

ARTICLES

The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or a Sorry State of Affairs?

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“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”

—*The Federalist No. 42* (James Madison)¹

Introduction

In the 1980s, a number of state and local governments imposed restrictions on procurement from and investment in companies doing business in South Africa, as a way to declare their abhorrence of that nation’s apartheid regime.² About the same time, other municipalities

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We would like to thank Dr. Robert H. Birkby, Professor Boris I. Bittker, Michael A. Gatje, Dr. Richard N. Haass, John Ragosta, Professor W. Michael Reisman, Professor Glenn H. Reynolds, Eric Thomas of USA*ENGAGE, Professor Laurence H. Tribe, Dr. John Vile and Professor John Yoo for their helpful comments and criticisms of earlier drafts of this article. The statements, views and opinions expressed herein should not be attributed to anyone but the authors of this article. Each author states for the record, however, that any remaining sins or errors of omission or commission are to be solely ascribed to his co-author.

1. THE FEDERALIST No. 42, at 270 (James Madison) (Random House) [hereinafter THE FEDERALIST].

2. See, e.g., Grace A. Jubinsky, Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543 (1985); Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987);

passed ordinances and charter amendments declaring themselves to be “nuclear free” zones in which both “the manufacture and deployment of nuclear weapons” were prohibited.³ These examples of state and local involvement in foreign policy drew comment⁴ and court challenge⁵ at the time and have, in the late 1990s, served as models for a more sweeping series of state and local procurement and divestment laws aimed at companies doing business with countries like Myanmar (formerly Burma), China, Cuba, Indonesia, Nigeria, and even Switzerland.⁶ This latest round of what one foreign policy expert has called “the democratization of foreign policy run amok”⁷ has produced vigorous criticism from various experts, trade groups,⁸ and members of the State Department.⁹

Lori A. Martin, Comment, *The Legality of Nuclear Free Zones*, 55 U. CHI. L. REV. 965, 966 (1988); Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986).

3. Martin, *supra* note 2, at 966 (footnote omitted) (suggesting constitutional problems with nuclear free zones); see also *Fossella v. Dinkins*, 488 N.E.2d 117 (N.Y. App. Div. 1985), *aff'd*, 485 N.E.2d 1017 (N.Y. 1985) (striking down early 1980s New York City “nuclear-free zone” enactment).

4. See *supra* note 2.

5. See *Board of Trustees v. Mayor & City Council of Baltimore*, 562 A.2d 720 (Md. 1989) (upholding ordinance requiring trustees of pension fund to divest holdings of companies doing business in South Africa), *cert. denied sub nom. Lubman v. Mayor & City Council of Baltimore*, 493 U.S. 1093 (1990); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986); *New York Times Co. v. City of New York Comm’n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977).

6. Many cities and states . . . now have their own sanctions. Chicago and New York are considering divesting their pension funds from Switzerland because of the Swiss banks’ treatment of Holocaust accounts. Takoma Park, Maryland, boycotts Burmese goods because of human rights violations. Heavily Cuban-American Dade County, Florida, has a selective purchasing and investment law against Cuba.

Jacob Heilbrunn, *The Sanctions Sellout*, THE NEW REPUBLIC, May 25, 1998, at 21, 24. See also Fred Hiatt, *Massachusetts Takes on Burma*, WASH. POST, Jan. 31, 1999, at B7; David Cay Johnston, *Two States Outline Sanctions on Swiss Banks in Holocaust Case*, N.Y. TIMES, July 2, 1998, at A5; Warren Richey, *Using Boycotts to Punish Nations*, CHRISTIAN SCI. MONITOR, Dec. 23, 1998, at 3; USA*ENGAGE, *State and Local Sanctions Watch List* (last visited Nov. 4, 1998) <<http://usaengage.org/news/status.html>>; *infra* notes 26-48 and accompanying text.

7. Paul Blustein, *Thinking Globally, Punishing Locally*, WASH. POST, May 16, 1997, at G1, G2 (quoting Richard N. Haass, director of foreign policy studies at the Brookings Institute).

8. See, e.g., Kimberly Ann Elliott, *Backing Illegal Sanctions*, J. COM., Aug. 6, 1997, at 8A, available in LEXIS, News library, Curnws file; see also *Testimony of Todd M. Malan, Executive Director, Organization for International Investment, before the California Assembly Committee on International Trade and Development, Oct. 28, 1997* (last visited Nov. 4, 1998) <<http://www.usaengage.org/legislative/malan.html>> [hereinafter *Malan Testimony*].

9. See, e.g., Reuters, *U.S. Opposes Holocaust Suits But Says It Can’t Stop Them*, USA TODAY, July 7, 1998, at 9A; Robert S. Greenberger, *States, Cities Increase Use of Trade*

More importantly, one recent measure — a Massachusetts law barring state contracts with companies that do business in Myanmar¹⁰ — was successfully challenged in federal district court in Boston as an unconstitutional state interference with the federal government's foreign affairs power.¹¹ The outcome of the suit has implications not only for the state and local sanctions imposed against Myanmar in other jurisdictions,¹² but also those sanctions either enacted or under consideration elsewhere that target other countries.¹³

Despite the laudable motives with which many of these statutes and ordinances are introduced and the loathsomeness of many regimes against which such sanctions are enacted, the constitutionality of these measures is hotly disputed. Opponents claim that such sanctions unconstitutionally usurp the federal government's prerogative to conduct foreign affairs as it sees fit; they argue that decisions whether and when to levy sanctions should be properly made by the federal, not a state or local, government.¹⁴ The authors of one recent article¹⁵

Sanctions, Troubling Business Groups and U.S. Trade Partners, WALL ST. J., Apr. 1, 1998, at A-20; Robert E. Pierre, *Md. Bill Targeting Nigeria Stirs Ire, State Dept. Opposes Sanctions Proposal*, WASH. POST, Mar. 27, 1998, at B1, B4 (describing State Department lobbying of "state and city officials nationwide to leave foreign policy decisions to them"); David E. Sanger, *McCall and State Dept. Clash on Sanctions Against Swiss Over Gold*, N.Y. TIMES, July 23, 1998, at B1, B2; see also USA*ENGAGE, *Testimony of Deputy Assistant Secretary David Marchick Before the Maryland House of Delegates Committee on Commerce and Government Matters, Mar. 25, 1998* (last visited Nov. 4, 1998) <<http://www.usaengage.org/legislative/marchick.html>> [hereinafter *Marchick Testimony*].

10. MASS. GEN. LAW ANN. ch. 7 §§ 22G-22J (West 1998 Supp.). For a discussion of Massachusetts' law, see *infra* notes 28-36 and accompanying text.

11. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998). For a discussion of the *Baker* case, see *infra* notes 132-47 and accompanying text. See also Martin Crutsinger, *Suit Attacks State Law Penalizing Business with Myanmar*, BOSTON GLOBE, May 1, 1998, at E7; Evelyn Iritani, *Suit Challenges Myanmar Trade Ban*, L.A. TIMES, May 1, 1998, at D1, D10.

12. See Iritani, *supra* note 11, at D1 ("The suit . . . has direct implications for similar laws in effect in Santa Monica, San Francisco, Berkeley and Oakland aimed at Myanmar investors. The city of Los Angeles is considering such a measure."); Michael S. Lelyveld, *Ruling on Sanctions Proves No Deterrent*, J. COM., Dec. 28, 1998, at 1A (describing Los Angeles' decision to keep its sanctions in place despite the *Baker* ruling); Bonnie Rochman, *2 Towns, 2 Takes on Burma*, THE NEWS AND OBSERVER (Raleigh, NC), Feb. 6, 1999, at B5 (describing debate in Carrboro, North Carolina whether to repeal sanctions against Myanmar, in light of the *Baker* decision); Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443, 443-44 & n.3 (1998). Price and Hannah's article appeared in publication as our article was being finalized.

13. See USA*ENGAGE, *State and Local Sanctions Watch List*, *supra* note 6 (citing list of pending sanctions).

14. See, e.g., Elliott, *supra* note 8, LEXIS at 1; *Marchick Testimony*, *supra* note 9, at 2-4; Robert P. O'Quinn, *A User's Guide to Economic Sanctions* (June 25, 1997) (last visited Nov. 4, 1998 <<http://usaengage.org/studies/users.html>> (arguing that state and local sanc-

conclude that state and local sanctions intrude on the power of the federal government to regulate foreign commerce,¹⁶ violate the Supremacy Clause of the Constitution,¹⁷ and hinder the ability of the federal government to conduct foreign policy.¹⁸

Supporters of these subnational-level sanctions, like Massachusetts Attorney General Scott Harshbarger, respond that state and local governments have a role to play in the vindication of human rights worldwide and that they may do so constitutionally by exercising their power of the purse.¹⁹ Supporters continue to argue in court, as was claimed with the previous sanctions directed against South Africa, that when state and local governments are acting as “participants” rather than “regulators” in the marketplace, the usual strictures of the Commerce Clause should not apply.²⁰

We argue that these state and local sanctions violate the Constitution in at least two ways. First, the state and local governments’ involvement in foreign affairs through such sanctions violates the structural allocation of power in the Constitution that assigns plenary responsibility for foreign affairs to the federal government.²¹ Second, the state and local sanctions impermissibly burden foreign commerce by both discriminating against foreign commerce and by inhibiting the

tions introduce “incoherence and disunity” into foreign policy); Steven Spear, *50 Different Departments of State*, THE EXPORT PRACTITIONER (July 1997) (last visited Nov. 4, 1998) <<http://usaengage.org/news/97julyep.html>>.

15. See David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT’L L. 175 (1997).

16. See U.S. CONST. art. I, § 8, cl. 3 (reserving to Congress the power to regulate commerce “with foreign Nations, and among the several States, and with the Indian Tribes”); Schmahmann & Finch, *supra* note 15, at 189-98.

17. See U.S. CONST. art. VI, cl. 2 (declaring the Constitution, all laws of the United States “made in Pursuance thereof” and all treaties made under the authority of the United States to be the “supreme Law of the Land”); Schmahmann & Finch, *supra* note 15, at 198-99.

18. See U.S. CONST. art. I, § 8, cl. 10 (providing Congress with the power to define and punish acts of piracy and felonies on the high seas and “Offences against the Law of Nations”); Schmahmann & Finch, *supra* note 15, at 202-07.

19. See, e.g., Iritani, *supra* note 11, at D2 (quoting Massachusetts Attorney General Harshbarger: “Massachusetts should play a role in trying to improve the human rights of the people of Burma, and I believe that the Constitution allows us to do so.”). See generally Alejandra Carvajal, Note, *State and Local “Free Burma” Laws: The Case for Sub-National Trade Sanctions*, 29 LAW & POL’Y INT’L BUS. 257 (1998); Peter J. Spiro, *Hearing Voices on the World Stage*, LEGAL TIMES, Dec. 14, 1998, at 25.

20. See *infra* notes 223-27 and accompanying text.

21. See *infra* notes 51-129 and accompanying text.

ability of the federal government to present a unified trade policy and make centralized decisions regarding sanctions.²²

In addition, we argue that courts should reject the claims of municipalities and states that they are exempt from the strictures of the Foreign Commerce Clause because of the "market-participant" exception to the dormant Commerce Clause doctrine. That exception, which has heretofore been applied solely in interstate commerce cases, is not easily adapted to the realm of foreign commerce. In any event, assuming *arguendo* that the market-participant exception does apply to foreign commerce, many of the enacted or proposed state and local sanctions attempt to impose limits that far exceed those allowed under existing case law.²³

I. State and Local Sanctions: An Overview

Because subnational governments cannot directly initiate boycotts or impose export controls like the federal government can,²⁴ the term "sanctions," as used to describe recent state and local enactments, is somewhat of a misnomer. We use it throughout this article, however, not only for the sake of convenience, but also because the term accurately describes the indirect aims of these measures.

A recent policy analysis offered the following taxonomy of the "secondary boycotts" used by states and cities:

(1) procurement restrictions . . . bar any company that does business in a target country from supplying good and services to the state or locality and (2) investment restrictions . . . prevent a state or locality from investing public funds in or lending public funds to any company that does business in a target country. [Both] attempt to force companies to choose between doing business with the state or local government or doing business in the target country.²⁵

22. See *infra* notes 158-208 and accompanying text.

23. See *infra* notes 223-92 and accompanying text.

24. See also Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 830-31 (1989) (noting constitutional prohibitions on state-initiated embargoes and boycotts). See generally U.S. CONST. art. I, §10, cl. 2 (prohibiting states from laying imposts or duties on imports and exports without congressional consent); Export Administration Act of 1979, 50 U.S.C.A. app. § 2401 *et seq.* (West 1991 & Supp. 1998) (enacting federal export controls for reasons of national security, foreign policy and preservation of scarce supplies and resources); *id.* § 2407 (West 1991) (specifying prohibitions on U.S. citizens' participation in connection with certain foreign-instigated boycotts).

25. O'Quinn, *supra* note 14, at 12 (emphasis added). For a complete discussion of the various sanctions enacted to protest South Africa's apartheid regime, see Spiro, *supra* note 2, at 816-22. The author describes procurement regulations like those adopted by Massa-

The Massachusetts law recently struck down by the district court²⁶ prohibits “a state agency, . . . authority, the house of representatives or the state senate” from procuring goods and services from persons listed on a “restricted purchase list” maintained by the secretary of administrations and finance or who, though not on the restricted list, “is determined through an affidavit or . . . other reliable methods to meet the criteria for so being listed.”²⁷ All contracts made

chusetts and discussed below as a “new wrinkle” and without “parallel at either the state or federal level.” *Id.* at 821-22.

Many of the current state and local sanctions under discussion are of the type most commonly known as *procurement restrictions*, which “impose general prohibitions on the procurement of goods and services with a [foreign county] connection,” as opposed to *divestment restrictions*. Spiro, *supra* note 2, at 821. The latter were chosen for many of the anti-apartheid statutes; they required partial or full divestment of state- or municipally-managed funds and investments (*e.g.*, pension funds) from investments with South-Africa related firms. *See id.* at 819-22. The predecessor of the newest type of sanctions may have been a 1985 ordinance passed by the City of Pittsburgh, which

banned city purchases not only from business entities with South African operations, but also from corporations providing goods or services to American concerns connected with South Africa; that municipality, in other words, may no longer deal with such firms as IBM, Ford, Texaco, and Coca-Cola, nor with any of their suppliers.

Id. at 821-22 (citation omitted). Because the majority of the anti-apartheid divestment enactments were linked, however, to investment decisions for states’ and cities’ own accounts and finances – “an area of special state concern, and [one] without an explicit federal expression of preemptive intent,” *id.* at 849 – the few such divestment statutes challenged in court generally have been able to pass muster against preemption and constitutionally-based arguments. *See infra* notes 88-90 and accompanying text. As will be seen, contemporary procurement restrictions sweep more broadly.

26. *See supra* notes 10-11 and accompanying text. This was the first “selective purchasing law against Burma” to be enacted in the nation. Price & Hannah, *supra* note 12, at 449. Selective purchasing legislation currently pending before the New York State Assembly is closely modeled after Massachusetts’s Myanmar sanctions statute. *See* A.B. No. 9147, 221st Leg. Sess. (N.Y. 1998). New York City has adopted a comparable municipal ordinance directed at Myanmar. Price & Hannah, *supra* note 12, at 450-52. Many of the local ordinances in Massachusetts are likewise modeled after the state statute’s provisions. *See* NEWTON, MASS., REV. ORDINANCE §§ 2-208 to 2-209 (1997) [hereinafter NEWTON ORDINANCE]; QUINCY, MASS., MUN. CODE ch. 2.48.020 (1997) [hereinafter QUINCY ORDINANCE]; SOMERVILLE, MASS., PROPOSED ORDINANCE § 2-386 (1997) [hereinafter SOMERVILLE ORDINANCE]; *see also* An Act Related to State Investments in or Contracts with Companies Doing Business with Burma (Myanmar), H.B. 2960 75th Leg., Reg. Sess. (Tex. 1997) (adopting Massachusetts’s “doing business with” definition).

27. MASS. GEN. LAW ANN. ch. 7 § 22H (a) (West 1998 Supp.). The only exceptions are for “essential procurement,” *see id.* § 22H (b)(1) (1998 Supp.), or instances in which disqualification would result in inadequate competition. *See id.* § 22H (b)(2) (1998 Supp.). Humanitarian and news-gathering organizations are also exempt. *See id.* § 22H(e) (1998 Supp.) (exempting news and telecommunications providers) & § 22I (1998 Supp.) (exempting medical suppliers).

Leaving aside the overall constitutionality of Massachusetts’ statute, the creation of the restricted list itself raises significant due process concerns. Namely, the ability to have a person or business essentially face blacklisting, based on little more than the submission

in violation of these provisions are void.²⁸ Before awarding any procurement contract, the "awarding authority" is required to obtain a statement from the bidder, made under penalty of perjury, "declaring the nature and extent to which said person is engaging in activities which would subject [the bidder] to inclusion on the restricted purchase list."²⁹

The restricted purchase list, according to the statute, includes "the names of all persons currently doing business with Burma (Myanmar)."³⁰ Both the "persons"³¹ covered under the statute and the range of activities that qualify for "doing business with" Burma are defined quite broadly,³² as is the term of "the government of Burma (Myanmar)." The latter includes "any national corporation in which

of "an affidavit or . . . other reliable methods," *see id.* § 22H (a) (1998 Supp.), without being apparently afforded an opportunity for notice and challenge prior to being added to the restricted list, would seem to violate the most basic minimum requirements of procedural due process long required by the Supreme Court. *See, e.g.,* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (requiring minimum notice requirement of due process to be that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *see also* *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 106 (1963) (holding that the activities of the New York bar association's character and fitness committee in not providing a candidate with an opportunity to contest an adverse report was a deprivation of such candidate's right to procedural due process). According to the district court in *National Foreign Trade Council v. Baker*, a procedure existed under the Massachusetts statute by which a company could respond to a preliminary finding that it belonged on the restricted purchase list. *See National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 289 (D. Mass. 1998).

Also, while state and local sanctions like Massachusetts's statute are most passionately advocated by human rights activists, the evidentiary provisions of the Massachusetts statute may provide a curious and sinister example of the "politics makes strange bedfellows" adage. When one considers the persons and groups who may have the strongest motivation to turn in would-be violators of the statute, these may not necessarily be only idealistic activists. Disgruntled competitors may use the statute as a weapon in an attempt to disqualify their competitors for state procurement opportunities. The authors are indebted to Michael A. Gatje for this observation.

28. MASS. GEN. L. ANN. ch. 7 § 22L (1998 Supp.).

29. *Id.* § 22H (2)(c) (1998 Supp.).

30. *Id.* § 22J (a).

31. *See id.* § 22G (1998 Supp.).

32. "Doing business with the government of Burma (Myanmar)" is defined as:
(a) having a place of business, place of incorporation, 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 (Myanmar), including . . . direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;

Burma (Myanmar) has a financial interest or operational responsibilities.”³³ As a consequence, while no company had been formally excluded from bidding under Massachusetts’s statute by mid-1997, more than 150 foreign companies, including Honda, Nestle and Siemens, and over 40 U.S. companies, including Mobil and PepsiCo, were on that state’s restricted purchase list.³⁴

A similar bill targeting Nigeria, introduced in Maryland in 1997, was actively opposed by the U.S. State Department³⁵ and was ultimately defeated. This bill required all financial institutions used as state depositories to certify, in writing, that they had neither “direct loans” nor “foreknowledge of any indirect loans outstanding” to either a governmental unit or national corporation of Nigeria.³⁶ The bill imposed similar certification requirements on state contractors soliciting bids for jobs worth \$10,000 or more, who were required to certify “that the bidder . . . is not doing business with or in Nigeria or knowingly subcontracting with an entity that does so.”³⁷

The Rhode Island legislature is considering a similar investment measure. In its current form, this bill states that “no assets subject to investment by or otherwise under the jurisdiction of the state investment commission shall be invested in any security representing an equity interest in or a debt or other obligation in East Timor, Indonesia” and requires divestment of any such investment.³⁸ Virginia is considering banning state procurement of goods “produced or manufactured in whole or in part by forced or indentured labor under the penal sections of the People’s Republic of China.”³⁹ Berkeley, California’s ordinance requires companies with whom that city does business to certify that they would not even be *willing* to provide personal services or goods to the government of Nigeria, which, at least until the recent death of the despotic General Sani Abacha, was a favorite target of state and local governments.⁴⁰

(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. § 22G (1998 Supp.).

33. *Id.*

34. Spear, *supra* note 14.

35. See *supra* note 9 and accompanying text.

36. S. 354, 1998 Reg. Sess., § 1 (Md. 1998).

37. *Id.*

38. H. 6721, 1997-98 Leg., Jan. Sess. (R.I. 1997).

39. H. 1324, 1998 Sess. § 1(B)(4) (Va. 1998).

40. See BERKELEY, CAL., RES. NO. 5985-NS, § III.A [hereinafter BERKELEY ORDINANCE].

A Florida statute, enacted in 1992, which at first appears to be a throwback to the so-called "communist goods" ordinances of the 1960s that placed certain licensing and notice requirements on the import and sale of Eastern Bloc goods in various jurisdictions, puts a slightly different wrinkle in the latest sanctions legislation.⁴¹ In the Florida statute, no explicit procurement ban on sales to or from Cuba is imposed. The statute's practical effect, rather more subtly, is to discourage potential investments in certain companies or their affiliates if such a company or its affiliates "does business with the government of Cuba or with any person or affiliate located in Cuba."⁴² If a company, itself or through its affiliates, does business with any entity located in Cuba - not just the Cuban government - and if such company is engaged in a securities offering that does not meet exemptions from registration under federal or state laws,⁴³ the company must make various detailed disclosures in its securities prospectus as to the nature of its business dealings in Cuba.⁴⁴ Moreover, failure to comply with this requirement may subject the company in question to fines, injunctive relief, and a potential civil cause of action.⁴⁵

Notwithstanding the fact that federal legislation already prohibits most trading with Cuba⁴⁶ and that recent federal securities legislation has essentially preempted and gutted this statute (at least on a national stock exchange level),⁴⁷ the Florida statute is still an interesting counterpoint to the other pending or enacted sanctions statutes be-

41. For more on these early forerunners of the anti-apartheid and procurement sanctions of the 1980s and 1990s, see Richard B. Bilder, *East-West Trade Boycotts: A Study in Private, Labor Union, State, and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841, 862-923 (1970) (reviewing examples of state, local and labor union-inspired statutes, ordinances and boycotts directed against the Soviet Union, the People's Republic of China, Cuba and other communist regimes and the various legal challenges to such activities); Note, *Ordinances Restricting the Sale of "Communist Goods,"* 65 COLUM. L. REV. 310, 310-18 (1965) (finding the anti-communist goods ordinances to be flawed under Commerce Clause and federal preemption grounds and as being discriminatory against foreign commerce).

42. FLA. STAT. ANN. § 517.075(1) (West 1997). An additional series of administrative regulations promulgated by Florida's Securities Commissioner expands upon the statute's requirements. Fla. Rule 3E-900.001, cited in 1A Blue Sky L. Rep. (CCH) ¶ 17,531, at 13,447.

43. FLA. STAT. ANN. § 517.075(8) (West 1997).

44. *Id.* § 517.075(2).

45. *Id.* § 517.075(5)-.075(6).

46. See, e.g., 22 U.S.C.A. § 6005 (West 1998 Supp.) (imposing certain prohibitions on business transactions and banning "vessels carrying goods or passengers to or from Cuba" from entering any United States port); *id.* § 6032 (West 1998 Supp.) (regarding enforcement of the long-standing United States economic embargo against Cuba).

47. National Securities Markets Improvement Act of 1996, Pub. L. 104-290, § 102(a), 990 Stat. 3417 (1996) (codified as amended at 15 U.S.C.A. § 77r (West 1997)).

cause it indirectly shifts the onus from the state and places it squarely on the company. Simultaneously, the Florida statute strives to implement two of the same features often found in the more recent subnational sanctions legislation. While ostensibly enacted to sanction the Castro regime, it also subjects the U.S. company that does business directly or indirectly with Cuba to public scrutiny and “pariah” status, apparently hoping to discourage potential investors in Florida from buying such company’s stock as a matter of solidarity with the large anti-Castro community residing in that state. Furthermore, the statute, independently of longstanding federal sanctions, may implicitly function as Florida’s own foreign policy “big stick” with which to chastise the Castro regime as it forces potential stock issuers either to abandon their Cuban business activities or to undertake elaborate disclosures not required of other securities issues in Florida.

As is clear from these examples, these measures sweep broadly. Companies generally are prohibited from having any connection to the target country, direct or indirect, which can even reach company contracts with third parties who do business in target countries.⁴⁸ Even those measures that seek only to control where a state or local government deposits its money can potentially reach loans made by a financial institution to a company with ties to a target country.⁴⁹ While supporters of such measures would, no doubt, claim that such breadth is necessary to prevent companies from merely shunting forbidden business off to wholly-owned foreign subsidiaries, the state and local sanctions’ extraterritorial reach has ramifications for supporters’ assertions that such requirements are merely incidental to their participation in the market.⁵⁰

In the following sections, we examine the two main constitutional objections to the imposition of indirect sanctions by state and local governments on national governments and regimes with whose policies they disagree.

48. See generally notes 25, 30-31 and accompanying text.

49. See generally notes 25 & 38 and accompanying text. As one commentator has noted about the practical effects of the anti-apartheid divestment laws: “[T]he state and local sanctions are more than narrowly tailored laws designed to achieve purely local purposes. They are aimed at altering the international conduct of U.S. target companies as well as the behavior of the particular foreign governments.” Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 *Nw. J. INT’L L. & BUS.* 563, 579 (1993).

50. See *infra* notes 223-92 and accompanying text.

II. The Foreign Affairs Power

If there is one thing that all delegates to the Philadelphia Convention of 1787 could have agreed upon had a poll been taken, it would likely have been the necessity for national uniformity in the conduct of relations with other countries.⁵¹ The structure of the Constitution itself reflects this concern by restricting the ability of states to form alliances,⁵² make treaties,⁵³ wage war,⁵⁴ and tax commerce.⁵⁵ Even prominent Antifederalists conceded the propriety of federal regula-

51. See generally THE FEDERALIST, *supra* note 1, No. 22, at 131 (Alexander Hamilton):

In addition to the defects already enumerated in the existing Foederal [*sic*] system, there are others of not less importance which concur in rendering it altogether unfit for the administration of the affairs of the Union.

The want of a power to regulate commerce . . . has already operated as a bar to the formation of beneficial treaties with foreign powers, . . . and [n]o nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance to them, while they were apprised that the engagements on the part of the Union might at any moment be violated by its members

Id.; see also "Marcus" IV [James Iredell], Mar. 12, 1788, reprinted in 1 DEBATE ON THE CONSTITUTION 386-87 (Bernard Bailyn ed., 1993) (arguing that the ability to bring Great Britain to terms, and to extricate the State from "our present degrading commerce with that country," requires "a powerful [national] government, which can dictate conditions of advantage to ourselves") [hereinafter DEBATE]; Governor Edmund Randolph's Reasons for Not Signing the Constitution, Dec. 27, 1787, reprinted in 1 *id.* at 600 (criticizing the situation as to management of the nation's foreign affairs under the Articles of Confederation as being one of "thirteen distinct communities under no effective superintending controul [*sic*]"); Resolution of the Inhabitants of Pittsburgh, Nov. 17, 1787, reprinted in 1 *id.* at 324 (urging ratification of the Constitution to remedy "the weakness of Congress to take proper measures with the courts of Spain and Britain"); ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 111 (3d ed. 1963) ("By 1786, many, especially nationalists, thought the United States was a political failure. . . . A weak and helpless government was unable to defend its sovereignty against Britain, Spain, or the western Indians; Congressional foreign policy seemed equally ineffective."); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 26 (1996) ("[T]he most serious doubts about the adequacy of the Articles of Confederation arose over the inability of Congress to frame and implement satisfactory foreign policies. The emerging dilemmas of the mid-1780s . . . revealed . . . that Congress lacked the formal authority it needed to protect American commercial interests."); *id.* at 26-27 (describing the results of Congress' "[l]acking authority to regulate interstate or foreign commerce"); Schmahmann & Finch, *supra* note 15, at 190 n.56 ("One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased.")

52. See U.S. CONST. art. I, § 10, cl. 1.

53. See *id.*

54. See *id.* art. I, § 10, cl. 3.

55. See *id.* art. I, § 10, cl. 2.

tion of foreign affairs, including the uniform regulation of foreign commerce.⁵⁶

From the history that informed the drafting and ratification of the Constitution, as well as its structural provisions, the modern Supreme Court has inferred certain limitations on subnational power to conduct foreign affairs.⁵⁷ These restrictions bear directly on the question of whether the new round of state and local sanctions can be undertaken in harmony with the Constitution.⁵⁸ The cases in which the

56. See, e.g., Richard Henry Lee, Oct. 8, 1787, *reprinted in* THE ANTIFEDERALISTS 207 (Cecilia M. Kenyon ed., 1966) (“Let the general government[’s] powers extend exclusively to all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, Indian affairs, [and to] peace and war”); “Agrippa” [James Winthrop] IX, Dec. 28, 1787, *reprinted in* 1 DEBATE, *supra* note 51, at 629 (urging the amendment of the Articles to give Congress “a limited right to regulate our intercourse with foreign nations”); “Agrippa” [James Winthrop] XII, Jan. 14, 1788, *reprinted in id.* at 144 (“[T]he intercourse between us and foreign nations properly forms the department of Congress.”); see also JACKSON TURNER MAIN, THE ANTIFEDERALISTS 181 (1961) (“One power which most Antifederalists were willing to concede to Congress was control over commerce. . . . [T]here was only scattered objection [raised by the Antifederalists] to the commerce clause.”); “Agrippa” [James Winthrop] XVIII, Feb. 5, 1788, *reprinted in* 2 DEBATE, *supra* note 51, at 160 (urging defeat of the proposed Constitution, but proposing the passage of “an explicit resolve, defining the powers of Congress to regulate the intercourse between us and foreign nations”); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 27 (1981) (“The Antifederalists agreed with Publius [*i.e.*, James Madison] that ‘if we are to be one nation in any respect, it clearly ought to be in respect to other nations.’”).

This view appears to have been widely accepted at the time by most commentators on the Constitution and the federal system. As De Tocqueville noted some fifty years after ratification:

The people in themselves are only individuals; and the special reason why they need to be united under one government is that they may appear to advantage before foreigners. The exclusive right of making peace and war, of concluding treaties of commerce, raising armies, and equipping fleets, was therefore granted to the Union.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 120 (Henry Reeve trans. & Phillips Bradley ed., 1945).

57. While the powers to regulate foreign and interstate commerce are both constitutionally granted to Congress in similar wording, “there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.” JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW, § 4.2, at 125 n.2 (3d ed. 1986) (citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979)) (footnote omitted).

58. A student commentator in favor of state and local sanctions writes that because there is no *specific* prohibition on states exercising power in foreign affairs or in foreign commerce, the claim that federal power in these areas is exclusive must, of necessity, fail. See Carvajal, *supra* note 19, at 262 & n.31. This is constitutional literalism in the extreme. First, there *are* specific prohibitions on states’ foreign affairs powers. The Constitution prohibits states from burdening foreign commerce with “imposts and excises,” from engaging in acts of war, and from making treaties with other countries. See U.S. CONST. art. I, § 10, cls. 1-3. Second, even cursory attention to constitutional history demonstrates that

Supreme Court has articulated these limits are a logical point of departure for our discussion.

A. Supreme Court Limitations on States' Involvement in Foreign Affairs

In *Hines v. Davidowitz*,⁵⁹ decided in 1941, the Supreme Court struck down a Pennsylvania alien-registration statute that purported to "complement" less rigorous measures passed by Congress. Writing for the Court, Justice Black found the state scheme inconsistent with its federal counterpart, despite the lack of either an actual conflict between the two or of Congress's prohibition of analogous state action.⁶⁰ The statute, being "in a field which affects international relations, the one aspect of our own government that from the first has been most generally conceded imperatively to demand broad national authority," was deemed fundamentally different from other concurrent powers, like the power to tax.⁶¹ Therefore, "[a]ny concurrent state power that may exist is restricted to the narrowest of limits"⁶² The Court formulated the appropriate standard of review in such cases as being "whether, under the circumstances of this particular case [the statute] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶³ Noting that the limitations on aliens imposed by Congress were passed in the face of other, more restrictive congressional proposals akin to those passed

the necessity for uniformity in foreign affairs, including the regulation of foreign commerce, was recognized even by the Antifederalists. See *supra* notes 51, 56 and accompanying text. Third, such a literalist reading assumes no role for reasoning from both text and structure in constitutional interpretation. Under such an approach, the very values of federalism that the author thinks mandate respect for subnational sanctions would be under-protected because of the absence of a specific textual provision.

The author also cites Article III's provision that extends the Supreme Court's original jurisdiction to cases involving a state and its citizens and foreign states or its subjects, see U.S. CONST. art. III, § 2, as proof that states were intended to play a role in foreign affairs. See Carvajal, *supra* note 19, at 262-63. Actually, that example cuts the other way. The obvious reason for placing controversies between states and foreign governments within the Supreme Court's original jurisdiction seems to be that the Framers wished to ensure that such cases would be heard in a federal, not a state, judicial forum.

59. 312 U.S. 52 (1941).

60. See *id.* at 74. Cf. *id.* at 75 (Stone, J., dissenting) ("Assuming . . . that Congress could constitutionally set up an exclusive registration system for aliens, I think it has not done so and that it is not the province of the courts to do that which Congress has failed to do.").

61. *Id.* at 68.

62. *Id.*

63. *Id.* at 67.

by Pennsylvania, Justice Black concluded that Congress had intended to go only as far as it did, and Pennsylvania could thus go no further.⁶⁴

The strongest statement of the exclusivity of the foreign affairs power, however, came in *Zschernig v. Miller*,⁶⁵ a 1968 case in which the Supreme Court struck down an Oregon statute that prohibited aliens from inheriting from a decedent's estate where the country in which the alien resided (East Germany, in this case) did not allow reciprocal inheritance by foreign citizens. The decision was somewhat of a surprise since only twenty years before, in *Clark v. Allen*,⁶⁶ the Court had upheld a similar statute on the books in California. Justice Douglas, the author of *Clark*, reached the opposite conclusion in *Zschernig* without overruling his previous decision.

In *Clark*, a testator who died during World War II left property in a will to nonresident German aliens, who were barred under California law from taking under the will.⁶⁷ The California statute at issue stated that nonresident aliens could not take under a will unless citizens of the United States were entitled to take under the laws of descent and distribution of that country on the same terms as its citizens.⁶⁸

While much of the Court's opinion in *Clark* turned upon the effect of the war on various treaties signed with Germany and on the effect of the Federal Trading with the Enemy Act,⁶⁹ a challenge to the California statute was also made on that grounds that it "is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government."⁷⁰ For the Court, Justice Douglas rejected this challenge. "Rights of succession

64. *See id.* at 69-73. Fifteen years later, when Pennsylvania again attempted to supplement the enforcement of federal sedition laws with its own statute, the Court again ruled against the Commonwealth on grounds of federal preemption. *See Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The Court felt that the passage of a federal sedition statute precluded Pennsylvania from adopting complementary or supplemental legislation. Chief Justice Warren wrote that the state plan "touch[ed] a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude state laws on the same subject." *Id.* at 504 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (internal quotation marks omitted)). Allowing the statute to stand would "present[] a serious danger of conflict with the administration of the federal program." *Id.* at 505. For more on preemption in this context, see *infra* note 81.

65. 389 U.S. 429 (1968).

66. 331 U.S. 503 (1947).

67. *See id.* at 506 & n.1.

68. *See id.* at 506.

69. *See id.* at 507-16.

70. *Id.* at 516.

to property," he wrote, "are determined by local law."⁷¹ Since the action here was neither preempted by "different or conflicting arrangements" at the federal level, nor a forbidden negotiation with a foreign nation or the making of a compact with another country, California's statute did not "cross the forbidden line" despite the "incidental or indirect effect" the statute might have in other countries.⁷² However, twenty years later, in *Zschernig*, Douglas concluded that Oregon's statute had crossed that line.⁷³

The difference between the two cases, as explained by Justice Douglas, hinged on subsequent evidence that, in the administration of statutes like that passed in Oregon,

the probate courts of various states ha[d] launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.⁷⁴

Douglas concluded that Oregon's statute (and others like it) "in-escapab[ly] . . . affects international relations in a persistent and subtle way"⁷⁵ and had "great potential for disruption or embarrassment" to the United States foreign relations because of its search "for the 'democracy quotient' of a foreign regime."⁷⁶ The Court's previous decision in *Clark* did not sanction "[t]hat kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government"⁷⁷ and "not [to] local probate courts."⁷⁸ While acknowledging Oregon's statute was "not as gross an intrusion into the federal domain as . . . others might be[,] . . . it has a direct impact upon foreign relations and may well adversely affect the power" of the federal government.⁷⁹ If such restraints are to be imposed, Douglas concluded, "they must be provided by the Federal Government;" and not the executive, but the

71. *Id.* at 517.

72. *Id.*

73. *See Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

74. *Id.* at 433-34.

75. *Id.* at 440.

76. *Id.* at 435.

77. *Id.* at 436.

78. *Id.* at 437-38.

79. *Id.* at 441.

judicial, branch bears the ultimate burden as to whether such a measure is grossly intrusive into the foreign affairs power.⁸⁰

Supporters of subnational sanctions have interpreted Justice Douglas' refusal in *Zschernig* to overturn *Clark* explicitly and his focus on the potential impact the California statute had on foreign affairs to mean that as long as state organs do not hold hearings into a country's "democracy quotient," do not enact statutes that conflict with laws of Congress, and refrain from passing measures having other than an "incidental or indirect effect" in foreign countries, state and local sanctions do not encroach on federal power over foreign affairs so as to be preempted by federal law.⁸¹ One commentator writes that "implicit" in the Court's allowing *Clark* to stand is the view

80. *Id.* See also Price & Hannah, *supra* note 12, at 457.

81. See, e.g., Board of Trustees v. Mayor & City Council of Baltimore, 562 A.2d 720, 744-46 (Md. 1989); Jubinsky, *supra* note 2, at 570-72; Lewis, *supra* note 2, at 513-14 (suggesting ways state and local governments might navigate the shoals of *Zschernig*; concluding that "the divestment statutes ought to be outside the preemption doctrine as a matter of policy"). Given that legislation is pending currently before Congress, however, with respect to the imposition of sanctions on several regimes, including Nigeria's, see, e.g., S. 2102, 105th Cong. (1998); H.R. 3890, 105th Cong. (1998), the likelihood for state and local sanctions to come into conflict with congressional enactments, not to mention "[having] a direct impact upon foreign relations," is much greater, so that a stronger case may exist for federal preemption of the current wave of subnational sanctions. See *infra* notes 112, 120-22 & 165, and accompanying text. See also Schmahmann & Finch, *supra* note 15, at 202-03; Price & Hannah, *supra* note 12, at 472-78. One of the defenders of subnational sanctions devotes considerable effort to refuting Schmahmann and Finch's arguments for preemption. See Carvajal, *supra* note 19, at 256-66. We agree that there are stronger constitutional arguments for such recent subnational sanctions' invalidity.

The Supreme Court has been reluctant in recent years to find an implied intent to preempt state law, preferring as a rule to allow states to act in the absence of an explicit congressional intent to the contrary. See *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring) ("[w]e begin 'with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Silkwood v. Kerr-McGee, Corp.*, 464 U.S. 238 (1984); *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311, 317 (1988) (noting the Court's "extreme reluctance . . . to find preemption"). Professor Rotunda summarized the Court's attitude as follows: "Preemption exists if Congress clearly and explicitly provides for it by statute. Otherwise, if it is possible for the party to comply both with the federal law and the state regulation—if such dual compliance is not 'physically impossible'—then the Court is unlikely to find preemption." *Id.* But see *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986) (finding state debarment statute aimed at repeat violators of the National Labor Relations Act to be preempted by an "integrated scheme of regulation" created by Congress").

Because, as Schmahmann and Finch admit, congressional legislation with regards to sanctions against Myanmar "is silent as to its preemptive effect," Schmahmann & Finch, *supra* note 15, at 184, we doubt that a court would imply preemption to invalidate state and

that states are permitted to enact laws that clearly pass moral judgment over foreign nations, but states may not indulge in detailed inquiries into their affairs. As long as states avoid this overly intrusive inquiry, the Court is suggesting that they will be allowed to pass moral legislation in foreign relations.⁸²

On the contrary, despite allowing *Clark* to stand, Justice Douglas seemed to recognize that laws like that challenged in *Clark* invite detailed inquiries about "democracy quotients" in other countries, which cannot not be permitted because of the potential for mischief in the conduct of foreign policy.⁸³ Moreover, as detailed below, many of

local sanctions. This is especially true given the availability of stronger constitutional arguments for invalidation. Of course, the Supreme Court has, in the past, used preemption as a "preferential ground" for avoiding decisions on more substantive constitutional grounds, like the dormant Commerce Clause doctrine. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Campbell v. Hussey*, 368 U.S. 297 (1961); see generally Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 *STAN. L. REV.* 208 (1959).

The author of the Stanford note cites examples in which the Court invalidated state measures "despite the fact that none of the interpretive sources revealed a federal policy which required . . . invalidation" and concluding that the "Court bases its decision on preemption ground[s] in order to avoid reaching some other constitutional question." *Id.* at 210. Many of the cases the author cited involved the Court's "use [of] essentially the same reasoning process in cases nominally hinging on pre-emption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce." *Id.* at 219-20. It is not difficult to imagine a scenario in which the Supreme Court, unwilling to issue an opinion on the limits of federalism in foreign affairs, simply concludes that Congress either intended to preempt state action, or much as it did in *Davidowitz*, concludes that legislation with regard to certain countries "occupied the field," leaving no room for parallel state measures.

In fact, the court in *Baker* rejected the National Foreign Trade Council's preemption argument. Noting that the "[p]laintiff's burden is particularly heavy because . . . implied, rather than express preemption [is argued]," the court found that evidence of Congress' intent to impose unilateral sanctions on Myanmar "does not establish sufficient actual conflict for this court to find implied preemption." *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998).

82. Carvajal, *supra* note 19, at 268.

83. Carvajal also suggests that *Zschernig's* concern that only the federal government conduct foreign policy should be read against, and limited by, a Cold War backdrop. See Carvajal, *supra* note 19, at 267-68; see also *id.* at 269: "In today's global context, nations are no longer tenuously balanced on the verge of world war. . . . Thus, state and local selective-purchasing laws should not be treated as if they function in a hostile international context where every political move is understood in reference to an ongoing or potential war." This statement is a non sequitur. Concerns with state conduct of foreign policy predated the Cold War, and the prevention of wars does not exhaust the reasons why having states pursue separate foreign policies independently from the federal government is a bad idea. It is worth noting, though, that wars have certainly begun over "mere" commercial disagreements. The War of 1812 resulted, in part, from British interference with American shipping, and a *de facto* war was waged between the Jefferson administration and France some ten years previously, again largely originating over commercial issues. As a more recent example, it has been suggested that the Japanese attack on Pearl Harbor was partly a reaction to embargoes on raw materials imposed on that nation for its military adventures in the Far East. See generally RONALD H. SPECTOR, *EAGLE AGAINST*

these sanctions do entail “detailed inquiries into [foreign countries] affairs,”⁸⁴ to the degree that city commissions have even arrogated to themselves the power to determine whether democracy has been restored in a particular country.⁸⁵

Nevertheless, courts and commentators have cited *Zschernig*'s refusal to overrule *Clark* as evidence of the Supreme Court's desire to apply the *Zschernig* rule sparingly. For example, in 1989 the Maryland Court of Appeal upheld a Baltimore municipal ordinance requiring that city's pension fund to divest itself of holdings in companies doing business in South Africa.⁸⁶ The court distinguished *Zschernig* on the grounds that, in that case, the Supreme Court had merely “circumscribe[d], but apparently . . . not eliminate[d] a state's ability under certain circumstances to take actions involving substantive judgments about foreign nations.”⁸⁷ The court held that the effect on relations between the United States and South Africa would be “minimal and indirect” and cited *Clark* for the proposition that “[a] state or local law is not invalid if it has only ‘some incidental or indirect effect in foreign countries.’”⁸⁸

B. Lower Courts and the Foreign Affairs Power

Other courts have not interpreted *Zschernig* so liberally. The year after the Supreme Court decided *Zschernig*, the California Court of Appeal invalidated that state's “Buy American” statute, which prohibited the procurement of foreign goods for use by the State.⁸⁹ Starting from the premise that “[f]or national purposes, embracing our

THE SUN: THE AMERICAN WAR WITH JAPAN, 68-69, 75-78 (1985). At the very least, sanctions by states can create ill-will within the target countries against not just an individual state, but the entire country. See *infra* notes 112-14 and accompanying text (describing actions by certain Swiss retailers in retaliation for state and local sanctions on Swiss banks prior to the Holocaust settlement).

84. Carvajal, *supra* note 19, at 268.

85. See *infra* notes 99-107 and accompanying text.

86. Board of Trustees v. Mayor & City Council of Baltimore, 562 A.2d 720 (Md. 1989).

87. *Id.* at 746.

88. *Id.* at 747 (quoting *Clark v. Allen*, 331 U.S. at 517), 749. The court relied on a secondary source (a student note) for the rather conclusory proposition that state divestment “in a corporation doing business in South Africa . . . has [no] immediate effect on foreign relations between South Africa and the United States.” *Id.* (quoting Jubinsky, *supra* note 2, at 574).

89. See *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800 (Ct. App. 1969).

relations with foreign nations, we are but one people, one nation, one power,'"⁹⁰ the California Court of Appeals concluded that

[t]he California Buy American Act, in effectively placing an embargo on foreign products, amounts to a usurpation by this state of the power of the federal government to conduct foreign trade policy. That there are countervailing state policies which are served by the retention of such an act is "wholly irrelevant to judiciary inquiry"⁹¹

"Foreign trade," the court continued, "is properly a subject of national concern, not state regulation. State regulation can only impede, not foster, national trade policies. The problems of trade expansion or non-expansion are national in scope, and properly should be national in scope in their resolution."⁹²

The California court concluded by raising the specter of foreign retaliation against the entire nation because of the actions of a single state, echoing Alexander Hamilton's warning in *The Federalist No. 80* that "the peace of the WHOLE ought not to be left at the discretion of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."⁹³ The court reasoned that California's legislation "may bear a particular onus to foreign nations since it may appear to be the product of selfish provincialism, rather than as an instrument of justifiable policy. It is a type of protectionism which invites retaliatory action on our own trade."⁹⁴ The California Court of Appeal thus regarded the possibility of such a disruption as sufficient to overcome whatever benevolent state policies motivated the statute's enactment. If the federal government decided to institute a "Buy American" policy or erect barriers to the importation of foreign goods, it could do so, but such actions could not be unilaterally undertaken by individual states.

Likewise, in 1986, the Illinois Supreme Court invalidated a state anti-apartheid measure on similar grounds.⁹⁵ The Illinois high court

90. *Id.* at 802 (quoting 2 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES § 206 (1963)).

91. *Id.* at 803 (quoting *United States v. Pink*, 315 U.S. 203, 233 (1942)).

92. *Id.* at 803.

93. THE FEDERALIST, *supra* note 1, No. 80, at 517 (Alexander Hamilton).

94. *Bethlehem Steel Corp.*, 80 Cal. Rptr. at 805.

95. *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (striking down Illinois law creating exemptions from state taxes for coins and currency issued by the United States and foreign countries, except South Africa); *see also* *New York Times Co. v. New York Comm'n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980) (overturning decision by University of New Mexico Board of Regents to exclude Iranian students from that university

struck down a discriminatory tax on the sales of South African gold coins (Krugerrands), concluding that (i) “the exclusion’s sole motivation is disapproval of a nation’s policies”; (ii) “the exclusion is targeted at a single foreign nation”; and (iii) “the practical effect of the exclusion is to impose, or at least encourage an economic boycott.”⁹⁶ It concluded that measures “which amount to embargoes or boycotts are outside the realm of permissible State activity.”⁹⁷

The cases in this area of constitutional jurisprudence seem to stand for the following propositions. First, foreign affairs are the primary, if not the exclusive, domain of the federal government. Second, though the States in the enforcement of their laws will occasionally touch on or indirectly affect foreign affairs, the States have little, if any, concurrent power to regulate foreign affairs directly, in the same way that they may exercise concurrent powers, like that of taxation. Third, any power that *may* exist is to be interpreted in the narrowest possible manner, and courts may preclude state action even in the absence of an express congressional prohibition or an explicit conflict between a state enactment and a federal statute relating to foreign

in retaliation for the taking of American hostages in Tehran; action precluded in part by authority the Constitution gives to the federal government in matters of foreign affairs). *But see* General Elec. Co. v. New York State Assembly Comm. on Govt'l Operations, 425 F. Supp. 909 (N.D.N.Y. 1975) (holding that federal government’s power over foreign affairs did not preempt state legislature’s subpoena of materials relating to alleged “Arab boycott” carried on by plaintiff).

In *New York Times Co.*, the New York Court of Appeals affirmed the lower court’s reversal of a decision of New York City’s Commission on Human Rights that found the New York Times Corporation violated the City’s antidiscrimination laws by publishing advertisements for employment opportunities in South Africa. 361 N.E.2d at 969. “The reality is that complainants seek to impose an economic boycott aimed at the present government of the Republic South Africa. . . . [W]e would conclude that a city agency was without jurisdiction to make and enforce its own foreign policy.” *Id.* at 968. “The peace and security of the United States,” the court continued, “has not been left to the whim of but one State whose actions would have consequences, perhaps dire, for all the States. The Federal Government represents the collective interests of all the States” *Id.*

The court also noted the danger that the proliferation of these sorts of measures posed to the formation of a coherent, national foreign policy:

The true danger is that if New York City could do this in one instance, it could do so in many instances. . . . This would be disastrous, not only because of multiplicity and divergence of policies, but because local decisions are often influenced by pragmatic local considerations which are not necessarily controlling or even relevant to national policy

Id. at 969.

96. *Springfield Rare Coin Galleries, Inc.*, 503 N.E.2d at 307.

97. *Id.*; see also Price and Hannah, *supra* note 12, at 467-68; Fenton, *supra* note 49, at 567 (noting that congressional enactment in 1977 of the Export Administration Act, 50 U.S.C. app. § 2407(c) (1988), “expressly preempted these state laws” as to restrictive trade practices or boycotts).

affairs. Fourth, even statutes that have only an incidental or speculative affect on foreign affairs may be invalidated, especially if they involve the search for Justice Douglas' "democracy quotient," *viz.*, subnational governmental inquiries into forms of national government and judgments about the policies of those national governments towards their own citizens.⁹⁸

C. State and Local Sanctions and the Foreign Affairs Power

The differences between the statute in *Clark*, on the one hand, and the state and local sanctions like those of Massachusetts, on the other, are significant enough for a court to conclude that a state has crossed *Zschernig's* "forbidden line" in its enactment of sanctions legislation. First, Douglas stressed in *Zschernig* that probate courts had begun to make detailed inquiries into the forms of government of various countries, and whether the assurances of foreign consuls and ministers could be taken as truthful by the court. In *Clark*, however, the Court seemed to conclude that the California statute was applied relatively evenhandedly, without any particularized inquiry into a foreign government's ideology.⁹⁹

In stark contrast, many sanctions contain lengthy preambles replete with references to the shortcomings of particular regimes.¹⁰⁰ Proposed resolutions submitted to the town of Brookline, Massachusetts condemned Myanmar's use of "institutionalized torture and rape as political instruments"; its policy of "forcible relocation, forced labor and slavery, . . . persecution of ethnic minorities"; and its denial "to the people of Burma the right to participate in the political process,

98. See *supra* note 76; see also NOWAK, ROTUNDA & YOUNG, *supra* note 57, § 4.2, at 125 (listing Article I, § 10's prohibitions on states' actions and concluding, "Thus it can be safely asserted that there was *no* constitutional recognition of any 'reserved powers' of the states to act in these areas.") (emphasis added).

99. Similarly, a Pennsylvania "Buy American" statute was upheld by the Third Circuit Court of Appeals because of a similar facial neutrality. See *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990). In his opinion, Judge Louis Pollak emphasized this fact: "Pennsylvania's statute provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes. On its face the statute applies to steel from any foreign source, without respect to whether the source country might be considered friend or foe." *Id.* at 913. Judge Pollak upheld the statute in light of *Zschernig* in part because of his determination (backed only by the strength of his own authority and reasoning) that "[s]tate procurement practices present no problems reconciling conflicting policy among multiple national sovereigns." *Id.* at 912.

100. Compare S. 354, 1998 Reg. Sess. preamble (Md. 1998) (chronicling various anti-democratic actions taken by the late General Sani Abacha's regime) with S. 2102, 105th Cong. § 2 (1998) and H.R. 3890, 105th Cong. § 2 (1998) (similarly reciting Senate and House findings, respectively, as to anti-democratic actions of the same Nigerian regime).

the right to benefit from a fair and equitable system of justice and the right to exercise fairly their economic rights.”¹⁰¹ Maryland’s proposed sanctions against Nigeria stated that it “cannot, and will not, condone or overlook the denial of democratic civilian rule, against the clear wishes of the Nigerian people” and pledged “support [for] the Nigerian people in their commitment to unity and democracy”¹⁰² In the preamble to its sanctions ordinance against Myanmar, Los Angeles condemns the State Law and Order Restoration Committee (SLORC) regime as being in violation of “international law and morally repugnant to the citizens of Los Angeles.”¹⁰³ In other sanctions proposed against Nigeria, the City of Berkeley, California premised its right to sanction the country on the fact that its citizens “believ[e] that their quality of life is diminished when peace and justice are not fully present in the world”¹⁰⁴

Thus, the current wave of state and local sanctions are largely, if not wholly, predicated on a determination about the relative wholesomeness of a particular country’s form of government. They are not therefore evenhanded, as they apply only to companies that trade with specific countries – albeit ones with exceedingly reprehensible regimes, by almost anyone’s standards of human rights and political development – whose governments, in turn, fail to achieve a state-mandated “democracy quotient.” The present state and local sanctions, if anything, involve a more particularized inquiry because they target specific countries, instead of all countries that share a particular democratic deficiency; such as having no form of participatory democracy, lacking freedom of speech guarantees, practicing torture or other cruel and inhuman penal measures, or lacking guarantees of trial by jury in criminal cases, to name some examples.¹⁰⁵ Further, several of

101. Proposed Resolutions, Brookline, Mass., at 18-1 (unpublished and undated resolutions, on file with authors).

102. An Act Concerning State Finance and Procurement—Sanctions Against Nigeria, S. 354, 1998 Reg. Sess. preamble (Md. 1998); see also ALAMEDA CO., CAL., ORDINANCE No. 0-98-27, at § 4.36.010 (1997) (declaring that a democratic transition plan in Nigeria was “unacceptable because opposition groups were not consulted”) [hereinafter ALAMEDA CO. ORDINANCE].

103. Proposed Ordinance on Burma for the City of Los Angeles, preamble (rev. draft, June 4, 1997) [hereinafter Los Angeles Ordinance]; see also *id.* (condemning the ruling regime for denying “the majority of the population the right to participate in the political process, to benefit from a system of justice, or to enjoy fundamental, generally accepted economic and environmental rights”).

104. BERKELEY ORDINANCE, *supra* note 40, preamble.

105. We think it makes no difference that the state organs making the inquiry in *Clark* and *Zschernig* were courts and that legislative bodies are making these inquiries in contemporary examples of state and local sanctions. If states in general should be restrained from

the proposed sanctions leave it solely to the discretion of a local governmental entity to decide when democracy or democratic rights have been restored in a targeted country.¹⁰⁶

Second, it is difficult to square the intended effect of these sanctions¹⁰⁷ — to deprive target countries of capital equipment, financial resources, technology, and consulting services — with claims that their effect will be “incidental or indirect.” If a state or local government wishes to make a symbolic gesture, why not pass a non-binding resolution denouncing a target nation’s activities? Or why not petition Congress or the President for a change in United States policy towards such nations?¹⁰⁸ In any event, gauging the effect that these sanctions might have on relations with a particular country hardly seems an ap-

interfering with the federal government’s foreign affairs power, it is immaterial from which branch of government the encroachment comes. *See* Lewis, *supra* note 2, at 514 & n.233; *see also* United States v. Pink, 315 U.S. 203 (1942) (holding actions of New York State court, in refusing to recognize the Soviet regime, and the State of New York’s refusal to enforce an executive agreement between the federal government and the Soviet Union, to be invalid).

106. *See, e.g.*, BERKELEY ORDINANCE, *supra* note 40, at § XI (policy to remain in effect “until the City Council determines that the people of Nigeria have become self-governing”); NEWTON ORDINANCE, *supra* note 26, at § 2-209 (“This ordinance shall remain in effect . . . until the board of aldermen shall determine that Burma has restored democratic rights.”); SOMERVILLE ORDINANCE, *supra* note 26 at § 2-387 (“This ordinance shall remain in effect . . . until the board of aldermen shall determine that Burma has restored democratic rights.”); *see also* ALAMEDA CO. ORDINANCE, *supra* note 102, at § 4.36.110 (“This ordinance shall remain in effect from the established effective date until democratic rights are restored in Nigeria.”); OAKLAND, CAL., ORDINANCE No. 11886, § X [hereinafter OAKLAND ORDINANCE].

As the Supreme Court has noted, however, when considering the purpose of an ordinance or statute at issue, a reviewing court will not be bound by the name, description or legislative purpose expressed in the disputed enactment. *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 106 (1992); *see also* Price & Hannah, *supra* note 12, at 460-61.

107. *See, e.g.*, Associated Press, *States Dictate Own Foreign Policy*, Apr. 13, 1998, available in LEXIS, News library, Curnws file, at 1 (quoting Mass. Rep. Byron Rushing, author of Massachusetts’ legislation presently under challenge: “We showed there was support at the grass-roots level for action against Burma . . . to advance the cause of human rights”); Greenberger, *supra* note 9, at A20 (quoting Rep. Rushing to similar effect); Iritani, *supra* note 11, at D2 (quoting Massachusetts’s Attorney General Harshbarger); Schmahmann & Finch, *supra* note 15, at 197 & nn.100-05 (citing local lawmakers and preambles of several cities’ sanctions ordinances, providing the purported justifications for such ordinances).

108. *See, e.g.*, An Act to Denounce the Heroin Traffic Trade from the Union of Myanmar, Formerly Burma, and to Request Companies Presently Doing Business with the State of North Carolina and Also Doing Business in the Union of Myanmar to Withdraw Their Operations from the Union of Myanmar in Support of the Democracy Movement in the Union of Myanmar, S. 1067, 1997 Sess. (N.C. 1997); H. 6614, Jan. 1997 Sess. (R.I. 1997) (requesting that Congress sanction Indonesia for its occupation of East Timor).

propriate job for the courts, even federal courts.¹⁰⁹ Worse, many supporters of state and local sanctions argue that while they unquestionably intrude to some extent on foreign affairs, the slight effect on relations with target countries should be balanced against the State's interest in expressing moral outrage at social injustice around the world.¹¹⁰ Both sets of values are hardly commensurate. Asking a court to make those sorts of *ad hoc* determinations brings to mind Justice Scalia's trenchant observation that compares such endeavors to "judging whether a particular line is longer than a particular rock is heavy."¹¹¹

Nor is there any evidence that the effect of subnational sanctions on the relations between the United States and target countries is merely incidental or minimal. Recent events in Switzerland confirm Alexander Hamilton's prophecy that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members."¹¹² According to the *New York Times* and the Under Secretary of State for Economic Affairs Stuart Eizenstat, proposed sanctions by states and municipalities against Switzerland "engendered anti-Americanism in Switzerland"¹¹³ A major Swiss retailer as a result "ban[ned] four American products: sweet corn, California wine and two brands of whisky, Jack Daniels and Four Roses."¹¹⁴ It is worth noting that, with the exception of the California wine, none of those products is produced in a state that had threatened to sanction Switzerland over

109. See Spiro, *supra* note 2, at 824 (noting the difficulty of "precise measurement of the ways and extent that these measures have contributed to . . . decline" in relations among the United States and South Africa during its apartheid era).

110. See Lewis, *supra* note 2, at 491, 515, 517; Jubinsky, *supra* note 2, at 574-75.

111. *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 889, 897 (1988) (Scalia, J., concurring) (criticizing the Supreme Court's customary balancing methodology in its dormant Commerce Clause jurisprudence).

112. THE FEDERALIST, *supra* note 1, No. 80, at 517 (Alexander Hamilton); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228-29 (Johnson, J., concurring) ("Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them") (emphasis added).

113. Sanger, *supra* note 9, at B2. To pressure the Swiss to increase the amount offered to settle the controversy over bank accounts of Holocaust victims, New York City, New York State, New Jersey, Pennsylvania, and Florida threatened Swiss banks with sanctions, over the objections of the Clinton Administration. See, e.g., *Sanctions Would Harm Everyone, Swiss Say: Threat Over Bank Claims Spur Plea to Back Off*, CHI. TRIB., July 29, 1998, available at 1998 WL 2880386. With the \$1.25 billion settlement agreement reached in August 1998 between Holocaust survivors and Swiss banks, state officials in New York, California, and Pennsylvania have since indicated that their states will lift any existing sanctions against the Swiss and cancel any planned but unexecuted sanctions. Amy Waldman, *Holocaust Accord Ends Sanctions*, N.Y. TIMES, Aug. 14, 1998, at A8.

114. Sanger, *supra* note 9, at B2.

the claims of Holocaust survivors.¹¹⁵ Similarly, Japan and the European Union initiated dispute settlement proceedings in 1997 before the World Trade Organization in response to Massachusetts' passage of its Myanmar sanctions.¹¹⁶

To the extent that Justice Douglas intended to establish a standard that allowed for subnational forays into foreign affairs that are futile or have only a limited effect, resulting in a statute's constitutionality turning on judicial determinations of degree, we think that Justices Stewart and Brennan provided a better standard in their *Zschernig* concurrence. The degree of harm potentially caused by such measures, Justice Stewart wrote, is not as important as "the basic allocation of power between the States and the Nation."¹¹⁷ If permitted, statutes like the one invalidated in *Zschernig* "launch the State upon a prohibited voyage into a domain of exclusively federal competence."¹¹⁸

The patchwork of sanctions imposed by "50 separate State Departments"¹¹⁹ are, in practical effect, much like boycotts and embargoes against the target countries that are their subjects, in that their ultimate aim is to deny state and local citizens the ability to engage in commerce with the sanctioned countries.¹²⁰ History, structure, and the Supreme Court's own doctrine suggest that the Framers declined to give the states a limited power to impose embargoes on other countries because the imposition of embargoes was a matter for the central government to undertake.¹²¹ Furthermore, the only rationale that prevented an explicit prohibition from being placed in the Constitu-

115. This indiscriminate retaliation calls into question the notion that in an increasingly sophisticated globalized view, foreign sovereigns faced with sanctions from a particular sub-national unit will merely target that unit for reciprocal retaliation. *See, e.g.,* Spiro, *supra* note 19, at 25.

116. Price & Hannah, *supra* note 12, at 445 nn.7-10 & 463 nn. 126-28.

117. *Zschernig v. Miller*, 389 U.S. 429, 443 (Stewart, J., concurring).

118. *Id.* at 442 (Stewart, J., concurring).

119. *See* Spear, *supra* note 14.

120. *See* Price & Hannah, *supra* note 14, at 499 (reasoning that state and local sanctions are essentially "secondary boycotts implemented through the coercive exercise of sovereign economic power").

121. Notes from the Committee of Detail indicate that such a power was, at one point, sought to be reserved for the States in early drafts, but it did not survive to be ratified. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135 (Max Farrand ed., rev. ed. 1966) (Committee of Detail, III: "Each State may lay Embargoes in Time of Scarcity.") [hereinafter RECORDS]. As ratified, the Constitution's explicit provisions against states' actions relate to the imposition of duties of tonnage, keeping of troops or warships in peacetime, entrance into agreements or compacts with other states or foreign countries or engaging in war without Congress' consent, "unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. CONST. art I. § 10, cl. 3.

tion itself was that the States may need to impose an embargo in time of scarcity precipitated by war, if Congress has not had time to act.¹²² However, such a contingency would rarely occur in an age when Congress sits virtually year-round. This factor, when combined with the affirmative restrictions that did end up in the Constitution¹²³ and the long-standing prohibition against interstate embargoes enforced through the application of the dormant Commerce Clause doctrine,¹²⁴ militate against allowing subnational entities such sweeping powers.

Moreover, despite the lack of any congressional action that has yet become law, parallel measures are under consideration;¹²⁵ measures that, if they become law, might by implication foreclose “complementary” state and local sanctions *à la Davidowitz*.¹²⁶ Furthermore, the state and local sanctions are being passed against a backdrop of continued debate between the executive branch and Congress as to the appropriateness and efficacy of unilateral sanctions,¹²⁷ and in the

122. See 2 RECORDS, *supra* note 121, at 440-41:

Mr. Madison moved to insert after the word “reprisal” (art. XII) the words “nor lay embargoes.” He urged that such acts [by the States] would be unnecessary—impolitic—& unjust—

Mr. Sherman thought the States ought to retain this power in order to prevent suffering & injury to their poor.

Col. Mason thought the amendment would be not only improper but dangerous, as the Genl. Legislature would not sit constantly and therefore could not interpose at the necessary moments— He enforced his objection by appealing to the necessity of sudden embargoes during the war, to prevent exports, particularly in the case of a blockade—

Mr[.] Govr. Morris considered the provision as unnecessary; the power of regulating trade between State & State, already vested in the Genl—Legislature, being sufficient.

On the question

. . . [Ayes—3; noes—8.]

See also NOWAK, ROTUNDA & YOUNG, *supra* note 57, § 8.9, at 282-83 (discussing generally the prohibitions against the interstate impositions of embargoes).

123. See *supra* notes 16-18 and accompanying text.

124. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and cases discussed therein.

125. See, e.g., S. 2102, 105th Cong. (1998); H.R. 3890, 105th Cong. (1998) (pending legislation providing for sanctions against the Nigerian government). Cf. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166, 3009-167 (1996) (imposing a fairly narrow range of sanctions on Myanmar regime), and Price & Hannah, *supra* note 12, at 452-53.

126. See *supra* notes 59-64 and accompanying text. But see *supra* note 81 (discussing Supreme Court’s recent reluctance to imply preemption).

127. It is also somewhat ironic that subnational-level sanctions are blossoming at a time when unilateral federal sanctions are themselves being increasingly subjected to criticism from various commentators, including the President and members of the House and Senate. See Eric Schmitt, *U.S. Backs Off Sanctions, Seeing Poor Effect Abroad*, N.Y. TIMES, July 31, 1998, at A6. In 1997, the President’s Export Council reported that 75 nations, “home to more than 50% of the world’s people,” were already subject to unilateral U.S.

face of various public objections and the objections of the State De-

sanctions: "Included were not just traditional pariah states like Iraq, Libya and Burma [Myanmar], but such NATO allies as Canada and Italy as well as Japan . . ." *The Negative Cost of Sanctions*, L.A. TIMES, May 22, 1998, at B-8. U.S. exports to all such sanctioned countries approximated \$94 billion in 1996, but with a concomitant loss of some 250,000 U.S. jobs attributed to the imposition of such sanctions. *See id.*

While unilateral sanctions have begun to meet criticism from a variety of sources besides trade groups and members of Congress, President Clinton admitted in April 1998 that automatic unilateral sanctions laws at the federal level have hamstrung the executive branch to such a degree that "it puts enormous pressure on whoever is in [that branch] to fudge on evaluation of the facts of what is going on," in order to retain even a modicum of flexibility for appropriate reactions. *See, e.g.,* Michael Kelly, *Foreign Affairs Fudge Factor*, WASH. POST, May 6, 1998, at A19. In the light of the mounting crisis over India's and Pakistan's atomic bomb tests in late spring 1998, which occurred just weeks after the President's exceptionally candid admission (and which triggered mandatory unilateral sanctions under federal nuclear non-proliferation statutes) the President's comments seemed prescient. This is especially so in light of numerous further criticisms from U.S. and international foreign policy experts to the effect that the unilateral federal sanctions imposed against both countries did little to lessen tensions or provide a substantial deterrent to the further development of both nations' nuclear arsenals. *See, e.g.,* Kelly, *supra* at A19; Schmitt, *supra*, at A1, A6; Elaine Sciolino, *Clinton Argues for "Flexibility" Over Sanctions*, N.Y. TIMES, Apr. 28, 1998, at A1, A6; *Albright Criticizes U.S. Sanctions*, Associated Press, June 15, 1998; *Experts: India Sanctions May Fail*, Associated Press, June 19, 1998, available in LEXIS, News library, Curnws file.

As to critiques of the effectiveness (or lack thereof) of unilateral sanctions in general, for reasons varying from the economic deficiencies of such sanctions to their harming the "rogue" nation's own oppressed citizens (through lack of adequate medical care, as in Iraq and Cuba), see, *e.g.,* Daniel Schorr, *Sanctions: A Primitive Tool*, CHRISTIAN SCI. MONITOR, June 19, 1998, at 15; Kenneth Rodman, *Fudging Sanctions*, J. COM., June 23, 1998, at 8A; Michael S. Lelyveld, *Sanctions Only Bite With Global Teeth*, J. COM., June 23, 1998, at 1A; Richard N. Haass, *Sanctioning Madness*, FOREIGN AFFS., Nov.-Dec. 1997, at 74; Richard N. Haass, *Sanctions Almost Never Work*, WALL ST. J., June 19, 1998, at A14; and Thomas Omestad, *Addicted to Sanctions*, U.S. NEWS & WORLD REP., June 15, 1998, at 30-31.

Suffice it to say that the issue of the effectiveness of unilateral sanctions far exceeds the scope of this article. For a more comprehensive treatment of sanctions and their pros and cons in general, see the two-volume treatise GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOTT, *ECONOMY SANCTIONS RECONSIDERED* (2d ed. 1990). *See also* Malan Testimony, *supra* note 10, at 2-4; O'Quinn, *supra* note 16; David A. Koplow & Philip G. Schrag, *Carrying a Big Carrot: Linking Multilateral Disarmament and Development Assistance*, 91 COLUM. L. REV. 993 (1991) (advocating development aid as a "carrot" in lieu of solely using sanctions as the "stick" of foreign policy).

In light of the various challenges to the efficacy of unilateral sanctions, Senator Richard Lugar and Representative Lee Hamilton have called for a bipartisan effort to reform the federal sanctions regimes "by subjecting them to sunset reviews and cost-benefit analyses" and by advocating multilateral sanctions over unilateral ones. Stephen Lamar, *A Sanctions Epidemic*, WASH. TIMES, May 26, 1998, at A19; Schorr, *supra*, at 15. In November 1997, Senator Lugar sponsored legislation, still pending at the date of this article, to foster reform of the federal sanctions schemes. *See* Enhancement of Trade, Security and Human Rights Through Sanctions Reform Act, S. 1413, 105th Cong., 1st Sess. (1997).

partment.¹²⁸ Instead of trying to adduce judicially-manageable standards establishing whatever *de minimis* exception to the prohibition on state interference in foreign affairs that *Zschernig* may have left intact, courts ought to acknowledge that “simplicity has its virtues”¹²⁹ and employ a bright-line rule against state and local action.

D. *National Foreign Trade Council v. Baker*

On November 4, 1998, a federal district court struck down Massachusetts’ procurement law, holding that it violated the foreign affairs power.¹³⁰ After disposing of a challenge to the plaintiffs’ standing,¹³¹ the court held that (i) “the Framers’ inten[ded] to vest plenary power over foreign affairs in the federal government”;¹³² (ii) that the foreign affairs power “is not shared by the States . . .”;¹³³ and (iii) that under the court’s reading of *Zschernig*, the Massachusetts law “is an unconstitutional infringement on the federal government’s power over foreign affairs.”¹³⁴

The court noted that Massachusetts “concedes that the statute was enacted solely to sanction Myanmar for human rights violations and to change Myanmar’s domestic policies.”¹³⁵ It further found sufficient evidence of the “disruptive impact [of the law] on foreign relations,” citing amicus briefs from the European Union, Japan, and the Association of the South East Asian Nations.¹³⁶

The court then expressly rejected two of four arguments advanced by Massachusetts.¹³⁷ First, the court rejected attempts by the state to analogize its statute to other divestment and procurement

128. See *supra* notes 9 and 35 and accompanying text (noting State Department’s opposition to proposed Maryland sanction bill against Nigeria and to state sanctions against Switzerland).

129. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974).

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

131. See *id.* at 289-90.

132. *Id.* at 290.

133. *Id.* at 290 (quoting *United States v. Pink*, 315 U.S. 203, 233 (1942)).

134. *Id.* at 292.

135. *Id.* at 291.

136. *Id.*

137. See *id.* at 291-92.

Defendants argue that the Burma Law does not intrude on the federal government’s foreign affairs power because: (1) the Constitution permits certain state actions that indirectly affect foreign affairs; (2) the Burma Law does not establish a direct contact between the state and the Nation of Myanmar; (3) important state interests embodied in the First and Tenth Amendments justify the statute; and (4) as the foreign affairs’ doctrine is itself “vague,” the court should leave to the legislative branch the issue of whether to invalidate the Massachusetts Burma Law and similar state procurement statutes.

statutes upheld by other lower courts.¹³⁸ The "Buy American" statutes upheld by, for example, the Third Circuit "did not single out a particular foreign country for particular treatment, as does the Massachusetts Burma Law."¹³⁹ Further, the Baltimore ordinance upheld in *Board of Trustees v. Mayor & City Council of Baltimore*,¹⁴⁰ was distinguished on the ground that it "modified the City's own conduct, and did not seek to influence individuals or companies in their private commercial activities."¹⁴¹ The court also cited lower court decisions, discussed above, that invalidated state actions on grounds they usurped the federal government's role in foreign affairs.¹⁴²

To Massachusetts's argument that because there was no direct link between the state and Myanmar, there was no violation of the Foreign Affairs Power, the court responded that this was irrelevant, since *Zschernig* examined "the substantive impact a state statute has on foreign relations."¹⁴³ The Massachusetts statute's purpose was to change Burma's domestic policy.¹⁴⁴ This was "an unconstitutional infringement on the foreign affairs power of the federal government. State interests, no matter how noble, do not trump the federal government's exclusive foreign affairs power."¹⁴⁵

Id. at 291. The third and fourth arguments were not addressed in the court's opinion. For a response to Massachusetts' argument for judicial restraint, see *infra* Part IV.

138. See *id.* at 291-92. See also *supra* notes 65-80 & 87-98 and *infra* notes 293-313 and accompanying text (discussing various cases cited by the court and their inapplicability to Massachusetts' and similar statutes).

139. *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 292 (D. Mass 1998). Even those statutes, Chief Judge Tauro noted in passing, are not free from all constitutional questions. See *id.* (citing *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800, 802-03 (1969) (striking down California "Buy American" statute)); see also *supra* notes 89-94 (discussing *Bethlehem Steel*).

140. 562 A.2d 720 (Md. 1989), cert. denied *sub nom.* *Lubman v. Mayor & City Council of Baltimore*, 493 U.S. 1093 (1990).

141. *Baker*, 26 F. Supp. 2d at 292.

142. See *id.* at 292; see *supra* Part II.C.

143. *Id.*

144. See *id.*

145. *Id.* For the curious argument that although Chief Judge Tauro's decision in *Baker* "has considerable historical support and reflects the traditional imperatives of international relations" it should nevertheless be reversed, see Spiro, *supra* note 19, at 25. Professor Spiro believes that "[t]he changed dynamic of international relations" justifies disregarding "[t]he lopsided allocation of authority [over foreign affairs] reflected [in] the founders' views on the issue." *Id.* For our response to a similar assessment of the world situation, see *supra* note 83. Cf. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (attributing the modern interchangeability of executive agreements and treaties requiring Senate ratification to a "constitutional moment" brought about by historical exigencies that rendered the formalist mode of treaty-making irrelevant). Professor Spiro's endorsement of the Massachusetts law is particularly inter-

E. The Goldsmith Critique

An important recent article by Professor Jack Goldsmith strongly criticizes the *Zschernig* decision and the assumption about the exclusivity of the federal government's power in foreign affairs that has grown up around that decision.¹⁴⁶ Though we cannot fully do justice to his nuanced argument here, we wish to highlight his critique of *Zschernig*, particularly because of *Baker's* explicit reliance on *Zschernig*. Goldsmith argues that the Supreme Court's reliance in *Zschernig* on a self-executing, judicially-enforced limitation on state actions that affect foreign relations was in fact an innovation of the *Zschernig* Court and a departure from the law that had come before.¹⁴⁷ In general, Professor Goldsmith questions "the widely held view that the states have no legitimate interest in the regulation of foreign relations,"¹⁴⁸ and asserts that the originalist arguments for federal primacy in foreign affairs are premised on a mistaken reading of text and history.¹⁴⁹ Even if actions taken at the subnational level do have effects on foreign relations, Goldsmith argues that fact "does not, by itself, justify federal *judicial* lawmaking."¹⁵⁰ Moreover, Professor Goldsmith faults commentators and scholars for clinging to what he terms the "federal common law" of foreign affairs preemption, even in the face of decisions like *Barclays Bank*, in which the Court seems less inclined to embrace such an expansive federal power ab-

esting in light of his 1986 student note, in which he concluded that state and local sanctions against South Africa were unconstitutional. See Spiro, *supra* note 2, at 850:

State and local anti-South Africa legislation demonstrates, in practical terms, the drawbacks of allowing non-federal authorities to act on matters relating to the nation's foreign policy. These measures represent a serious threat to the implementation of a unified and coherent federal program in the area. . . . Left unchecked, state and local interference could cripple the national government's ability to conduct foreign affairs, resulting in the sort of fractious cacaphony that a federal entity can ill afford to project in its relations with other nations.

146. See generally Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); see also Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998). Professor Harold Koh critiqued the Bradley and Goldsmith position in *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

147. See Goldsmith, *supra* note 148, at 1661 ("Contrary to conventional wisdom, the federal common law of foreign relations announced by . . . *Zschernig* marked a sharp departure from prior law").

148. *Id.* at 1677.

149. See *id.* at 1641-64.

150. *Id.* at 1679; see also *id.* at 1698 ("There is little reason to think that state control over matters not governed by enacted federal law affects U.S. foreign relations in a way that warrants preemption.").

sent some signal from Congress that it intends to preempt state action.¹⁵¹

Professor Goldsmith's argument against *Zschernig*, and against an exclusive power of the federal government over foreign affairs, is forcefully presented, but unpersuasive. First, as explained above,¹⁵² we think that the various provisions related to foreign affairs can be read to contain a structural or "penumbral" restriction on state actions affecting foreign affairs, even in the absence of a congressional enactment.¹⁵³ Our interpretive method in arriving at the conclusion should not concern Professor Goldsmith overmuch, since he accepts as legitimate the self-executing restrictions recognized by the Supreme Court in the dormant Foreign Commerce Clause doctrine.¹⁵⁴ Moreover, Goldsmith favors using that doctrine "to redress the evils that inhere in . . . [state] discrimination" against foreign commerce.¹⁵⁵ Finally, as we explain below, we think it is significant that the Supreme Court's alleged retreats from the principles enunciated in *Zschernig* have come about in cases involving states' exercise of their taxing power, an indubitably concurrent power that the Court has often been loath to narrow.¹⁵⁶

In any event, acceptance of Professor Goldsmith's critique of *Zschernig* does not necessarily mean that the subnational sanctions are constitutional.¹⁵⁷ There may be a simpler way for courts to find these measures, such as the challenged Massachusetts statute, unconstitutional. Instead of wrestling with the ambiguities of *Clark* and

151. *Id.* at 1698-1705.

152. *See supra* Part II.

153. On the popularity of penumbral reasoning with the Supreme Court in recent decisions, see Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089 (1997).

154. *See* Goldsmith, *supra* note 146, at 1637. Professor Goldsmith does dispute the validity of the so-called "one voice" factor articulated as part of the dormant foreign Commerce Clause test, *i.e.*, whether an otherwise nondiscriminatory state tax or regulation is nevertheless invalid because it prevents the federal government from speaking "with one voice" in the articulation of national foreign affairs. *See id.*; *see also infra* Part III.B.(1)-(3).

155. Goldsmith, *supra* note 146, at 1689-90.

156. *See infra* notes 184-96 and accompanying text.

157. It is not clear that Professor Goldsmith himself would approve of the subnational sanctions. *See* Goldsmith, *supra* note 146, at 1711 (urging replacement of the *Zschernig* doctrine with, *inter alia*, "judicial review of state activity based on impermissible purpose or motive to conduct foreign relations" and arguing that "a motive test would likely prohibit state foreign relations activities such as . . . political sanctions that, for many, present the strongest case for the federal common law of foreign relations"); *see also id.* at 1689-90 & n.243 (remarking that even if the federal common law of foreign relations were abandoned, the dormant Foreign Commerce Clause would still operate to invalidate discriminatory state regulations).

Zschernig, courts might simply look at these sanctions' effects on foreign commerce. As we explain in the next section, the power accorded to Congress over foreign commerce, and conversely, the degree to which the States are forbidden to interfere with such commerce, has been frequently litigated before the Court. As a result, the boundaries between permissible and impermissible state action are more clearly drawn.

III. The Foreign Commerce Clause

Besides targeting certain countries as "outlaws" and seeking to deprive their governments and their people of the goods, services and capital of American corporations, state and local governments passing divestment and procurement sanctions also subject domestic corporations to an unpalatable Hobson's Choice: forego opportunities in emerging markets overseas,¹⁵⁸ or lose the opportunity to bid competitively for government procurement contracts.¹⁵⁹ This disadvantaging of companies engaging in certain foreign commerce implicates the Foreign Commerce Clause.¹⁶⁰ We argue in this section that state and

158. Ironically, many of the very nations of the developing world that have abysmal democracy and human rights records may also be the nations most willing to accept U.S. investment. Such investment can, in turn, provide potentially lucrative opportunities both for business investment by U.S. firms and for moral encouragement of democratic principles among opposition groups. Perversely, one net result of the imposition of unilateral sanctions can frequently be "the [removal of] a salutary U.S. influence from the local scene." Schmahmann & Finch, *supra* note 15, at 189.

159. See, e.g., Marchick Testimony, *supra* note 9, at 3 (estimating sanctions' costs to the U.S. economy to be \$15-19 billion in unrealized exports and approximately 200,000 jobs); Greenberger, *supra* note 9, at A20 ("Procurement contracts in California alone, for example, are worth more to some U.S. companies than any business they could secure in many countries, but they don't want to have to choose."). For the effect on American companies in the wake of South African divestment and procurement regulations, see Spiro, *supra* note 2, at 824-27.

160. The textual foreign Commerce Clause and its implicit restrictions on the States, which we call here the "dormant" Foreign Commerce Clause doctrine, is of course intertwined with the more structural restriction described in Part II. The degree to which the States are restrained depends not only on the scope of Congress' power "to regulate commerce with foreign nations" but also, as the Supreme Court has made clear, on the power of the federal government generally to conduct foreign affairs. See *supra* notes 51-55 and accompanying text. See also Spiro, *supra* note 2, at 823:

Conceptually, and in terms of the evils they address, these two doctrines are distinguishable only in that the commerce clause attack logically seems no more than a slice of the foreign-relations pie. The basic idea behind both, in the context of foreign commerce, is that no subdivision of the Union should be able to act independently so as to affect adversely the whole.

Id. While he is correct to note the interrelated nature of the two arguments, we think that Professor Spiro overstates the extent to which the Foreign Commerce Clause and foreign relations arguments are indistinguishable. One might argue that companies may more eas-

local sanctions violate the dormant Foreign Commerce Clause in three ways: (i) by discriminating against foreign commerce; (ii) by exposing companies engaged in foreign commerce to a "virtual welter"¹⁶¹ of multiple state burdens; and (iii) by hindering the ability of the United States to speak with "one voice"¹⁶² in matters of international trade.

A. The Scope of Congressional Power

The Commerce Clause gives Congress the power to "regulate Commerce with foreign nations"¹⁶³ Unlike its interstate commerce counterpart, the scope of the so-called "Foreign" Commerce Clause historically has been much less in dispute. From the time of John Marshall, the Supreme Court has held that the power of Congress to regulate commerce with other nations was complete, plenary, and exclusive, and that the States had little, if any, concurrent power in this area.

State impotence to restrain foreign trade is reflected in leading constitutional commentators. In his influential treatise on the Constitution, Justice Joseph Story regarded it as "universally admitted, that the words [of the Foreign Commerce Clause] comprehend every species of commercial intercourse. No sort of trade or intercourse can be

ily raise the Foreign Commerce Clause argument claims without risking the significant problems of standing associated with a structural foreign relations argument. The sanctions, moreover, affect both foreign and domestic companies more directly, as distinct from the state laws in *Davidowitz* and *Zschernig*, which were aimed directly at foreign nationals. Compare *Hines v. Davidowitz*, 312 U.S. 52, 59-61 (1941) (summarizing direct effects of the challenged Pennsylvania alien registration act on aliens) and *Zschernig v. Miller*, 389 U.S. 429, 430-32 & n.1 (1941) (summarizing the Oregon statute's effects on foreign legatees, heirs, devisees and distributees) with notes 29-32 and accompanying text (discussing the Massachusetts's statute's coverage of "all persons presently doing business with Myanmar" and the expansive definitions employed therein).

There are, additionally, certain foreign affairs points implicated by sanctions that can be structurally distinguished from a purely "foreign commerce" or international trade aspect; for example, to the extent that the actions of individual States, through their sanctions, arguably jeopardize the ability of the nation as a whole to fulfill its rights and obligations under international law and treaties, such an issue would be more appropriately categorized as raising foreign affairs issues under Article I, section 8, clause 10 and Article VI of the Constitution. See also *Zschernig*, 389 U.S. at 440-41; LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS*, 137-226 (2d ed. 1987) (discussing and analyzing relationships between international law and domestic law).

The *Baker* court did not address the plaintiffs' Foreign Commerce argument, resting its decision on the Foreign Affairs Power. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998).

161. *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.6 (1992).

162. See *infra* notes 189-202 and accompanying text.

163. U.S. CONST. art. I, § 8, cl. 3.

carried on between this country and another, to which it does not extend.”¹⁶⁴ A leading contemporary treatise describes the foreign commerce power as “virtually unlimited.”¹⁶⁵ Louis Henkin, a noted authority on the Constitution and foreign affairs, speculated that “[t]he [foreign] Commerce Power . . . might be sufficient to support virtually any legislation that relates to foreign intercourse, i.e., to foreign relations.”¹⁶⁶ These assessments are not hyperbolic: in 1927, for example, the Court declared flatly that “Congress has complete and paramount authority to regulate foreign commerce”¹⁶⁷

Significantly, the Court on at least two separate occasions has mentioned that Congress, in the exercise of its foreign commerce power, is free from the restraints of federalism or those limits implicit in the states’ reserved powers, which strongly suggests that the power is not shared concurrently with the States. Chief Justice Hughes wrote in *Board of Trustees v. United States* that “[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.”¹⁶⁸ More recently, in *Japan Line, Ltd. v. Los Angeles*, the Court noted that while “Congress’ power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty,” the Court’s decisions have “never . . . suggested that Congress’ power to regulate foreign commerce could be so limited.”¹⁶⁹ Thus, if it chose to do so, Congress could impose a moratorium on state and local sanctions, preempting existing state and local sanctions and preventing them from being

164. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 363 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833).

165. 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 4.2, at 358 (2d ed. 1992) (“The Constitution as originally framed seems . . . to recognize a virtually unlimited power of Congress over commerce with foreign nations.”).

166. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 66 (2d ed. 1996).

167. *See Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927).

168. 289 U.S. 48, 57 (1933).

169. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 n.13 (1979) (citing *National League of Cities v. Usery*, 426 U.S. 833 (1976)). The only limitations on Congress’ power seem to be the Export Clause, which forbids Congress from taxing goods exported from the United States, and the Port Preference Clause, which prohibits Congress from favoring the ports of one State over those of another State. Ronald D. Rotunda and John E. Nowak write in their treatise on constitutional law: “It would seem clear from the [Constitution] that the power to deal with foreign commerce was very precisely defined and is a plenary one within only the specified restrictions set by that document [*i.e.*, the Export and Port Preference Clauses].” 1 ROTUNDA & NOWAK, *supra* note 165, at 359. Of course, the Bill of Rights would constitute additional restrictions on Congress’ power.

passed in the future. That it has not, however, does not authorize states and municipalities to act with impunity.

B. The Dormant Foreign Commerce Clause Doctrine

The logical corollary to the plenary power possessed by the federal government under the Foreign Commerce Clause is that state power in this area is limited.¹⁷⁰ In the seminal 1824 case of *Gibbons v. Ogden*, Chief Justice Marshall wrote:

[I]n regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States.¹⁷¹

In his concurrence, Marshall's colleague Justice Johnson expressed similar sentiments. "[T]he power to regulate *foreign* commerce," he wrote, "is necessarily exclusive."¹⁷² He continued, "[w]hatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity."¹⁷³ Just over a century later, Chief Justice Charles Evans Hughes similarly reasoned that "[i]t is an essential attribute of the [foreign commerce] power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action."¹⁷⁴

The Supreme Court has thus always held it to be "a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more vigorous and searching scrutiny."¹⁷⁵ Where matters of international trade were concerned, Chief Justice Hughes wrote, "the people of the United States act through a single government with uni-

170. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 469 (2d ed., 1988) (describing "state regulation of foreign commerce" as "tightly proscribed by the negative implications of what might be called the Foreign Commerce Clause").

171. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

172. *Id.* at 228 (Johnson, J., concurring) (emphasis added).

173. *Id.* at 228-29. See also *supra* note 112 (quoting THE FEDERALIST No. 80).

174. *Board of Trustees v. United States*, 289 U.S. 48, 56-57 (1933) (quoting *Gibbons*, 22 U.S. at 193). See also *DiSanto v. Pennsylvania*, 333 U.S. 34, 37 (1927) ("The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against . . . frauds . . ."); HENKIN, *supra* note 166, at 66 ("There is room for [federal] 'police power' regulation in foreign commerce and of local matters that affect foreign commerce and intercourse.") (footnote omitted).

175. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

fied and adequate national power.”¹⁷⁶ As it has in the area of interstate commerce,¹⁷⁷ this means, at a minimum, that states are not permitted to pursue policies with either the intent or the effect of discriminating against foreign commerce or companies engaged in foreign commerce.

In *Di Santo v. Pennsylvania*,¹⁷⁸ the Court declared that “[a] state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed.”¹⁷⁹ Though he dissented over the issue of whether the statute did, in fact, burden foreign commerce, Justice Stone noted that if a regulation discriminated against foreign commerce or “erect[ed] barriers to the free flow of commerce, interstate or foreign,” it would likely be invalid.¹⁸⁰ Hence, under this formulation, the presumption is that any state or local statute so impinging on foreign commerce is constitutionally infirm.

The Court’s modern Foreign Commerce Clause case, *Japan Line, Ltd. v. Los Angeles*,¹⁸¹ though famous for the articulation of the “one voice” test,¹⁸² supplemented its previously stated tests for interstate commerce only after deciding that the statute at issue did not discriminate against foreign commerce.¹⁸³ Despite the uncompromising language of the *Di Santo* opinion, later decisions of the Court have not

176. *Board of Trustees*, 289 U.S. at 59.

177. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

178. 273 U.S. 34 (1927).

179. *Id.* at 37.

180. *Id.* at 43-44 (Stone, J., dissenting). *See also* *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 45 (1948) (Jackson, J., dissenting from decision to uphold Michigan civil rights statute as applied to a ferry taking passengers to an amusement park in Canadian waters; reasoning that the fact that foreign commerce is involved “should [alone] be enough to prevent a state from controlling what may, or what must, move in the stream of that commerce”).

181. 441 U.S. 434 (1979).

182. *See infra* notes 189-202 and accompanying text.

183. Under the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), taxes on interstate commerce are permissible if (i) there was a substantial nexus between the company and the taxing jurisdiction, (ii) the taxes were fairly apportioned, (iii) the taxes did not discriminate against commerce, and (iv) the taxes were fairly related to the services provided. Even critics of the *Complete Auto* test, like Justice Scalia, have endorsed what is sometimes called the “antidiscrimination principle” that restrains states from passing measures that discriminate against interstate or foreign commerce. *See Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 889, 898 (1988) (Scalia, J., concurring) (reasoning that he would find a state statute as invalid under the Commerce Clause “if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose”).

forbidden *all* state action that affects foreign commerce. Such a prohibition would no doubt have proved as unworkable as early attempts to forbid states from regulating some aspects of interstate commerce. The question before the Court, therefore, has been one of degree: when does state action become a hindrance to the federal government's ability to carry on relations with other countries?

1. Japan Line, Ltd. v. County of Los Angeles

Though concerned primarily with taxation of foreign commerce, *Japan Line*¹⁸⁴ has become the reference point for all Foreign Commerce Clause questions that have arisen thereafter. At issue was an attempt by Los Angeles County to apply a nondiscriminatory *ad valorem* tax to certain containers of a Japanese corporation, whose containers were used exclusively in foreign commerce, and which though present in California on tax day, only resided there a short time and only in connection with preparations for continuing on in foreign commerce.¹⁸⁵ Though the California courts had awarded a refund on a different theory, the question that the Supreme Court took up was "whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned *ad valorem* property taxation by a State."¹⁸⁶

Los Angeles argued that state taxation of foreign commerce should be treated no differently than taxation of interstate commerce.¹⁸⁷ The Supreme Court disagreed, stating that when evaluating state laws affecting foreign commerce, "a more extensive constitutional inquiry is required."¹⁸⁸ Specifically, the Court identified two concerns that must be added to the normal interstate commerce inquiry: (i) whether there was an increased risk of multiple taxation and (ii) whether the regulation inhibited the ability of the United States to speak with "one voice" in matters of foreign affairs.¹⁸⁹

184. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

185. *See id.* at 446-47.

186. *Id.* at 444 (footnote omitted). In framing the issue before it, the Supreme Court made it explicit that it was not deciding "questions as to the taxability of foreign-owned instrumentalities engaged in interstate commerce, or of domestically owned instrumentalities engaged in foreign commerce." *Id.* at 444 n.7.

187. *See id.* at 446.

188. *Id.*

189. *Id.* at 446-48. The Court in *Japan Line* actually borrowed the "one voice" prong from its seminal Import-Export Clause case, *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), in which the Court scrapped tax immunity for imports still in their original packages, holding that such goods were subject to a nondiscriminatory *ad valorem* property tax

First, the Court noted that the problem of double taxation was particularly acute “when one of the taxing entities is a foreign sovereign” because a court cannot demand that a foreign country fairly apportion its taxes.¹⁹⁰ In addition, “a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern.”¹⁹¹ The Court then identified several ways national policy could be disrupted by unrestricted state taxation. First, apportionment disputes might arise.¹⁹² Second, foreign countries may retaliate against United States commerce because of state taxing policies.¹⁹³ Third, foreign commerce may find itself subject to multiple taxation as various states enforce their tax laws.¹⁹⁴ The Supreme Court concluded in *Japan Line* that if a state tax ran afoul of either of the two additional requirements, even though it had otherwise satisfied all the prongs of the *Complete Auto* test,¹⁹⁵ it would violate the Commerce Clause and thus be unconstitutional.¹⁹⁶

2. *Foreign Commerce After Japan Line, Ltd.*

Four years later, the Supreme Court refined the “one voice” test in *Container Corp. of America v. Franchise Tax Board*.¹⁹⁷ There the

without offending the underlying rationale of the clause. One part of that rationale, wrote Justice Brennan, was the need for “the Federal Government [to] speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power” *Id.* at 285-86.

190. *See Japan Line*, 441 U.S. at 447.

191. *Id.* at 448.

192. *See id.* at 450-51.

193. *See id.*

194. *See id.*

195. *See supra* note 183.

196. *See* 441 U.S. at 451. According to the Supreme Court, Los Angeles’ tax failed both parts of the newly articulated test. First, the Court found that double taxation was almost a certainty in this case. The corporation was Japanese, and the containers’ home port was in Japan. *See id.* at 451-52. “Even a slight overlapping of tax . . . assumes importance when sensitive matters of foreign relations and national sovereignty are concerned.” *Id.* at 456 (footnote omitted). As for the “one voice” test, the Court identified several ways in which Los Angeles’ tax impinged upon national foreign affairs prerogatives. Most importantly, since similar containers owned by American companies were not taxed in Japan, the tax created an “asymmetry in international taxation,” *id.* at 453, which was inconsistent with the desire of both the United States and Japan for “uniform treatment of containers used exclusively in foreign commerce” as evidenced “by the Customs Conventions on Containers, which the United States and Japan have signed.” *Id.* at 452. This “asymmetry” increased the risk of retaliation by Japan, which would harm the entire nation, not just California or Los Angeles County.

197. 463 U.S. 159 (1983).

Court was asked to pass on the validity of California's franchise tax as applied to a Delaware corporation headquartered in Illinois and doing business in California, but which had a number of foreign subsidiaries.¹⁹⁸ In the majority opinion, Justice Brennan announced that "a state tax at variance with federal policy will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive."¹⁹⁹ The latter test, the Court acknowledged to be "essentially a species of pre-emption analysis;"²⁰⁰ the former, the Court reasoned, could only be applied by reference to broad standards, the "most obvious" of which would be the danger of offending trading partners and risking retaliation.²⁰¹

In a dissent joined by Justice O'Connor and Chief Justice Burger, Justice Powell argued that the Court should strike down State taxes after identifying *any* foreign policy issues implicated by the imposition of the tax. The Court's balancing analysis, for Powell, represented "an intrusion on national policy . . . that is not permitted by the Constitution."²⁰²

In the years since *Container Corp.*, the Supreme Court has been extremely solicitous of state taxation schemes, even when applied to foreign corporations²⁰³ or to foreign commerce.²⁰⁴ In its latest foreign

198. Under California's method of calculating its franchise tax (which it has since abandoned), all of the various subsidiaries and affiliates (including those operating overseas) were presumed to constitute a "unitary business," the total income of which was taxable, after proper apportionment. *See id.* at 168 & n.5 (citing CAL. REV. & TAX CODE ANN. § 25105 (West 1979)) & 181-84.

199. *Id.* at 194.

200. *Id.* *See supra* note 81 (discussing preemption).

201. *Container Corp. of America*, 463 U.S. at 194.

202. *Id.* at 205 (Powell, J., dissenting).

203. *See, e.g.*, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

204. *See, e.g.*, *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993); *Wardair Canada, Inc. v. Florida Dept. of Rev.*, 477 U.S. 1 (1986).

In *Wardair Canada*, the Court upheld a State tax imposed on the sale of airline fuel used in international travel. 477 U.S. at 3. In his opinion, Justice Brennan concluded that the United States had not intended to deprive Florida of its taxing ability by being a signatory to various international treaties aimed at eliminating various taxes on aviation, the goals of which the Court termed "aspirational." *Id.* at 9-10. Therefore, by imposing the tax, Florida had violated no federal directive. *Id.* at 6-7. As to the question whether the tax contravened "foreign policy issues which must be left to the federal government," the opinion is less clear. Justice Brennan framed his entire discussion in terms of whether the tax violated a "federal policy," *id.* at 9, thus collapsing both the "federal directive" and "foreign policy issues" factors of the "one voice" test back into a single standard. It made little difference in this case because, in the Court's view, "the evidence relied upon by the appellant and the United States not only fails to reveal any such federal policy, but . . . shows also that in the context of this case we do not confront federal governmental silence

commerce case,²⁰⁵ the Court upheld a California tax scheme in terms so deferential²⁰⁶ that some commentators question whether the “one voice” prong of *Japan Line* retains any vitality.²⁰⁷ Lower court decisions, applying the *Japan Line* criteria in light of more recent Supreme Court cases, seem to confirm this trend towards judicial restraint, at least in those cases involving nondiscriminatory state regulations that affect foreign commerce, and in the absence of action by Congress.²⁰⁸

of the sort that triggers dormant Commerce Clause analysis.” *Id.* On the contrary, the Court concluded that in the “more than 70 bilateral aviation agreements” to which the United States was a party, “not one” required the “United States . . . to deny the States the power asserted by Florida in this case.” *Id.* at 11.

205. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

206. In *Barclays Bank*, the Court upheld California’s peculiar method of calculating franchise taxes. 512 U.S. at 330-31. In an opinion by Justice Ginsburg applying the *Japan Line* test, the Court found that the tax neither posed a substantial risk of double taxation, nor ran afoul of the “one voice” requirement. Moreover, the Court seemed to suggest that Congress, not the judiciary, was the institution best suited to protect its ability to speak with “one voice.” Justice Ginsburg found it significant that, in the eleven years since *Container Corp.*, Congress had not acted to prevent States from using the “unitary business” method of taxation adopted by California. *See id.* at 323-24. Further, the Court signaled that, unlike in its interstate dormant Commerce Clause jurisprudence, Congress did not have to indicate clearly its intent to allow the States to regulate absent congressional action to prevent the Court from striking down State actions affecting foreign commerce: “Congress may more passively indicate that certain state practices do *not* ‘impair federal uniformity in an area where federal uniformity is essential’ . . . ; it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce” *Id.* at 323. Congressional inaction meant for the Court that California was violating no “clear federal directive.” *Id.* at 328-29. As for the danger that foreign governments might retaliate, Justice Ginsburg remarked that such concerns were simply “directed at the wrong forum.” *Id.* at 328 (footnote omitted).

Justice O’Connor, joined by Justice Thomas, dissented. Justice O’Connor expressed concern that foreign corporations’ “outsider” status would make them an attractive target for taxing authorities. “Domestic taxpayers,” she wrote, “have access to the political process, at both the state and national levels, that foreign taxpayers simply do not enjoy It is all too easy . . . for the state legislature to fill the State’s coffers at the expense of outsiders.” *Id.* at 336-37 (O’Connor, J., dissenting).

207. *See, e.g.*, 1 JEROME HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* 8-146 (2d ed. 1993).

[The] reliance on Congressional action [in *Container Corp.*] in order to determine whether the State tax violated the Federal uniformity requirement and the need to speak with one voice saps the rule of any real significance. For if the need for Federal uniformity and for one voice in speaking for the nation in international trade must be established by proof of Congressional action, nothing is added to the Commerce Clause jurisprudence by the new “one voice” test of the constitutionality of state taxes on foreign commerce enunciated in *Japan Line*.

Id.; Bradley & Goldsmith, *supra* note 146, at 864-65 (questioning the viability of *Zschernig* after *Barclays Bank*); Goldsmith, *supra* note 146, at 1699-1700 (*Barclays Bank* “gutted” one-voice test of *Japan Line*).

208. *See, e.g.*, *Pacific N.W. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (upholding Washington Department of Wildlife regulations prohibiting the sale, importation, possession, or transfer of certain types of “deleterious exotic wildlife” as “not a

The Court's reluctance to apply *Japan Line* and *Container Corp.* rigorously in state tax cases may reflect a hesitance to restrict a state's concurrent taxing power, even where the exercise of that power touches on foreign commerce. In general, the taxes upheld were applied evenhandedly and made no attempt to penalize foreign companies doing business in the taxing jurisdiction or otherwise to favor domestic commerce over foreign. But the Court's unwillingness to create, by judicial fiat, a wide-ranging tax exemption for foreign commerce in the absence of action by Congress should not be construed as an endorsement of a concurrent power over foreign affairs or the regulation of foreign commerce. This narrower reading is supported by the fact that the Court has not replaced the Foreign Commerce Clause test first articulated in *Japan Line* and amplified in *Container Corp.* with another, more lenient, standard.

3. *Applying a Standard of Review for Non-Tax Foreign Commerce Clause Cases*

Under a reading of *Japan Line* and its progeny, in order to pass constitutional muster, a state or local non-tax measure may not (i) discriminate against foreign commerce; (ii) present a risk of cumulative burdens being placed on foreign commerce; or (iii) hinder the federal government's efforts to speak with "one voice" on matters of foreign trade by either violating a "clear federal directive" or by implicating foreign policy issues best left to the federal government.

A court might not even reach the additional *Japan Line* factors because state and local sanctions blatantly discriminate against foreign commerce.²⁰⁹ Under the Massachusetts statute, no company wishing to do business with any part of the government of Massachusetts may

matter in which national uniformity is important" absent "reason[s] why international commerce in these animals might be of concern to the whole nation" or how banning them would "offend foreign nations"); *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018 (5th Cir. 1989) (upholding the imposition of certain fees on ships traveling in foreign commerce to finance emergency response services; deeming federal oversight, as well as the power of Congress to correct egregious abuses, as sufficient to avoid the concerns expressed in *Japan Line*); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987) (upholding a Delaware state law prohibiting the bulk transfer of materials between ships within Delaware's environmentally-sensitive coastal zone and refusing to regard an incidental increase in the cost of doing business a constitutionally-impermissible "burden" on foreign commerce).

209. See, e.g., *Chemical Waste Mgmt., Inc. v. Templet*, 700 F. Supp. 1142 (M.D. La. 1991) (invalidating a state statute, aimed at American-owned *maquiladora* plants operating in Mexico, prohibiting the importation of hazardous wastes from outside the United States); Goldsmith, *supra* note 146, at 1637, 1711 (suggesting that discrimination against foreign commerce is constitutionally impermissible).

have any operations whatsoever in Myanmar or any other target country.²¹⁰ Moreover, the discrimination is evident on the face of the statute: only persons “doing business with” target countries that are listed in the statute - which by definition includes only persons engaged in foreign commerce - are subject to the sanctions. While this is not the sort of economic protectionism so often condemned in the interstate commerce area,²¹¹ it is discrimination,²¹² and the Court has made clear that the motivation behind the discrimination is not relevant when foreign commerce is involved.²¹³ Further, the fact that state and local governments claim license to pass such laws and ordinances under the market-participant exception, discussed below, indicates a recognition that but for that exemption, the sanctions would likely be condemned as unconstitutional discrimination.²¹⁴

Second, though at first glance the “multiple taxation” prong may seem inapplicable in a non-tax setting, an analogy between subnational sanctions and the Supreme Court’s directive to be wary of taxes levied by multiple jurisdictions is not inappropriate. In other non-tax settings in the Interstate Commerce Clause area, the Court has invalidated certain state regulatory measures, reasoning that if all states undertook to regulate the same problem, and all imposed different requirements, an intolerable burden on interstate commerce would result.²¹⁵ As the Supreme Court recently stated in the interstate commerce context:

[T]he practical effect of [a] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.²¹⁶

210. See *supra* notes 30-33 and accompanying text.

211. See *supra* note 183.

212. As one definition puts it, discrimination is the “failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.” BLACK’S LAW DICTIONARY 420 (5th ed. 1979).

213. See *supra* notes 172-77 and accompanying text.

214. See Schmahmann & Finch, *supra* note 15, at 183 & n.24 (noting that many measures passed by cities included language invoking the protection of the market-participant doctrine). See also notes 223-72 *infra* and accompanying text.

215. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). For an application of the multiple state burdens doctrines in another non-tax area, see Glenn Harlan Reynolds, *Virtual Reality and “Virtual Welters”: A Note on the Commerce Clause Implications of Regulating Cyberporn*, 82 VA. L. REV. 535 (1996).

216. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

Such considerations are particularly appropriate, in the case of sanctions, since many state and local governments have passed or are considering legislation similar to that enacted in Massachusetts. The risk of multiple burdens imposed on foreign commerce by allowing states and local governments to, in effect, pursue separate foreign policies is no mere exercise in speculation. According to one count, sanctions have been enacted or proposed in nearly forty different states, counties, and municipalities.²¹⁷ A socially-conscious company doing business across the nation, and wishing to remain eligible for government contracts, might find its opportunities to do business overseas diminished as more subnational governments add countries to their restrictive purchase lists. Moreover, compliance with state and local sanctions does not guarantee that the state or local contracts for which it may bid will be awarded to it. Nevertheless, a corporations must, even to be eligible, demonstrate its intention not to do business, directly or indirectly, with the target nations.²¹⁸

Finally, these sanctions hinder the federal government's ability to speak with one voice on matters of international trade and foreign relations in general. True, Congress has yet to speak to the issue, so states and municipalities are not in violation of a "clear federal directive,"²¹⁹ but the sanctions are aimed at matters best left to the discre-

217. See USA*ENGAGE, *State and Local Sanctions Watch List*, *supra* note 6.

218. *But see* Blustein, *supra* note 7, at D2 (citing an analyst with one investment firm that invests only in socially responsible companies as saying: "The real threat to effective foreign policy is not the 50 states. It's the Fortune 500.").

219. See *supra* note 199 and accompanying text. In this regard, however, the situation here is different than with the South Africa sanctions, some of which may have been implicitly authorized by Congress. See 22 U.S.C.A. §§ 5061 & 5091(c) (West 1990) (providing for certain anti-apartheid sanctions), *repealed by* Pub. L. No. 103-149, § 4(a)(1), 107 Stat. 1504 (1993) *as implemented by* Exec. Order No. 12,769, 56 Fed. Reg. 31,855 (1991) *reprinted in* 22 U.S.C.A. § 5061 (West Supp. 1998). *But see* Board of Trustees v. Mayor & City Council of Baltimore, 562 A.2d 720, 740-49 (Md. 1989) (upholding anti-apartheid divestment ordinances; determining that local ordinances were neither preempted by federal law, including federal anti-apartheid statutes, nor impermissibly intruded into the federal government's foreign policy authority), *cert. denied sub nom.* Lubman v. Mayor & City Council of Baltimore, 493 U.S. 1093 (1990). Several commentators have therefore concluded that, based on the logic of such the Maryland Court of Appeals in *Board of Trustees*, state and local sanctions similar to the ones currently at issue should likewise be insulated from challenge. See, e.g., Jubinsky, *supra* note 4, at 559; Lewis, *supra* note 2, at 513-15 (reasoning that "divestment statutes ought to be outside the *Zschernig* doctrine, as a matter of policy"); Bilder, *supra* note 24, at 830-31 (guardedly concluding that subnational anti-apartheid and procurement sanctions are constitutional, but noting that they "approach the 'forbidden line'"); and TRIBE, *supra* note 170, at 469. Not all commentators, however, have agreed that state and local sanctions would face smooth sailing in the sea of constitutionality. See Price & Hannah, *supra* note 12, at 498; Schmahmann & Finch, *supra* note 15, at 183; see also *Tayyari v. New Mexico State Univ.*, 495 F.Supp. 1365, 1365

tion of Congress and, under the direction of the President, the State Department. The legislative and executive branches are the ones charged by the Constitution with the conduct of foreign affairs and the regulation of foreign commerce; they should be allowed to fashion a unified, unambiguous policy toward the countries of the world without risking embarrassment or affront to foreign countries as a result of sanctions imposed by subnational governments. Though countries might not retaliate or take offense, they are free to do so,²²⁰ with uncertain and indeterminate harm to the United States' interests abroad not readily apparent either to the state and local governments that enacted the sanctions or to the courts asked to uphold them. The ability of fifty or more (if one counts the municipalities devising sanctions ordinances) fragmented "Secretaries of State," each ultimately answerable to a purely local constituency, to craft a unified, meaningful response to such retaliation is dubious at best. This is especially so, if those imposing the sanctions are not themselves the targets of retaliation from the foreign countries. Simultaneously, such statutes tend to erode the executive branch's ability to implement an effective foreign policy and negotiate trade agreements, thus weakening federalism as a whole.²²¹ As one commentator has noted, "[t]he [federal] government would no longer simply be a representative of the states, but a referee between the states on one side and multinational corporations and countries on the other."²²²

(D.N.M. 1980); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986); *New York Times Co. v. New York Comm'n on Human Rights*, 361 N.E.2d 963, 968 (N.Y. 1977).

220. As did the Swiss. See *supra* notes 113-15 and accompanying text (discussing certain retaliatory actions taken by Swiss retailers).

221. For comments on the relation of the states (and their political subdivisions) to the conduct of foreign affairs, see Bilder, *supra* note 24, at 827-28; HENKIN, *supra* note 166, ch. VI. See also Fenton, *supra* note 50, at 579 & 591 (noting the potentially damaging effects to federalism, in the context of the "political and financial obstacles to [congressional and court] challenges" of subnational divestment and debarment/procurement sanctions: "The fragmentation of policy formulation enables local groups with strongly held views to obtain local legislation unreflective of the national consensus. Broader-based or more diffuse groups with opposing or more moderate viewpoints cannot intervene at every level. The result is a potential distortion of U.S. foreign policy views."); Brenda S. Beerman, Comment, *State Involvement in the Promotion of Export Trade: Is It Time to Rethink the Concept of Federalism as it Pertains to Foreign Relations?*, 21 N.C. J. INT'L. L. & COM. REG. 187, 200 (1995) ("Ultimately, it may be unwise to permit state and local involvement in matters relating to foreign affairs simply because such involvement is inconsistent with the structure of our democratic society.").

222. Spear, *supra* note 14 (citing Professor Robert Stumberg, director of Georgetown University's Center for Policy Alternatives).

Ironically, this is the precise situation with which the federal government must contend in the case of the World Trade Organization's dispute with the Massachusetts sanc-

In sum, the Supreme Court's Foreign Commerce Clause test gags state and local sanctions with all three of its prongs. Sanctions discriminate against foreign commerce by targeting specific countries and the companies trading with them in foreign commerce, as well as against foreign corporations of the target countries themselves. Sanctions expose companies engaged in foreign commerce to multiple state burdens that can cripple any foreign or domestic company attempting to comply with regulations in every state and municipality while conducting business overseas. Sanctions also expose the trade of the United States as a whole to retaliation, thus rendering the whole of the country liable for the actions of its constituent parts. Finally, by issuing sanctions, states and municipalities pretend to the exercise of powers that were not and should not be entrusted to them.

C. Should the Courts Recognize a "Market Participant" Exception to the Dormant Foreign Commerce Clause?

In the end, state and local governments will argue that the "market-participant" doctrine frees their actions from the restraints of the Foreign Commerce Clause.²²³ In his valuable treatise on constitutional law, Laurence Tribe has written that while states are limited by the Foreign Commerce Clause in their ability to regulate commerce with foreign nations, divestment and procurement statutes might be shielded by the "market participant" exception to the dormant Commerce Clause doctrine.²²⁴ Courts, other commentators, and state and

tions statute. *States Dictate Own Foreign Policy*, *supra* note 107, LEXIS at 2 ("The State Department would have to defend Massachusetts before the WTO panel because individual U.S. states have no standing before the world body."). *See also* Marchick Testimony, *supra* note 9, at 3 (regarding the federal government's role in the WTO dispute with Massachusetts); Price & Hannah, *supra* note 12, at 445 (discussing the WTO dispute).

223. *See, e.g., Oakland Ordinance*, *supra* note 108, preamble ("WHEREAS, the United States Supreme Court has upheld the power of a municipality to make legitimate economic decisions without being subject to the constraints of the interstate Commerce Clause when it participates in the market place as a corporation or a citizen as opposed to exerting its regulatory powers. . . .").

224. *See* TRIBE, *supra* note 170, at 469. Professor Tribe wrote:

[U]nder the Supreme Court's market participant exception to the commerce clause, a state would be free to pass laws forbidding investment of the state's pension funds in companies that do business with South Africa, or 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.

Id. (footnotes omitted) (emphasis added); *but see infra* note 225. In a communication with one of the authors, Professor Tribe indicated that he is rethinking this position in the forthcoming third edition of his treatise. In the previous sentence, moreover, Professor Tribe stated that without authorization from Congress, a state or local government that opposed the apartheid regime then in place in South Africa could not "enact a measure denying

local governments themselves have held up Tribe's statement as proof that the market-participant doctrine removes any taint from their measures.²²⁵

This begs the question whether the market-participant doctrine even applies to foreign commerce; there are no Supreme Court opinions so holding.²²⁶ At least one commentator, who otherwise favors local sanctions and believes them to be constitutional, agrees that the

South African companies the privilege of doing business within its jurisdiction; nor could a state or locality forbid its citizens and resident corporations from investing in or trading with multinational corporations which have affiliates or subsidiaries in South Africa." *Id.* (footnote omitted).

225. See Jubinsky, *supra* note 2, at 559 (arguing that "state legislation governing the state's proprietary decisions are confined to operate only upon the marketplace activities of the state itself. . . . [A] state enacting a [divestment statute] does not detract from the federal government's ability to present a coherent set of regulations regarding the conduct of foreign commerce."); Carvajal, *supra* note 19, at 270-74.

In all fairness to Professor Tribe, his views on procurement statutes may have been misconstrued by commentators to confer too broad an immunity and, in any event, are being rethought. In an e-mail to one of the authors, Professor Tribe stated that it did not follow from the position that "a state or municipality should be free, under [the market-participant] exception, to decline to do business itself with a given foreign nation, or to decline to invest public funds in that nation or that nation's businesses" that "a state or municipality enjoys unlimited freedom to engage in a kind of secondary boycott, declining to enter into contractual relationships with anyone in turn who engages in business activities in the disfavored country." Such "remote, downstream connections are potentially beyond that exception's reach." E-mail memorandum, Laurence H. Tribe to Brannon P. Denning (Oct. 4, 1998) (copy on file with authors). Though this is one of the positions that we take, see *infra* notes 272-278, that should not be construed as an endorsement of our analysis by Professor Tribe, the second edition of whose treatise assumed the exception applied to foreign commerce, a position that we question. See *infra* notes 272-278 and accompanying text.

226. Given the relatively large number of cities that passed divestment requirements, it is somewhat surprising that so few cases were actually litigated; none made it to be argued before the Supreme Court. See, e.g., *Board of Trustees v. Mayor & City Council of Baltimore*, 562 A.2d 720 (Md. 1989), *cert. denied sub nom. Lubman v. Mayor & City Council of Baltimore*, 493 U.S. 1093 (1990) (upholding the constitutionality of Baltimore law requiring retirement fund divestment of stocks of companies doing business in South Africa); Price & Hannah, *supra* note 12, at 498 (noting that *Board of Trustees* "represents the sole instance in which a reviewing court has affirmed the right of local governments to impose foreign economic sanctions"); Bilder, *supra* note 24, at 823 n.11 (citing additional cases). South Africa's pariah status and the moral repugnancy of its regime in the days of apartheid no doubt made it a client that few lawyers cared to represent.

Acknowledging Massachusetts' invocation of the market-participant exception as a defense to the plaintiffs' charge the state's law violated the Foreign Commerce Clause, the Massachusetts district court in *Baker* noted that "neither the Supreme Court nor the First Circuit has addressed the issue." *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998).

market-participant exception has no application in the area of foreign commerce.²²⁷

In this section we argue that the market-participant exception should not apply to subnational sanctions. Specifically, we argue that (i) the Supreme Court has expressed hesitance to apply the exception to situations involving foreign commerce, suggesting that the exemption is not transferable between interstate and foreign commerce; (ii) the rationale for the exemption, as expressed by the Court and leading commentators, does not support the immunization of state and local sanctions from judicial scrutiny; (iii) even if the market-participant exemption were applied, the state and local sanctions are a "primeval governmental activity" more akin to taxation than to ordinary participation in a market; and (iv) under the Court's own precedents, the breadth of some of the sanctions would render them ineligible for the exemption because of their impermissible "downstream regulation" of companies' contracts with third parties having no contact whatsoever with the city or state.

1. *The Market-Participant Exception*

a. *Hughes v. Alexandria Scrap Corp.*

First recognized by the Supreme Court in *Hughes v. Alexandria Scrap Corp.*,²²⁸ the market-participant exception suspends the operation of the dormant Commerce Clause doctrine when (i) a governmental entity contracts for goods or services in the marketplace as a "purchaser," as opposed to a "regulator;" and (ii) imposes terms as a condition of participation that would discriminate against or impermissibly burden interstate commerce, if imposed by the entity as a "regulator."²²⁹

227. See Lewis, *supra* note 2, at 481 ("In one sense, divestment statutes fit snugly into the market participant niche that the Court has provided; however, the doctrine is ultimately inhospitable because a great part of the statutes' effects fall on foreign commerce.") (footnote omitted); see also *id.* at 477.

228. 426 U.S. 794 (1976). The Supreme Court had previously summarily affirmed a case arising in a Florida district court in which a publisher challenged a Florida statute mandating that all publishing done for the state of Florida be done in Florida. *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla. 1972), *aff'd*, 409 U.S. 904 (1972) (mem.). Rejecting the plaintiff's dormant Commerce Clause challenge, the district court reasoned that while "[t]rade regulations are clearly subject to Commerce Clause restrictions, . . . statutes that merely specify the conditions of state purchases are not." *Id.* at 725. For citations to similar cases from states upholding similar state laws, see *id.* at 724 n.29.

229. See generally BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 7.01-7.07 (1999); NOWAK, ROTUNDA & YOUNG, *supra* note 57, § 8.9, at 283-86; 2 ROTUNDA & NOWAK, *supra* note 167, at 47-51; TRIBE, *supra* note 170, at 430-34; Dan T. Coenen, *Untangling the Market-Participant Exception to the Dormant*

In *Alexandria Scrap*, the Court upheld a Maryland statute that used a combination of fines and bounties to encourage the efficient processing of abandoned cars into scrap and whose provisions favored in-state scrap dealers. Analogizing the Maryland scheme to a direct subsidy of an industry by the State, and distinguishing it from laws the Court had invalidated as violations of the Commerce Clause, the Court upheld the law. In so doing, the Court declared that

Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. There has been an impact upon the interstate flow of hulks only because . . . Maryland effectively has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland rather than take them outside the State.²³⁰

Justice Powell concluded that the purposes behind the Commerce Clause do not “prohibit[] a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”²³¹

b. Applying the Exception

Three years after *Alexandria Scrap*, in *Reeves, Inc. v. Stake*, the Court decided that the State could “favor its own citizens” by giving preference to them over out-of-state citizens who sought to purchase cement from a cement plant owned and operated by the State.²³² The plant was built in the 1920s to supply state cement needs.²³³ Due to

Commerce Clause, 88 MICH. L. REV. 395 (1989); Theodore Y. Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S. ILL. U. L.J. 73, 76-77; John L. Brownlee, *The Market Participant Doctrine: Ammunition for the War on Trash*, 17 WM. & MARY J. ENVTL. L. 59 (1992); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097 (1988); Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L.J. 559 (1990); A. Dan Tarlock, *National Power, State Resource Sovereignty and Federalism in the 1980s: Scaling America's Magic Mountain*, 32 U. KAN. L. REV. 111, 133 (1983); Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1134 (1980); Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. CHI. L. REV. 615 (1993); Greer L. Phillips, Comment, *Commerce Clause Immunity for State Proprietary Activity: Reeves, Inc. v. Stake*, 4 HARV. J.L. & PUB. POL'Y 365 (1981); Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism?*, 1985 DUKE L.J. 697; Bruce B. Weyhrauch, Note, *South-Central Timber Development, Inc. v. Wunnicke: The Commerce Clause and the Market Participant Doctrine*, 15 ENVTL. L. 593 (1985).

230. *Alexandria Scrap Corp.*, 426 U.S. at 806 (footnote omitted).

231. *Id.* at 810.

232. 447 U.S. 429 (1979).

233. *Id.* at 430-31.

overproduction, the plant began to sell its surplus to out-of-state purchasers.²³⁴ When a production slow-down resulted in an inability to supply all of its customers, the state commission charged with overseeing the plant's operation announced a policy recommitting the plant to supply the needs of in-state users first and then selling any surplus to out-of-state purchasers on a first-come, first-served basis.²³⁵

Despite the fact that the out-of-state petitioner had come to rely on cement from the plant and was unable to find a replacement supplier, the Court, applying the reasoning of *Alexandria Scrap*, upheld the commission's policy.²³⁶ In the majority opinion, Justice Blackmun characterized the basic distinction drawn in *Alexandria Scrap* "between States as market participants and States as market regulators" as making "good sense and sound law."²³⁷

The Court claimed that accepting the petitioner's contention that once the State elected to become part of the market, it could not withdraw, "would interfere significantly with a State's ability to structure relationships exclusively with its own citizens. . . . [and would] threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse"²³⁸ To the petitioner's charge that the Commission's policy amounted to protectionism, the Court responded that the "State's refusal to sell to buyers other than South Dakotans [was] 'protectionist' only in the sense that it limit[ed] benefits generated by a state program to those who fund the state treasury and whom the State was created to serve."²³⁹

The Court also noted that South Dakota had neither limited access to the State's cement market, nor to the materials necessary to produce cement, nor did the State possess "unique access to the materials needed to produce cement" so as to create a tacit monopolistic situation.²⁴⁰ Further, the Court remarked that South Dakota had not attempted to restrict out-of-state sales of cement purchased from its plant. Had it done so, the result would be "a greater measure of

234. *Id.* at 432.

235. *Id.* at 432-33.

236. *Id.* at 446-47.

237. *Id.* at 436.

238. *Id.* at 441.

239. *Id.* at 442. This doctrine that the State may limit benefits to its citizens is well-established in Supreme Court precedent. *Cf. McCready v. Virginia*, 94 U.S. 391, 395 (1876) (holding that a Virginia law against "planting oysters" in the waters commonly owned by the State of Virginia violated neither the Commerce Clause nor the Privileges and Immunities Clause of the Constitution).

240. *Reeves*, 447 U.S. at 444.

protectionism and stifling of interstate commerce than the challenged system allows.”²⁴¹

In *White v. Massachusetts Council of Construction Employees*, the Court upheld an executive order from the Mayor of Boston directing that all construction projects funded in whole or in part by the city or funds that the city had authorization to administer should be performed by firms whose crews were composed of at least fifty percent Boston residents.²⁴² The Court’s opinion, authored this time by then-Justice Rehnquist, characterized *Alexandria Scrap* and *Reeves* as “stand[ing] for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause.”²⁴³ The Court was untroubled by the prospect that the executive order reached beyond the privity of contract with the contractors to affect the latter’s contracts with their subcontractors.²⁴⁴ Justice Rehnquist wrote that it was permissible because, at least in an informal sense, everyone affected by the mayor’s order was “working for the city.”²⁴⁵

241. *Id.* at 445. Interestingly, Justice Powell, the author of the *Alexandria Scrap* decision, dissented in *Reeves*. South Dakota’s policy “represent[ed] precisely the kind of economic protectionism that the Commerce Clause was intended to prevent.” *Id.* at 447 (Powell, J., dissenting). The question for Powell was “whether the Commission’s policy should be treated like state regulation of private parties or like the marketing policy of a private business.” *Id.* at 449. Powell would have held the Commerce Clause inapplicable if the area in which the State involves itself involves “traditional governmental functions;” *id.* (quoting *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)). However, if the “the State enters into the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization.” *Id.* at 449-50. Justice Powell then expressed doubt that a State could ever be considered truly analogous to a private market participant. “[P]recisely because South Dakota is a State, it cannot be presumed to behave like” a regular private enterprise. *Id.* at 450.

242. 460 U.S. 204, 205-06 (1983).

243. *Id.* at 208.

244. *See id.* at 211 n.7.

245. *Id.* Though *White* seems to allow substantial flexibility for state and local governments as it does extend the protection of the market-participant exception to conditions the City of Boston chose to impose on the workers with whom it was not directly in privity of contract, Justice Rehnquist’s reasoning has not gone without criticism. Professor Coenen writes:

Then-Justice Rehnquist . . . brushed aside the attack on the Boston rule by asserting in effect that the case did not involve a downstream restraint at all. Rather, it was the majority’s view that “[e]veryone affected by the order is, in a substantial if informal sense, ‘working for the city.’” This analysis is puzzling. Construction workers, after all, work for construction companies. . . . To say that construction workers “work for the city” thus seems to blink at reality.

Coenen, *supra* note 229, at 466-67; *see also id.* at 467 n.412 (quoting other criticisms of Justice Rehnquist’s characterization). Professor Coenen speculates that, in light of later

2. *The Limits of the Exception*

Following *White*, the Supreme Court decided a series of cases in which it limited the application of market-participant exception.²⁴⁶ The Court has invalidated restrictions whose effects extend far beyond the market in which the subnational government is participating. It has also questioned the exception's applicability to foreign commerce. Finally, the Court has refused to apply it to actions that are "primeval governmental activities" inconsistent with the premise of the exception, *viz.*, that the government is merely acting in a market as a normal purchaser or seller of goods and services.²⁴⁷

a. Regulation Outside the Relevant Market

In *South-Central Timber Development, Inc. v. Wunnicke*,²⁴⁸ decided in 1984, the Court made clear that the power to impose restrictions on those other than the immediate parties to the contract was not unlimited. In return for selling some of state-owned timber below cost, Alaska required that before the timber could be shipped from the state, "[p]rimary manufacturing" be done in the State of Alaska.²⁴⁹ This regulation was intended to protect existing industries, provide revenue for the State, and encourage the establishment of new industries.²⁵⁰

The Supreme Court invalidated the restrictions, finding that the condition was not authorized by Congress, and holding that by imposing the local-processing condition, Alaska was acting as a market regulator, not a market participant.²⁵¹ Lacking congressional approval, the two issues left were "(1) whether . . . Alaska's requirement is permissible because Alaska is acting as a market participant, rather than as a market regulator; and, (2) if not, whether the local-processing requirement is forbidden by the Commerce Clause."²⁵²

As to the first question, Justice White distinguished *White* on the "crucial" ground that the contractors and their subcontractors in that

cases, *White* could be restricted "essentially to cases involving hiring by construction contractors." *Id.* at 468.

246. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Harrison*, 117 S.Ct. 1590 (1997); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

247. *See infra* notes 263-67 and accompanying text.

248. 467 U.S. 82 (1984).

249. *See id.* at 84.

250. *Id.* at 85.

251. *See id.* at 87-93.

252. *Id.* at 87.

case were, in a sense, “working for the city.”²⁵³ The same could not be said of the relationship between South-Central Timber as purchaser and the State of Alaska as seller of timber. There was not even a colorable indirect relationship between the ultimate purchasers of the timber and the State, of the sort present among the City of Boston, the contractors, and subcontractors in *White*.²⁵⁴ Further, unlike in *Alexandria Scrap*, there was no subsidy of an existing market. “[W]hen Maryland became involved in the scrap market, it was a purchaser of scrap; Alaska on the other hand, participates in the timber market, but imposes conditions downstream in the timber-processing market.”²⁵⁵ Similarly, the Court noted that while it supported the general proposition that a state, as a market participant, was free to exercise its discretion in deciding with whom it would deal, “it did not – and did not purport to – sanction the imposition of any terms that the State might desire.”²⁵⁶ Concluding that the State “is more than a seller of timber,” the Supreme Court reasoned:

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.²⁵⁷

These conditions, the Court felt, “restrict[ed] the post-purchase activity of the purchaser, rather than merely the purchasing activity.”²⁵⁸

253. *Id.* at 95.

254. *See White v. Massachusetts Council of Constr. Employees*, 460 U.S. 204, 211 n.7 (1983); *supra* note 244 and accompanying text.

255. *South-Central Timber Dev., Inc.*, 467 U.S. at 95.

256. *Id.* at 96.

257. *Id.* at 97 (footnote omitted).

258. *Id.* at 99. A student commentator favoring subnational sanctions firmly believes that the market-participant exception allows subnational sanctions, but in discussing *South-Central Timber*, *see Carvajal, supra* note 21, at 273 & n.98, the author (i) fails to note the heightened scrutiny for foreign commerce to which the Supreme Court subjects the requirement; (ii) does not acknowledge that the Court has never stated affirmatively that the exception even applies in foreign commerce cases; and (iii) fails to offer an explanation why broad subnational sanctions, like Massachusetts’ statute, do not merely impose the same impermissible downstream regulations that were invalidated in *South-Central Timber*. More generally, the Comment fails to answer the objections that the purposes of the market-participant exception are not served by such sanctions. *See infra* notes 268-271 and accompanying text.

b. Foreign Commerce

Of particular importance to the Court in *South-Central Timber* was the fact that "foreign commerce is burdened by the restriction"²⁵⁹ – South-Central Timber shipped nearly all of its lumber to Japan.²⁶⁰

The Court recited the "well accepted rule that state restrictions burdening foreign commerce are subject to a more rigorous and searching scrutiny,"²⁶¹ and refused to apply the market-participant exception to Alaska's local processing requirement. Though it did not explicitly say so, the Court seemed concerned that allowing states – even those ostensibly acting as mere participants in a particular market – to take actions that discriminated against or burdened foreign commerce, would jeopardize "the efficient execution of the Nation's foreign policy" that demands the federal government "speak with one voice when regulating commercial relations with foreign governments."²⁶²

c. "Primeval Governmental Activities"

In later cases, the Supreme Court refused to apply the market-participant exception where a state had enacted a tax that discriminates against out-of-state interests, even if the tax was intended to function as the equivalent of a cash subsidy.²⁶³ Taxation, the Court has held, is a "primeval governmental activity" and is inconsistent with the claim that a governmental entity is functioning as a mere market participant.²⁶⁴

The Court also declined to allow the State of Wisconsin to claim immunity under the market-participant exception for a law barring state procurement from firms having been cited for three or more violations of the National Labor Relations Act in a five-year period, regardless of whether those violations occurred within or without the State.²⁶⁵ Wisconsin maintained that its law escaped preemption under the National Labor Relations Act "because it is an exercise of the

259. *South-Central Timber Dev., Inc.*, 467 U.S. at 100.

260. *Id.* at 96. The other two unique factors were that the case involved natural resources, and, unlike *Reeves*, the goods could not leave the state unless they were subjected to primary manufacturing requirements.

261. *Id.* at 100.

262. *Id.* (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1979)).

263. See *Camps Newfound/Owatonna, Inc. v. Harrison*, 117 S.Ct. 1590 (1997); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

264. See *infra* notes 279-283 and accompanying text.

265. See *Wisconsin Dep't Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 283-84 (1986).

State's spending power rather than its regulatory power."²⁶⁶ The Court disagreed, stating that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services' . . . for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation."²⁶⁷

3. *The Rationale for the Market-Participant Doctrine*

Though a completely coherent rationale for the market-participant exception has been somewhat elusive,²⁶⁸ Professor Dan Coenen has offered a test of sorts in his leading article on the doctrine that he derived from Justice Blackmun's defense of the exemption in *Reeves v. Stake*.²⁶⁹ Professor Coenen writes that

[t]o decide market-participation cases . . . courts must consider whether the challenged program does or does not bring into play the policies underlying the market-participant rule. In particular, they must consider:

- (1) whether the program reflects an effort of local citizens to reap where they have sown;
- (2) whether invalidation of the program is consistent with the underlying values of federalism, including the particular val-

266. *Id.* at 287.

267. *Id.* at 289 (quoting *Gould, Inc. v. Wisconsin Dep't Indus., Labor & Human Relations*, 750 F.2d 614 (7th Cir. 1984)).

268. Though the Court has repeatedly endorsed the market-participant exception in principle, its members have differed almost regularly as to either a rationale for it or its application. Justice Powell, who wrote the opinion in *Alexandria Scrap*, dissented in *Reeves* and *South-Central Timber*. Justice Blackmun, who authored the *Reeves* opinion, himself dissented in *White*. On the other hand, Justice White, who dissented in *Alexandria Scrap* and *White*, authored the Court's opinion in *South-Central Timber*, where the Court accepted the market-participation exception in theory, though it declined to apply it. Not surprisingly, perhaps, Justice Rehnquist, who authored the *White* opinion, dissented from the Court's holding in *South-Central Timber*.

269. See Coenen, *supra* note 229, at 441.

In *Reeves*, Justice Blackmun offered the following arguments in support of the market-participant exemption. First, according to his reading of the Commerce Clause's history, "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1979). Second, "considerations of state sovereignty counsel restraint." *Id.* at 438. Third, recognizing the "right of the trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal," Blackmun argued that "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 438 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (internal quotation marks omitted)). Finally, Justice Blackmun reasoned that traditional Commerce Clause analysis was inadequate to "assess" the "subtle, complex, [and] politically charged" circumstances accompanying "cases involving state proprietary action." *Id.*

ues of local experimentation and optimal responsiveness to local concerns;

(3) to what extent the program threatens the underlying commerce clause values of a free market and unified nation; and

(4) whether the state bears the appearance of "participating in," rather than "regulating," the market.²⁷⁰

Other commentators have articulated a rationale using similar language.²⁷¹ The common theme is that states should be able to reserve state largesse for the benefit of their citizens; the best of the market-participant cases bear this out, whether it is scrap cars in Maryland or cement in South Dakota. It is best applied in situations in which (i) the state or local government is benefiting its citizens; (ii) it is truly "participating" in a particular market; (iii) its actions are consistent with the structure of government under the Constitution; and (iv) the actions do not unnecessarily interfere with other important constitutional values.

The Inapplicability of the Market-Participant Doctrine to State and Local Sanctions

The states' confidence in the Court's market-participation doctrine to redeem statutes that otherwise impermissibly discriminate against foreign commerce is misplaced. Subnational sanctions are not consistent with the underlying philosophy of the exception. Even if applied to foreign commerce, sanctions like the Massachusetts law struck down in *Baker* represent attempts at market regulation, not market participation. Finally, these sanctions reach too broadly, imposing restrictions on parties outside the markets in which the subnational governments claim to be participating.

a. Application of the Exception in the Area of Foreign Commerce is Inconsistent with the Animating Purposes of the Exception.

The Supreme Court has not explicitly declared that the market-participant exception even applies to foreign commerce, and has strongly suggested that the exception may be limited in the realm of foreign commerce.²⁷² It could, consistent with its case law and the doctrine's underlying rationale, simply decline to apply it in a foreign commerce context.

270. Coenen, *supra* note 229, at 441 (footnote omitted).

271. See, e.g., BITTKER, *supra* note 229, § 7.07 at 7-29 to 7-30; NOWAK, ROTUNDA & YOUNG, *supra* note 57, § 8.9, at 283-86; TRIBE, *supra* note 170, at 430-34.

272. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984); *Reeves*, 447 U.S. at 438 n.9. See also Spiro, *supra* note 2, at 839.

The rationale behind the market-participant doctrine presumes that a state is acting in the market as an ordinary buyer and wishes to benefit its own citizens. To paraphrase Professor Coenen, it allows state citizens to “reap where they have sown.”²⁷³ With sanctions though, there are no tangible benefits that accrue to the citizens of the State. It is not as if, through the imposition of sanctions, Massachusetts seeks to secure a significant amount of state business for its own citizens.²⁷⁴ In fact, to the extent that a corporation is a “citizen” of its state of incorporation, that state’s sanctions may work to the detriment of the corporation, as well as any local employees and shareholders, by putting it at a competitive disadvantage with other international corporations that face no such burdens on their overseas activities. Moreover, even under the dubious proposition that states may participate in the market as a valid exercise of their police power,²⁷⁵ the only benefit to Massachusetts’ citizens’ “health, safety and welfare” is perhaps peace of mind - a psychic subsidy? a Karmic subsidy? a “reputational benefits” subsidy? - that none of their tax dollars are going to the coffers of corporations who may directly or indirectly provide goods or services to countries with whose governments a majority of legislators disagree.²⁷⁶ The intended beneficiaries are, in truth, manifestly *not* the citizens of the affected state or city, but the people of the target countries who suffer under that govern-

273. See Coenen, *supra* note 229, at 423.

274. Cf. *White v. Massachusetts Council of Constr. Employees*, 460 U.S. 204, 213-14 (1983) (noting that the program being challenged “sounds a harmonious note” with federal policy by “encouraging economic revitalization, including improved opportunities for the poor, minorities and unemployed” and concluding that, under such circumstances, such “parochial favoritism” did not violate the strictures of the Commerce Clause).

275. The exercise of which is, of course, wholly at odds with the notion that the state is acting as a market participant and not as a market regulator in the first place. See *supra* note 174 and *infra* note 282 and accompanying text.

276. Many sanctions ordinances contain this sort of psychic subsidy language. Berkeley, California’s procurement ordinance barring dealings with companies connected with Burma (Myanmar) declares in its preamble that its citizens’ “quality of life” suffers “when peace and justice are not fully present in the world . . .” BERKELEY, CAL., RESOLUTION No. 57,881-N.S. (1995) quoted in Schmahmann & Finch, *supra* note 15, at 197 & n.104. See also *id.* nn.104-06 (noting similar language in San Francisco, California’s and Takoma Park, Maryland’s sanctions ordinances).

By and large, the anti-apartheid statutes and ordinances were premised on three general rationales: (i) that continued investment in South Africa was contrary to a state’s or city’s own commitment to racial equality as grounded in its statutes or charter; (ii) that “companies with South African operations are simply not good investments in light of the [then-ongoing] political turmoil in that country;” and (iii) at last, a form of the psychic subsidy rationale appears—that local authorities, as businesses, have the right and obligation to deal only with those whom are “morally acceptable, albeit often grounded in terms of the market-participant exception.” Spiro, *supra* note 2, at 822-24.

ment's policies, not necessarily the citizens of Massachusetts, San Francisco, or New York City. While morally laudable, these are hardly direct "local concerns" in the way that joblessness, abandoned cars or a cement shortage are. In fact, the Supreme Court has held in another context that a state had no interest in the protection of out-of-state investors through its anti-takeover legislation.²⁷⁷ Moreover, the benefit derived from a psychic subsidy of a state's citizens is offset by the potential for disruption in foreign relations to the nation's citizens as a whole, and the fragmentation of responsibility for the conduct of foreign affairs.²⁷⁸

b. State and Local Sanctions Are "Primeval Governmental Activities"

Further, in recent cases, the Supreme Court has made it clear that activities like taxation are "primeval governmental activities" that are inconsistent with the idea of a state's functioning only as a market participant and thus, subject to more rigorous constitutional analysis in the event of challenge.²⁷⁹ In one case, *New Energy Co. v. Limbach*, the Supreme Court struck down an ethanol tax subsidy provided by a state only to in-state producers of ethanol and those out-of-state producers whose home states offered reciprocal tax credits.²⁸⁰ Writing for a unanimous Court, Justice Scalia held that the tax violated the dormant Commerce Clause doctrine and refused to apply the market-participant exception, succinctly concluding that it "has no application here."²⁸¹ The State's action in offering the tax credit involved neither the "purchase [nor] sale of ethanol, but [rather the] assessment and computation of taxes - a primeval governmental activity."²⁸² One

277. See *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

278. See *supra* Part II.

279. See *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); see also *Camps Newfound/Owatonna, Inc. v. Harris*, 117 S.Ct. 1590, 1606-07 (1997) ("Maine's tax exemption . . . must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the charities function."); *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1979) ("Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged") (citing *Japan Line, Ltd., v. Los Angeles*, 441 U.S. 434, 434 (1979); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984)).

280. *New Energy Co.*, 486 U.S. at 271.

281. *Id.* at 277.

282. *Id.* See also *Camps Newfound/Owatonna*, 117 S.Ct. at 1607. Though recognizing that a tax exemption had "the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws," *id.* at 1607 (quoting *New Energy Co.*, 486 U.S. at 277), the Court concluded that the "assessment and computation of taxes [is] a primeval governmental activity." *Id.* (quoting *New Energy Co.*, 486 U.S. at 277). "A tax exemption," Justice Stevens summarized for the majority, "is not the sort of direct state involvement in the market that falls within the market-participation doctrine." *Id.*

could argue that the real activity here is not the purchase of governmental goods and services, but the indirect imposition of what are implicitly embargoes. And embargoes, even indirect ones, are “primeval governmental activities,” not at all like market participation.²⁸³

c. Sanctions Impose Impermissible Downstream Restrictions

Finally, assuming *arguendo* that a court agreed that no appreciable differences between interstate and foreign commerce existed to prevent the application of the market participant exception, the limits on that exception established by the Court in *South-Central Timber v. Wunnicke*²⁸⁴ present additional obstacles that state and local sanctions would have a difficult time surmounting. The Supreme Court invalidated Alaska’s local-processing rule as a condition for the purchase of the state-owned timber because it imposed conditions “that had a substantial regulatory effect” outside the market in which that state was participating.²⁸⁵

A California district court recently struck down a part of a San Francisco city antidiscrimination ordinance prohibiting the city from contracting with companies that failed to offer identical benefits to unmarried domestic partners as were offered to married couples in any other of their nationwide operations because it imposed conditions beyond the market in which the City was participating.²⁸⁶ As the court characterized the restrictions, “[o]nce a company signs a City contract, it cannot provide discriminatory benefit packages to its employees anywhere in the United States without facing penalties imposed by the City [T]he City effectively regulates certain extraterritorial practices of City contractors.”²⁸⁷ The city and county defended the restrictions’ scope, arguing that “the City’s goal in passing the ordinance is to add a concrete requirement to its condition that contractors not discriminate on the basis of sexual orientation.”²⁸⁸

283. See also *Wisconsin Dep’t Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (holding state debarment scheme to be regulation, not participation).

284. 467 U.S. 82 (1984).

285. *Id.* at 97.

286. See *Air Transport Ass’n of America v. San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998).

287. *Id.* at 1162.

288. *Id.* at 1157. The ordinance applied to (i) contractors’ operations within San Francisco; (ii) outside of San Francisco if work was performed on property owned or leased by the City or on which the City had a right to occupy; (iii) where work is being done for the City within the United States; and (iv) any of the contractors’ operations within the United States. See *id.* The ordinance was enforced by fines and possible debarment from doing work for the City for a period of years. See *id.* at 1158.

While acknowledging that the City of San Francisco was a market participant, the relevant question for the district court was "whether . . . the City inappropriately reaches beyond the sphere of economic activity in which it is participating in an attempt to regulate commerce beyond its borders."²⁸⁹ The ban on offering benefits packages differentiating between married couples and domestic partners anywhere in the country, the court concluded, "encompasses much more than that in which the City is a 'major participant' . . . and the individuals affected by the Ordinance could hardly be described, even informally, as 'working for the city.'"²⁹⁰

Procurement statutes like that on the books in Massachusetts do just that: impose restrictions on companies that affect that company's operations over and above the particular market in which the state happens to be participating as a purchaser of goods or services. Parallels between San Francisco's attempt to control a contractor's conduct outside the borders of San Francisco and the subnational sanctions are worth noting. First, such sanctions self-consciously operate extraterritorially. States and municipalities seek to control conduct of corporations, their subsidiaries, and affiliates that falls not only outside the State and the rest of the United States, but outside the *country*. Further, the sanctions affect relationships that have nothing to do with the corporation's relationship with the subnational government imposing the sanctions; they are not, even informally, all "working for the city," nor does the governmental unit imposing the sanctions usually have any relationship, as a market participant or otherwise, with the foreign operations it seeks to regulate.

Suppose XYZ Corp., a multifaceted industrial conglomerate with operations around the world, signs a procurement contract to supply widgets to Massachusetts. XYZ Corp. also has a subsidiary, Burmco, that distributes flubber in Burma. Under Massachusetts' statute, XYZ Corp. could not continue to supply goods to the state and control its foreign subsidiary distributing a separate product line in another country. To allow Massachusetts to control, through its procurement statutes, the relationship between XYZ Corp. and Burmco (which is in no sense "working for the [State]") allows it to regulate commerce (i) of a market in which it is not a "major participant;" (ii) beyond its borders and beyond those of the United States – surely a far cry from the broad reach of even the most remote state "long-arm" jurisdic-

289. *Id.* at 1163.

290. *Id.*

tional statute;²⁹¹ and (iii) outside the relevant widget market in which it is acting as a market participant. Such extraterritorial regulation goes beyond what the Supreme Court has allowed, even in *White*.²⁹²

5. Distinguishing the “Buy American” Statutes

Before the Supreme Court’s later articulation of limits on state powers as market participants, some courts upheld “Buy American” statutes that forbade the purchase of foreign goods and parts when equivalent American alternatives were available.²⁹³ In a 1977 case, *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*, the New Jersey Supreme Court upheld a New Jersey “Buy American” statute against, *inter alia*, a Commerce Clause challenge by citing the market-participant doctrine.²⁹⁴ “One principle to be derived from *Alexandria Scrap*,” the court wrote, “is that a state’s legislation with respect to its purchase of goods and materials for its own end use, at least in the absence of federal action, is not subject to the usual Commerce Clause restrictions.”²⁹⁵ Despite the differences apparent in the Supreme Court’s case law between interstate and foreign commerce, the New Jersey court regarded as “incongruous” the result that such differences would mean that “a Buy New Jersey scheme would be exempt from Commerce Clause restrictions, but a Buy American scheme would not.”²⁹⁶ The court concluded that it would be “odd indeed to find that when a state becomes less parochial and chooses in its own purchases to prefer the products of the nation, as opposed to those of the state, its purpose becomes suspect under the Commerce Clause” and saw “no reason to deem [this action] . . . less legitimate” when such concern is manifested.²⁹⁷ The New Jersey court even went so far as to say that encouraging national commerce was an valid exercise of the state’s police power.²⁹⁸ Yet, as one com-

291. Cf. *Markham v. Anderson*, 531 F.2d 634 (2d Cir. 1976) (construing New York’s long-arm statute; dismissing complaint for lack of personal jurisdiction under such statute).

292. See generally *White v. Massachusetts Council of Constr. Employees*, 460 U.S. 204, 206-13 (1983).

293. See, e.g., 41 U.S.C.A. § 10a-10d (West 1987 & Supp. 1998); ALA. CODE § 39-3-1 (1992 & Supp. 1997); MD. CODE ANN. STATE FIN. & PROCURE. §§ 17-301 to 306 (1995); N.J. STAT. ANN. 52:32-1 (West 1986 & Supp. 1998). See also Note, *Buy-American Statutes—An Assessment of Validity Under Present Law and a Recommendation for Preemption*, 23 RUTGERS L.J. 137 (1991) [hereinafter *Buy-American Statutes*].

294. 381 A.2d 774, 789 (N.J. 1977).

295. *Id.* at 787.

296. *Id.*

297. *Id.*

298. *Id.* (“The state legislation which is so sanctioned would seem to include those acts designed to further economic interests or other legitimate ends, such as public health and

mentator noted, "What the New Jersey court found odd is, in fact, quite understandable: the Supreme Court's doctrine accepts New Jersey's discrimination between a New Jersey resident and a Californian; but recognizes different factors at work when New Jersey discriminates between a Californian and a Mexican."²⁹⁹

It is tempting to note the approval that Buy American statutes have received in the lower courts and to construct an analogy between them and to state and local sanctions; many advocates of an active state and local foreign policy have succumbed to that temptation.³⁰⁰ However, there are significant differences even between Buy American statutes, which in any event have not been tested before the Supreme Court, and state and local sanctions.³⁰¹ Though the New Jersey Supreme Court had no trouble making the leap from interstate to foreign commerce, its rationale was built on the erroneous premise that "[t]he power to regulate commerce among the several states is . . . coextensive with [the power to regulate commerce with foreign nations]" and that Supreme Court cases "scrutinizing state regulations affecting commerce . . . seem to have made no distinction between interstate and foreign commerce."³⁰² Those statements were almost surely wrong when the New Jersey court wrote them in 1977³⁰³ and are most certainly incorrect today in light of *Japan Line*.³⁰⁴

Significant distinctions can also be drawn between the present state and local sanctions and the occasionally challenged but (excepting the *Bethlehem Steel* case) largely upheld state "Buy American" statutes.³⁰⁵ Unlike the present statutes, or even the anti-communist goods ordinances of the Cold War,³⁰⁶ the Buy American statutes were not purposefully directed at any particular country or regime but, rather, only required that certain products or raw materials be used

welfare."). *But see* *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800 (Ct. App. 1969) (striking down California statute flatly prohibiting foreign materials in items purchased by the state; deemed not a legitimate state interest).

299. Lewis, *supra* note 2, at 476.

300. *See, e.g.*, Jubinsky, *supra* note 2, at 559. *But see* Lewis, *supra* note 2, at 481.

301. For a discussion of these distinctions, see *infra* notes 305-13 and accompanying text.

302. *K.S.B. Technical Sales Corp.*, 381 A.2d at 788.

303. *See supra* notes 170-208 and accompanying text (describing the articulation of Supreme Court limits on state interference with foreign commerce).

304. *See supra* notes 184-196 and accompanying text. *But see* Jubinsky, *supra* note 4, at 561 ("[I]t appears that *Japan Line* did not undermine *K.S.B.*: foreign and interstate commerce may be treated a like [*sic*] if . . . the statutes do not interfere with uniform federal regulation of commerce.").

305. *See supra* note 99 and accompanying text.

306. *See supra* note 41 and accompanying text.

for the applicable state's public works projects.³⁰⁷ This is hardly the case with the present subnational sanctions, which, with a few exceptions, do not include "carve-outs" for protection of the public interest or even to reduce costs to the State.³⁰⁸ Moreover, unlike the current state and local sanctions,³⁰⁹ the Buy American statutes singled out no particular business entity or vendor for special treatment based upon a relationship it might have with a particular foreign country or regime. Buy American statutes, like the New Jersey³¹⁰ statute upheld in the *K.S.B.* case,³¹¹ were generally not found to discriminate against any country's ideology. Thus, such statutes occasioned no probing for a "democracy quotient."³¹² Other challenges along foreign policy lines, occasionally raised under the ambit of the General Agreement on Tariffs and Trade ("GATT"), were rejected, so that no undue burdens on foreign policy or foreign commerce or violation of the Supreme Court's "one voice" approach generally resulted from the implementation of state Buy American legislation.³¹³ Warts and all, such flexible, facially neutral statutes are a far cry from the application and consequences of today's largely inflexible and facially discriminatory state and local sanctions.

IV. The Case Against Judicial Restraint

Supporters of state and local sanctions point out that even if the measures do intrude into areas of federal primacy, it should be up to Congress, not the courts, to offer a corrective measure.³¹⁴ After all, no one questions Congress' power to stop such measures tomorrow if

307. Often, with an exception in the event that public officials determined the cost to be unreasonable or if buying American goods or services was otherwise inconsistent with the public interest. See *Trojan Tech., Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3d Cir. 1990); *Buy-American Statutes*, *supra* note 293, at 140-44.

308. See *supra* note 27 (noting the Massachusetts sanctions statute's humanitarian exception).

309. See *supra* notes 27-50 and accompanying text.

310. N.J. STAT. ANN. § 52:32-1 (West 1986 & Supp. 1998).

311. *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977).

312. *Id.* at 782-84.

313. See, e.g., *id.* at 782-84 and 788-89. But see *Bethlehem Steel Corp. v. Board Comm'rs*, 80 Cal. Rptr. 800 (Ct. App. 1969) (striking down California's "Buy American" statute).

314. See, e.g., *Bilder*, *supra* note 26, at 831; *Goldsmith*, *supra* note 146, *passim*.

it wished.³¹⁵ One tentative supporter of state and local initiatives has observed:

State and local governments . . . will presumably argue, in support of their legality, that [such measures] reflect strong and legitimate local interests and concerns regarding the appropriate disposition of state or local public pension and other funds; that they have only an indirect and marginal impact on foreign relations; that they relate to concerns on which Congress, although fully aware of these extensive state and local activities, has deliberately not taken preemptive action; and that, consequently, they do not impermissibly intrude upon the federal foreign relations power.³¹⁶

However, requiring restraint so that a corrective measure has to come from Congress possibly entails shutting the barn door long after the horses have run off. Congress is either forced to spend its time trying to anticipate encroachments on its own and the President's power over foreign affairs and preempt those with affirmative legislation, or it must try to "unring the bell," to react to state and local legislation after potentially severe damage to foreign policy has already been done. The Massachusetts legislation, for example, has already been the subject of a complaint to the World Trade Organization, before which the United States government must appear to represent the State, Massachusetts itself having no standing to appear on its own.³¹⁷ Moreover, detrimental to claims that a vigilant and active Congress is the best guardian of its prerogatives, the popularity and emotional appeal of state and local sanctions transcends political parties. Liberals favor them for countries like Indonesia, Myanmar and Nigeria, while conservatives invoke them for countries like Cuba and China. This rare transideological popularity is premised partly, one suspects, on the theory that doing something is preferable to doing nothing³¹⁸ and gives sanctions a kind of political cover that could entrench them against legislative action, if the courts decline to intervene.³¹⁹

315. See *supra* text accompanying notes 168 & 169. But see Fenton, *supra* note 49, at 590-92 (advocating the need for judicial action as to the consideration of subnational sanctions, due to the significant obstacles militating against congressional action).

316. Bilder, *supra* note 24, at 831.

317. See Marchick Testimony, *supra* note 9 at 3.

318. See generally Omestad, *supra* note 127, at 30 ("The allure of sanctions is easy to understand: They offer a way of doing *something*, short of using military force, about troublesome issues . . .").

319. This temptation to sacrifice constitutional integrity to political expediency is nicely captured by the Clinton Administration's desire to play both sides of the sanctions controversy against the middle by opposing the reversal of *Baker* while defending Massachusetts

As in the application of the dormant Commerce Clause doctrine to interstate commerce, the question becomes who should bear the burden of inertia, Congress or the states. We argue that judicial invalidation of these programs is consistent with the best understanding of the respective roles of the state and federal governments *vis-à-vis* foreign affairs. As to possible harms to federalism, we note that arguments from federalism are weaker when it comes to foreign affairs.³²⁰ While the Supreme Court in *Curtiss-Wright Export Corporation v. United States* was probably incorrect to say that responsibility for foreign affairs went from the Crown to the Congress formed after the Constitution's ratification in 1789,³²¹ it was precisely *because* of the chaos produced by the divergent foreign policies of the several states under the Articles of Confederation that centralization of foreign affairs and trade was uncontroversial, even among Antifederalists.³²²

Judicial silence, premised on the theory that Congress may act if it wishes, distorts the allocation of power made by the Constitution. We cannot be, as James Madison suggested, "one nation . . . in respect to other nations"³²³ if state and local governments are allowed to pursue what amount to independent foreign policies. Unlike in interstate or foreign commerce, Congress' silence in the face of state and local measures like those discussed here does not signal acquiescence, nor can it, as those boundaries are demarcated by the structure of the Constitution. To remain silent, moreover, allows Congress to evade its own and the executive branch's responsibility to forge a national foreign policy that takes into account the sometimes divergent interests of the national polity's constituent members and risks international criticism for taking moral stands on foreign policy issues.

before the WTO. See Michael S. Lelyveld, *US May Defend, Oppose State's Sanctions Law*, J. COM., Feb. 3, 1999, at 3A. But a bipartisan group of House members has filed an *amicus curiae* brief in *Baker* supporting Massachusetts, and "[t]he White House is said to be debating whether it should pursue the Constitutional issue in a case involving a regime as unpopular as that of Myanmar." Michael S. Lelyveld, *15 Lawmakers Back Massachusetts Appeal*, J. COM., Feb. 5, 1999, available at 1999 WL 6371552.

320. See, e.g., note 165 *supra* (discussing Congress's "virtually unlimited power" over foreign commerce); note 167 *supra* (citing Congress's "complete and paramount authority" over foreign commerce); note 168 *supra* (describing Congress's powers over foreign affairs and commerce as "very precisely defined and . . . plenary"); and Beerman, Comment, *supra* note 221, at 222 ("Thus, it remains settled that Congress has the final word in regulating trade with foreign nations.").

321. 249 U.S. 304, 316-17 (1936).

322. See *supra* notes 51 & 56 and accompanying text.

323. See *supra* note 1.

Conclusion

*"It is crucial to the efficient execution of the Nation's foreign policy that 'the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments.'"*³²⁴

Many state and local governments are enacting or are considering procurement statutes aimed at companies that operate in or deal with certain countries with whose policies those state and local governments disagree. By insisting that affairs of state are states' and municipalities' affairs, subnational governments have produced a sorry state of affairs in which effective foreign policy-making at the national level is hindered and in which allies (and potential adversaries) are left confused and irritated. As a result, jobs are lost and business opportunities are squandered. Admittedly, many of the countries and regimes against whom the latest wave of subnational sanctions are directed are highly anti-democratic and have amassed records of substantial human rights abuses. Such reprehensible conduct, however, does not answer the question whether state and local governments may constitutionally impose such sanctions. These are judgments that must be made regardless of the nature of the regime against which sanctions are enacted. These sanctions, like the statute struck down in Massachusetts, are unconstitutional because they violate the allocation of power between the state and local governments recognized in Supreme Court cases like *Davidowitz*, *Clark*, and *Zschernig*, and because they constitute a violation of the implicit restrictions on a state's power to regulate foreign commerce under the Commerce Clause.

In addition, in enacting these sanctions, subnational governments are not "market participants," assuming (which we do not) that the market-participant exception to the dormant Commerce Clause doctrine even applies in the foreign commerce context. Sanctions, like embargoes and taxes, are best characterized as a "primeval governmental activity," which takes such governments' actions out of the realm of mere market participation. In any event, the current wave of subnational-level sanctions clearly impose restrictions far beyond the market in which the state or local government purports to be participating, and on persons who can, in no sense, be understood to be working for the governmental unit.

If state and local governments wish to have a voice in the formation and implementation of foreign policy, they should make their

324. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984), citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

views known to members of Congress and to the President,³²⁵ both of which branches would seem to ignore the wishes of their constituents at their peril. States and municipalities, however, should neither be allowed to hinder both branches in the execution of their constitutional duties nor to continue to function as a clamorous multitude of *de facto* "Secretaries of State" on their own behalf. The continued fragmented results of state and local sanctions may, in the end, prove to be a collective disservice to all, leaving us all - as in the days of the Articles of Confederation - "victims of our own imbecility,"³²⁶ a Balkanized nation in the spheres of foreign affairs and commerce.

325. *See, e.g.*, *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998) ("Massachusetts' concern for the welfare of the people of Myanmar as manifested by this legislative enactment may well be regarded as admirable. But under the exclusive foreign affairs doctrine, the proper forum to raise such concerns is the United States Congress."). *See also* text accompanying note 110 *supra*.

326. I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 261, at 181 (Thomas M. Cooley, ed., 1873) (1833) (commenting on foreign policy and foreign commerce defects of the Articles of Confederation: "We were . . . the victims of our own imbecility, and reduced to a complete subject to the commercial regulations of other countries, notwithstanding our boasts of freedom and independence."). *See also* note 53 *supra* and accompanying text.