2002

Are States Denied a Voice: Citizen-Driven Foreign Policy after Crosby v. National Foreign Trade Council

Wendy L. Wallace

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol52/iss3/6

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
ARE STATES DENIED A VOICE?:
CITIZEN-DRIVEN FOREIGN POLICY
AFTER CROSBY V. NATIONAL FOREIGN TRADE COUNCIL

INTRODUCTION

“If selective purchasing had been banned ten years ago, Nelson Mandela might still be in prison today.” The author of this statement, Massachusetts State Representative Byron Rushing, hoped that the Massachusetts Selective Purchasing Act (“Massachusetts Burma Law” or “MBL”) would be as successful in undermining Burma’s repressive regime as were the state anti-apartheid laws of the 1980s. Massachusetts passed the first-ever, state-wide law in 1996 to condemn Burma’s deplorable human rights record and to discourage corporate investment in the Burmese government, which sponsored slavery, torture, and human trafficking. The MBL barred state agencies from purchasing goods or services from any person or corporation doing business with Burma. This was certainly not the first state effort to influence foreign affairs—twenty-three states, fourteen counties, and eighty cities enacted either divestment or procurement legislation to limit corporate investment in South Africa’s apartheid regime. Such laws had been upheld by lower courts in the past and were credited at least in part with toppling South Africa’s apartheid government.

In April 1998, the National Foreign Trade Council (“NFTC”), a lobbying group boasting 600 corporate members, launched a lawsuit

2 *MASS GEN. LAWS ANN.* ch. 7, §§ 22G-M (West 2001); see John Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1298 (C.D. Cal. 1997) (describing Burmese villagers’ allegations that Unocal was complicit in the Burmese government’s human rights violations against the villagers in connection with the Yadana Natural Gas Pipeline project joint venture); Mark B. Baker, *Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma, the Commonwealth of Massachusetts, the WTO, and the Federal Courts*, 32 LAW & POL’Y INT’L BUS. 51, 70 (2000) (“During the period 1992-97, Human Rights Watch/Asia estimated that approximately two million Burmese people were used for forced labor to make the Burmese infrastructure more attractive for foreign investment and tourists.”).
against the MBL that culminated in the June 2000 Supreme Court decision in **Crosby v. National Foreign Trade Council**.\(^4\) The Supreme Court invalidated the MBL as preempted by a federal Burma law because it stood as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [under the federal Act].”\(^5\) The Court decided the issue on preemption alone and declined to address whether the MBL violated the Foreign Affairs Power or the Dormant Commerce Clause\(^6\) as the First Circuit had held.\(^7\) The NFTC proclaimed that the **Crosby** decision “should put an end to state and local efforts to make foreign policy.”\(^8\) But did it?

After **Crosby**, the key question is whether states have any remaining ability to use their procurement or divestment functions to influence corporate behavior and foreign policy. **Crosby** will certainly invalidate a number of local government procurement laws that target countries, such as Burma, that already are addressed by federal sanctions laws.\(^9\) However, several states and municipalities have enacted procurement and divestment laws targeting countries either not subject to any federal law or targeting a condition, such as labor rights, which may not be preempted under **Crosby**’s narrow holding.\(^10\) Other laws have been drafted to conform to the **Natsios** ruling, and their future under **Crosby** is equally uncertain.

**Crosby** left unanswered key issues that are sure to be the subject of future challenges. First, does the Foreign Affairs Power prohibit states from stepping in where the federal government has not acted to promote human rights, environmental protection, and labor rights abroad, or are they reduced to making largely symbolic proclamations? Second, may states, acting as private market participants, direct

---

\(^4\) 530 U.S. 363 (2000).

\(^5\) Id. at 377.

\(^6\) Hereinafter “Dormant Commerce Clause” or “Foreign Commerce Clause.”


\(^9\) See Miller, supra note 1, at 2 (noting that twenty-three U.S. cities have laws prohibiting city governments from contracting with companies doing business in Burma); Jonathan Ringel, High Court Ruling Hurts Dade’s Anti-Cuba Law, MIAMI DAILY BUS. REV., June 20, 2000, at 3 (reporting that **Crosby** ruling may effectively invalidate provisions similar to the MBL which violate a federal law, including the Miami-Dade ordinance).

\(^10\) See infra Parts II.A-B.
state resources away from companies doing business in certain for-
egntry countries without violating the Dormant Commerce Clause? This Note will examine the Foreign Affairs and Dormant Commerce Clause Powers as applied to state laws and predict whether procure-
ment and divestment laws will survive in a post-Crosby environment.

I. THE CONTROVERSY OVER THE MASSACHUSETTS BURMA LAW

A. The Massachusetts and Federal Burma Laws

The MBL prohibited state officials and their agents from purchase-
ing goods and services from any person or entity (U.S. or for-
eign) that did business with Burma unless the party’s bid price was
ten percent lower than the prices of all other bids received.11 The
MBL defined “doing business with Burma” to include firms with a
principal place of business or a majority-owned subsidiary in Burma
or firms with other types of business with the government.12 The
state was required to maintain a restricted purchasing list of all corpo-

11 See MASS. GEN. LAWS ANN. ch. 7, §§ 22G-M (West 2001). Section 22J(a) states: “The
secretary shall establish and maintain a restricted purchase list. . . . [which] shall contain the
names of all persons currently doing business with Burma (Myanmar).” Id. § 22J(a).
Section 22H(a) states:

Except as otherwise provided in this section, a state agency, a state au-
thority, the house of representatives or the state senate may not procure
goods or services from any person listed on the restricted purchasing list
maintained by the secretary, or who is determined through affidavit or
through other reliable methods to meet the criteria for being so listed.
Id. § 22H(a).

Section 22G defines “Doing business with Burma (Myanmar) [as]:

(a) having a principal place of business, place of incorporation or its cor-
porate headquarters in Burma (Myanmar) or having any operations,
leases, franchises, majority-owned subsidiaries, distribution agreements,
or any other similar agreements in Burma (Myanmar), or being the ma-
ajority-owned subsidiary, licensee or franchise of such a person;
(b) providing financial services to the government of Burma (Myanmar),
including providing direct loans, underwriting government securities,
providing any consulting advice or assistance, providing brokerage ser-
vice, acting as a trustee or escrow agent, or otherwise acting as an agent
pursuant to a contractual agreement;
(c) promoting the importation or sale of gems, timber, oil, gas or other
related products, commerce in which is largely controlled by the gov-
ernment of Burma (Myanmar) from Burma (Myanmar);
(d) providing any goods or services to the government of Burma
(Myanmar).
Id. § 22G.

Section 22G defines “Comparable low bid or offer” as “a responsive and responsible bid or
offer which is no more than ten percent greater than the lowest bid or offer submitted for goods
or a service.” Id.

12 Id. § 22G.
rations doing business in Burma. The state could select a contractor from that restricted list only if (1) it was an essential procurement and (2) there was no comparable bid from a company without business in Burma. Corporations were exempt from the ban if (1) their sole business in Burma was to report the news or provide goods and services for international communications or (2) if their only business was the sale of medical supplies or devices. In submitting their bids on any state contract, the corporations had to attach an affidavit stating that they did no business in Burma. Massachusetts wielded significant purchasing power through the MBL; the annual state procurement budget is two billion dollars. In response, companies vociferously protested being forced to choose between the lucrative state contracts and their business in Burma. Some large U.S. companies, including Apple, Kodak, and Hewlett-Packard, unilaterally pulled out of Burma, citing the MBL as the primary reason.

Three months after the passage of the MBL, Congress passed a comprehensive sanctions program for Burma in Title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997. The federal Burma Law ("FBL") authorizes the President to prohibit all new investment in Burma by U.S. citizens and corporations by executive order. The President initiates the sanctions by certifying to Congress that "Burma has physically harmed, rearrested . . . or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the [d]emocratic opposition." The President must report to Congress every six months from the sanctions' start date whether the sanctions should remain in place or be lifted based on his assessment of the political situation in Burma. The FBL prohibits new investment, which includes "a range of activity concerning 'the economical development of resources located in

---

13 Id. § 22J.
14 Id. § 22H.
15 Id.
16 Id. § 22I.
17 Id. § 22I.
22 Id. § 570(b).
23 See id. § 570(d).
However, FBL specifically exempts the sale and purchase of goods, services, and technology if U.S. companies are not paid with shares or profits from any new investment. The FBL also charges the President to work with U.S. trading partners and allies to fashion a multilateral solution to the human rights situation in Burma. In May 1997, President Clinton issued Executive Order 13047, initiating the sanctions and the ban on new investment in Burma by United States persons.

B. The NFTC-Massachusetts Lawsuit

In April 1998, the NFTC filed a complaint alleging that several of its corporate members had been harmed by the MBL. The district court granted a permanent injunction against the MBL, finding as a matter of law that the MBL impermissibly infringed on the Foreign Affairs Power of the federal government. The court did not address in detail the NFTC’s claims that the MBL was preempted by the FBL or that the MBL violated the Foreign Commerce Clause. In June 1999, in National Foreign Trade Council v. Natsios, the Court of Appeals for the First Circuit affirmed the district court’s ruling and invalidated the MBL on two additional grounds—that the MBL discriminated against foreign commerce and was preempted by the FBL.

In June 2000, the Supreme Court affirmed this ruling, holding that the MBL was preempted by the FBL. The Court found that even without an express preemption provision in federal law, a state law must yield to a federal act if Congress intends to occupy the field, or where a state law is “naturally preempted” to the extent it conflicts with a federal law. The Court noted that preemption was found (1) where it was impossible for a private party to comply with both the

25 Foreign Operations, Export Financing and Related Programs Appropriations Act, 1997, § 570(f)(2). The sale and purchase of all goods, with limited exceptions, were banned under the MBL. See supra note 11 and accompanying text.
26 Foreign Operations, Export Financing and Related Programs Appropriations Act, 1997, § 570(c) at 289-90 n.5.
28 See NFTC v. Baker, 26 F. Supp. 2d 287, 289-90 n.5 (D. Mass. 1998), aff’d sub nom. NFTC v. Natsios, 181 F.3d 38 (1st Cir. 1999), aff’d sub nom. Crosby v. NFTC, 530 U.S. 363 (2000) (noting that one member who formerly had contracts with the state declined to bid because of the MBL and one member lost a state contract because its bid was not ten percent lower than the winning bid).
29 Id. at 289.
30 See id. at 293 (holding that neither argument is dispositive, but offering observations).
31 181 F.3d at 38.
32 Id. at 45.
state and federal rule, and (2) where the state law was an obstacle to the accomplishment of Congress' purposes and objectives. The Court found that the MBL undermined the intended purpose of Congress in three ways. First, the MBL prevented the delegation of effective discretion to the President to control economic sanctions against Burma because the presence of individual and disparate state acts reduced the President's authority and negotiating power with the Burmese government and other countries. Second, the MBL's sanctions were far broader and more absolute than the FBL's. MBL applied to all corporations and to all current investment and had no end date. Congress carefully considered and rejected sanctions similar to the MBL and adopted instead a calibrated sanctions approach to achieve maximum leverage with the Burmese government. Although the MBL and FBL shared a common goal, their substantive inconsistency undermined Congress' careful calibration of force. Third, MBL conflicted with the President's authority to speak for the United States among nations in developing the comprehensive, multilateral Burma strategy intended by Congress. As evidence that the MBL undermined the President's ability to speak for the United States in foreign policy, the Court pointed to the diplomatic protests and lawsuit initiated by the European Union and Japan in the World Trade Organization alleging that the MBL violated the Agreement on Government Procurement under the General Agreement on Tariffs and Trade. As a result, the Court explained, the national government was embroiled in international dispute processes with its diplomatic partners about a state law.

The Court's decision will certainly invalidate a number of state and local laws which, like the MBL, are directed against a country which is the subject of a federal law. Currently, twenty-three cities, including New York, San Francisco, Los Angeles, and Portland, Oregon, have laws prohibiting municipal governments from contracting

34 Id. at 372-73.
35 See id. at 377 (noting that if the Massachusetts law is enforceable, then the President has less to offer and less economic and diplomatic leverage).
36 See id. at 377-78.
37 See id. at 380.
39 Crosby, 530 U.S. at 367-68.
with companies doing business in Burma.\textsuperscript{40} Even before \textit{Crosby} was decided, commentators argued that the Miami-Dade County anti-Cuba ordinances that restrict the transaction of business with all firms doing business in Cuba would be preempted.\textsuperscript{41} The Miami-Dade County ordinances were more restrictive than those under the federal Helms-Burton Act of 1996\textsuperscript{42} and, unlike Helms-Burton, contained no exemption for cultural and informational exchanges. In \textit{Miami Light Project v. Miami-Dade County},\textsuperscript{43} the District Court for the Southern District of Florida found that Miami-Dade County’s requirement that prospective contractors sign an affidavit stating they had never transacted business with nor traveled to Cuba violated the Foreign Affairs Power and enjoined the ordinances. In addition to emphasizing that the U.S. government must speak with one voice on Cuba policy, the court noted the ordinances significantly exceeded the scope of the Helms-Burton sanctions and specifically referenced the absence of an exemption for cultural exchanges.\textsuperscript{44} Since then, several state laws have been challenged as violative of the Foreign Affairs Power, with mixed results.\textsuperscript{45}

This Note will evaluate several procurement and divestment laws either currently proposed or in force and attempt to predict which might survive after \textit{Crosby}. Preliminarily, this Note argues that divestment laws and procurement laws that target a condition, such as environmental, human rights, and labor rights, as opposed to a specific country, are more likely to satisfy the Foreign Affairs Power and Dormant Commerce Clause. Part II will discuss how current laws might fare under a Foreign Affairs Power challenge. Part III will discuss whether the laws can survive a Dormant Commerce Clause challenge.

\textsuperscript{40} Miller, supra note 1, at 2.
\textsuperscript{43} 97 F. Supp. 2d 1174 (S.D. Fla. 2000).
\textsuperscript{44} \textit{Id.} at 1180 (finding that the “Cuba Affidavit” is an independent foreign policy with more than an incidental effect on Cuba).
\textsuperscript{45} See \textit{In re World War II Era Japanese Forced Labor Litigation}, 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001) (holding that California law providing a cause of action to victims of the forced labor practices of the Nazi regime and its allies was unconstitutional because “it infringes on the federal government’s exclusive power over foreign affairs”); Gerling Global Reinsurance Corp. of Am. v. Quackenbush, No. CIV S-00 0505, 2000 U.S. Dist. LEXIS 8815, at *3 (E.D. Cal. June 9, 2000) (enjoining implementation of California’s Holocaust Victims Insurance Recovery Act on grounds that it impermissibly touched on Foreign Affairs Power), \textit{aff’d on other grounds sub nom.} Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739 (9th Cir. 2001) (affirming the injunction, but holding the state law did not violate the Foreign Affairs Power), \textit{cert. dismissed sub nom.} Am. Ins. Ass’n v. Low, No. 00-1926, 2002 U.S. LEXIS 697 (Jan. 22, 2002).
Challenge, with and without a market participant exemption. The Note concludes by summarizing the general features needed to survive these challenges.

Assuming that no federal law or policy expressly or impliedly preempts state and local laws, they will have to survive independent challenges under the (1) Foreign Affairs Power and (2) Dormant Commerce Clause. The next section addresses the former issue, and the section following addresses the latter.

II. THE FOREIGN AFFAIRS POWER

The Foreign Affairs Power stands for the proposition that the federal government, not the states, possess paramount authority to conduct the foreign policy of the United States. The Foreign Affairs Power is not found in any express provision of the Constitution, but rather is derived from various provisions and the structure of the Constitution. Some scholars argue that states are allowed some role in foreign affairs, but the precise boundaries of that role are unclear. For example, Professor Louis Henkin argues that while “[t]he language, the spirit, and the history of the Constitution deny the states authority to participate in foreign affairs . . . states have variously and inevitably impinged on U.S. foreign relations.” The Supreme Court addressed the issue of whether state laws regulating in a traditional state area violate the Foreign Affairs Power in Clark v. Allen and Zschernig v. Miller. In Clark, the Court upheld a California probate law conditioning the right of foreign nationals to inherit property located in that state on a reciprocal right for U.S. citizens to inherit in that country. The Court ruled that California’s statute did not extend state power into the field of foreign affairs, as there was “no treaty governing the rights of succession . . . [and] California [had not] entered the forbidden domain of negotiating with a foreign country, . . . or making a compact with it contrary to the prohibition of Article I, § 10 of the Constitution.” Therefore, California’s law had only an

---

47 See HENKIN, supra note 46, at 13-16.
48 See id. at 150, 162; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 1 cmt. 5 (1987) (“Subject to the limitations indicated, State law and State judicial decisions continue to affect the foreign relations of the United States as they do other national policy.”).
49 331 U.S. 503 (1947).
51 Clark, 331 U.S. at 517 (holding that the statute was not affected by overriding federal policy).
52 Id. at 517.
"incidental or indirect effect in foreign countries." The Court held that local law properly determined inheritance rights, unless an overriding federal policy, such as a treaty, makes "different or conflicting arrangements." If so, the state law must give way.

In Zschernig, the Court invalidated an Oregon probate statute that required proof that foreign heirs would actually receive Oregon estate proceeds without confiscation. The Court held that "the history and operation of this statute ... is an intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress." The Oregon statute "unduly interferes with the United States' conduct of foreign relations ... for it has more than some incidental or indirect effect in foreign countries, and [a] great potential for disruption or embarrassment." Unlike the probate law in Clark, which the Court found required only a "routine reading of foreign laws," the Oregon statute, as applied, led to "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied the "right to receive."'" This type of statute, the Court noted, made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own." The Court concluded that despite the fact that probate issues were traditionally regulated by the states, a state's policy may disturb foreign relations even in the absence of a treaty and that the Oregon law "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." Noting the cumulative effect of the state probate laws, the Court observed that "the Oregon law does ... illustrate the dan-

53 Id.
54 Id. The Court compared the Clark situation to Blythe v. Hinchley, 180 U.S. 333 (1901), which upheld a California law that granted aliens a right to recover in the absence of a treaty and rejected arguments that this additional law was a forbidden entry into foreign affairs.
55 Zschernig, 389 U.S. at 430.
56 Id. at 432.
57 Id. at 434-35. The Court noted the embarrassment caused by the formal protest from the government of Bulgaria in response to State Land Board v. Rogers, 347 P.2d 57 (Or. 1959).
58 Zschernig, 389 U.S. at 433. The Court stated that its ruling in Clark had been limited to the plain language of the California probate statute and that appellant conceded that the probate court had confined itself to a routine reading of foreign law. The Court noted that had Clark appeared in the posture of Zschernig, a different result might have obtained. The district court found the statute unconstitutional because of a clear legislative intent to prevent American assets from reaching hostile nations, but appellant did not raise this issue in the Supreme Court. See id. at 432-33, 433 n.5.
59 Id. at 440. Opining that probate court decisions "radiate" the Cold War attitudes of judges, the Court quoted a probate judge exclaiming, "I am not going to send money to Russia where it can go into making bullets which may one day be used against my son." Id. at 435 n.8.
60 Id. at 441.
gers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy. 62

The precise boundaries of Zschernig are unclear as it remains the sole case in which the Supreme Court has invalidated a state law governing a traditional state function under the Foreign Affairs Power. 63 Some scholars argue that because the Supreme Court has not revisited Zschernig and because the Zschernig majority did not overrule Clark, Zschernig may not automatically preclude state legislative activity. There are two key views—first, that Zschernig can be read at a low level of generality to invalidate only those state actions that reflect a "state policy critical of foreign governments and involve 'sitting in judgment on them'"; 64 second, that Zschernig distinguishes between state actions with an indirect or incidental impact on foreign relations and those that directly intrude on the conduct of foreign affairs. 65 Thus, a court would "balance the degree to which a local enactment intrudes upon foreign affairs against the degree to which the enactment falls within the ambit of traditional state powers." 66

In National Foreign Trade Council v. Natsios, 67 the First Circuit affirmed the trial court's holding that the MBL was invalid under Zschernig because it had "more than 'an indirect or incidental effect in foreign countries,' and has a 'great potential for . . . embarrassment."

Rejecting the argument that Zschernig requires the court to balance the nation's foreign policy interests against the state interest, the court held that there is "a threshold level of involvement in and impact on foreign affairs which the states may not exceed." 69 Then,

---

62 Id.
64 See HENKIN, supra note 46, at 164; Lily Batchelder, Note, The Costs of Uniformity: Federal Foreign Policymaking, State Sovereignty, and the Massachusetts Burma Law, 18 YALE L. & POL'Y REV. 485, 489 (2000) (discussing the interpretation of Zschernig at a "low level of generality"). However, Professor Henkin notes that even this approach would "condemn also 'sense resolutions' on foreign policy by state legislatures though such resolutions are not law and could not be invalidated, and state legislatures presumably cannot be prevented or enjoined from adopting them." HENKIN, supra note 46, at 164.
65 See HENKIN, supra note 46, at 164 (discussing Zschernig's lack of specificity regarding state actions that are excluded from its coverage).
66 Lucien J. Dhooge, The Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution, 37 AM. BUS. L.J. 387, 437 (2000) (discussing Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal Counsel 65 (1986)). Under a balancing approach, Professor Henkin suggests that "certain impingements on foreign affairs are excluded because national uniformity is required; infringements are barred if they discriminate against or unduly burden our foreign relations; the courts will balance the state's interest in a regulation against the impact on U.S. foreign relations." HENKIN, supra note 46, at 164.
68 Id. at 51.
69 Id. at 52.
the court concluded that the MBL had more than an incidental effect on foreign relations by considering the following five factors. First, the MBL was not facially neutral and the legislative intent was to "sanction Burma . . . to pressure the Burmese government to change its domestic policies." The court emphasized that "by targeting a foreign country, monitoring investment in that country, and attempting to limit private interactions with that country, [the MBL] goes far beyond the limits of permissible regulation under Zschernig." Second, the state, with its two billion dollar per year procurement budget, was capable of effectuating the law's intent. Third, as in Zschernig, the court stressed the cumulative negative effect of multiple local and state sanctions laws, which taken together added up to a direct impact on foreign affairs. Fourth, the MBL caused disruption and embarrassment because the U.S. had been besieged with international protests against the MBL. Also, unlike in Zschernig, senior State Department officials and members of Congress complained that the proliferation of local sanctions laws undermined the federal ability under the FBL to achieve a multilateral strategy in Burma. Fifth, the court noted that the MBL differed in at least five respects from the FBL, thus causing potential embarrassment. Thus, even if the MBL promoted a legitimate state interest, it violated the Foreign Affairs Power because it had a direct impact on foreign affairs and caused embarrassment and disruption.

Under a balancing approach, where the federal interest must be overriding to displace state law under the Foreign Affairs Power, the court may have found Massachusetts' arguments more compelling. First, although the legislature intended to condemn the atrocious conduct of a foreign country, the MBL also expressed a powerful state interest in controlling local procurement. Second, assuming that the Zschernig test is still relevant to a balancing approach, it is arguable

---

70 Id. at 53.
71 Id.
72 Id. at 56.
73 Id. at 53.
74 Id.
75 See id.; see also Crosby v. NFTC, 530 U.S. 363, 382-83 (2000) (noting the numerous complaints about the MBL from the European Union and Japan).
76 Zschernig, 389 U.S. at 434 (noting that the U.S. amicus curiae brief argued that the Oregon probate statute did not unduly interfere with U.S. foreign policy).
77 Natsios, 181 F.3d at 53.
78 Other courts may balance the federal and state interests. See Miami Light Project v. Miami-Dade County, 97 F. Supp. 2d 1174, 1180 (S.D. Fla. 2000) (emphasizing the sensitivity of U.S.-Cuban relations because "in this hotbed of foreign affairs, it is of paramount importance that the federal government be recognized as the 'one voice' of all Americans") (emphasis added).
79 See supra text accompanying note 57.
that the MBL did not present the same direct impact on foreign affairs as did the probate laws overturned in Zschernig. The MBL neither required the state to make "minute inquiries concerning the actual administration of foreign law," nor required the state to delve "into the credibility of foreign diplomatic statements" that seem to constitute the Court's chief concern in Zschernig. By contrast, the First Circuit held that the MBL "clearly establish[ed] ongoing scrutiny, by creating a "mechanism for ongoing investigation into whether companies are doing business with Burma." While the court acknowledged that the MBL did not require the state to inquire into the human rights situation in Burma, still, by scrutinizing the actions of private companies, the state was "evaluating developments abroad in a manner akin to the Oregon probate courts in Zschemig." But Zschernig was not concerned with state monitoring of the behavior of private actors, such as companies, but with local government and judicial inquiries into the actual administration of foreign law. However, even under a balancing approach, a court may find that the state's targeting of a foreign country, and its intent to have an actual impact in that country, albeit indirectly by discouragement of third-party investment, is a sufficient state pronouncement against a foreign government. Additionally, the MBL caused actual disruption or embarrassment for the U.S. under Zschernig because of the international protests it generated. Thus, a court may find that the MBL had more than an incidental effect on foreign affairs because of the federal government's interest in uniformity, despite the state's compelling interest in controlling state procurement and the absence of minute inquiries into foreign law under the MBL.

---

80 Zschernig, 389 U.S. at 435.
81 Id.
82 Id. at 435 n.6 (describing a probate court's analysis of "the general nature of rights in the Soviet system instead of examining whether Russian inheritance rights were granted equally to aliens and residents. The court found Russia had no separation of powers, too much control in the hands of the Communist Party, no independent judiciary, confused legislation, unpublished statutes, and unrepealed obsolete statutes . . . . The court characterized the testimony of a leading Soviet jurist's interpretation of Russian inheritance rights law as "modeled after Humpty Dumpty, who said, "When I use a word . . . . , it means just what I choose it to mean—neither more nor less.""") (citation omitted).
84 Id.
85 Id. at 52.
86 See supra text accompanying note 72.
A. Local Divestment and Purchasing Laws and the Foreign Affairs Power

The Note will now consider whether local procurement and divestment laws could survive a challenge under the Foreign Affairs Power as defined by Zschernig, Crosby, and lower court opinions.

1. Divestment Laws

Numerous local governments have enacted laws that require state officials to invest no new funds in financial institutions or companies that provide loans or do business with certain countries and to divest funds currently held in these entities. The divestment bills and laws are based upon laws enacted in the 1980s to oppose the apartheid regime in South Africa. This Note argues that divestment laws, especially those not targeting a specific country, would survive a Foreign Affairs Power challenge because Crosby's decision can be limited to procurement laws, and the Supreme Court has not yet addressed whether a divestment law would violate the Foreign Affairs Power. Further, divestment laws do not raise the same Zschernig concerns expressed by the First Circuit in Natsios regarding the impact of a state law on a foreign country and the federal government's ability to conduct foreign policy.


88 Compare Thomas A. Barnicio, The Road from Burma: State Boycotts After Crosby v. National Foreign Trade Council, 19 B.U. INT'L L.J. 89, 109-10 (2001) (arguing that Crosby's narrow preemption grounds allows state and local governments "to act as catalysts for federal action") with Carol E. Head, The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries, 42 B.C. L. REV. 123, 171-72 (2000) (proposing a "functional" Foreign Affairs Power test, and concluding that state and local actions, including divestment laws and investment decisions, may touch "on foreign affairs" and "continue to be subject to criticism under the Dormant Foreign Affairs Power").
First, a state court has upheld a divestment law under the Foreign Affairs Power. In *Board of Trustees v. Mayor of Baltimore*, the Maryland Court of Appeals found that a Baltimore ordinance divesting city pension funds from corporations with investments or business with South Africa did not invoke the Foreign Affairs Power. The court reasoned that *Zschernig* "circumscribes, but apparently does not eliminate, a state's ability under certain circumstances to take actions involving substantive judgments about foreign nations." The court then noted: "The fatal flaw in administration of the Oregon . . . statute was not that state law touched on foreign affairs, but the detailed, case-by-case judicial inquiries into foreign practices that the law entailed. Therefore, a single, general decision by a state mandating the divestment of state funds arguably would be beyond the scope of Zschernig." The court then balanced the state and federal interests and concluded that "investment policy for public pension funds is ordinarily governed by local law, and no federal treaty or statute preempts the enactments . . . in this case." Moreover, the law's effect both on South Africa and on corporations investing in South Africa was thought minimal and indirect because "when a state sells its stock in a corporation doing business in South Africa, it has no immediate effect on foreign relations between South Africa and the United States." The court emphasized several factors contributing to the law's minimal impact: the law required no minute inquiries into a foreign country, but instead represented a single decision beyond the scope of Zschernig; the city did not itself scrutinize the activities of private companies, it used a list prepared by an independent, non-profit organization; it targeted only companies with significant investments in South Africa; and it divested at a gradual pace. Thus, a state may rely on *Board of Trustees* for the premise that a divestment law, even

---

89 562 A.2d 720 (Md. 1989), *cert. denied sub nom.* Lubman v. Baltimore City, 493 U.S. 1093 (1990). Baltimore Ordinance No. 765 reads: "[N]o funds . . . shall remain invested in, or in the future be invested in, banks or financial institutions that make loans to South Africa or Namibia or companies 'doing business in or with' these countries." Baltimore used the Africa Fund's annual report, entitled the "Unified List of United States Companies with Investments or Loans in South Africa and Namibia," to identify the entities. Divestiture of current funds was to occur within a two-year period. The Board of Trustees could suspend divestiture if (1) the rate of return was substantially lower than the average of annual earnings over the past five years and (2) continued divestiture will be inconsistent with generally accepted investment standards or (3) divestiture would cause financial losses to the funds. *Id.* at 724.

90 *Id.* at 746.

91 *Id.*

92 *Id.* at 741.

93 *Id.* at 724, 741.

94 *Id.* at 724, 747.
one targeting a particular country, does not touch impermissibly on foreign affairs.

Second, neither the First Circuit in Natsios nor the Supreme Court in Crosby addressed whether a divestment law, as opposed to a selective contracting law, violates the Foreign Affairs Power or is preempted by a federal law. In National Foreign Trade Council v. Baker, the district court rejected analogies between the MBL and Baltimore's ordinance, holding that "the Baltimore statute only modified the City's own conduct, and did not seek to influence . . . companies in their private commercial activities." The First Circuit agreed, noting that "Board of Trustees, whether rightly or wrongly decided, does not alter our decision that the Massachusetts Burma Law . . . goes far beyond the limits of permissible regulation under Zschernig."

The Supreme Court noted it had no occasion to consider a divestment law in Crosby. In Miami Light Project, the court, in enjoining the Miami-Dade Cuba ordinances, distinguished Board of Trustees, noting that the divestment law required no continual monitoring of a foreign situation and had an incidental impact on South Africa, "because it precluded only companies doing a significant amount of business with South Africa." Thus, a state may argue that Crosby's narrow holding applies only to state procurement laws that are preempted by federal law and that Board of Trustees still supports the constitutionality of divestment laws.

Clearly, if future courts follow the balancing approach in Board of Trustees, current divestment laws will pass a Foreign Affairs Power challenge. Two bills, introduced in the Massachusetts State Legislature, divest current and future state pension funds from companies operating in Burma and Indonesia. A hybrid investment-
procurement bill in the New York State Assembly requires the state to assess whether a financial institution does business with fifteen countries when deciding whom to use for future investment of state funds and other financial services. Its investment and procurement functions will be considered separately. Commentators contend that states could defend their divestment laws because they "reflect strong and legitimate local interests... regarding the appropriate disposition of local public pension or other funds; that they have only an indirect... impact on foreign relations; that they relate to concerns on which Congress, although fully aware of these... local activities, has deliberately not taken preemptive action."

Following this reasoning, states may argue under Board of Trustees that their divestment laws have an incidental impact on foreign affairs. State and local governments certainly have a powerful interest

---

102 Note that A.B. 9514 was resubmitted to the 2001-02 N.Y. Assembly as A.B. 1777, 2001 Leg., 224th Legis. Sess. (N.Y. 2001), LEXIS 2001 Bill Text NY A.B. 1777. A.B. 9514, 2000 Leg., 223d Legis. Sess. § 2 (N.Y. 1999), supra note 87, provides that state officials will, when choosing among banks of comparable cost, seek to invest and deposit funds in banks with the highest state rating for compliance with the state policy of not supporting countries with Christian persecution.

Section 2 provides that the state will develop a rating system to "evaluate whether banks are using the means at their disposal to comply with any United States trade or financial sanctions imposed upon China, Sudan, Indonesia, Saudi Arabia, Egypt, Pakistan, Nigeria, Turkey, Cuba, Iran, North Korea, Iraq, Morocco, Laos or Vietnam ...." In addition, the state will evaluate whether the banks are taking the following actions: withdrawal of operations from the countries, denial of loans, letters of credit, and other banking services to the countries, restriction on rescheduling of loans, and divestiture of outstanding debt owed by the named countries.

103 New York's bill requires the state to invest, deposit funds and contract for financial services only with banks that comply with its criteria. It could be argued that this provision imposes a direct harm on the banks, as they, like a company under a procurement law, stand to lose a lucrative business. Thus, the Note will consider only the divestment features of this bill.
in directing investment of public funds. The divestment decision is a single act to refrain from investing state funds in certain companies, which obviates the need for minute inquiries into a foreign situation. Thus, divestment has a lesser impact on foreign affairs, both economically and politically, than does procurement. In balancing the state and federal interests, the Maryland court found that divestment alone would not cause companies to leave South Africa, reasoning that a company may decide to retain its investments rather than become eligible for the city’s investment.\textsuperscript{105} Moreover, scholars argue that there is a fundamental difference in effect between avoiding investment in a company and avoiding trade with that company.\textsuperscript{106} Under the Massachusetts and New York bills, a company may lose a stockholder, but the harm is mitigated because the stock can always be resold. Thus, the harm to the company’s bottom line may be indirect or minimal.\textsuperscript{107} Certainly, a company suffers a more direct type of economic harm when it loses a state contract, than when its stock changes hands from one purchaser to another. Additionally, the harm to companies is indirect because the Massachusetts divestment laws, unlike the MBL, provide a gradual time-line for divestment,\textsuperscript{108} so a company or bank would not experience a large or sudden sale or transfer. The New York bill, like the Baltimore ordinance, has an opt-out provision allowing the state to use a non-compliant financial institution if it cannot obtain the needed services elsewhere.\textsuperscript{109} Thus, the new bills contain provisions that mitigate the financial effects on the financial institutions and companies, and on the foreign countries themselves.

States can also argue that the potential for disruption or embarrassment required under \textit{Zschernig} will not materialize with divest-
ment laws. Currently, there is no multilateral agreement on investment or divestment to conflict with a state divestment law, in contrast with the GATT procurement regulations at issue in the MBL case. The Executive Branch has expressed official approval of divestment as an approach. Therefore, the current divestment bills neither contradict an agreement signed by the U.S., nor seem to impinge on the government's ability to conduct foreign affairs, which caused the actual embarrassment in Crosby.

Even if divestment laws have a lesser impact on foreign affairs than procurement laws, a court may nonetheless find that the New York and Massachusetts bills have a direct impact on foreign affairs under the stricter threshold test of the First Circuit. There, the court held that the MBL had more than an incidental effect on foreign affairs based on five factors, three of which are still present in the current divestment laws. These include: (1) the laws target a particular foreign country and are intended to change policy in that country; (2) New York and Massachusetts have the purchasing power to effectuate the law's intent; and (3) the laws may spawn similar laws in other states.

The divestment bills, like the MBL, target specific countries and are intended to have an impact in those countries. The Baltimore Anti-Apartheid ordinance was adopted for the express purpose of influencing corporations to "take . . . steps in opposition to apartheid." Similarly, the new bills are enacted to discourage companies and financial institutions from dealing with identified countries that persecute Christians and participate in slavery. Thus, divestment laws targeting countries do have a direct impact on foreign affairs. Secondly, the state's investment power may be able to force a company to make a choice between investment abroad and state patronage. However, as discussed above, this may be a lesser injury to the company than the loss of profits under a state procurement contract. Even if the New York and Massachusetts divestment laws are a "bellwether" for other states, this factor alone cannot rise to a direct impact on foreign affairs. However, the New York and Massachusetts divestment laws, by targeting a specific country and evincing a clear

110 See Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal Counsel 49, 67 (1986) (concluding that state divestment laws are constitutional, and advising the U.S. not to file suit to invalidate them), 1986 WL 213238; see also infra note 169 and accompanying text.

111 See supra text accompanying notes 70-77.

112 Bd. of Trustees, 562 A.2d at 724 n.6. The Maryland court did not find the specific targeting of South Africa to be significant, as its analysis focused on the absence of minute inquiries into a foreign country. This suggests the court may have erred in applying Zschernig, where the Supreme Court invalidated a facially neutral law.
clear intent to change that country’s policy, may be vulnerable to a Foreign Affairs Power challenge under the First Circuit’s approach.

If a divestment law targeted a condition—such as human or labor rights—states could argue that the divestment law applied to all investment sources, regardless of foreign holdings, and thus does not directly touch on foreign affairs. In Trojan Technologies v. Pennsylvania, the U.S. Court of Appeals for the Third Circuit found that Pennsylvania’s “Buy American” law did not violate the Foreign Affairs Power because the law applied equally to all countries, whether friend or foe, and did not inquire into the nature or law of foreign regimes. Similarly, a state could argue that, like the general reciprocity statute in Clark, the divestment law enables city funds to be invested in companies that share the state’s interest in human rights or fair labor practices. A condition-specific divestment law has all the positive features—indirect economic and political impact—of divestment laws and lacks the country targeting that resulted in the invalidation of the MBL.

States may also minimize the targeting of foreign countries and prevent charges of on-going scrutiny abroad prohibited under Zscherng by emphasizing the neutral condition and avoiding criticism of specific countries. For example, Professor Strumberg reports that the California Public Employees Retirement Fund (“CalPers”) recently adopted a policy that the fund “will avoid unnecessary risk by avoiding stock companies that trade or invest in unstable and undemocratic nations.” Thus, state fund selection criteria could include consideration of a company’s record in human and labor rights and environmental protection because these factors have an impact on the long-term stability and profitability of the investment. Similarly, in Board of Trustees, Baltimore avoided on-going scrutiny into South Africa’s political affairs and corporate investments by adopting the Africa Fund list of companies doing business in South Africa, which was developed by an independent organization. Such techniques may further minimize the state’s criticism of a foreign nation while preserving its right to invest funds consistent with the principles of its citizens.

114  Id. at 913.
115  See Strumberg, supra note 106, at 150.
116  See Bd. of Trustees v. Mayor of Baltimore, 562 A.2d 720, 724 n.6 (Md. 1989). But see MASS. GEN. LAWS ANN. ch. 7, § 22J (West 2001) (directing the state to consult reports of the United Nations, Investor Responsibility Research Center, and Associates to Develop Democratic Burma, and other reliable (and independent) resources when formulating the restrictive purchasing list).
In sum, divestment bills targeting a particular condition, but not a country, will survive a Foreign Affairs Power challenge because (1) Crosby is limited to procurement laws preempted by a federal law; and because (2) the indirect nature of the divestment transaction has only an incidental impact on foreign affairs, and does not cause disruption or embarrassment. Divestment laws targeting a specific country still may be vulnerable to challenge under the stricter threshold test of the First Circuit in Natsios. The threshold test is the most recent and preferred interpretation of Zschernig principles and has been applied in several recent Foreign Affairs Power challenges,\textsuperscript{117} while the sole authority supporting targeted laws and the balancing approach is Board of Trustees.\textsuperscript{118} In addition, courts may be unwilling to conduct the case-by-case analysis required under a balancing test, particularly in the realm of foreign affairs, traditionally the province of Congress and the executive branch. A divestment law targeting a condition will survive because of its incidental economic and political impact and absence of targeting. Such a law may better serve state interests—while the state cannot publicly condemn any particular foreign government through the law, its broader scope will serve to discourage human rights abuses internationally.

2. Procurement Laws

This Note will now examine three selective contracting laws currently proposed or in force under the Foreign Affairs Power.\textsuperscript{119} Prior to the MBL, several courts considered whether state “Buy American” procurement laws violated the foreign affairs power, with mixed results. In the earliest case, Bethlehem Steel Corp. v. Board of Commissioners,\textsuperscript{120} a California court invalidated the state’s Buy American procurement laws targeting a particular condition.

\textsuperscript{117} See NFTC v. Natsios, 181 F.3d 38, 52 (1st Cir. 1999), aff’d sub nom. Crosby v. NFTC, 530 U.S. 363 (2000); Gerling Global Reinsurance Corp. v. Am. v. Low, 240 F.3d 739, 753 (9th Cir. 2001) (reversing the District Court’s holding that California’s Holocaust Victims Insurance Recovery Act violated the Foreign Affairs Power and holding instead that Zschernig did not apply because the law did not target specific countries, unlike the MBL in Natsios); In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160, 1173 (N.D. Cal. 2001) (drawing Foreign Affairs Power analysis factors from Gerling and Natsios including: “a [statutory] purpose to influence foreign affairs directly,” and that the “statute targets particular countries.”). See also Batchelder, supra note 64, at 490-91 (arguing that the prior Supreme Court case law reflects a threshold approach to foreign affairs analysis).

\textsuperscript{118} Bd. of Trustees, 562 A.2d at 746-48 (noting the ordinance’s minimal state intrusion on the federal government’s conduct of foreign affairs and the local state interest in ensuring that the City’s pension funds were not invested in a manner offensive to beneficiaries and other Baltimore residents).


\textsuperscript{120} 80 Cal. Rptr. 800 (Ct. App. 1969).
law because, like the probate statute in Zschernig, the state law has a
great potential for embarrassment and "may bear a particular onus to
foreign nations since it may appear to be the product of selfish provi-
cionalism." Later, in Trojan Technologies v. Pennsylvania and
Commission, the courts held that neither the Pennsylvania nor the New
Jersey "Buy American" laws constituted an intrusion by the state into foreign affairs. Unlike the probate judges in Zschernig, the courts emphasized that, under the Buy American laws, state officials did not make minute inquiries into the ideologies or politics of other countries and that the laws applied uniformly to all countries. K.S.B. Technical Sales Corp. distinguished Bethlehem Steel by noting that, unlike the California law, the New Jersey statute allowed the state to suspend the Buy American provisions if the cost was unreasonable or inconsistent with the public interest. In addition, the California court in Bethlehem Steel found its law to be inconsistent with the federal Buy America Act and held that the state law should not be permitted to operate in the same sphere. Absent preemption by a federal law, states may argue that selective contracting laws, particularly those not targeting a particular country, would pass a Foreign Affairs Power challenge under Trojan Technologies and K.S.B. Technical Sales Corp.

Under Crosby, procurement statutes targeting countries already
the subject of a federal law would be preempted. This Note argues that state procurement laws not preempted by a federal sanctions re-
gime remain vulnerable to challenge because, under Zschernig and Natsios, if they target a specific country and expressly intend to un-
dermine a particular regime through their measures.

For example, a bill proposed in the New York State Assembly
prohibits the state from contracting with corporations with business activities in countries that persecute Christians. Despite the bill's

---

121 Id. at 805.
124 Trojan Technologies, 916 F.2d at 913; K.S.B. Technical Sales Corp., 381 A.2d at 782.
126 Bethlehem Steel Corp., 80 Cal. Rptr. at 804 n.8.
§ 4 of the bill provides:
"[N]o state agency shall contract for the supply of goods, services or
construction with any person who does not agree to stipulate ... as a ma-
terial condition to the contract ... (1) that the contractor and its affiliates
shall not during the term of such contract sell ... goods or services [to
the countries mentioned above], (2) that none of the goods to be supplied
added exceptions and reference to the federal sanctions against certain countries, the bill will not survive a Foreign Affairs Power challenge. First, under a balancing approach, the state has a powerful interest in managing procurement. Contracting, like probate law, is traditionally a state interest. As there is no treaty, legislative action, or an executive branch policy addressing Christian persecution, the state can argue there is no overriding federal interest at stake. In the absence of direct federal action, New York can argue there is no current overriding federal interest that would preclude its procurement law. However, the plain language of the bill shows New York’s intent to directly influence foreign policy, to protest the failure of the federal government to take sufficient action, and to sanction certain regimes in the absence of federal government action. Similarly, Massachusetts conceded that its purpose in enacting the MBL was to condemn the Burmese government’s human rights record and change its domestic policies. Moreover, the New York bill will probably be invalidated for its very specificity, as it singles out fifteen countries by name.

Under the stricter threshold test, the New York bill would automatically fail, because it targets specific countries and pertains to subject matter (human rights issues, including persecution of Christians) that is part of ordinary diplomatic relations between the U.S. and every other country. In Zschernig, the Court held that the Oregon probate statute had a direct impact on foreign relations with the Soviet bloc even in the absence of a treaty or specific federal policy governing inheritance issues. Under Zschernig, even if the federal gov-
ernment has failed to act, the New York bill still represents an unwarranted intrusion into foreign affairs.

Secondly, the bill allows the state to directly engage representatives of foreign governments that will result in the “minute inquiries” into the actual administration of foreign law prohibited by Zschernig. Section 4 of the New York bill requires the state to assess whether contractors who are withdrawing from specific countries have engaged in good faith efforts to negotiate with local trade unions regarding the termination of local employees. Thus, the bill has a direct influence on foreign affairs because of the bill’s clear intent to supplement a “vacuum” at the federal foreign policy level and its unusual intrusiveness into the laws of a foreign country. A court will find the potential for great embarrassment because the bill targets a U.S. ally (Turkey) and other countries with which the U.S. is trying to improve relations (Vietnam, Iran). Since the bill is tied to existing federal sanctions, a court may invalidate the bill under the foreign affairs power for intruding where Congress has already spoken.

A second procurement bill is pending in Massachusetts. After the First Circuit’s decision, the Massachusetts House of Representatives modified the MBL language to craft a new procurement law aimed at Indonesia. This bill (1) requires the state to develop a restricted purchase list of companies for Indonesia and (2) exempts contracts that are covered under the GATT procurement agreement. The bill’s conformity with the GATT provisions reduces its direct impact on a federal treaty and potential for embarrassment under Zschernig. However, the Indonesia bill would still fail because it targets a country and requires the state to scrutinize private investment abroad.

Third, a City of North Olmsted, Ohio resolution requires contractors to certify that goods supplied to the city were not produced under sweatshop conditions. The striking aspect of the resolution is that it does not target a specific country nor does it

---

132 Id. §§ 2-4. The New York bill requires, in order to receive a state contract, all persons to stipulate as a material condition of the contract that he or his affiliates have not within the twelve months prior to the award of such contract violated and shall not during the period of such contract violate any federal sanctions imposed on any countries named in the bill. Id.
133 H.B. 3177, 1999 Leg., 181st Legis. Sess. (Mass. 1999), supra note 87 provides: “A state agency that is subject to the international Government Procurement Agreement may procure goods and services from a person who is on or who is so determined to meet the criteria of the restricted purchase list for Indonesia only, if the value of the contract to be awarded is not less than $500,000 for procurement of goods or services . . . or not less than $7 million for procurement of construction services.”
134 North Olmsted’s resolution provides: “The administration shall maintain a policy of evaluating suppliers products concerning the working conditions under which the products are manufactured . . . [t]o the extent possible, goods from suppliers who will not state that their products are not made under sweatshop conditions will not be purchased.” City of North Olmsted Ohio Res. No. 97-9 (1998), supra note 119. Sweatshop conditions are defined as: (1) employing children in labor under age 15, and (2) forced labor or prison, indentured or bonded
that it does not target a specific country nor does it directly target conditions abroad. Like the Buy American laws upheld in Trojan Technologies and K.S.B. Technical Sales Corp., North Olmsted’s resolution is uniformly applicable to any products the city procures, whether from foreign or domestic sources. Under a balancing test, the city’s interest in controlling the quality of city procurements should prevail, since the law does not conflict with an overriding federal policy or law. Under Zschernig’s threshold test, the law would also pass because it applies equally to domestic companies and does not affect foreign affairs.135

The North Olmsted resolution may run afoul of Zschernig’s prohibition of minute inquiries, as it requires the city to inquire into the specific working conditions of contractor-supplied goods. The law defines minimum standards and requires that every worker be informed of the standards, where consistent with foreign law.136 Because neither the enforcement mechanisms nor the contract award criteria are specified, it is unclear how the city will assure the absence of sweatshop conditions. If the city accepts the contractor’s certification that goods are not produced in sweatshops at face value, then the law requires no minute inquiries. Unlike the Massachusetts or New York bills, North Olmsted is not required to collect data or monitor foreign conditions or corporate activity abroad.

While Massachusetts may have the purchasing power to influence a company’s investment decisions abroad, a small city with fewer resources clearly has only an incidental impact on foreign policy. The North Olmsted resolution, by itself, would have a limited potential for diplomatic embarrassment in the absence of a treaty.137 However, a court could still find the city’s resolution a “bellwether” for similar local intrusions into foreign affairs and invalidate it, less for its actual impact than to prevent a proliferation of local laws that cumulatively

---

133 Id. The preamble states: "[I]t is the desire of this council to support the rights of citizens around the world to work in a safe and healthy workplace at reasonable compensation by not purchasing products made under sweatshop conditions."

136 The resolution requires: “These standards must be communicated to every worker, supervisor and manager in the factory, orally and in writing, in the language understood by each person.” Id.

137 This Note does not consider the effectiveness of the various laws in effecting political change. The fact that the North Olmsted resolution, because of its lack of specificity, may successfully pass a legal challenge does not make it an effective reform mechanism.
would have a highly negative effect. Thus, North Olmsted's resolution may also be invalidated.

The greater a law's specificity and the greater the burden a state imposes on private corporations, the less likely a procurement law will survive a Foreign Affairs Power challenge. Yet it is precisely through the specific requirements that a state can affect corporate behavior through its purchasing power. Procurement and divestment laws may be upheld if they do not target specific countries, although procurement laws remain vulnerable to invalidation under the First Circuit's approach because they cause direct economic impact. Scholars recognize that state actions always have some impact on foreign affairs, and this impact will continue to grow as countries become increasingly dependent on global trade. State and local laws can be viewed as one essential forum for the expression of dissent and public opinion in foreign affairs. Since foreign affairs are the least transparent of the federal functions, a judicial policy allowing for procurement laws not targeting a country would allow communities one

---

138 In Zschernig, the Court noted that the Oregon law shows the dangers involved if each state is allowed to conduct a foreign policy through its probate courts. See Zschernig v. Miller, 389 U.S. 429, 441 (1968).

139 Additional evidence that courts may uphold state laws if they do not target specific countries can be found in the Ninth Circuit's recent decision in Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739 (9th Cir. 2001) [hereinafter Low], cert. dismissed sub nom. Am. Ins. Ass'n v. Low, No. 00-1926, 2002 U.S. LEXIS 607 (Jan. 29, 2002). In Low, California's Insurance Commissioner appealed an injunction of California's Holocaust Victim Insurance Relief Act ("HVIRA") which had been challenged by insurance companies and a trade association. Id. at 741. HVIRA required all insurance companies doing business in California to comply with state reporting requirements regarding the resolution of Holocaust-era claims. Id. at 741-42. The Insurance Commissioner was required to suspend certificates of authority for failure to comply. See id. The lower court held that HVIRA violated the Foreign Affairs Power because it potentially conflicted with the United States' efforts to resolve Holocaust-era claims with foreign governments and had great potential for embarrassment. Gerling Global Reinsurance Corp. of Am. v. Quackenbush, No. CIV. S-00-0506, 2000 U.S. Dist. LEXIS 8815, at *21-28 (E.D. Cal. June 9 2000). Thus, HVIRA had "[m]ore than an [i]ncidental [e]ffect in [f]oreign [c]ountries." Id. at *32. The Ninth Circuit affirmed the injunction, but held that the district court erred in its Foreign Affairs Power analysis. Low, 240 F.3d at 751. The Court distinguished Natsios, because, unlike the MBL, HVIRA did not refer to any particular country, and "there [was] no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in Zschernig." Id. at 753. The Court concluded that "HVIRA, on its face, involves commerce alone, and it is not, on its face, directed at any particular foreign country." Id. On remand, the district court granted Gerling's motion for summary judgment on Due Process grounds and enjoined California from suspending insurer licenses for failure to comply with the HVIRA reporting requirements. See Gerling Global Reinsurance Corp. of Am. v. Low, No. CIV. S-00-0506, 2001 U.S. Dist. LEXIS 16072, at *42-43 (E.D. Cal. Oct. 2, 2001).

140 See Bilder, supra note 3, at 821-22 (citing sister-city exchanges, local economic development programs, and cultural exchanges as permissible state activities).

avenue to express their concerns, at least until the federal government decided to act.

III. THE DORMANT COMMERCE CLAUSE

Assuming that divestment or procurement laws are not invalidated by the Foreign Affairs Power, they also must pass muster under the Dormant Commerce Clause. The Constitution grants Congress the power "[t]o regulate commerce with foreign Nations and among the several States." 142 Under the Dormant Commerce Clause, a state cannot advance its legitimate goals by means that facially discriminate against foreign commerce, absent a compelling justification. 143 Massachusetts argued that it was acting as a market participant in state procurement and, therefore, the Commerce Clause restrictions did not apply to the MBL. The market-participant exemption has not been applied to the Foreign Commerce Clause, and the Supreme Court did not address the issue in Crosby. Commentators have suggested that the market-participant exemption should be extended, arguing that limiting the exemption to interstate commerce would result in a logical inconsistency—a state could discriminate against out-of-state commerce, but must offer identical terms of trade to foreign and in-state commerce. 144 States supporting the MBL argued that the Court's cases reflect a trend towards supporting states' rights and enabling states to "serve as laboratories for social and economic experiments,"145 so extending the market-participant exemption would enable states to be politically accountable to community values regarding the use of state funds. 146 If a state's citizens wish its government to avoid products produced by Burmese slave labor, and are aware that their taxes will be used to pay a slightly higher price for goods, a state should be able to incorporate the externality into its prices. This Note will analyze local divestment and procurement laws assuming a market-participant exemption and under the traditional Dormant Commerce Clause analysis.

142 U.S. CONST. art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." South-Central Timber Dev., Inc. v. Wunnike, 467 U.S. 82, 87 (1984) (holding that Alaska's in-state timber processing requirement was a market regulation and therefore invalid under the Commerce Clause).

143 See, e.g., Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Finance, 505 U.S. 71 (1992) (invalidating an Iowa tax provision that treated dividends received from foreign subsidiaries differently as violative of the Foreign Commerce Clause).

144 For policies supporting extension of the market-participant exemption, see Batchelder, supra note 64, at 491. See also Brief of Amici Curiae New York City et al., supra note 141, at 8-9.


146 See Batchelder, supra note 64.
A. Market-Participant Exemption

The Court first articulated the market-participant exemption to the Dormant Commerce Clause in *Hughes v. Alexandria Scrap Corp.* In *Hughes*, the Court upheld Maryland's law offering a bounty to encourage local processing of inoperable automobiles although the law favored in-state scrap processors over out-of-staters. Noting that the state had entered the market to protect its environment, the Court ruled that "[n]othing in the purposes . . . of the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Following *Hughes*, the Court applied the market-participant exemption in other domestic Commerce Clause cases. In *Reeves v. Stake*, the Court upheld South Dakota's policy to limit sales of state-produced cement to state residents only. First, the Court held that South Dakota, as a seller of cement, was a market participant. A public entity acts as a market participant when it buys, sells, or functions in the marketplace, because it takes on private business elements. In contrast, a state is a regulator and is covered by the Commerce Clause when it imposes taxes or regulations in the marketplace. Second, the Court held that the state could withdraw its cement from the out-of-state market; otherwise, the state's ability to structure relations exclusively with its own citizens would be significantly impaired. Because South Dakota had not attempted to limit the access of out-of-staters to the state's raw materials nor restricted the ability of private firms or other states to set up cement plants inside South Dakota, it had not violated the Commerce Clause.

Similarly, in *White v. Massachusetts Council of Construction Employers*, the Court found that an executive order requiring city-funded construction contractors to hire at least fifty percent of their crews from Boston residents did not violate the Commerce Clause. The Court ruled that the city was acting as a market participant and that the order covered "a discrete, identifiable class of economic activity in which the city is a major participant." In response to the argument that the requirement went beyond the city's market participation because it essentially regulated employment contracts between

---

148 Id. at 810.
150 Id. at 438 n.12.
151 Id. at 441.
153 Id. at 211 n.7.
the public contractors and their subcontractors, the Court held that the Commerce Clause does not require the city to stop at the boundary of formal privity of contract.\textsuperscript{154} It also noted that there "are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," but did not find it necessary to define them in \textit{White}.\textsuperscript{155}

The following year, the Court further defined the boundaries of the market-participant exemption. In \textit{South-Central Timber Development, Inc. v. Wunicke},\textsuperscript{156} the Court held that an Alaskan in-state timber processing requirement violated the Commerce Clause, even though Alaska was acting as a participant in its timber market. The Court distinguished \textit{White}, stating that there, the crucial fact was that the employees were all in some way working for the city of Boston. Here, Alaska "may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside"\textsuperscript{157} of the market in which the state is a market participant. The Court also distinguished \textit{Reeves} by noting that three crucial elements—foreign commerce, a natural resource, and restrictions on resale—were present in Alaska's case but not in \textit{Reeves}.\textsuperscript{158}

In \textit{Natsios}, the First Circuit held that Massachusetts was acting as a market regulator, not a market participant, because it was "attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts."\textsuperscript{159} The state regulated because the state's restrictive purchasing list continually monitored foreign investment, not just during the contract period, and the state imposed conditions on contractors beyond the original transaction—the signing of the contract—in which the state is a market participant.\textsuperscript{160} Also, the state's goal of disassociating itself from the "moral taint" of companies doing business in Burma was beyond the scope of ordinary market participation.

1. \textit{Divestment Laws Under a Market-Participant Exemption}

Assuming the market-participant exemption applies to the Foreign Commerce Clause, local divestment laws could survive if the state acts as a market participant. In \textit{White}, the Court held that the

\begin{itemize}
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} 467 U.S. 82 (1984).
\item \textsuperscript{157} Id. at 97.
\item \textsuperscript{158} Id. at 98.
\item \textsuperscript{159} NFTC v. Natsios, 181 F.3d 38, 63 (1st Cir. 1999), aff'd sub nom. Crosby v. NFTC, 530 U.S. 363 (2000).
\item \textsuperscript{160} Id. at 65.
\end{itemize}
impact of a state law is only considered after it is decided that the city is regulating the market rather than participating in it. Thus, under White, a future court must consider (1) whether the state is a market participant and (2) the effect of the state law on interstate commerce. As the trustee of public funds, a state participates in the private investment market on behalf of the public, and it engages in a discrete, economic activity, contracting and managing the investment of public funds. Divestment laws will do less harm to interstate commerce than procurement laws that penalize private firms directly through the loss of lucrative contracts. However, the First Circuit found Massachusetts was a regulator because the MBL affected the firms’ investment decisions unrelated to their contracts with the state. Similarly, state divestment laws attempt to discourage firms from investing in specific countries, foreign activities that have little to do with the state’s investment transactions. In order to be eligible for city investment, firms must be “investment-free” beyond the original investment transaction with the state. Therefore, firms will suffer some impact, through the loss of potential or current investors.

However, a state may argue that it is not regulating through its divestment laws. First, if it can be shown that conditions such as human rights abuses or poor environmental records have a destabilizing effect on the long-term profitability of investments, then a state may argue that its use of such criteria is directly tied to its role as trustee and manager of public pension funds. Thus, the state’s interest in human rights could be directly related to its role as a market participant in managing its long-term investments. Second, White allows a market participant to impose some conditions beyond the contractual transaction. In Board of Trustees, the court noted that the ordinance, like the executive order in White, involved “an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract.” As with White’s requirement that fifty percent of city contract workers be Boston residents, the city’s requirement that public funds be invested only in firms with no South Africa investment was deemed a continuing proprietary interest in the contract. As states retain a continuing proprietary interest in monitoring the performance of the firms in which public funds are invested, the city is justified in imposing conditions that extend beyond the investment transaction. Unlike the procurement law prohibitions that remain in effect for the duration of the contract, the state applies

---

162 Natsios, 181 F.3d at 64.
163 See Strumberg, supra note 106, at 150.
164 Bd. of Trustees v. Mayor of Baltimore, 562 A.2d 720, 752 (Md. 1989).
its selection criteria simultaneously with its investment transaction under a divestment law. If the above-mentioned linkage between the long-term stability and profitability of investments and a company's human rights or environmental record is not accepted, then a question arises as to whether the state, in imposing human rights criteria in investment decisions, is acting as an ordinary market participant. A state can be a market participant if it acts to increase benefits to local residents at the expense of nonresidents. In Board of Trustees, the court held that a market participant need not benefit exclusively economic interests. Baltimore's ordinance benefited the non-economic local interests: the state favored its citizens and fund beneficiaries by acting as a "guardian and trustee" in administering local funds in conformity with its citizens' interests in promoting human rights in South Africa. Also, the opt-out provisions in the Baltimore ordinance and New York investment bill allow the state to discontinue divestment if it is financially unreasonable. By allowing for such exceptions, the state is acting as an ordinary market participant by prioritizing the fund's performance over the policy.

In sum, because the state acts as a market participant in affirmatively selecting investment mechanisms for public funds and divestment policy constitutes a legitimate continuing state interest, divestment laws could pass a Commerce Clause challenge, assuming a market-participant exemption. The United States suggested in its MBL amicus brief that, because a state acts as an owner of the companies through its pension funds, it may be a market participant under a divestment law. Thus, a divestment law would not be seen as a state's attempt to regulate corporate conduct abroad.

2. Procurement Laws Under a Market-Participant Exemption

This Note will now analyze whether New York's bill and North Olmsted's resolution are forms of state market participation. In


167 Bd. of Trustees, 562 A.2d at 750 (citing K.S.B. Technical Sales Corp., 381 A.2d at 787, and noting that only minimal benefits flowed to local citizens from the Buy American law, by channeling state funds away from foreign firms to domestic firms, some of whom might be located in New Jersey). See also Air Transport Ass'n of Am. v. City of San Francisco, 992 F. Supp. 1149 (N.D. Cal. 1998) (recognizing that the city acted to effectuate a legitimate local public interest, that of ensuring no discrimination against same-sex couples, but invalidating the ordinance for violating the Dormant Commerce Clause).

168 Brief of Amici Curiae New York City et al., supra note 141, at 8.

Reeves v. Stake, the Court upheld South Dakota's preference for in-state purchasers for its state-produced cement, observing that the state, having created the interstate market, could withdraw from that market and favor its own citizens. Similarly, in Trojan Technologies, the court of appeals held that Pennsylvania, as a market participant, "enjoys the . . . right to specify to its suppliers the source of steel" it procured under its Buy American law. States therefore may defend procurement laws by arguing that, as in Reeves, state funds have created a market for the purchase of needed goods and services and that, as the buyer, they are market participants. States are involved in a discrete economic activity, the purchase of goods and services supported by local funds.

However, procurement laws face the same hurdles as do the divestment laws—they target conditions beyond their actual markets. The First Circuit held that Massachusetts was not a market participant because it attempted to impose conditions in markets unconnected to the transaction with the state. Thus, Massachusetts' conduct was similar to Alaska's in South-Central Timber, where the state required all purchasers of timber produced on state lands to also process that timber inside the state with in-state processors. By imposing post-purchase conditions in downstream markets (processing market) in which it was not a participant (sale of timber market), the state attempted to govern the private, separate economic relationships of its trading partners.

First, states can attempt to distinguish South-Central Timber, because three elements identified by the Court as key to its decision to limit downstream conditions—a natural resource, foreign commerce, and restrictions on re-sale—are not all present in the case of a procurement law. Second, commentators suggest that South-Central Timber can be read more narrowly to prohibit states from imposing downstream conditions only. A future court could find that a procurement law imposed a condition precedent—preferring firms that did no business in Burma—to contracting with the state. Similarly, the North Olmsted requirement that suppliers certify their goods were not produced in sweatshop conditions is a condition precedent to conclude a contract with the city. The New York bill requires a contrac-

---

170 Reeves, 447 U.S. at 441.
172 38, 64 (1st Cir. 1999), aff'd sub nom. Crosby v. NFTC, 530 U.S. 363 (2000).
174 Id. at 95-96.
175 Dhooge, supra note 66, at 467 (arguing that Alaska's requirement of in-state processing can be characterized as providing for after-the-fact state participation in South-Central Timber).
tor to stipulate as a material condition of the contract that it conducts no business in specific countries for the term of its contract. If the human rights requirement is a condition of the contract, then New York can argue that the bill does not impose any downstream conditions on the contractor. If the state later discovers that a contractor has business in a specific country, then subsequent state enforcement actions would relate to a breach of a material condition of the contract, not the imposition of downstream regulation.

However, procurement laws may still fail because the state attempts to regulate activities unconnected with the state. In White, the Court found the Mayor's hiring requirement acceptable because the city imposed the resident-hiring requirement only on construction contracts with the city, not on all construction firm contracts. The fact that the New York bill limits investment in specific countries only during the contract period does not help it here, because the company may have no investment at all. The North Olmsted resolution would pass because it imposes the sweatshop restrictions only for goods supplied to the city. North Olmsted could argue that, as in Reeves, the city does not impose conditions beyond its own procurement market. The resolution does not touch on a company's diverse investments or contracts with a foreign government or foreign suppliers. Indeed, it would be possible to comply with the North Olmstead resolution if a potential bidder maintained separate suppliers—one with non-sweatshop goods for city contracts, and another supplier for less scrupulous customers. Because the North Olmsted law limited its interest to goods produced only for the city and does not attempt to limit business decisions beyond the city contracts, it does not impose the restriction found in the MBL. If the New York bill focused its prohibition on goods supplied to the state, rather than monitoring contractor foreign investment, the bill might also pass muster.

The court must also find that the state, in adopting human rights or other non-economic criteria, is acting as a market participant. The First Circuit held that Massachusetts had not acted as a market participant in conditioning contract awards on noninvolvement in Burma. States defending procurement laws face somewhat different challenges in proving local benefit than do those with divestment

---

176 See A.B. 9514, 2000 Leg., 223d Legis. Sess. § 5(A) (N.Y. 1999), supra note 87. § 5(A) requires the State to insert the no-business policy into the contract as a material condition and not as a criteria for award of the state's bid, as in MBL.


179 NFTC v. Natsios, 181 F.3d 38, 65 (1st Cir. 1999), aff'd sub nom. Crosby v. NFTC, 530 U.S. 363 (2000) (noting that "[t]he proper inquiry is whether Massachusetts is acting as an ordinary market participant would act, not whether any participant has acted in such a fashion").
laws. While states may defend divestment laws or investment policies based on the hypothesis that corporate investments in countries with poor human rights or environmental records may lead to a riskier or less stable investment, goods supplied to a state procurer from countries with slave labor arguably may be cheaper to the local consumer. However, in enacting procurement laws, state and local officials are responding to citizens' demands for increased accountability for human rights. The Court has recognized that states serve legitimate citizen interests that are both economic and non-economic in nature. For example, in *Hughes v. Alexandria Scrap Corp.*, the Court noted with approval Maryland's decision to pay bounties favoring in-state scrap processors to protect the environment. A plurality of the Court has also recognized that local governments have a compelling interest in assuring that public dollars do not support racially discriminatory activities. Thus, states may argue that citizens are willing to internalize the costs of slightly higher priced goods for the assurance that the producer of these goods makes a living wage or has decent working conditions. According to such an argument, part of the legitimate state interest in procurement is the right to allocate resources according to the needs and priorities of citizens.

The market-participant exemption should be extended to procurement and divestment laws. The state furthers the economic and political interests of its citizens by taking human rights into account, as this internalizes the hidden costs of human rights abuses or environmental concerns into the state's purchasing costs. Assuming a market-participant exemption, divestment and procurement laws would pass muster, with some modifications. The laws should target conditions, such as labor rights or human rights, rather than country-specific criteria. Procurement laws should be limited to goods supplied to the locality. The more a state attempts to influence a corporation's choice of partners or have an impact on markets beyond the state procurement market, the less likely the laws will survive a Commerce Clause challenge.

---

182 Brief of Amici Curiae New York City et al., *supra* note 141, at 9.
B. Dormant Commerce Clause Without a Market-Participant Exemption

If the state is not protected by the market-participant exemption, the court must next examine whether the state statute violates the Dormant Commerce Clause. In *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, the Court invalidated an Iowa tax provision that allowed a dividend deduction for domestic subsidiaries but not for foreign subsidiaries under the Dormant Foreign Commerce Clause. The Court outlined its test under the Commerce Clause: "Absent a compelling justification . . . a State may not advance its legitimate goals by means that facially discriminate against foreign commerce." If the Court finds that the law "facially discriminates" against foreign commerce, the law is "virtually per se invalid" and is struck down. If the law does not facially discriminate, the Court will apply a balancing test to consider if the regulation has an incidental effect on interstate commerce by considering whether the burden on commerce clearly exceeds the putative local benefits. In *Kraft General Foods*, the Court rejected Iowa's arguments that the regulation did not favor local interests and that it promoted administrative convenience. Since the Constitution grants greater protection against state taxation for foreign commerce because of national concerns about retaliation and the need for uniformity, the absence of a local benefit did not eliminate the international concerns.

As the Court more rigorously scrutinizes state laws under the Foreign Commerce Clause, it applies added tests to those under the Commerce Clause. In *Container Corp. of America v. Franchise Tax Board*, the Court upheld California's tax reporting system against a claim that it resulted in double taxation for multinational enterprises, thus regulating foreign commerce. The Court held that a state tax could have "foreign resonances," that would not directly influence foreign affairs. If so, the Court will not infer that Congress intended to require states to adopt a federal system, unless Congress explicitly gave such direction. In a related case, *Barclays Bank v.*

---

184 *Id.* at 81.
186 *Id.* (citing *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970)).
189 See *id.* at 193-94.
190 *Id.* at 194.
Franchise Tax Board of California, the Court again upheld the California tax system under a Foreign Commerce Clause challenge, this time brought by a foreign corporation, Barclays. The Court articulated an additional test: whether the state law impaired federal uniformity in an area where federal uniformity is essential and thus prevented the government from speaking with one voice in international trade. The Court considered existing federal laws, treaties, and policies to determine congressional intent to develop a uniform system. The Court then concluded: "[G]iven these indicia of Congress’ willingness to tolerate States’ . . . reporting mandates, even when those mandates are applied to foreign corporations . . . we cannot conclude that the foreign policy of the United States—whose nuances . . . are much more the province of the Executive Branch and Congress than of this Court—is [so] seriously threatened . . . as to warrant our intervention."

The First Circuit determined that the MBL facially discriminated against foreign commerce because the law’s goal was to affect business decisions concerning a foreign nation. The Foreign Commerce Clause, noted the court, applies both to regulation of foreign companies and domestic companies operating overseas. Thus, the fact that the MBL applied evenly to both domestic and foreign companies did not save it because the law still discriminated against all companies with business in Burma, and the absence of local benefits was irrelevant. The MBL impaired the federal ability to speak with one voice because, unlike in Barclays, Congress intended to establish a uniform rule through the FBL. Finally, the MBL regulated beyond the national borders and the state failed to show a legitimate local interest for the law.

1. Divestment Laws and the Dormant Commerce Clause

Divestment laws will survive a Foreign Commerce Clause challenge if they do not facially discriminate against foreign commerce and do not conflict with the need for federal uniformity. In Board of Trustees, the court found that Baltimore’s South Africa divestment ordinance did not facially discriminate because (1) it applied even-
handedly to all firms in which the city might invest, and (2) the law was not intended to favor local interests at the expense of businesses elsewhere. Board of Trustees' analysis has been superseded by the current Domestic and Foreign Commerce Clause cases, as illustrated in Kraft General Foods. Under these cases, a law that discriminates against all firms, foreign and domestic, with business in South Africa violates the Foreign Commerce Clause and the absence of local benefits is irrelevant. The First Circuit found facial discrimination because the MBL penalized any businesses doing business in Burma, foreign and domestic firms alike. One could argue that an investment decision does not necessarily burden foreign commerce because it does not automatically cause a company to lose profits, although the company does lose current or potential investors. However, the Massachusetts and New York bills would fail under the Foreign Commerce Clause because they discriminate against all entities with business in specific countries and favor business without particular foreign interests. Neither the absence of local benefit nor a state interest will save a per se violation. A condition-specific law targeting human rights or environmental policy will not fail as it applies to all firms, foreign and domestic, regardless of whether they participate in foreign commerce or not, and thus does not facially discriminate against foreign commerce.

If a law does not facially discriminate, a court will examine whether the burden on foreign commerce is clearly excessive in relation to the local benefits. In Board of Trustees, the court held that the divestment ordinance burdened the interstate sale of securities. However, this was outweighed by the city's interest in condemning racial discrimination by refusing to invest in South Africa, especially where its citizens felt strongly about slavery. A condition-specific law reflects a powerful state interest in ensuring that public funds are invested consistently with citizen interests, but this may not be sufficiently compelling to outweigh the burden of the regulation on foreign (and domestic) commerce.

197 Bd. of Trustees v. Mayor of Baltimore, 562 A.2d 720, 754 (Md. 1989).
198 Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin., 505 U.S. 71, 82 (1992) (holding absence of local benefit irrelevant to finding of per se facial discrimination); see also C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (holding in-state processing requirement for recyclable waste invalid per se under Commerce Clause unless city could show there was no other means to advance a local legitimate interest); City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978) (invalidating New Jersey law banning the disposal of out-of-state waste in the state despite claim of environmental/safety purpose).
199 See Natisos, 181 F.3d at 67-68.
200 Bd. of Trustees, 562 A.2d at 755-56.
201 See supra note 198 for recent cases rejecting similar state interests.
Additionally, divestment laws do not impair the federal government’s ability to speak with one voice. In deciding that the government did not intend to impose a uniform tax system, the \textit{Barclays} Court noted Congress’ awareness of the need for a uniform system and its failure to pass a bill.\footnote{Barclays Bank v. Franchise Tax Bd. of Cal., 512 U.S. 298, 324-28 (1994).} Thus, the state law did not impair the government’s ability to speak with one voice. Similarly, there is no international treaty or federal law governing divestment. The nature of a divestment decision produces only a foreign resonance, because the transaction is directed at the U.S. private sector and not at the offending country itself. In \textit{Barclays}, the Court deferred the decision of choosing between the risk of foreign retaliation and states’ rights to implement their tax policies to Congress and the executive branch.\footnote{\textit{Id.} at 327-28.} Unless either body adopts a policy or law, divestment laws will not impair the federal government’s ability to speak with one voice.

Divestment laws targeting a country will not survive a Foreign Commerce Clause challenge as the laws facially discriminate against foreign commerce and any firm doing business in a specified country. Moreover, condition-specific laws may also fail because it is doubtful whether the state’s interest to ensure investment consistent with citizen interests would qualify as a compelling justification to outweigh the law’s impact on foreign commerce. Divestment laws pass the \textit{Barclays} Foreign Commerce Clause test, because the lack of a congressional or federal policy concerning divestment shows there is no need for federal uniformity.

\section*{2. Procurement Laws and the Dormant Commerce Clause}

The Note will next analyze whether the New York bill and North Olmsted resolution could pass a Foreign Commerce Clause challenge. The First Circuit found the MBL clearly discriminated against companies, both domestic and foreign, which did business in Burma. Similarly, the New York bill discriminates against companies that do business in the specified countries by requiring that these companies submit bids that are five percent lower than the lowest bid or that they certify they have no prohibited foreign investments.\footnote{\textit{See A.B. 9514, 2000 Leg., 223d Legis. Sess. § 5(A) (N.Y. 1999), supra note 87.}} Since companies with particular holdings are burdened, the New York bill would be invalid under the Foreign Commerce Clause.

In contrast, the North Olmsted resolution applies equally to all companies foreign and domestic, with and without foreign investments. The only requirement is that goods supplied to the city not be
made with sweatshop or slave labor. 205 The law does not facially discriminate against foreign commerce as it applies evenly to companies regardless of location or nature of business. Under the balancing test, the court would consider whether the burden on interstate commerce was excessive in relation to the putative local benefits. Here, the state has a direct interest in controlling its procurement and ensuring that citizen interests are protected. It might also have a police power interest in protecting local workers from substandard working conditions. North Olmsted could argue that its procurement interest should outweigh the minimal financial burden the city imposes on foreign commerce, especially as contractors could feasibly maintain several suppliers and pass the costs on to the state. 206

If the state law does not facially discriminate, the court would next consider whether the law conflicted with a need for federal uniformity. In Trojan Technologies, Inc. v. Pennsylvania, which pre-dates Barclays, the court held that the state’s Buy American statute did not impair federal uniformity, because “Congress is aware of state activity . . . and has not yet imposed a policy of national uniformity.” 207 The court also noted that state procurement policy was not “an area where federal uniformity is essential.” 208 The First Circuit did not apply Barclays to the MBL in its Foreign Commerce Clause analysis, noting that the California law in Barclays was not challenged under the Supremacy Clause. 209 Thus, Barclays “did not discuss how courts should address Supremacy Clause challenges to state laws that impact foreign affairs,” 210 such as the MBL.

If the Barclays test applies, procurement laws may not be invalidated because of the need for federal uniformity. Currently, there are no federal laws regarding the persecution of Christians, although the New York bill might still fail under the existing federal sanctions in certain countries. North Olmsted’s resolution would also pass, in the absence of conflicting federal laws governing international labor rights. 211 One remaining obstacle is that Congress is currently con-

206 But see supra note 198 (showing that the Supreme Court has set a high bar for legitimate state interests under the Commerce Clause).
207 916 F.2d 903, 912 (3rd Cir. 1990).
208 Id.
210 Id.
211 See Stumberg, supra note 106, at 139-42 (arguing that post-Crosby primary boycotts would survive preemption scrutiny). The U.S. has ratified United Nations conventions supporting workers’ rights of association, freedom from forced relocation, and freedom from forced labor. Professor Stumberg argues that the convention prohibiting forced labor, which is implemented under the International Labor Organization (ILO), allows for independent state action, including a primary boycott adopted by the state. Id.
sidering a comprehensive federal sanctions bill to promote a coherent federal sanctions policy.\textsuperscript{212} In Barclays, Congress had considered imposing a uniform reporting regime, but failed to pass a law. Therefore, the Court decided that the state law did not impair the federal government’s ability to speak with one voice.\textsuperscript{213} While the federal sanctions bill does not expressly preempt state or local sanctions, under \textit{Crosby} a court would hold that Congress intended to require federal uniformity for sanctions. Thus, the New York bill and North Olmsted ordinance would be invalid, as both apply additional sanctions to a federal policy. Procurement laws targeting a specific country would fail because they discriminate against foreign commerce. A condition-specific law may withstand a Foreign Commerce Clause challenge, as it applies evenly to all commerce; however, a court may reject state procurement interest as a legitimate justification under the balancing test. In the absence of an explicit federal need for uniformity, the court would likely defer to Congress to decide whether the state’s right to impose regulations on commerce outweighs the incidental impacts on foreign commerce. The possibility of a comprehensive federal sanctions law would, of course, invalidate the procurement laws.

**CONCLUSION**

\textit{Crosby} did not entirely vitiate the states’ ability to impose normative restrictions in its procurement or investment functions that may affect foreign countries. A key lesson is that the more a state attempts to influence a corporation’s choice of partners or have an impact on markets beyond the state procurement market, the less likely the laws will survive either a Foreign Affairs Power or Dormant Commerce Clause challenge. The more general the language and the less detailed the procedural or enforcement mechanisms, however, the less effective the law will be as an engine of social change and the more likely it will be an aspirational statement.

Divestment laws will be most successful in meeting any legal challenges. The law will pass muster if the law (1) does not target specific countries, but focuses on conditions (human rights, environmental protection), (2) articulates an economic justification for taking conditions into account, (3) contains a reasonable time frame for di-


\textsuperscript{213} Barclay’s Bank v. Franchise Tax Bd. of Cal., 512 U.S. 298, 327 (1994).
vestment to reduce the impact on financial institutions, and (4) minimizes ongoing scrutiny of the situation abroad. While the divestment mechanism is certainly a weaker policy tool than selective contracting, states may find it the optimal mechanism for promoting citizens’ interests. The future for procurement laws is less bright. States may still enact procurement laws, absent a preemptsing federal law, if they are modified to focus on conditions. In general, the greater specificity and burden a state imposes on private corporations, the less likely a procurement law will survive either a Commerce Clause or Foreign Affairs Power challenge.

The Massachusetts Burma Law raises broader questions that must be answered in this era of inevitable global economic integration. Will local laws governing traditional state areas (for example, procurement or health and safety standards) be swept away by international trade treaties? Should citizens have some say in foreign affairs at the local level, especially when the federal government refuses or is unable to act? After Crosby, states can continue to express their policy preferences, albeit in a more muted and generalized fashion.

WENDY L. WALLACE

1 Thanks to Professor Jonathan L. Entin for his helpful suggestions on this Note.