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COMMENT

Massachusetts, Myanmar, Market Participation, and the Federal Shutdown of Selective Purchasing Laws: Is the Power to Purchase Really the Power to Regulate?

Scott Sommers^{*}

I. INTRODUCTION

On June 22, 1999, the First Circuit Court of Appeals in *NFTC v. Natsios*¹ effectively forbade any state from enacting selective purchasing laws that touch on foreign affairs. On June 19, 2000, the Supreme Court affirmed the decision.² The Massachusetts "Burma Law," which limited state

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¹ *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999). The First Circuit decided the case on June 22, 1999. The Supreme Court granted certiorari on November 29, 1999 and heard oral argument on March 22, 2000. See *Natsios v. National Foreign Trade Council*, 120 S. Ct. 525 (1999).

² *Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288 (2000).

government purchases from companies doing business in Burma,³ was struck down as unconstitutional.

Global corporations doing significant business with U.S. states and their agencies may breathe a collective sigh of relief, knowing that they will not face judgment or punishment for any of their activities outside the United States. Citizens and taxpayers of states, however, may find the decision more problematic. Why does a state not have the right to choose its suppliers based on the moral qualities of their involvements abroad? Individual consumers routinely make purchasing choices based on more than raw economic analysis. The citizen who chooses to buy an automobile manufactured in her country, or the consumer who refuses to buy shoes manufactured using slave labor exemplify these choices. It seems wrong that states and their agencies should not have the same range of choices as consumers in this regard because their choices, like the choices of individual consumers, apply economic rather than political leverage.

The state of Massachusetts, acting through its legislature, made a decision in June of 1996 to avoid buying any products from companies doing business in Burma whenever reasonable economic alternatives existed. The "Massachusetts Burma Law" was passed because of significant and ongoing human rights abuses taking place in Burma due to the dictatorial government there in power. The justification behind the law is that companies doing business in Burma are somehow complicit in the persistence of the present regime and/or conditions in the country.

This article does not discuss whether intentionally giving companies an incentive to withdraw from Burma is economically or politically desirable for the people of Burma. The First Circuit did not concern itself with this subject either in rejecting the Massachusetts Burma Law. The question of interest to the court, and which should be of interest to any state citizen or global corporation interested in doing business with state agencies, was whether Massachusetts had the discretion to make a purchasing law directly concerning the business involvement of suppliers in foreign countries. While legitimate legal and practical arguments may be made that states should not be allowed to take the foreign involvements of companies into account when making purchasing decisions,⁴ the First Circuit strains credi-

³ This article consistently refers to "Burma" because both district and appellate courts, as well as the state of Massachusetts, refer to the country as such. In June 1989, the Burmese government renamed the country the Union of Myanmar. Officials made the name change in order to "better reflect ethnic diversity". The term Burma connotes Burman, the nation's dominant ethnic group, to the exclusion of other ethnic minorities." *Burma Decides It's the "Union of Myanmar,"* L.A. TIMES, June 21, 1989, at 11.

⁴ For an overview analysis of all the grounds on which the Massachusetts Burma law may be found illegal or unconstitutional, see Lucien J. Dhooge, *The Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution*, 37 AM. BUS. L.J. 387 (2000). Dhooge analyzes in full the foreign affairs power, foreign commerce clause, and

bility by arguing that Massachusetts' action amounted to the "regulation" of companies disfavored by the purchasing law.

This article considers just one of the aspects of the First Circuit's decision: the court's determination that the established "market participant" exception to the dormant Commerce Clause did not shield the Massachusetts law from scrutiny. Under the exception, states may affect interstate, and possibly international, flows of commerce so long as they confine their conduct to participation in the market. The Supreme Court addresses the market participation argument in a footnote, choosing to ground its affirmation of the First Circuit's decision on federal preemption.⁵ It is not surprising that the Supreme Court glosses over the market participant exception because the argument in favor of that exception is appealing in cases of selective purchasing laws.

Part II of this article gives a brief factual overview of the present situation in Burma. Part III reviews the Massachusetts Burma Law. Part IV gives an overview of the First Circuit and Supreme Court opinions. Part V analyzes in detail the First Circuit's and Massachusetts' competing arguments about the meaning of Supreme Court precedent on the Market Participant exception to the dormant Commerce Clause. Part VI concludes that the First Circuit has misinterpreted the precedent in order to expediently dismiss Massachusetts' market participant exception arguments, and the Supreme Court has avoided the sticky issue by proceeding as though its preemption/federalism analysis is valid regardless of the nature of the state action.

II. THE SITUATION IN BURMA

The Massachusetts law was passed in response to the atrocious political and social conditions persisting in Burma.⁶ Burma is ruled by a military dictatorship and has been since 1962.⁷ In 1988, Aung San Suu Kyi's National League for Democracy ("NLD") led nonviolent street protests against the State Law and Order Restoration Council ("SLORC"), the euphemistic moniker for the military junta.⁸ During the protest, government troops

preemption arguments, among others, that the First Circuit used in striking down the Massachusetts Burma Law. This article addresses these arguments in passing only.

⁵ As such, this article gives only limited analysis of the Supreme Court decision, see primarily *infra* section III.

⁶ This brief summary of the conditions in Burma represents an adapted and updated version of that given by Lynn Loschin & Jennifer Anderson in *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 376-78 (1999).

⁷ See *Burma Project Report 1994-1996*, at <http://www.burmaproject.org> (last modified Jan. 29, 2001). The Burma Project is a nonprofit foundation founded by the financier George Soros to promote democracy in Burma.

⁸ See Brad Miller, *Burma in Chains: U.S. Companies Profit from Slavery*, THE PROGRESSIVE, Oct. 1995, at 32.

killed as many as 10,000 people in the streets, but, in contrast to the Tian-anmen Square uprising in China, shocking television images never reached the outside world due to the regime's heavy-handed control of the media.⁹ When the NLD won national elections in 1989, the military government refused to honor the election results, arrested 3,000 NLD workers, and put the elected members of parliament into prison.¹⁰ Ms. Suu Kyi, who is 55 and a 1991 Nobel Peace Prize winner, was recently detained and placed under house arrest by SLORC because, according to an "investigation" by the military, she is "a traitor collaborating with Western nations to destabilize Myanmar."¹¹

Unsurprisingly, given its political situation, Burma has an extremely poor record on human rights. The United Nations Commission on Human Rights, Amnesty International, and other groups have continued to condemn SLORC for the use of torture, disappearances, and forced labor.¹² SLORC has, however, continuously sought foreign investment to strengthen Burma's economy. Between 1990 and 1996, SLORC received 65% of its finances from foreign oil companies.¹³ One of the most significant foreign investments is a natural gas pipeline funded by Unocal and Total.¹⁴ Eyewitness accounts suggest that slave labor is being used to build the pipeline and many other tourism and infrastructure projects in the country.¹⁵

In 1995, Berkeley, California became the first city to pass a selective purchasing ordinance concerning Burma, and several other municipalities adopted similar laws.¹⁶ Selective purchasing laws represent acts of self-restraint by which sub-national governments internally regulate their own purchases. Several large companies, including Levi-Strauss, Amoco, Carlsberg, Columbia, Liz Claiborne, Philips Electronics, and Eddie Bauer halted operations in Burma after the enactment of the Berkeley law.¹⁷ After Massachusetts adopted its similar selective purchasing law in 1996, Motorola, Hewlett Packard, and Apple Computer pulled out citing the Massa-

⁹ See John Pilger, *In a Land of Fear*, THE GUARDIAN (U.K.), May 4, 1996, at 12.

¹⁰ See *id.* at 14.

¹¹ *Burmese Freed By the Junta Plan to Test Its Limits*, N.Y. TIMES, Sept. 15, 2000, at 3.

¹² See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996 598 (1997).

¹³ See Pilger, *supra* note 9, at 16.

¹⁴ See *As Administration Weighs Burma Sanctions, Unocal Inks New Gas Deal*, ASSOCIATED PRESS, Jan. 31, 1997.

¹⁵ See Pilger, *supra* note 9, at 16.

¹⁶ See David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175, 182, n.22 (1997).

¹⁷ See *Rights Group Says Total Backs Burma Junta*, REUTERS WORLD SERVICE, Oct. 23, 1996.

chusetts law as one reason.¹⁸ Apple, for example, stated that it was pulling out of Burma so as to continue supplying Massachusetts' lucrative market for computers in schools.¹⁹ Other firms, including Pepsico and J. Crew, may have been responding to consumer boycotts and did not specifically attribute their exit from Burma to the Massachusetts law.²⁰

A Burmese general, Khin Nyunt, testified to the efficacy of the stance taken by Massachusetts and other sub-national governments by admitting that they were creating a crisis.²¹ Early in 1998, the Burmese generals hired two firms of management consultants, Bain and Jefferson Waterman, to lobby governments.²² During the makeover, the junta changed its name from the State Law and Order Restoration Council to the less ominous State Peace and Development Council.²³

Many foreign companies continue to do business with the military junta. Total foreign investment in Burma at the end of 1998 exceeded nine billion dollars, with the United States as the fifth largest foreign investor, after the United Kingdom, France, Singapore, and Thailand.²⁴ Massachusetts' restricted purchase list includes such well-known names as Mitsubishi and Sony, both of which continue operations in Burma.²⁵ The selective purchasing laws, as well as the limited sanctions that both the United States and European Union have imposed, have not yet had a palpable effect in softening the Burmese regime.

III. THE MASSACHUSETTS BURMA LAW, ITS ATTACKERS, AND ITS DEFENDERS

On its face, the law at issue in *NFTC v. Natsios* concerns only the purchasing decisions of Massachusetts and its state governmental agencies. The First Circuit noted that the law "does not impose any explicit limits on the ability of private parties to engage in business in Burma, or on the ability of private parties or local governments to purchase products from firms engaged in business in Burma."²⁶ Nor does the law completely forbid companies doing business in Burma from selling goods and services to the state of Massachusetts; rather, bids from such companies are increased by 10%

¹⁸ See Michael Grunwald, *Trade Tiff Widens Over State 'Burma Law,'* BOSTON GLOBE, Feb. 1, 1997, at B1.

¹⁹ Ted Bardacke, *American Burma Boycotts Start to Bite,* FIN. TIMES (London), Feb. 6, 1997, at 6.

²⁰ See Grunwald, *supra* note 18.

²¹ See Nick Cohen, *Hold on a Minute...; Why the FO is Run by Village Idiots,* THE OBSERVER, Sept. 20, 1998, at 32.

²² See *id.*

²³ See *id.*

²⁴ See Dhooge, *supra* note 4, at 395-96.

²⁵ See Loschin & Anderson, *supra* note 6, at 378.

²⁶ *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 46 (1st Cir. 1999).

when compared to competing bids.²⁷ Companies that provide goods or services to Massachusetts unavailable from other suppliers, and companies that produce certain medical devices or provide news and telecommunications services in Burma, are excepted from the law.²⁸

Before a company can bid on a Massachusetts contract, the law requires it to provide a sworn declaration disclosing any business it does in Burma. The law defines "doing business in Burma" broadly to include:

(a) Having a principal place of business, place of incorporation or . . . corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;

(b) Providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;

(c) Promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);

(d) Providing any goods or services to the government of Burma (Myanmar).²⁹

The law requires the Secretary of Administration and Finance for the state of Massachusetts to maintain a "restricted purchase list" of all firms engaged in business with Burma.³⁰ At the time the National Foreign Trade Council ("NFTC") filed its complaint, 346 companies were on the restricted purchase list.³¹ Forty-four of these companies were U.S. companies.³² Several companies have withdrawn from Burma, citing the Massachusetts law as one of the reasons.³³

The law did not include an express statement of purpose.³⁴ However, the First Circuit puts special emphasis on some of the statements made by proponents of the law. State Representative Byron Rushing, for example, stated that the "identifiable goal" of the law was "free democratic elections in Burma."³⁵ Significantly, Massachusetts argued before the district court that the law reflects "the historic concerns of the citizens of Massachusetts"

²⁷ See *id.*

²⁸ See *id.*

²⁹ MASS. GEN. LAWS ch.7, § 22G (West 1996).

³⁰ See *Natsios*, 181 F.3d, at 45.

³¹ See *id.* at 47.

³² See *id.*

³³ See *id.*; see also *supra* notes 18-20.

³⁴ See *Natsios*, 181 F.3d, at 46.

³⁵ *Id.*

with supporting the rights "of people around the world."³⁶ Massachusetts did not at any point contend that the law would provide any economic benefit to Massachusetts.³⁷

Though the law clearly applies on its face only to internal state purchasing decisions, opponents of the Massachusetts Burma Law, including foreign governments, consistently portray the law as a *regulation* of multinational corporations. On September 22, 1998, both Japan and the European Union opened legal proceedings in the World Trade Organization ("WTO"), in the words of a sympathetic commentator, "to force the U.S. state of Massachusetts to do business with firms that trade with Burma."³⁸ Initial European Union and Japanese protests were prompted in part by fears that the state might extend the provisions to companies doing business in Indonesia to protest human rights violations in East Timor.³⁹ More generally, however, foreign governments wished to halt the proliferation of sanctions in the United States being brought below the federal level.⁴⁰ In 1994, the European Union published a report identifying more than 2,700 sub-national laws and municipal ordinances that potentially violate GATT.⁴¹ As of 1997, ninety laws in California alone could be challenged under the WTO.⁴² As of November 1999, more than two dozen state and local governments, including New York City, barred their departments and agencies from buying from companies doing business in Burma, Cuba, and other countries with authoritarian governments.⁴³ The European commission rested its legal case in the WTO on the claim that Massachusetts was imposing "political" rather than economic conditions when it awards public contracts.⁴⁴ The British Foreign Office stated, in a typical comment, "We want to stop U.S. states imposing their law on European companies,"⁴⁵ implying that conditional refusal to award a contract amounted to positive regulation. Interestingly, the European Union had already withdrawn its

³⁶ *Id.* at 47.

³⁷ *See id.*

³⁸ Katherine Butler, *EU tries to Scrap Burma Sanctions*, THE INDEPENDENT (London), Sept. 22, 1998, at 15.

³⁹ *See* Ted Bardacke, *American Burma Boycotts Start to Bite*, FIN. TIMES (London), Feb. 6, 1997, at 6.

⁴⁰ *See* Butler, *supra* note 38.

⁴¹ *See* Brian Owens, *The World Trade Organization and States' Rights: Will Foreign Threats over Massachusetts' Burma Law Lead to a Domestic Backlash Against International Trade Agreements?*, 21 HASTINGS INT'L & COMP. L. REV. 957, 977 (1998).

⁴² *See id.*

⁴³ *See* Linda Greenhouse, *Justices to Decide Foreign Policy Question in Massachusetts Boycott of Myanmar*, N. Y. TIMES, Nov. 30, 1999, at A20.

⁴⁴ *See* Butler, *supra* note 38.

⁴⁵ Cohen, *supra* note 21.

own trading preferences with Burma when it attacked the Massachusetts law.⁴⁶

Foreign protest must also be seen in the context of the strenuous opposition to the Helms-Burton sanctions against foreigners doing business in Cuba and the attendant impatience with perceived American unilateral trade action.⁴⁷ However, the Helms-Burton law does not parallel the Massachusetts Burma Law. As an editorialist in *The Observer* stated:

European firms [that] deal with Castro face the seizure of their U.S. assets and the arrest of their executives. Companies that trade with Burma just lose orders from Americans who are choosing how to spend their own money. The [European Union] is not defending Europe against American arrogance, as its alliance with U.S. corporations shows.⁴⁸

Massachusetts and its defenders consistently portray the law as a discretionary purchasing decision. One commentator, at the extreme, summarized that "[t]he [European Union] and the free-market companies who are pulling its strings say the public can have no freedom of choice in the market."⁴⁹ Additionally, the state has received support from labor unions, who are concerned about competition from slave labor in underdeveloped countries. In January 1997, the International Confederation of Free Trade Unions alleged that 800,000 Burmese had been made to work against their will.⁵⁰ The leaders of eleven domestic trade unions called on President Clinton to defend the Massachusetts law.⁵¹ The State of Massachusetts, in its brief to the appeals court, noting that 23 states and 80 cities had once had "selective purchasing" laws toward South Africa, more modestly contended that "[n]othing in our federal constitution denies to the states the right to apply a moral standard to their spending decisions."⁵² The Supreme Court contends in its *Crosby* decision that it never ruled on the legitimacy of such sanctions.⁵³

Ironically, the National Foreign Trade Council, which brought the action against the state and represents over 550 major U.S. corporations, refused to identify its members because the members feared consumer boycotts.⁵⁴ Since the law at issue is effectively a boycott by the state of

⁴⁶ See Marc Selinger, *State Law Punishing Burma Probed*, WASH. TIMES, Oct. 22, 1998, at B8.

⁴⁷ See Butler, *supra* note 38.

⁴⁸ Cohen, *supra* note 21.

⁴⁹ *Id.* (quoting Simon Billenness of Boston's Franklin Research Development Legal Center).

⁵⁰ See *Burma's Children Suffer from Forced Labor*, REUTERS NEWS RELEASE, Jan. 15, 1997.

⁵¹ See Owens, *supra* note 41, at 970.

⁵² *Justices to Decide Foreign Policy Question in Massachusetts Boycott of Myanmar*, N. Y. TIMES, Nov. 30, 1999, at A20.

⁵³ See *Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288, 2302 (2000)..

⁵⁴ See generally *Sanctions on Burma: Who has the right?*, NATION, Sept. 27, 1998.

Massachusetts, the question presented by challenges to the law is whether Massachusetts has the same rights as the consumers that the NFTC member companies fear.

IV. THE FIRST CIRCUIT AND SUPREME COURT OPINIONS

The First Circuit rejects the Massachusetts Burma Law using the following legal arguments:

A. Massachusetts has violated the foreign affairs power of the federal government. It has done so because its Burma Law “affects significant issues of foreign policy.”⁵⁵

B. Massachusetts cannot avoid scrutiny under the foreign affairs power merely because the law at issue concerns purchasing decisions by Massachusetts state agencies. No “market participant” exception to the foreign affairs power of the federal government exists.⁵⁶

C. Even if such an exception existed, Massachusetts is not acting as a market participant. Massachusetts is regulating a market by refusing to buy from companies that do business in Burma.⁵⁷

D. Massachusetts has violated the foreign commerce clause because it is regulating commerce beyond its borders.⁵⁸

E. Federal law on Burma preempts the Massachusetts law.⁵⁹

Though the First Circuit thus presents its decision in five parts, the opinion actually offers only three independent legal arguments because the conclusions of certain legal arguments affect the premises of others.⁶⁰ The three legal arguments are: (1) that Massachusetts is engaging in foreign affairs, impermissible under the foreign affairs power given to the federal government in the Constitution, (2) that the Massachusetts Burma Law is not about “purchasing” but is in fact an attempt to “regulate” a market, and (3) that federal law on Burma preempts the Massachusetts law. This article

⁵⁵ *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir. 1999).

⁵⁶ *See id.* at 59-61.

⁵⁷ *See id.* at 62-65.

⁵⁸ *See id.* at 61-71.

⁵⁹ *See id.* at 71-77.

⁶⁰ Three independent legal arguments fall out of the five because argument B amounts to little more than an assertion by the First Circuit, and argument D above depends crucially on the truth of argument C. There is no caselaw conclusively demonstrating that state conduct protected by the market participant exception to the domestic commerce clause is not also shielded from the foreign affairs power. The First Circuit admits argument B is “novel,” and merely asserts that “this view directly contradicts the Supreme Court’s repeated statements that the federal government’s foreign affairs power is not limited.” *Id.* at 51, 53. As for argument D, if a state is not “regulating” under the market participant exception, it cannot logically be “regulating” conduct beyond its borders. Or, to put it another way, behavior shielded by the market participant exception should be immune from foreign just as it is from domestic commerce clause scrutiny.

addresses only the validity of and issues raised by the second legal argument that the First Circuit makes against the Massachusetts Burma Law because that argument is both the most appealing one in Massachusetts' favor, and its resolution affects the equities of the first and third arguments.

The Supreme Court Opinion rests its affirmation entirely upon federal preemption in general, and conflict preemption analysis in particular.⁶¹ According to the Court, the congressional Burma statute,⁶² passed three months after the Massachusetts Burma Law took effect, preempted the Massachusetts law because:

[The Massachusetts law] undermines the intended purpose and 'natural effect' of at least three provisions of the federal Act[;] that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive multilateral strategy towards Burma.⁶³

These preemption arguments fail to take into account the entirely different natures of the Massachusetts and Federal laws. The federal law permits "economic sanctions" because it allows the President to ban new investment by "United States persons" in Burma. In contrast, the Massachusetts law fits the description of an economic boycott because the Massachusetts law governs not the behavior of companies or individuals but the purchasing behavior of the state. This distinction is crucial because the Supreme Court argues conflict preemption grounded on the idea that "the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach."⁶⁴ In fact, the Massachusetts Burma Act "penalizes" no one: the state does not apply its coercive *legal* power against companies trading with Burma, as would the federal government against violators of a sanctions regime imposed by the President. It is the state's *spending* power that is at issue. The Supreme Court argues, in a footnote,⁶⁵ that it has rejected the argument that a State's "statutory scheme . . . escapes preemption because it is an exercise of the State's spending power rather than its regulatory power."⁶⁶ The case on which the Supreme Court relies for this precedent, however, concerned a state law that applied a state boycott to past violators of federal labor laws, and thus had no functional purpose

⁶¹ See *Crosby*, 120 S.Ct., at 2294, n8.

⁶² See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009-121 to 3009-172).

⁶³ *Crosby*, 120 S.Ct., at 2294.

⁶⁴ *Id.* at 2296.

⁶⁵ *Id.* at 2294, n.7.

⁶⁶ *Id.*, citing *Wis. Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986).

except to modify the penalty for the violation of a federal law, and bore no relationship to state procurement.⁶⁷ The Massachusetts Burma Law, in contrast, makes no reference to federal laws, and does not use spending power to frustrate the intent of federal laws. In addition, the law bears a rational relationship to the desires of the people of the state of Massachusetts for their state's purchasing. For precisely this reason, to allow state interests to influence state purchasing, the market participant exception to the dormant commerce clause was created.

V. THE "MARKET PARTICIPANT" EXCEPTION

The most intuitive argument in Massachusetts' favor is that the federal government has no business telling a state from whom it must buy. This bit of common sense is established in the "market participant" exception to the dormant commerce clause: "[I]f a state is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."⁶⁸ The basic rationale behind the market participant exception affords states the freedom of consumers when they act as consumers—as entities with interests and desires that have an influence on their own behavior in the market—but not when they act in their official capacity as lawgivers.⁶⁹ Though the market participant exception has been recognized at least since the 1940's,⁷⁰ it received its fullest expression in 1980 in the case of *Reeves, Inc. v. Stake*, in which the Supreme Court held that the role of each state to act as "guardian and trustee for its peoples" mandated federal restraint in the area of state procurement.⁷¹ Thus, "states may fairly claim some measure of sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal."⁷²

The First Circuit's opinion, from the standpoint of one who disagrees with the ultimate holding in the case, presents one central problem: having concluded that Massachusetts' action is impermissible because it affects foreign affairs and foreign commerce, the court simply refuses to accept that the law is what it appears to be on its face, a proprietary selective purchasing law. The law clearly does not regulate the conduct of anyone other than the state itself, and it merely "governs" the state's participation in the

⁶⁷ See *infra* Part IV.E.

⁶⁸ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (White, J., plurality) (cited in *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 62 (1st Cir. 1999)).

⁶⁹ See *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998).

⁷⁰ See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("[t]he Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.").

⁷¹ See *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980); see also *infra* discussion of *Reeves* in Part D.

⁷² *Id.* at 438 n.10. This discussion of the origins of the market participant has been adapted from Dhooze. See Dhooze, *supra* note 4, at 466-67.

markets for goods that it buys. The First Circuit advances four reasons why the law does not represent market participation: the law (1) affects activity unrelated to the transactions that it governs, (2) governs too wide a range of transactions, (3) does not have an economic purpose, and (4) is not motivated by sufficiently "ordinary" market concerns. While one can debate the merit of these objections, none of them go to the heart of the matter. The heart of the matter is whether the Massachusetts Burma Law, regardless of its consequences or intentions, represents nothing more than participation in the market.

Because at the most basic level, Massachusetts is indeed merely participating in the market, the First Circuit must devise strained arguments for why the state is "really" regulating. The sections that follow analyze the First Circuit's interpretation of the meaning, scope, and nature of state regulation as compared with market participation. An evaluation of the cases on which the court relies for precedent challenges the court's logic.

A. *White* and the Coercion Problem

In theory, the First Circuit's strongest argument is that the Burma Law *coerces* private parties, and therefore regulates them indirectly. In response to Massachusetts' argument that its law does not coerce, the court first addresses *White v. Massachusetts Council of Construction Employees, Inc.*⁷³ In *White*, the city of Boston passed a law requiring that all contractors working for the city of Boston employ at least 50% Boston residents.⁷⁴ The Supreme Court concluded that Boston was acting as a market participant in the market for contractors and was free to buy from whom it chose.⁷⁵ In confronting this case, the First Circuit comments that the Supreme Court found "no evidence that the executive order in question was an attempt to force virtually all businesses that benefit in some way from the economic ripple effect"⁷⁶ of the city's construction contracts "to bias their employment practices in favor of the [city's] residents."⁷⁷ The First Circuit quotes this language as if it has significance, but the opinion does not explain why the Massachusetts Burma Law differs in nature from the Boston law. It is difficult to find a difference.

Surely, just as firms that hope to engage in business with Massachusetts have an incentive to end their involvement in Burma, so were firms that hoped to perform contracting work for Boston given an incentive to hire more Boston residents. Rarely would offering an incentive for busi-

⁷³ *White v. Mass. Council of Constr. Employees, Inc.*, 460 U.S. 204 (1983).

⁷⁴ *See id.* at 205 n.1 (describing the statute at issue).

⁷⁵ *See id.* at 205.

⁷⁶ *Id.* at 211, *cited in* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 62-63 (1st Cir. 1999) (internal quotation marks omitted).

⁷⁷ *Id.* (internal quotation marks omitted).

nesses to act a certain way in order to win government contracts qualify as an attempt to “force virtually *all* businesses that benefit in some way”⁷⁸ from state purchasing to change their behavior. Here, as in *White*, there is no question of Massachusetts attempting to control the behavior of companies that enjoy a “ripple effect” from state purchasing decisions. The Massachusetts Burma Law places no restrictions on companies that do business with companies that in turn do business with the state—this pattern would represent the kind of forbidden “ripple effect” noted in *White*.

Companies may always choose not to sell to the governmental body in question. This fact makes the *White* decision even more amenable to an interpretation favorable to Massachusetts. Construction contracting is, by hypothesis, a relatively local business, and conditions that Boston imposed would have loomed large for local contractors, because the city would likely purchase a significant amount of construction services in the Boston market. In contrast, the Massachusetts Burma Law only would set terms for companies that, by definition, are global corporations with contracts all over the world. Most, if not all, companies large enough to be doing business in Burma do not absolutely need to have Massachusetts as a customer. Relatively few corporations have pulled out of Burma despite the Massachusetts law; this fact proves that the law does not coerce.⁷⁹

In response to Massachusetts’ argument that its law parallels the order upheld in *White*, the court responds:

But *White* involved an attempt to dictate the employment of Boston residents in projects funded by the city; it did not involve an attempt by Boston to require all contractors with the city to employ Boston residents in all of their other projects, a situation more akin to this case.⁸⁰

The court’s analogy overstates the breadth of the conditions that the Burma Law imposes. The Burma Law merely placed conditions on the suppliers’ specific contacts with Burma, not “all of their other projects.” Nevertheless, the court complains that the conditions that Massachusetts attempts to impose “are not even remotely connected to such companies’ interactions with Massachusetts.”⁸¹ The court fails, however, to adequately explain why.

The court’s complaint displays the following view: the conditions that a state imposes on its trading partners must directly concern the transaction at issue between the state and the company, otherwise the condition is regulatory in nature. This conclusion is not logical. When a consumer decides whether to buy a pair of shoes from a company known to employ slave labor, she considers not just how the company made the actual product she contemplates purchasing, but all of the other things the company

⁷⁸ See *White*, 460 U.S., at 211 (emphasis added).

⁷⁹ See Grunwald, *supra* note 18; see also Bardacke, *supra* note 19.

⁸⁰ National Foreign Trade Council v. Natsios, 181 F.3d 38, 63 (1st Cir. 1999).

⁸¹ *Id.*

does as well. Indeed, companies expend great resources to make consumers feel goodwill towards their brands generally, not only towards their specific products, knowing that goodwill strongly influences purchasing behavior. Companies and consumers alike realize that purchasing decisions turn on more than the explicit terms of the transaction. For this reason, the participation/regulation distinction should not turn on whether the governmental consumer narrowly considers just the good or service underlying the transaction or whether it considers larger issues. *White* itself proves this: Boston did not require 50% employment of Boston residents because it believed Boston residents would do a better or cheaper construction job, but because the city wanted to benefit its residents. In other words, although the employment condition *related* to the transaction, the condition did not relate in any economically rational way. The relation between the conditions of the Massachusetts Burma Law and the transactions at issue is no more distant than the relation between the conditions and the transactions in *White*.

The court's assertion that the conditions that Massachusetts imposes on potential suppliers "are not even remotely connected" to Massachusetts' "interactions"⁸² with those suppliers misinterprets Massachusetts' motivations. The Massachusetts Burma Law has moral foundations. The law relies on the premise that it is immoral for Massachusetts to "interact," commercially, with companies doing business in Burma. Just as the law in *White* was not really about construction, the Burma Law is not really about the products available for purchase. Rather, the law focuses on the state's "interaction" with suppliers that it deems morally tainted. Thus, the conditions of moral corporate behavior imposed by the law are intimately connected to Massachusetts "interactions" with those suppliers. The fact that the conduct at issue takes place "far away" does not have any bearing on the participation/regulation issue because ordinary market participants routinely base their individual purchasing decisions, and especially decisions that touch on morality, on conduct happening "far away." The court's view of the matter is tantamount to asserting that ordinary market participants never take moral issues into account, which is absurd.

B. *South-Central Timber* and the "External Market" Problem.

The First Circuit next suggests that Massachusetts attempts to control not its own purchasing but an external market. The court suggests that *NFTC* presents a factual situation similar to *South-Central Timber Dev., v. Wunnicke*.⁸³ In *South-Central Timber*, the state of Alaska chose to sell state-owned timber. However, the state required that the timber only be sold to companies that agreed to process the timber in state. The Supreme

⁸² *Id.*

⁸³ See generally *South-Central Timber Dev., v. Wunnicke*, 467 U.S. 82 (1984).

Court concluded that Alaska was attempting impermissibly to regulate a market.⁸⁴

The First Circuit concludes that *South-Central Timber* teaches that the market participant exception does not “sanction the imposition of any terms that the State might desire,”⁸⁵ and “the doctrine is not carte blanche to impose any conditions that the state has the economic power to dictate.”⁸⁶ The market participant doctrine cannot “immunize [a state’s] downstream regulation of a market in which it is not a participant.”⁸⁷

What the First Circuit misses in its analysis of *South-Central Timber* is that the relationship between the transactions at issue and the law at issue is quite different for the Massachusetts Burma Law. Whereas the law at issue in *South-Central Timber* applied to a single type of good over whose supply the state exercised substantial control, the law in *NFTC v. Natsios* applies to thousands of goods (everything the state buys), for none of which is Massachusetts a sole purchaser. In *South-Central Timber*, the state of Alaska had truly “created a market,” namely the market for state-owned timber. Whether or not one considers the market for state-owned timber conceptually distinct from the market for Alaskan timber generally, the state unquestionably owns enough timber for it to play the part of an economic oligarch in this market. Because it is in the position of a near or total monopsonist, Alaska truly had the “economic power” to “dictate” virtually any “terms” at all regarding what was done with its timber.⁸⁸ If Alaska had said that any company hoping to purchase state-owned timber had to cut up the trees and turn them into matchsticks, any logging company interested in the tremendous market for state-owned timber would have had to sell the trees they felled to match companies. Because Alaska imposed conditions on what could be done with the timber after its sale, its law amounted to a regulation of a market that did not relate to the transaction at issue. The transaction at issue was the sale of state-owned timber, but the market regulated was that for timber processing. Logically, some sort of economic power is *required* to turn a purchasing condition into a regulation. Otherwise, any consumer would “regulate” a market whenever she chose between competing goods.

Massachusetts simply does not have the economic power, in the specific context of its Burma Law, to turn its purchasing conditions into regulations. Massachusetts buys thousands of different goods and services from thousands of suppliers. The Massachusetts Burma Law covers everything the state and its agencies buy, from soft-drinks to heavy equipment.⁸⁹ Vir-

⁸⁴ See *id.* at 84.

⁸⁵ *Id.* at 95-96, cited in *Natsios*, 181 F.3d at 63.

⁸⁶ *South-Central Timber*, 467 U.S., at 97, cited in *Natsios*, 181 F.3d, at 63.

⁸⁷ *Id.* at 99, cited in *Natsios*, 181 F.3d, at 63.

⁸⁸ See *id.* at 95-97, cited in *Natsios*, 181 F.3d, at 63.

⁸⁹ See MASS. GEN. LAWS ch. 7, § 22G (1996).

tually every one of these goods and services already is traded in a huge market, and Massachusetts is one customer among many. More importantly, wherever the law would have any effect, the supplier already must be involved in a global market since it is also doing business on the other side of the world in Burma, an economic backwater. Massachusetts did not "create" the huge markets for these goods, any more than an individual consumer "creates" a shoe market when she shops for shoes. Granted, Massachusetts is a large purchaser—the court notes that the state buys over \$2 billion in goods and services a year⁹⁰—but the relevant criterion is Massachusetts' power with respect to individual suppliers in individual markets. Whereas in *South-Central Timber*, Alaska compelled a logging company to do whatever Alaska wanted if the company was to participate in the market for state-owned timber, here, firms remain free to simply choose not to sell to the state of Massachusetts and to continue to do business in Burma. Firms still can participate in whatever market they sell their goods in, because Massachusetts is but one participant in that market. The market for Alaskan state-owned timber was a unique market, most significantly in *space*. In contrast, the market represented by Massachusetts's purchasing needs is not unique, either in space or in type. Any company doing business in Burma can sell goods in Massachusetts; it merely cannot sell to the state. Influence over a market, which Massachusetts may have to a limited extent, should not be confused with economic power of the type that Alaska could wield.⁹¹

In sum, the First Circuit fails to apprehend that the reason that Alaska was a market regulator, rather than a market participant, is that it had controlling economic power. Therefore, it was in a position to regulate a market different from the one in which the transaction took place through what appeared to be mere conditions placed on its trading partners.

The court next addresses Massachusetts' contention that Alaska's law in *South-Central Timber* differs significantly from the Massachusetts Burma Law because the Alaska law restricted private economic activity after the transaction with the state was completed. Massachusetts argued that its Burma Law does not restrict private economic activity after the completion of the state contract, whereas the Alaska law applied specifically to what would be done with the product in question after the transaction was completed.⁹²

⁹⁰ See *Natsios*, 181 F.3d, at 46.

⁹¹ It is difficult to determine whether some of the companies cited by Grunwald actually withdrew because of the Massachusetts Burma law or not. See Grunwald, *supra* note 18. They may, for example, have been intending to withdraw consistent with internal policies but were happy to give their shareholders a business reason for doing so as well.

⁹² See *Natsios*, 181 F.3d, at 64.

The court concedes that Massachusetts is “technically correct”⁹³ in that companies can do whatever they choose once they complete their contracts with Massachusetts, but the court responds that the monitoring of companies’ activities in Burma is “ongoing” and not limited to individual purchasing decisions.⁹⁴ For example, “Massachusetts is attempting to regulate unrelated activities of its contractors once a contract is signed but before its performance is completed.”⁹⁵ This statement is true, but it does not respond to Massachusetts’ argument. One of the reasons why *South-Central Timber* exemplified regulation was that the conditions that Alaska imposed took effect after the actual transaction was entirely completed: Alaska would only sell a buyer timber if, after the timber was paid for and delivered, the buyer processed it in-state.⁹⁶ In contrast, the Massachusetts law imposes no conditions whatever on vendor behavior after the Massachusetts contract is completed.⁹⁷

Presenting no cogent rebuttal to Massachusetts’ “timeline” argument, the court tries to shift the debate about *South-Central Timber* to the issue of the substance of the conduct on which the state conditions its purchasing. “Importantly,” the court says, “the Massachusetts Burma Law applies to conduct not even remotely linked to Massachusetts . . . Under *South-Central Timber*, states may not use the market participant exception to shield otherwise impermissible regulatory behavior that goes beyond ordinary private market conduct.”⁹⁸ Here, we see the recurring theme that because the conduct on which the state conditions its purchases remains remote and “unrelated,” the state is “regulating.” Once again, the court implies that it cannot be “ordinary private market conduct” to consider anything but price when making purchasing decisions. However, it is precisely so the state can take other issues into account that the market participant exception exists at all! Market participation is an *exception* to the commerce clause, which normally forbids states from interfering with interstate commerce. *South-Central Timber* certainly cannot show that Massachusetts’ conditions amount to “impermissible regulatory behavior” merely because they concern activities remote to the transaction. Alaska’s impermissible conditions were proximate to the transaction: they concerned what would happen to the products as soon as the transaction was complete. Yet, Alaska still was guilty of regulation.

The First Circuit has no convincing response to the most powerful of Massachusetts’ arguments: that the effects of its law are not relevant to the inquiry into whether it is acting as a regulator. Once again, the First Circuit

⁹³ *Id.* at 64.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See generally *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 83-85 (1984).

⁹⁷ The court admits this fact. See *Natsios*, 181 F.3d, at 64.

⁹⁸ See *id.*

simply asserts that Massachusetts cannot use the market participant exception to pursue the goals that it is pursuing and does not explain how the goals of a state law are relevant to the crucial participant/regulator distinction. In fact, they are not. The First Circuit uses this argument to attempt to disable the market participant exception because the court wishes to shift the focus to the Foreign Affairs power, where it has a more tenable argument: that Massachusetts' action impermissibly interferes with the Federal government's control over foreign policy.⁹⁹

C. *Camps Newfound* and the Problem of Scope

Third, the First Circuit attempts to show that the Massachusetts law affects too broad a range of transactions to be shielded by the market participant exception. In support of its position, it points to *Camps Newfound/Owatonna, Inc. v. Town of Harrison*.¹⁰⁰ In *Camps Newfound*, the Supreme Court struck down a Maine statute that limited tax benefits to non-profit organizations serving out-of-state residents versus organizations serving Maine residents.¹⁰¹ The First Circuit takes this case as an admonition against an "expansion of the market participant exception"¹⁰² because the Supreme Court said that Maine's tax exemption "must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function."¹⁰³

Camps Newfound concerned tax law, not state purchasing decisions. It seems obvious that Maine should not avail itself of the market participant exception simply because its tax law involves the state obliquely in the "markets" in which non-profit organizations function.¹⁰⁴ Tax law represents a form of state regulation: it governs not the state government's own behavior but the actions of private individuals and organizations. The only relevant question for the dormant commerce clause is whether it discriminates against interstate commerce.

⁹⁹ See *id.* at 49-61.

¹⁰⁰ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

¹⁰¹ See *id.* at 567.

¹⁰² See *Natsios*, 181 F.3d, at 63.

¹⁰³ *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 594, cited in *Natsios*, 181 F.3d, at 63.

¹⁰⁴ Indeed, this was the Supreme Court's central problem with the Maine statute.

[T]he notion that whenever a State provides a discriminatory tax abatement it is "purchasing" some service in its proprietary capacity is not readily confined to the charitable context. A special tax concession for liquors indigenous to Hawaii, for example, might be conceived as a "purchase" of the jobs produced by local industry . . . Discriminatory schemes favoring local farmers might be seen as the "purchase" of agricultural services in order to ensure that the State's citizens will have a steady local supply of the product . . . Our cases provide no support for the Town's radical effort to expand the market-participant doctrine.

Id.

Here, in contrast, the issue is whether Massachusetts is regulating in the first place: if it is not doing so, then interstate, and by extension foreign commerce effects should be disregarded. *Camps Newfound* does not help the court prove that the market participant exception must involve “a discrete activity focused on a single industry,”¹⁰⁵ as it claims. Indeed, Massachusetts argued to the First Circuit that *Camps Newfound* actually supports Massachusetts’ position and pointed out that the court in *Camps Newfound* distinguished the Maine tax law at issue from laws that involve state purchases of goods and services.¹⁰⁶ This distinction fatally flaws the First Circuit’s use of the case as precedent. Nonetheless, the First Circuit responds in a footnote that the distinction “does not support the contention that *all* state purchasing decisions are protected by the market participant exception,”¹⁰⁷ (emphasis added), which is true enough, but the court does not acknowledge that the distinction makes the First Circuit’s argument about the precedent set by *Camps Newfound* very weak indeed.

D. *Alexandria Scrap, Reeves* and the Problem of Goals

Massachusetts points out that in *Hughes v. Alexandria Scrap Corp.*,¹⁰⁸ the Supreme Court allowed the state of Maryland to act as a market participant to pursue environmental concerns—a goal beyond local and economic well-being. Maryland imposed extra documentation requirements on out-of-state scrap metal processors who sought to receive bounties from the state for converting junk cars into scrap. As in *Newfound Camps*, *Alexandria Scrap* did not involve the state actually purchasing goods or services, yet the Court still found a valid market participant exception.¹⁰⁹ Some commentators have concluded from *Alexandria Scrap* and *Reeves, Inc. v. Stake*¹¹⁰ that the market participant doctrine has been upheld when states “intended their entrances [into the market] to affect the flow of commerce so as to enhance public values.”¹¹¹ In *Reeves*, the state of South Dakota, which owned cement factories, passed a law limiting its sale of cement to South Dakota residents during a cement shortage, and the Supreme Court upheld the law.

¹⁰⁵ See *id.*, cited in *Natsios*, 181 F.3d, at 63.

¹⁰⁶ See *id.*

¹⁰⁷ *Natsios*, 181 F.3d, at 64 n.19.

¹⁰⁸ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

¹⁰⁹ See *id.* at 809-810 (“Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the state’s environment. . . Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”).

¹¹⁰ See *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

¹¹¹ LAWRENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 144 (1985) (emphasis added).

The First Circuit counters that *Alexandria Scrap*, *Reeves*, and *White* indicate that a state may “favor its own citizens over others” using the market participant exception, but “this doctrine does not permit Massachusetts to pursue goals that are not designed to favor its citizens or secure local benefits.”¹¹² This assertion, even if true, does not settle the matter: the question becomes how to define “favor its citizens” and “secure local benefits.” Tellingly, the court neither explains why, nor explicitly asserts that the Massachusetts Burma Law does not do these things. Nor does the court explain how the law does not “enhance public values.” The difficulty that the court would encounter, if it addressed these questions, is how a law that, for example, protects the environment as in *Alexandria Scrap*, enhances local public values any better than a law which states that citizens’ tax dollars shall not be used to buy from companies doing business with dictatorial regimes. There is a local moral milieu, as well as a local physical one, and the court evidently does not want to become embroiled in that discussion.

E. *Gould* and the “Characteristically Governmental” Problem

The First Circuit goes on to find Massachusetts’ action invalid under *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*¹¹³ on the theory that Massachusetts’ action is “characteristically governmental.” In *Gould*, the Supreme Court held that Wisconsin was not acting as a market participant when it refused to purchase products from repeated violators of the National Labor Relations Act (“NLRA”).¹¹⁴ The First Circuit then cites a later Supreme Court decision that interprets *Gould* to mean that “when the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role.”¹¹⁵ As with its previous arguments, the First Circuit fails to complete its argument and spell out why the Massachusetts Burma Law is characteristically governmental. Commentators, as well, seem content to assert that the idea of a boycott is “characteristically governmental.”

The stated goal of selective purchasing laws, as well as their principal effect—boycotting companies with commercial ties to Burma in order to influence events in Burma—demonstrate that these local governments are not simply functioning as private purchasers of goods and services.¹¹⁶

¹¹² *Natsios*, 181 F.3d, at 64.

¹¹³ See *Wis. Dep’t of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282 (1986).

¹¹⁴ See *id.* at 283.

¹¹⁵ See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218, 229 (1993), cited in *Natsios*, 181 F.3d at 65.

¹¹⁶ Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT’L L.J. 443, 490 (1998). Mr. Price provided legal counsel to the NFTC in its suit in the district court.

The conclusion does not logically follow. It is *typically* “private purchasers of goods and services” who boycott. And they tend to do so to influence events unconnected with their purchasing decisions, but more importantly to refuse to be morally complicit in the questionable conduct in which the company engages. Massachusetts is thus acting in its decision precisely as might a private individual.

Gould is a clear case of a state simply deciding that it would impose an additional legal penalty for previous violations of a federal law. The Wisconsin law could not “even plausibly be defended as a legitimate response to state procurement”¹¹⁷ because it *forever* barred companies from doing business with the state for *past* violations of law. Though it came in the form of a purchasing decision, the *Gould* law did not address any moral issues concerned with purchasing because it conditioned purchases not on what a company was doing but what it had done. Therefore, the *Gould* law simply functioned to regulate behavior by increasing “penalties” for non-compliance with the NLRA, and thereby to deter violations of federal law. Wisconsin could not plausibly argue that it derived any benefit from refusing to deal with contractors who in the past had violated the NLRA. In contrast, the benefit derived by Massachusetts from refusing to purchase from morally tainted suppliers derives not from the suppliers’ *identity*, but from their ongoing *activities*. A supplier may be removed from the Massachusetts “restricted purchase list” when it ceases operations in Burma. Thus, Massachusetts can validly claim it is avoiding “moral taint,” and not suppliers *per se*, whereas Wisconsin could not.

The First Circuit synthesizes *South-Central Timber* and *Gould* to assert that “state regulations that go beyond the scope of normal market participation are not immune from commerce clause scrutiny.”¹¹⁸ This statement validly interprets those two cases, but all hangs on the definition of “normal.” The court continues, without any link or explanation at all, that “Massachusetts’s desire to eliminate moral taint that it claims it suffers from dealing with firms that do business in Burma does not permit it to act to regulate activities beyond its borders.”¹¹⁹ The unstated implication is that the Massachusetts law is “beyond the scope of normal market participation.” This conclusion is hardly inevitable, as it is conceivable that a consumer might boycott a producer who engages in actions that the consumer deems immoral. By coming to this conclusion, the First Circuit implies that states must act more like for-profit companies that only look to the bottom line, rather than individual human beings who may be motivated by moral factors.

¹¹⁷ *Gould*, 475 U.S., at 291, cited in *Natsios*, 181 F.3d, at 64-65.

¹¹⁸ See *Natsios*, 181 F.3d, at 65.

¹¹⁹ *Id.*

The First Circuit notes Massachusetts' contention that it acts as "private actors" do because some companies have ceased doing business with Burma due to human rights concerns.¹²⁰ The court also notes, however, the counterargument presented by NFTC that "[such] companies have not ceased doing business with other companies that remain involved in Burma."¹²¹ Both of these arguments miss the mark because Massachusetts is not a "company," and should not be compared to a "company" for purposes of determining whether it is a market participant or not. When it buys goods and services, Massachusetts should be considered to be a consumer, and if it acts as a consumer might do, and its actions are not regulatory in nature because of some special economic power that it wields, it is acting as a market participant.

Bizarrely, and without precedential support, the First Circuit claims that "[t]he proper inquiry is whether Massachusetts is acting as an *ordinary* market participant, not whether any participant has acted in such a fashion."¹²² The problem with such a test is that it completely guts the market participant exception. If "ordinary" means "economically efficient," as it appears to in the context of the court's argument, then the First Circuit has entirely misinterpreted the precedent. State governments are never "ordinary" in this sense because they are not supposed to be entirely self-interested. In *Alexandria Scrap*, the case in which the Supreme Court established the market participant exception, the Court allowed Maryland to impose different documentation requirements on out-of-state processors of junk cars when they requested a bounty for their cars. Never mind the fact that treating in-state versus out-of-state suppliers in the junk car market never would qualify as an "ordinary" action for a company involved in that market; the whole concept of a "bounty" generally is foreign to private business. A bounty on scrap cars only makes sense from an environmental standpoint, and only the state has the responsibility of protecting the environment. In *Reeves*, the state's decision to limit its sales to South Dakota residents was not economically efficient. In *White*, the state's interest in employing Boston residents was not economically efficient. When a state participates in any market, it is not "ordinary"—everything it does, it does at least nominally in the public's interest, not its own. Thus, the First Circuit's restriction that only "ordinary" participation in a market may qualify for the market participant exception utterly contradicts the purpose of the exception: to allow the state to do what is best for the citizens of the state, so long as it merely participates in the market. While it might be more economically advantageous for the state of Massachusetts to continue to do business with companies involved in Burma, the state believes that this choice would not serve the people of Massachusetts, whom it represents.

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *Id.* (emphasis added).

F. The Court's Confused Law and Economics

The First Circuit concludes its argument with a statement that demonstrates its confusion on the issues crucial to the participant/regulator distinction: "Massachusetts has created a market, but it cannot regulate the market it has created so as to regulate conduct elsewhere not related to that market."¹²³ This statement and its flaws merit a full discussion.

The first problem with this statement is that Massachusetts has not "created a market." Individual entities cannot create a market unless they are monopolists or monopsonists. Massachusetts is, as the court notes, a large consumer of goods and services. However, it does not consume a single type of goods or services, and does not have special economic power with respect to any of the goods and services that it purchases from global companies large enough to be doing business in Burma. Additionally, as a purchaser, Massachusetts does not differ substantially from any other purchaser, either private or governmental. It does not demand that the specifications for the soft drinks or cameras or petroleum that it buys vary from the market standard. It is therefore inaccurate, in economic terms, to suggest that there is a differentiable market that Massachusetts has created merely by having purchasing needs.

The second problem with the statement is that because Massachusetts has not "created" a market, it cannot be "regulating" that market simply by setting conditions for the type of purchaser from which it seeks to buy. If Massachusetts *had* created a market, then it would have the economic power to dictate terms to suppliers, as Alaska did in *South-Central Timber*. It does not have this power and is incapable of truly dictating terms. Merely because it does not have this kind of economic power, however, does not mean that its actions cannot legitimately have some influence on market behavior.¹²⁴ Beyond the purpose of "enhancing public values" for Massachusetts residents, one of the intents of the law was to influence market behavior and to give an incentive to companies to cease trading with Burma. And influence on market behavior is precisely what the market participant exception excepts, even if there are interstate commerce effects. Whenever a consumer boycotts a producer, she has dual goals in mind: (1) to preserve her own morality by not enriching a producer that acts immorally, and (2) to give the producer an incentive to stop doing whatever is objectionable. In the case of the individual consumer and the gigantic corporation, the first goal is paramount. In the case of the governmental consumer and the gigantic corporation, the second goal gains in prominence. To suggest that Massachusetts acts as a regulator merely because it has

¹²³ *Id.*

¹²⁴ Indeed, if individual market participants had *no* economic power, consumer boycotts would never work. Nor would consumer preferences have any effect. Markets function because there *is* feedback from consumers to producers.

more influence than the typical corporate or individual consumer is to penalize Massachusetts for its size and nothing else. Such a stance leads to the absurd conclusion that Massachusetts is too powerful to make its own decisions about purchasing.

The third problem with the statement is the suggestion that Massachusetts is *regulating* conduct in Burma. This idea is ludicrous for a variety of reasons. First, Massachusetts has no power to regulate private activity in Burma. Neither does the federal government have the power to regulate private activity in Burma. Second, the Massachusetts Burma Law does not regulate private conduct relating to Burma *in Massachusetts*. The Massachusetts Burma Law places no restrictions whatever on the ability of companies doing business in Massachusetts to carry on trade in Burma. It is only if companies wish to trade with the state and state agencies of Massachusetts on an equal footing¹²⁵ with other companies that they must cease their business in Burma. Massachusetts is not exercising any of the truly coercive powers in its arsenal.¹²⁶

VI. CONCLUSION

A. The First Circuit and Supreme Court Decisions.

Ultimately, the First Circuit relies on a series of misconceptions of fact, economic theory, and precedent in coming to its conclusion. When it compares the situation in *White* to the case before it, the court fails to find a meaningful way in which Boston's behavior, which was held constitutional, differs from Massachusetts' behavior. The court suggests that it would have been too much for Boston to require all of its contractors to hire only Boston residents in all their projects, but this hypothetical fails to acknowledge (a) the substantially different relative economic bargaining positions of Boston versus local contractors in comparison to Massachusetts versus global business, and (b) the sheer onerousness of the conditions implied by the court's hypothetical, when compared to the requirement that companies not do business in Burma. These two considerations render the court's conclusion that *White* does not support Massachusetts' position suspect.

When it addresses *South-Central Timber*, the First Circuit fails to recognize that Alaska was "regulating" primarily because it was in a position of monopsony power with respect to the "market" in question. For this reason, virtually any conditions that Alaska put on the sale of its timber would have qualified as regulations. In addition, the court fails to recognize the

¹²⁵ The Massachusetts Burma law does not absolutely bar trade between the state and companies doing business in Burma, it merely raises by 10% the bids of such companies when comparing bids with competitors. See *infra* section II.

¹²⁶ One could easily imagine, for example, some sort of tax on companies conducting transactions in Massachusetts and doing business in Burma.

importance of the fact that Alaska sought to regulate the behavior of its trading partners after the relevant transaction was finished.

The First Circuit uses *Camps Newfound* to show that the Supreme Court does not want to see the market participant exception “expanded,” but the case’s facts differ too radically from the ones presented by *NFTC v. Natsios* for the case to be persuasive in the court’s argument. *Camps Newfound* stands for the proposition that a state cannot use the market participant exception when it differentially taxes not-for-profit organizations dependent on whether they primarily serve state residents.

The court acknowledges that *Alexandria Scrap* allows the market participant exception to be used to further state interests beyond local beneficial *economic* effects but asserts that the exception still must favor a state’s citizens. The court fails to show convincingly that the Massachusetts Burma Law does not “enhance public values,” as commentators have argued the exception is partially designed to do. In so doing, the court denies the people of Massachusetts the ability to allow the expenditure of their state tax dollars to reflect their values.

The court rolls out the *Gould* decision to attempt to show that states that “punish” suppliers act in a regulatory manner. However, the court fails to perceive that the law in *Gould*, unlike the Burma Law, amounts to just another legal penalty for previous illegal conduct, and therefore does not serve any interest even remotely related to the state’s purchasing decisions, and indeed interferes with the penalties carefully crafted by the federal law. In other words, the court misunderstands *Gould* to mean that any statute with a “moral” effect is impermissible, rather than correctly seeing *Gould* as an admonition against inappropriate legal penalties. Ultimately, the Supreme Court adopted this broad interpretation of *Gould* in its *Crosby* decision, which allowed the Court to overlook entirely the issue of market participation and to focus squarely upon preemption.

The First Circuit synthesizes *Gould* and *South-Central Timber* into a doctrine in which the market participant exception applies only when the state acts in an “ordinary” manner, which completely guts the exception because states often have interests that individuals and companies do not. Indeed, the exception was designed specifically to allow states to do what economic agents do not “ordinarily” do—discriminate on a basis other than price and quality of product or service.

Finally, the First Circuit concludes that Massachusetts has “created a market.” Therefore any conditions which it places on its own purchases qualify as “regulations” of that market. This view utterly fails to perceive the realities of Massachusetts’s economic bargaining position relative to the huge businesses doing business in Burma.

B. The Future of Selective Purchasing Laws

The First Circuit’s decision, upheld by the Supreme Court, tolls the death knell for any kind of state purchasing conditions based on suppliers’

activities abroad. This article analyzed the market participant exception because it seems the most legitimate justification for state-level action that may influence, which is not to say "regulate," commerce in other countries. If state governments may not use foreign involvement as a criterion for purchasing decisions, it is difficult to imagine how states can reflect their citizens' wishes when making those decisions. The federal judiciary's shutdown of selective purchasing laws will no doubt come as a relief to companies fearing retribution from a multitude of sub-national governments, and will likewise come as a relief to countries that will not have to worry about economic consequences which flow from the acts of any authority within the United States larger than the individual consumer and smaller than the federal government. Perhaps the larger issue is whether dealing with U.S. states should, for multinational corporations, be more like dealing with individual human beings or more like dealing with profit-maximizing corporations. Unfortunately for democracy, it seems that the Federal courts have given the latter answer.