

The Costs of Uniformity: Federal Foreign Policymaking, State Sovereignty, and the Massachusetts Burma Law

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Natsios v. National Foreign Trade Council, 181 F.3d 38 (1st Cir. 1999), cert. granted, 68 U.S.L.W. 3353 (Nov. 29, 1999) (No. 99-474).

Last fall's protests at the World Trade Organization (WTO) convention in Seattle evidenced mounting pressure by states and municipalities to retain their authority to further shared values of environmental conservation, labor standards, and human rights through their government procurement policies.¹ As one local commentator lamented, "the WTO has had a tremendous chilling effect on jurisdictions."² For example the Seattle City Council declined to enact a selective purchasing ordinance targeting human rights abuses in Burma after a similar law in Massachusetts was challenged before the WTO.³ That law, the Massachusetts Burma Law (MBL),⁴ now faces constitutional challenge as well. In *Natsios v. National Foreign Trade Council*,⁵ the Supreme Court will decide the MBL's fate under U.S. law,⁶ presumably the validity of at least 31 other

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1. See, e.g., Donella H. Meadows, Editorial, *Record Explains Protests in Seattle*, ST. LOUIS POST-DISPATCH, Nov. 29, 1999, at B7, (citing the challenge to the Massachusetts Burma Law under the WTO as a reason environmentalists, human rights advocates, and labor organizations oppose the WTO); Robert G. Pedersen, *Democratic Input Into World Trade*, INDIANAPOLIS STAR, Dec. 2, 1999, at A19, ("Citizens should have the right to democratically determine how their tax dollars are spent, and pass procurement provisions to promote environmental goals . . . or social progress . . ."); *Top 10 reasons to oppose the WTO*, NAT'L POST, Oct. 29, 1999, at C7 (citing WTO obstacles to using trade policy to influence the Burmese dictatorship or to limit child labor as one of the top 10 reasons to oppose the WTO).

2. Geov Parrish, *WTO 101*, SEATTLE WKLY., Nov. 11, 1999, at 25.

3. See *id.*

4. MASS. ANN. LAWS ch. 7, §§ 22G-22M (Lexis 1999). Burma changed its name to Myanmar in 1989. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir.) (1999). To maintain consistency with the language of the district court, First Circuit and petitioner, this Case Note refers to the federal sanctions as the "Federal Burma Law" and to the country Myanmar as "Burma."

5. 181 F.3d 38 (1st Cir. 1999), cert. granted, 68 U.S.L.W. 3353 (Nov. 29, 1999) (No. 99-474).

6. Under the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, §102(b)(2)(A), 108 Stat. 4809, 19 U.S.C.S §3512(b)(2)(A) (1994), "[n]o State law . . . may be declared invalid . . . on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for [that] purpose. . . ." Since the United States is not the plaintiff in this case, the Court cannot consider whether the Massachusetts Burma Law violates the

municipal selective purchasing laws targeting Burma and other countries⁷ and the *ex post* legality of 117 such laws aimed at apartheid South Africa.⁸

The MBL prohibits the Commonwealth and its agents from purchasing goods or services from any person doing business with Burma unless the party's bid is ten percent lower than all others received.⁹ Pursuant to this restriction, the statute authorizes the state to establish a "restricted purchase list" of companies doing business with Burma,¹⁰ which includes firms that have a principal place of business or a majority-owned subsidiary in the country, or engage in certain forms of business with the government of Burma.¹¹ The MBL governs only state government purchasing and does not affect the transactions of private citizens. However, given that Massachusetts purchases more than \$2 billion in goods and services annually,¹² while the entire GDP of Burma is \$19 billion,¹³ three companies, all members of the National Foreign Trade Council (NFTC), withdrew from Burma in the following years in partial response.¹⁴ NFTC filed suit to enjoin enforcement of the statute as a result.¹⁵ Simultaneously Congress had authorized sanctions proscribing new U.S. investment in Burma, including that by private parties, just three months after passage of the

URAA, the instrument by which the United States joined the WTO.

7. See Marc Selinger, *State Law Punishing Burma Probed*, WASH. TIMES, Oct. 22, 1998, at B8. Current municipal purchasing laws also target Nigeria, Tibet, Indonesia, Cuba, Switzerland and "countries with sweatshop labor." *Id.*

8. Twenty-three states, 14 counties and 80 cities enacted divestment or procurement legislation directed at South Africa's apartheid policies. See Richard B. Bilder, *The Role of States and Cities in Foreign Affairs*, 83 AM. J. INT'L L. 821, 822 (1989).

9. See MASS. ANN. LAWS ch. 7, §§ 22G-22H. The MBL exempts companies that are only providing medical supplies to Burma, and transactions where the Commonwealth is purchasing certain medical supplies, see *id.* at § 22I, or the procurement is essential and the restriction would eliminate the only bid or would result in inadequate competition, see *id.* at § 22H(b).

10. See *id.* at § 22J. Once that agency, the Operational Services Division, makes a preliminary finding that a company does business with Myanmar, the company can submit a sworn affidavit to refute the finding. OSD then makes a final decision whether to place a company on the "restricted purchase list." See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999).

11. Specifically, the law defines "doing business with Burma" to include:

- (a) having a principal place of business, place of incorporation or . . . 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 franchisee of such a person;
- (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage 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).

MASS. ANN. LAWS ch. 7, § 22G.

12. See *Natsios*, 181 F.3d at 53.

13. See UNITED STATES DEP'T OF STATE, COUNTRY COMMERCIAL GUIDES FY 1999: BURMA, (visited Apr. 8, 2000) <http://www.state.gov/www/about_state/business/com_guides/1999/eastasia/burma99_01.html> (1997/98 estimate).

14. See *Natsios*, 181 F.3d at 47.

15. See *id.* at 48.

Massachusetts Burma Law

MBL.¹⁶ The Federal Burma Law instructs the President, upon determination of specified human rights abuses, to prohibit new private and public investment in Burma that involves “the economic development of resources located in Burma” and excludes contracts for goods, services or technology.¹⁷ In May 1997 President Clinton activated these federal sanctions, proscribing new investment by U.S. persons in Burmese “natural, agricultural, commercial, financial, industrial, [or] human resources.”¹⁸

Upon stipulated facts, the United States District Court for Massachusetts granted summary judgment for NFTC, holding that the MBL impermissibly infringes on the federal government’s power to regulate foreign affairs.¹⁹ The district court noted that the federal sanctions did not preempt the MBL, and declined to address the law’s validity under the Commerce Clause.²⁰ The First Circuit affirmed the district court’s holding on the federal foreign affairs power and found that that the statute violates the dormant foreign Commerce Clause and was preempted by the Federal Burma Law.²¹ In the absence of Supreme Court precedent on the subject, neither court determined whether the market participant exception to the interstate Commerce Clause—which exempts states from dormant Commerce Clause limitations when acting as market participants rather than regulators²²—applies to the dormant foreign Commerce Clause or foreign affairs power.²³

By extending the market participant exception to foreign commerce and foreign affairs, the Court would ensure consistency in its Tenth Amendment jurisprudence, articulate a clear standard for state authority as market participants given the increasing integration of domestic and foreign markets, and create the widest range of congressional foreign policy options. This extension,

16. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 1, 166-67 (1996).

17. *Id.* at § 570(b). The law also bars any “United States assistance to the Government of Burma,” except for humanitarian assistance, assistance for anti-narcotics or crop substitution efforts, or “assistance promoting human rights and democratic values.” *Id.* at § 570(a)(1). It mandates that the United States oppose any “loan or other utilization of funds” by international financial institutions to or for Burma, and denies visas to most Burmese officials seeking entry to the United States unless required by treaty. See *id.* at § 570(a)(2-3). It also instructs the President to work with “members of ASEAN and other countries having major trading and investment interests in Burma” to develop “a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma” *Id.* at § 570(c). Finally, the law requires the President to report to Congress and grants her the power to waive any of the sanctions if she “determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.” *Id.* §§ 570(d), (e).

18. Exec. Order No. 13,047 § 4(e), 62 Fed. Reg. 28,301 (1997).

19. See Nat’l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 289-90 (D. Mass. 1998).

20. See *id.* at 17-18.

21. See *Natsios*, 181 F.3d at 45.

22. See *South-Central Timber Dev., Inc. v. Wunnicke* 467 U.S. 82, 93 (1984).

23. The First Circuit suggested that the market participant exception should not encompass the foreign affairs or foreign commerce powers and held that the MBL does not qualify as market participation, if such an exception exists. See *Natsios*, 181 F.3d at 59-60, 62, 65-66.

however, should be balanced with a stricter preemption standard for state and local selective purchasing laws manifesting foreign policy concerns than the “major damage” standard for traditional state functions like government procurement. Under these clarifications of the market participant and preemption doctrines, the MBL would stand.

I. TRADITIONAL FOREIGN AFFAIRS AND FOREIGN COMMERCE CLAUSE ANALYSIS

Absent a market participant exception, the lower courts correctly held that the MBL transgresses the foreign Commerce Clause and possibly the foreign affairs power. The foreign Commerce Clause prohibits state laws that facially discriminate against foreign commerce, without a compelling justification.²⁴ For example, in *Kraft General Foods v. Iowa Department of Revenue and Finance*, the Court invalidated as facially discriminatory an Iowa tax scheme that treated dividends from and taxes paid for foreign subsidiaries less favorably than domestic subsidiaries.²⁵ Under domestic Commerce Clause analysis, the lack of a local benefit or of widespread disadvantage to out-of-state competitors does not exempt discrimination from Commerce Clause prohibitions.²⁶ Similarly, under foreign Commerce Clause analysis, the applicability of a state law to both foreign and domestic companies does not save it if it targets a particular state or nation.²⁷ Furthermore, although the foreign Commerce Clause does not invalidate state laws with only “foreign resonances,”²⁸ state laws discriminating against foreign commerce face more rigorous scrutiny than their

24. See *Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 81 (1992) (“Absent a compelling justification, however, a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.”).

25. See *id.* at 74.

26. See *New Energy Co. v. Limbach*, 486 U.S. 269, 276 (per curiam) (1988) (“[W]here discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown.”); *Kraft*, 505 U.S. at 79 (“As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions”). But see *Kraft*, 505 U.S. at 83-84 (“Iowa obviously has no selfish motive . . . and the absence of such a motive is strong indication that none of the local advantage which has so often characterized our Commerce Clause decisions is sought here.”) (Rehnquist, J., dissenting); *Bd. of Trustees v. Mayor & City Council of Baltimore*, 562 A.2d 720, 754-55 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990) (upholding Baltimore’s divestment of pension-fund investments from South Africa under a domestic Commerce Clause analysis because it does not favor city residents in purpose or effect, and because its burdens on interstate commerce do not outweigh the city’s interest in moral condemnation of racial discrimination).

27. See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 317 (1851) (permitting a Pennsylvania law requiring pilots, or a contribution to a pilots’ fund, for vessels using state ports, while noting that the Framers were anxious to prevent “discriminations favorable or adverse to commerce with particular foreign nations”).

28. *Container Corp. of Am. v. Franchise Tax Bd.*, 462 U.S. 159, 194 (1983) (validating a California method of taxing income of multinational corporations that differed from federal and foreign policies and holding that “if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer, absent some explicit directive from Congress, . . . that treatment of foreign income at the federal level mandates identical treatment by the States”) (citation omitted).

domestic counterparts since the Framers intended the scope of the foreign commerce power to be greater than the interstate commerce power.²⁹

The MBL discriminates against companies doing business with Burma. It also discriminates against foreign commerce generally for, of necessity, only firms engaging in foreign commerce do business with Burma. One may argue the MBL presents only “foreign resonances.” But when aggregated with other state and local selective purchasing laws, its effect seems substantial.³⁰ Moreover, to hold that the Court must engage in a case-by-case analysis of the foreign resonance of state policies that openly aim to influence foreign nations³¹ would create confusion where the bright line of intent exists and force courts to engage in policy analysis outside their expertise. A much stronger argument for the MBL is that states’ interest in expressing shared values through their traditional procurement authority constitutes a compelling justification for discrimination against some forms of foreign commerce. Yet this assertion is more an argument for a market participant exception rather than a justification for the MBL in its absence.³²

Similarly the foreign affairs power—lacking a market participant exception—presents obstacles to the MBL. *Zschernig v. Miller*³³ established an im-

29. See *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) (“[T]here is evidence that the Founders intended the scope of the foreign commerce power to be the greater [than the interstate commerce power]”); see also *id.* at 446 (“When construing Congress’s power to ‘regulate Commerce with foreign Nations,’ a more extensive constitutional inquiry is required [than for interstate commerce]”); *South-Central Timber Dev., Inc. v. Wunnicke* 467 U.S. 82, 100 (1984) (“[S]tate restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny” than interstate commerce).

30. See, e.g., Richard Haas, *Sanctions Almost Never Work*, WALL ST. J., June 19, 1998 (“Sanctions . . . probably hastened the end of South African apartheid.”); Peter N. Bouckaert, *The Negotiated Revolution: South Africa’s Transition to a Multiracial Democracy*, 33 STAN. J INT’L L. 375, 380 (1997) (“[T]here is little doubt that the lifting of sanctions was a powerful carrot that lured the NP government to the negotiating table.”).

31. Massachusetts conceded that the MBL was enacted solely to sanction Myanmar for human rights violations and to change Myanmar’s domestic policies. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass.) (1998).

32. The First Circuit also proffered weaker arguments that the MBL transgresses the foreign Commerce Clause. First, it asserted that state commerce legislation may not impair the federal government’s ability to “speak with one voice” in foreign affairs, because such state action harms “federal uniformity in an area where federal uniformity is essential.” *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 68-69 (1st Cir. 1999) (citing *Japan Line*, 441 U.S. at 448-49). Second, it noted the holding in *BMW of North America v. Gore* that the principles of state sovereignty and comity proscribe states from “imposing economic sanctions on violators of its own laws with the intent of changing . . . lawful conduct in other States” or, presumably, nations. See *Natsios*, 181 F.3d at 69 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) (invalidating a punitive damage award by Alabama courts because it was based on the national number of non-disclosures, though non-disclosure was legal for legitimate policy reasons in other states)); see also *Healy v. Beer Inst.* 491 U.S. 324, 336 (holding that the critical inquiry is whether the practical effect of state regulation is to control conduct beyond its borders in nullifying a Connecticut statute attempting to peg state liquor prices to those of other states). In fact, the MBL may merely amplify the federal government’s unitary voice. Further, unlike *BMW*, where the Alabama courts sanctioned BMW for legal conduct in other states, the MBL aims to change unlawful, not lawful, conduct of other nations. Ample evidence indicates that Burma continues to violate international law on numerous counts. See *infra* text accompanying notes 72-74.

33. 389 U.S. 429 (1968).

plied federal foreign affairs power in striking down an Oregon statute barring non-resident aliens from inheriting state property if their home country did not offer U.S. citizens reciprocal inheritance rights that were protected from government confiscation.³⁴ However, *Zschernig* remains the sole case invalidating a state law on foreign affairs power grounds and its boundaries remain unclear.³⁵ If interpreted at a low level of generality, *Zschernig* may hold that state laws cannot entail ongoing “inquiries into the governments that obtain in particular foreign nations” or the credibility of the representations of other nation’s agents.³⁶ Alternately, it may proscribe state laws that “make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.”³⁷ The MBL would then meet the *Zschernig* test, for it does not require that Massachusetts or the courts conduct a case by case analysis of the Burmese government’s policies, instead imposing a blanket ban on state purchasing linked to Burma.

When considering the case law underpinning *Zschernig*, however, a higher level of generality that invalidates the MBL seems more appropriate. Though prior cases never invalidated state laws as violations of the federal foreign affairs power *per se*, many hinted at such a power. *Chy Lung v. Freeman*,³⁸ in striking down a California statute authorizing state officials to require bonds from “undesirable,” predominantly Chinese, immigrants, warned against state policies that can “embroil us in disastrous quarrels with other nations.”³⁹ And *United States v. Pink*⁴⁰ maintained the “power over external affairs is not shared by the States; it is vested in the national government exclusively.”⁴¹ Such cases seem less concerned with the minuteness of inquiry into foreign regimes or judicial judgement upon them, than with the impact of state laws on federal foreign affairs policy. Read in this broader manner, *Zschernig* may hold

34. See generally *id.*

35. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, 163-65 (1996).

36. See *Zschernig*, 389 U.S. at 434; see generally Comment, *Foreign Affairs Power - The Massachusetts Burma Law Is Found to Encroach on the Federal Government's Exclusive Constitutional Authority to Regulate Foreign Affairs*, 112 HARV. L. REV. 2013 (1999) (arguing *Zschernig* should be interpreted at a high level of generality to better protect the federal government’s exclusive authority to regulate foreign affairs).

37. *Zschernig*, 389 U.S. at 440.

38. 92 U.S. 275 (1875).

39. *Id.* at 280.

40. 315 U.S. 203 (1942)

41. *Id.* at 233 (reversing state law holding regarding nationalizations that violated federal agreement with U.S.S.R.); see *Hines v. Davidowitz*, 312 U.S. 52, 63 (holding foreign relations must be entirely free from state interference); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) (upholding a federal statute banning arms sales to countries at war in the Chaco and finding that “[t]he Framers’ Convention . . . exerted its powers upon the irrefutable postulate that though the states were several their people in respect to foreign affairs were one”); *United States v. Belmont*, 301 U.S., 324, 331 (1937) (“[T]he external powers of the United States are to be exercised without regard to state laws or policies.”); THE FEDERALIST NO. 42, at 285 (James Madison) (M. Walter Dunne ed., 1901) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations”).

Massachusetts Burma Law

that state policies cannot create “great potential for . . . embarrassment of United States foreign policy,” have “more than . . . incidental or indirect effect[s] on foreign countries,” or arise from “foreign policy attitudes . . . [as] the real desiderata.”⁴² Given the MBL’s intent to influence Burma⁴³ and the District Court and First Circuit’s findings that it has more than an indirect effect on Burma, the law fails to meet a stronger *Zschernig* test.⁴⁴

II. THE MARKET PARTICIPANT EXCEPTION EXTENDED

Nonetheless, compelling doctrinal and policy considerations suggest the MBL should not fall within traditional foreign commerce and foreign affairs analyses, but rather within a market participant exception. The Court’s jurisprudence places no obstacles before such an extension. Though *Reeves v. Stake*⁴⁵ suggested that “Commerce Clause scrutiny may well be more rigorous when restraint upon foreign commerce is alleged,”⁴⁶ the Court can achieve heightened scrutiny through stricter Commerce Clause tests or, as will be suggested, a modified preemption standard. Similarly, the fact that the Court declined to extend the market participant exception to the Privileges and Immunities Clause does not undercut the merits of its extension in this context. Rather, *United Building and Construction Trades Council of Camden County v. Mayor and Council of Camden*⁴⁷ implicitly supports such an extension.⁴⁸ Like the domestic Commerce Clause, the foreign commerce and foreign affairs powers “act as . . . implied restraint[s] upon state regulatory powers,” while the Privileges and Immunities Clause grants a “protected privilege . . . [that] imposes a direct restraint on state action”⁴⁹ Indeed, judicial caution and consistency counsel extension of the market participant exception to state laws implicating foreign affairs on at least three grounds.

First, to deny the market participant exception in this context would entail the sweeping rejection of existing state and local laws, some of which have been upheld, and jeopardize other laws previously found valid under domestic Commerce Clause analysis. Currently states and municipalities enforce at least

42. *Zschernig*, 389 U.S. at 435-36.

43. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (“[The] Commonwealth concedes that the statute was enacted solely to sanction Myanmar for human rights violations and to change Myanmar’s domestic policies.”)

44. See *id.* at 291 (“The Massachusetts Burma Law has more than an ‘indirect or incidental effect in foreign countries,’ and a ‘great potential for disruption or embarrassment.’”); *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 55 (1st Cir. 1999) (“[T]he Massachusetts Burma Law has more than an ‘incidental or indirect effect’”).

45. 447 U.S. 429, 437 (1980)

46. *Id.* at 437.

47. 465 U.S. 208 (1984).

48. See generally *id.* (invalidating under the Privileges and Immunities Clause a municipal ordinance requiring that 40 % of employees of contractors working on city construction projects to Camden residents).

49. *Id.* at 220.

thirty-one selective purchasing and divestment laws aimed at human rights abuses abroad, and numerous "Buy American" statutes that affect foreign commerce as well.⁵⁰ With the exception of *Natsios*, lower courts have quite consistently approved such laws, while invalidating statutes in which states or municipalities utilize their regulatory or taxation powers to the same end, rather than their market power.⁵¹ The Court should pause before establishing such a disruptive precedent. Furthermore, disallowing the market participant exception for foreign commerce would create confusion and awkward contradictions with domestic Commerce Clause analysis. For instance, *Reeves* validated South Dakota's decision to confine sales from a state-owned cement plant to state residents during a cement shortage.⁵² *Hughes v. Alexandria Scrap Corporation*⁵³ authorized additional documentation requirements for firms located outside of Maryland, who sought to receive state bounties for converting junk cars into scrap.⁵⁴ Would the Court's refusal to extend the market participant exception imply that South Dakota and Maryland may continue such discrimination against out-of-state domestic firms, but must provide foreign and in-state firms with identical terms of trade?

Second, extending the market participant exception would lend consistency

50. See Selinger, *supra* note 7, at B8.

51. For statutes upheld in which municipalities use their investment or purchasing power, see *Trojan Tech., Inc. v. Pennsylvania*, 916 F.2d 903, 909-14 (3d Cir. 1990) (upholding a Pennsylvania statute requiring U.S.-made steel in state public works projects), *cert. denied*, 501 U.S. 1212 (1991); *Bd. of Trustees v. Mayor & City Council of Baltimore*, 562 A.2d 720 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990) (upholding Baltimore's divestment of pension-fund investments from South Africa); *K.S.B. Technical Sales Corp. v. New Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 788 (N.J. 1977) (upholding a New Jersey "Buy American" statute); and *North American Salt Co. v. Ohio Dept. of Transp.*, 701 N.E.2d 454, 462-63 (Ohio Ct. App. 1997) (upholding an Ohio "Buy American" statute). For similar statutes invalidated that because they use regulatory or taxation powers see *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376 (D.N.M. 1980) (invalidating a motion passed by the Regents of the State University that denied Iranian students continued enrollment until the return of American hostages as violating equal protection, conflicting with federal immigration policy, and frustrating federal foreign policy during an international conflict); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (invalidating a sales tax exemption applied to coins and currency from all countries except South Africa and "hold[ing] only that disapproval of the political and social policies of a foreign nation does not provide a valid basis for a tax classification by this State"); *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963, 968-69 (N.Y. 1977) (finding that New York could not apply local anti-discrimination laws to prohibit the New York Times from carrying advertisements for employment opportunities in South Africa). See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-21, 469 (2d ed. 1988) (noting that while state laws banning private individuals and companies from business with South Africa would be invalid under *Zschernig*, "under the Supreme Court's market participant exception to the commerce clause, a state would be free to pass . . . rules requiring that purchases of goods and services by and for the state government be made only from companies that have divested themselves of South African commercial involvement") (footnote omitted); see also *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 590, 595 (invalidating a Maine statute that granted more limited tax benefits to non-profit organizations largely serving non-residents and finding a constitutionally significant difference between taxation and subsidies or market participation). But see *Bethlehem Steel Corp. v. Board of Commissioners*, 276 Cal. App. 2d 221, 229 (Ct. App. 2d Dist. 1969) (invalidating the California Buy American Act).

52. *Reeves*, 447 U.S. at 430, 446-47.

53. 426 U.S. 794

54. See *id.* at 800-01, 814.

to the Court's Tenth Amendment jurisprudence. To date the Court has not established a general applicability test.⁵⁵ Yet every Tenth Amendment Commerce Clause case since *Garcia v. San Antonio Metropolitan Transit Authority*⁵⁶ supports the proposition that the federal government may not impose domestic Commerce Clause restrictions that burden states more heavily than private parties.⁵⁷ The general applicability principle gains force from the deeper constitutional justifications of federalism: it provides a check to federal limitations on state action, ensuring that states may continue to "serve as laboratories for social and economic experiment" and as political communities capable of expressing citizens' shared values.⁵⁸

The market participant exception is a natural outgrowth of the general applicability principle, for exercising the right to choose with whom to contract is a natural and protected method of experimenting and expressing shared values.⁵⁹ By invalidating the MBL, the Court would contradict the general applicability principle and vastly circumscribe state freedom to contract relative to private parties whose procurement policies may have a much greater effect on foreign nations. For instance, each of the U.S. Fortune 500 firms controls annual revenues greater than Massachusetts' procurement budget, and 71 command revenues larger than Massachusetts' total budget, much of which supports non-commercial activities.⁶⁰ These firms exercise their influence—Pepsi, Levi-Strauss, and Macy's recently withdrew operations or prohibited new in-

55. See *Reno v. Condon*, 120 S. Ct. 666, 672 (2000) ("[W]e need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the [Driver's Privacy Protection Act] is generally applicable.").

56. 469 U.S. 528, 554-56 (1985).

57. See *id.* (upholding the Driver's Privacy Protection Act as generally applicable); *South Carolina v. Baker*, 485 U.S. 505, 510 (1998) (validating a federal tax on municipal bonds that already applied in stronger form to privately-issued bonds); *Printz v. United States*, 521 U.S. 898, 903 (1997) (striking down a statute restricting the issuance of handguns that conscripted state officials for its enforcement while imposing lighter burdens on private issuers of handguns); *New York v. United States*, 505 U.S. 144, 176-177 (1992) (striking down the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act that forced states alone either to take title to nuclear waste or regulate it according to federal standards); *Garcia*, 469 U.S. at 554-56 (authorizing the equal application of the Fair Labor Standards Act to public mass-transit authorities and private parties).

58. *Garcia*, 469 U.S. at 546 ("States cannot serve as laboratories for social and economic experiment if they must pay an added price when they . . . [take] up functions that [an] earlier day . . . left in private hands.").

59. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("[Like] private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (supporting "the long recognized right of [a] trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

60. See FORTUNE, 1999 FORTUNE 500 (visited Mar. 1, 2000) <<http://www.fortune.com/fortune/fortune500/index.html>>. The 1999 Massachusetts budget, including non-tax income, was \$19.5 billion, see COMMONWEALTH OF MASSACHUSETTS, FISCAL YEAR 1999 BUDGET, CH. 194 OF THE ACTS OF 1998 (visited Mar. 1, 2000) <<http://www.state.ma.us/legis/senate/99budget/contents.htm>>, while its procurement budget is over \$2 billion, see *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 53 (1st Cir. 1999).

vestment in Burma, independent of selective purchasing laws like the MBL,⁶¹ and corporate codes of conduct incorporating human rights concerns are proliferating.⁶² Similarly individual consumers are free to purchase only from companies they deem socially responsible, and have done so historically: Massachusetts citizens boycotted tea from the morally unattractive East India Company in the 18th century and slave-made goods in the mid-19th century.⁶³ Granted the foreign commerce and affairs powers contemplate greater federal authority than the domestic Commerce Clause and consequently the general applicability principle should not be irrefutable. Foreign nations, especially those unaccustomed to federalism, will more likely ascribe state action implicating foreign affairs to the United States than they would action by U.S. firms.⁶⁴ But at the least it should be congressional preemption, not judicial prescription, that determines whether in this context the need for unitary foreign policy outweighs the merits of general applicability.

Finally, extending the market participant exception to foreign affairs and commerce actually provides federal actors with a wider range of foreign policy tools. In deciding whether to extend the exception, the Court will determine the default relationship between state and federal action in foreign affairs. Both defaults entail costs. Under the first—denying the market participant exception—all state procurement action implicating foreign affairs is presumptively invalid, but Congress may affirmatively authorize it under Article 1, § 10.⁶⁵ Given impediments to enacting legislation, Congress will likely fail in some instances to authorize state action it supports in this arrangement. Furthermore, forcing a congressional majority to voice support openly will actually constrain Con-

61. See OPEN SOCIETY INSTITUTE, BURMA PROJECT, BURMA BACKGROUNDER: FOREIGN INVESTMENT (visited Mar. 1, 2000) <<http://www.soros.org/burma/CRISIS/index.htm>>.

62. A recent Department of Labor report observes “codes of conduct have become increasingly common in recent years,” and finds that 36 of 42 apparel manufacturers surveyed have some form of policy specifically prohibiting the use of child labor in overseas production facilities, often in conjunction with prohibitions against forced labor, discrimination and forced overtime, and guarantees for workplace safety, minimum wages, the right to collectively bargain. See UNITED STATES DEP’T OF LABOR, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM? §§ I.D, II.D.3, II.E.2 (1996), <<http://www.dol.gov/dol/ilab/public/media/reports/iclp/apparel/main.htm>>; see also John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 474-89 (2000) (summarizing corporate codes of conduct including the Sullivan Principles and the MacBride Principles); Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 665 (1995) (“Codes of conduct for international business operations are proliferating as investors, companies and governments confront demands to respect human and labor rights claims.”).

63. Akhil Reed Amar, *A State’s Right, a Government’s Wrong*, WASH. POST, Mar. 19, 2000, at B1.

64. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 228 (Johnson, J., concurring) (“The states are unknown to foreign nations”).

65. U.S. CONST. art. 1, § 10, cl. 2 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power . . .”). For example Massachusetts currently maintains twenty-three “sister state” and other bilateral agreements with sub-national foreign governments and trade promotion organizations. See *Natsios*, 181 F.3d at 50.

gressional action.⁶⁶ For example, in the case of Burma, Congress's optimal policy may be to enact weaker federal sanctions on Burma in the interest of building multilateral support with ASEAN countries supporting "constructive engagement," while supplementing federal sanctions with stronger state and local selective purchasing laws.⁶⁷ If Congress must explicitly authorize statutes like the MBL, this "good cop, bad cop" strategy is eliminated, for Congress can no longer claim lack of responsibility for the sub-national selective purchasing statutes they tacitly support.

The converse default presents more negotiable constraints upon foreign policy. Under the market participant exception, state procurement action is valid unless Congress indicates some intent to preempt. Again, transaction costs in legislating imply that some state policies will persist which, in the interest of a unitary voice in foreign affairs, Congress would prefer removed. Given the presumed importance of the foreign policy concern, however, such transaction costs should be weaker than under the first default.⁶⁸ Under a weak preemption standard, Congress would also need explicitly to preempt selective purchasing laws. Doing so on a case-by-case basis might signal softness on a given foreign policy concern. And failure to preempt expressly might hinder multilateral deal-making if other countries expected the U.S. to control its sub-national units, became frustrated with judicial vacillation in determining implied preemption, or misconstrued such vacillation as executive duplicity. Nonetheless, Congress likely has greater expertise than the courts to determine the effect on multilateral deal-making and may enact a blanket preemption if it sees fit. Moreover, a more sensitive preemption standard coupled with a market participant exception would eliminate most of these concerns, while preserving the "good cop, bad cop" strategy as a federal policy option.

66. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989) (discussing how minoritarian default rules can inhibit strategic behavior that benefits majorities by forcing them to disclose information).

67. For implicit support of this interpretation of congressional intent, see Brief of Members of Congress, Amici Curiae in Support of Petitioners and For Reversal at *1, *Natsios v. Nat'l Foreign Trade Council* (No. 99-474) (brief of 78 senators and representatives expressing concern "that the court of appeals has usurped the authority of Congress to determine whether to preempt state law based upon foreign commerce or foreign affairs concerns"). But see Brief of Amici Curiae Members of Congress in Support of Respondent and for Affirmance at *i, *Natsios* (No. 99-474) (brief of 20 senators and representatives arguing "the Court should declare a 'per se' rule invalidating direct involvement by State and local governments in making foreign policy through imposing . . . sanctions."); Brief for the United States as Amicus Curiae Supporting Affirmance at *3, *Natsios* (No. 99-474) (asserting that the MBL, "while consistent with United States foreign policy in its ultimate end, seeks to achieve that end by means that diverge from those chosen by the President and Congress").

68. See Jack L. Goldsmith, *Separation of Powers in Foreign Affairs: The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1421 (1999) (arguing that political branches are more likely to intervene when courts underprotect by not preempting state law "because political branch responsiveness is at its height when a gap in federal law harms U.S. foreign relations interests," and less likely to intervene when courts overprotect by preempting state law "because judicial errors of this type do not typically have adverse effects on U.S. foreign relations").

III. APPLYING THE MARKET PARTICIPANT EXCEPTION

If the market participation exception were extended to the foreign commerce and foreign affairs power, the MBL would qualify as market participation, contrary to the First Circuit's finding.⁶⁹ In *Reeves*⁷⁰ and *Hughes*,⁷¹ the Court distinguished market participation, which includes state purchases, from state regulation that may involve tax policy or prohibitions on the flow of selected articles of commerce. The MBL uses state purchases, not taxation or regulation, to achieve its policy goals. Similarly, under *White v. Massachusetts Council of Construction Employers* and its progeny, states must confine selective purchasing laws to a "discrete, identifiable class of economic activity" rather than effectively regulating by encompassing substantially downstream and upstream effects.⁷² The MBL remains market participation under this line of cases by declining to encompass downstream or upstream transactions. It does not proscribe state purchasing from firms that have done business with Burma in the past, nor does contracting with Massachusetts prevent a firm from doing business with Burma in the future. Though the restrictions on purchases from firms with sub-contractors in Burma may hint of an "economic ripple," such hints are likely permissible given *White's* holding that market participant exception "does not require the [state] to stop at formal privity of contract."⁷³ Further, under the market participant exception the MBL's impact on Burma is immaterial, for the exception operates at the threshold, exempting state action from Commerce Clause restraints when the state operates as a market participant, regardless of its impact.⁷⁴

69. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 63 (1st Cir.) (1999) ("[I]n enacting the Massachusetts Burma Law the Commonwealth has crossed over the line from market participant to market regulator.").

70. *Reeves v. Stake*, 447 U.S. 429 (1980) ("[T]he Commerce Clause responds principally to state taxes and regulatory measures. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.") (citations omitted).

71. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-08 (1976) (validating a statute on the grounds that Maryland did not seek to prohibit or regulate the flow of hulks but rather entered the market as a purchaser, restricting trade to its own citizens or businesses within the state).

72. See *White v. Mass. Council of Construction Employers*, 460 U.S. 204, 211, n.7 (1983) (upholding an executive order that at least half of employees on city-funded construction projects be Boston residents); see also *Wisconsin Dep't of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 283 (1986) (striking down on preemption grounds a Wisconsin law barring the state from doing business with repeat violators of the National Labor Relations Act); *South-Central Timber Dev., Inc. v. Wunnicke* 467 U.S. 82, 96-98 (1984) (holding that Alaska cannot require that timber from state lands be processed within the state before being exported because "the seller usually has no say over . . . how the product is to be used after sale" and "[this] restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship"); *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978) (invalidating an Alaska statute requiring an employment preference for Alaskan residents for all work connected with oil and gas leases to which the State was a party, holding it forced "all businesses that benefit in some way from the economic ripple effect" to comply).

73. *White*, 460 U.S. at 211, n.7.

74. See *id.* at 210 ("If the city is a market participant the Commerce Clause establishes no barrier . . . Impact on out-of-state residents figures in the equation only after it is decided that the city is regu-

The MBL's purpose of promoting human rights in Burma also should not invalidate it under the market participant exception. The First Circuit suggests that the exception "does not permit Massachusetts to pursue goals that are not designed to favor its citizens or to secure local benefits."⁷⁵ But such a limited interpretation contradicts the Court's holding in *Hughes* that environmental conservation is a valid object of selective purchasing laws, and that "an 'independent justification' [is] unnecessary to sustain [a] State's program."⁷⁶ Moreover, to confine the market participant exception to selfish goals, while invalidating selfless aims, would be tantamount to judicial legislation in economic policy. It implies that maximizing economic wealth regardless of externalities, is the only valid governmental policy, while maximizing social value is not. The MBL, for instance, can be seen as a selfless choice of Massachusetts citizens to pay more in taxes in order to ensure that state purchases made with their funds incorporate externalities like forced labor that may render some firms able to offer lower bids.⁷⁷

Instead, the First Circuit's stronger argument is that "Massachusetts's action here is akin to prohibiting purchases from companies that do business in states that have policies with which Massachusetts disagrees. This would plainly be unconstitutional under the domestic Commerce Clause."⁷⁸ Their analogy invokes fears that permitting non-self-interested state purposes would grant states free rein to use the market participant exception to promote any policy whatsoever. Yet the exception's limitation to discrete, identifiable classes of economic activity, and the option of preemption, both mitigate such wide-ranging state authority. Furthermore, human rights violations may properly fall into a different analytic category from "policies." Perhaps the First Circuit would not be so sanguine regarding the "plain" unconstitutionality of a hypothetical 19th Century statute prohibiting state purchases from companies that employed slave labor. In Burma's case, substantial evidence exists that the government does just that, engaging in summary executions, rape, torture, forced relocations, forced labor, and widespread repression of democratic op-

lating the market rather than participating in it.").

75. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 64 (1st Cir. 1999).

76. *Hughes*, 426 U.S. at 809 (holding that "Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment" but that "the Commerce Clause was [not] intended to require independent justification" for such state market participation).

77. For instance, commentators have condemned Unocal for profiting from the Burmese government's forced labor practices and such charges are now being litigated. See *Doe v. Unocal Corp.*, 963 F. Supp. 880, 885, 892, 898 (1997) (finding jurisdiction and denying a motion to dismiss by Unocal against charges that it "continue[s] to be aware of and benefit from the use of forced labor to support the Yadana gas pipeline project" and participated in slave trading); Anderson, *supra* note 62, at 463 ("The Burmese military government has forced entire villages to work on the railroad [for Unocal's pipeline] without pay while under armed guard by Burmese troops . . .").

78. *Natsios*, 181 F.3d at 65.

position including 1991 Nobel Laureate Aung San Suu Kyi.⁷⁹ These practices violate the Forced Labour Convention of 1930, which Burma ratified in 1955 and from which it unilaterally withdrew last June⁸⁰ and *jus cogens* norms against summary execution, torture, and inhuman or degrading treatment.⁸¹ The Court may prefer to avoid necessary determinations on nations' compliance with human rights law in its market participant jurisprudence. But at the very least the goal of promoting human rights is "commendable," and therefore under *Reeves* the MBL's purpose provides greater, not less, reason for applying the market participant exception.⁸²

IV. PREEMPTION STANDARDS MODIFIED

Given the long-standing recognition of heightened federal authority in foreign affairs, however, the Court should not extend an unaltered market participant doctrine to the international context. A more sensitive preemption standard ensures that Congress may "make us, as far as regarded our foreign policy, one people, and one nation."⁸³

In areas of traditional state concern such as government procurement, the preemption standard is strict: absent "clear and manifest" congressional preemption,⁸⁴ the Court will infer preemption only if a state law does "major damage to clear and substantial federal interests."⁸⁵ In the foreign affairs context,

79. See UNITED STATES DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BURMA (2000), (visited Mar.1, 2000) <http://www.state.gov/www/global/human_rights/1999_hrp_report/burma.html>; AMNESTY INTERNATIONAL, MYANMAR: 10TH ANNIVERSARY OF MILITARY REPRESSION (1998) (finding that since seizing power the Burmese government has "killed, tortured, raped, imprisoned and forcibly relocated hundreds of thousands of Burmese people"); *Forced Labour Persists in Myanmar: ILO Applies Extraordinary Constitutional Procedures*, ILO NEWS, (International Labour Organization, Geneva), Mar. 29, 2000 (reporting that the Burmese government continues to engage in forced labor, including forced sex for the military, and that failure to comply results in arrest and torture).

80. See INTERNATIONAL LABOUR ORGANIZATION, CONVENTION NO. C29 WAS RATIFIED BY 152 COUNTRIES (visited Mar. 1, 2000) <<http://ilolex.ilo.ch:1567/scripts/ratifce.pl?C29>>; DEP'T OF STATE, *supra* note 79. As a result of these forced labor practices, a 1998 International Labour Organization Commission of Inquiry held the Burmese government was "guilty of an international crime that is also, if committed in a widespread or systematic manner, a crime against humanity," INTERNATIONAL LABOUR ORGANIZATION, ILO/98/32 (Press Release), REPORT OF ILO COMMISSION OF INQUIRY REVEALS WIDESPREAD AND SYSTEMATIC USE OF FORCED LABOUR IN MYANMAR (BURMA), Oct. 20, 1998. (visited Mar. 1, 2000) <<http://www.ilo.org/public/english/bureau/inf/pr/1998/32.htm>>. This year the ILO Governing Board invoked Article 33 for the first time in its 80-year history to secure compliance with the Commission's recommendations. See *Forced Labour Persists in Myanmar*, *supra* note 79.

81. See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 57 n.42 (1996).

82. See *Reeves v. Stake*, 447 U.S. 429, 442 (1980) (dismissing petitioner's suggestion that a non-protectionist goal is necessary to invoke the market participant exception, while holding that "if some underlying 'commendable as well as legitimate' purpose is also required, it is certainly present here.")

83. *Holmes v. Jennison*, 39 U.S. 540, 575 (1840).

84. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229 (1947) (holding that if the subject matter of the law in question is an area traditionally occupied by the states, congressional intent to preempt must be clear and manifest).

85. *Rose v. Rose*, 481 U.S. 619, 625, 636 (1987) (finding state divorce statute requiring veteran to

this standard is too demanding. Express preemption entails collective action costs and the possibility of Congress appearing equivocal on an issue if, for example, it enacts strongly worded sanctions coupled with provisions proscribing state and local selective purchasing laws that target the same concern. Meanwhile, the implied preemption test of “major damage” to federal interests is so difficult to prove that it will effectively eliminate implied preemption as an option.

Alternatively, the weak preemption standard that the First Circuit advanced in *Hines v. Davidowitz*⁸⁶ renders the market participant exception meaningless. In *Hines* the Court found that federal legislation preempted a Pennsylvania Alien Registration Act, for “where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”⁸⁷ Where Congress has acted, such a standard is simply an alternate expression of *Zschernig*’s foreign affairs power, which this Case Note suggests should permit a market participant exception.⁸⁸

Instead, the Court should apply the traditional preemption analysis to state market participation policies that affect foreign commerce or foreign affairs. The Court summarized the classic standard as follows:

Absent explicit preemptive language, Congress’s intent to supercede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room [for the states] to supplement it. . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.⁸⁹

The MBL’s status under this preemption standard is not immediately clear. Congress did not expressly preempt state and local selective purchasing laws when enacting the Federal Burma Law.⁹⁰ Nor is compliance with both statutes a physical impossibility. In addition, the scheme of federal regulation is not

pay child support from his federal veterans’ disability benefits was not preempted because it does not “unequivocally” conflict with federal law).

86. 312 U.S. 52 (1941).

87. *Id.* at 66-67; *see id.* at 63 (“Our system of government is such that . . . 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.”).

88. *But see id.* at 62 (“[We] expressly leav[e] open all of appellee’s other contentions, including the argument that federal power in this area, whether exercised or unexercised, is exclusive.”).

89. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983) (holding California moratorium on nuclear plants not preempted by Atomic Energy Act).

90. *See Omnibus Consolidated Appropriations Act, 1997*, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 1, 166-67 (1996).

demonstrably pervasive—though the federal sanctions prohibit private investment and restrict U.S. aid to the Burmese government, Massachusetts did indeed find room to supplement them through its own procurement policies. The MBL, however, may well stand as an obstacle to the “full purposes and objectives” of Congress. On the one hand, as the First Circuit asserted, the FBL varies from the MBL by excluding contracts for goods and services, instructing the President to develop a “multilateral strategy . . . to improve human rights practices . . . in Burma,” and providing for the President to terminate sanctions when human rights conditions improve.⁹¹ If such provisions are central to congressional objectives the FBL could preempt. On the other hand, evidence exists that Congress did not intend to preempt. Seventy-eight representatives and senators submitted an amicus curiae brief in support of the MBL, while 20 submitted one in opposition.⁹² In 1997 and 1998 Congress considered and declined to restrict state selective purchasing laws targeting human rights abuses.⁹³ And the Uruguay Round Agreements Act states, “it is the intent of Congress . . . to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements [URA].”⁹⁴ Given that the MBL likely violates this treaty, amici congressional representatives asserted they have not preempted the MBL but rather have proscribed the private action at hand because it is brought “in connection with” the URA.⁹⁵

In cases of such confusion regarding the permissibility of obstacles to federal objectives, the Court holds that as long as the specifics of a state statute undergird the broadly defined purpose of a federal act, the Court will not infer

91. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 76 (1st Cir. 1999).

92. See Brief of Members of Congress, Amici Curiae in Support of Petitioners and For Reversal at *1, *Natsios v. National Foreign Trade Council* (No. 99-474); Brief of Amici Curiae Members of Congress in Support of Respondent and for Affirmance at *i, *Natsios* (No. 99-474). Though preemption turns on congressional intent, the Executive Branch did finally submit a brief in support of affirmance at the Supreme Court level. See United State Brief for the United States as Amicus Curiae Supporting Affirmance at *3, *Natsios* (No. 99-474).

93. In 1997 a bill intended to limit federal trade sanctions did not apply to state and local legislation, even though its sponsor noted that “roughly 20 States and localities have adopted laws prohibiting government commercial dealings with . . . countries that have poor human rights records” and “some of [these]. . . sanctions raise difficult questions concerning the constitutional authority to conduct U.S. trade and foreign policy.” See H.R. 2708, 105th Cong., 2d Sess. (1997); 143 CONG. REC. E. 2080 (Oct. 23, 1997) (statement of Rep. Hamilton). In 1998, the House of Representatives also debated the constitutionality and wisdom of state and local actions affecting foreign policy without acting to preempt such laws. See 144 CONG. REC. H7277-H7285 (Aug. 5, 1998).

94. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, §102(c)(2), 108 Stat. 4809, 19 U.S.C.S §3512(c)(2) (1994).

95. See Brief of Members of Congress, Amici Curiae in Support of Petitioners and For Reversal at *10, *Natsios* (No. 99-474). Amici also argue the action is barred under the Statement of Administrative action for the Uruguay Round Agreements Act (SAA), 19 U.S.C. § 3511(a), “which constitutes the ‘authoritative expression by the United States concerning the interpretation and application of the [URAA] in any judicial proceeding,’ 19 U.S.C. § 3512(d), [and] states unambiguously that WTO rules may not be used ‘directly or indirectly’ in a private action, including an action based on ‘Congress’s Commerce Clause authority,’ SAA, reprinted at 1994 U.S.C.C.A.N. 4440, at 20.” *Id.* at *10.

Massachusetts Burma Law

preemption, even if the state law provides for more vigorous enforcement.⁹⁶ The MBL and the FBL both share the goal of promoting human rights in Burma, even if the FBL in some respects covers a narrower range of business activity and a more finite time period. In addition, in the presence of such ambiguity congressional intent is the “ultimate touchstone,”⁹⁷ and there is a presumption against preemption.⁹⁸ Significant evidence from congressional action and inaction suggests that Congress did not intend to preempt the MBL. In contrast, the only evidence of preemption lies in differences between the specifics of each statute. Consequently, as the district court found, the plaintiff failed to carry the burden of proof of intent to preempt, and the MBL should stand.⁹⁹

V. THE ROLE OF INTERNATIONAL LAW

Despite its validity under a market participant exception and traditional preemption analysis, the life of the MBL will nonetheless likely be short. In 1997 the E.U. and Japan lodged complaints with the WTO, asserting that the MBL violates the WTO’s Government Procurement Agreement to which the United States and Massachusetts are both signatories.¹⁰⁰ The dispute went as far as a WTO dispute panel but was suspended when the District Court invalidated the MBL in November 1998.¹⁰¹ Assuming the dispute panel finds the MBL is a violation, Massachusetts must rescind the law or the United States will face penalties.¹⁰² The case therefore implicitly raises questions regarding the role of international law in U.S. courts and the authority of Congress to deny private causes of action under treaties to which the United States is a party. Nonetheless such fundamental questions should be deferred. Deciding *Natsios* on its merits in U.S. law both abides by congressional intent to preserve state statutes like the MBL that may violate the WTO, and through the eventual imposition of penalties or diplomatic embarrassment pressures Congress to cease placing obstacles to the implementation of international treaties

96. See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 78 (upholding an Indiana law severely limiting hostile corporate takeovers relative to federal law as not frustrating the congressional purpose to strike a careful balance between the interests of offerors and target companies even though “very few tender offers could run the gauntlet that Indiana has set up”).

97. See, e.g., *Wisconsin Dep’t of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 290 (1986) (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

98. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1983) (holding that state-authorized award of punitive damages arising out of the escape of plutonium from a federally licensed nuclear facility was not preempted by Atomic Energy Act and that “it is Kerr-McGee’s burden to show that Congress intended to preclude such awards”).

99. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 292 (D. Mass. 1998).

100. See *EU/US: Supreme Court To Examine Massachusetts Burma Law*, EUR. REP., Dec. 4, 1999.

101. See *Supreme Court Review of “Burma Law” Will Decide Local Sanction Power*, AGENCE FRANCE PRESSE, Nov. 30, 1999.

102. See Pedersen, *supra* note 1, at A19.

in U.S. law. In such a scenario, although the WTO protestors may lose the battle for the MBL, they could win the war as human rights treaties gain justiciability in U.S. courts.