State Foreign Policy: The Legitimacy of the Massachusetts Burma Law

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INTRODUCTION

The legitimacy of state and local selective purchasing laws was placed in jeopardy on November 4, 1998. On this date, the United States District Court for the District of Massachusetts
struck down the Burma Law, a 1996 Massachusetts government procurement statute that bans goods and services contracts between Massachusetts and those doing business with, or in, the Union of Myanmar (formerly Burma). Massachusetts enacted the statute in response to ongoing atrocities committed by Myanmar’s government, a military regime known as the State Peace and Development Council (SPDC). Challenged in National Foreign Trade Council v. Baker, the law was invalidated because it impermissibly infringed on the federal government’s power to regulate foreign affairs.

The Baker decision could have a serious effect on other state and local laws that attempt to make similar statements about world issues. The Burma Law raises the question of whether state and local governments have the right to choose the nations with whom they do business, as well as whether they have any right to make statements about foreign policy. Given the tradition of exclusive federal authority over foreign affairs and foreign commerce, the weight of precedent and history lies against the law. Nevertheless, the important human rights issues at the heart of the Burma Law, as well as the intriguing constitutional issues and powerful economic interests involved, will ensure the fight over the Burma Law’s legitimacy will continue regardless of its recent setback in federal court.

2. In 1997 the country formerly known as Burma changed its name to Myanmar.
5. See, e.g., Fred Bayles, Burma Law in Massachusetts Ruled Unconstitutional: Local Governments’ Rights to Enact Foreign-Policy Laws at Issue, USA TODAY, Nov. 6, 1998, at 3A (indicating that Burma Law supporters will rally to fight the prospect of international corporations micromanaging state procurement policies). See also Michael S. Lelyveld, Massachusetts Sanctions Struck Down: Judges Ruling May Set Precedent for State Bans, J. COM., Nov. 6, 1998, at 1A (discussing the prospect of Massachusetts requesting that the law remain in force pending appeal, and the belief of legal experts that the issue may reach the Supreme Court).
The SPDC is notorious for its history of violence and human rights violations. In 1989, the SPDC placed National League for Democracy (NLD) leader and 1991 Nobel Peace Prize winner Aung San Suu Kyi under house arrest and later refused to recognize the NLD's landslide victory in Myanmar's 1990 multiparty elections. Over the course of its rule, the SPDC has arrested over one thousand protestors who are often subjected to torture and solitary confinement, tried without legal counsel, and sentenced to long prison terms for reasons as vague as writing material that the government found "unacceptable." Moreover, the SPDC is known to use slave labor, engage in heroin and opium smuggling, foster prostitution, and force villagers to act as human mine-sweepers. The SPDC has thus far refused to recognize the NLD's 1990 multiparty election victory, and tensions have recently mounted due to the NLD's establishment of a committee purporting to perform the functions of a parliament. The committee has declared all laws enacted by the SPDC since 1988 to be without legal basis or authority.

State and local responses to the SPDC's atrocities have embroiled the United States in a controversy over the appropriateness of legal action by individual states and localities in response to Burmese politics. During the 1980s, state and local governments took unilateral action against South Africa because of its apartheid policies, but no challenge to those laws

7. See id.
8. See id.
10. See Wallance, supra note 6, at 1209.
12. See Myanmar Raps "Interference" in Democracy Issues, JAPAN ECON. NEWswire, Oct. 1, 1998 (noting the SPDC's refusal to recognize the NLD's victory and describing the NLD's new committee).
13. See id.
reached federal court.\textsuperscript{15} Citing policy disagreements with the federal government, numerous cities and states have now passed, or are planning to pass, laws banning trade with some foreign countries and prohibiting government contracts with those who do business with them.\textsuperscript{16} Such laws prompt debate over their constitutionality\textsuperscript{17} and conformity with World Trade Organization (WTO) agreements.\textsuperscript{18} As demonstrated by \textit{Baker}, selective procurement laws in 43 states and in many localities are in jeopardy.\textsuperscript{19}

Critics of the Burma Law and similar statutes argue that such laws are susceptible to constitutional challenge on three grounds. First, they are preempted by federal law; second, they interfere with the authority of the federal government to conduct international relations; and third, they interfere with Congress' authority to regulate foreign commerce.\textsuperscript{20} Proponents counter that the Burma Law is not preempted by federal legislation because it has the same goals as a comparable federal law and Congress has not expressed an intent to preempt the Burma

\begin{itemize}
  \item \textsuperscript{16} See, e.g., Evelyn Iritani, \textit{Coalition Challenges Myanmar Trade Ban Courts: Suit Has Direct Implications for Similar Laws in California Cities}, L.A. Times, May 1, 1998, at D1 (recognizing that Santa Monica, San Francisco, Berkeley and Oakland have similar laws targeting Myanmar and that Los Angeles is considering one, as well). See also Kimberly Music, \textit{Local, State Sanctions Get Industry's Attention}, Oil Daily, Mar. 2, 1998, at 1 (noting that Maryland, New York, Vermont, and Minneapolis have introduced measures to sanction Myanmar).
  \item \textsuperscript{17} See generally Carvajal, \textit{supra} note 3; Schmahmann \& Finch, \textit{supra} note 14; Price \& Hannah, \textit{supra} note 14 (discussing the constitutionality of state and local government procurement laws).
  \item \textsuperscript{18} See, e.g., Schmahmann \& Finch, \textit{supra} note 14 (arguing that WTO agreements are violated). See also Japan Protests Massachusetts Law, Mass. Lawyer's Wkly., Feb. 10, 1997, at 31 (describing Japan's claim that the Burma Law violates WTO agreement provisions).
  \item \textsuperscript{19} See Bayles, \textit{supra} note 5, at 3A (stating the opinion of legal experts as to the status of such laws).
  \item \textsuperscript{20} See Schmahmann \& Finch, \textit{supra} note 14, at 183; Price \& Hannah, \textit{supra} note 14, at 454-55.
\end{itemize}
Law. Proponents further argue that the Burma Law does not impermissibly interfere with the federal government's ability to conduct foreign affairs because its actual effect is incidental. Finally, proponents point to the rights of states as market participants, as well as the spirit of the First Amendment, to support the contention that states should be able to spend their money as they choose.

This Note will discuss the legality of state and local laws that target foreign countries because of their governments' policies, focusing on the Commonwealth of Massachusetts' 1996 Burma Law and its recent invalidation in Baker. Part I introduces the Massachusetts Burma Law as well as a federal law banning all new investment with Myanmar. Part II addresses criticism of the Burma Law and various grounds adduced for its invalidation. Part III discusses precedent relevant to the Burma Law and presents the most viable arguments in favor of its constitutionality—in particular, the argument that states have the right as market participants to decide how they will spend their own funds. This Note concludes that although the Burma Law's legitimacy is tenuous, it stands a credible chance of being upheld on appeal.

I. THE BURMA LAW AND FEDERAL SANCTIONS

A. THE BURMA LAW

Massachusetts was the first state to pass a selective purchasing law that targets Myanmar. The law prohibits the


22. See, e.g., Myanmar Official Downplays U.S. Business Restrictions, BNA INT'L TRADE DAILY, Mar. 10, 1997 (quoting a statement by Myanmar's minister for national planning and economic development that selective purchasing laws "will only hurt the United States companies but will not affect Myanmar much.")

23. See Bilder, supra note 15, at 829 (discussing the possibility that freedom of speech and petition rights of state and local governments are implicated).


26. See U.S. Group Files Suit To Keep Contacts Open With Myanmar, ASIAN WALL ST. J., May 4, 1998, available in 1998 WL-WSJA 3475381 (noting that NFTC President Frank Kittredge indicated the NFTC will litigate the case all the way to the Supreme Court if need be).

27. See Price & Hannah, supra note 14, at 449. Indeed, in 1982 the state legislature passed an anti-apartheid divestment law that required the state to
Commonwealth of Massachusetts and its agents from procuring goods or services from anyone whose name appears on a restricted purchase list composed of individuals or entities found to be “doing business with Burma (Myanmar).” 28 The Burma Law defines “doing business with Burma (Myanmar)” as being incorporated or having one’s principal place of business in Myanmar, providing goods or services to its government, or promoting the importation or sale of products, the trade of which is largely controlled by the Myanmar government. 29 The Massachusetts Secretary of Administration and Finance maintains the restricted purchase list 30 and disseminates it to all state agencies and state authorities. 31

withdraw, over three years, all public pension funds from companies that did business in South Africa. 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, 13 (1990). Many believe that such laws, popular in the 1980s, were instrumental in pressuring South Africa to end apartheid. See id. at 8. More recently, Massachusetts proposed legislation penalizing companies that do business with Indonesia, prompting renewed criticism from opponents of the Burma Law. See, e.g., David R. Schmahmann, et al., Off the Precipice: Massachusetts Expands its Foreign Policy Expedition from Burma to Indonesia, 30 VAND. J. TRANSNAT’L L. 1021 (1997).

28. See Burma Law, supra note 1, at § 22(H)&( J). The Burma Law applies only to contracts entered into after the effective date of the act. See id at § 22(J).

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

Id. at § 22(G).

30. See id. at § 22(J)(a)-(c) (stating that the list is maintained by secretary of the Operational Services Division of the Executive Office of Administration and Finance, who, during compilation, consults “United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources,” with updates at least once every three months).

31. See id. at § 22(J)(d).
When soliciting contract bids, state agencies or state authorities must give bidders advance notice of the law's requirements. Before bids are reviewed, or before the contract is awarded, the awarding authority must obtain a statement from an authorized representative of the bidder or offeror which states the "nature and extent to which said person is engaging in activities which would subject said person to inclusion on the restricted purchase list." At that point, if the "person" is on the list, that "person" may only be awarded the contract if the awarding authority certifies in writing to the secretary or chief operating officer that (1) the procurement is essential and compliance with the statute "would eliminate the only bid or offer, or would result in inadequate competition," or (2) the Commonwealth is purchasing certain medical supplies; or (3) there is no comparable low bid or offer by an individual not on the restricted list.

B. THE FEDERAL LAW

After Massachusetts passed the Burma Law, Congress enacted the Omnibus Consolidated Appropriations Act of 1997, which issued federal sanctions against Myanmar. This legislation prohibits all aid to Burma except humanitarian assistance, counter-narcotics assistance, and "assistance promoting human rights and democratic values." In addition, the legislation orders the Executive Branch to vote against aid to Myanmar in international financial institutions, prohibits the granting of entry visas to any Myanmar official, and appeals to the President, along with Myanmar's neighbors and other major trading partners, to develop a multilateral strategy

32. See id. at § 22(H)(c).
33. Id.
34. Id. at § 22(H)(b)(1)-(4).
35. See id. at § 22(I). This section provides that "a state agency may purchase medical supplies intended to preserve or prolong life or to cure, prevent, or ameliorate diseases, including hospital, nutritional, diagnostic, pharmaceutical and non-prescription products specifically manufactured to satisfy identified health care needs, or for which there is no medical substitute." Id.
36. See id. at § 22(H)(d). A "comparable low bid" is one that is up to 10% higher than one made by one on the restricted purchase list. Id.
38. See id. at § 570(a)(1)(A).
39. See id. at § 570(a)(1)(B).
40. Id. at § 570(a)(1)(C).
41. See id. at § 570(a)(2).
42. See id. at § 570(a)(3).
to foster democracy and end violations of human rights in Myanmar. Finally, if the President finds, subsequent to the enactment of the law, that the situation in Myanmar has not improved, he or she is authorized to prohibit all new investment in Myanmar. On May 20, 1997, President Clinton invoked this provision after determining that the government of Myanmar had indeed continued its repressive policies. The President issued an executive order declaring a national emergency and prohibiting new investment in Burma. Regardless of whether the federal sanctions are "tough" on Myanmar, their failure to reach goods, services, and technology has caused some critics to argue that they are unlikely to have much effect.

C. ALLEGED WTO VIOLATIONS

The General Agreement on Tariffs and Trade (GATT) was intended to improve international economic welfare by barring protectionist trade barriers with binding legal obligations. In 1997, Japan and the European Community (EC) called for WTO Consultations, claiming that the Massachusetts Burma Law violated the WTO's Agreement on Government Procurement (AGP). The Consultations did not resolve the conflict,

43. See id. at § 570(c).
44. See id. at § 570(b).
45. See Exec. Order No. 13047, 62 Fed. Reg. 28301 (1997) (prohibiting U.S. persons from engaging in new investments in Burma, and foreign persons from approving or facilitating a transaction which would constitute new investment in Myanmar). Most contracts to sell or purchase goods, services, or technology are excluded unless they include payment in either shares of ownership or in participation in royalties, earnings, or profits, in "the economic development of resources located in Burma." Id. at § 3(b)(i) & (ii).
50. WTO Agreement on Government Procurement, 14 INT'L TRADE REP. (BNA) No. 26, at 1098 (June 25, 1997) [hereinafter AGP].
however, and Japan and the EC both filed requests for a dispute settlement panel.\textsuperscript{51} 

Japan and the EU argue that the Burma Law violates Articles III, VIII(b), and XIII of the WTO Agreement on Government Procurement, primarily because, in practice, the law imposes a 10% price increase on contract bids if a bidding company does business with, or in, Myanmar.\textsuperscript{52} Japan and the EU allege a violation of Article III because suppliers on the restricted purchase list are not accorded "no less favorable treatment" than that accorded to suppliers not on the list. They also contend that the Burma Law violates Article III because of the possibility that one locally established supplier could be treated "less favorably" than another solely on the basis of which country produces the goods or services supplied, or on the degree of foreign affiliation or ownership of the supplier.\textsuperscript{53} Japan and the EU further claim that the Burma Law similarly violates Article VIII(b) because it imposes conditions on a tendering company which are not essential to ensure the firm's ability to fulfill the contract. Finally, they allege that the Burma Law is in conflict with Article XIII because it prohibits an award of any contract to tenderers whose offer is the lowest, except under criteria which violate the AGP.\textsuperscript{54}

Despite the forceful arguments against the validity of the Burma Law, there is a chance it will survive WTO scrutiny\textsuperscript{55} if the U.S. government supports it. When a dispute settlement panel finds a state law to violate the AGP, the law is not auto-


\textsuperscript{52} See Request for the Establishment of a Panel by Japan, United States-Measure Affecting Government Procurement \textit{supra} note 51; Request for the Establishment of a Panel by the European Communities, United States-Measure Affecting Government Procurement \textit{supra} note 51.

\textsuperscript{53} See id.

\textsuperscript{54} See id.

matically invalidated. The U.S. Trade Representative will first meet with the state to attempt a "mutually agreeable response to the report of the panel." If the Trade Representative and the state cannot reach an agreement, the U.S. Attorney General may challenge the law in federal court. It should be noted, however, that in this forum the federal government has the burden of proof and the panel ruling receives no deference and is not binding precedent.

Finally, if the U.S. favors a state law found to violate the AGP, it can withdraw from the WTO after six months notice. However, this will probably not be necessary in this case, because the Burma Law's sponsor, Massachusetts Representative Byron Rushing, stated that he did not know about the AGP at the time he pushed the Burma Law through the state legislature and that he would be willing to amend the law if the EU imposes new sanctions on Myanmar. Massachusetts officials have also initiated meetings with U.S. officials who are attempting to "assist them in crafting legislation that takes into account U.S. international obligations."

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59. See id. at § 3512(b)(2)(B)(i)&(ii).
60. See Marrakesh Agreement Establishing the World Trade Organization, art. 15(1), Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND VOL. 31 (1994), 33 I.L.M. 1125, 1144 & 1152 (1994) [hereinafter WTO Agreement]. While Article XX of GATT authorizes a "public morals" exception that could apply to the Burma Law, the exception rarely applies because justification for discriminatory trade barriers must be detailed and scrutiny is rigorous. See Farber & Hudec, supra note 47, at 1420-21.
61. See Robert S. Greenberger, Massachusetts' Law Banning Ties With Myanmar Troubles Industry Groups and Trading Partners, ASIAN WALL ST. J., Apr. 2, 1998, available in 1998 WL-WSJA 3473323 (stating that Massachusetts Representative Byron Rushing did not know about the WTO AGP at the time he pushed the Burma Law through the state legislature, but would move to amend it if the EU would impose new sanctions on Myanmar).
Despite the pressure from Japan and the EC, the Clinton administration has promised to defend the Burma law against charges that it violates WTO agreements, and a spokesperson for U.S. Trade Representative Charlene Barshefsky commented that Barshefsky will “vigorously defend the Massachusetts measure.” Barshefsky stated that Washington will defend the Burma law, because “[t]he practical commercial effect of this type of legislation on Europe is nil.”

II. THE CASE AGAINST MASSACHUSETTS

The National Foreign Trade Council posed three major arguments in opposition to the Burma Law before the U.S. District Court for the District of Massachusetts. It argued that the Burma Law is (1) preempted by a federal statute; (2) interferes with “the federal government’s exclusive power to regulate foreign affairs;” and (3) “discriminates against and burdens international trade,” thus violating the Foreign Commerce Clause of the Constitution. In Baker, Chief Judge Joseph Tauro invalidated the Burma Law after determining that it interfered with the federal government’s foreign affairs power. Accordingly, he did not rule on either the preemption or foreign trade arguments.

As an important test case for the constitutionality of state and local procurement laws, Baker was closely scrutinized.

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64. Altbach, supra note 63.

65. See id.


67. Id.

68. See id.

69. Id. (stating that “the court finds that the Massachusetts Burma Law impermissibly infringes on the federal government’s power to regulate foreign affairs.”).

70. Id. at 293.

71. See, e.g., James E. Perrella, Address to the German-American Business Council (Sept. 1, 1998), available in Vital Speeches 681, 1998 WL 141284558 (discussing why the NFTC filed the Baker case); Association’s Lawsuit Challenges Massachusetts Burma Sanctions Law, BNA INT’L TRADE DAILY, May 1, 1998 (quoting NFTC President Frank Kittredge). Kittredge stated that “[w]e regard this lawsuit to be an important test case that will determine the very
The European Union even sent an attorney to the hearing—an extremely unusual move for the EU. Should the case continue through the courts on appeal, the Burma Law faces an uphill struggle. The Supreme Court has never ruled on the constitutionality of state procurement laws affecting foreign relations, and most authority supports federal supremacy in that area.

A. Preemption

In *Baker*, the NFTC argued that the federal Omnibus Consolidated Appropriations Act of 1997 preempts the Burma Law. Judge Tauro, however, declined to hear arguments regarding preemption, stating that he did not believe the NFTC had met its burden of showing actual conflict between the Burma Law and the Omnibus Act. Judge Tauro’s decision turned instead on the Burma Law’s interference with the federal government’s foreign affairs power. Despite Judge Tauro’s silence on the issue, the current state of preemption law with regard to foreign affairs is not favorable to the Burma Law.

The Constitution and the laws and treaties of the United States “shall be the supreme Law of the Land” and supersede state laws with which they are inconsistent. Despite this, however, preemption analysis begins with an “assumption that the historic police powers of the States [are] not to be superseded significant, perplexing and continuing issue concerning the constitutionality of state and local sanctions.” *Id.*


73. *See* Jackson-Han, *supra* note 4 (describing statement of Georgetown University law professor Robert Sumberg that there is no decisive legal precedent on state and local sanctions because none of the South Africa sanctions laws of the 1980s ever reached the Supreme Court). *See also* Price & Hannah, *supra* note 14, at 446 (recognizing that no federal court has ruled on this issue).

74. Although the best argument will be based on the market participant exception, it will be discussed last in order to compare the Burma Law with the Omnibus Act and present the relevant authority concerning federal foreign policy power.


77. *Baker*, 26 F.Supp. 2d at 293 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 131 (1978), for the proposition that there must be actual rather than speculative conflict).


79. U.S. CONST. art. VI, cl. 2.
by the Federal Act unless that was the clear and manifest purpose of Congress."^{80}

There are three major types of preemption in which such a purpose may manifest itself. First, Congress may explicitly state in the text of a statute that it intends to supercede state law.\textsuperscript{81} Preemption can also occur when a state law is inconsistent with federal law such that compliance with the purposes and objectives of both is impossible.\textsuperscript{82} A third type of preemption is commonly referred to as field preemption. This occurs when federal regulations in a field of law are "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"\textsuperscript{83} or when the federal act "touch[es] 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."\textsuperscript{84} Factors considered in preemption analysis include whether traditional state authority embraces the state law and whether the benefits of national uniformity outweigh the interest in allowing states and localities to make their own decisions.\textsuperscript{85} Accordingly, the Burma Law could be preempted if federal law either directly conflicts with the Burma Law or pervasively covers the relevant field.

State and local selective purchasing laws enacted against Myanmar have been challenged under the Supremacy Clause\textsuperscript{86} because they overlap and actually go beyond previously enacted federal legislation.\textsuperscript{87} Proponents of this position first point out that the federal legislation exempts contracts to sell or purchase "goods, services, or technology,"\textsuperscript{88} while the Burma Law does

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\textsuperscript{80} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
\textsuperscript{81} See, e.g., Burbank v. Lockheed Air Terminal, 411 U.S. 624, 640 (1973) (holding that federal legislation preempted a local ordinance).
\textsuperscript{84} Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (preempting a state act because Congress had demonstrated an intent to occupy the field of immigration law).
\textsuperscript{86} U.S. CONST. art. VI, cl.2.
\textsuperscript{87} See Schmahmann & Finch, supra note 14, at 189 (stating that laws like Massachusetts's "attempt to implement through local action a strategy expressly considered and rejected by the Senate.").
\textsuperscript{88} Omnibus Consolidated Appropriations Act of 1997, supra note 25, at § 570(f)(2).
not. They also note that the legislative history shows Congress' intent that the federal law form the core of U.S. relations with Myanmar, and President Clinton has expressed his desire "that the Administration and the Congress speak with one voice on this issue." Finally, proponents of the supremacy argument note that the Burma Law goes beyond the federal legislation by covering subsidiaries of U.S. companies abroad and of foreign companies operating outside the U.S.

Although the Supreme Court has held that there is a presumption against preemption absent clear preemptive language, existing Supreme Court authority holds that preemption of state and local law is presumed in the area of foreign policy, due to the federal government's supremacy in the field. For example, in *Hines v. Davidowitz*, the Supreme Court struck down a Pennsylvania statute because it attempted to regulate immigration, a federal concern already covered by federal legislation. *Hines* noted the possible repercussions of the statute and acknowledged that "[o]ur system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." The Court also stated that "[a]ny concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax."

The Supreme Court has also applied its foreign policy preemption analysis to state statutes providing remedies for existing federal law. In *Wisconsin Department of Industry, Labor*...
and Human Relations v. Gould, Inc., the Court struck down a state law that punished violators of the National Labor Relations Act (NLRA) because the law was too similar to a federal remedy. The Court found that Congress had occupied much of the field of industrial regulations when it passed the NLRA, thus preventing states from regulating in the area or creating judicial remedies for NLRA violations. A notable factor in this case was the comprehensive nature of the federal legislation enacted by Congress.

Although the preemption arguments against the Burma Law are powerful, there are legitimate arguments against preemption. In Barclay's Bank v. Franchise Tax Board of California, the Supreme Court upheld a state tax apportionment method even though the federal government's taxation method differed, the Executive Branch opposed it, and foreign countries protested it. The Court declared that Congress may "passively indicate that state practices do not 'impair federal uniformity in an area where federal uniformity is essential.'" It then found that because Congress had been aware of the entire situation yet failed to enact legislation spelling out an intent to preempt the state method, it had tacitly expressed a willingness to tolerate it.

Similarly, in Trojan Technologies, Inc. v. Pennsylvania, the third circuit upheld a Pennsylvania "buy-American" steel procurement law despite the existence of federal statutes regulat-

100. See id. at 286.
101. See id. at 290 (recognizing that Congress intended for the legislation to occupy the field).
103. See id. at 305 (stating that the federal government employs a "separate accounting" method, as opposed to the combined reporting method used by California).
104. See id. at 329 (stating that proposed legislation to outlaw state taxation practices was not evidence of undue interference with foreign affairs because the Executive Branch had proposed it, not Congress). Neither was the judiciary in a position to decide "how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please." Id. at 328 (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)).
105. See Barclay's Bank, 512 U.S. at 324 n.22 (referring to amicus briefs filed by the United Kingdom, 11 European Communities member countries, and the governments of eight other countries in disapproval of California's method).
106. Id. at 323 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).
ing foreign commerce.\textsuperscript{108} The act was challenged on the same three grounds as the Burma Law, and the court found that rather than preempting state buy-American laws, the federal law "seems tacitly to acknowledge and permit them."\textsuperscript{109} The legislative history indicated that Congress was concerned about achieving reciprocal trade barrier reduction, and therefore it would not have made sense to infer that it intended to preempt all existing state trade barriers.\textsuperscript{110}

Finally, in 1989, Maryland's highest court upheld city ordinances requiring divestment of pension fund holdings in companies doing business in South Africa.\textsuperscript{111} In \textit{Board of Trustees v. Mayor of Baltimore}, the Maryland Court of Appeals found that the ordinances were not preempted by the Comprehensive Anti-Apartheid Act of 1986,\textsuperscript{112} a federal act which imposed various economic sanctions on South Africa.\textsuperscript{113} The court reasoned that regulation by the city of Baltimore of its own employees' pension funds was a matter of traditional local regulation that required compelling evidence of congressional intent to preempt.\textsuperscript{114} The ordinances were upheld when the court found neither an express nor implied intent to preempt them.\textsuperscript{115}

B. FOREIGN RELATIONS

The \textit{Baker} court invalidated the Burma Law because it impermissibly infringed on the federal government's authority in the realm of foreign affairs.\textsuperscript{116} The European Union further criticized the law in a brief submitted to the \textit{Baker} court, arguing that it invited passage of other similar statutes which, taken to-
gether, would "aggravate international tensions," and that the success of such laws could spread to other issues where corporations have a greater interest. Finally, the EU expressed its doubts as to "the ability of the U.S. to honor international commitments entered into within the framework of the World Trade Organization."

Although not raised by the EU, critics of laws like the Burma Law have also noted that state and local government officials could embarrass the federal government or insult or injure foreign countries or their citizens because they "lack the expertise, information and resources to make sensible public judgments about complex international relations issues." Indeed, the election of state and local officials is normally not based on their knowledge of foreign affairs, and they are not accountable to the people of the United States for their actions.

Supporters of such laws, however, have argued that state and local government officials have no need for "special knowledge" if they merely provide new ideas and alternatives not addressed by the federal government. State and local laws can even serve as checks on "ill-conceived or immoral national foreign policies." If states overstep their bounds, Congress may pass federal laws that specifically preempt state and local counterparts. Finally, it is possible that the recent flurry of state and local action in the realm of foreign affairs is the result of the melding of national and state interests, rather than an attempt by states to infringe upon federal power.

The underlying controversy thus appears to turn on whether state governments have any power in foreign relations. Unfortunately for the states, the weight of authority supports the federal government's supreme power to regulate foreign affairs. Congress has the authority to "regulate Commerce with

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118. See Theo Emery, State With Foreign Policy Roils Trade Beyond Seas, BOSTON GLOBE, Sept. 21, 1997, at D1 (quoting Georgetown University professor Robert Stumberg). Stumberg stated that opponents of state and local selective-purchasing laws are "clearly afraid that if economic sanctions and selective purchasing laws can be enacted in the case of Burma, sanctions will spread to other issues, where there are much larger corporate interests at stake." Id.
120. Bilder, supra note 15, at 828.
121. See id. at 827-28.
122. Id. at 829.
123. See id. at 828.
124. See id.
foreign Nations, and among the several States."\textsuperscript{125} Additionally, the States may not "enter into any Treaty,"\textsuperscript{126} nor enter into any agreement or compact\textsuperscript{127} with a foreign nation without the consent of Congress.\textsuperscript{128} Neither may they lay any imposts or duties on imports or exports without the consent of Congress.\textsuperscript{129} Finally, although the Tenth Amendment guarantees that the States retain powers not expressly delegated to the federal government nor denied to them,\textsuperscript{130} case law has tended to support federal over state authority in the area of foreign affairs.\textsuperscript{131}

1. Key Precedent

Although \textit{Zschernig v. Miller}\textsuperscript{132} is the leading case defining the power of the federal government in foreign affairs, several other Supreme Court cases leading up to it are relevant to an analysis of the Burma Law.

In \textit{United States v. Belmont}, the Supreme Court upheld a Soviet settlement claim against the United States even though it ran against New York State's public policy.\textsuperscript{133} The claim was part of an agreement negotiated between the federal government and the Soviet Union, and the interest of the federal government was deemed superior to state policy.\textsuperscript{134} The Court declared that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."\textsuperscript{135} \textit{United States v. Pink} involved the same agreement, and the Court reiterated its previously expressed principle that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."\textsuperscript{136}

\textit{Hines v. Davidowitz}\textsuperscript{137} presents a difficult precedential barrier for the Burma Law. In \textit{Hines}, the Supreme Court invali-
dated Pennsylvania's Alien Registration Act which, like the Burma Law, was enacted just before the federal government passed legislation dealing with the same subject matter. The Court stated that the federal government "is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties" and that "our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." 

In the face of this negative precedent, the Burma Law's prospects are brightened by several government procurement cases. In *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*, a state "Buy American" statute was upheld because it did not necessitate localities assessing the policies of foreign countries and because it applied to all foreign nations equally. Furthermore, in *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, a different state "Buy American" law was upheld because it gave state administrators no opportunity to "comment on, let alone key their decisions to, the nature of foreign regimes." However, a California "Buy American" act was held unconstitutional in *Bethlehem Steel Corp. v. Board of Commissioners of the Department of Water &

138. See id.

139. Id. at 63. A number of lower court holdings bear on this issue. In *New York Times Co. v. City of New York Comm'n on Human Rights*, New York City's antidiscrimination laws were held to be unacceptably intrusive upon the foreign affairs power of the federal government as applied to a newspaper that published advertisements for employment in South Africa. 361 N.E.2d 963, 968 (N.Y. 1977). In *Springfield Rare Coin Galleries v. Johnson*, an Illinois law was struck down because the state's purpose of encouraging an economic boycott of the South African Krugerrand was not legitimate. 503 N.E.2d 300 (Ill. 1986). But see Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values Into Foreign Policymaking*, 62 Temp.L. Rev. 813, 823-24 (1989) (arguing that the New York Times court failed to address New York City's citizens' interest in expressing distaste for government-sponsored violations of human rights and criticizing the court in Springfield for focusing on the potential, rather than actual effect, on foreign relations). Finally, a state university policy banning admission of Iranian students in response to the 1979 Tehran hostage crisis was held unconstitutional because it constituted an intrusion on the "arenas of foreign affairs and immigration policy, interrelated matters entrusted exclusively to the federal government." See *Tayyari v. New Mexico State Univ.*, 495 F.Supp. 1365, 1376 (D.N.M. 1980).

140. 381 A.2d 774 (N.J. 1977).

Power of the City of Los Angeles for intruding upon the federal government's power over foreign affairs.\textsuperscript{142}

\textit{Zschernig v. Miller}\textsuperscript{143} is the leading case defining the power of the federal government in foreign affairs. \textit{Zschernig} established that a state law may be struck down even where no preemptive federal legislation exists and where the federal government has expressed support for the law.\textsuperscript{144} Decided in 1968 at the height of the Cold War, \textit{Zschernig} involved an Oregon statute denying inheritance rights to nonresident aliens living in countries that did not reciprocate. In striking down the statute, the Court noted that it was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."\textsuperscript{145} The Court also expressed substantial discomfort at the prospect of probate courts scrutinizing the policies of foreign countries.\textsuperscript{146} Distinguishing the case of \textit{Clark v. Allen}, in which a similar statute was upheld, the Court noted that the \textit{Clark} statute would have had only "some incidental or indirect effect in foreign countries."\textsuperscript{147} The \textit{Zschernig} statute, however, required probate judges to engage in fairly in-depth analyses of foreign policy, and the Court held that these inquiries had more than an incidental effect, resulting in too much state interference.\textsuperscript{148}

Critics of the Burma Law argue\textsuperscript{149} that it violates the holding in \textit{Zschernig} because it was passed specifically to force the

\textsuperscript{142} 276 Cal. App.2d 221 (1969).
\textsuperscript{143} 389 U.S. 429, 441 (1968) (stating that "even in the absence of a treaty, a State's policy may disturb foreign relations").
\textsuperscript{144} See id. at 434. Justice Stewart recognized that the Executive Branch had expressed its opinion that the Oregon law did not "unduly interfere" with the federal government's exercise of the foreign affairs power. See id. at 443 (Stewart, J., concurring). However, he stated in his concurrence that:

that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department.

Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may.

\textit{Id.}
\textsuperscript{145} Id. at 432.
\textsuperscript{146} See id. at 433-34.
\textsuperscript{147} 331 U.S. 503, 517 (1947). In \textit{Clark}, the California probate law at issue was similar to the one in \textit{Zschernig}. On its face, however, the law did not require probate judges to engage in deep analysis of foreign policy, and therefore it was deemed to have only an incidental effect on foreign countries. See id.
\textsuperscript{149} See, e.g., Price & Hannah, supra note 14, at 454. Price and Hannah also read \textit{Zschernig} to imply that judges should look at the possible "cumulative effect that a multiplicity of such laws would have on the ability of the federal
SPDC to change its policies, a matter strictly within the purview of the federal government.\footnote{150} They further contend that the complaints of the European Communities and Japan constitute even greater proof of foreign opposition than the single, small foreign country whose complaint was cited in \textit{Zschernig}.\footnote{151} They stress the broad nature of federal foreign policy power\footnote{152} and allege that local laws, like the Burma Law, interfere with the ability of the U.S. government to maintain a coherent and coordinated foreign policy.\footnote{153} In \textit{Baker}, Chief Judge Tauro seems to agree with this view.\footnote{154}

If the Burma Law is to survive, Massachusetts must show that it is not attempting to invade the federal government’s power and that, like the statute upheld in \textit{Clark}, its effects are incidental. \textit{Zschernig} has not been overruled, but in turn it did not overrule \textit{Clark}.\footnote{155} It is important to note that while the Constitution does not allow the states to conduct their own foreign policy, it does not completely exclude them from the area of foreign relations. There have been, for example, no major objections to state and local government-sponsored cultural and edu-

\footnote{150. \textit{See Price} \& \textit{Hannah}, supra note 14, at 462 (citing \textit{Zschernig} for the proposition that these are “matters which the Constitution entrusts solely to the Federal Government”).

151. \textit{See id.} at 463 (mentioning the fact that in one instance, application of the \textit{Zschernig} statute resulted in a complaint being registered by the small communist country of Bulgaria).

152. \textit{See id.} at 466-71.

153. \textit{See id.} at 464 (stating that selective purchasing laws destroy the federal government’s ability to create a coherent foreign policy).


155. Clark v. Allen, 331 U.S. 503, 517 (1947). \textit{See also Tiefer, supra note 55, at 49 (pointing out that Congress has been deferential in “federalism-sensitive areas like state taxes.”)}. The continuing force and precise applicability of \textit{Zschernig} has also been questioned. \textit{See, e.g.,} Bilder, \textit{supra} note 15, at 826 (citing L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 227, 476-77 n.51 (1972)).
cational exchanges with foreign countries and cities. Neither have there been objections to trade or investment solicitation or to the establishment of foreign offices due to trade or investment ties.

Nevertheless, Massachusetts should seriously consider limiting the existing law to reduce its tendency to necessitate "minute inquiries concerning the actual administration of the foreign law, [and] the credibility of foreign diplomatic statements." These were issues with which the Zschernig Court had serious problems. Although Zschernig now needs to be read in light of post-Cold War realities and with an eye toward the opposing views of Clark, it is still good law and Massachusetts should treat it as such.

2. Effects of the Burma Law

While the economic effects of the Burma Law are unclear, it has achieved its goal of making an impression on the international community. This impression is evidenced by external reactions to the law. Japan and the European Community have called for a WTO dispute settlement panel and are vocally opposed to the law, while Brigadier General David Abel, Myanmar's own Minister for National Planning and Economic De-

156. See Bilder, supra note 15, at 826 (listing a number of goodwill activities engaged in by states and localities with foreign states and localities).

157. See id.


159. See Baker, 26 F.Supp.2d at 291 (noting legislative history that evidences these goals).

160. Among the companies that have withdrawn from Myanmar are: Apple Computer, Philips Electronics, Amoco, Columbia Sportswear, Carlsberg, Levi Strauss, Liz Claiborne, and Spiegel's Eddie Bauer. See Schmahmann & Finch, supra note 14, at 202 (citation omitted). But see Ted Bunker, Burma Sanctions Lack Mass Business Appeal, BOSTON HERALD, Aug. 24, 1998, available in 1998 WL 7653657 (stating that Johnson & Johnson, Proctor & Gamble, UPS, Federal Express, and Textron have all maintained ties with Myanmar, as well as foreign companies such as BMW, Bridgestone, Honda, Hyundai, JVC, Sony, Nestle, and Toyota). Furthermore, at least one large oil company that recently pulled out of Myanmar reportedly did not do so because of the Massachusetts law. See id.

161. See United States-Measure Affecting Government Procurement, Request for Consultations by Japan, supra note 48; United States-Measure Affecting Government Procurement, Request for Consultations by the European Communities, supra note 49 (discussing the complaints of Japan and the EC regarding the Burma Law).
velopment, has stated that the law will have little or no effect on Myanmar.162

International support for the goals of the Burma Law is strong and reflects the powerful sentiment that human rights violations are wrong and intolerable. Britain, Denmark, and Sweden have criticized Myanmar's human rights violations.163 The International Confederation of Free Trade Unions (ICFTU) and the European Trade Union Confederation (ETUC) have indicated their support for the Burma Law as well, noting the hypocrisy of the EU in condemning Myanmar's human rights violations while simultaneously attempting to force Massachusetts to change its law.164 The International Federation of Chemical, Energy, Mine and General Workers' Unions recently wrote to the EU's trade commissioner, arguing that the EU should withdraw its WTO complaint and cut all trade ties with Myanmar until democracy has been achieved.165 Further, World Bank chief economist Joseph Stiglitz commented that the international investment community increasingly prefers to


163. See Britain Calls for Tougher Action Against Myanmar, AGENCE FRANCE-PRESSE, Oct. 15, 1998, available in 1998 WL 16619584 (recognizing the possibility that Britain will ban EU transit visas for the SPDC and that although strongly opposed to the junta, it is reluctant to make a solo stand and has expressed a desire for other nations to join it in a united front against the SPDC and its policies). In response, the SPDC published a press release criticizing Britain and stating that the call for sanctions was colonialistic, noting that Myanmar (then Burma) was a British colony up until 1948. See Myanmar Steps Up Protest Against British Calls for Sanctions, AGENCE FRANCE-PRESSE, Oct. 20, 1998, available in 1998 WL 16622144. Denmark and Sweden have also called for tougher sanctions. See Angus MacKinnon, EU Accused of Condoning "Pariah" Burma with WTO Action, AGENCE FRANCE-PRESSE, Sept. 21, 1998, available in 1998 WL 16603807.

164. See MacKinnon, supra note 163 (discussing the Unions' protests). ICFTU General Secretary Bill Jordan stated that "if the actions of Massachusetts, which put the human rights of the Burmese people above the interests of a few multinational companies, do not comply with WTO rules, then the WTO rules need changing, not the actions of Massachusetts." Id. Also of interest, despite Japan's participation in the WTO challenge, its own foreign minister, Masahiko Komura, has reportedly told U.S. Secretary of State Madeleine Albright that Tokyo will not be giving aid to Myanmar in the near future. Myanmar Junta Holds Mass Anti-NLD Rally, AGENCE FRANCE-PRESSE, Sept. 30, 1998, available in 1998 WL 16609661.

avoid investing in countries that engage in undemocratic actions.\textsuperscript{166}

3. The Sullivan Principles

Numerous commentators have argued that sanctions such as those imposed by the Burma Law and the Omnibus Act will simply not work and that, instead of cutting economic ties, the United States should encourage foreign investment in offending countries in order to exert more control over their governments.\textsuperscript{167} This approach was articulated in the "Sullivan Principles," a code of conduct put together as part of the effort to end apartheid in South Africa.\textsuperscript{168} As under the "Sullivan Principles," foreign companies doing business in a country such as Myanmar would agree to abide by a voluntary code of conduct and their behavior would be monitored by an independent consulting company. The continued participation of the companies would provide both stability and a model for the troubled nation.\textsuperscript{169}

Business groups insist that sanctions will fail and will result "[i]n the surrender of the Burmese market to international competitors."\textsuperscript{170} Instead, they argue that a human rights analogue to the Sullivan Principles should be adopted, rather than allowing states and localities to take matters into their own legislative hands. Unfortunately, the previous application of the Sullivan Principles largely failed, the founder himself later admitting that they had not been effective.\textsuperscript{171} It follows that leaving Burmese human rights to business people and corporations, pursuant to a program like the Sullivan Principles, would not work. As National League for Democracy leader Suu Kyi recog-


\textsuperscript{167} See, e.g., Finch, supra note 46, at 14.

\textsuperscript{168} See id. at 14 n.8 (discussing the Sullivan Principles which are a set of principles constructed by Leon Sullivan, a Philadelphia minister and board member of General Motors and other corporations, for American companies to adopt rather than going to the extreme of ending all investment in South Africa).

\textsuperscript{169} See id.

\textsuperscript{170} Citing Deepening Political Repression, U.S. Bans All New Investment in Myanmar, BNA INT'L TRADE DAILY, Apr. 23, 1997 (referring to a statement made by National Association of Manufacturers President Jerry Jasinowski).

\textsuperscript{171} See Berat, supra note 27, at 19-23 (explaining that Sullivan became disillusioned with how the Principles were followed, and eventually asked companies to withdraw from South Africa completely). The problem was that the companies agreeing to honor the Principles tended to either fail or nearly fail compliance tests, or actually drop out of the program altogether. In general, little progress was made and few facilities were desegregated. See id.
nizes, economic development would be inadequate because investors in Burma would discover that the expected profits cannot be realized, and they would most likely not be interested in exerting moral leverage without monetary profit.\textsuperscript{172} Simply put, human rights are not a priority for corporations and entities interested in foreign investment.

C. FOREIGN COMMERCE CLAUSE AND THE MARKET PARTICIPANT EXCEPTION

In \textit{Baker}, Judge Tauro declined to base his ruling on the Foreign Commerce Clause, perhaps because he viewed interference with the federal foreign relations power as a stronger claim.\textsuperscript{173} However, it was argued that the Burma Law could be struck down as a violation of the Foreign Commerce Clause. Thus Massachusetts must be prepared to defend against this claim on appeal.

1. The Foreign Commerce Clause

As stated previously, the Constitution grants to Congress the sole power to "regulate Commerce with foreign Nations, and among the several States."\textsuperscript{174} Furthermore, the states need Congressional approval to make treaties, agreements, or compacts\textsuperscript{175} and to lay imposts or duties on imports or exports.\textsuperscript{176} Accordingly, if selective purchasing laws unduly affect international trade in order to achieve their purposes, they are unconstitutional because they impermissibly interfere with Congress' authority to regulate foreign commerce.\textsuperscript{177} To go one step further, opponents of the Burma Law argue that even without con-

\textsuperscript{172} Interview by Dominic Faulder with Aung San Suu Kyi Dominic Faulder, Nobel Peace Laureate (Apr. 17, 1996), available at <http://www.pathfinder.com/asiaweek 96/0503/ nat6.html> (last visited Feb. 8, 1999). Kyi also stated that "[n]o business that wishes to exert moral leverage would be engaged in Burma under the present circumstances." \textit{Id.}


\textsuperscript{174} U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{175} See U.S. CONST. art. I, § 10, cl. 1, 3. The Burma Law is not an "agreement" or "compact"; for discussion of what \textit{does} constitute one, see Neret & Valladares, \textit{supra} note 15, at 207-08.

\textsuperscript{176} See U.S. CONST. art. I, § 10, cl. 2.

\textsuperscript{177} See, \textit{e.g.}, Price & Hannah, \textit{supra} note 14, at 455 (making this argument). See also Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (stating that the Commerce Clause was intended to prevent the economic Balkanization that was so problematic first among the colonies, and then among the states under the Articles of Confederation).
trary federal legislation, the Burma Law would violate the "dormant" Commerce Clause because of its undue burdens on interstate commerce and attempts to regulate foreign commerce.\textsuperscript{178}

The leading case involving state legislation and the Foreign Commerce Clause is \textit{Japan Line, Ltd. v. County of Los Angeles}.\textsuperscript{179} In that case, the Supreme Court struck down California's facially neutral ad valorem tax as applied to Japanese shipping containers used in foreign trade,\textsuperscript{180} stating that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."\textsuperscript{181} The Court reviewed California's tax under strict scrutiny and struck it down because of the "acute" risks of interfering with federal uniformity and provoking Japanese retaliation, which would be felt by the United States.\textsuperscript{182} The Court further indicated that scrutiny is heightened when the Foreign, rather than Interstate Commerce Clause, is implicated.\textsuperscript{183}

Under strict scrutiny, the Burma Law is vulnerable, but not hopelessly so. Massachusetts may support its position by pointing to the moderate judicial shift toward protection of state and local acts affecting foreign commerce. In \textit{Di Santo v. Pennsylvania}, the Supreme Court, in 1926, struck down a state statute requiring international ticket brokers to obtain a license, show proof of good character and fitness to conduct such business, pay an annual fee, and post a security bond against fraud and misrepresentation to purchasers.\textsuperscript{184} The principles set forth

\textsuperscript{178} See, e.g., Camps Newfound-Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 580-81 (1997)(discussing activities that violate the dormant commerce clause).

\textsuperscript{179} 441 U.S. 434 (1979).

\textsuperscript{180} See id.

\textsuperscript{181} Id. at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)). The Court also stated that "'[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'" Id. at 448 (quoting Board of Trustees of Univ. of Ill. v. United States, 289 U.S. 48, 59 (1933)).

\textsuperscript{182} See \textit{Japan Line}, 441 U.S. at 453.

\textsuperscript{183} See id. at 446. See also \textit{South-Central Timber Dev. v. Wumninck}, 467 U.S. 82, 100 (1984) (stating the rule that state restrictions on foreign commerce are subjected to a higher level of judicial scrutiny than federal restrictions).

\textsuperscript{184} 273 U.S. 34 (1926). The statute in \textit{Di Santo} was found to unduly burden foreign commerce. See id. at 37.
in the dissenting opinions, which would have upheld the statute, were later adopted by the Court.¹⁸⁵

The dissent of Justice Brandeis found that Pennsylvania was not attempting to regulate foreign commerce because the purchase of international tickets was an intrastate transaction. Justice Brandeis also noted that the legislation attempted to combat a state concern—namely, the fraud and misrepresentation in the state that primarily affected poor immigrants.¹⁸⁶ Because Pennsylvania did not obstruct, discriminate against, or directly burden foreign commerce, Justice Brandeis found the statute was constitutional.¹⁸⁷

There is also evidence of a shift toward protection of state and local laws affecting foreign relations in Container Corp. of America v. Franchise Tax Board.¹⁸⁸ California's method of apportioning its franchise tax for multinational corporations was upheld against charges that it unduly burdened foreign commerce. The Court upheld the statute because it was fair and therefore posed little risk of foreign retaliation.¹⁸⁹ Two notable lower court holdings are also consistent with the shift. In 1989, Maryland's Court of Appeals held in Board of Trustees v. City of Baltimore that a state anti-apartheid ordinance did not unduly burden interstate commerce because of its minimal effects on South Africa and the legitimate local interests of Baltimore in divesting its money.¹⁹⁰ Additionally, in 1990 the Third Circuit Court of Appeals decided Trojan Technologies, Inc. v. Pennsylvania.¹⁹¹ The Trojan Court extended the market participant exception to cover states disfavoring foreign suppliers,¹⁹² upholding Pennsylvania's "Buy American" law because it gave

¹⁸⁵. See, e.g., California v. Thompson, 313 U.S. 109, 116 (1941) (recognizing that the principles of Di Santo's dissenting opinions were approved by the Court in subsequent cases).


¹⁸⁷. Id. at 41 (Brandeis, J., dissenting).


¹⁸⁹. See id. at 194. The Court stated that the law had "merely foreign resonances, but does not implicate foreign affairs," and the risk of retaliation was viewed as "attenuated at best." Id. at 195.

¹⁹⁰. 562 A.2d 720, 753 (Md. 1989), cert. denied, 493 U.S. 1093 (1990) (finding the effect on South Africa to be negligible and finding the market participant exception applicable). See also Andrea McArdle, supra note 139, at 829-30 (arguing that Baltimore narrows the application of Zschernig by focusing on the actual impact on a foreign government or its citizens). But see Price & Hannah, supra note 14, at 490-98 (arguing that the Maryland court was in error).


¹⁹². See id. at 912.
state administrators no opportunity to “comment on, let alone key their decisions to, the nature of foreign regimes.”\(^{193}\)

Four years after Trojan, the Supreme Court decided the case of Barclay's Bank v. Franchise Tax Board of California.\(^{194}\) The same apportionment method previously challenged in Container Corp. was again upheld, this time as applied to worldwide operations of foreign multinational corporations conducting business in California.\(^{195}\) Significantly, this apportionment method differed from that of the federal government.\(^{196}\) It is also noteworthy that the Executive Branch\(^{197}\) and foreign countries both opposed the California law.\(^{198}\) Despite these facts, the Court nevertheless found that the apportionment method did not impair the federal government from “speaking with one voice” in international trade.\(^{199}\) The Court reasoned that Congress may “passively indicate that state practices do not ‘impair federal uniformity in an area where federal uniformity is essential.’”\(^{200}\) After finding that Congress was aware of the displeasure of foreign governments with California's methods and had enacted none of the bills introduced to prohibit the method, the Court deemed Congress' failure to spell out its intent to supercede California's method a tacit expression of its willingness to tolerate it.\(^{201}\) In fact, the Court noted that opponents of the tax had warned of the risk of foreign retaliation and referred to warnings issued by foreign countries to support their case.\(^{202}\) Neither this nor the Executive Branch's opposition, however, were given much deference.\(^{203}\)

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193. Id. at 913.
195. See id. at 330-31.
196. See supra note 103 and accompanying text (stating that the federal government employs a “separate accounting” method, as opposed to the combined reporting method used by California).
197. See supra note 104 and accompanying text (explaining that the Executive Branch's proposed legislation to outlaw state taxation practices was not evidence of undue interference with foreign affairs, and that the judiciary was also ill-equipped to balance the risk of retaliation against the sovereign rights of states).
198. See supra note 105 and accompanying text (referring to amicus briefs filed by the United Kingdom, 11 European Communities member countries, and the governments of eight other countries in disapproval of California's method).
199. Barclay's Bank, 512 U.S. at 327.
200. Id. at 323 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).
201. See id. at 323-24.
202. See id. at 328 n.30 and accompanying text.
203. See id. at 328-29.
These cases suggest that the Court has become slightly more lenient in its Foreign Commerce Clause jurisprudence, at least with regard to state taxation. One possible reason is that all-out war is not an obvious and imminent risk today, whereas it was a major concern when *Japan Line* was decided.\(^{204}\) Additionally, there is less reason to anticipate harsh economic retaliation because the WTO's Dispute Settlement Understanding limits use of retaliatory measures.\(^{205}\) The Burma Law, however, is still on treacherous ground because of its facial discrimination against Myanmar. Accordingly, the Burma Law's best defense is the market participant exception.

2. Market Participant Exception

Even if certain provisions of the Burma Law technically violate the Foreign Commerce Clause, the market participant exception could prevent its invalidation.

The Supreme Court has recognized that if a state or locality is acting as a market participant rather than as a market regulator, it may impose regulations that might otherwise violate the dormant Commerce Clause. In *Hughes v. Alexandria Scrap Corp.*, for example, the Supreme Court upheld Maryland’s right as a market participant to make it more difficult for out-of-state scrap companies to collect money paid by the state to those who demolished abandoned cars.\(^{206}\) The burden on scrap processors was permissible because Maryland entered the scrap market as a purchaser of demolished automobiles, not as a regulator, and could therefore exercise “the right to favor its own citizens over others.”\(^{207}\)

In an analogous case, *Reeves v. Stake*, the Supreme Court allowed South Dakota to restrict the sale of state-produced cement to out-of-state buyers because it had a legitimate purpose to act in a protectionist manner.\(^{208}\) The Court recognized that as a sovereign, a state has the long-held right to engage in “an entirely private business, freely to exercise his own independent

\(^{204}\) See Tiefer, *supra* note 55, at 73 (stating that with regard to trade, “foreign retaliation is not a matter of catastrophic war or peace.”).


\(^{206}\) 426 U.S. 794 (1976).

\(^{207}\) *Id.* at 810.

\(^{208}\) 447 U.S. 429 (1980).
discretion as to parties with whom he will deal.” In Reeves, however, the Court did note that it was not deciding whether the same analysis applied to the Foreign Commerce Clause.

Finally, in White v. Massachusetts Council of Construction Employers, Inc., the Court acknowledged the market participant exception when the mayor of Boston ordered that at least half of the workers hired by city construction project contractors be Boston residents. Because the city used its own funds on the projects, the Court found that it was operating as a market participant. The Court did, however, state that “there are some limits on a state or local government’s ability to impose restrictions that reach beyond the immediate parties with which the government transacts business.”

Four years after White, the Court invalidated an Alaska statute because it did reach beyond the immediate parties. In South-Central Timber Dev. v. Wunnicke, the Court held that Alaska was not acting as a market participant when it required all timber sold from state-owned land to be processed within the state. The Court refused to immunize Alaska through the market participant exception because it was imposing conditions “downstream,” regulating the purchaser’s dealings with third parties after the sale was complete.

 Critics of the Burma Law argue that Massachusetts should not be able to invoke the market participant exception for three main reasons. First, Congress has passed legislation, and the market participant exception applies only in the absence of Congressional action. Second, the Supreme Court has indicated that the market participant exception does not apply when foreign commerce is involved. Third, the law exceeds the limited exception that Congress contemplated.

209. Id. at 439 (1980). The Court stated that although state action could raise issues which are “subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis,” the proper way to deal with it is to allow Congress to resolve the matter in a democratic manner. Id.

210. See id. at 437 n.9.


212. See id. at 214-15.

213. Id. at 211 n.7.


215. Id.

216. Schmahmann & Finch, supra note 14, at 192.

217. See Wunnicke, 467 U.S. at 95-96 (citing Reeves, Inc. v. Stake, 438 U.S. 429, 437-38 n.9 (1980) (indicating that the exception does not apply because of the heightened scrutiny used in foreign commerce cases)).

218. See Schmahmann & Finch, supra note 14, at 192.
With regard to the first two arguments, Massachusetts has a good defense based on *Board of Trustees v. City of Baltimore*, in which the market participant exception was held applicable to a Baltimore anti-apartheid divestment ordinance despite the existence of similar federal legislation\(^\text{219}\) and despite its effect on foreign commerce.\(^\text{220}\) The third argument, however, presents a greater obstacle for the Burma Law. Massachusetts' best rejoinder is that the Burma Law lacks the blatant protectionist nature of the *Wunnicke* statute.\(^\text{221}\) Instead of seeking to promote the economic interests of its own citizens, the Burma Law seeks to promote human rights.

An additional boost to the Burma Law may come from the theoretical First Amendment rights of the states.\(^\text{222}\) Massachusetts could assert that the First Amendment protects the right of states to express their views on federal action through state or local legislation, as well as to associate with the businesses of their choice, because the "purpose and spirit" of the First Amendment covers these rights.\(^\text{223}\) Indeed, giving the states some authority in foreign affairs will enable people to come closer to their own government and actively participate in it, which may in turn spur the federal government to become more accountable to the people it represents.\(^\text{224}\) Despite the absence of precedential support for this argument, there is always the possibility that an appellate court will give some deference to the expressive rights of states and localities.\(^\text{225}\)

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\(^{220}\) *Id.* at 749. *But see* Price & Hannah, *supra* note 14, at 490-98 (arguing that the Maryland court was in error). Furthermore, the Third Circuit has held the market participant exception applicable to a case involving the Foreign Commerce Clause. *See Trojan Technologies v. Commonwealth of Pennsylvania*, 916 F.2d 903, 910 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991).

\(^{221}\) *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984).

\(^{222}\) *See generally* McArdle, *supra* note 139 (discussing First Amendment rights of state and local governments).

\(^{223}\) *See*, e.g., Bilder, *supra* note 15, at 827. The author asserts that these rights "fall within the purpose and spirit of these [First Amendment] fundamental rights and the courts are likely to find a basis for extending them some protection." *Id.*


\(^{225}\) *See* McArdle, *supra* note 139, at 833-39 (discussing how state and local governments could act as vehicles for citizen input into foreign affairs).
III. HOPE FOR THE BURMA LAW

The *Baker* decision was clearly an important statement about the constitutionality of state selective purchasing laws in the foreign relations context. Despite the opposition the Burma Law faces on appeal, there is still hope for its survival based upon the following arguments.

A. THE PREEMPTION CHALLENGE

In *Baker*, Judge Tauro declined to hear oral arguments on the issue of preemption because he did not believe the NFTC met the preemption doctrine's required burden of proof. Preemption may be the weakest of the three arguments against the Burma Law, but even here the law faces a difficult struggle. In light of the presumption of federal preemption in foreign affairs, the following arguments represent Massachusetts' best chance at prevailing on this issue.

Massachusetts should argue that the Burma Law has not been expressly preempted by the Omnibus Consolidated Appropriations Act. The federal act was passed after the Burma Law was enacted. Thus, Congress could have passed preemptive legislation had it felt the Burma Law threatened its foreign affairs power. Furthermore, White House sources have reportedly stated that the Clinton administration does not want to confront the states in this context. Additionally, compliance with both the Burma Law and the federal law is possible. The *Baker* court was quick to note the absence of "actual conflict" between the two laws, and while critics charge that Congress "expressly considered and rejected" the approach taken by the Burma Law, both laws aim to foster human rights improve-

226. Lelyveld, *supra* note 76, at 3A.
230. See *supra* note 82 and accompanying text (describing preemption where laws are so inconsistent with federal law that compliance with both is impossible).
231. *Baker*, 26 F.Supp.2d, at 293 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 131 (1978), for the proposition that there must be actual rather than speculative conflict).
232. Schmahmann & Finch, *supra* note 14, at 189 (stating that laws like Massachusetts' attempt "through local action a strategy expressly considered and rejected by the Senate").
ments in Myanmar. The federal legislation is more limited in scope because it exempts contracts for goods, services, or technology,233 but the two laws are not mutually exclusive.

The most daunting opposition to the Burma Law is the traditional assumption of federal preemption in the realm of foreign relations. The weight of precedent, evident in the previously discussed cases of Hines234 and Gould,235 supports this assumption. Hines, for example, stated that the federal government “is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties,” and that “[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”236

In both Barclay’s Bank237 and Trojan Technologies,238 state laws involving foreign nations were upheld against preemption challenges when Congress’ failure to enact clear preemptive legislation was deemed to be tacit approval of the relevant state law.239 Given these cases, Massachusetts should argue that because Congress could have preempted the Burma Law but chose not to, it tacitly approved of the law. Furthermore, in Board of Trustees v. Mayor of Baltimore, the Maryland high court upheld city ordinances which required divestment of employee pension funds from businesses in South Africa in spite of federal legislation that was titled “comprehensive.”240 Control of city funds was deemed a matter of state concern such that a clear statement of congressional intent to preempt was necessary.241

234. See Hines v. Davidowitz, 312 U.S. 52 (1941). See also supra notes 96-98 and accompanying text.
236. Hines, 312 U.S. at 63.
239. Barclay’s Bank, 512 U.S. at 323-24; Trojan Technologies, 916 F.2d at 907.
240. See supra notes 111-15 (discussing the ordinances which were upheld despite the existence of the Comprehensive Anti-Apartheid Act of 1986).
241. See supra notes 112-15 (discussing the requirement of clear intent and the fact that there was no finding of intent in the case).
B. State Foreign Policy

The *Baker* decision, which rested on the issue of state interference with federal foreign policy, will be difficult to overturn on appeal. *United States v. Belmont*, *Zschernig v. Miller*, and *Hines v. Davidowitz* provide a powerful backbone for supreme federal authority in foreign affairs. Additional charges that the Burma Law violates the Agreement on Government Procurement and conflicts with the U.S. government's WTO obligations add to the case against the Burma Law. Moreover, opponents argue that state and local officials are not sufficiently knowledgeable to participate in foreign affairs.

In response to these attacks, Massachusetts must deflect the idea that it is a rogue state attempting to intrude upon the federal government's authority. This can be accomplished by focusing on the parallel goals of the Burma Law and the federal legislation, as well as by arguing that rather than attempting to infringe upon federal foreign relations authority, Massachusetts is simply attempting to control how it spends its own state dollars.

Massachusetts should begin its argument against federal control of foreign relations by pointing to *Clark*. The statute at issue in *Clark* did not require probate judges to inquire deeply into foreign policy and was therefore deemed to have only an "incidental or indirect effect in foreign countries." Similarly, the Burma Law does not require continuing judicial investigation or assessment of a foreign government. Rather, it requires a statement as to whether an individual or business does business with, or in, Myanmar. The statement of a Myanmar official that the law will have little effect on Myanmar

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244. 389 U.S. 429 (1968).

245. 312 U.S. 52 (1941).

246. See *supra* notes 48-54 and accompanying text (discussing the complaints of Japan and the EU regarding the Burma Law).


249. *Id.* at 517.

250. See *supra* note 33 and accompanying text (describing the statement required to be given by businesses or individuals seeking a contract with Massachusetts).

corroborates the claim that the Burma Law’s effects are incidental. Furthermore, the promise of U.S. Trade Representative Charlene Barshefsky that Washington will defend the Burma law because “[t]he practical commercial effect of this type of legislation on Europe is nil,” bolstered this claim.

Although Japan and the European Union’s contention that the Burma Law violates the AGP is damaging, the law’s sponsor has stated that he would be willing to amend it if the EU will impose new sanctions on Myanmar. In line with this statement, Massachusetts officials have met with U.S. officials in an attempt to “craft legislation that takes into account U.S. international obligations.” Possible changes to the law could allow Massachusetts to express its disapproval of the SPDC’s human rights violations, while preventing the law from having more than an “incidental” effect on foreign relations and foreign trade. Yet even without any amendments, the current version of the Burma Law does not pose a serious risk of foreign retaliation. The Court in and those in other leading cases in the area were noticeably concerned with the possibility of military retaliation by foreign nations. Such concerns are greatly reduced today.

The tacit approval argument against preemption can also be used to support the Burma Law in the face of federal supremacy over foreign relations. Under Barclay’s Bank and Trojan

that selective purchasing laws “will only hurt the United States companies but will not affect Myanmar much.”

252. See Altbach, supra note 63 and accompanying text.

253. See Greenberger, supra note 61 and accompanying text (recognizing that Massachusetts Representative Byron Rushing did not know about the WTO AGP at the time he pushed the Burma Law through the state legislature but would move to amend it if the EU would impose new sanctions on Myanmar).

254. See supra note 62 and accompanying text (referring to a letter written by U.S. Trade Representative Charlene Barshefsky to Sir Leon Brittan, vice-president of the EC).

255. Assuming the truth of Myanmar’s minister for national planning and economic development’s statement that selective purchasing laws “will only hurt the United States companies but will not affect Myanmar much.” Myanmar Official Downplays U.S. Business Restrictions, supra note 22.

256. See, e.g., United States v. Belmont, 301 U.S. 324, 331 (1937) (recognizing the risk of conflict within foreign nations); See also Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (recognizing the risk of one state’s actions, intentional or unintentional, leading to war with foreign nations that would affect the United States as a whole). Accord Zschernig v. Miller, 389 U.S. 429, 441 (1968).

state laws involving foreign nations may be upheld if Congress had the chance to enact clear preemptive legislation, but chose not to. Congressional inaction can be deemed an implied approval of the relevant state law. Accordingly, Massachusetts can argue that despite the presumption that states must steer clear of foreign affairs, Congress obviously did not consider the Burma Law a threat to its foreign affairs authority. If it had, Congress would have preempted the Burma Law.

Massachusetts should additionally argue that “foreign affairs” should not be construed so broadly as to curtail a state’s right to demonstrate how its citizens feel. The Burma Law can be viewed not as an attempt to regulate foreign affairs, but as a way to critique the SPDC’s behavior by refusing to spend Massachusetts’ taxpayer money in any way that would support that regime. A democracy such as the U.S. has neither a reason nor a right to prohibit its local governments from making their opinions and values known to the world. Therefore, this should especially be true when a state expresses its disapproval by refusing to spend its own tax dollars to conduct business with those who participate in what is deemed wrong. Finally, if the NLD was the rightful victor of the 1990 multiparty elections, it is wrong to strike down sanctions promoting the democracy that the NLD endorses. The NLD supports sanctions against Myanmar, and the wishes of the rightful ruling party should be recognized.

C. THE FOREIGN COMMERCE CLAUSE AND THE MARKET PARTICIPANT EXCEPTION

Defending the Burma Law against charges of a Commerce Clause violation will be difficult, both because of the law’s facially discriminatory nature and because it affects a field traditionally dominated by the federal government. Massachusetts, however, does have viable arguments that the Burma Law escapes Commerce Clause invalidation. First, it does not actually conflict with the federal legislation. Second, and most important, is the fact that any burden the Burma Law may place

259. See Barclay’s Bank, 512 U.S. at 323-24; Trojan Technologies, 916 F.2d at 907.
on foreign trade is acceptable because the law falls within the established market participant exception. 261

1. Acceptable Incidental State Burdens on Foreign Commerce

The leading Foreign Commerce Clause case, Japan Line, was based on the desire for national uniformity and the risk of retaliation by foreign entities when a state law unduly burdens foreign commerce. 262 Japan Line stressed the importance of the federal government speaking "with one voice when regulating commercial relations with foreign governments." 263 The Court struck down the tax in Japan Line because it believed the tax risked provoking Japanese retaliation. 264 Two previously discussed cases lend support to the validity of the Burma Law in the realm of foreign commerce. The Supreme Court has shown a willingness to uphold state laws that are not protectionist and marginally affect foreign commerce. For example, the tax apportionment method upheld in Container Corp. 265 and Barclay's Bank 266 survived because it was fair and therefore posed little risk of foreign retaliation. 267 The cases make sense if one assumes that if a law is fair, there should be a smaller risk of retaliation by a foreign nation. Further, when the federal government has declined to preempt a state law dealing with foreign relations, there is little reason to believe that the federal government fears that the state law interferes with foreign commerce.

Accordingly, Massachusetts should argue that the Burma Law is fair because it was not passed in a protectionist attempt to favor the citizens of Massachusetts. Instead of seeking to promote the economic interests of Massachusetts, the law strives to promote human rights. Furthermore, the Burma Law does not attempt to regulate "downstream" activities. 268 Rather, the Burma Law requires that companies and individuals refuse to

263. Id. at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).
support human rights violations if they wish to do business with Massachusetts. Once a sale or transaction has occurred, the company or individual is not hampered with "downstream" requirements imposed by Massachusetts and may even enter into business transactions with, or in, Myanmar without affecting the prior sale. Only the future ability of the individual or company to deal with Massachusetts is at stake.

Finally, human rights violations are a universal concern and defending them should not be termed "protectionist." Given the Burma Law's marginal effect on trade with the nation of Myanmar, the law's laudable goal of protecting human rights militates in favor of legitimacy.

2. The Market Participant Exception

Even if Foreign Commerce Clause analysis is not precluded, Massachusetts has a good argument that the Burma Law should be upheld because it involves a state acting in its role as a market participant. The Supreme Court has recognized that if a state or locality is acting as a market participant, it may, as long as there is a legitimate purpose for any discrimination in favor of the state's own citizens, impose requirements on those with whom it does business even though such impositions would otherwise violate the dormant Commerce Clause.269

As previously stated, critics argue that the market participant exception does not apply to the Burma Law because: 1) there is federal legislation and the exception only applies in the absence of it; 2) the Supreme Court has indicated that the market participation exception does not apply when foreign commerce is involved due to the higher scrutiny applied in those cases; and 3) the law reaches too far by affecting the conduct of third parties.270

The first two arguments may fail given Board of Trustees v. City of Baltimore's extension of the market participant exception to an anti-apartheid divestment ordinance even though similar federal legislation existed and foreign commerce was involved.271 Those arguments are further weakened by the hold-

269. See, supra notes 206-07 and accompanying text (discussing Hughes v. Alexandria Scrap Corp.). See also supra note 208-10 (discussing Reeves v. Stake, in which the Court further acknowledged the right of states to conduct private business and decide with which parties they will deal).

270. See, e.g., White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 211 n.7 (1983) (stating that the exception should not extend to laws that reach beyond the immediate parties involved in the transaction).

The Burma Law also does not attempt to regulate "downstream" activities. As previously discussed, the Burma Law requires up front that companies and individuals refuse to support human rights violations in order to initiate a business relationship with Massachusetts. In addition, like "Buy American" statutes, the Burma Law involves a state decision as to how it will spend its own funds. The Burma Law is not protectionist because it aims to promote human rights rather than further the economic interests of its own citizens. For these reasons, Massachusetts has a credible argument that the Burma Law should be upheld as falling within the market participant exception.

CONCLUSION

The Burma law attempts to communicate to the world, and to Myanmar in particular, the feeling of Massachusetts' citizens that human rights violations and the tyrannical methods of the SPDC are wrong. Massachusetts has chosen to express this sentiment by refusing to spend its own money in support of a military junta and its associates. There is no better way to express distaste for a nation's policies than to withdraw every conceivable form of support. In doing this, Massachusetts has upset companies who earn their profits by investing in Myanmar or do business with those who do.

The Burma Law has not been expressly preempted, and there is a credible argument that Congress has tacitly approved of its existence. While its interference with the federal foreign affairs power is the biggest obstacle to the Burma Law's legitimacy, it has a moral undertone rather than a protectionist one. Finally, Massachusetts is acting as a market participant. For these reasons, the Burma Law has a chance of being upheld by an appellate court.

Americans have always valued freedom of expression, which in this case is clearly at odds with the historic exclusion of the States from speaking in the area of foreign affairs. State anti-apartheid divestment and selective purchasing laws have existed for years, but the federal government's need to conduct foreign policy in a uniform manner must also be recognized and

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respected. It is not easy to show disapproval in a way that will have an impact without any harmful effects. In this case, some companies will be harmed. That harm, however, is strictly economic and pales alongside the greater harm perpetrated by the SPDC, which includes using human beings as slaves, prostitutes, and mine-sweepers.

Those most opposed to the Burma Law are companies unwilling to sacrifice profits for human rights. While the Burma Law and similar statutes may require businesses to scrutinize their international relationships, the human lives at stake make it hard to sympathize with them. Voluntary intervention on the part of huge companies will not work, as the failure of the Sullivan Principles demonstrated. Perhaps we should listen to those, like Aung San Suu Kyi, who know the situation best and still support sanctions against Myanmar, their own country. In the end, laws like the Burma Law will not go away. As long as human rights violations occur, these laws will be passed, and the debate over their constitutionality will continue.