companies doing business with Burma, is invalid under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives").

73. *Crosby*, 530 U.S. at 374. The Court found that the Massachusetts law impeded three provisions of the federal Act:

> (1) [the federal Act's] delegation of effective discretion to the President to control economic sanctions against Burma, (2) [the Act's] limitation of sanctions solely to U.S. persons and to new investment, and (3) [the Act's] directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.

Id.

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

75. *See* Jennifer Loeb-Cederwall, Note, *Restrictions on Trade with Burma: Bold Moves or Foolish Acts?*, 32 NEW ENG. L. REV. 929, 944 (1998).

76. *Id.*

77. *Id.*

78. *Id.*

79. *See Crosby*, 530 U.S. at 372 (quoting California v. ARC America Corp., 490 U.S. 93, 100 (1989)).

80. U.S. CONST. art. I, § 8, cl. 3. *See generally* United States v. Lopez, 514 U.S. 549, 552-53 (1995) (holding that the federal Gun-Free School Zones Act fell outside the power of Congress under the Commerce Clause because possession of guns in local school zones was not an economic activity that had a substantial effect on interstate commerce); Japan Line, Ltd. v. County of Los

that Congress have plenary power over foreign commerce in order to guard against possible economic Balkanization among the several states.[81] This Part focuses on three elements of federal foreign commerce power. Section 1 discusses the discriminatory nature of selective purchasing laws. Section 2 examines whether there are legitimate local purposes in selective purchasing laws. Section 3 analyzes whether these laws interfere with the federal government's power to speak with one voice.

1. Discrimination against Foreign Commerce

Under the principles of the Commerce Clause, the first step in analyzing any law subject to Commerce Clause scrutiny is to determine whether the state law discriminates against foreign commerce on its face,[82] or regulates evenhandedly with only "incidental" effects on foreign commerce.[83] If a state law is discriminatory against interstate commerce on its face, it is per se invalid.[84]

Angeles, 441 U.S. 434, 453-54 (1979) (striking down the California property tax on Japanese vessels exclusively used in foreign commerce); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (stating that "[t]his [commerce] power, like all others vested in [C]ongress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than are prescribed in the [C]onstitution").

81. *See* Oregon Waste Systems, Inc. v. Dept. of Envtl. Quality of Oregon, 511 U.S. 93, 98-99 (1994) (stating as to balkanization that "[t]his principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable economic units," (quoting, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 537, 538 (1949)). The word "balkanize" is defined as "to divide (a country, territory, etc.) into small, often quarrelsome states." *Random House Webster's College Dictionary* 105 (1992).

82. Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Fin., 505 U.S. 71, 81 (1992). The Court invalidated Iowa's income tax scheme which allowed a deduction for dividends received from domestic subsidiaries but not for dividends received from foreign subsidiaries. *Id.* at 82. Finding that the Iowa statute was facially discriminatory against foreign commerce, the Court held that it violated the Foreign Commerce Clause. *Id.*

83. Zschernig v. Miller, 389 U.S. 429, 434-35 (1968). *See Oregon Waste Systems, Inc.*, 511 U.S. at 99 (applying the same standard to interstate commerce).

84. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575-76 (1997) (striking down the Maine property tax exemption statute in violation of the dormant commerce clause). Finding that the law discriminates against interstate commerce on its face, the Court focused on the fact that the Maine law specifically distinguished between interstate and intrastate clientele. *Id.* at 576. The law singled out businesses serving in state and provided beneficial tax treatment to these businesses while penalizing businesses serving interstate. *Id. See also Oregon Waste Systems, Inc.*, 511 U.S. at 99-100 (invalidating the Oregon waste surcharge imposed on solid waste generated out-of-state). Rejecting the state's argument that the surcharge recouped the costs of disposing of out-of-state waste in Oregon, the Court found that such surcharge penalty was facially discriminatory. *Id.* at

In *National Foreign Trade Council v. Natsios*, the court found that one of the objectives of the Foreign Commerce Clause is to prevent enactment of a state law that limits trade with a specific foreign nation.[85] "Foreign commerce" within the meaning of the Constitution includes not only regulating the conduct of foreign entities but also limiting the conduct of American entities doing business overseas.[86] In *Natsios*, the Court placed the Massachusetts-Burma statute under the *Container Corp. v. Franchise Tax Board* analysis and held that the state statute clearly had "more than just foreign resonances" and thus was discriminatory on its face.[87] Applying this standard, local selective purchasing laws are generally discriminatory on their face.

Another inquiry in analyzing the constitutionality of state selective purchasing laws is whether such state statutes have more than "indirect or incidental effect in foreign nations."[88] In *Natsios*, the court invalidated the Massachusetts-Burma law, concluding that the sole purpose of that law was to sanction Burma in order to pressure the Burmese government to change its domestic policies.[89] In other words, the very objective of the law was to bring about change in the foreign government, and thus it had more than an indirect or incidental effect. The Burma law was therefore held unconstitutional.

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100. *See also* Fulton Corp. v. Faulkner, 516 U.S. 325, 347 (1996) (finding that the North Carolina's intangibles tax on a fraction of the value of corporate stock owned by state residents was in violation of the Commerce Clause). Favoring domestic corporations over foreign competitors, the intangible tax facially discriminated against interstate commerce. *Id.* at 333.

85. *Natsios*, 181 F.3d at 67. *See also* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

86. *Natsios*, 181 F.3d at 68.

87. *Id.*

88. *See Baker*, 26 F. Supp. 2d at 291 (holding that the Massachusetts-Burma statute had more than an "indirect or incidental effect in foreign countries" and a "great potential for disruption or embarrassment").

89. *Natsios*, 181 F.3d at 51. The *Natsios* court held that the invalidation of the Massachusetts-Burma law was dictated by the combination of factors present in that case. *Id.* These factors were:

> (1) the design and intent of the Massachusetts-Burma law was to affect the affairs of a foreign nation; (2) because Massachusetts had two billion dollars in total annual purchasing power by state authorities and agencies, the state was able to affect the affairs of a foreign nation through the anti-Burma law (and as a result, Massachusetts successfully drove entities out of Burma); (3) such effects on Burma, caused by the Massachusetts-Burma law, may intensify if Massachusetts becomes the leader for other states and governments to follow the same policy against Burma; (4) the Massachusetts-Burma law has resulted in serious protests from other nations, such as ASEAN, and the European Union (EU); and (5) Massachusetts had chosen a course divergent in at least five ways from the federal law, raising the prospect of embarrassment for the United States.

Id. at 53.

The *Natsios* analysis is applicable to other selective purchasing laws passed by cities and states across the United States, whether targeting Burma or some other nation. The sole purpose of these laws is to influence the behavior of targeted foreign nations with disfavored policies by pressuring and sanctioning them.[90] Therefore, these laws plainly fail under the incidental or indirect effect test. Further, with the proliferation of these laws across the United States, serious interruption of foreign trade is inevitable. In fact, the Massachusetts-Burma law caused serious protests from other countries, ASEAN, and the European Union and subjected the United States to "disruption and embarrassment."[91] By placing other local selective purchasing laws under the *Natsios* analysis, it is likely that these laws will be found discriminatory on their face, and they will also be found to have substantial effects on foreign commerce. Therefore, they will also likely be found unconstitutional.

2. No Legitimate Local Purpose

In *Pike v. Bruce Church*, the U.S. Supreme Court examined the Arizona Fruit and Vegetable Standardization Act which prohibited a commercial farming company from transporting cantaloupes from its ranch in Arizona to a nearby city in California without proper packing arrangements approved by the state.[92] In invalidating the state law, the Court stated: "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit."[93] If a statute promotes a legitimate local purpose, the question then becomes one of degree.[94] Furthermore, "the extent of the burden to be tolerated will hinge on the very nature of the local interest involved"[95] and whether there are reasonable

90. *See Natsios*, 181 F.3d at 53-54 (asserting that the Massachusetts law encourages other municipalities to enact similar laws in order to place greater pressure on the Burmese government).

91. *Natsios*, 181 F.3d at 54. *See Zschernig*, 389 U.S at 435-37 (holding that the Oregon probate statute barring aliens not residing in the United States from taking property had "a great potential for disruption or embarrassment").

92. Pike v. Bruce Church, Inc., 397 U.S. 137, 138 (1970).

93. *Id.* at 142 (quoting Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)). In *Pike*, the Court found that the purpose of the Arizona statute was to protect the Arizona consumers from contaminated and unfit goods and to enhance the reputation of Arizona cantaloupe growers. *Id.* at 143. While recognizing that the state was pursuing a legitimate local interest, the Court nevertheless struck down the state statute because it placed undue burden on commerce. *Id.* at 145.

94. *Id.* at 142.

95. *Id.*

nondiscriminatory alternatives that would adequately protect that interest.[96]

Because the Massachusetts-Burma law far exceeded the threshold level of involvement permitted for individual states, the First Circuit in *Natsios* refused to balance the state interest against the harm resulting from state intrusion on foreign commerce.[97] Nevertheless, there seems to be no such local interest in the Massachusetts-Burma law. As stated above, the goal of the Massachusetts-Burma law was to express the state's moral views regarding conditions in Burma to encourage other jurisdictions or other countries to take similar action.[98] As such, the Massachusetts-Burma law effectuates no legitimate state interest. Other selective purchasing laws enacted by states and municipalities are analogous to the Massachusetts-Burma law in that these laws serve no legitimate public interest except for expressing disapproval for the targeted nations' certain behaviors and policies.

A state could argue that the procurement of goods and services for that state is a state concern. However, the *Zschering* decision indicates otherwise.[99] In *Zschering*, the Court analyzed an Oregon law that required the property of an intestate to be confiscated by the state if the decedent's heirs were not residents of the United States or its territories.[100] While recognizing that the descent and distribution of estates is traditionally a state concern and within the state's power, the *Zschering* court held that the Oregon law must nonetheless yield to the treaty between Germany and the United States because the state law impaired the effective exercise of the nation's foreign policy.[101]

3. *Interference with Federal Power to Speak with One Voice*

Foreign commerce is preeminently a matter of national concern because federal uniformity is essential.[102] As such, "the federal government must speak with one voice when regulating

96. *Oregon Waste Systems, Inc.*, 511 U.S. at 101.

97. *Natsios*, 181 F.3d at 52. The Court asserted that the *Zschernig* decision set forth the existence of the threshold level the states may not exceed in their involvement in foreign affairs. *Id.*

98. Vaillancourt, *supra* note 27, at 27; *Natsios*, 181 F.3d at 46, 52.

99. *See generally Zschernig*, 389 U.S. at 440 (noting that a state regulation must "give way" when the state exceeded a threshold level of involvement in and impact on foreign affairs).

100. *Id.* at 430.

101. *Id.* at 440.

102. *See Japan Line, Ltd.*, 441 U.S. at 448 (quoting Board of Trustees v. United States, 289 U.S. 48, 59 (1933), stating that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.").

commercial relations with foreign governments."[103] In *Japan Line Ltd.*, the Supreme Court invalidated a California law by declaring that state law may impair federal uniformity by imposing a state tax on the instrumentalities of foreign commerce.[104] Applying this well-established principle to local selective purchasing laws it is likely that these laws will also be found to be intrusive to the exclusive federal power over external affairs[105] because they impair federal uniformity[106].

Not only do local selective purchasing laws create an impermissible intrusion on federal power under a constitutional analysis, they also raise significant concerns in terms of international law.[107] By setting forth its own foreign policy, such local laws create a tremendous burden on thousands of U.S. and foreign businesses.[108] When each of the hundreds of municipalities, in addition to the fifty states, creates a foreign policy of its own, the attacked companies will be forced to deal with heightened unpredictability, and sacrificed business opportunities outside the United States.[109]

C. *Foreign Affairs Power*

The Constitution contains explicit language prohibiting states from engaging in certain acts.[110] These constitutional provisions

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103. *Id.* at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-87 (1976)).

104. *Id.* at 448. The Customs Convention on Containers signed by the United States and Japan reflected a national policy to remove impediments to the use of containers in international traffic. *Id.* at 452-53. Based on this federal policy, the Court found that the California tax would "frustrate attainment of federal uniformity." *Id.* at 453.

105. *Natsios*, 181 F.3d at 50.

106. *Japan Line, Ltd.*, 441 U.S. at 448.

107. Loeb-Cederwall, *supra* note 75, at 930. The General Agreement on Tariffs and Trade (GATT) is a treaty under the meaning of Article VI of the Constitution, and the members of GATT created the World Trade Organization (WTO). *Id.* at 958-59. One of the subagreements made in 1994 was the Government Procurement Agreement (WTO-GPA), which requires the member countries to observe "non-discriminatory, fair, and transparent procedures" when they purchase certain goods. *Id.* at 959. Receiving the fierce protests from Japan and the EU, the Massachusetts-Burma law may be found in violation of WTO-GPA because it uses a discriminatory method of government procurement. *Id.* at 960-62.

108. Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443, 446 (1998). The authors point out that companies have traditionally structured their foreign operations to comply with the laws and regulations of the federal government. *Id.* However, the proliferation of state and municipal sanctions force companies to consider separate foreign policy concerns. *Id.*

109. *Id.*

110. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal . . ." U.S. CONST. art. I, § 10, cl. 1. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on

vest exclusive power in the federal government over its foreign affairs.[111] Thus, even if federal law does not preempt local selective purchasing law, and even if the local law does not violate the Commerce Clause, it is still unconstitutional if it infringes on foreign affairs power.[112]

In striking down the Alien Registration Act adopted by the commonwealth of Pennsylvania, the U.S. Supreme Court in *Hines* stated: "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."[113]

Perhaps the strongest statement regarding exclusivity of foreign affairs power was made in the *Zschernig* case. At issue in *Zschernig* was an individual's right to inherit property from an Oregon decedent's estate.[114] Recognizing that the Oregon law did not grossly intrude upon the federal domain, the Court nevertheless held the law unconstitutional because it had a direct impact upon foreign relations and might adversely affect federal power to deal with such issues.[115] Compared to the law at issue in *Zschernig*, local selective purchasing laws intrude much further on the federal domain in that these laws are designed to have "disruptive impact upon foreign relations."[116] Furthermore, as in the Massachusetts-Burma case, the United States is likely to come under attack by various foreign trade partners, causing "disruption and embarrassment" to the nation.[117]

IV. PROPOSAL

Selective purchasing laws aimed at certain foreign countries have become such common tools for state and local governments that one expert has even called them "the democratization of foreign policy run amok."[118] States and municipalities are using

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Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws . . . ." *Id.* art. I, § 10, cl. 2. "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* art. I, § 10, cl. 3.

111. *Natsios*, 181 F.3d at 49.

112. Loschin & Anderson, *supra* note 46, at 400.

113. *Hines*, 312 U.S. at 63.

114. *See Zschernig*, 389 U.S. at 430 (detailing the issue presented in a case concerning disposition of the estate of a resident of Oregon who died intestate, with his sole heirs being residents of East Germany).

115. *Id.* at 441.

116. *Natsios*, 181 F.2d at 51 (agreeing with the district court's finding that the Massachusetts law was unconstitutional under *Zschernig*).

117. *Id.*

118. *See* Paul Blustein, *Thinking Globally, Punishing Locally; States, Cities*

economic sanctions as weapons. These actions are a serious threat to the authority and ability of the United States to effectively execute its foreign policy.[119] To return power over foreign policy and trade to the federal government according to the *Crosby* decision, the U.S. Supreme Court should strike down local selective purchasing laws as unconstitutional. In so doing, the Court must definitively state that local sanctions against foreign nations conflict with the principles of federalism. Local selective purchasing laws intrude upon the exclusive power of the federal government to speak with one voice and as one nation.[120]

Because no one ever challenged anti-apartheid statutes against South Africa in the 1980s, the Court has very little case law on which to rely in this field.[121] Supporters of the Massachusetts-Burma law argue that the law was inspired by the state's intentions to bring about change and democracy in Burma, a country plagued with deplorable human-rights conditions and a brutal military regime.[122] Similarly, advocates of selective purchasing laws in other state and local governments claim that those laws also carry laudable motives.[123] However, there are other ways in which local governments can attain the same objective. For example, in the case of the Massachusetts-Burma law, Massachusetts could still exert pressure on companies doing business with Burma without placing conditions on purchasing

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Rush to Impose Their Own Sanctions, Angering Companies and Foreign Affairs Experts, WASH. POST, May 16, 1997, at G1 (quoting Richard N. Haass, Director of Foreign Policy Studies at the Brookings Institution). While detailing the proliferation of economic sanctions imposed by state and local governments, the author points out the fear raised among foreign affairs experts and lobbyists. *Id.* They fear that "a crazy quilt of local legislation" may threaten the coherence of U.S. foreign policy and damage U.S. economic interests. *Id.* Further, because of these local sanctions, multinational companies face expensive choices between forgoing profitable contracts with government agencies or giving up business opportunities in potentially lucrative world markets. *Id.* Even though a poor country like Burma may not present great business opportunities for most multinational companies, the author warns that penalties targeting fast-growing and large economies such as China or Indonesia could hurt the companies badly. *Id.*

119. *See* Fenton, *supra* note 12, at 563 (discussing economic sanctions as "the weapons of choice in maintaining international order" and noting that these local measures "threaten to undermine the authority and effectiveness of United States' foreign policy.").

120. *Japan Line, Ltd.*, 441 U.S. at 449.

121. *See* Loeb-Cederwall, *supra* note 75, at 936 (noting how local South African statutes went unchallenged in the 1980s and explaining that the debate over the statutes ended after President Reagan signed the Executive Order 12,532 and Congress enacted the Anti-Apartheid Act of 1986).

122. *Crosby*, 530 U.S. at 368.

123. Blustein, *supra* note 118, at G1. Supporters of local sanctions against foreign nations state that states and cities have a right to spend their money "as they see fit." *Id.* They further argue that local governments have "a moral duty to act" when the federal government fails to do so. *Id.*

practices.[124] Massachusetts could withdraw state and local pension funds and other investments in companies that do business with Burma.[125] Alternatively, rather than impose economic sanctions and isolate those already poverty-stricken countries, states and municipal governments could encourage U.S. business activity in those countries. By doing so, states and municipal governments could not only build closer ties with those countries, but also advocate democracy, fulfilling the same goals as selective purchasing legislation.[126]

CONCLUSION

Selective purchasing laws enacted by states and other local jurisdictions are unconstitutional, and therefore invalid under the rulings of *Baker*,[127] *Natsios*,[128] and *Crosby*.[129] The Supremacy Clause confers the highest power upon the federal government in areas in which the Constitution authorizes it to act.[130] As such, federal measures should preempt local selective purchasing laws under the theory of express or implied preemption.[131]

Even if there is no existing federal legislation which parallels local selective purchasing laws, local measures violate federal foreign commerce power. As the *Natsios* court found, selective purchasing laws are discriminatory on their face because they are designed to place restrictions on commerce with specific foreign counties.[132] Further, the overwhelming protests the Massachusetts-Burma law received from a number of U.S. trading partners support the conclusion that selective purchasing statutes are likely to create more than incidental effects on foreign commerce.[133]

Selective purchasing laws are unconstitutional because they serve no legitimate local interest.[134] The primary objective of selective purchasing laws is to express disapproval of certain

124. Brian Knowlton, *Justices Reject State Business Ban on Burma*, INT'L HERALD TRIB., June 20, 2000, at 1 (quoting Georgetown University Professor Robert Stumberg who co-wrote a brief in support of the Massachusetts law).

125. Walsh, *supra* note 6, at A10; Greenhouse, *supra* note 12, at A5.

126. *See* William H. Lash III, *State and Local Trade Sanctions: A Threat to U.S. Interests*, U.S.A. TODAY MAGAZINE, November 1, 1998, at 18 (noting Chinese dissent Li Lu's statement that "[b]usiness is the ultimate force for democratic change").

127. 26 F. Supp. 2d 287 (D. Mass. 1998).

128. 181 F.3d 38 (1st Cir. 1999).

129. 530 U.S. 363 (2000).

130. U.S. CONST. art. VI, cl. 2.

131. *See supra* notes 63-70 and accompanying text for a discussion of the theory of express and implied preemption.

132. *Natsios*, 181 F.3d at 68.

133. *Id.* at 54.

134. *Id.*

behaviors or government policies in particular countries.[135] This kind of local purpose is unlikely to reach the level of legitimacy and justification required under the analysis of the Foreign Commerce Clause.[136] Most importantly, local selective purchasing laws overstep the boundaries traditionally reserved to the federal government and limit the ability of the federal government to speak with one voice.[137] By creating their own foreign policy against certain countries with whom they disagree, states and municipalities hinder effective national foreign policy.[138] Striking down local selective purchasing laws under the principles of federalism will return power over foreign policy and trade back to the federal government. Only then will the United States speak with one clear voice.

135. *Id.* at 77.
136. *Id.*
137. *Crosby*, 530 U.S. at 366.
138. *Id.* at 368.