

1997

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David Schmahmann and James Finch, The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar), 30 *Vanderbilt Law Review* 175 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol30/iss2/1>

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VANDERBILT JOURNAL OF TRANSNATIONAL LAW

VOLUME 30

MARCH 1997

NUMBER 2

The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)

*David Schmahmann
James Finch**

ABSTRACT

As a punitive measure against the military regime in Burma, state and municipal governments in the United States have adopted laws penalizing firms that conduct business in that nation. This Article analyzes the validity of these statutes and ordinances under various provisions of the U.S. Constitution.

After introducing the nature of this development and the constitutional issues raised, Part II of this Article proceeds to examine the character of the local enactments and the political backdrop which lead to their adoption. In Part III, the Authors analyze four federal constitutional issues surrounding the local legislation: implied preemption by federal legislation, impermissible intrusion into federal jurisdiction under the Foreign Commerce Clause, impermissible usurpation of federal authority under the Supremacy Clause, and impermissible delegation of authority

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to private parties in violation of the the Due Process Clause. In Part IV, the Authors discuss the practical problems presented by parallel and inconsistent foreign policies. This Article concludes that while the local measures are constitutionally infirm, they are unlikely to be challenged by injured firms.

TABLE OF CONTENTS

I.	INTRODUCTION	176
II.	LOCAL ENACTMENTS.....	179
III.	CONSTITUTIONAL ATTACKS ON LOCAL FOREIGN POLICYMAKING	183
	A. <i>Preemption</i>	184
	B. <i>The Foreign Commerce Clause</i>	189
	C. <i>The Supremacy Clause</i>	198
	D. <i>Possible Impermissible Delegation</i>	199
IV.	PRACTICAL PROBLEMS PRESENTED BY PARALLEL FOREIGN POLICIES.....	202
	A. <i>The Federal Government has Acted on the Matter and yet its Considered Decision is not the Law of the Land</i>	202
	B. <i>State and Local Governments Are Inappropriate Bodies for Foreign Policymaking</i>	204
V.	CONCLUSION.....	207

I. INTRODUCTION

By the end of 1996, one state¹ and eight cities² in the United States had adopted measures seeking to penalize business entities conducting activities in Burma (Myanmar).³ These local

1. Massachusetts. See Act of June 25, 1996, ch. 130, § 1, 1996 Mass. Acts 210.

2. Berkeley, Santa Monica, San Francisco, and Oakland, CA; Takoma Park, MD; Ann Arbor, MI; Carborro, NC; and Madison, WI. In addition, the cities of Seattle, WA, Chicago, IL, and Santa Cruz, CA have adopted measures expressing their disapproval of the Burmese regime. As of December, 1996, several other cities, including New York City, were reportedly considering similar measures. See, e.g., Paul Reines, *Takoma Park Takes Global View with Burma-Related Ban*, WASH. TIMES, Nov. 3, 1996, at A11; Farhan Haq, *Burma: Students Begin Three Days of Fasts for Burma*, Inter Press Service, Oct. 8, 1996.

3. In June, 1989, the government of Burma changed the country's name to the Union of Myanmar and renamed the capital, formerly Rangoon, Yangon.

anti-Burma initiatives employ immediate economic disengagement as a punitive measure against the regime in Rangoon.⁴ Federal legislation, on the other hand, threatens to prohibit new investment as leverage to secure the safety of Aung San Suu Kyi and other Burmese democracy leaders, and to encourage dialogue and reconciliation.⁵

Local excursions into the realm of foreign affairs are not new,⁶ but they continue to raise difficult issues. While several

The change was made, according to officials to "better reflect Burma's ethnic diversity. The term Burma connotes Burman, the nation's dominant ethnic group, to the exclusion of other ethnic minorities." *Burma Takes Another Name: Now, the Union of Myanmar*, N.Y. TIMES, June 20, 1989, at A5. Rangoon was changed to Yangon supposedly to reflect more faithfully contemporary usage. *2,000 Burmese Protest Attack on Opposition Chief*, N.Y. TIMES, June 24, 1989, § 1, at 5.

4. See *infra* notes 12-24 and accompanying text.

5. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009. Conditional sanctions on Burma were imposed as part of the Act making appropriations for foreign operations, export financing, and related programs for the year ending September 30, 1997. With regard to Burma, the Act provides that until the President certifies to Congress "that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government," certain sanctions were to be imposed, most notably an end to most bilateral assistance and obstruction by the United States of most multilateral assistance. *Id.* In addition, certain "conditional sanctions" were imposed. New investment in Burma was to be prohibited "if the President determines and certifies to Congress that, after the date of enactment of this Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition." *Id.* The Act further contemplated that the President would "seek to develop . . . a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma." *Id.*

"New investment" is defined in the Act to mean activity undertaken "on or after the date of certification" by the President as contemplated by the Act, and is limited to investment in developing resources located in Burma. *Id.* "New Investment" specifically does *not* include "the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." *Id.*

Finally, the Act required the President to submit periodic reports to certain Congressional committees on:

- (1) progress toward democratization in Burma;
- (2) progress on improving the quality of life of the Burmese people . . . ;
- (3) progress made in developing the strategy referred to in subsection (c) [to bring democracy to and improve human rights practices and to develop a dialog between SLORC and opposition groups].

Id.

6. As of 1991, more than 900 localities passed resolutions supporting a "freeze" in the arms race; 197 demanded a halt to nuclear testing; 120 refused to cooperate with the Federal Emergency Management Agency's nuclear-war exercises; 126, plus 27 states, divested more than \$20 billion from firms doing business in South Africa; 86 formed linkages with Nicaragua and, along with

excellent articles on the constitutionality of these local measures exist,⁷ the case law is almost completely undeveloped.⁸ The fact that serious questions remain about the constitutionality of these local forays into foreign affairs may largely be due to the significant political disincentives to challenging their

grassroots activists, provided more humanitarian assistance to the Nicaraguan people than all the military aid Congress voted for the contras; 80, along with the U.S. Conference of Mayors, demanded cuts in the Pentagon's budget; 73 formed sister-city relationships with Soviet cities (roughly 50 more are pending); 29 provided sanctuary for Guatemalan and Salvadoran refugees; 20 passed stratospheric protection ordinances phasing out ozone-depleting chemicals; and at least 10 established funded offices of international affairs—in essence municipal state departments. Howard N. Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 564 n.1 (1993); see also 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, 815 n.14 (1986) (listing measures taken in several states penalizing or proposing to penalize certain kinds of commerce in Iran, Northern Ireland, Poland, Sri Lanka and Libya).

7. See generally Fenton, *supra* note 6; Garrett M. Smith, Board of Trustees v. City of Baltimore: *Public Pension Fund Divestment of South African Securities Upheld*, 49 MD. L. REV. 1030 (1990); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821 (1989); Anne R. Bowden, Note, *North Carolina's South African Divestment Statute*, 67 N.C. L. REV. 949 (1989); Patrick J. Borchers & Paul F. Dauer, *Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components*, 40 HASTINGS L.J. 87 (1988); Cynthia R. Fischer, *Federal Preemption and the South African Sanctions: A Survival Guide for States and Cities*, 10 LOY. L.A. INT'L & COMP. L.J. 693 (1988); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1162 (1987); Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987); 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); 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); Christina Walsh, Note, *The Constitutionality of State and Local Governments' Response to Apartheid: Divestment Legislation*, 13 FORDHAM URB. L.J. 763 (1985).

8. The jurisprudence on the specific issue of the constitutionality of local requirements for divestment and debarment is almost non-existent. In *Board of Trustees v. Mayor of Baltimore*, 562 A.2d 720 (Md. 1989), *cert. denied sub nom. Lubman v. Mayor of Baltimore*, 493 U.S. 1093 (1990), a Maryland court upheld the constitutionality under the U.S. Constitution of a Baltimore law requiring divestment of a retirement fund from stocks in corporations doing business in South Africa. In *United States v. City of Oakland*, D.C. No. CV-89-03305-JPV (N.D. Cal. 1990), *aff'd*, 958 F.2d 300 (1992), the court granted the government summary judgment against Oakland's nuclear free zone ordinance, which included a contract debarment provision. In *Regents of the Univ. of Michigan v. State*, 419 N.W.2d 773 (Mich. App. 1988) and *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986), state laws requiring divestment or denying tax exemption on the basis of a South African nexus were struck down, but on state constitutional grounds.

constitutionality.⁹ Few corporations would have been bold enough to challenge a community's censure of apartheid, and not many more will want to be perceived as supporting the State Law and Order Restoration Council (SLORC) regime in remote Burma.

This Article analyzes the constitutionality of these state and local enactments under the U.S. Constitution. Part II of this Article reviews the character of these statutes and ordinances, examining their structure, language, and adoption. In Part III, the constitutional infirmities of these state and local enactments are presented and discussed. With a detailed analysis of Supreme Court case law, this Article asserts that these state and local enactments are constitutionally infirm under preemption, the Foreign Commerce Clause, and the Supremacy Clause of the U.S. Constitution. Further, this Article suggests that these statutes and ordinances may also amount to an impermissible delegation by state and local governments under Due Process. Part IV of this Article then presents the practical problems of multiple foreign policies by federal, state, and local governments, including the failure to "speak with one voice" on international issues. Finally, this Article concludes that these state and local laws are unconstitutional and susceptible to great mischief, and that their constitutional infirmities are congruent with their practical flaws. Finally, in the case of Burma, local enactments, however well-intentioned, may even work at cross purposes with national policy.

II. LOCAL ENACTMENTS

It is not difficult to understand why Burma has captured the attention of American activists, nor why local initiatives such as those under discussion have proliferated. Aung San Suu Kyi's serene and principled stand against a military regime calling itself the SLORC¹⁰ presents a "good" versus "evil" scenario ripe for

9. And the process by which foreign policy is thus made. As reported in THE WASHINGTON TIMES, for instance, Takoma Park's debarment ordinance "began in the spring, when supporters and Burmese students primarily from Montgomery College's Takoma Park campus began discussing the issue with residents and city officials. . . . At a September 9 City Council hearing, about 100 people stressed charges of drug trafficking, human rights and other abuses." Reiners, *supra* note 2. The outcome of that process, such as it was, has become a component of U.S. foreign trade policy.

10. "In 1988, the SLORC-SLORC-that stands for the State Law and Order Restoration Council. What a name; what a name. Talk about a fascist name." 142 CONG. REC. S8795 (daily ed. July 25, 1996) (statement of Sen. D'Amato); see also *id.* at S8756 ("A military regime whose initials form the unenviable acronym SLORC, as if 'SLORCing' out of the black lagoon.") (remarks of Sen. Moynihan).

indignation.¹¹ An issue such as this presents a high visibility, low risk opportunity for local political leaders and activist groups. It "draws the attention of the local press, is more substantive than adoption of a precatory resolution of censure or disapproval, and presents little economic risk to the jurisdiction."¹²

The first city to act was Berkeley, California, which passed a Resolution in February, 1995 prohibiting contracts for personal services or for the purchase of commodities from entities doing business in Burma "until the City Council determines that the people of Burma have become self-governing."¹³ The first state to act was Massachusetts, which amended its general laws in June 1996, to prohibit the state, except in certain limited circumstances, from doing business with entities on a "restricted purchase list" supposedly containing the names "of all persons currently doing business with Burma (Myanmar)."¹⁴ Seven other localities adopted like measures within the next eighteen months.¹⁵

The local measures are similar in most salient respects. Each contains a preamble referencing and condemning the political practices of the Burmese regime, and several refer to the struggles and valor of Aung San Suu Kyi and other notables who have expressed their opposition to the SLORC regime.¹⁶ Significantly for purposes of constitutional analyses, each locality, except Ann Arbor and Carborro, includes in its measure language purporting to establish a legitimate local purpose in taking a stand against injustice across the world. Berkeley's measure begins:

11. It is unclear, in the absence of such a luminous contrast, why Burma would stand so starkly apart from other regimes in Asia whose human rights records are arguably as poor. China, in its well documented dealings with Tibet and with its own citizens in Tienanmen Square, comes to mind as does Indonesia in its handling of East Timor. Likewise, the Vietnamese political system is not notable for its concern with individual liberties.

12. Fenton, *supra* note 6, at 590.

13. Berkeley, Cal., Resolution No. 57,881-N.S., IIIB and IVB (Feb. 28, 1995). Berkeley was also the first U.S. city to pass such a bill in the anti-apartheid campaign against South Africa. Tiffany Danitz, *Senate May Follow State, City Actions to Punish Burma*, WASH. TIMES, May 4, 1995, at A20.

14. Act of June 25, 1996, ch. 130 § 22J(a), 1996 Mass. Acts 210, 212.

15. Madison, Wis., Resolution No. 52,471, I.D. No. 17607 (Aug. 15, 1995); Santa Monica, Cal., Selective Purchasing Ordinance, Resolution No. 8966 (Nov. 28, 1995); Oakland, Cal., Selective Purchasing Law; Ann Arbor, Mich., Resolution Barring Purchases from Businesses in Burma and from Those Doing Business with Burma (Myanmar) (Apr. 15, 1996); SAN FRANCISCO, CAL., ADMIN. CODE § 12J.1 (1996); Carborro, N.C., Resolution Barring Purchases from Businesses in Burma and from Those Doing Business with Burma, Resolution No. 18/96-97 (Oct. 8, 1996); Takoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996).

16. Berkeley; Madison; Oakland; San Francisco; and Takoma Park.

The citizens of the City of Berkeley, believing that their quality of life is diminished when peace and justice are not fully present in the world adopted Ordinance No. 5985-N.S. to promote universal respect for human rights and fundamental freedoms, recognize the responsibility of local communities to take positive steps to support the rule of law and to help end injustices and egregious violations of human rights wherever they may occur¹⁷

San Francisco's and Takoma Park's measures contains almost identical language. Madison's ordinance notes that the SLORC regime is "illegal and contrary to international law and covenants," and declares its existence "morally repugnant to the citizens of the City of Madison" ¹⁸ Santa Monica's measure recites how "the city and the government of the City of Santa Monica reflect a community united in its commitment to policies which guarantee broad human rights to people throughout the world."¹⁹ Oakland "recognize[s] the moral responsibility of communities to take positive steps to end human rights abuses and support legitimately elected governments."²⁰

Further, with respect to substantive debarment provisions, two distinct but related features are notable. First, the Massachusetts statute and four city measures incorporate the analysis of independent organizations in determining which businesses are present in Burma (as variously defined and modified) so as to merit debarment.²¹ Second, none of the

17. Berkeley, Cal., Resolution No. 57,881-N.S. (Feb. 28, 1995).

18. Madison, Wis., Resolution No. 52,471, I.D. No. 17607 (Aug. 15, 1995).

19. Santa Monica, Cal., Selective Purchasing Ordinance, Resolution No. 8966 (Nov. 28, 1995).

20. Oakland, Cal., Selective Purchasing Law.

21. The Massachusetts statute provides that a "restricted purchase list" will be compiled after consultation with "United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources." Act of June 25, 1996, ch. 130, § 22J(b), 1996 Mass. Acts 210, 212.

Oakland "shall make use of information provided by the Investor Responsibility Research Center and other reliable sources." Oakland, Cal., Selective Purchasing Law.

San Francisco provides that "'prohibited person or entity' shall mean any person or entity designated by the Investor Responsibility Research Center" but provides that the city "shall have authority to delete from such list any person or entity designated by the IRRC as having investments or employees in Burma if any such entity demonstrates to the [city's] satisfaction that such designation is erroneous." SAN FRANCISCO, CAL., ADMIN. CODE § 12J.1 (1996).

Takoma Park's Free Burma list "shall be the most current list of all companies with direct investment or employees in Burma as listed by the Investor Responsibility Research Center." Takoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996).

Madison declares that it will use the "Council on Economic Priorities listing of companies with economic interest in Burma" in determining debarment. Madison, Wis., Resolution No. 52,471, I.D. No. 17607 (Aug. 15, 1995).

measures clearly defines or anticipates what constitutes doing business "with" or "in" Burma.²²

22. The Massachusetts statute, for instance, is not clear as to whether a company needs majority ownership of the entity doing business in Burma to be debarred, or whether the determinant is *either* a majority stake or "operations, distribution agreements, or any other similar agreements in Burma." Act of June 25, 1996, ch. 130, § 22J(b), 1996 Mass. Acts. 210, 212. The statute may also mean that "operations" is that level of activity which places a company on the "Restricted Purchase list," which is itself derived from third parties using their own formulae for such inclusion.

San Francisco's "Prohibited Person or Entity" list is compiled by reference to the IRRC list, which is characterized as including "any person or entity . . . having investments or employees in Burma, or any person or entity that licenses any person or entity organized under the laws of Burma (Myanmar) to produce and market its products." SAN FRANCISCO, CAL., ADMIN. CODE § 12J.1 (1996). The ordinance is silent as to the implications of activity in Burma by a parent corporation, a partly-owned subsidiary, or an affiliate, relying presumably on the discretion to be exercised by the IRRC in compiling its list.

Takoma Park similarly contemplates compilation of a "Takoma Park Free Burma list" adopted from the IRRC list, with modifications to ensure debarment of "any person or corporation which has equity ties with any public or private entity located in Burma." Takoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996). "Equity ties" is left undefined, and the measure itself lapses into opacity in debarring the purchase of any commodity from "any person for the express purpose of investing in business operations or trading with any public or private entity that is located in Burma or has direct investment or employees in Burma." *Id.*

Takoma Park's ordinance also has the unique distinction of disqualifying any lawyer and law firm from performing legal services for the city if it represents "any person or corporation which has equity ties with any public or private entity located in Burma," or would even be "*willing*" to provide legal services to the SLORC regime. *Id.* (emphasis added).

Berkeley's ordinance prohibits the city from entering into contracts with any person who "buys, sells, leases or distributes commodities in the conduct of business with, or who provides or is *willing* to provide personal services to . . . any person for the express purpose of *assisting in* business operations or trading with any public or private entity located in Burma." Berkeley, Cal., Resolution No. 57, 881-N.S., IIIB & IVB (Feb. 28, 1995) (emphasis added). While the measure provides that the City Manager may promulgate rules and regulations "necessary or appropriate to carry out the purpose and requirements" of the Resolution, as of yet none have been. *Id.*

Oakland debars entities on a "List" compiled from the IRRC and "other reliable sources." Oakland, Cal., Selective Purchasing Law.

Madison provides that it will use the list compiled by the Council on Economic Priorities to determine which entities have an "economic interest" in Burma, and then defines economic interest to include "(a) direct investment, (b) licensing and leasing agreements, and (c) the operation of sales outlets in Burma (Myanmar)." Madison, Wis., Resolution No. 52,471, I.D. No. 17607 (Aug. 15, 1995).

Santa Monica's Ordinance, while *resolving* to debar contracts with entities doing business in Burma or purchasers of goods produced in Burma, in its text seems to prohibit only the purchase of goods actually made in Burma and to debar only entities actually doing business with SLORC or SLORC owned entities.

Ann Arbor and Carborro simply prohibit contracts with entities "who do business" in Burma. Both measures are silent as to what level of activity is required to trigger the debarment provisions.

More significantly, however, several of the measures include language contemplating their possible constitutional infirmity.²³ The measures adopted by Berkeley, Madison, Oakland, San Francisco, and Takoma Park provide as follows:

The United States Supreme Court has upheld the power of a municipality to make legitimate economic decisions without being subject to the restraints 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.²⁴

III. CONSTITUTIONAL ATTACKS ON LOCAL FOREIGN POLICYMAKING

All of the cited measures are vulnerable to constitutional attack on three grounds, and by delegating legislative authority to third parties for the compilation of "restricted" or "prohibited" lists, possibly four. First, the local measures are preempted by federal legislation.²⁵ Second, under the Foreign Commerce Clause of the Constitution, they constitute an impermissible intrusion into an area reserved for the federal government.²⁶ Third, the local measures are an impermissible usurpation of federal authority under the Supremacy Clause of the Constitution.²⁷ These latter two doctrines are closely related.²⁸ Finally, those local measures that incorporate by reference the judgment of third parties such as the Investor Responsibility Research Center may present Due Process problems if found as a matter of fact to be an impermissible delegation of authority.²⁹

23. See *infra* Part IIIB.

24. Berkeley, Cal., Resolution No. 57, 881-N.S., IIIB & IVB (Feb. 28, 1995); Madison, Wis., Resolution No. 52,471, I.D. No. 17607 (Aug. 15, 1995); Oakland, Cal., Selective Purchasing Law; SAN FRANCISCO, CAL., ADMIN. CODE § 12J.1 (1996); Tokoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996).

25. U.S. CONST. art. VI, cl.2.

26. *Id.* art. I, § 8, cl.3.

27. *Id.* art. VI, cl.2.

28. "Although the two doctrines are closely related, they have evolved on distinct precedential foundations and, at the margins, may denote different thresholds of constitutionality." Spiro, *supra* note 6, at 834, 841. A Commerce Clause analysis may be "overshadowed" by the fact that local initiatives impinge on foreign relations. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), discussed *infra* at Part II(b), in which the Supreme Court, in deciding a case on foreign Commerce Clause grounds, invokes language and reasoning from non-commercial cases, specifically the concept that the nation must "speak with one voice" in foreign affairs. *Id.* at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

29. See *infra* notes 122-33 and accompanying text.

A. Preemption

Article VI of the Constitution provides that the laws and treaties of the United States are "the Supreme Law of the Land" and prevail over, or preempt, state and local enactments. Thus any local law that purports to regulate or govern a matter explicitly³⁰ or implicitly covered by federal legislation is preempted, even if it is in an area otherwise amenable to state regulation.³¹ Since the Omnibus Consolidated Appropriations Act of 1997³² is silent as to its preemptive effect, preemption, if it exists, must be implied.

The parameters of implied preemption were spelled out in *Hines v. Davidowitz*,³³ which dealt with Pennsylvania's attempts to impose registration requirements on aliens that were in several respects different from and more onerous than the federal requirements. The Pennsylvania law contained a number of provisions evincing a suspicion of or hostility to aliens, *i.e.*, the requirement to carry identification cards with proof of registration, many of which the Supreme Court found had actually been considered by Congress, severely criticized, and not included in the federal act.³⁴

The Supreme Court struck down Pennsylvania's law, noting that the "basic subject of the state and federal laws is identical. . . . The only question is whether . . . the state and Federal Government have concurrent jurisdiction. . . ."³⁵ Even in the absence of preemption, however, the fate of the Pennsylvania statute may have been sealed because it interfered in foreign affairs. Taking careful note of the possible foreign ramifications of Pennsylvania's hostility to aliens,³⁶ the Court reiterated that the "the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution, was pointed out by the authors of *The Federalist* in 1787, and has since been given continuous recognition by this Court."³⁷

30. See, *e.g.*, Export Administration Act of 1977, 50 U.S.C.A. app. § 2407(c) (West 1991). The law specifically states that its provisions "shall preempt any law, rule, or regulation of any of the several States" or governmental subdivision thereof. *Id.*

31. See, *e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

32. See, *e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

33. Omnibus Consolidated Appropriations Act of 1977, Pub. L. No. 104-208, 110 Stat. 3009.

34. *Id.* at 72.

35. *Id.* at 61.

36. *Id.* at 64.

37. *Id.* at 62 (citations omitted); see also discussion *infra* Part II(c) regarding the Federal Supremacy issue.

The Court could not provide a timeless prescription for circumstances in which preemption would be found. "In the final analysis," it said, "there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³⁸ Important in considering the question of whether federal enactments preclude enforcement of state laws on the same subject was "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law. . . ."³⁹ Furthermore, in the field of international relations "[a]ny concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax."⁴⁰

Indeed, not only may "[t]he scheme of federal regulation be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"⁴¹ but even legislation facially *consistent* with a stated federal policy may be preempted if the Court finds that it intrudes on foreign commerce. In *South-Central Timber Dev. v. Wunnicke*,⁴² for instance, the Court struck down an Alaskan statute that required any timber sold within the state to have been processed in Alaska. Although this requirement did not in fact conflict with any federal law, the Court made it clear that the state had to show more than consistency with federal policy in taking a step so intrusive on foreign commerce. The Court stated:

The need for affirmative approval is heightened by the fact that Alaska's policy has substantial ramifications beyond the Nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the necessity that congressional authorization not be lightly implied.⁴³

Finally, the constitutionality of contract debarment laws that impinge on federal jurisdiction may already have been decided by the Supreme Court in *Wisconsin Dept. of Industry v. Gould*.⁴⁴ In *Gould*, the state of Wisconsin had sought to punish companies violating the National Labor Relations Act⁴⁵ by barring such firms

38. *Hines*, 312 U.S. at 67.

39. *Id.* at 70.

40. *Id.* at 68.

41. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

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

43. *Id.* at 92 n.7.

44. *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282 (1986).

45. 29 U.S.C. § 151 (1935).

from receiving state contracts. The Supreme Court held Wisconsin could not enact such measures and expressed a concern completely appropriate to the Burma sanctions, specifically the proliferation of local sanctions which, while not inconsistent with federal law, "further detracts from the 'integrated scheme of regulation' created by Congress."⁴⁶ "[I]f Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. . . . Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA. . . ."⁴⁷ The State's "goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the [National Labor Relations] Board."⁴⁸

Juxtaposing federal law imposing conditional sanctions on Burma with the local enactments leaves little room for a plausible argument that the state and local ordinances are not preempted. Senator Mitchell McConnell of Kentucky tried without success to persuade his colleagues in the U.S. Senate to require U.S. business interests to withdraw from Burma, the stated purpose of the local measures.⁴⁹ A review of Senator McConnell and his supporters' comments to the Senate in July, 1996, when an Amendment removed provisions from his bill requiring an economic withdrawal, establishes that his motivations and objectives were completely congruent with the local measures now under scrutiny.⁵⁰ While every legislator who spoke voiced

46. *Gould*, 475 U.S. at 288-89.

47. *Id.* at 288.

48. *Id.* at 291.

49. His bill to impose sanctions against Burma, first introduced on July 28, providing that "[n]o United States National may make any investment in Burma," would have required the Secretary of State to "prohibit the use of United States passports for travel to Burma," and would have required the President to "initiate negotiations with all foreign countries with which the United States trades for the purpose of entering into agreements with the countries . . . to support United States sanctions against Burma," and provided steps the President would take to *punish* those countries if they did not go along with American demands that Burma be economically isolated. *See* S. 1092, 104th Cong. (1995).

50. The [Cohen amendment calling for conditional sanctions rather than mandatory sanctions] actually makes the situation worse, in my opinion. It will allow aid to . . . increase. In other words . . . it is worse than current law because last year we voted to cut off a narcotics program in that country because we did not have any confidence in dealing with [SLORC]. This would make those dealings possible again should the administration decide to engage in it.

The second condition in the Cohen amendment which seems to me to be troublesome is it makes Aung San Suu Kyi's personal security the issue rather than the restoration of democracy. In other words, if you see that Aung San Suu Kyi is in trouble or there is large-scale trouble or

disapproval of the SLORC regime, most senators viewed their decision as involving "the effectiveness of mandatory . . . sanctions as a tool of foreign policy to encourage change in Burma. It is about the best policy to pursue that will bring about the changes that we all want to see in the nation of Burma."⁵¹

The proponents of mandatory unilateral sanctions did not prevail. Instead, the Amendment filed by Senator Cohen, reflecting his analysis as to the better federal policy, is now the law of the land.⁵² Furthermore, the State Department and the President also rejected the McConnell view.⁵³

violence, then you can take certain actions if you want to, but you do not have to because all of it can be waived.

In short, with all due respect to my good friend from Maine [Senator Cohen], it seems to me that this amendment basically gives the administration total flexibility to do whatever they want to do, which every administration would love to have. I can understand why they support this amendment. But looking at the track record of this administration and the previous one, given the discretion to do nothing, nothing is what you get. Nothing is what we can anticipate from this administration, and that is what we got from the last one.

142 CONG. REC. S8811 (daily ed. July 25, 1996) (statement of Sen. McConnell).

Senator D'Amato, supporting Senator McConnell's bill, agreed:

Business is important. Providing economic growth and opportunity is important. But freedom and liberty is more important. The human dignity of each and every individual and their right to live without being terrorized, both in this country and abroad, are more important.

We should not be providing succor and comfort to those who deprive millions and millions of people an opportunity to live free, an opportunity to be able to have their vote count

Id. at S8795-96 (statement of Sen. D'Amato).

With respect to the argument that sanctions would hurt American companies and not inflict much damage on companies of other countries, Senator Moynihan argued in support of the McConnell Bill that the principle was worth the price:

The world is watching. We are going to hear today—and we will not hear wrong—that if we impose these sanctions, American firms will lose opportunities, and European firms or Asian firms will take advantage of them. And that may be true. But I wonder for how long, and I wonder in the end at what profit. If our firms are strong and competitive and international, it is because of the principles the United States has stood for in this century, and should continue to stand for.

Id. at S8756 (statement of Sen. Moynihan in support of the McConnell Bill).

His position was not accepted by the Senate.

51. 142 CONG. REC. S8809 (daily ed. July 25, 1996) (statement of Sen. Craig).

52. [T]he question is, does the [mandatory sanctions] approach . . . increase America's ability to foster change in Burma and strengthen our hand and allow the United States to engage in the type of delicate diplomacy needed to help a poor and oppressed people obtain better living

standards, political and civic freedoms, and a brighter future as a dynamic Asian economy. . . .

I think, Mr. President, with all due respect, the answer is no. By adopting the [McConnell] language the Senate will be sending the following message:

That the United States is ready to relinquish all of its remaining leverage in Burma;

That America is shutting every door and cutting off all of its already-depleted stake in Burma's future;

That the Congress is ready to further bind the hands of this and any future administrations, taking away those tools of diplomacy—incentives, both in a positive and negative sense—which are crucial if we are ever going to hope to effect change in a nation where our words and actions already carry diminished clout.

. . . We all sense the plight of the Burmese people. We know the United States must support the forces of democratic change in Burma. . . .

I think we have to recognize the reality of the situation in Burma and our influence over there.

142 CONG. REC. S8746 (daily ed. July 25, 1996) (statement of Sen. Cohen).

Burma is located in one of the most dynamic regions of the world. . . . I suggest, Mr. President, that we have seen the flowering of democracy and freedom in parts of the world where values were quite alien to those that we support. . . . The same thing can happen in Burma. The best way to do that is to adopt a policy which gives the President some tools to influence the situation. The subcommittee's proposal is all sticks, no carrots. What we seek to do is give the President some limited flexibility to improve the situation on behalf of the Burmese people.

Id. at S58747; *see also* 142 CONG. REC. S8749 (daily ed. July 25, 1996) (statement of Sen. Johnston):

[T]his is a difficult question. No one defends the SLORC, the group that is running Myanmar, or Burma The question is: Would it be effective to do what Senator McCONNELL has proposed? . . . Would it help achieve the end? Mr. President, I think it would do precisely and exactly the opposite.

Mr. President, to cut off American participation in Burma—not foreign participation but American participation—would be exactly the wrong thing. First of all, it is no sanction because Americans are less than 10 percent of foreign investment in Burma today. . . .

And the question is: Is it good to have an American company, or would it be better to have Total, the French company, have the contract? Really that is the question proposed by the McConnell approach. I submit it is better to have an American company there.

See also 142 CONG. REC. S8750-51 (daily ed. July 25, 1996) (statement of Sen. Bond):

How can we influence anything if we are the only ones outside the room while the rest of the world is carrying on without us, probably happy to see us play the self-righteous outsider and get out? I cannot see how punishing United States firms by threatening to keep them out of Burma is an effective way to bring about change. United States presence, U.S. firms are the ones on the ground who can help spread American values.

53. The Congressional Record contains a letter addressed to Senator Cohen from the U.S. Department of State:

The local measures are an attempt to implement through local action a strategy expressly considered and rejected by the Senate. The local measures seek to institute that situation which opponents of the McConnell bill and proponents of the Cohen amendment wanted to avoid: diminishing the U.S. presence in Burma, reducing the flexibility and leverage the President has to influence events in a volatile situation, and removing a salutary U.S. influence from the local scene. Whether one *agrees* with the Senate's analysis and conclusions is irrelevant; local measures that may undermine the path chosen by the Senate must be preempted, or the entire Senate discussion, if proponents of local sanctions continue to prevail, is rendered moot.

This problem would persist *even if* the President were to determine that conditions for imposing sanctions had arisen. The federal act only prohibits "new investments," primarily in the development of natural resources in Burma.⁵⁴ It specifically exempts many, if not all, of the economic activities presently caught in the web of state and local sanctions, namely "entry into, performance of, or financing of a contract to sell or purchase goods, services or technology."⁵⁵

B. *The Foreign Commerce Clause*

Article I, Section 8, Clause 3 of the Constitution prohibits states or localities from regulating or taxing commerce if such actions burden interstate or foreign commerce.⁵⁶ With regard to foreign commerce, the Supreme Court has held that the federal government's regulatory power is "exclusive,"⁵⁷ and in a much quoted phrase, has stated that the nation must "speak with one

[W]elcom[ing] and support[ing] the amendment which you and others have offered to Section 569 (Limitation on Funds for Burma) of H.R. 3540. . . . We believe the current and conditional sanctions which your language proposes are consistent with Administration policy. As we have stated on several occasions in the past, we need to maintain our flexibility to respond to events in Burma and to consult with Congress on appropriate responses to ongoing and future development there.

142 CONG. REC. S8752-53 (daily ed. July 25, 1996).

54. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 569(f) (c), 110 Stat. 3009.

55. *Id.*

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.

Michelin Tire Corp. v. Wages, 423 U.S. 276, 283 (1976).

57. *Id.* at 286.

voice" in its foreign commercial relations.⁵⁸ As early as 1851, the Supreme Court described the Commerce Clause as preventing:

discriminations favorable or adverse to commerce with particular foreign nations [that] might be created by state laws . . . , deeply affecting that equality of commercial rights, and that freedom from state interference, which those who formed the Constitution were . . . so anxious to secure, and which the experience of more than half a century has taught us to value so highly.⁵⁹

The seminal case applying Article I, Section 8, Clause 3 to state legislation which burdens foreign commerce is *Japan Line, Ltd. v. County of Los Angeles*,⁶⁰ which dealt with several California counties' attempts to impose *ad valorem* taxes on Japanese shipping containers that were used consistently in international commerce, but that happened to be sitting on a California wharf or in a repair shop on a certain day of the year. The Court concluded that the taxes were an impermissible impediment to international commerce. "[A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential."⁶¹ Accordingly, "[f]oreign commerce is preeminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'"⁶² This is also true in those situations where the federal government is silent on a particular international issue. Even if Congress had not acted on the Burma issue, "it long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of the competing demands of state and national interests.'"⁶³

Moreover, the Supreme Court has held that "a more extensive constitutional inquiry" is required when analyzing claims arising under the Foreign Commerce Clause rather than under the Interstate Commerce Clause.⁶⁴ "It is a well-accepted rule," the

58. *Id.* at 285.

59. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317 (1851).

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

61. *Id.*

62. *Id.* at 448 (quoting *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)).

63. *Id.* at 454-55 (citations omitted).

64. *Id.* at 446; *see also* Bilder, *supra* note 7, at n.18, and cases cited therein.

Court has held, "that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."⁶⁵ The Court has found "evidence that the [F]ounders intended the scope of the foreign commerce power to be . . . greater" than the federal government's power to regulate interstate commerce, and citing *Michelin Tire Corp. v. Wages*,⁶⁶ referred to the "[f]ramers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'"⁶⁷

Although the Constitution . . . grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.⁶⁸

Because states and localities "have virtually no ability to influence a particular foreign nation through curtailing or eliminating their own international trading activities (a primary economic boycott), they exercise their domestic leverage over firms with which they do business in a manner designed to influence foreign nations (a secondary economic boycott)."⁶⁹

Depending on the size of the government procurement contracts involved and the market positions of the companies involved, these laws range from being mere nuisances to constituting virtual commands. The Eastman Kodak Company, for example, withdrew from South Africa altogether, allegedly in response to the threatened loss of its business with the New York City Government.⁷⁰

Notwithstanding the obvious market power states possess, several of the local ordinances reference a line of cases decided under the *Interstate Commerce Clause* which hold that where a state or locality imposes requirements on those with whom it does business as a market participant, rather than as a "regulator," some interference with interstate commerce is permitted.⁷¹ A "market participant" analysis is inappropriate to the local Burma enactments for at least three reasons.

65. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 100 (1984); see also *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-38 n.9. (1980).

66. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

67. *Japan Line*, 441 U.S. at 449.

68. *Id.* at 448 (citations omitted).

69. Fenton, *supra* note 6, at 567.

70. *Id.* at 571 (citation omitted).

71. See *supra* note 24 and accompanying text. Oakland and Berkeley also alluded to this doctrine in their South Africa resolutions. See Oakland, Cal., Ordinance 10, 611 C.M.S. (July 23, 1985); Berkeley, Cal., Res. 52, 858-N.S. (July 30, 1985).

First, the market participant doctrine has no application in those instances where the federal government has actually acted. Except for those situations where federal law is silent, it is irrelevant whether the local action is consistent with a federal regulatory scheme as in *Wisconsin Dept. of Industry v. Gould*⁷² or inconsistent, and thus precluding the federal government from "speaking with one voice." Federal law is not silent in the case of the Burma enactments.

Second, the Supreme Court has suggested that the market participant doctrine does not apply when a restraint on foreign commerce is alleged⁷³ and where constitutional scrutiny "may well be more rigorous."⁷⁴ Indeed, it has never applied the market participant doctrine to a case involving foreign commerce.⁷⁵

Third, and most significantly, even if this were a situation where the federal government had not acted, and even if it did not involve foreign commerce, the market participant doctrine would not apply because the local Burma ordinances go beyond the types of activities contemplated by the Court in carving out this limited exception to the general prohibition on a locality's intrusion into interstate or foreign commerce.

The market participant doctrine was first enunciated in *Hughes v. Alexandria Scrap Corp.*,⁷⁶ in which the Court upheld a Maryland statutory scheme that made it more difficult for out-of-state scrap processors to be awarded bounties for destroying cars abandoned on state highways. The Court's rationale for allowing the encumbrance of free commerce between the states was clear: The Commerce Clause does not prohibit a state from "participating in the market and exercising the right to favor its

72. "What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place. Congressional purpose is of course 'the ultimate touchstone.'" *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282, 290 (1986) (citations omitted).

73. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 102 (1984).

74. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-38 n.9 (1980); see also *Zschernig v. Miller*, 389 U.S. 429 (1968); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986).

75. There are also good practical reasons why this should be so:

Inasmuch as trade relations are now an inseparable part of U.S. foreign relations, the proliferating state and local views expressed and promoted through even the indirect trade restrictions have the potential to seriously disrupt U.S. foreign policy. They may also interfere with the ability of U.S. firms to pursue trade opportunities around the globe. Working through the maze of federal trade controls is difficult enough without having to consider the foreign policy goals of 50 states and hundreds of local jurisdictions.

Fenton, *supra* note 6, at 566.

76. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

own citizens over others."⁷⁷ In *Reeves, Inc. v. Stake*,⁷⁸ the Court permitted South Dakota to restrict its sales of state produced cement to out-of-state buyers. The Court observed that the states have a role as "guardian and trustee" for their citizens, noted the state's apprehension that absent its intervention cement shortages would be "threatening the people of this state,"⁷⁹ and held that this both suggested a duty and supplied a legitimate local purpose for states to discriminate in their citizen's favor.⁸⁰

The limits of the doctrine are seen in *White v. Massachusetts Council of Construction Employers, Inc.*,⁸¹ in which the Court considered a mayoral order that required all construction projects funded in whole or in part by the city to be performed by at least one-half Boston residents. The Court upheld this particular requirement, but cautioned that state and local governments could not develop restrictions that "reach beyond the immediate parties with which the government transacts business."⁸² Because the mayor's order "cover[ed] a discrete, identifiable class of economic activity in which the city [was] a major participant," the order fell within the limits of the doctrine.⁸³ The Court noted, "Everyone affected by the mayoral order is, in a substantial if informal sense, 'working for the city.'"⁸⁴

If *White* left any ambiguity as to the limits of the market participant doctrine, *South-Central Timber Dev. v. Wunnicke*⁸⁵ removed it. In *South-Central Timber*, the State of Alaska sought to require all timber sold from certain state owned parcels to be processed within the state. Alaska argued that it was acting as "a seller of timber, pure and simple,"⁸⁶ and that it could thereby impose any requirements on a sale that any private person could. The Court found it "clear that the State is more than merely a seller of timber."⁸⁷

In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he

77. *Id.* at 810.

78. *Stake*, 447 U.S. at 429 (1980).

79. *Id.* at 430.

80. *Id.* at 438.

81. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

82. *Id.* at 211.

83. *Id.*

84. *Id.*

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

86. *Id.* at 96 (quoting Respondents' Brief at 28).

87. *Id.*

pleases. Instead he is obligated to deal with a stranger [a local processor] to the contract after completion of the sale.⁸⁸

This, the Court said, rendered Alaska more than a mere market participant.

There are sound reasons for distinguishing between a State's preferring its own residents in the initial disposition of goods when it is a market participant and a State's attachment of restrictions on dispositions subsequent to the goods coming to rest in private hands

Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. In contrast to the situation in *White*, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract. [Citation omitted.] In sum, the State may not avail itself of the market-participant doctrine to immunize its *downstream regulation of the timber-processing market in which it is not a participant*.⁸⁹

The Court's language establishes that the market-participant doctrine could not reasonably be invoked to immunize local debarment enactments predicated on the political acts of a foreign government.

The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant. [Citation omitted]. Contrary to the State's contention, the doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity. [Citation omitted.]

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*. [Citation omitted.] Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with [a] permissible state purpose⁹⁰

In the South Africa divestment debate, the issue became whether the state as an investment market participant had the same rights as a private investor to decide with whom to do

88. *Id.*

89. *Id.* at 98-99 (emphasis added).

90. *Id.* at 97-98 (emphasis added) (citations omitted).

business.⁹¹ While the issue was not resolved in that context, debarment in an area subject to federal action is probably prohibited under *Wisconsin v. Gould*.⁹²

Wisconsin notes correctly that state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause. We agree with the Court of Appeals, however, 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.⁹³

The problem for localities advancing the market participant argument is compounded by the complete absence of a legally cognizable local purpose, something that existed in each of the market participant cases. While several of the anti-Burma measures purport to establish a nexus is between local interests and ethical concerns abroad, such a nexus is beyond anything the Court has ever recognized as weighing in the balance regarding the "necessary accommodation between local needs and the overriding requirement of freedom for the national commerce."⁹⁴

In contrast, the necessary balance was best articulated in *Pike v. Bruce Church, Inc.*⁹⁵

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive *in relation to the putative local benefits*. [citation omitted] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved. . . .⁹⁶

In *Pike*, which dealt with Arizona's attempt to impose a packing and labelling requirement on melon growers, the Court said:

91. See sources cited *supra* note 7.

92. *Wisconsin Dept. of Indus. v. Gould*, 475 U.S. 282, 288-89 (1986); see also *supra* notes 38-42 and accompanying text. Professor Tribe agrees, noting that a focus on a state's right to decide with whom it will conduct business by virtue of its criteria is vastly different from a focus on the state as dictating to business how it can become a candidate for a state's business. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-22, at 375 (1978).

93. *Gould*, 475 U.S. at 289 (citations omitted).

94. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (quoting *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946)).

95. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

96. *Id.* at 142 (emphasis added).

We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation, has long been recognized'. . . . [T]he Arizona statute . . . does impose . . . a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest [in ensuring people knew certain high quality cantaloupes were grown in Arizona] is minimal at best - certainly less substantial than a State's interest in securing employment for its people.⁹⁷

In the context of foreign relations, the Court set a clear standard for weighing the balance in *Container Corp. of America v. Franchise Tax Board*.⁹⁸ According to the Court, permissible local actions are those that have a legitimate local purpose with "merely foreign resonances" short of interfering with foreign affairs.⁹⁹ It is unclear how the balancing test should be applied to local ordinances *designed* to have a foreign effect.¹⁰⁰

Several local enactments under scrutiny purport to serve a legitimate local purpose in the hope of surviving a constitutional

97. *Id.* at 143, 146.

98. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

99. *Id.* at 194; *see also* *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768-69 (1945), which talks of the "regulation of local matters [that] may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved."

100. Local officials have made no secret of the fact that their objectives are to get as many business entities as possible to sever all ties with Burma. For instance, on hearing that Motorola had closed its operations in Burma so as to compete successfully for a San Francisco contract, Supervisor Tom Ammiano, who proposed the legislation in San Francisco, was reported to be delighted with the news and said "This shows that the Burma boycott is working. . . . It shows that business people are heeding the prohibition." Leslie Goldberg, *Motorola Gets Out of Burma, Into City: Firm's Closing of Office Likely to Net It \$40 Million S.F. Radio Contract*, S.F. EXAMINER, Dec. 6, 1996, at A1.

Similarly, Jane Jerome of the Bay Area Burma Roundtable, one of the several groups that lobbied for the ordinance, is reported to have said of it: "We found that sanctions against South Africa were very effective in bringing substantial change in that country. It seemed logical to use the same tactics on Burma." Leslie Goldberg, *911 Radio Bidders Run Afoul of Polity: S.F. Averse to Hiring Firms That Do Business in Burma*, S.F. EXAMINER, Sept. 24, 1996, at A1 [hereinafter Goldberg, *911 Radio Bidders*].

Indeed, the specific and only aim of the debarment ordinances is to make an impact in and on Burma. On hearing that Apple Computers was withdrawing from Burma so as to retain its Massachusetts contracts, "Rep. Byron Rushing . . . who marshalled the [debarment] bill through the [Massachusetts] Legislature" is reported to have reacted: "This is exactly what we want this law to do We hope the rest of the companies will also get out." Frank Phillips, *Apple Cites Mass. Law in Burma Decision*, BOSTON GLOBE, Oct. 4, 1996, at B6.

The Takoma ordinance actually requires copies of it to be sent to, among others, the Burmese Ambassador, the Secretary General of the United Nations, and Aung San Suu Kyi.

challenge.¹⁰¹ The Berkeley Ordinance has a preamble that states that the "quality of life" of the people of Berkeley "is diminished when peace and justice are not fully present in the world," and "recognize[s] the responsibility of local communities to take positive steps to support the rule of law and to help end injustices and egregious violations of human rights wherever they may occur."¹⁰² San Francisco's Ordinance contains a similar declaration,¹⁰³ as does Takoma Park and Maryland's.¹⁰⁴ Takoma Park's enactment, however, "recognize[s] the important role local communities can take to promote universal respect for human rights and fundamental freedoms," and emphasizes its "strong and vibrant tradition of organizing local action to affect larger world events, as manifested by the Takoma Park Nuclear Free Zone Act."¹⁰⁵

Perhaps the clearest rebuttal to the argument that this alleged interest constitutes a local nexus to an international event is found in *Lujan v. Defenders of Wildlife*,¹⁰⁶ a standing case. In *Lujan*, as in the case of localities attempting to establish a sufficient nexus between a world event and a local interest by a showing of local injury, the plaintiffs tried to stop certain construction projects abroad that threatened a certain species of Nile crocodile and Asian elephant, and argued that they had standing under an "ecosystem nexus" theory where "any person who uses any part of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away."¹⁰⁷ The plaintiffs also argued standing based on an "animal nexus" theory, "whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing."¹⁰⁸

The Court flatly rejected both theories of standing:

This is beyond all reason. Standing is not 'an ingenious academic exercise in the conceivable,' It goes beyond the limit . . . and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.¹⁰⁹

101. See *supra* notes 17-20 and accompanying text.

102. Berkeley, Cal., Resolution No. 57,881-N.S. (Feb. 28, 1995).

103. SAN FRANCISCO, CAL., ADMIN. CODE § 12J.1(a) (1996).

104. Takoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996).

105. *Id.*

106. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

107. *Id.* at 566.

108. *Id.*

109. *Id.* at 566-67 (citation omitted). "No traditionally local concerns, such as maintaining the integrity of health, safety, and other welfare-related standards, are implicated. Recognition of a state's 'moral' interest in severing economic ties

C. The Supremacy Clause

The Supremacy Clause of the Constitution, Article VI, clause 2, provides that the foreign policy of the United States will be conducted by the federal government. Consequently, local enactments designed to participate in the conduct of foreign policy may run afoul of the Supremacy Clause. In *Hines v. Davidowitz*,¹¹⁰ the Supreme Court was explicit in defining the boundary:

The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.¹¹¹

Zschernig v. Miller,¹¹² a landmark on the subject, was decided at the height of the Cold War and reflects the Court's distaste for local officials attempting to imprint their particular reaction to an international matter in their local governance, even in a field so specifically subject to local regulation as probate. In *Zschernig*, an Oregon statute prohibited a resident of East Germany from inheriting under an Oregon will on the basis (couched in general language but leaving no doubt as to its rationale) that no Oregonian could receive an estate bequeathed him from behind the Iron Curtain because the recipient stood a good chance of getting his proceeds confiscated. Citing *Hines*, the Court disallowed the meddling as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress,"¹¹³ and would not permit the practice of "the probate courts of various States . . . launch[ing] inquiries into the type of governments that obtain in particular foreign nations."¹¹⁴ What was supposed to be a probate statute was, in effect, "not an inheritance statute, but a statute of confiscation and retaliation,"¹¹⁵ and "foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like [were] the real

with South Africa-related concerns as a 'legitimate' justification for impeding interstate commerce would be unprecedented." Spro, *supra* note 6, at 834.

110. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

111. *Id.* at 63 (citations omitted).

112. *Zschernig v. Miller*, 389 U.S. 429 (1968).

113. *Id.* at 432.

114. *Id.* at 433-34.

115. *Id.* at 434 (citation omitted).

desiderata."¹¹⁶ That, the Court said, "affects international relations in a persistent and subtle way," and "must give way if they impair the effective exercise of the Nation's foreign policy."¹¹⁷

Particularly noteworthy as well is that the Court reached its decision *in spite of* an amicus brief filed by the Justice Department which indicated that it had no objection to Oregon's statutory stand against Communism.¹¹⁸ "But," Justice Stewart found, "that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department."¹¹⁹

The Supremacy Clause analysis is thus quite similar to the Foreign Commerce Clause analysis. A local action must have a legitimate local purpose, and its effect on foreign affairs, "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,"¹²⁰ must be incidental. The analysis, whether regarding preemption or under the Foreign Commerce or Supremacy Clauses, contemplates that the nation must speak with one voice, and that particularly in foreign matters, the voice must emanate from the federal government.

The logic of this rationale is obvious. "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power."¹²¹

D. Possible Impermissible Delegation

The yardstick by which Massachusetts and several local governments have decided to measure compliance by reference to third party organizations, primarily the Investor Responsibility

116. *Id.* at 437.

117. *Id.* at 440.

118. *Id.* at 443 (Stewart, J., concurring).

119. *Id.*

120. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citing *Hines v. Davidowitz*, 312 U.S. 52, 70 n.287 (1941)).

121. *United States v. Pink*, 315 U.S. 203, 232 (1942). Consider also a parallel scenario involving an economically powerful state like California and a relatively influential trading partner like Mexico. A California initiative, in response to a purely local grievance, to ban all contracts with companies doing business in Mexico could provoke retribution felt well beyond California's borders. In the case of Burma, retribution is unavailable, but in concept it is clear that a single state could take a provocative foreign act unapproved by Washington and for which the whole country would pay dearly.

Research Center (IRRC) in Washington D.C., may present Due Process problems and leave business entities without fair redress.

In *Fuentes v. Shevin*,¹²² the Supreme Court emphasized that "the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"¹²³ The Court continued that "[t]he purpose of this requirement is not only to ensure fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations" ¹²⁴

As discussed above,¹²⁵ the local measures are ambiguous as to the quantum of business in Burma that will place companies on a blacklist. Nor is it clear how the IRRC, a private group, arrives at the criteria it uses in compiling its list. As in *Eubank v. Richmond*,¹²⁶ in which the Court invalidated an ordinance under which certain property owners could decide the rights of others without a clear definition of their terms of reference, a municipal ordinance which "confer[s] the power on some property holders to virtually control and dispose of the proper [sic] rights of others [is unconstitutional because it] creates no standard by which the power thus given is to be exercised."¹²⁷ A delegation of power uncontrolled by any standard or rule prescribed by legislative action, and with no provision for review, is "repugnant to the due process clause of the Fourteenth Amendment."¹²⁸ While delegation of fact-finding to a private consultant is not problematic *per se*, it becomes problematic where the facts create an inference that the local government functions as "simply a 'rubber stamp'" for the decisions of the outside entity.¹²⁹ Such a

122. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

123. *Id.* at 80 (citations omitted).

124. *Id.* at 80-81.

125. *See supra* note 22.

126. *Eubank v. Richmond*, 226 U.S. 137 (1912).

127. *Id.* at 143-44.

128. *Washington v. Roberge ex rel. Seattle Trust Co.*, 278 U.S. 116, 122 (1928); *see also* *Browning v. Hooper*, 269 U.S. 396 (1926).

129. *Schulz v. Milne*, 849 F. Supp. 708, 713 (N.D. Cal. 1994); *see also* *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983). This is true too, for instance, in Massachusetts, which delegates the decision as to who is doing business in Burma to the IRRC. "It is well established in this commonwealth and elsewhere that the Legislature cannot delegate the general power to make laws, conferred upon it by a constitution like that of Massachusetts." *Corning Glass Works v. Ann & Hope, Inc.*, 294 N.E.2d 354, 361-62 (Mass. 1973) (citations omitted). "One of the exceptions to or qualifications of the nondelegation doctrine is that 'the Legislature may delegate to a board or an individual officer the working out of the details of a policy adopted by the Legislature.'" *Id.* (citations omitted). The court found, indeed, that the delegation under scrutiny failed to

determination would be a question of fact.¹³⁰ It is unclear as a matter of practice what, if any, scrutiny or review Massachusetts or the local municipalities perform of the IRRC, its processes, its criteria for inclusion, or its decisions as it wields the considerable power delegated to it.

A matter, similar to the one here, was before a Maryland court in a very similar context in *Bd. of Trustees v. Mayor of Baltimore*.¹³¹ In that case, the Trustees of the Employees' Retirement System of Baltimore challenged a municipal ordinance that required divestment of the city's three pension funds from companies doing business in or with South Africa. The ordinance, moreover, delegated the determination as to who was doing business in or with South Africa to an entity called the Africa Fund.

The Maryland court did not find impermissible delegation in this scheme largely due to the principle that a court should, whenever possible, interpret a statute in a manner upholding its constitutionality.¹³² The ordinance's use of the word "reference" in regard to the Africa Fund's Unified List, the court said, was reasonably subject to the construction that the list did not in fact bind the trustees. If it had bound the trustees, the delegation would have violated the Maryland constitution. As one of several commentators criticizing the decision has said:

It stands to reason, however, that the court . . . should have inquired into how the Africa Fund compiles and annotates the [Africa Fund's] Unified List and, finally, into how the Trustees employ it . . . [and] to demonstrate that they acted with some degree of independence in making divestment decisions as evidence of the nonbinding effect of the Unified List.

. . . .

The issue is of great importance because the Africa Fund could be thrust into a position of great power, depending on the number of state or local governments that rely upon the Unified List. The

incorporate the essential safeguards. The delegation contained "no provision for participation by any public board or officer in the process . . . nor for any policy or standard to govern [its decision making], nor for notice, hearing or judicial review of [the decision made]." *Id.* at 362; see also *DiLoreto v. Fireman's Fund Ins. Co.*, 418 N.E.2d 612, 614-15 (Mass. 1981) ("The Legislature may . . . delegate authority to a private person in order that he may fulfill duties which are public in nature . . . so long as proper safeguards are provided."). Where a delegation is to an entity that is "impartial and has no personal or private interest in the dispute . . . [which] must follow detailed procedures and is bound to apply the statutory standards," the delegation is not improper. *Town of Arlington v. Board of Conciliation & Arbitration*, 352 N.E.2d 914, 920 (Mass. 1976).

130. See, e.g., *Assiniboine & Sioux Tribes v. Board of Oil & Gas*, 792 F.2d 782 (9th Cir. 1986).

131. *Board of Trustees v. Mayor of Baltimore*, 317 Md. 72 (1989), cert. denied, 493 U.S. 1093 (1990).

132. *Id.* at 97-98.

Africa Fund's decisions can indirectly but decisively affect South Africa's population and government, scores of owners and employees of America's corporations, and millions of pension fund beneficiaries. It is not in the best interest of pension beneficiaries to remain wedded to this or any other organization¹³³

The question is one of process and of fact. While several of the ordinances contain language suggesting that they do not simply "rubber stamp" the IRRC's findings, it would be important to establish that this is in fact so. It is also important to ensure that the other safeguards the courts have emphasized are indeed present in a process conducted almost entirely outside public scrutiny.

IV. PRACTICAL PROBLEMS PRESENTED BY PARALLEL FOREIGN POLICIES

A. The Federal Government has Acted on the Matter and yet its Considered Decision is not the Law of the Land

The local enactments under scrutiny here have had an effect. Apple Computer, Philips Electronics, Amoco, Columbia Sportswear, Carlsberg, Levi Strauss, Liz Claiborne, and Spiegel's Eddie Bauer "have already left Burma. There is a steadily growing number of companies that have evaluated the business opportunities in Burma, and have decided that it makes more sense to leave rather than face consumer boycotts of penalties from selective purchasing laws."¹³⁴

Yet this is not the law of the nation, nor the approach Congress has chosen after deliberation. Whether future events prove Congress' judgment to be right or wrong remains to be seen. It is, however, undeniably Congress' policy that the threat of sanctions should be the President's to deploy, and that even if such sanctions are imposed, they should not be so broad as to jeopardize the long term interests of U.S. businesses.¹³⁵ Economic sanctions, involving various issues such as against

133. Smith, *supra* note 7, at 1041-42.

134. INVESTOR RESPONSIBILITY RESEARCH CENTER, MULTINATIONAL BUSINESS IN BURMA (MYANMAR) III (1996).

135. The definition of "new investment" in the Omnibus Consolidated Appropriation Act specifically would not preclude U.S. companies from selling their products in Burma, or buying from Burmese sources. Omnibus Consolidated Appropriations Act of 1977, Pub. L. No. 104-208, 110 Stat. 3009. The importance of product and name recognition, market share and penetration, and the acquisition of contacts, infrastructure and experience in what may be in the future a significant market are acknowledged in the federal legislation and sacrificed to ideology in the local enactments. See *id.*

whom, when, and how broadly to deploy them, have become important tools of U.S. foreign policy. The actions of state and municipal governments designed specifically to influence foreign nations provides a clear example of the nation's failure to "speak with one voice" on international issues.¹³⁶

While a particular locality may succeed in pressing a corporation to withdraw from Burma so as to be eligible for that locality's business, such action may undermine efforts at the federal level to assist U.S. businesses to compete internationally,¹³⁷ may limit the President's ability to choose between a range of policy options,¹³⁸ and may restrict the federal government from responding to positive changes such as a commitment to start a dialogue with the democratic opposition. In striking their own balance between pragmatism and principle

136. As the Deputy Secretary of State said in response to a question about divestment during a similar debate on South Africa:

Disinvestment would signal a U.S. unwillingness to pursue the only logical course of action open to us, which is attempting to promote peaceful change in South Africa. Withdrawal of U.S. business interests would remove one of the few tools of influence available to us in helping to promote change and would leave a moral void that would result in a lessening of both regional U.S. influence and our ability to influence movement away from apartheid.

Spiro, *supra* note 6, at 828 n.96 (response of Dep. Sec. of State Kenneth Dam to question of Sen. Heinz.).

137. "The Clinton administration has so far resisted [debarment], saying that it wouldn't be effective and that Asian-led projects would replace American investment." Matt Miller, *Pipeline of Controversy: Unocal Called to Court by Opponents of Burma Regime*, SAN DIEGO UNION-TRIBUNE, Nov. 10, 1996, at 11.

Japanese businesses that are aggressively entering Burma include Nissan Motor Company, Mitsubishi Motors, Mitsui Engineering and Ship Building, Marubeni (which is involved in a variety of other projects such as building an airport to developing the teak trade), Sumitomo, Itochu Corp, Daiwan Research Institute, an affiliate of Daiwan Bank which is helping to set up Burma's stock exchange), Tokyo Mitsubishi Bank, Mitsubishi Heavy Industries, Nippon Steel Corp, Komatsu, and others. *Burma: Japan Sees Rich Pickings in Burma*, BUSINESS VIETNAM, Aug. 1, 1996.

Whether the federal policy is right or wrong, it is clear from the Congressional debate that federal lawmakers were concerned that withdrawal of the few U.S. companies present in Burma would do little to change SLORC's politics and would simply leave a void which other countries' businesses would fill. An example of this would be the aftermath of Dutch pressure on Amsterdam-based Heinicken to leave Burma. Acceding to the pressure, Heinicken sold its stake in a half completed brewery in Burma to Fraser and Neave of Singapore. "The Singaporean group buying out the Dutch will simply market beer under its Tiger brand instead." Ted Bardacke, *Western Companies Encounter Protesters on Road to Burma*, FINANCIAL TIMES, July 12, 1996, at 3.

138. There is already federal legislation pertaining to Burma which the local enactments neither acknowledge nor purport to work in tandem. See H.R. Con. Res. 188, 104th Cong., 2d Sess. (1996) (describing such legislation and its effects).

and diminishing to some extent U.S. global presence, localities may be sacrificing U.S. jobs in areas where the anti-Burma initiatives are not law.

Finally, the constitutional system has no mechanism to ensure that the state and federal governments respond uniformly to changes in the circumstances that led to the adoption of measures aimed at foreign nations.¹³⁹ One commentator notes that in 1991 the United States softened sanctions on South Africa to encourage President de Klerk's reforms, but that only one of the 140 local laws, which were mostly far broader than the federal law, was repealed. "This has raised fundamental questions about the United States' basic policy toward South Africa and the reforms of the minority white government."¹⁴⁰

B. State and Local Governments Are Inappropriate Bodies for Foreign Policymaking

There are at least three major problems with local governments in the United States purporting to make and implement the nation's foreign policy.

First, the United States is a large and diverse nation in which carrying parochial concerns to the international stage could have repercussions well beyond the localities themselves. No harm is done when Boston's large population of Irish politicians gathers to sing Irish songs on St. Patrick's day; there may be harm done, however, if Boston is allowed to instigate a skirmish with the United Kingdom over Northern Ireland in which the rest of the country is not inclined to participate.¹⁴¹ Nor is the local slant

139. Dean Fenton points to a federal anti-apartheid law passed in 1986 (the Comprehensive Anti-Apartheid Act, 22 U.S.C.A. § 5001-17 (West Supp. 1991)), which came into existence at a time when over 100 local jurisdictions had adopted some form of divestment or contract debarment laws. Many of these laws were aimed at forcing companies to completely disengage, while the federal law sought to use the presence of U.S. firms as leverage for change. When President Bush exercised his option under the Act and ended most sanctions, only one state repealed its divestment law and the situation was one in which there were then minimal federal restrictions with extensive state and local restrictions, with significant cumulative effect. Fenton, *supra* note 6, at 577-78.

140. *Id.* at 564.

141. MASS. GEN. L. ch. 7, 22C(a) (West Supp. 1996) in effect prohibits state agencies from procuring goods or services from businesses that supply any equipment used for military purposes by the British army, and MASS. GEN. L. ch. 32, 23(1)(d)(iii) (West. Supp. 1986) bans pension funds from investing in financial institutions which have loans outstanding to businesses selling military equipment for use by the British army. The British government's reaction, predictably, has been to express considerable irritation. *See, e.g.*, BOSTON GLOBE, Apr. 5, 1983, at 68.

only geopolitical.¹⁴² Although vigorous local input is both protected and beneficial in the debate that precedes the crafting of foreign policy, it would seem particularly unwise to have parochial concerns interposed in the implementation of a national foreign policy.

Second, U.S. foreign policy is informed by organizations and intelligence networks that, flawed or not, are instrumentalities designed for that particular purpose. Local actions may be intemperate and not informed by larger, national policy issues. At least one federal court took a dim view of retaliation as mounted by the State University of New Mexico against Iran during the embassy hostage crisis where the university denied admission to students whose home government held or permitted the holding of U.S. citizens as hostages.¹⁴³ In disallowing the retaliatory measure, the Court stated that "sensitive judgments" in foreign affairs should not be made by those lacking expertise and information in foreign policy.

In the Burma context, the issue of whether engagement or divestment is a better impetus for change is unclear and was much debated at the federal level, and references to the success of similar business retaliation in the context of South Africa may be inapposite. As several senators noted, there are major differences between the two foreign policy problems. First, Burma is surrounded by countries that by and large either ignore or easily tolerate its regime; South Africa had only hostile neighbors.¹⁴⁴ Second, South Africa had an economy intertwined

142. Tom Ammiano, the San Francisco Supervisor who was a leading figure in getting that city to adopt its boycott, is quoted as having argued in its support, "They put people under house arrest If you're HIV-positive, they shoot you on the spot." Goldberg, *911 Radio Bidders*, *supra* note 99. Since Burma has approximately between 150,000 and 450,000 reported cases of HIV infection, the proposition is unlikely to be true. See, e.g., Philip Shenon, *AIDS Cuts Wide Swath in Vulnerable Burma*, CHI. TRIB., Mar. 20, 1994, at 19.

143. *Tayari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1379 (1980).

144. First, let me say Burma is not South Africa. Back in the 1970's and 1980's, the oppressive nature of the apartheid regime . . . led the Senate to impose heavy sanctions and isolation to end the regime. In order to do that, we had the support of not only our Western European allies but of the front-line nations, those surrounding South Africa, who also lent their support and joined in the effort to bring down apartheid.

Unlike South Africa in the 1970's and 1980's, Burma is not surrounded by nations ready to shun it. As a matter of fact, Burma's neighbors and other states in the region reject the view that isolating Burma is the best means to encourage change. They are pursuing trade and engagement, and will do so regardless of what we do or say. Those nations over there who are closest and in closest proximity are maintaining their relations with Burma, seeking to bring about change over a period of time. Isolating Burma is simply not going to work, and we

with the rest of the world: "The scope of companies [with South African ties] is immense. They are among the nation's biggest and most prestigious, with a total stock value of \$600 billion, representing half the capitalization of the Standard and Poor's 500 Index."¹⁴⁵ Burma, after years of isolation, does not have the sort of economy that a U.S. withdrawal is likely to damage.¹⁴⁶ Third, South Africa's oligarchy, its white middle class, benefitted from foreign engagement and suffered at divestment from the collapsing Rand, from deteriorating standards of living, and from the sense of international castigation that resulted. Burma has no appreciable middle class, nor is it clear who sanctions will hurt since the withdrawal of U.S. investment is unlikely to result in a vacuum.¹⁴⁷ There was also a measure of consensus about South Africa because of the sensitive issue of race in the United States.¹⁴⁸ Burma, on the other hand, is much less reported and the issues that confront that country are less well known.

Finally, as a practical matter, these local measures may be difficult for business entities to follow, let alone comply with. As noted above, several measures are ambiguous and not readily susceptible of clear and reasonably uniform interpretation.¹⁴⁹ For instance, in Berkeley's statute, "willingness" alone to do business in Burma is grounds for debarment, as is "assisting" someone to

will not have the support of our allies. We will not have the support of our Asian friends.

142 CONG. REC. S8746 (daily ed. July 25, 1996) (statement of Sen. Cohen).

145. Anise C. Wallace, *Wall St. Feels the Heat from Apartheid*, N.Y. TIMES, Apr. 21, 1985, at F10.

146. First, United States policy toward South Africa was coordinated with our allies and that nation's most important trading partners. It was multilateral. There was no serious prospect that when our companies pulled out of the South African economy others would readily take their place, thereby undermining the effect of sanctions and making their chief victim American companies. Second, South Africa was much richer than Burma is today. Per capita income in South Africa was \$2,000 when we imposed sanctions. In Burma today it is \$200, one of the lowest rates in the world. South Africa had a stake in the world economy. Burma has just begun to develop an interest in attracting foreign trade and investment. Third, Burma is an overwhelmingly rural economy, with manufacturing accounting for 9.4 percent of GDP and 8.2 percent of employment. Fourth, the South African regime and the elite that supported it had historical connections to the nations censuring it. It was not only affected materially by the sanctions imposed on it, but many in South Africa who treasured their ties to the West were dismayed by their international isolation.

Burma has a long history of self-imposed isolation.

142 CONG. REC. S8754 (daily ed. July 25, 1996) (statement of Sen. McCain).

147. *Id.*; see also *supra* note 137.

148. See, e.g., Spiro, *supra* note 6, at 815 n.16.

149. See *supra* note 22 and accompanying text.

do business there. In trying to get a city contract in San Francisco, Ericsson GE was disqualified due to the activities of a related entity in Europe over which it had no control. "Ericsson GE denies doing business in Burma. 'It's our parent company, Ericsson LM in Sweden, that's doing business there,'" a spokesman for Ericsson GE is reported to have said.¹⁵⁰

The prohibited quantum of business involvement in Burma is phrased differently in different locations. A business entity considering a venture abroad, or without control over a subsidiary or affiliate with majority foreign ownership, could be at a loss as to whether it is the foreign policy of a city in North Carolina or that of the federal government that governs foreign commerce.

V. CONCLUSION

A unilateral U.S. boycott of Burma is unlikely to have much impact on Burma for the same reason that the local anti-Burma enactments are likely to go unchallenged. The few U.S. businesses that remain in Burma are unlikely to have much interest in mounting a constitutional challenge to a grassroots and superficially reasonable movement. Such reluctance, however, does not mean that the enactments are constitutional, or that the process they betoken is wise. Indeed, the Burma situation may be one of those circumstances about which it is aptly noted that hard cases make bad law.

150. Goldberg, *911 Radio Bidders*, *supra* note 100.

