



1-1-1998

# Constitutionality of State Laws Prohibiting Contractual Relations with Burma: Upholding Federalism's Purpose, The

Jay A. Christofferson

*University of the Pacific, McGeorge School of Law*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

## Recommended Citation

Jay A. Christofferson, *Constitutionality of State Laws Prohibiting Contractual Relations with Burma: Upholding Federalism's Purpose, The*, 29 McGEORGE L. REV. 351 (1998).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol29/iss3/5>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# The Constitutionality of State Laws Prohibiting Contractual Relations with Burma: Upholding Federalism's Purpose

Jay A. Christofferson\*

## I. INTRODUCTION

Does the power to control all activities that impact foreign countries, even if just tangentially, reside uniquely with the national government?<sup>1</sup> It once was repeated as mantra by jurists, "The states are unknown to foreign nations."<sup>2</sup> Now state<sup>3</sup> governments unsheepishly enact legislation which intends, or which symbolically manifests a desire, to have foreign nations understand that their practices do not go unnoticed and can serve as the impetus to spur states to act.<sup>4</sup> Naturally, state officials attuned to the desires of their respective constituents are not interested in committing political hara-kiri by discounting popular causes.<sup>5</sup> With this understanding, state authorities have overtly restricted commercial intercourse,<sup>6</sup> divested

---

\* J.D. to be conferred 1999, McGeorge School of Law, University of the Pacific; M.S., History, University of Utah, 1995; B.A., History, B.A., Political Science, California State University, Santa Barbara, 1992.

1. See generally Richard Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821 (1989) (synthesizing diverse material including the Federalist papers and modern academic articles in assessing the viability of state and local activities with potential foreign affairs ramifications).

2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 228 (1824) (Johnson, J., concurring).

3. This note uses "state" to refer to both state and municipal action unless otherwise indicated. See GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 332 (3d ed. 1996) (quoting *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 211 (1984), "A municipality is merely a political subdivision of the State from which its authority derives.").

4. See Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 564 n.1 (1993) (cataloging a panoply of non-federal laws, including:

- 900 localities, passing resolutions supporting a freeze in the arms race;
- 197 localities demanding a halt to nuclear testing;
- 120 localities refusing to cooperate with the Federal Emergency Management Agency's nuclear war exercises;
- 126 localities, plus 27 states, divesting more than \$20 billion from firms doing business in South Africa;
- 86 localities forming linkages with Nicaragua to off-set aid supplied to the *Contras* by the federal government;
- 73 localities forming sister-city relationships with Soviet cities; and
- 10 localities establishing funded offices of international affairs;

see also FLA. ST. ANN. § 205.0532 (West Supp.1997) (providing that any local governing authority issuing an occupational license to any individual, business or entity, or parent company may revoke or refuse to renew such license if the individual, business or entity is doing business with Cuba).

5. Fenton, *supra* note 4, at 590.

6. See Peter J. Spiro, Note, *State and Local Anti-South Africa Action As an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 813-14 n.5 (1986) (elucidating that state governments implemented "communist goods" ordinances in the 1960's restricting Eastern Bloc products by imposing various discriminatory licensing and notice requirements on their sale).

funds from nations guilty of human rights violations,<sup>7</sup> acted as the catalyst for federal legislation,<sup>8</sup> and also exercised their freedom of expression to satisfy popular demand.<sup>9</sup> More recent forays into what have previously been, uniquely federal controlled areas include enacting nuclear free zones<sup>10</sup> and “buy American statutes.”<sup>11</sup> Despite the proliferation of these laws and the proliferation of activity

---

7. See Lynn Berat, *Undoing and Redoing Business in South Africa: The Lifting of the Comprehensive Anti-Apartheid Act of 1986 and the Continuing Validity of State and Local Anti-Apartheid Legislation*, 6 CONN. J. INT'L L. 7, 8-11 (1990) (discussing the relationship between state divestment strategies and national policies removing money invested in banks and businesses in South Africa to induce Pretoria to modify its behavior toward the black majority).

8. See Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 FOREIGN POL'Y 158, 159 (1992) (documenting that local initiatives provided the impetus for the Reagan administration to begin the Strategic Arms Reduction Treaty negotiations, to stop aiding the *Contras*, and to abandon most of its nuclear-war civil defense planning).

9. See Spiro, *supra* note 6, at 814 nn.6-7 (analyzing various state practices to register state opinions concerning various foreign affairs issues which include New York City Council's move to rename an intersection near the former Soviet Union's United Nations mission as “Sakarov-Bonner Corner” to show solidarity with the famous dissident's plight and the actions by the governors of New York and New Jersey to deny landing rights to the plane of Andrei Gromyko, then-foreign minister of the Soviet Union, to protest the downing of Korean Airlines 007, killing hundreds onboard); see also Bilder, *supra* note 1, at 822 n.7 (discussing *Tayyari v. New Mex. State Univ.*, 495 F. Supp. 1365 (D. N.M. 1980), in which university regents, in protest of the American hostages held in Iran, denied admission to students whose home governments held, or permitted the holding of, U.S. citizens as hostages).

10. See generally *United States v. City of Oakland*, 958 F.2d 300 (9th Cir. 1992) (striking down Oakland's nuclear-free zone ordinance because it was “so comprehensive, so complete, so all-encompassing that it cannot help but conflict with the rights and authority of the federal government”). Compare Luis Li, *State Sovereignty and Nuclear Free Zones*, 79 CAL. L. REV. 1169, 1171-72 (1991) (positing that city nuclear free zones—prohibiting the manufacture or transportation of nuclear weapons and weapons parts within their borders—survive constitutional evaluation because they fall within the strictures of the United States Constitutional allotment of control over local police powers), with Teresa A. Otruba, Comment, *Local Nuclear-Free Zone Legislation: Force of Law or Expressions of Political Sentiment?*, 22 U.S.F. L. REV. 561, 562-63 (1988) (concluding that, as presently constituted, nuclear-free zone statutes fail constitutional scrutiny because of their interference with the Federal government's foreign affairs policy).

11. See generally *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (concluding that Pennsylvania's “Buy American” statute was constitutional because the state acted as a participant, not a regulator, and thus did not violate the Commerce Clause and also concluding that the statute had only indirect impacts on foreign commerce, immunizing it against a foreign affairs challenge); *K.S.B. Technical Sales v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977) (determining that states' statutes favoring American producers constitutes valid state action). But see *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969) (striking down a California statute requiring public works to buy American products). Compare Grace A. Jubinsky, Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 561 n.103 (1985) (finding the laws symmetrical with the market participant doctrine, as the state could only purchase American products and the anti-apartheid statute roughly approximates the federal buy-American statute, thereby reinforcing federal uniformity), and Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 470-71 (1987) (discussing the constitutionality of various state laws divesting funds from South Africa), with Geraldo Pascual, Note, *State Buy American Laws In A World of Liberal Trade*, 7 CONN. J. INT'L L. 311, 311-12 (1992) (determining that decisions validating state buy-American statutes inadequately assess the impact the laws have on international trade and national agreements, including the General Agreement on Tariffs and Trade (GATT)); Note, *State Buy-American Laws—Invalidity of State Attempts to Favor American Producers*, 64 MINN. L. REV. 389, 392, 412 (1980) (illustrating that state buy-American statutes cause a lack of national uniformity and violate GATT's strictures).

by states in "quasi—foreign affairs," the laws have occasioned a dearth of discussion in Congress<sup>12</sup> and inspired few legal battles.<sup>13</sup> One commentator concludes that inactivity by the federal government serves as benign neglect to protect the equipose of federalism by not foreclosing states' ability to engage in activity to enhance meaningful and responsive local government.<sup>14</sup>

In a showing of distaste for the egregious treatment doled out to political dissidents in Burma,<sup>15</sup> state<sup>16</sup> and municipal governments<sup>17</sup> have adopted laws prohibiting government contracts with Burma directly or indirectly with companies that have dealings with Burma.<sup>18</sup> Many other states are contemplating enacting similar legislation.<sup>19</sup> This comment assesses the constitutionality of these measures

12. See, e.g., 22 U.S.C.A. §§ 5001-5116 (West 1989) (declining to preempt existing state legislation divesting funds from South Africa).

13. See generally *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (determining that an Illinois statute that imposed discriminatory taxes on South African Kruggerands, but exempted gold coins from the United States and other nations, was an unconstitutional restraint on trade); *Board of Trustees v. Mayor of Baltimore City*, 562 A.2d 720 (Md. 1989) (holding that Maryland's divestment from apartheid South Africa statute passed constitutional muster despite the panoply of constitutional arguments).

14. See, e.g., David E. Dreifke, *The Foreign Commerce Clause and the Market Participant Exception*, 25 VAND. J. TRANSNAT'L L. 257, 288-89 (1992) (noting that states act as laboratories of experiment thereby allowing responsive local government and greater sensitivity to local concerns to which the federal government does not as effectively cater).

15. See Rudy Guyon, Comment, *Violent Repression In Burma: Human Rights and the Global Response*, 10 UCLA PAC. BASIN L.J. 409, 410 n.1 (1991) (detailing that, while respecting a people's right to name their country in any manner they choose, and in solidarity with the repressed majority, the country will be referred to as Burma, and not by their official name Myanmar). This paper, too, utilizes the name Burma and not Myanmar. One good reason for this decision is that Congressional legislation and one Presidential order refer to "prohibiting new investment in Burma." Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009; Executive Order No. 13047, 62 Fed. Reg. 28301 (1997); see also Estelina Dallet & Seth Rosenthal, *Human Rights Issues in United States Foreign Policy*, 4 HARV. HUM. RTS. J. 117, 117 (1991) (detailing the pervasive bloodshed and internecine conflict among the hill tribes promoted by the State Law and Order Restoration Council (SLORC), the military junta controlling Burma).

16. See MASS. GEN. LAWS ANN. ch. 7, § 22 H, J (West Supp. 1997) (proscribing new state contracts with Burma or providing goods or services to the government of Burma).

17. See David Osborne, *Boston Takes on the EU Over Burma Trade; City Hall Against the World: Local Governments Confront Nation States, Corporations, and Trade Blocs*, INDEPENDENT, Feb. 12, 1997, at 9 (explaining that 10 cities, including San Francisco, Oakland, and Berkeley, had passed selective procurement laws designed to punish companies with operations in Burma by circumscribing all future contractual relations); see also Paul Reines, *Takoma Park Takes Global View with Burma-Related Ban*, WASH. TIMES, Nov. 3, 1996, at A11 (calling attention to the mushrooming of state selective contract laws).

18. See Tiffany Danitz, *Senate May Follow State, City Actions to Punish Burma*, WASH. TIMES, May 4, 1995, at A20 (revealing that Berkeley has joined other cities in passing legislation banning contracts with companies doing business with Burma, following its own lead in being the first city to pass an anti-apartheid bill against South Africa).

19. See, e.g., CAL. AB 888 1997 (authorizing the prohibition of state government contracts with companies that are doing business with Burma); COLO. S.R. 5 1997 (same); CONN. HB 6354 1997 (same); N.C. SB 1067 1997 (same); TEX. HB 2960 1997 (same); see also Reines, *supra* note 17, at A11 (reporting that the cities of Ann Arbor, Mich., Madison, Wis., and Santa Monica, Cal., have adopted measures expressing disapproval of the Burmese regime, and noting that New York City will purportedly consider a similar measure); Denis Collins, *What More Reason Needed For Sanctions Against Burma*, WISCONSIN ST. J. (Madison), Jan. 5, 1997, at 2B (imploing the University of Wisconsin to cut ties with Burma and categorically listing the reasons to initiate sanctions against

under several provisions of the United States Constitution. Part II of this comment reviews the language and purpose of several of these statutes and ordinances. Part III reviews the importance of the First Amendment in protecting discourse between the two levels of government—state and federal. In Part IV, these statutes are analyzed in connection with the preemption doctrine. Part V considers the viability of these statutes under the rubric of the Foreign Commerce Clause. Part VI focuses on the relationship of the Constitution's Supremacy Clause and the potential effect these statutes could have on foreign affairs. These sections will also include considerations of the purposes of federalism and the interplay of state actors with the federal government. Part VII will concentrate on the importance of federalism in protecting state activity that influences decisions rendered in Washington and boardrooms all over the world. In essence, this piece proposes that selective contract laws are constitutional and embody democratic decisions fostering observance of international human rights and the tenets of federalism by utilizing the quintessential First Amendment speech right: to voice opinions to influence policy-makers.<sup>20</sup> In a less abstract way, the laws also exemplify the pithy, yet poignant, bumpersticker rally, which calls on people to “think globally and act locally.”

## II. STATE SELECTIVE CONTRACT LAWS

The brutality of Tienamen Square captured the attention of the American public and spurred world condemnation, but the bloodshed in Burma has easily exceeded that of Tienamen Square ten-fold.<sup>21</sup> Burma, as opposed to other international human rights violators, has received greater world media attention because of the plight of Aung San Suu Kyi and her heroic stand against the State Law and Order Restoration Council (SLORC), the military government of Burma, and the subsequent world acknowledgment of her efforts particularly through her receipt of the Nobel Peace Prize.<sup>22</sup> Congress criticized the human rights violations and passed concurrent

---

Burma, including: the political oppression of the native populace, the drug trade, forced labor, and other human rights violations).

20. See Shuman, *supra* note 8, at 176 (detailing that the First Amendment guarantees the rights of all citizens, including governors, mayors, and their employees, to speak out on national foreign policy); see also Dreifke, *supra* note 14, at 289 (noting the meaningful and responsive local government, including increased participatory democracy).

21. See Dana Rohrabacher, *The United States Should Put its Legislation Where Its Ideals Are for Burmese Democracy Movement*, ROLL CALL ASSOC., (Sacramento), July 29, 1996, at 1-2 (aligning with other representatives in the California Assembly to highlight the atrocities effectuated by the SLORC against dissident groups and the inordinate loss of life and continued repression experienced in Burma); see also Dennis Bernstein & Leslie Kean, *A Boycott for Burma—the South Africa of the 90's*, S.F. EXAMINER, Apr. 26, 1996, at A23 (detailing the variegated political problems and pervasive bloodshed within Burma, and noting that thousands of peaceful protesters were publicly and privately massacred in Burma during 1988).

22. See Rachel Gordon, *Burma Debate Leaves Airport Deal Up in the Air, Firms' Bids for Big Contract Hampered By Alleged Ties to Asian Nation*, S.F. EXAMINER, Dec. 12, 1996, at A-26 (discussing the willingness of San Francisco to sever all ties with companies economically engaged in Burma because of the recent publicizing of human rights violations); see also Bernstein & Kean, *supra* note 21 at A23 (noting Aung San Suu Kyi's long

resolutions condemning SLORC for those violations.<sup>23</sup> However, due to strategic alliances, trade, reelection pressures, and global politics, Congress has acted cautiously in implementing sanctions against Burma.<sup>24</sup> In the wake of Congress's incomplete response, state acts have proliferated.<sup>25</sup> As Burma does not have a monopoly on brutalizing a native populace, many state actions also target other nations violating human rights.<sup>26</sup>

Some commentators contend that these laws have excellent "risk-opportunity" ratios for local politicians because the laws "draw the attention of the local press, are more substantive than adoption of precatory resolution of censure and disapproval, and present little economic risk to the jurisdiction."<sup>27</sup> Another purported strike against the debarment, or selective contract, laws emphasizes that the withdrawal of American companies will only allow foreign competition to fill the void without bringing any pressure to bear on SLORC.<sup>28</sup> Debarring contracts from just

---

in house arrest).

23. See Dallett & Rosenthal, *supra* note 15, at 124 nn.65-67 (cataloging various Congressional efforts to condemn SLORC's human rights violations).

24. See David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175, 186-87 (noting that Congress has chosen constructive engagement over complete withdrawal); see also Dallett & Rosenthal, *supra* note 15, at 125 (urging the Bush administration to isolate Burma and discourage private investment there); Matt Miller, *Pipeline of Controversy: Unocal Called to Court by Opponents of Burma Regime*, COPLEYS NEWS SERV., Nov. 10, 1996, (reporting that "The Clinton administration has so far resisted stiffer penalties, saying that it wouldn't be effective and that Asian-led products would replace American investment.").

25. See Schmahmann & Finch, *supra* note 24, at 180 n.15 (listing several city selective contract provisions including:

Ann Arbor, Mich., Resolution Barring Purchases from Businesses in Burma and from Those Doing Business with Burma (Myanmar) (Apr. 15, 1996); Berkeley, Cal., Resolution No. 57,881-N.S., III.B. and IV.B. (Feb. 28, 1995); Carborro, N.C., Resolution Barring Purchases from Businesses in Burma and From Those Doing Business with Burma, Resolution No. 18/96-97 (Oct. 8, 1996); Madison, Wis., Resolution No. 52471, I.D. No. 17607 (Aug. 15, 1995); Oakland, Cal., Selective Purchasing Law; San Francisco, Cal., Admin. Code 12J.1 (1996); Santa Monica, Cal., Selective Purchasing Ordinance, Resolution No. 8966 (Nov. 38, 1995); Takoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996)).

*Id.*

26. See Rachel Gordon, *Supes Defend, Expand Burma Ban; Amos Brown Wants 5 More Countries On Enemies List*, S.F. EXAMINER, June 17, 1997, at A1 (reporting that San Francisco, CA, has contemplated applying state contracting moratoriums against African nations violating human rights); John Nichols, *City Bans Sweatshop Products; No Municipal Purchases of Such Products by Officials in North Olmstead, OH. Allowed*, PROGRESSIVE (Cleveland) May 20, 1997, at 14 (assessing North Olmstead's selective-purchasing law that prevents the city from purchasing products made in sweatshops, including products made in the United States); see also LA. REV. STAT. ANN. § 33:4798 (West 1986) (passing state authority to municipalities to adopt ordinances to prohibit the sale and offering for sale of products manufactured or produced in any Communist country, including North Korea, Red China, and Bulgaria).

27. Fenton, *supra* note 4, at 590; see also Eric Altbach, *USTR To Defend Massachusetts' Burma Law*, JAPAN ECON. INST. RPT., Aug. 22, 1997 (quoting Byron Rushing (D.-Boston), as stating that "Massachusetts would enjoy a good run-in with the State Department," and adding that state legislators have enjoyed the favorable publicity they have gotten in their home state for passing and defending the law); Schmahmann & Finch, *supra* note 24, at 186 (noting that legislators can profit at the polls by supporting local measures).

28. See Schmahmann & Finch, *supra* note 24, at 203-04 (discussing the economic disadvantages American companies will experience by pulling out of Burma, and the minimal tangible gains these withdrawals will reap).

one nation seem incongruous when considering American economic dealings with other dictatorial regimes.<sup>29</sup>

Notwithstanding the purported limited political risk and negligible gain evinced by these laws, the state acts in question reflect the essential workings of the democratic process: passing legislation via popularly elected officials held accountable to their respective electorates.<sup>30</sup> Furthermore, in governing their affairs, states historically have indirectly impinged on American foreign relations through taxing of international goods within their borders, regulating the admission of aliens—including, for instance, Florida's headline grabbing decision to refuse the admittance of the Cuban and Haitian flotillas—and determining to apply state or foreign law to an international transaction.<sup>31</sup> Moreover, the questioned state laws focus on *all* companies, foreign and domestic, that do business in Burma, thereby making contract decisions, not foreign policy decisions, similar to state laws restricting government contracts with Cuba.<sup>32</sup> This choice to stop contracting with companies economically engaged with Burma serves as one step, although not necessarily a final step, toward achieving greater economic responsibility.<sup>33</sup>

Ineluctably, the Framers hammered out a democratic political process characterized by a dual level system of federalism from the forge of the sweltering summer of 1789.<sup>34</sup> But the Framers, in creating our federalist system, did not intend the federal government to have unbridled authority to eliminate state autonomy.<sup>35</sup> "If the Founding Fathers really intended to take all foreign-policy activities away from local and state governments, surely they would have said so."<sup>36</sup> Invariably, a

---

29. *Id.* at 203.

30. See Bilder, *supra* note 1, at 828-29 (decrying the cursory discounting of state laws that involve local political decisions impacting foreign affairs as simply popularity boosters, because local laws require participation in the democratic process by allowing the input of others concerning foreign affairs issues).

31. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 238 (1972) (cataloging the inevitable promulgation of local laws that will influence foreign affairs).

32. Compare MASS. GEN. LAWS ANN. ch. 7, § 22J(a) (West Supp. 1997) (prohibiting trade with all companies doing business in Burma), with FLA. STAT. ANN. § 215.471 (West Supp. 1998) (making it Florida's policy to divest any investment made by the State Board of Administration in the form of stocks, securities or other obligations with any institution or company domiciled in the United States or foreign subsidiary doing business with Cuba). See Eduardo E. Neret & Marcio W. Valladares, *The Florida International Affairs Act: A Model For State Activism In Foreign Affairs*, 1 J. TRANSNAT'L L. & POL'Y 197, 199-206 (1992) (describing the Florida International Affairs Commission which functions to establish a uniform international policy for the state regarding trade, investment, tourism and education).

33. See Henry Richardson, III, *Current Development of the Stock Portfolio of the Society*, 81 AM. J. INT'L L. 744, 746 (1987) (explaining that the Executive Council of the American Society of International Law chose to divest from South Africa, rather than other nations, because of the massive and continued violation of international law perpetrated by Pretoria).

34. See GEOFFREY STONE ET AL., *supra* note 3, at 148 (explaining the Framers' purpose of creating a federalist system of government and their fear it might not work efficiently).

35. Kenneth Starr et. al., *The Law of Preemption*, 1991 A.B.A. SEC. OF ANTI-TRUST L. 6, 43 (recounting that the Constitution affirms the states as integral parts of the national system). Moreover, the Tenth Amendment recognizes the cogent role that the States must play in the governance of our federalist system. *Id.*

36. Shuman, *supra* note 8, at 163.

federal system thrives on its ability to generate various solutions to unique problems. Discounting states input on these issues would eliminate fifty viable candidates to generate specialized policy, not to mention the thousands of cities that also can provide much needed innovation.<sup>37</sup> Hence, as will be discussed, ostensibly the Framers intended to have states act to influence foreign-policy activities.<sup>38</sup> Therefore, these state acts comport with the Framers' goals of providing for a rich political discourse and evidence the cogent features of political action within a federal system.

A. *The Statutes, Ordinances, and Acts*

Uniformly, the state laws denounce Burma as an archetypal dictatorial regime lacking political legitimacy.<sup>39</sup> The incessant killing and repression sponsored by SLORC reinforce the reality that, despite diplomatic pressure from the federal government, SLORC will not unilaterally effectuate the state laws' twin aims of Burma's future adherence to international human rights law and Burma's granting democratic elections.<sup>40</sup> Although moralistic in tone, the laws make it clear that curtailing dealings with Burma and companies doing business with Burma there exemplify state citizens' desires to influence Washington and international companies not to interact commercially with Burma and instead to condemn SLORC.<sup>41</sup> The selective purchasing laws proscribe contracts with companies doing business with SLORC.<sup>42</sup> Some exceptions to these laws exist, including allowances for news and media involvement in Burma.<sup>43</sup> Additionally, existing contracts that are neither

---

37. Starr, *supra* note 35, at 43.

38. See Shuman, *supra* note 8, at 163 (detailing that the enumerated powers of Congress do not contravene most municipal policies affecting foreign affairs).

39. See, e.g., HB 6354 CONN. 1997 (providing that Connecticut will not deal with the repressive SLORC regime).

40. See Dallett & Rosenthal, *supra* note 15, at 126 (advocating that Congress forego all investment opportunities in Burma because discussions through diplomatic channels appeared ineffectual to create the desired change).

41. See CAL. AB 888 (1997) (acknowledging the need to prevent relations with the military regime in Burma).

42. See Schmahmann & Finch, *supra* note 24, at 180-82 n.22. Discussing the following provisions: Berkeley Cal. Resolution No. 57, 881-N.S., III.B. & IV.B. (Feb. 28, 1995) (prohibiting the municipality from creating contracts with any person who "buys, sells, leases or distributes commodities in the conduct of business with, or who provides or is willing to provide personal services to . . . any person for the express purpose of assisting in business operations or trading with any public or private entity located in Burma"); Oakland, Cal., Selective Purchasing Law (debaring entities listed as having involvements with Burma); Takoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996) (disqualifying any lawyer or law firm from representing the city if it represents "any person or corporation which has equity ties with any public or private entity that is located in Burma or has direct investment or employees in Burma.")

*Id.*

43. See CAL. AB 888 (1997) (exempting media and news coverage from the law).



extended nor modified also receive exemptions, as prescribed by the United States Constitution.<sup>44</sup>

The statutes provide a mechanism for determining which entities constitute *personas non gratas* by compiling names of "all persons currently doing business in Burma."<sup>45</sup> To generate the list, typically, the state utilizes a private service to investigate and catalogue all persons doing business in Burma.<sup>46</sup> Although amorphous and undefined in the statutes themselves, the term "doing business" in this context presumably will receive a very broad interpretation and thus companies with negligible dealings in Burma would still not likely enjoy an exemption.<sup>47</sup>

The various laws' actual effect on corporate behavior avert conclusive assessment because of their recent inception.<sup>48</sup> However, the laws have influenced corporate behavior. Companies including Levi-Strauss, Liz Claibourne, Eddie Bauer, Inc., Pepsi, Co., Macy's, Apple Computer, Amoco, Phillips Electronics, and Carlsberg have unilaterally deserted Burma before determining whether the laws prohibit future governmental contracts with them or whether the statutes' ambiguities allow them an exception.<sup>49</sup> In addition, the White House, foreign nations, international trading blocs, and interest groups have wrestled with how to interact strategically with these statutes.<sup>50</sup>

44. U.S. CONST. art. I, § 10 (preventing the dissolution of existing contracts); see CAL. AB 888 (1997) (shielding those companies with pre-existing contracts from the statute's strictures).

45. See, e.g., MASS. GEN. LAWS ANN. ch. 130 § 22 J(b) (West Supp. 1996) (providing that any person shown on the list is an ineligible trading partner); CAL. AB 888 (1997) (allowing a private company to compile a list of companies involved with Burma); see also Schmahmann & Finch, *supra* note 24, at 182 n.22 (noting that "Madison's ordinance, Madison, Wis., Resolution No. 52,471 I.D. No. 17607 (Aug. 15, 1995), will use a list compiled by the Council on Economic Priorities to determine which entities have an "economic interest" in Burma, and then will define economic interest to include "direct investment, licensing and leasing agreements, and the operation of sales outlets in Burma [Myanmar]"").

46. MASS. GEN. LAWS ANN. ch. 130, § 22 J(a) (West Supp. 1996).

47. See CAL. AB 888 (1997) (propounding that this bill would prohibit the state from entering into *any* contractual agreement with the military regime in Burma, *any* business or corporation organized under the authority of the military regime in Burma, or *any* person on a list of persons currently doing business with Burma that is prepared and maintained by the Department of General Services). *But see* Schmahmann & Finch, *supra* note 24, at 181-82 (criticizing the statutes for not clarifying what constitutes "doing business" for purposes of the prohibition).

48. See Barbara Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN J. GLOBAL TRADE 153, 187 (1997) (listing a number of companies that have left Burma and commenting that the majority of the companies have left because of domestic pressure).

49. See Bernstein & Kean, *supra* note 21, at A23 (describing the exodus of companies from Burma to avoid being stigmatized as unethical); see also Frey, *supra* note 48, at 187 (outlining how Levi-Strauss considers which countries to affiliate with by assessing pertinent criteria such as how the company's image will appear to purchasers and whether the social turmoil will threaten their commercial interest); Schmahmann & Finch, *supra* note 24, at 202 (cataloging several companies that have deserted Burma); Paul Elias, *S.F. Human Rights Agency Caught In Cross Fire*, RECORDER, Mar. 7, 1997 at 1 (writing that a recent decision, *ABB Daimler-Benz Transp. Inc. v. City of San Francisco*, 98531, upheld the San Francisco's Human Rights Commission decision to bar a contract with a company dealing with Burma against challenges that the commission has inordinate power).

50. See Altbach, *supra* note 27, at 1 (commenting that groups representing business including USA-Engage—a business coalition formed to protest the use of unilateral U.S. trade and investment sanctions—have considered mounting a challenge to the local initiatives). Moreover, the article notes that Japan and the European

In evident ways, the statutes, in conjunction with Washington's statements, have succeeded. By creating greater interest in the plight of Burma's repressed, and by inspiring attempts for legislation proscribing affiliations with other human rights violators, the selective contract laws have gone a long way towards modifying the behavior of governments and international companies.<sup>51</sup> Innovatively, courts have found new latitude for protecting international human rights by holding international oil producers Unocal and Total liable for harms committed upon Burmese citizens by SLORC.<sup>52</sup> To proclaim the laws as devoid of a concrete purpose seems counter-intuitive in the face of the company departures, potential national policy changes, and the possibility for tort liability.<sup>53</sup> Finally, local action influences the national debate. For example, cities "showed the Reagan administration the extent of the public sentiment against the arms race through nuclear freeze resolutions, against 'constructive engagement' with South Africa through divestment ordinances, and against supporting the *Contra* war through U.S.-Nicaragua sister cities programs."<sup>54</sup>

Entities, such as state governments, and individuals expressing disagreement with a particular national policy allows for a more robust debate and increased thoughtfulness concerning unpopular activities.<sup>55</sup> States, through the auspices of the First Amendment, wield similar authority to express their view through commercial

Union have initiated proceedings in the World Trade Organization (WTO) to ban the selective-contract laws. *Id.*; see also *EU/US: US Urges Delay in EU Move To Challenge to Massachusetts' Burma Law*, EUR. REP., June 18, 1997 (reporting that United States Trade Representative Charlene Barshefsky has written to the European Trade Commissioner Sir Leon Brittan to try and quell a possible legal battle over Massachusetts' selective contract law); Henriette Campagne, *Japan Protests Massachusetts Law*, MASS. LAW. WKLY, Feb. 10, 1997, at 31 (revealing that Japan has complained to the U.S. Department of State, and the U.S. trade representative and the then-governor of Massachusetts, William Weld, concerning the selective-contact law).

51. See Frey, *supra* note 48, at 169-70 (cataloging several attempts to pass legislation proscribing trade with Burma, China, and to encourage companies to adopt and comply with a code of conduct regarding human rights abuses); see also Altbach, *supra* note 27, at 2 (reporting that United States Trade Representative, Charlene Barshefsky, has pledged that Washington would defend the Massachusetts statute against a challenge by the European Union and Japan in the WTO).

52. See Joseph D. Pizzurro & Nancy E. Delaney, *New Peril for Companies Doing Business Overseas; Alien Tort Claims Act Interpreted Broadly*, N.Y. L.J., Nov. 24, 1997, at 3-7 (considering the impact of *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), which allowed a suit against two international companies in American courts for their involvement in violations of human rights in Burma).

53. See Frey, *supra* note 48, at 174 (applauding the appearance of private initiatives to regulate transnational corporations' conduct regarding human rights); see also Altbach, *supra* note 27, at 3 (quoting Trade Representative Barshefsky as stating, "Had the WTO existed to hear such complaints against state sanction laws 10 years ago, state sanctions against South Africa which helped to bring peaceful democracy to that country would never have been possible.").

54. Shuman, *supra* note 8, at 172 (stressing that municipal activities generate greater accountability and provide forums for policies that would not be otherwise recognized in national policy debates).

55. See generally *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (protecting anti-abortion speech against overly inclusive buffers surrounding abortion clinics); *R.A.V. v. St. Paul*, 505 U.S. 377, 406 (1992) (quoting *Eu v. San Francisco City Democratic Cent. Comm.*, 494 U.S. 214, 223 (1989), that when considering political speech "the First Amendment has its fullest and most urgent application"); *NAACP v. Button*, 371 U.S. 415 (1963) (recognizing the importance of protecting speech intended to influence the political mechanism).

restrictions.<sup>56</sup> Indeed, state decisions not to trade with rogue nations, for example Cuba, have failed to inspire rancorous criticism and manifest how states can act to voice their concern.<sup>57</sup> By precluding states from determining contractual relationships without the federal government definitively determining the issue causes the constitutional goals of a balanced bi-level system and desired state input to needlessly fail.<sup>58</sup>

Certainly arguments exist that states have usurped national power by essentially creating their own foreign policy. For example, some states have ministers of foreign affairs and, similarly, some foreign nations send economic advisors to address state governments as well as Washington.<sup>59</sup> Furthermore, by attempting to influence foreign policy, states arguably implement *de facto* foreign policy.<sup>60</sup>

However, this argument proves too much because the final decision regarding trade barriers and sanctions rests with the White House and Congress because they could easily silence state actors.<sup>61</sup> Influencing Washington serves as an impetus behind sundry legislation, such as advocating for chemical castration of repeat sexual offenders.<sup>62</sup> Similarly, selective contract laws serve to provide the vital diversity needed to find solutions to difficult problems. Therefore, these laws do not serve as foreign policy, but rather exemplify how nonfederal political units can effectively voice an opinion concerning international issues.<sup>63</sup>

---

56. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (articulating that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

57. See FLA. STAT. ANN. § 288.854 (West Supp. 1998) (indicating Florida's willingness to participate in, and to try to augment, the economic embargo of Cuba); see also *id.* § 288.853(a) (castigating the acts of Fidel Castro and his government and declaring them threats to "international peace and to the peace of the State of Florida").

58. See Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 96 (1988) (explaining the importance of using states as laboratories for regulatory innovation thereby creating a rich debate generated by fifty separate voices).

59. See Altbach, *supra* note 27, at 2-3 (discussing the need for foreign governments to consider state policy in determining how to structure trade debate with the United States).

60. See generally Schmahmann & Finch, *supra* note 24, at 199 (specifying that states should be cautious not to invade the federal government's control of federal policy).

61. See *infra* notes 87-92 and accompanying text (emphasizing the constitutional scheme that requires the federal government to affirmatively act to prohibit states from legislating in particular arenas).

62. See Jason O. Runkel, Comment, *Abuse It and Lose It: A Look at California's Mandatory Chemical Castration Law*, 28 PAC. L.J. 547, 549 (1997) (remarking that California's recent passage of mandatory chemical castration for repeat child offenders, which comes on the heels of the Federal Crime Act passed by Washington, could serve to influence Washington to create even stiffer penalties for sex offenders nationwide).

63. See Altbach, *supra* note 27, at 3 (representing that these laws embody efforts by voters to promote the democratic freedoms of peoples overseas while, at the same time, protecting their rights as U.S. citizens and groups, such as Public Citizen, to ensure that local government decisions reflect majoritarian political values).

### III. FIRST AMENDMENT: PROTECTING POLITICAL DISCOURSE

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government, is operated or should be operated and all such matters relating to political processes.<sup>64</sup>

The First Amendment prohibits Congress from passing laws that “abridge the freedom of speech.”<sup>65</sup> While the Amendment has never received such a broad interpretation to preclude all laws that circumscribe speech,<sup>66</sup> the Supreme Court has provided greater protection for speech surrounding the political process.<sup>67</sup> Indeed, the Supreme Court has determined that the First Amendment affords the broadest protection to political expression in order to assure “the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>68</sup> By defining political speech as a fundamental First Amendment value, the protection it supplies to political speech serves as an antidote for abuses by governmental officials and as a constitutionally chosen means for “keeping officials elected by the people responsible to all people whom they were selected to serve.”<sup>69</sup> Without this freedom the Framers’ goal of improving our society and keeping it free through public debate would falter.<sup>70</sup> Without this free trade in ideas, the public interest in gathering information to make informed choices would not receive ample protection.<sup>71</sup> Concomitantly, representative reinforcement,<sup>72</sup> the process of electing representatives that embrace similar views of a particular polity, would function

---

64. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

65. U.S. CONST. amend. I.

66. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (deciding that “fighting words,” those words that would stir a normal listener to fight, do not enjoy First Amendment protection); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that words used as personal abuse and epithets are not in any sense communication of information or opinion safeguarded by the Constitution); *Frohwerk v. United States*, 249 U.S. 204 (1919) (determining that the First Amendment was not intended to provide an immunity for every possible use of language). *But see* *Konigsberg v. State Bar of California*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (finding the First Amendment to be a complete prohibition against the government making laws abridging the freedom of speech).

67. *See* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346-47 (1995) (recounting previous decisions regarding the dissemination of information concerning candidates and the exposition of ideas).

68. *Roth v. United States*, 354 U.S. 476, 484 (1957).

69. *Mills*, 384 U.S. at 219.

70. *Id.*

71. *See* *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (protecting individuals who wish to enter the marketplace of ideas from governmental attack); *see also* *Saxbe v. Washington Post Co.*, 417 U.S. 843, 864 (1974) (Powell J., dissenting) (arguing for greater protections of speech concerning public debate on important issues).

72. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 43-72 (1982) (reflecting that the decisions made by elected representatives represent the will of the majority, and if the elected official does not adhere to the majority, or the majority’s view shifts, then the official will not enjoy reelection).

ineffectively because discordant views would not receive an ample opportunity for discussion and therefore, potential political representatives would not mold their platforms and voting decisions to account for these views.<sup>73</sup>

Based on the constitutional premise that political speech deserves the greatest protection and serves a vital interest, laws enacted by states to manifest disagreement or embrace values different from federal governmental policies deserve similar deference.<sup>74</sup> Legislation, notwithstanding effective special interest group lobbying, embodies the majority views of the political locality, whether state, national, or municipal.<sup>75</sup> Legislation, thus serves as a vehicle for a particular populace to express itself and define debate at the national level.<sup>76</sup> In this case, state laws concerning banning contracts with companies that have dealings with Burma embody local views toward Burma's violations of human rights.<sup>77</sup> The Congressional discussion of how to approach the atrocities in Burma included consideration of these state laws and, in fact, used the laws as possible models for federal legislation.<sup>78</sup> Therefore, the states acted as participants in the national debate by contributing their respective views, thus engaging in the quintessential feature of the First Amendment: participation in the political process.

By denying states the opportunity to legislate in this manner, the federal government would lose the rich diversity of opinions and viewpoints that the states can generate, and thus eliminate the opportunity for state law to influence federal legislation.<sup>79</sup> However, this debate could be entirely foreclosed if Congress definitively prevented states from legislating on the matter.<sup>80</sup> This would not prevent a continued dialogue of these issues, but the debate would center on repealing or changing federal law, or enactment of state law that would not violate federal law guidelines.

---

73. *See id.* at 145-48 (noting that when there is a prejudice against "a discrete and insular minority," the legislature is likely to ignore or undervalue the interests of the minority and emphasizing that the judiciary should only strictly scrutinize legislation if that "legislation impinges on first amendment values by restricting those political processes which ordinarily can be expected to bring about repeal of undesirable legislation").

74. *Id.* at 155-57.

75. *Id.* (according to Ely, a democratic government owes its citizens ample opportunity to voice their opinions concerning legislation so that a legislature can assess the costs and benefits of a proposed law against the position of its constituents).

76. *Id.* at 145-57.

77. *See supra* note 20 and accompanying text (describing how government officials can influence the national debate by voicing concerns over foreign policy); *see also supra* notes 42-47 and accompanying text (describing the state selective laws' purpose and scope).

78. *See Schmahmann & Finch, supra* note 24, at 186 (noting that "Senator Mitchell McConnell of Kentucky tried without success to persuade his colleagues in the U.S. Senate to require U.S. business interests to withdraw from Burma, the stated purpose of the local measures").

79. *See id.* at 186-87 (noting the Congressional discussion involving state and local legislation on Burma before settling on their own legislation).

80. *See infra* Part IV.B (considering the role of preemption and federalism and noting the importance for cautious application of preemption without definitive action by Congress).

Absent a definitive Congressional statement, prohibiting states from implementing legislation concerning selective contract laws effectively acts as a prior restraint on speech.<sup>81</sup> Prior restraints have been “considered a more drastic infringement on free speech than subsequent punishment.”<sup>82</sup> Indeed the modern Supreme Court has recognized, “liberty of the press . . . has meant, principally although not exclusively, immunity from previous restraints or censorship.”<sup>83</sup> Similarly, devoid of Congressional legislation to the contrary, the abhorrence of prior restraints would also weigh in favor of allowing states to pass legislation concerning Burma.<sup>84</sup>

Though the Constitution does not require states to act on all issues, and even forbids them to do so in some situations notwithstanding the First Amendment,<sup>85</sup> the First Amendment provides the necessary protections for states to voice their opinions on issues when they decide to do so.<sup>86</sup> The premise that the First Amendment protects this activity is strengthened when considered in relation with how Congress can choose to preempt the states from legislating in particular areas which is discussed in part IV below.

#### IV. PREEMPTION: BENIGN ARBITRARINESS

“The foundation of the Supremacy Clause of the Constitution, which gave rise to the doctrine of preemption, was colored by the concerns of the Framers that the Constitution would strike an unworkable balance between federal and state interests.”<sup>87</sup> The Framers carefully compromised between the goals of nationally

---

81. See *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965) (considering a noncriminal process which required the prior submission of a film to a censor before release failed because the process was devoid of prompt judicial oversight of films that a censor disapproves of thus effectively acting as a prior restraint); see also GERALD GUNTHER, *CONSTITUTIONAL LAW* 997 (12th ed. 1991) (discussing the Framers’ aversion to prior restraints because of the English technique of restricting speech before its exposure to the populace).

82. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW*, 969 (4th ed. 1991); see also *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938) (reciting that the “right against freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision”).

83. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

84. See GUNTHER, *supra* note 81, at 997-98 (articulating that the Framers’ desired to eliminate prior restraints, because one philosophical theme supporting free speech is the value of freedom of expression for a system of representative democracy and self-government).

85. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (dictating that, “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in payment of Debts; Pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”).

86. See *Shuman*, *supra* note 8, at 177 (lamenting the loss of state and local input by prohibiting states and cities from legislating on issues touching on foreign affairs because that would degrade the importance of the rights of protest, speech and assembly).

87. David A. Herrman, Comment, *To Delegate Or Not To Delegate—That is Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157, 1161 (1997).

uniform laws and the particular needs of individual states.<sup>88</sup> Because the Framers understood that, of the three branches of government, Congress alone represents the states as states, the Framers gave Congress the authority and responsibility to balance federal and state power by choosing to preempt state laws with federal legislation.<sup>89</sup>

### A. *The Mechanism of Preemption*

The question whether federal law preempts state law is one of congressional or Presidential intent, with the “purpose of Congress [being] the ultimate touchstone.”<sup>90</sup> Article VI of the Constitution provides that the laws and treaties of the United States are “the Supreme Law of the Land”<sup>91</sup> and, thus, they trump state law. Preemption may be expressed or implied and is compelled whether Congress’s command is “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”<sup>92</sup>

The three mechanisms of preemption include express preemption, occupying the field, and when the state law stands as an obstacle to enforcement of federal law.<sup>93</sup> The express preemption approach requires courts to rely on statutory construction to settle conflicts between state and federal law; a finding of congressional intent to preempt state law will resolve the conflict in favor of the federal law.<sup>94</sup> For the instant controversy, this analysis provides the initial step in determining if local

---

88. See *Project: The Role of Preemption in Administrative Law*, 45 ADMIN. L. REV. 107, 111 (Paula A. Sinozich et al., ed. 1993) (stating that, although the Framers understood that supreme federal power was essential to a coherent national government, they were concerned with the preservation of state autonomy).

89. See Susan B. Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1432-33 (1984) (describing Congress’s unique role among the three branches of government as the representative of the states as states, and therefore concluding that it is the most suited branch of government to balance the competing interests of federal power and states’ rights); see also THE FEDERALIST NO. 45, at 134-35 (James Madison) (Roy Fairfield ed. 1981) (teaching that “states need not fear any loss of power by the federal government overreaching because of the federalist system of government”); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176-79 (1980) (explaining that the structural aspects of the national political system safeguard states’ rights and individual autonomy).

90. *Allis Chambers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

91. U.S. CONST. art. VI.

92. *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525 (1977). See generally *English v. General Elec. Co.*, 496 U.S. 72 (1990) (illuminating the three types of preemption); *Shaw v. Delta Airlines*, 463 U.S. 85, 95, 98 (1983) (analyzing the Employment Retirement and Income Security Act (ERISA) (29 U.S.C.A. § 514(a) (West 1997)) which expressly supersedes “all State laws insofar as they may now or hereafter relate to any employee benefit plan”).

93. See Christi R. Martin, Note, *Preemption in the Age of Local Regulatory Innovation: Fitting the Formula to a Different Kind of Conflict*, 70 TEX. L. REV. 1831, 1833-34 (1992) (describing the three preemption doctrines).

94. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 480-81 (2d ed. 1988); see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (recognizing preemption by implication). See generally *Medtronic v. Lohr*, 116 S. Ct. 2240 (1996) (harmonizing discordant circuit court decisions by declaring that the Federal Medical Device Amendment (MDA) did not preempt state tort law).

legislation will survive a preemption challenge.<sup>95</sup> Congress has enacted legislation that provides for conditional sanctions against Burma, preventing domestic corporations from initiating new contracts there, but does not cover foreign companies.<sup>96</sup> These sanctions require that until “the President certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government” sanctions such as “the termination of most bilateral assistance and obstruction by the United States of most multilateral assistance will follow.”<sup>97</sup> In a similar vein, President Clinton has issued an Executive Order<sup>98</sup> that prohibits new investment in Burma, contingent upon Burma’s ability to comply with existing laws, regulations and directives.<sup>99</sup> These laws complement each other because they neither prohibit all United States companies from contracting there, nor do they bar all American presence in Burma.<sup>100</sup> Neither Congress nor the Executive has explicitly stated that federal law supersedes all state measures. Thus, with full knowledge of these state laws, the federal government has determined the better course was to create a penalty process that does not disturb existing state law,<sup>101</sup> and in so doing did not expressly manifest a clear intention to displace existing state law.<sup>102</sup>

The second method of preemption requires Congress to legislate in a manner that “occupies the field.”<sup>103</sup> This test requires the federal law to legislate so

---

95. See Martin, *supra* note 93, at 1835 (opining that comparing statutory language effectively decides few preemption controversies because Congress unlikely contemplated the conflict and so did not expressly preempt the law).

96. OMNIBUS CONSOLIDATED APPROPRIATIONS ACT of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as 50 U.S.C.A. § 1701); see also Altbach, *supra* note 27, at 4 (underscoring the difference between the federal and state contracting laws, with the former excluding foreign companies and with the latter including those companies).

97. OMNIBUS CONSOLIDATED APPROPRIATIONS ACT of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as 50 USCA § 1701).

98. Executive Order No. 13047, 62 Fed. Reg. 28301 (1997), 22 USCA § 2378.

99. *Id.*

100. See Schmahmann & Finch, *supra* note 24, at 186-88 n.50 (noting that the support for the federal law derives from its flexibility and its purpose of allowing the United States to retain a presence in Burma).

101. See S. Candace Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U.L. REV. 685, 694-95 (1991) (finding that eliminating state laws through less than explicit means does an injustice to federalism because it effectively closes an avenue for communities to implement strategies to solve problems).

102. See *Gade v. National Solid Waste Mfg. Bd.*, 505 U.S. 88, 116 (1992) (Souter, J., dissenting) (analyzing preemption from a starting point that “the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”); *Gregory v. Ashcroft*, 501 U.S. 452, 458-61 (1991) (holding that the Age Discrimination in Employment Act (ADEA) did not apply to a state’s mandatory retirement provisions affecting state judges because this area was of the most fundamental sort for a sovereign entity and one that required Congress’s intent to displace state decisions in this area to be clearly stated); see also Martin, *supra* note 93, at 1834-35 (criticizing courts which defer to nonexistent congressional intent to preempt local laws because Congress realized that a conflict could arise in the future and had the opportunity to solve the legal riddle at the time).

103. See *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) (finding state law is preempted by federal law if the federal law so thoroughly regulates a legislative field that Congress allowed no additional room to regulate); *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983) (explaining that congressional intent to supersede state law may be inferred from a federal regulatory scheme that leaves no room to supplement it); see also Martin, *supra* note 93, at 1833-34 (comparing



thoroughly as to foreclose states from augmenting federal law in this area.<sup>104</sup> States have found ample room to maneuver in the area governing contracts with Burma by implementing legislation that concerns penalties and further contractual restrictions not considered by Congress, such as including foreign companies within the ban.<sup>105</sup> Moreover, the minimal Congressional and presidential action in this area does not equate with the detail necessary to preempt legislation by “occupying the field,” as evidenced in existing case law.<sup>106</sup> Hence, the selective contract laws survive the occupy the field test.

The local measures also survive the final possible method of preemption, the stands as an obstacle approach.<sup>107</sup> This test has served to preempt state law not only when the state laws obstruct the accomplishment of a federal objective, but also when the laws frustrate a congressional goal or pose a potential for frustration of that goal.<sup>108</sup> However, judicial application of this standard has proven difficult and unpredictable.<sup>109</sup> For example, the Airline Deregulation Act (AADA) bars “states from enforcing any law . . . relating to rates, routes, and services of any air carrier.”<sup>110</sup> The court held in *Hodges v. Delta Airlines*,<sup>111</sup> applying the AADA, that claims against an airline for in-flight injuries were not preempted.<sup>112</sup> In contrast, in

---

the various methods of preemption and determining that frequently local legislation will survive absent explicit preemption by the federal government); Spiro, *supra* note 6, at 830-31 (analyzing President Reagan’s decision to sign an executive order that would hurt the machinery of South African apartheid, but was not designed to result in American economic withdrawal from South Africa thereby not preempting local legislation in this area).

104. See Martin, *supra* note 93, at 1836 (detailing the requirements of the occupies the field test).

105. See MASS. GEN. LAWS ANN. ch. 7 § 22(h) (precluding contracts with any person); Altbach, *supra* note 27, at 4.

106. See, e.g., *Pacific Gas & Elec. Co.*, 461 U.S. at 203-04 (requiring a very detailed set of laws to preempt by occupying the field).

107. See generally *Hines v. Davidowitz*, 312 U.S. 52 (1941) (elucidating a standard that, regardless of whether federal law occupies a field, a state law must be preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress); see also Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743, 1745-48 (1992) (tracing the taxonomy of this standard and other standards, which includes the “actual conflict,” “physical impossibility,” and “disruptive effect” tests, and concluding that all of them can be subsumed under the rubric of the “stands as an obstacle approach”).

108. See *Hillsborough County*, 471 U.S. at 717 (evidencing the Court’s desire to distance itself from the inference that preemption should result whenever an agency deals with a problem comprehensively); see also Martin, *supra* note 93, at 1838 n.52 (citing *McCarty v. McCarty*, 453 U.S. 210, 231-34 (1981), which held that a state community property law, when applied to military retirement pay, has the “potential to frustrate” congressional objectives of providing for retired service members and meeting personnel management needs in the active military forces).

109. See Nim Razook, *A Contract-Enhancing Norm Limiting Federal Preemption of Presumptively State Domains*, 11 B.Y.U. J. PUB. L. 163, 164-65 (1997) (discussing the confusion surrounding the purpose of federalism). Razook also has compiled several alternative points of view that advocate for state action to survive except in limited circumstances. *Id.* at 170.

110. 49 U.S.C.A. § 41713(b) (West Supp. 1998).

111. 44 F.3d 334 (5th Cir. 1995) (en banc).

112. See *id.* at 338-40 (reasoning that while Congress had limited actions concerning airline services, because the plaintiff asserted a tort action not concerning service, but rather negligence in storing a box of rum, the claim could go forward).

*Harris v. American Airlines*,<sup>113</sup> the court held that a claim for personal injury alleged to have resulted from the airline's in-flight service of alcoholic beverages was preempted.<sup>114</sup>

Under the rubric of frustrating or inhibiting a congressional goal, state laws regulating trade with Burma seem especially innocuous. In a field traditionally occupied by the states, the Supreme Court starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>115</sup> Regulating how a local government spends its own money arguably falls within this category.<sup>116</sup> Indeed, other laws regulating in the field of foreign relations in apparent disregard of federal law have received a clean bill of health.<sup>117</sup> However, the Supreme Court has preempted laws that did not contravene federal law but mainly made it more onerous to comply with a two-dimensional federal and state standard<sup>118</sup> or hindered the policy of creating national law uniformity.<sup>119</sup> On one level, the local laws do not frustrate Congress's purpose, in that federal law allows for conditional sanctions against Burma if "the government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition."<sup>120</sup> Meanwhile, state laws restrict any new contractual efforts with Burma from the present forward,

---

113. 55 F.3d 1472 (9th Cir. 1995).

114. *See id.* at 1476-77 (determining that the activities of the airline flight crew constituted "service" and thus both negligence and intentional infliction of emotional distress claims based on conduct of the flight crew during the flight were preempted).

115. *See Pacific Gas & Elec. Co.*, 461 U.S. at 206 (holding that although the Atomic Energy Act is comprehensive federal legislation regulating safety aspects of nuclear facilities, states retain their traditional responsibility for determining the need for power and, therefore, a presumption against preemption serves as the starting point of the analysis).

116. *See United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 214 (1984) (conceding that municipalities are treated like states, are subject to the Privileges and Immunities Clause, and implying that they can enjoy similar benefits as states, such as deciding with whom they contract); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (explaining that state preferential contracting does not violate the Constitution).

117. *See generally* *Board of Trustees v. Mayor of Baltimore*, 562 A.2d 720 (Md. 1990) (concerning preemption of a city ordinance directing that no city employee pension funds were to be invested in companies doing business with South Africa or invested in South Africa directly); *see also* *TRIBE*, *supra* note 94, at 480 n.12 (2d ed. 1988) (averring that states and localities are not preempted from engaging in their own efforts to end apartheid in South Africa). *But see* *Spiro*, *supra* note 6, at 829-31 (commenting that the United States government, under President Reagan's aegis, supported a policy of economic engagement that ran in obvious contravention of local laws promoting divestment).

118. *See generally* *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986) (preempting a state law that promoted the cleanup of oil spills and other toxic substances); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (preempting a state law that mandated oil tanker construction and modification in piloting procedures to reduce the likelihood of an oil spill harming Puget Sound).

119. *See United Steel Workers v. Rawson*, 495 U.S. 362, 371-72 (1990) (preempting a claim based on breach of a union's duty of fair representation).

120. OMNIBUS CONSOLIDATED APPROPRIATIONS ACT of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as 50 USCA § 1701).

without requiring triggering events.<sup>121</sup> The restrictions on new investment<sup>122</sup> promulgated by Congress and the state standards mirror one another.<sup>123</sup> Inasmuch as it is feasible to comply with both laws without creating any conflict, the state laws ostensibly do not violate any rules of preemption,<sup>124</sup> notwithstanding the tortured and uneasy state of preemption doctrine.<sup>125</sup>

### B. Preemption and Federalism: A Tricky Marriage

A more potent anodyne for the conflicting state of preemption doctrine that bolsters the viability of State debarment laws is found in the principles of federalism.<sup>126</sup> The renaissance of federalism, with its banner carried by *National League of Cities v. Usery*,<sup>127</sup> appeared suddenly. *National League of Cities* manifested the Court's decision to limit the extent of the federal government to set maximum hour and minimum wage provisions for almost all state employees.<sup>128</sup> The reasoning of the

---

121. See, e.g., Schmahmann & Finch, *supra* note 24, at 180-182 (discussing Berkeley, Cal., Resolution No. 57,881- N.S., III.B and IV.B (Feb. 28, 1995); Madison, Wis., Resolution No. 52,471, I.D. No. 17607 (Aug. 15, 1995); Tacoma Park Md., Ordinance 1966-33 (Oct. 28, 1996) as examples of statutes that preclude all future contracts without a change in Burmese policy).

122. See OMNIBUS CONSOLIDATED APPROPRIATIONS ACT of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as 50 USCA § 1701) (defining "new investment" as "any activity that is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement that is entered into with the government of Burma or a nongovernmental entity in Burma, on or after the date of the certification for the entry into a contract that includes the economical development of resources located in Burma or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract; the purchase of a share of ownership, including an equity interest, in that development; the entry into a contract providing for the participation in royalties, earnings, or profits in that development without regard to the form of participation"); see also 50 U.S.C.A. § 1702 (1997) (authorizing the President to investigate, regulate or prohibit any transactions in foreign exchange or involving property transactions in which any person is subject to the jurisdiction of the United States).

123. See, e.g., CAL. AB 888 (1997) (defining "new investment" as those contracts formed after the effective date of the statute, but exempting contract extensions and contracts deemed necessary for the health, safety, and welfare of the state populace).

124. Compare Lewis, *supra* note 11, at 471 (1987) (concluding that state divestment legislation did not fall within the strictures of Congressional acts and thus were not preempted), with Spiro, *supra* note 6, at 848-49 (finding it impossible that state divestment legislation would survive preemption scrutiny because of congressional enactment of anti-apartheid legislation and an executive order concerning apartheid legislation).

125. See David Rotschild, *A Proposed "Tonic" with Florida Lime to Celebrate Our New Federalism: How to Deal with the Headache of Preemption*, 38 U. MIAMI L. REV. 829, 838 (1984) (decrying that the preemption doctrine requires a tortured examination which has created "confusing, uncertain and even conflicting holdings"); see also Joseph T. McLaughlin et al., *Federal Preemption*, Q247 ALI-ABA 151, 155 (1996) (cataloging recent Supreme Court decisions to determine a rationale and basis for preemption decisions and concluding that many have "far reaching effects upon controversial areas").

126. See Martin, *supra* note 93, at 1840-41 (compiling data from the Federalist papers, especially the work of Alexander Hamilton, to supply the bulwark for her proposition that present preemption analysis derogates the Framers' interpretation of preemption's extent); see also Herrman, *supra* note 87, at 1167 (discussing that for preemption to serve the goals of federalism, "it should secure to both the federal government and the states the right to regulate in their proper fields of authority").

127. 426 U.S. 833 (1976).

128. *Id.* at 845.

decision rested on the bedrock idea that Congress could not impair the states' essential state functions and their ability to function effectively within a federal system.<sup>129</sup>

However, federalism's resurgence disappeared just as suddenly when, nine years later, the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>130</sup> forswore "any obligation to preserve the sovereignty of the states."<sup>131</sup> In *Garcia*, the Court analyzed the extent the minimum wage and overtime provisions of the Fair Labor and Standards Act controlled hours and wages of the San Antonio Metropolitan Transit Authority.<sup>132</sup> The Supreme Court overruled *National League of Cities*, and, in the process, concluded that state sovereign interests are protected from Congress's power to regulate under the Commerce Clause by "procedural safeguards inherent in the structure of the federal government," not "by judicially created limitations on federal power."<sup>133</sup> The Court recognized that the true, fundamental limitations inherent in all congressional action emanate from the built-in restraints provided by the federalist system through state participation in federal government action, not by judicial intervention.<sup>134</sup> According to the Supreme Court, the political process will correct unduly burdensome laws by electing representatives responsive to the needs of their own constituents.<sup>135</sup>

The constitutional authority of preemption makes it incumbent upon Congress to make its intentions to preempt known.<sup>136</sup> Using a distinctively recognizable legislative purpose insures that the implicit protections built into the federal system can adequately respond to those responsible for unpopular lawmaking.<sup>137</sup> Without such explicitness, the states are not afforded the distinct protections against preemption that are implicit in a federal system.<sup>138</sup> In the present circumstance, states have determined that their interests are better served by delinking contractually with a despotic regime.<sup>139</sup> The goals of federalism remain unachieved by quashing decisions made by democratically elected representatives from Oakland, Berkeley, and Massachusetts for the sake of protecting basically similar legislation enacted

129. *Id.* at 844-45.

130. 469 U.S. 528 (1985).

131. Martin, *supra* note 93, at 1842.

132. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985).

133. *Id.* at 552.

134. *Id.* at 556.

135. *Id.* at 551-52.

136. See Wolfson, *supra* note 58, at 96-102 (detailing the interplay between preemption and federalism).

137. See Starr et al., *supra* note 35, at 42 (emphasizing that Congress must explicitly manifest an intent to preempt state law). Furthermore, institutional concerns, such as the judiciary usurping too much Congressional authority, also should bolster protecting state law from non-explicit federal preemption. *Id.* at 47.

138. See Wolfson, *supra* note 58, at 100 (explaining the need for a set of safeguards on the administrative process similar to those available when Congress legislates).

139. See, e.g., MASS. GEN. LAWS ANN. ch. 7, § 22(h) (West Supp. 1997) (severing Massachusetts from future contracts with Burma); see also Shuman, *supra* note 139, at 174 (detailing that many cities not only had divestment programs to combat apartheid, but also created sister-community ties to help stop removal of black townships in South Africa).

on Capitol Hill.<sup>140</sup> Preempting state laws severs the connection between citizens and their value choices, thereby promoting voter apathy rather than robust civic republicanism. It also undermines public debate and local input perceived as integral for fostering the goals of local involvement in national governance.<sup>141</sup> States can promote the fundamental liberties and rights of their citizens by exercising power over political factions and movements that might advocate for an overreaching centralized government.<sup>142</sup> Perhaps most importantly, federalism provides citizens the opportunity to impact government on a local level, helping to make it more responsive to the immediate needs and evolving values of individual communities, and less susceptible to bureaucratic inertia and elitism that plagues Washington.<sup>143</sup> For the foregoing reasons, “the begin in my backyard” (BIMBY) shibboleth acts as an apt epigram for promoting and supporting state activities that promote good global citizenship.<sup>144</sup>

## V. FOREIGN COMMERCE CLAUSE

The Commerce Clause provides, “[t]he Congress shall have power . . . To regulate Commerce with foreign Nations, and amongst the several States, and with Indian Tribes.”<sup>145</sup> Provided with this express power to regulate commerce, Congress possesses the authority to enact legislation affecting interstate commerce, and alternatively, can allow states to do the same by delegating this power to them.<sup>146</sup> “Traditionally, in issues involving state regulation of foreign commerce, a higher degree of commerce clause scrutiny applies.”<sup>147</sup> Historically, the judicial branch has

---

140. See Martin, *supra* note 93, at 1837, 1842 n.80 (citing Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, U. Ill. L. REV. 515, 538 (1972), calling for courts to decide preemption cases on the basis of an explicit balancing test: “federal laws should not be deemed to preempt the operation of state laws which serve important state interests and which only marginally impinge on the operation of federal laws”).

141. See Hoke, *supra* note 101, at 694-95 (emphasizing the importance of generating greater public participation rather than stifling public outcry through undemocratic means such as preemption); see also Sullivan, 376 U.S. at 270 (desiring discussion of public issues in an uninhibited manner); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 306-08 (1932) (Brandeis, J., dissenting) (providing for state experimentation to discern new methods for successfully running local government or affairs and declaring that such experimentation is vital to improving methods of governing that states as laboratories of experiment can provide).

142. See Starr et al., *supra* note 35, at 41-42 (discerning that state influence serves as a check over the national government by exerting organized public pressure over centripetal political forces).

143. *Id.* at 42 (explaining that the ability of state and local governments to respond directly and amenably to citizens within its specific jurisdiction is an important advantage of the federal system).

144. See Shuman, *supra* note 8, at 175-76 (revealing that a growing number of U.S. cities have begun to eliminate the use of chemicals implicated in depleting the earth’s ozone layer and noting the restrictions on the use of polystyrene plastic foam and polyvinyl-chloride grocery bags, without the insistence of Congress).

145. U.S. CONST. art. I, § 8, cl. 3.

146. *New York v. United States*, 505 U.S. 144, 171 (1992); *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992); *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204, 213 (1984); see also TRIBE, *supra* note 94, at 403 (detailing that “Article I, section 8, is phrased as an affirmative grant of power to Congress”).

147. Dreifke, *supra* note 14, at 281; see *Michelin Tire Corp. v. Wages*, 423 U.S. 283, 286 (1976) (describing the federal government’s regulatory power over foreign commerce as exclusive).

accorded Congress virtual plenary authority over matters involving foreign commerce, in part because foreign commerce implicates issues concerning the division of foreign affairs power between the states and the national government.<sup>148</sup> Further justifying federal superiority, Article I section 10 of the Constitution does not, by its express terms, reserve State power in foreign trade or foreign relations.<sup>149</sup> Functional imperatives, such as national unity and agreement in international trade matters, also justify this interpretation.<sup>150</sup> Indeed, the Supreme Court has articulated the concept that the nation should “speak with one voice” in its foreign affairs, thereby foreclosing state action that generated a possibility of confusion among the United States’ trade partners.<sup>151</sup>

#### A. *Lessened Commerce Clause Scrutiny for Foreign Commerce*

Any prohibition on contracts with corporations having dealings with Burma and on contracts with Burma directly affects foreign commerce by creating a selectivity in contractual partners. However, there are two arguments that support the viability of the local laws. First, the Supreme Court has recently intimated that foreign companies deserve less commerce clause protection than domestic companies.<sup>152</sup> *Barclay’s Bank PLC v. Franchise Tax Board*,<sup>153</sup> involved a consolidation of two tax-refund actions: one by Barclay’s Group, a multinational banking enterprise based in the United Kingdom with subsidiaries in California, and a second by Colgate Palmolive Co., a U.S.-based multinational corporation with operations in California.<sup>154</sup> California computed the corporations’ incomes with the worldwide combined reporting method, which allows the aggregation of the total worldwide income for all entities that composed the unitary business purpose.<sup>155</sup> California

---

148. Dreifke, *supra* note 14, at 281; see JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 125-26 (3d ed. 1986) (discussing that the Framers provided broad powers to Congress and the executive in foreign commerce in the hopes of maintaining uniformity of law and thereby limiting foreign agitation over what legal standards they must adhere to when engaged in trade with the United States).

149. See NOWAK, *supra* note 148, at 125 (claiming that there is “no constitutional recognition of any reserved powers of the States to involve themselves in foreign affairs”).

150. See Dreifke, *supra* note 14, at 282 (discussing the reasoning supporting Congressional hegemony in the area of foreign commerce).

151. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452 (1979) (articulating the “one voice” standard in the context of multiple taxation against foreign commerce as it would potentially confuse foreign trade partners); see also *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (determining that the United States must speak with one voice when regulating commercial relations with foreign governments). *But see* Jubinsky, *supra* note 11, at 559 (averring that when the “one voice” criteria is not impaired, the heightened scrutiny inherent in the Foreign Commerce clause drops out and is replaced by the regular interstate commerce clause analysis).

152. See *Barclay’s Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 302-03 (1994) (allowing California to extend its corporate franchise tax to a foreign-based multinational corporation even though it acknowledged that these companies are subject to a systematically higher risk of multiple taxation).

153. *Id.*

154. *Id.* at 303-04.

155. *Id.* at 303.

taxed a portion of the taxpayer's worldwide income, calculated by multiplying total worldwide income by the arithmetic average of the fractions of worldwide payroll, property and sales located inside California.<sup>156</sup> The disparate tax treatment netted California \$152,420 from the subsidiary over and above the normal tax due under the conventional reporting method.<sup>157</sup> Causing more chagrin was the \$604,765 in additional taxes the corporations had to pay between 1970 and 1973 under California's system, in contrast to, the system used by the United States, which treats each corporate entity in a family of corporations separately.<sup>158</sup> The corporations posited that California's reporting method violated the Commerce Clause because the state interfered with federal policy and discriminated against international commerce.<sup>159</sup> The Supreme Court held that *Barclay's* failed to demonstrate that California's system imposed systematically disproportionate burdens on foreign enterprises.<sup>160</sup>

The Court also addressed two additional issues concerning the applicability of a state tax on international commerce. The Court found California's tax valid because it did not result in an unacceptable increase in the risk of multiple taxation and because it did not unduly interfere with the uniformity of federal international trade policy.<sup>161</sup> Concerning the multiple taxation issue, the Court adhered to the analysis in *Container Corp. of America v. Franchise Tax Board*.<sup>162</sup> In following that analysis, the Court acknowledged that *Barclay's* involved a foreign multinational while *Container Corp.* involved a domestic multinational, and that foreign multinationals are subject to a higher risk of multiple taxation.<sup>163</sup> Nonetheless, the Court evinced no need to modify *Container Corp.*'s standards for foreign-based multinationals and went on to determine that California's tax satisfied these standards.<sup>164</sup>

---

156. See CAL. REV. & TAX. CODE § 25101 (West 1992) (outlining the worldwide combined reporting method); see also *id.* §§ 25129, 25132, 25134 (West 1994) (defining how property, payroll and sales factors assist in determining final taxation); *id.* § 25128(a) (West Supp. 1998) (modifying the formula, now counting the proportion of in-state sales twice).

157. *Barclay's Bank*, 512 U.S. at 307.

158. *Id.* at 307 n.6; see also I.R.C. § 881(a) (West 1997) (detailing that for the Internal Revenue Service, every corporation is liable for income tax, and a foreign corporation is taxable each year at 30% of the "amount received from sources within the United States," and considering interest, salaries and wages aggregate to determine the amount owed).

159. See *Barclay's Bank*, 512 U.S. at 302-03 (revealing that both corporate taxpayers argued the Commerce Clause was violated because the California law contravened federal policy).

160. *Id.* at 319.

161. *Id.*

162. 463 U.S. 159 (1983) (holding that the California tax law did not violate the Commerce Clause because it did not overly burden foreign commerce).

163. Compare *Barclay's Bank*, 512 U.S. at 317-18 (dealing with a foreign multinational corporation and the concern of creating international animosity), with *Container Corp.*, 463 U.S. at 186 (considering the foreign commerce clause protections for a domestic multinational corporation that might endure multiple taxation).

164. *Barclay's Bank*, 512 U.S. at 319-20.

Some practitioners consider the federal uniformity test outlined in *Japan Line, Ltd. v. County of Los Angeles*,<sup>165</sup> as dispositive, thus striking down laws prohibiting contracts with companies involved in Burma.<sup>166</sup> *Japan Line* requires that the state not “impair federal uniformity in an area where federal uniformity is essential;”<sup>167</sup> and, in particular, precludes laws that “prevent the Federal Government from speaking with one voice’ in international trade.”<sup>168</sup> One observer has surmised that the Court found that California’s tax satisfied the *Japan Line* test because no congressional action preempted or obstructed California’s tax, and Congress’s failure to act in the wake of *Container Corp.* constituted tacit acceptance of the tax as it fell upon Congress to act if it disapproved of California’s tax.<sup>169</sup>

Analogously, Congress and the President had the opportunity to regulate trade with Burma and preempt existing state law.<sup>170</sup> Inasmuch as Congress has regulated in the area of selective contract laws with Burma, but consciously chosen not to preempt state law, strengthens the inference that the laws affecting Burma survive Commerce Clause scrutiny. This conclusion follows from the Supreme Court’s opinion in *Barclay’s* that congressional silence was sufficient to support existing state law despite the heightened chance for multiple taxation.<sup>171</sup> Furthermore, as *Japan Line* and *Barclay’s* dealt with taxes and the increased cost of doing business, an actual increase in production cost for the respective companies,<sup>172</sup> foreign companies affected by the anti-Burma trade laws would not directly lose money because the selective contract laws would affect only prospective contracts. Instead, the companies would have to calculate the costs and benefits of forfeiting doing business in Burma or in the particular states.<sup>173</sup> Thus, the effect wrought by the selective contract legislation actually affects foreign companies to a lessened extent than the more severe but viable California taxing scheme examined in *Barclay’s*.

165. 441 U.S. 434 (1979).

166. See Schmahmann & Finch, *supra* note 24, at 190 (concluding that *Japan Line* serves to undermine state laws that adversely affect foreign commerce).

167. *Japan Line, Ltd.*, 441 U.S. at 448. See generally *Perpich v. Department of Defense*, 496 U.S. 334 (1990) (denying states’ capacity to withdraw from National Guard training exercises, because this is an area that mandates federal uniformity).

168. *Id.* at 453 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

169. See *Leading Cases Constitutional Law: Commerce Clause*, 108 HARV. L. REV. 139, 142-43 (1994) [hereinafter *Leading Cases Constitutional Law*] (determining the Court emphasized that the negative implication of Congressional deference to state law manifested the law’s validity).

170. See Schmahmann & Finch, *supra* note 24, at 187-89 (describing the President’s and Congress’s reluctance to eclipse state law).

171. See *Leading Cases Constitutional Law*, *supra* note 169, at 142-43 (commenting that actions taken by Congress that do not eclipse state laws deserve greater deference because of tacit Congressional acceptance).

172. *Id.* at 142.

173. See Frey, *supra* note 48, at 187-88 (illustrating why several companies left Burma to protect more profitable domestic contracts).



Although *Barclay's* cries out for sundry interpretations,<sup>174</sup> the most cogent view discerns the Court affirmatively eliminating a double standard, one for domestic corporations and another more stringent one for foreign companies and thereby equating foreign corporations to American companies.<sup>175</sup> The Court's decision to allow California's taxation of foreign nationals, despite the corporations' possibility of incurring multiple taxation in conjunction with their limited access to judicial and political mechanisms in the state to ensure fair apportionment, ostensibly affirmed that foreign-based multinationals are treated under the same standards as domestic corporations.<sup>176</sup> Further, the Court may have implicitly recognized the new realities of the post-Cold War world; a world beset with numerous actors acting in numerous forums.<sup>177</sup>

Moreover, the strongest rationale underlying the Commerce Clause—the economic union argument—is inapposite when considering foreign commerce.<sup>178</sup> Discriminating against another domestic company patently subjects the nation to extreme state protectionism.<sup>179</sup> However, with state discrimination against foreign-based corporations in international commerce, the concern differs because a state will not likely retaliate against another state for protectionist legislation burdening foreign commerce.<sup>180</sup> This same analysis logically flows for state discrimination against a foreign nation.<sup>181</sup>

174. See *Leading Cases Constitutional Law*, *supra* note 169, at 144-46 (averring that three interpretations of the case are apparent: First, the Court might have downplayed the importance of the multiple-taxation argument; second, the Court could have reemphasized the long-standing theory that dormant commerce clause analysis depends on the nature of the commerce burdened, not on the identity of the parties affected; third, the case might imply that foreign companies deserve less dormant commerce clause protection than domestic companies).

175. *Id.* at 145.

176. *Id.* See generally *Wardair Canada, Inc. v Florida Dep't of Revenue*, 477 U.S. 1 (1986) (upholding a state tax on aviation fuel, including fuel purchased by foreign carriers for use on international routes); Keith Hight & George Kahale, III, *International Decisions: Barclay's Bank v. Franchise Tax Board of California*, 88 AM. J. INT'L L. 766, 767 (1994) (arguing that the Court relied on words unspoken by Congress in accepting the state tax structures).

177. See *Bilder*, *supra* note 1, at 821-22 (noting that states and cities have assumed increasing prominence at the international level and that the federal government is doing very little to rein them in); Hight & Kahale, *supra* note 176, at 768 (commenting that other countries have come to realize that the United States government might not possess hegemony over all domestic political decisions and noting that nations have initiated direct political contacts with states).

178. See Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 430-32 (1981) (suggesting that the Framers intended the Commerce Clause to prevent economic parochialism and injustices among the States).

179. See *id.* at 431 (discussing the fear of conflicting local interests which could generate protectionist measures).

180. See *Dreifke*, *supra* note 14, at 282 (determining that potential state retaliation against other states for inhibiting foreign commerce did not concern the Framers' as much as possible foreign retaliation against discriminatory state laws); *Leading Cases Constitutional Law*, *supra* note 169, at 147 (commenting that state retaliation against laws affecting foreign commerce should not be a paramount concern).

181. See, e.g., FLA. STAT. ANN. § 205.0532 (West 1997) (giving carte blanche to Floridian cities to economically discriminate against Cuba).

Of course, the foreign Commerce Clause purportedly prevents individual states from inciting retaliatory measures by foreign governments,<sup>182</sup> which would harm the United States as a whole.<sup>183</sup> However, this argument requires the judiciary to have a sophisticated, up-to-date understanding of the current nuances of American trade policy.<sup>184</sup> The legislative branch and administrative agencies of the federal government are better situated than the judiciary to analyze the country's trade needs.<sup>185</sup> Furthermore, if concerns of infringements on foreign commerce should serve as a variable in assessing the constitutionality of state measures, the courts would have to engage in speculation on how to weigh the likelihood and magnitude of foreign retaliation.<sup>186</sup> Therefore, it seems injudicious to have courts solve this policy dilemma.

In this instance, Burma lacks a means of retaliating and international companies would probably not jettison operations from the United States in protest, although their home countries might choose to develop anti-U.S. trade policies.<sup>187</sup> The decision whether to forego trade with the United States or to end relations with Burma mandates a cost-benefit analysis—something that always factors into rational business dealing.<sup>188</sup>

Federalism principles allow each state to decide individually how to apportion and spend state revenues without federal influence.<sup>189</sup> Thus, prohibiting states from engaging in this practice, in effect, unduly places restrictions on state laws affecting

---

182. See *Barclay's Bank*, 512 U.S. at 308-09 (noting that California's tax system did provoke the United Kingdom to retaliate with increased taxes on American imports); Hight & Kahale, *supra* note 176, at 769 n.20 (recording that California changed its worldwide reporting method in the face of proposed United Kingdom (UK) retaliatory legislation directed not at the United States as a whole, but at California alone in the form of the Income and Corporation Taxes Act 1988, pt. XVIII, ch. 111 § 812 and sched. 30, paras. 20, 21 (Eng.)). But see *Leading Cases Constitutional Law*, *supra* note 169, at 142 (commenting that the court was not concerned with foreign reaction to state taxation policies).

183. See *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 399 (3d Cir. 1987) (arguing that the Commerce Clause serves to ensure uniformity among the states in the area of foreign trade); see also Spiro, *supra* note 6, at 839 (commenting that the dormant Foreign Commerce Clause "was conceived to protect all states from international retaliation provoked by the actions of one").

184. See *Leading Cases Constitutional Law*, *supra* note 169, at 147 (finding that courts are ill-equipped to determine national trade measures and arguing that Congress should explicitly determine the parameters of foreign trade).

185. *Id.*

186. See Dreifke, *supra* note 14, at 283 (surmising that international retaliation should not invalidate per se state legislation).

187. See Altbach, *supra* note 27, at 2 (reporting that the European Community and Japan have requested World Trade Organization consultations with the United States, charging that the law violates the Uruguay Round's government procurement agreement, which Massachusetts and thirty-six other states voluntarily pledged to uphold).

188. See Frey, *supra* note 48, at 187-88 (flushing out the variables that businesses commonly evaluate in determining whether to remain involved with a nation that has a questionable human rights record).

189. See STONE, *supra* note 3, at 243 (detailing that state legislatures are motivated to generate greater revenues and protections for their respective populaces); see also *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984) (discussing the basis supporting the market participant exception to the commerce clause including the need for states to apportion their funds as they deem appropriate).

foreign companies which the foreign commerce clause did not envision.<sup>190</sup> Essentially, such restrictions force the state to contract in an inefficient manner. Interestingly, many scholars and courts submit that discrimination against foreign companies may sometimes serve the interests of the United States by protecting domestic industries, raising revenues for state governments, protecting against dumping, and retaliating against trade barriers in foreign countries.<sup>191</sup> Indeed, federal trade policy often outwardly discriminates against foreign commerce.<sup>192</sup> Therefore, the policy of providing foreign commerce with greater protections counters many pragmatic political and economic goals of regulating commerce.

### *B. The Market Participant Doctrine*

Notwithstanding the questions raised over the standard applied to laws infringing on foreign commerce,<sup>193</sup> the market participation exception<sup>194</sup> probably insulates state selective contract laws with companies doing business in Burma.<sup>195</sup> The Supreme Court first enunciated the market participant rule in *Hughes v. Alexandria Scrap*.<sup>196</sup> The case involved a Maryland subsidy program designed to encourage the recycling of abandoned cars, but which imposed stricter requirements on out-of-state firms for establishing good title.<sup>197</sup> The law's natural implications produced a precipitate decline in the number of abandoned cars delivered to out-of-state producers.<sup>198</sup> Speaking for the court, Justice Powell explained that, "Maryland

---

190. See *Leading Cases Constitutional Law*, *supra* note 169, at 147 (commenting that preventing states from deciding with whom they will contract did not serve as the Framers' premise for creating the foreign commerce clause).

191. See *id.* at 147 n.56 (citing RICHARD POMFRET, *INTERNATIONAL TRADE* 122-45, 188-92 (1982) who put forth several arguments in support of national trade barriers and discriminatory trade policies).

192. See *id.* at 147 n.57 (noting that protectionist policies are often enacted through customs duties, anti-dumping laws, subsidies to domestic enterprises, and regulation of foreign investment).

193. See *supra* notes 159-92 (discussing the lessened scrutiny afforded foreign commerce infringements under Commerce Clause analysis); see also *Leading Cases Constitutional Law*, *supra* note 169, at 145 (suggesting that foreign corporations have less Commerce Clause protection than domestic corporations, thereby intimating that foreign-based multinational corporations in international commerce should not be protected by the dormant Commerce Clause at all).

194. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (embracing the market participant rule, which allows states to participate in the market without the constraints of the dormant Commerce Clause); see also Dan T. Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 400-01 (1989) (elucidating that the market participant rule evolved from Commerce Clause decisions to protect state activity when the state acts as a contractual partner in the market rather than as a regulator).

195. See Thomas A. Troyer, et al., *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions and Pension Funds*, 74 GEO. L. J. 127, 160 (1985) (concluding that if the Court confronted a divestment issue, it would apply the market participant exception). *But see* Schmahmann & Finch, *supra* note 24, at 191-92 (construing the market participant doctrine as ineffectual for laws in the foreign commerce context, because the market participation doctrine has never been applied to a case involving foreign commerce and that the doctrine unduly hampers the economic relationships of the state's trading partners).

196. 426 U.S. 794 (1976).

197. *Id.* at 796.

198. *Id.* at 797.

entered the market for the purpose . . . of protecting the State's environment. As the means of furthering this purpose, it elected the payment of state funds—in the form of bounties—to encourage the removal of automobile hulks from Maryland streets and junkyards. But no trade barrier of the type forbidden by the Commerce Clause, impedes their movement out of state."<sup>199</sup> He went on to announce that "[N]othing in 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."<sup>200</sup>

The doctrine's outlines received further refinement in *White v. Massachusetts Council of Construction Employers, Inc.*<sup>201</sup> In that case, the Court considered a municipal law that required all construction projects funded in whole or in part by the city to be performed by a crew of at least one-half Boston residents.<sup>202</sup> The Court upheld the order because it did not "reach beyond the immediate parties with which the government transacts business."<sup>203</sup> The Court determined that the order affected only those working for the city and thus those individuals were receiving city funds and the program constituted direct state participation in the market.<sup>204</sup> The Court concluded that Boston's hiring rule constituted "market participation," even though, as correctly pointed out, it "imposed restrictions that reach beyond the immediate parties with which the government transacts business."<sup>205</sup>

In *South-Central Timber Development, Inc. v. Wunnicke*,<sup>206</sup> the Court struck down for the first time a law that involved state proprietary activity. The case involved a requirement that Alaskan owned timber be processed within the state after purchase.<sup>207</sup> The Court agreed with the conclusion that the State could not use its leverage in the timber market to exert a regulatory effect on the market.<sup>208</sup> Obligating the purchaser of the timber to contract with another party was antithetical to having the state act as a market participant and not a regulator.<sup>209</sup> The Court emphasized that controlling the post-purchase behavior of its trading partners goes beyond the parties' direct commercial obligations, and held that the market participant doctrine does not immunize downstream regulation of the timber-processing market in which the state is not a participant.<sup>210</sup>

---

199. *Id.* at 809-10.

200. *Id.* at 810.

201. 460 U.S. 204 (1983).

202. *Id.* at 206.

203. *Id.* at 211 n.7.

204. *Id.* at 214-15.

205. Coenen, *supra* note 194, at 402.

206. 467 U.S. 82 (1984).

207. *Id.* at 84.

208. *Id.* at 98.

209. *Id.* at 96-97.

210. *Id.* at 96.

Language in *Wunnicke* supports placing local debarment enactments under the penumbra of the market-participant doctrine.<sup>211</sup> The doctrine permits a State to influence

a discrete, identifiable class of economic activity in which it is a major participant, . . . [but] the doctrine does not give carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.<sup>212</sup>

The debarment laws do not attempt to impose any requirements on international companies outside of contractual privity.<sup>213</sup> The state merely is exercising its selectivity in choosing economic partners, a privilege certainly within its purview.<sup>214</sup> All companies can continue to contract with whomever they wish, and the state laws do not condemn nor preclude them from exercising their economic choice.<sup>215</sup> Moreover, by not including a further requirement that the company perform services with another selected company or country, the state does not overreach the doctrine's limits illustrated in *Wunnicke*.

In a recent decision concerning the market participant doctrine, *New Energy Co. v. Limbach*,<sup>216</sup> the Court declined to authorize a state action through the market participant doctrine. The case involved an Ohio statute designed to encourage production and use of gasohol, a motor vehicle fuel made by mixing gasoline and a grain derivative, ethanol.<sup>217</sup> Ohio provided a tax credit for each gallon of ethanol sold against the fuel tax otherwise payable on gasoline and gasohol sales.<sup>218</sup> Ohio refused to allow credit for ethanol produced in states, including Indiana, which did not afford a similar tax credit for Ohio-produced ethanol, thereby overtly discriminating against out-of-state users of ethanol.<sup>219</sup> The Court held that "taxing is a primeval governmental activity"<sup>220</sup> and that the Ohio tax credit "cannot plausibly

---

211. *But see* Schmahmann & Finch, *supra* note 24, at 194 (averring that the *Wunnicke* court would oppose allowing market-participant immunity for local debarment statutes).

212. *Id.* at 97.

213. *See supra* notes 207-10 and accompanying text (explaining that restrictions on downstream purchases preclude use of the market participant exception).

214. *See White*, 460 U.S. at 205-06 (explaining that when a state purchases items then the state receives greater protection); *Reeves Inc., v. Stake*, 447 U.S. 429, 440 (1980) (propounding that when a state sells items, the state can determine to sell to its residents first); *Alexandria Scrap*, 426 U.S. at 810 (standing for the proposition that a State acting in its proprietary capacity as a purchaser or seller may favor its citizens over others).

215. *Wunnicke*, 467 U.S. at 82.

216. 486 U.S. 269 (1988).

217. *Id.* at 271.

218. *Id.* at 272.

219. *Id.* at 273.

220. *Id.* at 277.

be analogized to the activity of a private purchaser.<sup>221</sup> Thus, the market participant exception did not immunize the Ohio statute.

The highlighted activity that the selective contract statutes focus on concerns state involvement in a contract for goods or services. This scenario distinguishes itself from the tax credit of *Limbach* because selecting contractual partners is a function engaged in by private groups, unlike the government's monopoly on the taxing power.<sup>222</sup> Furthermore, the discrimination between the states that animated *Limbach* does not undercut the contractual debarment statutes because they pertain to foreign nations.<sup>223</sup> Therefore, the statutes will not directly incite discriminatory or protectionist actions by other states.<sup>224</sup>

The series of decisions defining the market participation exception reveals that the exemption does not exist for governmental entities engaged in activities that private citizens could not.<sup>225</sup> However, if the state engages in activities which a private citizen could partake, such as deciding with whom to contract, then the market participant exception applies.<sup>226</sup> Further strength for using the market participant exception for contractual debarment statutes derives from the justifications for the rule.<sup>227</sup> First, the doctrine reflects the Court's concern for state sovereignty.<sup>228</sup> Second, the doctrine protects a state's ability to choose its trading partners without judicial interference.<sup>229</sup> Finally, the doctrine embodies the judicial branch's abhorrence for policing the diverse activities undertaken by a state in its proprietary capacity.<sup>230</sup>

221. *Id.* at 278.

222. See *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983) (viewing a tax exemption as a form of governmental spending within Congress's purview).

223. See *Bilder*, *supra* note 1, at 831 (describing the negligible probability that nations would react by limiting trade against a state for not wanting to trade with companies affiliated with a despotic regime).

224. *Leading Cases Constitutional Law*, *supra* note 169, at 147.

225. See *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1607 (1997) (refusing to expand the market participant exception to an action by the State in its sovereign capacity); see also *Coenen*, *supra* note 194, at 404 (explaining that government purchasing in of a contractual setting should enjoy the exemption).

226. See *Camps Newfoundland*, 117 S. Ct. at 1607 (determining that state entry into the market in a proprietary fashion manifests the prototypical use for the market participant exception); see also *Coenen*, *supra* note 194, at 404 (postulating that the availability of the market participant exception for state activities involving purchasing and contracting should generally be available).

227. See *Coenen*, *supra* note 194, at 400 (averring that the market participant doctrine evolved to afford protections for state preferences, when the state is engaged in a proprietary function, of local interests).

228. *Reeves*, 447 U.S. at 438; see *GSW, Inc. v. Long City*, 999 F.2d 1508, 1511 (11th Cir. 1993) (considering the extent of the market participant doctrine and its limitations); see also *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1056 (9th Cir. 1987) (lamenting the judiciary's inability to distinguish between a "market regulator and a market participant").

229. See H. Christopher Boehning, *Northern Enclosure: State Preference Statute Guiding Local Government Purchasing Practices Qualifies for Immunity Under Market Participant Doctrine*, 71 WASH. U. L.Q. 455, 465 (1993) (analyzing the purposes supporting the market-participant doctrine and surmising that activities engaged in by an arm of the state, for example, a school, also deserved protection via market participation, but only if the immunity is extended for states acting in their proprietary capacity).

230. *Id.*

Upholding laws restricting the extension of contracts to Burma fosters all of these goals. Quintessentially, state sovereignty requires the ability to enter into contracts and to determine how and where to spend state money.<sup>231</sup> Inextricably linked with this concept are the “benefits that derive from meaningful and responsive local government, including increased participatory democracy and greater sensitivity to local concerns.”<sup>232</sup> Allowing democratic processes to dictate how states will engage the market, through elections and voting on referenda, exemplifies the archetypal Jeffersonian citizen influence manifested in enacting legislation on the local level.<sup>233</sup> Devoid of this ability, the few people actively participating in politics would likely dwindle still further if courts squash these laws under the heavy stone of the Commerce Clause. Therefore, the policies behind the market participant doctrine fully support local contractual debarment measures.

## VI. FOREIGN AFFAIRS AND THE SUPREMACY CLAUSE

“The foreign policy of the United States has been reserved to the federal government, and the Supreme Court has looked askance at state actions impinging on the exercise of foreign relations powers.”<sup>234</sup> This concern emanates from the desire to have the United States “speak with one voice” in matters of foreign policy.<sup>235</sup> Without such a paradigm, the United States could confuse foreign nations and, concomitantly, generate global animosity.<sup>236</sup>

Article VI, clause 2 of the United States Constitution provides that the “Laws of the United States; . . . and all Treaties made, or which shall be made, Under the Authority of the United States, shall be the supreme Law of the Land.”<sup>237</sup> Most academics have concluded that foreign policy remains the purview of the federal government,<sup>238</sup> largely because the Constitution expressly forbids any State to “enter into any Treaty, Alliance or Confederation,”<sup>239</sup> or “enter into any Agreement

---

231. *Reeves*, 447 U.S. at 439.

232. See Jubinsky, *supra* note 11, at 561 (explaining that the local nature of state management of state-owned resources should not fall within the federal government’s authority).

233. See Shuman, *supra* note 8, at 177 (determining that legislative decisions arrived at through democratic conduits deserve judicial protection).

234. Fenton, *supra* note 4, at 573.

235. *Id.* at 576; see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 306 (1936) (stating that the President alone has the power to speak or listen as a representative of the nation, appearing to contradict the Constitution’s division of foreign affairs powers between both Congress and the President); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (illustrating that our system of government is such that the interest of cities, counties and states imperatively requires that federal power concerning foreign relations remain singularly free from local interference).

236. See *Curtiss-Wright*, 299 U.S. at 319 (finding, as a concern, that in the realm of foreign relations, the United States’ policy requires responsibility and meaning not to impair the unity of design).

237. U.S. CONST. art. VI, § 2.

238. See HENKIN, *supra* note 31, at 241 (concluding that the United States Constitution has an engrafted presumption that foreign affairs powers belong solely to the national government).

239. U.S. CONST. art. I, § 10.

or Compact with another State, or with a foreign Power, or engage in War."<sup>240</sup> Notwithstanding the Constitution's limits, national power has never eclipsed all state activity in the realm of foreign affairs.<sup>241</sup> Almost daily states act in ways that indirectly affect foreign governments, international trade organizations, and transnational companies.<sup>242</sup> For example, a State could determine that only particular types of tomatoes, free of a particular pesticide, qualify as acceptable produce for state purchase.<sup>243</sup> While obviously this statute might have domestic impact, the impact likely would also affect, perhaps detrimentally, nearby trading partners, Canada and Mexico.<sup>244</sup> This law, therefore, could compel both nations to reconsider their present growing techniques and pesticide treatments in hopes of conformance with the law.<sup>245</sup> These changes emanate directly from state activity, but this activity is not an invalid state intrusion into foreign affairs.<sup>246</sup> If not the pesticide hypothetical, the "political decision" of Florida to accept or deny refugees from Cuba or Haiti also serves as an example of valid state legislative decision making.<sup>247</sup>

240. *Id.* at cl. 3.

241. See HENKIN, *supra* note 31, at 244 (describing several instances of state involvement in foreign affairs, such as engaging in trade with aliens inside its borders); see also *General Elec. Co. v. State Assembly Comm'n*, 425 F. Supp. 909, 915 (N.D.N.Y. 1975) (declining to block the inquiry into corporations' cooperation with Arab boycott of Israel); *Godstein v. Cox*, 299 F. Supp. 1389, 1393 (S.D.N.Y. 1968) (validating a nonresident alien inheritance statute); *Gorun v. Fall*, 287 F. Supp. 725, 728 (D. Mont. 1968) (denying injunction against enforcement of Montana statute that limited alien inheritance); *Troyer et al.*, *supra* note 195, at 159 n.123 (explaining that state courts have upheld laws affecting foreign affairs).

242. FLA. ST. ANN. §§ 288.852, 288.853 (West Supp. 1998) (urging Washington to forego economic and political relations with Cuba until the island nation sponsors democratic elections); Greg N. Anderson, Comment, *Achieving United States-Canadian Reciprocity in Sub-National Government Federalism and the Canadian-United States Free Trade Agreement, Procurement: Federalism and the United States and Canada Free Trade Agreement*, 4 IND. INT'L & COMP. L. REV. 131, 151-52 (citing *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913-14 (3d Cir. 1990), for the proposition that laws that do not adversely affect the central government's ability to deal with difficulties on an international level do not qualify as unconstitutional state involvement in foreign affairs). *But see* *Troyer et al.*, *supra* note 195, at 158 n.119 (citing *New York Times Co. v. City of New York Comm'n*, 41 N.Y.2d 345, 351-52, 361 N.E.2d 963, 968, 393 N.Y.S.2d 312, 318 (1977), striking down the City's ban on advertisements for employment in South Africa as improper invasion of federal power over foreign policy).

243. See *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (analyzing California law limiting avocado purchases to those having only 5% oil content, hence unavoidably circumscribing the number purchased from other states and nations).

244. See Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143, 167-68 (1993) (hinting that national trade agreements such as the General Agreement on Tariff and Trade (GATT) and the recent North American Free Trade Agreement (NAFTA) have eliminated some of the potential areas of contention by limiting states ability to legislate concerning foreign commerce, but noting that Buy-American Laws still strain international relationships).

245. *Id.* at 167 (determining that having states come to agreement to eliminate state procurement laws has proven difficult).

246. See *Neret & Valladares*, *supra* note 32, at 215 (discussing both state buy-American statutes and buy local statutes and concluding that the "same market participant logic" which protects those laws should also shield Florida's International Act that encourages Floridian products and restricts its government agencies to invest in only Florida-origin products or services). See generally *Trojan Techs. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (concluding that Pennsylvania's buy-American statute did not intrude into foreign affairs).

247. See generally *Garcia-Mir v. Meese* 788 F.2d 1446 (11th Cir. 1986) (upholding the detention of Cuban refugees in violation of customary international law).



Analogously, determining that foregoing trade with foreign and domestic companies unduly shocks foreign affairs essentially precludes states from creating legislation that tangentially affects foreign nations.<sup>248</sup> Obviously, with greater world interdependence, such a determination would make laws affecting others outside America's borders go the way of the dodo to society's detriment.<sup>249</sup>

In the area of foreign affairs, Supremacy Clause analysis begins with a requirement that a local action have a legitimate local purpose and that its effects must be incidental "on a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>250</sup> The reasoning behind this construction makes sense: "If state action could defeat or alter national foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power."<sup>251</sup>

With a dearth of cases on point, the leading decision, *Zschering v. Miller*<sup>252</sup> provides the canvas to critique state involvement in foreign affairs. The Oregon inheritance law in question compelled Oregon courts to determine whether the Czechoslovakian government granted residents enforceable property rights in inherited property or engaged in any form of confiscation.<sup>253</sup> The law's unspoken purpose focused on trying to deprive communist nations from acquiring American property.<sup>254</sup> This process required courts to judge the veracity of diplomatic statements regarding property rights in certain communist nations and to speculate about the political nature of those governments.<sup>255</sup> The Court held that "the foreign policy attitudes, the freezing or thawing of the 'cold war' and the like are the real

---

248. *Itel Containers Int'l v. Huddleston*, 507 U.S. 60, 74-75 (1993) (refusing to adhere to Itel's initial position that any aggregated domestic tax would unduly impinge on international companies and, thus, foreign affairs).

249. See Cooper, *supra* note 244, at 168 (noting that states have little incentive to voluntarily relinquish their control over state procurement policy because they would receive little benefit to compensate them for their loss of autonomy); see also Neret & Valladares, *supra* note 32, at 214 (emphasizing the multifaceted purposes behind states engaging in foreign affairs including the raising of public consciousness concerning foreign affairs).

250. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citing *Hines v. Davidowitz*, 312 U.S. 52, 70 n.28 (1941)); see *Banco de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (discussing Congress's preeminent position concerning sensitive foreign affairs issues); see also THE FEDERALIST NO. 42 (James Madison) (B. Wright ed. 1961) (writing that States must accede their authority to control of foreign affairs to the central government); Fenton, *supra* note 4, at 589-90 (calculating that the plethora of laws that effect a change in policy by the foreign state impermissibly impinge on Washington's ability to create foreign policy).

251. *United States v. Pink*, 315 U.S. 203, 232 (1942). But see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (explaining that many foreign policy decisions concern "actions . . . in our courts [that] raise sensitive issues concerning foreign relations" and implying that there are non-sensitive issues that do not implicate foreign relations).

252. 389 U.S. 429 (1968).

253. *Id.* at 430-31.

254. See Fenton, *supra* note 4, at 588-89 (noting that the law in *Zschering* required a state to sit in judgment over foreign nations a purpose that has been determined to be illegitimate).

255. *Zschering*, 389 U.S. 435-36.; see Troyer et al., *supra* note 195, at 159 (detailing that the fatal flaw in the administration of the Oregon nonresident inheritance statute was not that the state law touched on foreign affairs, but it failed because it mandated detailed, case-by-case judicial inquiries into foreign government practices).

desiderata . . . and these matters are for the federal government, not for the local probate courts."<sup>256</sup> Therefore, the necessity for constant judicial scrutiny of foreign legal and economic structure made the Oregon statute infirm because of a constitutional foreign affairs breach.

To distinguish between the unconstitutional inheritance statute of *Zschering*, and the contractual debarment provisions at issue, involves three considerations. First, the action challenged in *Zschering* had a direct impact on foreign citizens because it dealt with Oregon mandating repeated judicial inquiries of the rights of Czechoslovakian citizens and the type of government in Czechoslovakia.<sup>257</sup> The main repercussion of the selective contract law, in contrast, falls on firms contracting with Burma, and thus it does not directly implicate the legislatively created rights of the Burmese citizenry.<sup>258</sup> Further, the statutes require only one evaluation by a governmental entity to determine if the state can contract with a particular company.<sup>259</sup> This assessment will only require a determination that improper treatment of Burmese citizens has ceased, a much less arbitrary process than judicial evaluation of communist government treatment of property.<sup>260</sup> Human rights violations caused by unjustified killings and state sanctioned torture do not require thorough evaluation of Burmese law because they occur without any legal command, in contrast to the legal foundation that supported the land confiscation of *Zschering*.

The second factor differentiating the local provisions from the *Zschering* holding springs from the fact that the debarment laws minimally impact foreign affairs<sup>261</sup> and that they reflect legitimate local interests and concerns regarding the appropriate disposition of state funds.<sup>262</sup> Although escaping precise calculation, the predicted monetary loss Burma could suffer likely would not approach the funds

---

256. *Zschering*, 389 U.S. at 437-38.

257. *Id.* at 436.

258. See Fenton, *supra* note 4, at 589 (providing a foil to compare the impact of divestment provisions on the rights of South African citizens with the debarment question under consideration here).

259. See Troyer et al., *supra* note 195, at 159 (positing that a single, general decision by a state mandating the divestment of state funds arguably would be beyond the scope of *Zschering*, and thus, it could be implied that a state assessment of Burma's human rights record might also survive).

260. See Spiro, *supra* note 6, at 844 (commenting that the decision in *Zschering* hinged on the determination that state courts were passing judgment on the political orientation of other nations).

261. Compare *Board of Trustees v. Mayor of Baltimore*, 562 A.2d 720, 747 (1989) (holding that divestment legislation had a minimal impact on South Africa and thus did not constitute more than an incidental involvement in foreign affairs), with *Schmahmann & Finch*, *supra* note 24, at 198-99 (elucidating that debarment laws exemplify inordinate state involvement in foreign affairs).

262. See Bilder, *supra* note 1, at 830-31 (analyzing probable arguments to substantiate local laws such as divestment legislation and concluding that these laws should survive constitutional scrutiny). *But see* Spiro, *supra* note 6, at 833 (worrying that states and the judiciary lack the foreign affairs expertise to legislate and determine the efficacy of that legislation).

that the various divestment laws withdrew from South Africa.<sup>263</sup> Further, the “walking on egg-shells” concern that the court espoused in *Zschering* has no bearing on the Burmese provision. With the cold war a mere historical afterthought, the concern for escalating bad relations between East and West that colored *Zschering* does not influence relations with Burma. Moreover, these concerns relate to issues on which Congress, with full knowledge of the existence of these laws, did not take preemptive action, thus implying that the laws do not impermissibly intrude upon the federal foreign relations power.<sup>264</sup> Withholding private monies from bequeathed relatives also differs from selective contract laws because, through the selective contract laws, the state determines how to allocate its resources through contracts, but does not prevent individuals from obtaining vested rights.

Third, and finally, the selective contract laws concern the conduct of companies in which the respective State or city actors might contract.<sup>265</sup> Evidently, the Supreme Court’s main concern in *Zschering* focused on judicial evaluation of communist property law. Contrariwise, while the selective contract laws protect against contracts that offend the moralities of state citizens, they do not require meticulous assessment of Burmese law.<sup>266</sup> These facts make the case more closely resemble the Supreme Court’s decision to uphold California’s alien inheritance statute in *Clark v. Allen*.<sup>267</sup> In *Allen*, the Court explained that the alien inheritance statute did not constitute making a compact with another nation.<sup>268</sup> Moreover, the evaluation of German law had only “some incidental or indirect effect in foreign countries.”<sup>269</sup> Similarly, determining that egregious human rights violations continue does not require scrutinizing Burmese law. Therefore, the selective contract laws fit within the confines of appropriate state action.

---

263. See Spiro, *supra* note 6, at 817 (cataloging the billions of dollars withdrawn from banks and investments in South African companies); see also CAL. AB 888 1997 (allowing existing contracts to continue without penalty); Miller, *supra* note 24, at 11 (reporting that Unocal has the rights to develop an extremely lucrative oil pipeline in Burma).

264. See Bilder, *supra* note 1, at 831 (determining that local involvement through divestment or debarment laws likely would pass constitutional muster). See generally *Barclay’s Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (deciding that Congress’s silence reflects acquiescence toward state action).

265. See David M. Billings, *Board of Trustees v. Mayor of Baltimore*, 317 Md. 72, 562 A.2d 720, 84 AM. J. INT’L L. 568, 571 (citing the court in *Trustees* as discerning that judicial inquiry into actual administration of foreign law was unacceptable).

266. See MASS. GEN. LAWS ANN. ch. 7 § 22J(b) (West Supp. 1997) (generating the list of companies that cannot contract with the Massachusetts government from sources such as the United Nations and other “reliable sources,” thus obviating the need for the Massachusetts to consider the Burmese law).

267. 331 U.S. 503 (1947) (concerning a statute allowing a nonresident alien to inherit personal property only if, under the laws of the alien’s nation, U.S. citizens had a reciprocal right to inherit personal property on the same terms and conditions as the alien’s fellow citizens); see Jubinsky, *supra* note 11, at 570 (highlighting that *Clark* survives the later *Zschering* holding).

268. *Id.* at 517.

269. *Id.*

Other commentators counter that courts would not or should not<sup>270</sup> review state laws interfering with the foreign affairs power by considering their success in implementing the policies they have adopted.<sup>271</sup> However, logically, a state law that peripherally affects foreign affairs lessens the likelihood that the law will provoke a foreign relations challenge.<sup>272</sup> In addition, because of their proliferation and popular acceptance, it is less likely that these laws will receive a political or judicial challenge.<sup>273</sup> Accordingly, Congress might “feel the pressure” to diplomatically remain silent because of the local influence supporting the selective contract laws.<sup>274</sup> Although a concern for foreign policy balkanization exists because of greater potential for smaller groups to capture local politics and to force through legislation supporting their position, this concern does not supervene the goal of defending freedom of speech for governmental entities to influence Washington’s decision making.<sup>275</sup> This harmony of local voices to strive for laws protecting and furthering local interests serves as the archetype of republican democracy: attempting to impact legislation through voicing a political opinion.<sup>276</sup> Abrogating this mechanism not only stifles a First Amendment prerogative, but also vitiates the

270. See Fenton, *supra* note 4, at 590 (criticizing the court in *Mayor of Baltimore* for holding the negligible economic impact Baltimore’s divestment law had on South Africa as determinative that the law did not adversely affect or implicate foreign relations); see also Linder v. Portocarrero, 747 F. Supp. 1452, 1467 (S.D. Fla. 1990) (proclaiming that foreign affairs matters have been seen as a matter for which the judiciary has “neither aptitude, facilities nor responsibility and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry”).

271. See Fenton, *supra* note 4, at 590 (concluding that because the constitution reserves foreign affairs power entirely in the national government, the Supreme Court would not validate or invalidate the laws through the use of an empirical scale to calculate their effectiveness); *Zschering*, 389 U.S. at 434 (noting that the Court offered little incidence of interference with foreign relations and rejected the argument put forth in government amicus curiae in support of the bill because of its incidental impact on foreign affairs).

272. See *Board of Trustees*, 562 A.2d at 747 (attributing great weight to the fact that the divestment policy did not have a large monetary impact on South Africa as determinative that the policy did not impinge on the national foreign affairs power); *Container Corp.*, 463 U.S. at 194-95 (recognizing that some categories of state action fall short of interfering with foreign affairs through multiple taxation of foreign commerce). *But see* Altbach, *supra* note 27, at 3 (illustrating that Engage-USA, a corporate protection group, has begun deliberation in how to attack the nascent state legislation using a foreign affairs argument).

273. See *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 329 (1936) (discounting a court’s ability to effectively resolve inquiries involving foreign affairs, an area that has a settled jurisprudence); see also Shuman, *supra* note 8, at 172-75 (emphasizing the density and popularity of the legislation making it unlikely to be challenged through political means because doing so would garner unwanted citizen rancor, hinder reelections, or damage party politics).

274. See Cooper, *supra* note 244, at 169 (noting that federal officials often defer to states to avoid political fallout concerning local endeavors in foreign affairs); see also Altbach, *supra* note 27, at 3 (illustrating that President Clinton, vicariously through Trade Representative Barchefsky, supports Massachusetts’ selective-contract statute).

275. See generally *Shuttlesworth v. Alabama*, 394 U.S. 147 (1968) (determining that the First Amendment was especially made for peaceful protest against governmental action or inaction); see also *supra* Part III (discussing the importance of maintaining open channels of communication to accentuate a thorough trade in ideas).

276. See Shuman, *supra* note 8, at 177 (determining that it would be ludicrous to prohibit states and cities from acting in all areas touching on affairs of foreign nations because that implicitly means curbing the American core values of speech, protest and assembly).

fundamental feature of a federal democratic government: allowing locally elected officials to determine local governmental policy.<sup>277</sup>

## VII. CONCLUSION: IMPORTANCE OF LOCAL PARTICIPATION IN GOVERNMENT FOR FEDERALISM TO FUNCTION PROPERLY

State sovereignty and the ability to determine beneficial spending policies have become secondary to the federal government's objective of promoting free trade.<sup>278</sup> Global trade agreements such as the General Agreements on Tariffs and Trade (GATT), and regional ones such as the North American Free Trade Agreement (NAFTA), symbolize the difficulty of maintaining state autonomy to conduct trade and regulate its interests.<sup>279</sup> For example, national agreements create restrictions with which states must comply.<sup>280</sup> This difficulty in protecting states rights in the international arena has also increased the difficulty of protecting fundamental human rights<sup>281</sup> as defined in the Universal Declaration of Human Rights.<sup>282</sup> Requiring states to interact with companies engaged with nations violating human rights undermines the Declaration's goals.<sup>283</sup> Further, negating laws that seek to protect fundamental human rights under the guise of unconstitutionality would counter a trend of greater deference toward state activity in this arena.<sup>284</sup> This process would

---

277. Herrman, *supra* note 87, at 1167.

278. See A.J. Tagemann, Comment, *NAFTA and the Changing Role of State Government in a Global Economy: Will the NAFTA Federal-State Consultation Process Preserve State Sovereignty?*, 20 SEATTLE U.L. REV. 243, 243 (1996) (arguing that eroding state power over decisions concerning local trade has left the national government able to promote free trade by eclipsing individual state government involvement in international trade policy); see also Barry Friedman, *Federalism's Future In A Global Village*, 47 VAND. L. REV. 1141, 1142 (1994) (thinking that federalism has become a non-factor in making international agreements, to the detriment of state autonomy).

279. See Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 261, 261 (1995) (asserting that the dispute resolution mechanism under the international trade agreement coupled with the federal government's commitment to enforce NAFTA obligations created fears of lost state sovereignty).

280. See Anderson, *supra* note 242, at 131-32 (discussing several states' displeasure at becoming an observer in the dismantlement of state laws for the creation of free trade zones); see also Altbach, *supra* note 27, at 2 (recounting the European Community's decision to file a complaint against Massachusetts' selective-contract law because of alleged violations of Article XXIII of GATT, which protects against the nullification or reduction of benefits of a signatory by another nation).

281. See Frey, *supra* note 48, at 153 (considering the complexity of complying with international human rights law because of the variegated methods of treatment people receive by their own governments around the world).

282. HUMAN RIGHTS AND SOCIAL WORK 15 (1994) (citing *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. at 71, U.N. Doc. A/810 (1948)).

283. See *id.* (discussing generally the basic rules and freedoms of all peoples covering civil, political, economic, social and cultural rights).

284. See Shuman, *supra* note 1, at 174-75 (assessing the increased state involvement in the realm of protecting human rights).

also circumvent the legal mechanisms illustrated by GATT,<sup>285</sup> which makes it incumbent upon federal actors to remove incongruous state law.<sup>286</sup> One scholar notes that professor Tribe ascribes the duty to the federal government to choose between two alternatives: (1) either preempt the state law; or (2) bring an action against the state and persuade a court to strike the law down under GATT.<sup>287</sup> Neither has occurred here, as evidenced by the strong support the Massachusetts selective contract law received by United States Trade Representative Barshefsky in discussions at the WTO.<sup>288</sup> Ironically, by declaring selective contract laws unconstitutional, the United States would create more international second-guessing by not adhering to international agreements that have existing methods to resolve issues that potentially implicate international concerns. By not adhering to GATT rules, the United States cheapens GATT's force and damages the delicate structure that has taken so much time to create.<sup>289</sup> Hence, the constitutional challenge that selective contract laws unduly impinge on foreign affairs by generating international anger loses its vigor if the GATT mechanism possesses a remedy to solve the problem but does not provide the chosen solution.

Requiring Americans to act in unison where conflicting local laws endanger U.S. welfare and where national expertise offers the unique method to satisfy these concerns seems laudable.<sup>290</sup> Congress maintains the ability to control war funding and the procurement of money necessary for nuclear weapon creation and Congress can act to forbid local initiatives in contravention of promulgated policies.<sup>291</sup> In the case of selective contract laws, which only tangentially affect foreign affairs, imposing this ideal of unison epitomizes the difficulty of forcing a square peg into a round hole. States should control their monetary outlays and contracts as part and parcel to the goal of federalism.<sup>292</sup> Precluding states in this manner would impair local policymaking and undermine the role of the locality as a laboratory of experiment to create laws that speak to the national conscience.<sup>293</sup> This restriction on the

285. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as 19 U.S.C. 3511 (West Supp. 1997)).

286. See Straight, *supra* note 279, at 244 (citing *GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. On Commerce, Science and Transportation*, 103d Cong. 296 (1994) which includes the prepared statement of Laurence Tribe Professor of Law, Harvard University).

287. *Id.* at 244.

288. See Altbach, *supra* note 27, at 1 (illustrating the White House's decision to support Massachusetts' selective contract law).

289. Straight, *supra* note 279, at 244-46 (noting that neglecting the procedures in place for GATT would essentially make it a nullity).

290. Shuman, *supra* note 8, at 177.

291. *Id.*; see also Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 564-65 (1996) (struggling to define the scope and purpose of the Tenth Amendment against the backdrop of the expansion of the federal government).

292. See Shuman, *supra* note 8, at 176-77 (underscoring that many activities engaged in by state governments will have some impact on foreign affairs, but this should not prevent states from engaging in this activity).

293. Bilder, *supra* note 1, at 828-29; see Sullivan, 376 U.S. at 270 (demonstrating the importance given to speech concerning public issues).

states would also gag state governments by silencing them before taking action that implicates foreign policy, because many state activities “are not intended to, and do not, have any direct or significant adverse impact on foreign governments or their citizens.”<sup>294</sup> Because of pervasive global interdependence, local policymakers would now be forced to agonize over every local action that might impact international affairs.<sup>295</sup> To strike down laws that promote the vocalization of concerns for the maltreatment of people effectively muffles two-thirds of government and obviates the First Amendment.<sup>296</sup> Also, the existing contradiction of holding companies liable for involvement with governments guilty of heinous acts against their own populace while prohibiting state law that would *prevent* contracting with those nations and those companies would be eliminated.<sup>297</sup>

If Congress specifically regulates this area, then Congress accepts the accountability for enacting law that contravenes local wishes, and in the process supervenes local measures.<sup>298</sup> But without this definitive statement, leaving it to the judiciary, the least democratic branch, seems a haphazard way to solve concerns over national foreign policy.<sup>299</sup> “If the judiciary comes to respect the original intentions of the Founding Fathers, the country can enjoy all the virtues of a strong national foreign policy as well as the benefits of local innovation.”<sup>300</sup>

Congress should make a determination to calibrate the degree local laws can extend in this area. If Congress fails to legislate with sufficient clarity, the principles of federalism should serve to protect state selective contract laws. State debarment measures exemplify the benefits of allowing local policymakers to legislate. The ability to formulate novel methodologies to solve pressing problems receives enhancement by having numerous policymakers: The idea that two heads, in this case three heads, including states and municipalities, are better than one.

The state measures exemplify the purpose of having a federal government to promote a polyglot approach to issues that concern local populaces. The laws do not

---

294. Bilder, *supra* note 1, at 828.

295. See Straight, *supra* note 279, at 216 n.3 (ferreting out ninety-seven preferential trade agreements between various nations established under Article XXIV of GATT, including the European Economic Community, the African Common Market, the Latin American Free Trade Association, and the Israel-United States Free Trade Agreement); see also GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE Article XXIV- 4243 (making states adhere to exceedingly specific regulations such as limitations on selling gold coins).

296. Bilder, *supra* note 1, at 829; see Shuman, *supra* note 8, at 177 (discussing the important values of protest and assembly as two of the premises that support municipalities creating legislation that influences Washington).

297. See *Doe v. Unocal*, 963 F. Supp. 880, 883, 898 (C.D. Cal. 1997) (allowing claims under the Alien Tort Claims Act to go forward against Unocal and Total for their funding of SLORC's clearance of jungle for an oil pipeline, thereby causing the displacement of thousands of Burmese).

298. Troyer et al., *supra* note 195, at 160 (hypothesizing that, if it wished, Congress could prevent states from adopting divestment policies even for their own funds); see generally *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (upholding federal wage and hour legislation as applied to municipal employees, indicating the pervasive authority of Congress to supervene state laws to the contrary).

299. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 23 (2d ed. 1986).

300. Shuman, *supra* note 8, at 177.

represent a serious challenge to federal control in the areas of foreign commerce or foreign affairs. Further, the latest actions by the President and Congress deciding not to eradicate state law demonstrates federal acquiescence to selective contract laws. Of course, Congress and the President maintain the ability to strike down these measures should they become excessively onerous. Nevertheless, in the absence of this definitive action, to prohibit state activity in this area ostensibly makes states marionettes entirely dependent on federal actors, an idea disapproved of in Commerce Clause jurisprudence.<sup>301</sup> Lastly, our brand of federalism was designed to promote the flow of ideas and especially ideas concerning political or public matters of concern both horizontally, among the several states, and vertically from state to federal government and vice-versa. Striking down these laws on constitutional grounds does an ironic injustice to the Framers' goals.

---

301. See generally *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824) (declaring that the federal government lacks exclusive control over interstate commerce).



