Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws

Lynn Loshin
Jennifer Anderson

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol39/iss2/1
MASSACHUSETTS CHALLENGES THE BURMESE DICTATORS: THE CONSTITUTIONALITY OF SELECTIVE PURCHASING LAWS

Lynn Loschin & Jennifer Anderson*

I. INTRODUCTION

In June, 1996, Massachusetts Governor William Weld signed a law that prohibits Massachusetts from contracting with companies that do business with the nation of Burma. Massachusetts adopted the law to protest the Burmese regime's oppression of human rights, including restrictions on Nobel Peace Prizewinner Aung San Suu Kyi's political activity. Known as a "selective purchasing" or "selective procurement" statute, the Massachusetts law took effect on January 1, 1997. In June 1998, a consortium of more than 580 businesses filed suit against the state, seeking to have the law declared unconstitutional. On November 4, 1998,

---

* Lynn Loschin is a graduate of the University of California, Santa Barbara, and the University of California, Davis, School of Law, and an associate at Rutan & Tucker, LLP, in Costa Mesa, California. Jennifer Anderson is a graduate of the California State University, Chico, and a member of the class of 1999, University of the Pacific, McGeorge School of Law. Ms. Loschin would like to thank Professor Michael Glennon of U.C. Davis School of Law and Professor Robert Stumberg of Georgetown University Law Center for their assistance.

2. See A State's Foreign Policy: The Mass that Roared, THE ECONOMIST, Feb. 8, 1997, at 33 (quoting Governor Weld at bill-signing that "[we hope] other states and the Congress will follow our example and make a stand for the cause of freedom").
3. See Tiffany Danitz, Boycott of Burma Leads to Litigation, WASHINGTON
the District Court of Massachusetts held that the law unconstitutionally usurps the federal government’s exclusive authority over foreign affairs. Massachusetts plans to appeal the District Court’s ruling to the First Circuit.

Although scholars addressed the constitutionality of selective purchasing laws in the context of the South African divestment movement of the 1980s, the legal issues are worth revisiting. While many other countries had taken stronger measures against South Africa than those taken by the United States, many foreign countries and corporations continue to do business with the Burmese dictatorship. The Massachusetts law has also sparked protests from the European Union and Japan, asserting that the law violates the United States’ international trade obligations. Since 1995,

---

more than a dozen municipalities have passed similar laws. Furthermore, Burma may only be the tip of the iceberg, as states and municipalities consider selective purchasing laws aimed at other nations.

This paper explores the constitutionality of the Massachusetts law and similar state and local legislation. Part II provides some background information on the political and economic situation in Burma, and compares the economic sanction movement with the South Africa divestiture movement of the 1980s. Part III discusses the state of the law and analyzes the constitutionality of selective purchasing laws. This section concludes that such laws are not preempted by federal law and violate neither the dormant commerce clause nor the federal government’s exclusive power to conduct foreign affairs. Finally, the article provides some policy considerations that support upholding the constitutionality of selective purchasing laws.

II. HUMAN RIGHTS AND TRADE

Burma is only the most recent country to experience a nexus between its domestic political situation and its international trading position. In the past, both individual countries and the United Nations have used trade leverage to attempt to influence a nation’s domestic human rights practices. Whether trade sanctions actually lead to change non-discrimination. However, Article XXIII, section 2 creates an exception to the Government Procurement Agreement if the restriction is “necessary to protect public morals, order or safety ... human ... life” or relates to “prison labour.” Id. at Art. XXIII. Arguably, the selective purchasing laws might fit into this exception, especially if the proponents can offer proof that slave labor is used in Burma. Further, the agreement entered into force on January 1, 1996. Query the status of the municipal ordinances adopted prior to that date. See id. at Art. XXIV, § 1.

10. See Grunwald, supra note 9. Cites that have passed selective purchasing laws include San Francisco, Berkeley, Oakland, and Santa Monica, California; Ann Arbor, Michigan; Madison, Wisconsin; Takoma Park, Maryland; and Carybarro, North Carolina. See Mary George, Boulder May Aim Boycott at Myanmar, DENVER POST, Dec. 3, 1996, at B2.

11. Massachusetts was considering a selective purchasing law aimed at Indonesia when the legislature adjourned for the year. See H.B. 4575 (Mass. 1997). See also Grunwald, supra note 9 (suggesting that introduction of Indonesia bill sparked protest from Japan); A State’s Foreign Policy: The Mass that Roared, supra note 2, at 33 (stating that Indonesia bill may be real reason that Europe and Japan “went ballistic”).

12. See Michael J. Reppas, The Lawfulness of Humanitarian Intervention, 9
in these practices is a subject best left for political scientists, but the sanctions themselves affect international business practices, including where and with whom companies may do business.\textsuperscript{13}

A. Burma’s Political Situation

In 1988, Aung San Suu Kyi’s National League for Democracy led students and monks in nonviolent street protests against Burma’s military regime.\textsuperscript{14} The military killed 10,000 people in the streets and detained countless others.\textsuperscript{15} Suu Kyi was placed under house arrest.\textsuperscript{16} Her party won national elections in 1989, but the military government (reconstituted under the ominous acronym SLORC: the State Law and Order Restoration Council) refused to honor the results.\textsuperscript{17} Although Suu Kyi was technically “released” from house arrest in 1995, she is not free to move around the country, and anyone who associates with Suu Kyi risks detention.\textsuperscript{18}

Burma’s human rights record is appalling.\textsuperscript{19} Yearly reports by the United Nations Commission on Human Rights,

\begin{flushright}
\end{flushright}

13. See, e.g., European Community Approves Sanctions on South Africa, supra note 7 (discussing European sanctions on South Africa which restricted new investment and banned oil exports and the exchange of certain technologies).

14. See id. In contrast to the Tiananmen Square uprising in China, the Burmese democracy movement had little foreign news coverage.


16. See John Pilger, In a Land of Fear, The Guardian (U.K.), May 4, 1996, at T12, available in LEXIS, News Library, GuarDn File. Aung San Suu Kyi’s father, Aung San, was a revered hero in Burma. He led an uprising against the Japanese during World War II, and after the war negotiated Burma’s independence from Britain. See id. He was assassinated in 1947. See id.


18. See Pilger, supra note 16.

Amnesty International, and other groups continue to condemn SLORC for the use of torture, disappearances, and forced labor. However, SLORC has made a continuing effort to seek foreign investment to strengthen Burma's economy. Since SLORC's takeover in 1988, foreign oil companies alone have provided $400 to $500 million to the military regime. One of the most significant projects is a natural gas pipeline funded in part by Unocal. Critics charge that slave labor is being used to build the pipeline and other infrastructure projects. Further, the army has burned villages to accommodate the pipeline, creating thousands of refugees.

Humanitarian organizations have publicized the continuing human rights atrocities and environmental destruction in Burma, to considerable effect. In 1995, Berkeley, California became the first city to pass a selective purchasing ordinance, and several other municipalities adopted similar laws. Either due to economic or public relations considerations, several large companies, including Levi-Strauss, subsequently halted operations in Burma. After Massachusetts adopted its selective purchasing law, Eastman-Kodak, Walt Disney, Apple Computer, Motorola, Hewlett-Packard, and Pepsi followed suit. Currently, twenty-three cities have

20. See Bureau of Democracy, Human Rights & Labor, supra note 17. The continued repression and forced labor is creating a serious refugee problem. Thousands of Burmese fled to Bangladesh and Thailand. See id.


22. See id.


24. See Bureau of Democracy, Human Rights & Labor, supra note 17 (stating that the “[g]overnment restricts worker rights and uses forced labor”); Miller, supra note 15 (citing multiple incidences of forced labor).

25. See Bureau of Democracy, Human Rights & Labor, supra note 17 (stating that military forces relocated hundreds of rural villages, especially in ethnic minority areas).


laws prohibiting the municipal government from conducting business with companies that do business in Burma.\textsuperscript{29} Despite selective purchasing laws and activist-led boycott efforts, many foreign companies continue to do business with SLORC.\textsuperscript{30} Cumulative foreign investment in Burma at the end of 1996 exceeded five billion dollars.\textsuperscript{31} Fuji, one of Japan's largest banks, recently announced a joint venture with Burma's Yoma Bank.\textsuperscript{32} Massachusetts' "no-trade" list includes such well-known names as Mitsubishi and Sony, both of which continue to do business in Burma.\textsuperscript{33} Both American and foreign companies involved in infrastructure projects remain deeply entrenched in Burma.\textsuperscript{34}

B. Divestment and South Africa

Burma's situation is somewhat comparable to South Africa during the apartheid era. Like South Africa, Burma's intractable government rules with an iron fist, keeping a popular, charismatic leader imprisoned.\textsuperscript{35} As developing

choose to withdraw often cite the political instability of the region. See id. Others may be influenced by internal concerns—Pepsi's involvement in Burma had led to numerous shareholder resolutions demanding withdrawal. See id.


31. See Foreign Investment in Myanmar Tops 5 Billion Dollars, ASIAN ECON. NEWS, Jan. 20, 1997, available in LEXIS, Market Library, Iaicnws File. Two hundred and thirty three foreign companies from 21 countries did business in Burma, mainly in oil and gas, manufacturing, real estate, and mining. See id. The United States had the sixth highest level of investment at $244 million. See id.

32. See Smith, supra note 28.

33. The next legal battle over a Burma selective purchasing law may well involve Mitsubishi. San Francisco, which has a selective purchasing ordinance, initially selected a subsidiary, Mitsubishi Heavy, as contractor on an airport transportation system. The contract is now being challenged on several grounds, including the parent company's involvement in Burma. See Ted Bardacke, American Boycotts Starting to Bite, FIN. TIMES (London), Feb. 6, 1997, at 6.

34. See As Administration Weighs Burma Sanctions, Unocal Inks New Gas Deal, supra note 23 (noting that Unocal recently expanded their gas development agreement with Burma).

countries rich with natural resources and inexpensive labor, both countries have been attractive to foreign investors and both have been the targets of international boycott campaigns.\textsuperscript{36}

South Africa's apartheid regime was the target of many state and municipal divestment campaigns. Divestment laws required the jurisdiction to sell any financial interest in companies with South African operations.\textsuperscript{37} More than a dozen states and seventy cities and counties enacted some form of divestment law during the 1980s.\textsuperscript{38} The campaign convinced over 100 educational institutions to divest at least some South Africa-related holdings, resulting in the sale of more than $410 million in stock and other investments.\textsuperscript{39}

Despite the widespread state and local activity, the South African divestment campaign did not produce much new constitutional law. None of the municipal ordinances or state laws were struck down as unconstitutional,\textsuperscript{40} although the laws produced a great deal of academic commentary.\textsuperscript{41}

\begin{itemize}
  \item \textsuperscript{36} See Foreign Investment in Myanmar Tops 5 Billion Dollars, supra note 31.
  \item \textsuperscript{37} See generally 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 (1985) (providing an in-depth explanation of South African divestment schemes).
  \item \textsuperscript{38} 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, 820 (1986).
  \item \textsuperscript{39} See id. at 816-17.
  \item \textsuperscript{40} See, e.g., Board of Trustees v. Mayor of Baltimore, 562 A.2d 720 (Md. 1989) (upholding a divestment ordinance enacted in the City of Baltimore).
\end{itemize}
Furthermore, selective purchasing laws were fairly rare in the case of South Africa. Most of the laws called for direct divestment by the local entity itself, rather than purchasing restrictions. Additionally, beginning in 1985, the federal government itself imposed restrictions on trade with South Africa. To date, the federal government has not enacted similar comprehensive federal sanctions against Burma. Therefore, although Burma and South Africa are somewhat analogous, the constitutionality of state and local selective purchasing laws directed against Burma is worth considering in light of the differences.

III. LEGAL GROUNDS FOR INVALIDATING STATE SELECTIVE PURCHASING LAWS

To analyze the constitutionality of selective purchasing laws, three separate, but related, doctrinal areas must be considered. First, Congress may preempt a state law under the U.S. Constitution's Supremacy Clause. Even if Congress does not preempt the state law, it may still be invalid if it violates the dormant commerce clause. However, an exception known as the market participant doctrine may apply if the state is participating in, rather than regulating, the market. Finally, if neither preempted nor unconstitutional under the dormant commerce clause, the state law is nonetheless invalid if it intrudes upon the federal government's ability to conduct foreign policy. Even though these doc-

42. See Spiro, supra note 38, at 821 (noting that procurement restrictions were considered "a new wrinkle" in the divestment legislation in 1986).
43. See generally Troyer, supra note 37 (discussing divestment schemes affecting South Africa).
45. See Exec. Order No. 13,047, 3 C.F.R. 13,047 (1997). New investments in Burma are limited to activities undertaken pursuant to an agreement with the Government of Burma, or a non-governmental entity in Burma, entered into on or after the effective date of the order. Id. at 4(d). See also Gewirtz, supra note 5; Warren P. Strobel & Tiffany Danitz, No Sanctions for Burma, Even as Rights Woes Worsen, WASHINGTON TIMES, Apr. 5, 1997, at A2 (noting that Clinton administration had previously decided not to impose sanctions); infra notes 48-60 and accompanying text (discussing federal preemption).
46. U.S. CONST. art. VI, cl. 2.
48. See id at § 18.12 (recognizing that States cannot "intrude into the for-
trinal areas overlap somewhat, they have developed separate bodies of case law and are worth considering individually.

A. Preemption

1. Congress May Expressly or Impliedly Preempt State Law

The Supremacy Clause goes further than simply invalidating state laws that directly contradict federal law. McCulloch v. Maryland established that any state law that conflicts with federal law is invalid under the Constitution. However, the scope of the Supremacy Clause extends beyond state laws which directly conflict with federal law. A state law is also invalid if it conflicts with the purpose of federal law, or if Congress has enacted such a comprehensive scheme as to "occupy the field" in a particular area.

Preemption may be either express or implied. If Congress expressly preempts state law in the text of the federal statute, the only question for courts to decide is the scope of the preemption. One issue that arises fairly often is whether federal substantive law prevents a state from providing a state law remedy against the violator of the federal law. The court must then engage in a statutory construc-
tion exercise to determine Congress's intent. If Congress intended only to establish a uniform federal standard, then state law remedies will not be preempted.

If the federal statute is silent, the task of determining whether the state law is impliedly preempted is more difficult. The court must not only decide the scope of preemption, but whether Congress intended to preempt state law in the first place. Courts begin with a presumption that federal law does not preempt state law, especially in areas historically regulated by the states. When analyzing Congress's intent, the court can look to one of the several species of implied preemption that have been articulated over the years.

First, if the state law actually conflicts with federal law, the state law is preempted. The court will find an actual conflict if compliance with both state and federal law is physically impossible, or if state law stands as an obstacle to implementing the goals of the federal legislation. Second, federal law is preemptory where it regulates so comprehensively that it “occupies the field,” leaving no room for states to supplement the federal scheme.

One important implied preemption case specifically deals with an issue touching foreign affairs. In Hines v. Davido-

54. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (holding that the Court's primary task was to examine statute's preemption provision).
55. See Silkwood, 464 U.S. at 238.
56. See NOWAK & ROTUNDA, supra note 47, § 9.4 (explaining that when Congress has been silent on the issue of preemption, state law is only preempted to the extent of its conflict with federal law).
58. The Supreme Court's decision in Cipollone, 505 U.S. 504, created some confusion among lower courts. Some courts believed that if a statute contained a preemption clause, only an express preemption analysis was appropriate. The Supreme Court clarified this in Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), stating that an express preemption clause supports an inference that Congress did not intend to preempt matters outside the clause's scope. However, the mere existence of a preemption clause does not foreclose an implied preemption analysis.
SELECTIVE PURCHASING LAWS

The United States Supreme Court considered whether federal law preempted Pennsylvania's Alien Registration statute. The Court held that regulating immigration and associated matters was specifically delegated to the federal government. Furthermore, Congress had adopted a comprehensive scheme to register aliens. Therefore, the states could not adopt either inconsistent or supplementary laws beyond what Congress had already enacted. Even if a supplementary law was not inconsistent with the federal statute, the state law stood as an obstacle to Congress's objective in enacting a comprehensive, national scheme.

The Court stated that no single method conclusively determines whether or not Congress intended to enact a comprehensive scheme that preempted further state regulation. However, the Court did note that because the legislation implicated foreign affairs, "concurrent state power that may exist is restricted to the narrowest of limits." Thus, the Court's holding suggests that it may be easier to find that Congress intended to preempt state law when foreign affairs are at issue.

2. The Federal Government Has Not Preempted Selective Purchasing Laws

The federal government has not preempted state or local governments from enacting selective purchasing laws directed at Burma. Federal law has not expressly preempted state action, no actual conflict between state and federal law exists, and the federal government has not regulated so com-

63. 312 U.S. 52 (1941).
64. See id. at 62.
65. See id. at 66.
66. See id. at 66-67.
67. See id.
68. See Hines v. Davidovitz, 312 U.S. 52, 67 (1941). The Court suggested some factors to consider in a preemption analysis: the nature of the power exerted by Congress, the policy purpose Congress sought to attain, and the character of the obligations imposed by the law. See id. at 70.
69. See id. at 68.
70. However, if a state adopts a law that expressly supports federal immigration policy, it may not be preempted. See De Canas v. Bica, 424 U.S. 351 (1976). Federal law prohibited hiring certain aliens, and California adopted federal standards and imposed criminal sanctions on employers who hired aliens within the class prohibited by federal law. Thus, a state law that implements the policies adopted by the federal government may be permissible.
pletely as to occupy the field.

To determine whether Congress has expressly preempted state law, a reviewing court must first look to see whether any relevant legislation contains a preemption clause. The most specific legislation that might contain preemptive language is the Cohen-Feinstein amendment to the 1997 foreign operations appropriations bill. This amendment authorizes the President to prohibit new investment in Burma if he certifies to Congress that the Burmese government has committed "large-scale repression of or violence against the democratic opposition." Additionally, the bill prohibits most bilateral foreign aid to Burma and calls for the President to develop a multilateral strategy to promote democracy and human rights in Burma. However, it contains no preemption clause, nor any provision that might fairly be read as a preemption clause.

71. NOWAK & ROTUNDA, supra note 47, § 9.1.
73. Omnibus Appropriations Act § 570 (b). President Clinton put some sanctions into effect in May 1997, banning new American investment in Burma. Companies already doing business in Burma were permitted to continue. See Gevirtz, supra note 5.
74. See id. §§ 570 (a)(1), 570 (c). It has been suggested that the Massachusetts enactment is preempted by federal law simply because the Senate considered and rejected a similar federal proposal. Schmahmann & Finch, supra note 26, at 189. However, as discussed below, where Congress has chosen to remain silent on a particular issue, the appropriate analysis falls within the dormant commerce clause. It cannot fairly be asserted that Congress preempts state law every time it considers and rejects a course of action similar to one chosen by a state.
75. The District Court in Massachusetts agreed that no actual conflict exists between the Omnibus Appropriations Act and the Massachusetts selective purchasing law. The court noted that to establish preemption, Congress must intend to exercise its authority to preempt state law. No such intent was present. Moreover, no actual conflict existed between the Massachusetts law and the Appropriations Act. National Foreign Trade Council v. Baker, No. 97-12042, slip op. at 6 (D. Mass. Nov. 4, 1998).
The other possible federal statute that might preempt state law in this area is the Uruguay Round Agreements Act, the statute enacting the most recent round of the General Agreement on Tariffs and Trade (GATT) negotiations into U.S. law. One GATT agreement specifically addresses government procurement issues. However, the statute itself contains what might be called a “nonpreemption clause,” specifically stating that no state law may be declared invalid because it violates the Uruguay Round. The only exception is a lawsuit by the federal government itself for that purpose. Further, the Clinton administration’s statement to Congress regarding its interpretation of GATT specifically stated that Uruguay Round agreements do not automatically preempt state law, even if an international dispute panel found a state law inconsistent with GATT. The Act states that should a problem arise, the federal government will use consultative procedures to resolve the problem with the cooperation of state authorities. Given this statutory language and evidence of intent, it would be extremely difficult for a court to find express preemption.

Thus, neither the Cohen-Feinstein amendment nor the Uruguay Round Agreements Act expressly preempt state laws dealing with either sanctions against Burma or government procurement generally. Similarly, neither federal law actually conflicts with selective purchasing laws. The laws might even be viewed as actively supporting the policies implicit in Cohen-Feinstein, such as preventing American tax dollars from supporting the repressive Burmese regime.

77. See Agreement on Government Procurement, April 15, 1994, available in LEXIS, Intlaw Library, Gatt File.
78. See Uruguay Round Agreements Act, § 102 (b)(2)(A).
79. See id.
81. See Uruguay Round Agreements Act, § 102(b)(1)(C).
82. See supra note 75 (noting that no actual conflict existed between the Cohen-Feinstein Amendment and the Massachusetts law).
Therefore, the laws are only preempted if the federal government has "occupied the field."

Determining whether the federal government has "occupied the field" in this area depends on how broadly one defines the field. If the field is broadly defined as "foreign affairs," then the answer is probably yes. If the field is "state procurement practices" the answer is probably no. Analogy to the South African divestment movement suggests that the narrower interpretation is probably the correct one. In *Board of Trustees v. Mayor of Baltimore*, the Maryland Court of Appeals rejected the contention that the Comprehensive Anti-Apartheid Act of 1986 preempted Baltimore's divestment ordinance. Despite the comprehensiveness of the federal law's sanctions, the court noted that preemption was not lightly presumed, especially in areas traditionally regulated by state and local governments; investing public funds was clearly such an area. Thus, *Board of Trustees* suggests that the relevant "field" Congress must occupy to preempt state or local law is not foreign affairs, but local investment practices, and by analogy, procurement practices. Clearly, neither the Cohen-Feinstein amendment nor the Uruguay Round Implementation Act can be given such a broad reading. Because Congress has not preempted states or localities from acting in this area, the Supremacy Clause does not invalidate selective purchasing laws.

B. Dormant Commerce Clause

1. *State Regulations Cannot Impermissibly Interfere with Interstate Commerce*

Preemption analysis addresses whether a federal regulatory scheme preempts state law from regulating the same or similar issues. By contrast, the dormant commerce clause comes into play only when Congress is silent. The Constitu-

---

86. See *Board of Trustees v. Mayor of Baltimore*, 562 A.2d 720, 741 (1989).
87. See Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 634, n.2 (1997) (discussing the fact that the dormant commerce clause analysis only comes into play when Congress has remained silent on an issue).
tion grants Congress the power to "regulate Commerce with foreign Nations, and among the several states..." However, the number of subjects that can touch interstate commerce are so numerous that Congress cannot regulate all of them. In some areas, Congress will not regulate at all, either by omission or by design. Thus, while preemption analysis concerns itself with whether Congress intended to override the states, the dormant commerce clause examines whether a state's law is permissible in the face of congressional silence. In short, if a federal statute on point exists, then preemption analysis is appropriate; if Congress is silent, the appropriate inquiry is whether the statute violates the dormant commerce clause.

The history of the dormant commerce clause has been marked by several changes in theory and law. The overriding theme in dormant commerce clause cases is the search for a balance between the need for uniform, nondiscriminatory law on the one hand, and the legitimate need for local regulation on the other. The modern dormant commerce clause analysis, established in *Pike v. Bruce Church*, requires that the law regulate evenhandedly to effect a legitimate local purpose. If both of these requirements are met, the reviewing court must balance the nature of the local interest involved against the effect on interstate commerce and ask whether the state law is the least restrictive means of ef-

---

88. U.S. CONST. art. I, § 8, cl. 3.
89. See generally NOWAK & ROTUNDA, supra note 47, § 9.3 (comparing the preemption doctrine with commerce clause jurisprudence).
90. In this vein, the purpose of the dormant commerce clause has been likened to the purpose of the Equal Protection Clause; i.e., the former shields "interstate commerce" from discrimination by the states while the latter prevents individuals from being discriminated against by the states. See NOWAK & ROTUNDA, supra note 47, § 8.1, n.5.
92. See id. at 142. In *Pike*, the Court invalidated an Arizona statute that required certain Arizona produce to be packaged in the state. To comply with the statute, certain growers would be required to construct costly packing facilities within state borders. In performing its dormant commerce clause analysis, the Court said "[t]he State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the state." Id. at 145. See also HENKIN, supra note 49, at 160 (suggesting that the *Pike* analysis applies to foreign as well as interstate commerce).
fecting that interest. Merely incidental effects are permissible, while laws that significantly hinder interstate commerce are not. Some commentators suggest that when a state regulation effects foreign commerce, it should be subject to a more rigorous dormant commerce clause analysis. In the preemption case Hines v. Davidovitz, the Court stated that when it comes to foreign affairs, a state's power to legislate is at its lowest ebb. Thus, courts are more willing to find that Congress has preempted a state law when the law touches upon foreign affairs. Because a state's power to legislate on foreign affairs is minimal, its power to affect foreign commerce should also be minimal when Congress is silent.

The Supreme Court addressed the dormant commerce clause in a case directly dealing with foreign trade. In Japan Line, Ltd. v. County of Los Angeles, the Supreme Court invalidated California's imposition of property taxes on Japanese cargo containers. Generally, states may tax vessels engaged in both interstate and foreign commerce when the tax is nondiscriminatory, evenly apportioned, and has some relation to services that the state provides. However, because the vessels were engaged in foreign commerce, two additional factors came into play.

First, the Court was clearly concerned with the risk of double taxation, which offends the Commerce Clause. To remove this risk in interstate commerce, the Court created the requirement that jurisdictions apportion taxes between themselves, to ensure that no vessel is taxed more than

93. See Pike, 397 U.S. at 142.
94. See Nowak & Rotunda, supra note 47, § 8.7.
95. See Henkin, supra note 49, at 161. See also Spiro, supra note 38 at 835 (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), for this proposition). However, the challenged tax in Japan Line was prohibited by a multilateral treaty; further, the United States and Japan had a bilateral treaty specifically designed to avoid double taxation on the type of containers at issue. It seems that a simpler and more logical rationale would have been that the state tax was preempted by the two treaties.
96. 312 U.S. 52 (1941).
97. See id. at 68.
98. See Henkin, supra note 49, at 161 n. 52.
100. See id. at 444-45.
101. See id. at 446. The prospect of decreased profits as a result of double taxation is an obvious disincentive to foreign commerce.
once. When one of the taxing entities is a foreign sovereign, however, the U.S. government cannot act to ensure that vessels are not doubly taxed. Vessels domiciled in foreign countries are, most likely, fully taxed in that nation. Therefore, the Court held that the state tax exposed foreign, but not domestic, commerce to double taxation, and the tax was thus invalid.

Second, the Court held that state property taxes on the instrumentalities of foreign commerce impaired federal uniformity in an area where uniformity is essential. State taxes on foreign commerce prevent the nation from “speaking with one voice when regulating commercial relations with foreign governments.” For example, state taxes may cause international disputes over tax apportionment. Further, if state taxes create an imbalance in taxation, foreign nations may retaliate against American instrumentalities in their jurisdictions. Retaliation would not be limited to the state levying the tax, but would be felt nationwide.

Although Japan Line is often cited for the “speaking with one voice” proposition, the Court’s decision is specifically focused on taxes. The Court applied a different test than the traditional Pike v. Bruce Church dormant commerce clause analysis. This suggests that taxes are different than other laws that may touch interstate or foreign commerce and that special considerations of national uniformity restrict a state’s ability to tax instrumentalities of foreign commerce. Therefore, although proponents of applying a more stringent dormant commerce clause analysis to foreign trade often cite Japan Line, the contours of any extra scrutiny outside the tax context are unclear.

102. See id. at 447.
103. See id. at 448.
104. See id.
106. See id. at 450.
107. See id.
108. See id. at 450-51.
109. See, e.g., Schamahmann & Finch, supra note 26, at 189–90, 192.
110. See id.
111. See, e.g., Spiro, supra note 38, at 835. Professor Spiro cites Japan Line for the proposition that “a more extensive constitutional inquiry” is required in foreign dormant commerce clause cases. However, in Container Corp. v. Franchise Tax Board, 463 U.S. 159, 194 (1983), the Court held that even when state
2. Selective Purchasing Laws Do Not Pose an Undue Burden on Foreign Commerce

Selective purchasing laws do not violate the dormant commerce clause under the *Pike v. Bruce Church* analytic framework. Selective purchasing laws meet all three of *Pike's* criteria: 1) the laws regulate evenhandedly, 2) effect a legitimate local interest, and 3) the effect on foreign commerce is merely incidental.

First, selective purchasing laws are nondiscriminatory on their face. They do not favor local over foreign interests; they simply prohibit the locality from doing business with any company that fits into the law's criteria. Preventing discrimination that favors local over out-of-state businesses is one of the key functions of the dormant commerce clause.

Second, selective purchasing laws promote legitimate local interests. On the most abstract level, every governmental entity has the responsibility to protect basic human rights. This concept was recognized by the Supreme Court when it held that various "fundamental" provisions of the Bill of Rights applied to the states. Thus, local action to promote human rights is a legitimate local interest. Specifically, *Board of Trustees v. Mayor of Baltimore* recognized a local government's right to invest city funds consistently with the moral concerns of its citizens. The Maryland Court of Appeal, upholding the city's South Africa divestment ordinance, acknowledged that disassociating the city from the "moral taint" of apartheid was a legitimate local interest. The same moral issues apply in the context of government pur-

---

113. See NOWAK & ROTUNDA, supra note 47, § 8.1, at 275. The rationale of the commerce clause was to prevent the enactment of internal trade barriers that could economically Balkanize the Union. Approval of a discriminatory regulation by one state would only invite retaliatory legislation by burdened jurisdictions. Thus, by enacting the commerce clause, the framers limited the ability of the states to burden interstate commerce.
114. See generally NOWAK & ROTUNDA, supra note 47, § 11.6, at 385-88.
116. See id. at 755.
chasing.

Third, while selective purchasing laws serve legitimate local interests, they do not create an undue burden on interstate commerce. In Board of Trustees, the Maryland Court of Appeal rejected the argument that divestment impermissibly burdened interstate commerce under the Pike v. Bruce Church\textsuperscript{117} balancing test. Analyzing the ordinance at hand, and not the nationwide divestment trend,\textsuperscript{118} Baltimore’s divestment had only an incidental effect on interstate commerce.\textsuperscript{119} Logically, the same analysis applies to local purchasing statutes. Compared to foreign commerce as a whole, one state or local ordinance prohibiting purchases from a relatively small number of companies would have little effect. Furthermore, the Maryland court rejected the argument that some companies may be particularly harmed; for example, those who want to do business with both Burma and Massachusetts. The court noted that the dormant commerce clause is designed to protect the marketplace as a whole, not particular businesses.\textsuperscript{120}

Finally, selective purchasing laws do not violate Japan Line’s suggestion that heightened scrutiny is required where foreign commerce is implicated. In a subsequent case, Container Corp. v. Franchise Tax Board,\textsuperscript{121} the Supreme Court clarified that not all state regulations relating to foreign policy violate the dormant commerce clause.\textsuperscript{122} A law is only in-

\textsuperscript{117} 397 U.S. 137 (1970).
\textsuperscript{118} But see Spiro, supra note 38, at 834-35 (suggesting that courts should look at total effect of all similar laws to determine whether laws impermissibly burden commerce).
\textsuperscript{119} See Board of Trustees v. Mayor of Baltimore, 562 A.2d 720, 755 (1989). The court applied the Pike test, first concluding that the divestment ordinances effected the legitimate public interest of ensuring that pension funds are invested in a socially responsible manner. Id. The court then determined that "while we do not dispute that the Ordinances impose some burden on interstate commerce, in our opinion that burden is not excessive in relation to the benefits." Id.
\textsuperscript{120} See id.
\textsuperscript{121} 463 U.S. 159 (1983).
\textsuperscript{122} See id. at 194. See also Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994) (holding the California system originally challenged in Container Corp. permissible under the foreign commerce clause). The Court noted, inter alia, that Congress had remained silent on the issue in the eleven years since Container Corp. was decided. If Congress, the branch with the responsibility for regulating foreign commerce, objected to California's system, they could have acted to preempt it. See id. at 324.
valid if it involves foreign policy issues, which must be re-
solved by the federal government, or if it violates a clear fed-
eral directive.\textsuperscript{123} If the latter applied, the selective purchas-
ing laws would be impliedly preempted. Thus, the only
question is whether selective purchasing laws involve a for-
eign policy issue that must be resolved by the federal gov-
ernment. No such issue is implicated; selective purchasing
laws do not reflect foreign policy, they merely regulate the
state's own purchasing practices. Similarly, the Maryland
court rejected the suggestion that apartheid was such an is-

C. The Market Participant Doctrine

1. Development of the Doctrine

Even if a stronger version of the balancing test should be
applied to state laws that implicate foreign commerce, the
Supreme Court has carved out an exemption that should ap-
ply equally to interstate or foreign commerce. Known as the
market participant exemption, this doctrine exempts states
from the dormant commerce clause when they are acting as a
participant in, rather than a regulator of, the market.\textsuperscript{125} The
Supreme Court first recognized the market participant ex-
ception in \textit{Hughes v. Alexandria Scrap Corp.}\textsuperscript{126} Maryland had
established a complex program designed to reduce the num-

\textsuperscript{123} See Container Corp. v. Franchise Tax Board, 463 U.S. 159, 194. Justice
Scalia's view is that the "speak with one voice test" should be eliminated. \textit{See}
\textit{Barclays Bank PLC}, 512 U.S. at 331-32 (Scalia, J., concurring in part and con-
curring with the judgment). Justice Scalia would only overturn laws on dor-
mant commerce clause grounds in two situations: when the law discriminates
on its face, or when the law is indistinguishable from a law previously held un-
constitutional by the Supreme Court. \textit{See id. See also Itel Containers Int'l
and concurring in judgment).}

\textsuperscript{124} See Board of Trustees v. Mayor of Baltimore, 562 A.2d 720, 755 (Md.
1989). The court also considered the likelihood of retaliation, which the Su-
preme Court had stated as another reason behind the need for uniformity in
\textit{Container Corp.}, 463 U.S. at 159. The Maryland court rejected this argument,
stating that the likelihood that South Africa might retaliate against divestment
was "remote." \textit{See Board of Trustees}, 562 A.2d at 756-57. In light of the World
Trade Organization's control over such matters, retaliation seems even less re-
me in a modern context.

\textsuperscript{125} See NOWAK & ROTUNDA, supra note 47, § 8.4.

\textsuperscript{126} 426 U.S. 794 (1976).
ber of "junked" vehicles in the state. Under the original law, anyone in possession of an inoperable vehicle eight years or older could transfer the vehicle to a licensed scrap operator, who could then claim a "bounty" from the state for destroying the vehicle.\textsuperscript{127} Neither the owner or the scrap operator were required to provide documentation of title.\textsuperscript{128} In 1974, the law was amended to require title documentation.\textsuperscript{129} However, the requirements for Maryland scrap processors were less rigorous than for out-of-state processors, and the out-of-state processors challenged the law.\textsuperscript{130} The Court held that while under a traditional analysis the law would be subject to dormant commerce clause attack, the dormant commerce clause's limitations did not apply under these circumstances.\textsuperscript{131} When the state moves from acting as a regulator of the market to acting as a participant, the dormant commerce clause does not restrict the state's activity.\textsuperscript{132}

The Supreme Court reaffirmed this doctrine in two subsequent cases. \textit{Reeves, Inc. v. Stake}\textsuperscript{133} upheld South Dakota's policy of restricting the sale of cement from a state-owned plant to residents.\textsuperscript{134} Again, the Court distinguished between the state's regulatory and participatory roles in the market. The Court recognized "the right of a trader . . . engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{127} See id. at 798-99.
\item \textsuperscript{128} See id. at 799.
\item \textsuperscript{129} See id. at 800-801.
\item \textsuperscript{130} See id. A Maryland scrap processor was only required to submit an "indemnity agreement" in which a vehicle's supplier certifies his own right to the vehicle and agrees to indemnify the processor for any third-party claims arising from its destruction; non-Maryland processors were required to submit formal documentation of title in order to claim the bounty. \textit{Id.}
\item \textsuperscript{131} See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 804 (1976) (stating that Maryland's action is not the kind that implicates dormant commerce clause).
\item \textsuperscript{132} See id. at 809. By "bidding up" the price for scrapped vehicles through its offer of a bounty, Maryland was participating in the market rather than regulating it.
\item \textsuperscript{133} 447 U.S. 429 (1980).
\item \textsuperscript{134} See id. at 446. A Wyoming concrete distributor, which had been a long time customer of South Dakota's state-owned cement plant, was denied supplies during a cement shortage because of the plant's policy of filling orders from residents first. \textit{See id.} at 432-33.
\item \textsuperscript{135} \textit{Id.} at 438 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).
\end{itemize}
In *White v. Massachusetts Council of Construction Employers, Inc.*, the Court examined the constitutionality of the mayor of Boston's executive order requiring that city-funded construction projects employ a work force that includes at least fifty percent Boston residents. The Court disagreed with the conclusions of the Supreme Judicial Court of Massachusetts, which held that the city was not a market participant in the same sense that Maryland and South Dakota were in *Alexandria Scrap* and *Reeves*, respectively. The Court held that when the city entered into a construction contract, it was a market participant. The Court further noted that it was improper to examine the impact on local firms employing out-of-state residents or other interstate implications of the mayor's order. The only inquiry is whether the state is a participant in the market; if so, the dormant commerce clause analysis simply does not apply.

The market participant exception may have been restricted by the Supreme Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*. In *Wunnicke*, Alaska adopted a statute authorizing the sale of timber from state lands. The statute also required successful timber bidders to process the timber within the state. The Court disagreed with Alaska's argument that Congress had authorized this provision. However, the Court was unable to reach a majority decision on whether the in-state process-

137. Of the three key market participant cases, the facts of *White* probably present the clearest example of local protectionism. Nonetheless, the Supreme Court, in an opinion by Justice Rehnquist, upheld the market participant exception on a 7-2 vote. Justices Blackmun and White concurred in part and dissented in part. See id. at 215.
138. See id. at 214-15.
139. See id. The Court also rejected the argument that the market participant exception should not apply because some city projects were partly funded by federal dollars. The Court noted that the regulations of the federal programs, which provided that local labor must be used to the maximum extent possible, affirmatively sanctioned the Mayor's order. See id.
140. See id. at 209-10.
144. See id. at 84 n.1.
145. See id. at 92-93.
ing provision violated the dormant commerce clause.

Justice White’s plurality decision held that Alaska’s law violated the dormant commerce clause. Justice White felt that the market participant exception should not be permitted to place post-sale restrictions on the commodity, in this case, by requiring local processing. Such post-sale restrictions placed an unacceptable burden on interstate commerce by going beyond the market in which the state was a participant—the timber-selling market. Alaska’s regulation invaded an area where the state was not a participant—the timber processing market—and placed unacceptable burdens on interstate commerce. The plurality held that the “market,” for purposes of the market participant exception, must be narrowly defined. States are allowed to benefit local residents, but cannot act to burden interstate commerce through contract provisions that have a regulatory effect.

Justices Rehnquist and O’Connor disagreed with the plurality, stating that Alaska was acting as a market participant. Essentially, Alaska was offering the timber purchaser a reduced price in return for hiring Alaska residents to process the timber. Two Justices would have remanded the case to the lower courts to first determine whether Alaska was acting as a market participant. If not, the court would then apply the traditional dormant commerce

146. See id. at 100.
147. See id. at 95.
149. See id. at 98.
150. See id. at 101.
151. See id. at 97-98.
152. See id. at 98.
153. See id. at 102 (Rehnquist, J., dissenting).
The contractual term at issue here no more transforms Alaska’s sale of timber into “regulation” of the processing industry than the resident-hiring preference imposed by the city of Boston in White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983), constituted regulation of the construction industry. Alaska is merely paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. Id.
155. See id. at 101 (Powell, J., concurring in part and concurring in the judgment). Justice Marshall took no part in deciding Wunnicke. See id. at 101.
clause analysis to the facts of the case.\textsuperscript{156}

The restrictions placed on the market participant doctrine after \textit{Wünnicke} are unclear. Given the Supreme Court's splintered ruling and the changes in Court personnel since the decision,\textsuperscript{157} how the Court would decide a similar case in the future is unknown. However, even assuming the plurality decision is the correct law, the exception still acts to exempt states from dormant commerce clause restrictions when they act as direct participants in a narrowly defined market.

2. \textit{The Market Participant Doctrine Renders Selective Purchasing Laws Immune to Dormant Commerce Clause Considerations}

Unquestionably, when a government entity purchases goods or services in the marketplace, it is acting as a market participant, rather than a market regulator.\textsuperscript{158} Massachusetts and the other localities that have adopted selective purchasing ordinances do not purport to control the behavior of any private entity. They simply reflect a policy decision that the locality does not wish to transact business, as a market participant, with those who support the government of Burma. Any business that does not wish to do business with the locality is free to conduct business with Burma.\textsuperscript{159} Because the local governments are acting as market participants, the dormant commerce clause's restrictions should not apply. The policy concerns that led the Supreme Court to create the exception apply to selective purchasing laws. The dormant commerce clause helps to prevent state regulations and taxes from impeding the free market\textsuperscript{160} or unfairly favoring locals over outsiders.\textsuperscript{161} Selective purchasing laws do not implicate

\textsuperscript{156} See id.

\textsuperscript{157} Of the justices who decided \textit{Wünnicke}, only Chief Justice Rehnquist, Justice O'Connor, and Justice Stevens remain on the Court. Chief Justice Rehnquist and Justice O'Connor dissented strongly and would have applied the market participant exception to Alaska's timber sales policy. See id. at 101-103.

\textsuperscript{158} See White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983) (holding that city was market participant when hiring contractors to construct public buildings); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (holding that sales of cement from state-owned plant qualifies the state as a market participant).

\textsuperscript{159} See supra notes 1-10 and accompanying text.

\textsuperscript{160} See Reeves, 447 U.S. at 436-37.

\textsuperscript{161} See South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S.
these concerns. The government is merely placed in the same position as any other market participant: it is permitted to choose with whom it will conduct business. Competition and the free market proceed unhindered.

Opponents of selective purchasing laws may argue that the market participant doctrine should be limited, and applied only when the local government is acting to benefit its own citizens. However, this reading is far too narrow to accommodate the Supreme Court's statement of the doctrine. The Court has based the exception both on the purposes underlying the dormant commerce clause and the traditional right of traders to choose their trading partners. Additionally, the Court has stated that fairness to local governments supports the exception. State proprietary activities are burdened with the same restrictions placed on private traders and, therefore, they should enjoy the same benefits, including the right to choose with whom to conduct business. This broad language does not support the notion that the exception should only be permitted when local government acts to benefit its citizens.

Furthermore, it would be an odd choice indeed to allow local governments to discriminate, but not allow them not to discriminate. Under such a twisted formula, Massachusetts would be allowed to enact a selective purchasing law that requires the state to purchase goods only from Massachusetts companies, but it would not be allowed to enact a selective purchasing law that reflects other valid concerns of state citizens. This analysis suggests that state government's only valid policy concern is favoring locals over outsiders; an idea that the dormant commerce clause traditionally does not tolerate.

Opponents may also argue that the Wunnick doctrine (holding that states may not discriminate against outsiders under guise of safety regulations).

162. See, e.g., Schmahmann & Finch, supra note 26, at 192–94.
163. See Reeves, 447 U.S. at 438–39.
164. See id. (stating that because state proprietary activities must accept same burdens as private participants, states should share same freedoms when acting as market participants).
165. See id. at 439.
166. See supra note 113 (noting that preventing discrimination is a key concern of the dormant commerce clause).
applies, negating the market participant exception. See supra notes 99-110 and accompanying text (discussing Wunnicke decision).

168. See, e.g., Schmahmann & Finch, supra note 26, at 194 (asserting that local selective purchasing laws “restrict[] the post-purchase activity of the purchaser, rather than merely the purchasing activity”).

169. Wunnicke, 467 U.S. at 97.

The limit of the market-participant doctrine must be that it allows a state to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The state may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

Id. (emphasis added).

170. See supra note 142-152 and accompanying text. Alaska was arguably attempting to influence the timber processing market, in which it was not a participant.

171. Wunnicke, 467 U.S. at 99.

172. See, e.g., Schmahmann & Finch, supra note 26, at 195-98 (rejecting the proposition that selective purchasing laws are enacted to protect to local interests).

the market participant doctrine simply because foreign commerce may be implicated. Although the Court stated in *Japan Line, Ltd. v. County of Los Angeles*\(^1\) that Commerce Clause scrutiny may be more rigorous when foreign commerce is restrained, the concerns the Court expressed in that case do not apply when the state is acting as a market participant. *Japan Line* concerned a tax—a clear regulation of foreign commerce. Selective purchasing laws do not regulate what any other government or company may or may not do. Nor do they prevent the United States from "speaking with one voice when regulating commercial relations with foreign governments."\(^2\) Selective purchasing laws regulate the state's procurement policy, not commercial relations with foreign governments.\(^3\)

Additionally, if the Supreme Court should hold that the


174. 441 U.S. 434, 446 (1979). A selective purchasing law, on its face, is neither a restraint or requirement placed on a foreign government (or business) in the same manner as most favored nation status or import/export laws. Furthermore, many trade-related activities conducted by states and municipalities touch upon international relations. The California Trade and Commerce Agency, for example, has offices in ten foreign countries. See Home Page of the California Trade and Commerce Agency (visited Nov. 13, 1998) <http://commerce.ca.gov/index.html>. One could certainly argue that California's independent activities prevent the United States from "speaking with one voice." However, the counter-argument is that California only speaks for California when it promotes the state as a desirable location for investment and disseminates information about California's laws regulating business practices—just as Massachusetts only speaks for Massachusetts when it decides not to do business with companies engaged in Burma.

175. See id. at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

176. But see Spiro, supra note 38, at 839. Professor Spiro unfortunately muddies the waters by mixing the market participant and dormant commerce clause analyses. He suggests that *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), stands for the proposition that the market participant doctrine is limited if foreign commerce is involved. This is simply an incorrect reading; the Court was analyzing the Alaska law under the *Pike* framework after deciding that the doctrine did not apply. See id. at 99. The two tests must be conducted separately. If the market participant doctrine applies, then the state's action is outside the scope of the *Pike* balancing test. The *Pike* framework is only proper after rejecting the argument that the doctrine applies at all.
market participant doctrine does not apply if foreign commerce is implicated, it could well be the exception that swallows the rule. In today's world, nearly any commercial decision could conceivably be related to foreign commerce in some way. Suppose Canadian companies wanted some of the cement in Reeves, Inc. v. Stake, or some of the construction contracts in White v. Mayor of Boston. The market participant doctrine would have little substance left if any activity that might touch foreign commerce is outside its scope. Furthermore, refusing to apply the doctrine would do little to further the key goal of the dormant commerce clause: preventing unfair burdens on interstate commerce. Thus, when a state is acting as a market participant rather than regulator, foreign commerce implications are irrelevant and states should be allowed to take advantage of the doctrine.

D. Foreign Affairs Power

1. Federal Foreign Affairs Power as an Independent Limit on State Action

Of the three doctrines one must analyze to determine the constitutionality of selective purchasing laws, none is so amorphous as the "foreign affairs power"—the federal government's exclusive right to conduct foreign affairs. Thus, even if the state law is not preempted, and even if it does not violate the dormant commerce clause, it is still unconstitutional if it runs a foul of the foreign affairs power. The analysis is similar to the dormant commerce clause in that the question of whether the state's action violates the federal foreign affairs power is only of concern when Congress is silent. If the federal government has already acted to preempt the state law, the state law is clearly invalid.

The notion that the nation must speak with one voice in foreign affairs dates back to the Constitution's framers.

\[\text{177. 447 U.S. 429 (1980).} \]
\[\text{178. 460 U.S. 204 (1983).} \]
\[\text{179. See NOWAK & ROTUNDA, supra note 47, § 8.1.} \]
\[\text{180. See HENKIN, supra note 49, at 162 (noting that scope of foreign affairs power is unclear).} \]
\[\text{181. See supra notes 50–52 and accompanying text (discussing express preemption).} \]
\[\text{182. See, e.g., THE FEDERALIST NO. 42, at 279 (James Madison) (J. Cooke ed.} \]
SELECTIVE PURCHASING LAWS

The Constitution contains some explicit prohibitions on the states. States may not enter into treaties or compacts with foreign governments without Congress’s consent. Similarly, duties on imports or exports must receive congressional approval. Finally, states cannot negotiate with foreign governments on matters of foreign policy and are not permitted to send ambassadors abroad.

However, a significant body of law concerning matters touching on foreign relations has traditionally been left to the states. In the normal course of business, states inevitably affect the lives of foreign nationals, companies, and governments. States may use their long-arm statutes to assert jurisdiction over foreign nationals and companies. State courts may enforce foreign judgments and, in doing so, may decide whether the judicial system that rendered the judgment conforms to American due process standards. Finally, state courts adjudicate many types of cases that might touch on foreign policy or have some effect on diplomatic relations between the United States and another nation. Congress has granted exclusive federal jurisdiction to only a small number of the types of cases that may involve foreign governments, officials, or nationals.

1961). “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.” Id.
184. See U.S. CONST. art. I, § 8, cl. 3.
186. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. b (1987).
189. See 28 U.S.C. § 1251 (1994). The federal courts have exclusive jurisdiction over claims brought against foreign officials such as ambassadors. See id. The federal courts also have exclusive jurisdiction over claims brought against
In addition to some degree of latitude to act when Congress is silent, Congress has also expressly delegated authority to the states to implement national foreign policy obligations in some areas. For example, states were left to implement parts of the Uruguay Round of GATT and portions of certain human rights treaties. Although federal law is clearly supreme when Congress speaks on foreign policy, these examples demonstrate that despite pronouncements that the states have no voice at all in foreign affairs, the situation is quite the opposite. States are permitted and even encouraged to have a considerable impact on foreign policy.

States may only encroach so far upon the federal foreign relations power before the action becomes impermissible. Until the late 1960s, the Commerce Clause was considered the only source of "implied" limits on state interference in foreign affairs. However, in the 1968 decision Zschernig v. Miller, the United States Supreme Court recognized an implied limitation on state action outside the scope of the Commerce Clause. Zschernig involved an Oregon law that permitted nonresident aliens to inherit from a state resident only if the alien's country allowed U.S. citizens to inherit. Furthermore, the foreign beneficiaries had to have the right to enjoy the property without the risk that their government might confiscate the inheritance. Holding that Oregon's law intruded into a field constitutionally entrusted to the president and Congress, the Court found the law invalid as

---


191. See HENKIN, supra note 49, at 162. However, federal courts had made clear much earlier that when a conflict exists between a state and the federal government in the area of foreign affairs, the federal law is supreme. See, e.g., United States v. Pink, 315 U.S. 203, 233 (1942) (stating that "power over external affairs is not shared by the States; it is vested in the national government exclusively"); United States v. Belmont, 301 U.S. 324, 331 (1937) (stating that "in respect of foreign affairs generally, state lines disappear").


193. See id. at 430 n.1.

194. See id.
applied. The Court held that the statute constituted an undue intrusion into the realm of foreign relations. Thus, a doctrine that has been the subject of comment, criticism, and confusion—but no subsequent decisions by the Supreme Court—was born.

One fact about Zschernig that is often overlooked is that the Court only held the Oregon law unconstitutional as applied. The Court declined to revisit a past decision, Clark v. Allen, which held that general reciprocity statutes were not facially invalid. The Zschernig court noted that state courts are frequently required to read foreign laws. Deciding whether another nation’s laws granted reciprocal inheritance rights was not the problem. However, the state courts applying the laws appeared to be engaging in value judgments on the particular governments in question—searching for a “democracy quotient,” which actually appeared to be a “noncommunist quotient.” This kind of search into a foreign government’s administration and policies is speculative and has the potential to greatly embarrass the United States. Furthermore, this type of involvement, the Court held, crosses the line of permissible state involvement in what was essentially a national matter. While each individual inheritance case may only have an incidental effect on foreign relations, as a whole, the law as applied had a persistent, subtle effect.

Commentators have searched for Zschernig’s meaning since the case was decided. Some have tried to draw a distinction between state laws that “affect” foreign affairs as opposed to laws that “intrude.” But perhaps the key feature of Zschernig is that it only held the Oregon statute unconsti-

195. See id. at 432.
196. See id.
197. See, e.g., HENKIN, supra note 49, at 162-65. See also sources cited supra note 41 (offering varying interpretations of the foreign affairs power).
199. 331 U.S. 503 (1947).
201. See Zschernig, 389 U.S. at 433.
202. See id. at 435.
203. See id. at 434-35.
205. See id. at 440.
206. See HENKIN, supra note 49, at 164.
tutional as applied; the Court explicitly declined to overrule Clark v. Allen. The Court's decision, full of quotations from previous lower court rulings, seemed highly critical of probate judges who were willing to summarily discriminate against Soviet client states. It was not the state's laws that were unconstitutional, but the way judges discriminatorily applied them that created the potential international embarrassment. If this is the correct interpretation, then Zschernig may lack the long-reaching restrictive effect for which it is often cited. In upholding a California tax, the Court later recognized that states may take actions that "merely have foreign resonances," but do not interfere with foreign affairs. Incorporating both doctrines, then, perhaps states may act to "affect" foreign affairs, but judges must apply the laws evenhandedly to avoid embarrassing the United States internationally.

In any event, the Court has not had occasion to return to Zschernig, and the contours of the doctrine the Court was attempting to define are unclear. The simple fact that the Court has not struck down any other laws on Zschernig grounds suggests that the case has only a limited application. As a general statement, Zschernig suggests that in some cases, courts may invalidate state laws that impermissibly intrude upon the federal government's ability to conduct foreign relations, even when Congress has not spoken.

207. See Zschernig, 389 U.S. at 432.
208. See id. at 437 n.8.
210. See, e.g., Schmahmann & Finch, supra note 26, at 198 (stating that the Zschernig case "reflects the Court's distaste for local officials attempting to imprint their particular reaction to an international matter in their local governance").
212. Professor Henkin suggests that Zschernig may have no future life; it will merely become a relic of the cold war. See HENKIN, supra note 49, at 165 n.2.
2. Selective Purchasing Laws Do Not Intrude Upon the Federal Government's Ability to Conduct Foreign Policy

Selective purchasing laws do not implicate the same concerns the Supreme Court expressed in Zschernig v. Miller, and should not be invalidated on those grounds. The district court's decision that Massachusetts' law is unconstitutional was based entirely on Zschernig. The case was therefore incorrectly decided, and the First Circuit should reverse the ruling on appeal.

The probate law overturned in Zschernig required judges to make ad hoc decisions about foreign governments' policies and credibility. This concern does not apply to selective purchasing laws. The legislature, not the courts, makes a single decision that it will not do business with certain companies. The courts are not required to make the same type of continuous credibility decisions the Oregon statute required. Judges are not placed in a position to make difficult, ad hoc judgments; nor can they embarrass the federal government with the type of statements the Court cited in Zschernig.

214. National Foreign Trade Council v. Baker, No. 97-12042, slip op. at 7 (D. Mass. Nov. 4, 1998) (noting that given the court's ruling that the law violated the foreign affairs power, the court need not rule on plaintiff's commerce clause argument or Massachusetts' market participant defense).
216. See Lewis, supra note 41, at 507 (arguing that South African divestment laws do not implicate Zschernig's primary concerns).
218. The Court offered myriad examples of inappropriate statements about foreign governments that had appeared in state court judgments. The Court noted:

Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, such as “This court would consider sending money out of this country and into Hungary tantamount to putting funds within the grasp of the Communists,” and “If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia ....” In Pennsylvania, a judge stated at the trial of a case involving a Soviet claimant that “If you want to say that I'm prejudiced, you can, because when it comes to Communism I'm a bigoted anti-Communist.” And another judge exclaimed, “I am not going to send money to Russia where it can go into making bullets which may one day be used against my son.” A California judge, upon
Courts should also avoid overturning selective purchasing laws on \textit{Zschernig} grounds as a policy matter, because whether a state’s action impermissibly interferes with foreign policy is a question for the political branches to decide. Congress and the executive branch actually conduct foreign relations and are better suited than the judiciary to determine what intrudes upon foreign policy and what does not. Therefore, the courts should only act to restrain an otherwise legitimate exercise of state power in truly exceptional cases, such as \textit{Zschernig}, when a state’s conduct has the clear potential to cause embarrassment.

The District Court of Massachusetts held that the state’s selective purchasing law carried “a great potential for disruption or embarrassment.”\textsuperscript{219} However, the only reason cited for this “disruption” is that the European Union and Japan have filed a complaint about the law with the World Trade Organization.\textsuperscript{220} The Massachusetts law therefore interferes with the normal conduct of United States–European Union relations.\textsuperscript{221} The court’s opinion neglects to mention that the Clinton Administration will defend the law before the World Trade Organization.\textsuperscript{222} Given the federal government’s decision to defend the law, it is unclear where the potential for “disruption” or “embarrassment” arises. If the Massachusetts law contradicted established federal policy, such a potential might exist. In this instance, however, the state and federal policies are not in conflict. The district court purports to examine the “substantive impact a state statute has on foreign relations” and concludes that because the law was “designed” to change Burma’s domestic policies, the law is

\footnotesize{being asked if he would hear argument on the law, replied, “No, I won’t send any money to Russia.” The judge took “judicial notice that Russia kicks the United States in the teeth all the time,” and told counsel for the Soviet claimant that “I would think your firm would feel it honor bound to withdraw as representing the Russian government. No American can make it too strong.” \textit{Zschernig}, 389 U.S. at 437 n.8 (internal citations omitted). It is not difficult to see how such inappropriate and inflammatory statements might cause the Court to cringe with embarrassment for their judicial brethren.}

\textsuperscript{220. Id. at 5.}
\textsuperscript{221. Id.}
\textsuperscript{222. See Gevirtz, supra note 5.}
unconstitutional.\textsuperscript{223} However, the court fails to identify that substantive impact and merely concludes that because the law intended to cause changes in Burma's policies, it unconstitutionally intrudes on the federal government's foreign affairs power. This reasoning does not address the concerns raised by \textit{Zschernig} and should not have been the basis for holding the law unconstitutional.\textsuperscript{224}

\section*{IV. Conclusion}

During the debate over the constitutionality of South Africa divestment legislation, several commentators suggested that state and local divestment implicated the First Amendment's values of free speech and expression.\textsuperscript{225} Selective purchasing legislation furthers such values to an even greater extent and is an important policy consideration behind upholding selective purchasing laws.

The founders of our government intended to create a participatory democracy. Yet, two centuries later, many citizens feel more disenfranchised and alienated than ever, and they perceive that their ability to influence policy is nearly non-existent.\textsuperscript{226} As we move into the twenty-first century, local government may be the only arena in which citizens and small groups can truly effect policy. Such participation is crucial to the democratic process and should be encouraged and supported whenever possible. For a small group of citizens to be able to "send a message" to the government of South Africa or Burma is critically important; such empowerment encourages future activism. This rationale is even more acute when considering selective purchasing laws, which govern how local tax money is spent.

When the impact on foreign policy is minor, and the risk

\begin{itemize}
\item \textsuperscript{223} National Foreign Trade Council, No. 97-12042, slip op. at 6.
\item \textsuperscript{224} See supra notes 215–218 and accompanying text. See generally Lewis, supra note 41, at 507 (arguing that South African divestment laws do not implicate \textit{Zschernig}'s primary concerns).
\item \textsuperscript{225} See Bilder, supra note 41, at 829; McArdle, supra note 41, at 833.
\item \textsuperscript{226} Disillusionment can, of course, manifest itself in many different ways, but an empirical method of tracking citizen interest and involvement is voter turnout. According to the Committee for the Study of the American Electorate, voter turnout in the 1998 election was at a fifty-six year low. \textit{See} Press Release from the Committee for the Study for the American Electorate, \textit{Turnout Dips to 56-Year Low} (visited Nov. 6, 1998) <http://tap.opn.org/csaec/gans4.html>.
\end{itemize}
of retaliation is small or nonexistent, such considerations should not be brushed away lightly. In an era when many people perceive governmental influence as the exclusive province of the wealthy, corporations, and political action committees, it is particularly important to encourage grassroots involvement. Not only does such involvement fail to harm the federal government, it actually helps by restoring a measure of faith in a participatory, honest democracy.

Selective purchasing laws are legitimate exercises of power by states or local governments, and courts should uphold their constitutionality. The federal government has not preempted selective purchasing laws currently directed at Burma. Furthermore, the market participant doctrine exempts the laws from dormant commerce clause scrutiny, and even if the doctrine does not apply, the laws pass the *Pike v. Bruce Church* balancing test. Finally, selective purchasing laws do not interfere with the federal government's ability to conduct foreign policy and are supported by strong policy considerations.

In a time when most Americans feel increasingly alienated and unable to effectively voice their concerns about federal policies, selective purchasing laws provide a means for citizens to take concrete action at the local level. If the action is clearly incompatible with federal policy, Congress should preempt the state law. If it is not, as in the case of Burma, Congress and the President should take advantage of local initiatives to support and further federal policy.

227. See Center for Responsive Politics, *The Big Picture: Where the Money Came From in the 1996 Elections* (visited Sept. 8, 1998) <http://www.crp.org/pubs/bigpicture/overview/bpoverview.htm>. The report notes that 40% of contributions for House of Representative candidates came from political action committees, that the amount of soft money spent in 1996 tripled compared to four years earlier, and that the largest source of campaign money overall was the business community. *Id.*

228. See *supra* notes 158–179 and accompanying text.

229. See *supra* notes 112–124 and accompanying text.

230. See *supra* notes 213–224 and accompanying text.