State Anti-BDS Laws Counteracting the BDS Movement and the Constitution

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I. INTRODUCTION

When two groups of people have claims to the same piece of land, conflict is likely to ensue. For the Israelis and the Palestinians, the

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conflict over a piece of land around the size of the state of New Jersey has created one of the longest standing conflicts in modern times. While the United States has attempted to mediate peace discussions between the two groups for decades, Israelis and Palestinians continue to feud over the small piece of land. Energized by the resentment that Israel occupies Palestinian land, the Palestinians devised an international campaign that encourages individuals and companies to put economic and political pressure on Israel. These pressures take the form of boycotts, divestments, and sanctions, which inspired the movement’s name (the “BDS Movement”).

In order to protect and stand by Israel, several states have enacted anti-BDS laws that sanction any company that supports the BDS Movement by boycotting Israel. Subsequently, the federal government also implemented legislation to shield Israel from the dangers of boycotts. While state anti-BDS legislation is rooted in strong public policy to protect the states’ economies and to protect the nation’s alliance with Israel, the anti-BDS laws raise constitutional issues. Since the state anti-BDS laws take a stand on foreign relations, and foreign policy is typically within the federal government’s authority and not within the states’ authority, the state anti-BDS laws raise three constitutional issues: (1) whether they impede on the federal government’s exclusive power to conduct foreign policy, (2) whether they violate the dormant Foreign

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1. See Max Singer, What the Fight in Israel is All About, SIMPLETOREMEMBER (Nov. 8, 2002), http://www.simpletoremember.com/articles/a/what-the-fight-in-israel-is-all-about/.
4. Id.
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Commerce Clause, and (3) whether they are preempted by federal law. While this article examines the aforementioned constitutional issues, anti-BDS laws raise First Amendment challenges, as well.

Even though states have implemented laws similar to the anti-BDS laws at various times throughout the past three decades to take a stand on foreign issues, there is surprisingly little case law addressing their constitutionality. When determining whether the anti-BDS laws are unconstitutional, the Supreme Court of the United States (the “SCOTUS”) would likely look to the limited number of lower court cases that analyze other state sanctions, and its own narrow authority on the preempted state sanction.

Due to the complex nature of the Israeli-Palestinian conflict, it is unlikely that the states are permitted to take a stand on the dispute by implementing anti-BDS laws. Specifically, state anti-BDS laws likely interfere with the president’s ability to conduct diplomacy between the Israelis and Palestinians. In addition, since the anti-BDS laws discriminate against foreign commerce, the state

10. The Constitution grants Congress the authority to regulate interstate and foreign commerce. U.S. Const. art. I, § 8, cl. 3. Even when Congress is silent, the Commerce Clause is interpreted to “invalidate state laws that inappropriately interfere with interstate or foreign commerce,” which is known as the dormant Commerce Clause. Joel P. Trachtman, Non-actor States in U.S. Foreign Relations?: The Massachusetts Burma Law, 92 Am. Soc’y Int’l L. Proc. 350, 354 (1998).
11. Preemption is defined as: “the principal (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.” Preemption, Black’s Law Dictionary (10th ed. 2014); see U.S. Const. art. VI, cl. 2.
13. See Howard N. Fenton, III, The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions, 13 Nw. J. Int’l L. & Bus. 563, 565 (1993). Few federal courts have reviewed state sanctions and determined that they were unconstitutional, while one state court ruled that a local sanction was constitutional; additionally, the SCOTUS ruled that a state sanction was preempted by federal law but skirted the issues of whether the state sanction interfered with the federal government’s authority to conduct foreign affairs and whether it violated the dormant Foreign Commerce Clause. See, e.g., Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 375-77 (2000); Nat’l Foreign Trade Council, Inc. v. Giannoulis, 523 F. Supp. 2d 731, 750 (N.D. Ill. 2007); Bd. of Trs. of the Emps.’ Ret. Sys. v. Baltimore, 562 A.2d 720, 757 (Md. 1989).
14. See, e.g., Crosby, 530 U.S. at 363; Giannoulis, 523 F. Supp. 2d at 733; Bd. of Trs. of the Emps.’ Ret. Sys., 562 A.2d at 720.
15. See generally Singer, supra note 1.
16. See Crosby, 530 U.S. at 381; Giannoulis, 523 F. Supp. 2d at 745.
anti-BDS laws likely violate Congress’ foreign commerce power.\textsuperscript{17} However, since the federal government also isolates companies that boycott Israel, it is unlikely that the state anti-BDS laws are preempted by existing federal legislation.\textsuperscript{18} Moreover, the SCOTUS should thoroughly analyze state anti-BDS laws to finally determine whether states are permitted to take a stand on foreign affairs in the form of economic sanctions.

\section*{II. BACKGROUND}

The Israeli-Palestinian conflict is an intricate dispute over the same land.\textsuperscript{19} Currently, the conflict is centered around the West Bank, since the Palestinians want the region for their own state, but Israelis continue to construct settlements on the land.\textsuperscript{20} As a result of the land dispute, the Palestinians launched an international campaign, known as the BDS Movement, to encourage boycotts against Israel.\textsuperscript{21}

The United States responded to the BDS Movement and enacted laws to counteract it.\textsuperscript{22} Designed after popular anti-apartheid laws in the 1980s,\textsuperscript{23} the state anti-BDS laws support Israel by withdrawing state money from companies that support the BDS Movement.\textsuperscript{24} To support the states in their endeavor, the Senate introduced a bill attempting to denounce the potential constitutional challenges to

\begin{footnotesize}
\textsuperscript{17} See Japan Line, Ltd. v. Los Angeles, 441 U.S. 434, 434 (1979).
\textsuperscript{18} See Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. § 4452(c) (West 2016).
\textsuperscript{22} See generally Bob, supra note 5.
\textsuperscript{23} As a reaction to South Africa’s racially discriminatory political system, known as the apartheid, over 140 state and local governments enacted sanctions against South Africa. Fenton, supra note 13, at 564. While each state and local law varied, generally, these anti-apartheid laws prohibited investments in companies doing business with South Africa. Id. at 568. After the federal government passed its own sanctions against South Africa, one state court examined whether a local anti-apartheid law was constitutionally valid and ultimately determined that the local sanction was constitutional. \textit{See Bd. of Trs. of the Emps.’ Ret. Sys.}, 562 A.2d at 720.
\end{footnotesize}
state anti-BDS laws. Further, the federal government passed a separate act, intended to protect trade, which also punishes companies who boycott Israel.

A. **Overview of the Israeli-Palestinian Conflict**

The Israeli-Palestinian conflict is one of the longest standing conflicts in modern times. Centered around two groups of people with competing claims to the same land, the conflict is nothing short of complex. Land disputes are at the heart of this tumultuous history. Israeli and Palestinian officials have negotiated over land disputes intermittently throughout their history in the hopes of achieving peace. The Gaza Strip and the West Bank have been at the center of the conflict’s land dispute, since both groups have claims to these regions. In 2005, Israel permanently withdrew from the Gaza Strip as a step to achieving peace with the Palestinians. The Israeli settlements in the West Bank, however, remain at the forefront of the conflict.

The Israeli settlements in the West Bank are controversial because many political leaders believe Israeli settlements are preventing the Israelis and Palestinians from reaching a peace agreement. Due to clashing ideas as to how land should be divided, the

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27. *See* Bobbette Deborah Abraham, *From Mandate to Mineshaft: The Long Rocky Road to the Modern State of Israel*, 5 REGENT J. INT'L L. 123, 172 (2007) (noting that “the fight for possession of Israel’s inheritance” began when Israel proclaimed independence in 1948 and still “continues to this day”).
28. *Linker, supra* note 19. Some believe that there is no solution to the conflict at all, due to the demands from each side. *Id.* These thoughts are the consequences of Israel’s and Palestinian leaders’ demands: Israel wanting Palestinian recognition of the Jewish state and Palestinians wanting the Palestinian “right of return.” *Id.* Commentators believe these demands cannot coexist unless both sides are willing to compromise. *Id.*
31. *See generally id.* Jerusalem is also heavily fought over in this dispute. *Id.*
Israeli-Palestinian conflict polarizes the world. Often at the forefront of the United Nations, various tactics have been used to attempt to settle the dispute. Recently, the world ignited in a fierce debate regarding the Israeli settlements in the West Bank after the United Nations (the “UN”) passed a resolution condemning Israeli settlements. The UN resolution caused such a controversy because the United States did not veto the vote to condemn Israeli settlements in the West Bank.

Dating back to Israel’s independence in 1948, the United States has remained a present figure in the journey to achieve peace between the Israelis and Palestinians. Specifically, United States presidents have held and mediated peace discussions with Israeli and Palestinian leaders. President Bill Clinton, one of the most involved presidents in the conflict, held and mediated serious discussions between Israeli and Palestinian officials throughout his presidency; however, the Israeli and Palestinian leaders failed to reach a compromise. Since then, the Israeli-Palestinian conflict has remained at the top of each president’s diplomatic goals. Understanding the intricacies of the conflict, each current president handles the Israeli-Palestinian conflict with care in the hopes of finally bringing peace to the Middle East.


36. See generally Phyllis Bennis, What Has Been the Role of the UN in the Israel-Palestine Struggle?, TRANS ARAB RESEARCH INST. (Jan. 2001), http://tari.org/index.php?option=com_content&view=article&id=14&Itemid=15. The UN played a role in Israel’s independence and maintained its presence throughout disagreements between Israelis and Palestinians. Id.


38. See Milliere, supra note 37. While the Obama administration viewed the resolution as a feasible answer to achieve peace between the Israelis and Palestinians, Israel viewed the United States’ actions as betrayal. See id.


40. See, e.g., Oslo Accords, supra note 2 (detailing the Clinton administration’s efforts in the 1990s to facilitate Israeli-Palestinian negotiations).

41. Id. President Clinton held a summit at Camp David with Israeli and Palestinian leaders after a hostile period between the two groups. Id.


43. See generally Fisher, supra note 42.
B. What is the BDS Movement?

Palestinians launched an international campaign in July of 2005 to put economic pressure on the state of Israel in the form of boycotts, divestments, and sanctions, or “BDS.” The movement was created to pressure Israel into vacating territories highly disputed between the Israelis and the Palestinians, particularly the West Bank settlements. To achieve this goal, the BDS Movement encourages entities to withdraw their investments from companies that support Israel. The movement also encourages people to boycott Israeli products, Israeli professionals, Israeli professional associations, Israeli academic institutions, and Israeli artistic performances. Ultimately, the campaign urges people, organizations, churches, academic associations, and unions to join their movement to pressure Israel “to comply with international law.”

Since the BDS Movement encourages companies to economically boycott Israel, lawmakers recognize the BDS Movement as a threat to Israel’s existence. The alliance between the United States and Israel is an important relationship that affects the citizens of both nations immensely. For example, the United States entered into its first ever free trade agreement on April 22, 1985 — and this agreement was with Israel. Trade between the two countries has expanded immensely over the three decades this agreement has stood, reaching approximately $40 billion each year. In order to sustain the strong economic relationship between the United States and Israel, the United States began to counteract the effects of the BDS Movement.

44. Political Boycotts, supra note 12, at 2031.
45. Tatchell, supra note 21. The BDS Movement’s goals also include dismantling the wall separating Israeli and Palestinian territories, non-discrimination of Palestinians, and the right to return for all Palestinians that vacated after Israel’s independence. Id.
47. Id.
48. See Intro to BDS, supra note 3.
50. See id.
51. Id.
52. Id. Aside from trade, the United States and Israel also expand their research together in the most important aspects of their citizens’ lives: healthcare, agriculture, national security, and technology. Id.
C. Anti-BDS Legislation

Realizing the threats that the BDS Movement posed on Israel, states and the federal government sought to protect their ally through anti-BDS legislation.\(^{54}\) The state and federal anti-BDS laws were designed after legislation enacted in the late 1980s which penalized companies doing business in South Africa as a way to disapprove of South Africa's apartheid regime.\(^{55}\) State and local governments had also previously implemented sanctions modeled after the anti-apartheid laws to target countries such as Burma, China, Cuba, Indonesia, Nigeria, and Switzerland in the late 1990s.\(^{56}\) Generally, such state and local laws are enacted in response to political or human rights problems within foreign countries, in the hopes of changing the countries' behavior.\(^{57}\)

State and local sanctions are most often in the form of divestment and procurement laws.\(^{58}\) Procurement laws are selective purchasing laws that forbid the state from contracting with, or purchasing goods and services from, any entity that does business with the targeted country.\(^{59}\) Divestment laws are selective investment laws that forbid state or local agencies from investing state funds in companies that do business with the targeted country.\(^{60}\) Both forms of sanctions “attempt to force companies to choose between doing business with the state or local government or doing business in the target country.”\(^{61}\) Since the term “sanctions” accurately describes state and local legislation directed at foreign nations, the term is used throughout this article when referring to either type of these laws.\(^{62}\)

1. State Anti-BDS Legislation

In order to negate the effects of the BDS Movement, state legislatures enacted laws to prevent the boycotts against Israel.\(^{63}\) South

\(^{54}\) See generally Bob, supra note 5.


\(^{56}\) Id. at 308.

\(^{57}\) Garcia & Garvey, supra note 9, at 1.

\(^{58}\) See id.

\(^{59}\) See Peter J. Spiro, State and Local Anti-South Africa Action As an Intrusion Upon the Federal Power in Foreign Affairs, 72 VA. L. REV. 813, 821 (1986). These restrictions prevent government purchases of goods and services from entities that do business with the targeted nation. Id.

\(^{60}\) See Spiro, supra note 59, at 819-20.

\(^{61}\) Denning & McCall, supra note 55, at 311.

\(^{62}\) Sanction, BLACK'S LAW DICTIONARY (9th ed. 2009).

\(^{63}\) Bob, supra note 5.
Carolina and Illinois led this effort by proposing legislation to counteract the BDS Movement as early as June 2015. As of July 2017, North Carolina became the twenty-second state to enact anti-BDS legislation. Generally, the anti-BDS laws are state sanctions that divest state assets from corporations, entities, and non-profits that boycott Israel by refusing to conduct business with Israel or declining to purchase goods and services from Israel; however, each state’s anti-BDS law is slightly different. Some of the state anti-BDS laws prohibit state pension funds from investing in companies that participate in the boycotts against Israel, while other anti-BDS laws prohibit the state from entering into contracts with companies that fall within those criteria.

2. Federal Anti-BDS Legislation

After multiple states passed their specific anti-BDS laws, the Senate introduced a bipartisan bill supporting the states known as the “Combating BDS Act of 2017.” The bill expressly states that Congress supports the states divesting state assets from entities that participate in economic boycotts targeting Israel. This bill...

64. Id.
66. See Reuters, Ohio Anti-BDS Law Signed by Former Presidential Candidate Kasich, JERUSALEM POST (Dec. 20, 2016), http://www.jpost.com/Arab-Israeli-Conflict/Ohio-anti-BDS-bill-signed-into-law-by-former-White-House-candidate-Kasich-475968. South Carolina’s law is broader than most, in that it does not even mention Israel by name. Bob, supra note 5. As described by South Carolina state senator Alan Clemmons, the law “prohibits those who engage against trade based on national origin, against our allies and against the state of South Carolina.” Id. The companies that fall within that criterion are prohibited from receiving state contracts. Id. On the other hand, California’s anti-BDS law requires every company receiving a state contract over $100,000 to declare, under penalty of perjury, that they do not have anti-Israel policies. California State Assembly Unanimously Passes Bill Against Israel Boycotts, TOWER (Aug. 31, 2016, 6:27 PM), http://www.thetower.org/california-state-assembly-unanimously-passes-bill-against-israel-boycotts/print/.
67. Political Boycotts, supra note 12, at 2031.
69. Combating BDS Act of 2017, S. 170 § 2, 115th Cong. (2017). The bill states that states may divest from companies that partake in commerce related boycotts against Israel, if there is credible information available about the companies’ actions. Id. § 2(a)(1).
attempts to shield the state laws from future legal challenges by granting congressional approval.\textsuperscript{70} The policy behind the Combating BDS Act is to protect the United States’ and Israel’s shared economic and security interests.\textsuperscript{71}

The federal government also passed the “Trade Facilitation and Trade Enforcement Act of 2015” (the “Trade Act”) in February of 2016.\textsuperscript{72} To promote United States trade, the act, like the state anti-BDS laws, requires the United States to isolate companies that participate in the boycotts against Israel.\textsuperscript{73} The federal act protects Israel as well as all “Israeli-controlled territories.”\textsuperscript{74} The Trade Act’s inclusion of Israeli settlements in the West Bank potentially poses a challenge for the president to conduct diplomacy over the land dispute.\textsuperscript{75} Realizing this potential risk, President Barack Obama included a signing statement to the Trade Act which expressed his disapproval of the act’s inclusion of the “Israeli-controlled territories.”\textsuperscript{76} President Obama said this provision of the act was “contrary to longstanding bipartisan United States policy, including with regard to the treatment of settlements[,]”\textsuperscript{77} though, ultimately, President Obama said he would enforce the bill, so long as it did not interfere with diplomacy.\textsuperscript{78} Notably, many state anti-BDS laws include protection of Israeli settlements.\textsuperscript{79}

\textsuperscript{70} Id. § 2(d). The bill expressly states that the state anti-BDS laws are not preempted. Id.

\textsuperscript{71} Rubio, Manchin, supra note 68. Senator Manchin stated, “Israel has been our strongest ally in the Middle East and we need to send them a strong signal that we will do everything in our power to fight the BDS Movement.” Id.


\textsuperscript{73} Id. § 4452(b)(3). The bill mandates that a report must be submitted of all politically motivated boycotts against Israel. Id. § 4452(d)(1). After the report is submitted, the United States must take “specific steps” to discourage the boycotts against Israel. Id. § 4452(d)(2)(B).

\textsuperscript{74} See § 4452(d)(2)(A).


\textsuperscript{76} Id. Presidential signing statements are used when the president signs the bill but wants to include a short document to express his concerns with the bill, to explain it, or even to praise it. Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power, 23 CONST. COMMENT. 307, 308 (2006). While presidential signing statements may express the president’s disapproval on a particular bill, the president signed the bill into law; therefore, “no executive statement denying efficacy to the legislation could have either validity or effect.” DaCosta v. Nixon, 55 F.R.D. 145, 145 (E.D.N.Y. 1972).

\textsuperscript{77} Kampeas, supra note 75.

\textsuperscript{78} Id. in other words, President Obama would not enforce the bill with regards to Israeli settlements. See id.

\textsuperscript{79} Id.
III. CONSTITUTIONAL ISSUES

The states are taking a position on foreign policy when they enact anti-BDS laws by using their buying power to influence the views of companies in order to challenge the BDS Movement.\(^{80}\) Since the states have little, if any, authority in foreign relations, anti-BDS laws raise constitutional issues.\(^{81}\) First, the state anti-BDS laws may intrude upon the federal government’s power to conduct foreign affairs.\(^{82}\) Second, the state anti-BDS laws may violate the dormant Foreign Commerce Clause.\(^{83}\) Finally, an existing federal law may preempt the state anti-BDS laws.\(^{84}\)

Intruding into the federal government’s authority to conduct foreign affairs, violating the dormant Foreign Commerce Clause, and preemption by existing federal legislation are three separate and distinct constitutional issues.\(^{85}\) In other words, if a state statute violates one of the doctrines, this does not necessarily mean the statute also violates the other two doctrines.\(^{86}\) While courts may focus on one constitutional challenge and skirt the other two issues, state sanctions raise all three challenges.\(^{87}\)

A. Intrusion into Foreign Affairs

The federal government possesses superior power to conduct the nation’s foreign relations.\(^{88}\) As a result, state laws containing foreign policy elements may be unconstitutional if the state law hinders the federal government’s ability to conduct foreign affairs.\(^{89}\) Commonly referred to as the one-voice doctrine, the SCOTUS maintains that the United States must be able to speak with one voice

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81. See generally U.S. CONST. art. I, § 10.
82. See Garcia & Garvey, supra note 9, at 5.
83. See id. at 2.
84. See id. at 6.
85. See id. at 6-765-66. For example, the SCOTUS in Crosby only analyzed whether the state sanction against Burma was preempted by federal law, even though the state statute also likely violated the dormant Foreign Commerce Clause and intruded into the federal government’s authority to conduct foreign affairs. Id.; see generally Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 381 (2000).
86. See id. at 765-66. For example, the SCOTUS in Crosby only analyzed whether the state sanction against Burma was preempted by federal law, even though the state statute also likely violated the dormant Foreign Commerce Clause and intruded into the federal government’s authority to conduct foreign affairs. Id.; see generally Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 381 (2000).
when dealing with foreign nations.\textsuperscript{90} This idea has played a role in restricting the states from conducting foreign affairs.\textsuperscript{91} The two primary SCOTUS cases that control the issue of whether state laws relating to foreign policy are permissible or impermissible are \textit{Clark v. Allen} and \textit{Zschernig v. Miller}.\textsuperscript{92}

In the 1947 opinion of \textit{Clark v. Allen}, the SCOTUS analyzed the constitutionality of a California statute which held that nonresident aliens could only inherit property from residents of California if Americans could also inherit personal property in the alien’s home country.\textsuperscript{93} The Court analyzed whether California intruded into the realm of foreign affairs by enacting the statute.\textsuperscript{94} Writing for the majority, Justice Douglas opined that local law controls the rights of succession of property.\textsuperscript{95} The Court determined that so long as state legislation does not conflict with treaties and do not enter into the “forbidden domain” of negotiating with a foreign country, legislation pertaining to rights of succession would be constitutional.\textsuperscript{96} The Court determined that California did not enter “the forbidden domain of negotiating with a foreign country or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution.”\textsuperscript{97} Thus, the SCOTUS concluded that the statute was constitutional by stating, “[w]hat California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.”\textsuperscript{98}

\textsuperscript{91} \textit{Id.} at 959. When it comes to “national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power”; that “in respect of our foreign relations generally, state lines disappear... [and] the State... does not exist.” \textit{Id.} at 959-60 (quoting U.S. v. Belmont, 301 U.S. 324, 331 (1937)). Further, the “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.” \textit{Id.} at 960 (quoting U.S. v. Pink, 315 U.S. at 233).
\textsuperscript{92} Bd. of Trs. of the Emps. v. Baltimore, 562 A.2d 720, 744 (Md. 1989); see generally Zschernig, 389 U.S. at 429; Clark v. Allen, 331 U.S. 503, 503 (1947).
\textsuperscript{94} \textit{Clark}, 331 U.S. at 517.
\textsuperscript{95} \textit{Id.} The California statute was challenged based on preemption but the Court determined that the Treaty of 1923 with Germany did not preempt the statute. Lewis, \textit{supra} note 93, at 510.
\textsuperscript{96} Lewis, \textit{supra} note 93, at 510.
\textsuperscript{97} \textit{Clark}, 331 U.S. at 517. (internal citations omitted) (citing U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316-17 (1936)); U.S. CONST. art. I, § 10, cl. 1. Article I, Section 10 of the Constitution places limitations on states such as entering into treaties with foreign countries and issuing money. \textit{Id.}
\textsuperscript{98} \textit{Clark}, 331 U.S. at 517.
Twenty-one years after the *Clark* opinion, the SCOTUS overruled a similar Oregon statute in *Zschernig v. Miller*. The statute at issue in *Zschernig*, like the California statute in *Clark*, restricted inheritance by aliens if Americans did not have reciprocal rights to inherit in the alien’s home country; however, the Oregon statute in *Zschernig* also prohibited the alien’s home country from confiscating any of the inheritance received from their American heir. Again writing for the majority, Justice Douglas analyzed whether the Oregon statute intruded into the federal government’s authority to conduct foreign affairs. This time, the SCOTUS determined that the state intruded into matters of foreign affairs, which the “constitution entrusts to [the] President and Congress.” Unlike the California statute in *Clark*, the Court found the Oregon law in question had more than an incidental or indirect effect on foreign nations. Further, the Court opined that, while states traditionally regulate the distributions of estates, the regulations need to be submissive if they impair the Nation’s foreign policy power. The Court determined that state laws are forbidden if they have “a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.”

The difference between the statute in *Clark* and the statute in *Zschernig* was that the statute in *Zschernig* mandated that the foreign heirs “receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.” This provision required Oregon judges to examine how foreign law protected rights and how Oregon law protected rights. The Majority felt uncomfortable with that provision, stating, the “statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.” Thus, the Court determined that Oregon was in effect conducting its own foreign policy review by enacting this statute and found that the statute had a direct impact on foreign affairs.

100. Trachtman, supra note 10, at 357; see *Zschernig*, 389 U.S. at 430.
102. *Id.*
103. *Id.* at 434-35.
106. Lewis, supra note 93, at 510 (quoting *Zschernig*, 389 U.S. at 430).
107. *Id.*
108. *Id.* (quoting *Zschernig*, 389 U.S. at 440).
109. Lewis, supra note 93, at 511.
Ultimately, the SCOTUS in Zschernig determined that state statutes that may disrupt the federal government from conducting diplomacy are unconstitutional.\(^\text{110}\) The Court determined that the Oregon statute provided “great potential” to disrupt the federal government’s foreign relations or could cause an embarrassment for the nation as a whole.\(^\text{111}\) Further, the SCOTUS found that, by disrupting foreign relations, the statute could cause great international controversy.\(^\text{112}\)

### B. Violation of the Commerce Clause

The Commerce Clause of the United States Constitution grants Congress the power “to regulate Commerce with foreign Nations, and among the several States...”\(^\text{113}\) Although the Commerce Clause is an affirmative grant of power to Congress, the SCOTUS has consistently held that Congress has the authority to control anything pertaining to commerce, even when Congress does not explicitly act, which is known as the dormant Commerce Clause\(^\text{114}\). Although the scope of the dormant Commerce Clause is abstract since it is not expressly stated in the Constitution, the SCOTUS applies the dormant Commerce Clause when a state discriminates or burdens interstate commerce.\(^\text{115}\) When a state discriminates against interstate commerce facially or purposefully, the Court will apply strict scrutiny.\(^\text{116}\) In order to survive strict scrutiny, the state must show that there is a legitimate state purpose in enacting the legislation and an absence of non-discriminatory alternatives; however, since this test is difficult to survive, the discriminatory state laws are considered per se invalid.\(^\text{117}\) Conversely, non-discriminatory laws that indirectly burden interstate commerce are analyzed under a


\(^{111}\) Id.

\(^{112}\) Id. at 427-28.


\(^{115}\) Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); see also Trachtman, *supra* note 10.


\(^{117}\) Id. at 164.
balancing test and have a better likelihood of survival. Such laws will be upheld unless the burden on interstate commerce excessively outweighs the local benefits.

The primary exception to the dormant Commerce Clause is known as the market participant exception. When a state or local government acts as a seller or a buyer, rather than acting within its distinctive governmental capacity, the Commerce Clause does not limit the state’s activities. In other words, if the state or local government is acting as a market participant rather than a market regulator, the dormant Commerce Clause does not affect the actions of the state.

After the dormant Commerce Clause was established, the Court extended the same principals to state actions that discriminate or burden foreign commerce, known as the dormant Foreign Commerce Clause. Further, the Court added additional requirements to the dormant Foreign Commerce Clause – the state legislation may not increase the risk of double taxation or hinder the federal government from conducting foreign affairs. Since state action affecting foreign affairs can cause retaliation from foreign nations, the Court requires a closer analysis when foreign commerce is involved, rather than just applying an interstate dormant Commerce Clause analysis when affirmative congressional approval is absent.

118. Id. at 165. The balancing test is applied when “the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.” Id. (quoting Pike, 387 U.S. at 142).
119. Id. at 166 (citing Pike, 387 U.S. at 142).
121. Id.
122. Id.
123. Wilson, supra note 85, at 753. The Court has held that various activities conducted by the state are shielded from Commerce Clause scrutiny since their activities fall into the realm of the market participant exception. See Michael J. Polelle, A Critique of the Market Participation Exception, 15 WHITTIER L. REV. 647, 647 (1994). See, e.g., White v. Massachusetts Council of Const. Emp’rs, Inc., 460 U.S. 204, 204 (1983) (opining that an executive order by the Mayor requiring all construction projects funded by the city hire at least half of the workers from city residents was protected under the market participant exception of the dormant Commerce Clause); Reeves, Inc. v. Stake, 447 U.S. 429, 440 (1980) (finding South Dakota was a market participant when it sold its surplus of cement from a state-operated plant to out-of-state companies); Chance Mgnt., Inc. v. South Dakota, 97 F.3d 1107, 1108 (8th Cir. 1996) (holding that commerce clause restrictions do not apply to a South Dakota statute prohibiting video lottery machine licenses for corporations that South Dakota residents do not hold a majority stake in because South Dakota acted as a market participant in the lottery industry).
124. Wilson, supra note 85, at 753. The primary purpose of the dormant Foreign Commerce Clause is to protect against foreign nations retaliating based on the state legislation. Id.
125. Id.; Garcia & Garvey, supra note 9, at 3.
Japan, Ltd. v. Los Angeles was the first SCOTUS case applying the dormant Foreign Commerce Clause, and it laid out the requirements for the states to avoid constitutional scrutiny under the dormant Foreign Commerce Clause.\(^{126}\) The SCOTUS determined that when analyzing Congress’ commerce power with foreign nations, rather than “purely interstate commerce,” a “more extensive constitutional inquiry is required.”\(^{127}\) The Court ruled that a more stringent inquiry is required in cases involving foreign commerce for two reasons.\(^{128}\) First, there is a heightened risk of multiple taxation upon goods involved in foreign commerce than goods involved in domestic commerce.\(^{129}\) Second, the state “may impair federal uniformity in an area where federal uniformity is essential.”\(^{130}\) Namely, there is a strong need for the federal government to “speak with one voice when regulating commercial relations with foreign governments.”\(^{131}\) When a state acts as a participant in foreign affairs there is a good chance that foreign nations will correlate the state’s action with the whole nation.\(^{132}\)

While the SCOTUS has recognized the market participant exception to the dormant Commerce Clause for decades, it has yet to determine whether the market participant exception extends to foreign commerce.\(^{133}\) Lower courts have expressed their skepticism and even their refusal to apply the market participant exception to the dormant Foreign Commerce Clause.\(^{134}\) For example, the First Circuit in National Foreign Trade Council v. Natsios stated that it is more important for the nation to speak with a unified voice when it comes to foreign affairs than to extend the market participant exception to the dormant Foreign Commerce Clause.\(^{135}\) After Natsios, the District Court of Puerto Rico in Antilles Cement Corp. v. Calderon, explicitly opined that the market participant exception does not apply to the dormant Foreign Commerce Clause.\(^{136}\)

\(^{126}\) Wilson, supra note 85, at 753.
\(^{127}\) Id. at 754.
\(^{128}\) Id.
\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) Id. at 755 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).
\(^{133}\) Id. at 446.
\(^{134}\) See id. at 460.
\(^{135}\) Id. (quoting Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999)). Further, the First Circuit opined that the risk of “retaliation against the nation as a whole” was greater than the state’s interest in enjoying the market participant exception. Id. (quoting Natsios, 181 F.3d at 66).
\(^{136}\) Id. (citing Antilles Cement Corp. v. Calderon, 288 F. Supp. 2d 187, 196 (D.P.R. 2003), vacated on other grounds in part, 408 F.3d 41 (1st Cir. 2005)).
Relying on Natsios and Japan Line, the district court ruled, “the risks of foreign commerce are too great to allow the extension of the market participant exception.”

C. Preemption By Existing Federal Law

The Supremacy Clause of the United States Constitution declares that federal statutes, treaties, and the Constitution are the “supreme Law of the Land.” Accordingly, states can be restricted from taking action in certain fields if federal law controls. Congress controls the extent to which the states are preempted by federal law in any given area. Congress may clearly and expressly preempt state laws or an act of Congress can impliedly preempt state law. If federal law does not expressly preempt state law, a court is permitted to infer Congress’ intent to preempt state law in at least two circumstances: (1) state law is preempted when Congress intends for federal law to “occupy the field,” and (2) even if Congress does not intend for federal law to occupy the field, state law is naturally preempted to the “extent of any conflict with a federal statute.”

Since it does not take much searching to determine whether Congress expressly preempted state laws or whether state laws actively conflict with federal law, field preemption is the most ambiguous form of preemption. Courts are tasked with determining whether Congress left any room in the subject of the legislation for state legislation. First, the court starts with a presumption against preemption, especially in areas traditionally regulated by the

137. Id. (citing Antilles Cement Corp., 288 F. Supp. 2d at 197).
138. Garcia & Garvey, supra note 9, at 6; see U.S. CONST., art. VI, cl. 2.
139. Garcia & Garvey, supra note 9, at 6.
140. Id. “A fundamental principle of the Constitution is that Congress has the power to preempt state law.” Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372 (2000); see U.S. CONST. art. VI, cl. 2.
141. Garcia & Garvey, supra note 9, at 6; see U.S. CONST. art. VI, cl. 2.
142. Crosby, 530 U.S. at 372. Otherwise known as “field preemption,” which means the federal regulation is “so pervasive that one can reasonably infer that states or localities have no role to play.” Garcia & Garvey, supra note 9, at 6. Courts will rule that state laws are preempted when they can reasonably infer that Congress “left no room” for state laws in that particular field. California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
143. Crosby, 530 U.S. at 372 (citing Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941)). Otherwise known as “conflict preemption,” which means it is physically impossible to comply with both federal and state laws. Garcia & Garvey, supra note 9, at 6.
145. Id.
Beyond that, however, there is “no single method conclusively” to determine whether Congress intended to preempt state laws. Nevertheless, the SCOTUS has opined that when foreign affairs are at issue, “concurrent state power that may exist is restricted to its narrowest of limits.”

IV. NOTABLE SANCTION CASES

There is limited case law on the topic of state economic sanctions. A few lower court cases have determined that state economic sanctions are unconstitutional. The SCOTUS denied granting certiorari in the only case to determine that a state economic sanction was constitutional. The SCOTUS did, however, analyze one state sanction and determined that it was unconstitutional because federal law preempted it.

A. Board of Trustees of Employees’ Retirement System v. Baltimore

In July of 1986, the city of Baltimore enacted ordinances requiring city pension funds to divest funds from companies doing business with South Africa. In December of that same year, the Trustees of city employee pension funds and two employee beneficiaries filed suit against the Mayor and City Council of Baltimore asking the Circuit Court of Baltimore City to declare the divestment ordinances invalid. The Trustees argued that the ordinances were preempted by the federal Comprehensive Anti-Apartheid Act of 1986, the city ordinances intruded on the federal government’s power to conduct foreign affairs, and that the ordinances violated the Commerce Clause of the United States Constitution. Overall, the trial court upheld the ordinances and the Trustees appealed to the Maryland Court of Appeals, which ultimately held that

146. Id.
147. Id. at 383.
148. Id. (quoting Hines, 312 U.S. at 68).
152. Bd. of Trs. of the Emps.’ Ret. Sys., 562 A.2d at 724.
153. Id. at 725.
154. Id.
155. Id. at 720.
Baltimore's divestment law was constitutional. Notably, the case was appealed to the SCOTUS, which denied certiorari.

When analyzing whether the ordinances were preempted by the federal Comprehensive Anti-Apartheid Act of 1986, the Maryland Court of Appeals had to analyze the congressional intent behind the act because the act did not expressly preempt state law. The Maryland Court of Appeals opined that even though the Supremacy Clause states that federal law is the supreme law, in order to protect the sovereign states, preemption is not easily presumed. When it comes to areas where states traditionally regulate, there is a "strong presumption against finding federal preemption." When preemption is questioned in areas where state and local governments traditionally regulate there must be compelling evidence regarding the congressional intent to preempt.

The Maryland Court of Appeals determined that regulating the investments of its employees' pension funds is obviously a field in which local governments traditionally regulate. Since regulating investments is a traditional duty of state and local governments, there was a strong presumption that the state ordinances were not preempted by federal law. The Maryland Court of Appeals found that the evidence to prove that Congress intended to preempt the states was completely lacking, and therefore, the state ordinances were constitutional.

The Maryland Court of Appeals applied both Clark and Zschernig when it analyzed whether the ordinances intruded into the federal government's authority to conduct foreign affairs. The court determined that the ordinances were beyond the scope of Zschernig, and thus, were constitutional. Also, since the effect of the ordinances on South Africa were "minimal and indirect," the ordinances

156. Id.
157. Fenton, supra note 13, at 565 n.4.
159. Id. (citing California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987)).
160. Id. (citing California v. ARC Am. Corp., 490 U.S. 93, 100 (1989)).
161. Id. (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)).
162. Id.
163. Id.
164. Id. at 742-43.
165. Id. at 744; see Zschernig v. Miller, 389 U.S. 429, 435 (1968); Clark v. Allen, 331 U.S. 503, 517 (1947).
166. Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore, 562 A.2d 720, 746 (Md. 1989); see Zschernig, 389 U.S. at 441 (holding that state laws impermissibly intrude on the federal government's authority to conduct foreign affairs if the state laws have a direct impact on foreign relations and could prevent the federal government from conducting diplomacy).
were valid under Clark. The Maryland Court of Appeals determined that "[w]hen a state sells its stock in a corporation doing business in South Africa, it has no immediate effect on foreign relations between South Africa and the United States."  

The Trustees also argued that the ordinances violated the dormant Foreign Commerce Clause because the ordinances improperly played a role in interstate and foreign commerce. The City responded to the Trustees' dormant Commerce Clause argument by stating that the ordinances did not fall within the realm of the dormant Commerce Clause because of the market participant exception. Ultimately, the Maryland Court of Appeals agreed with the City and determined that Baltimore was acting as a market participant under the ordinances; therefore, the ordinances requiring the city pension funds to divest in companies doing business with South Africa were outside of the limitations of the dormant Commerce Clause.

The SCOTUS, however, has never held whether the market participant exception applies to actions affecting foreign commerce. When foreign commerce is affected, a more stringent constitutional inquiry must ensue. The Maryland Court of Appeals found that, while the Baltimore ordinances affected foreign commerce, the market exception of the dormant Commerce Clause still protected it from constitutional challenges.

B. Crosby v. National Foreign Trade Council

In 1996, Massachusetts enacted a law that prohibited state entities from purchasing products and services from companies that did business with the country then known as Burma, now Myanmar. Three months after the Massachusetts law was enacted, Congress passed legislation placing sanctions on Burma. The issue

167. Bd. of Trs. of the Emps.' Ret. Sys., 562 A.2d at 746-47; see Clark, 331 U.S. at 517 (opining that state legislation that only has some incidental or indirect effect on foreign countries does not intrude into the federal government’s authority to conduct foreign affairs).
169. Id. at 749.
170. Id.
171. Id. at 752.
172. Id. (citing Reeves, Inc. v. Stake, 447 U.S. 429, 438 (1980)).
173. Id. (citing Japan Line, Ltd. v. Los Angeles Cty., 441 U.S. 434, 445 (1979)).
174. Id. at 753.
176. Id. at 369; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus
examined in this case was whether Massachusetts’ Burma law was unconstitutional under the Supremacy Clause.\footnote{Crosby, 530 U.S. at 366; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009-121 to 3009-172 (1996)).}

In April of 1998, the National Foreign Trade Council (the “Council”), a nonprofit corporation that represented multiple companies affected by the Burma law filed suit against the state officials who administered the Burma law (the “State”).\footnote{Id. at 371.} The Council argued that Massachusetts’ law infringed upon federal foreign affairs power, disrupted the Foreign Commerce Clause, and was preempted by federal legislation.\footnote{Id. at 371 (citing Zschernig v. Miller, 389 U.S. 429, 429 (1968)).} The United States District Court for the District of Massachusetts determined that the Burma law “unconstitutionally impinge[d] on the federal government’s exclusive authority to regulate foreign affairs.”\footnote{Id. at 372 (citing Zschernig v. Miller, 389 U.S. 429, 429 (1968)).} Upon appeal, the First Circuit affirmed on three independent grounds: (1) the act was unconstitutional because it interfered with the federal government’s foreign affairs power under \textit{Zschernig},\footnote{Id. at 371; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570.} (2) the act violated the dormant Foreign Commerce Clause of the Constitution,\footnote{Id. (citing U.S. CONST. art. I, § 8, cl. 3).} and (3) the act was preempted by the federal Burma act.\footnote{Id. at 371; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570.} The case was then appealed to the SCOTUS.\footnote{See Crosby, 530 U.S. at 371.}

While the circuit court examined the three constitutional challenges to the state economic sanctions, the SCOTUS only analyzed the preemption issue regarding the Massachusetts Burma Act.\footnote{See generally id. at 370-71; see Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 45 (1st Cir. 1999).} The main analysis conducted by the SCOTUS in the \textit{Crosby} case was whether Massachusetts’ Burma law was preempted by the federal act sanctioning Burma.\footnote{See Crosby, 530 U.S. at 372; Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570.} Ultimately, the Court determined that Massachusetts’ Burma Act was preempted by the intended purpose of the federal act, which was to grant the president control
of the economic sanctions on Burma.\textsuperscript{187} During the Court's analysis of preemption it stressed that when Congress expressly or impliedly delegates authority to the president on a particular matter, his authority is great because it encompasses the power he was already granted under the Constitution plus the powers that Congress delegated.\textsuperscript{188} The Court found that it is implausible for Congress to both delegate a particular power to the president and want the states to intrude on the power and compromise its effectiveness.\textsuperscript{189}

The Court also determined that Massachusetts' act undermined the president's authority to speak for the whole nation with one voice in regards to foreign affairs.\textsuperscript{190} The Court cited to one of the president's enumerated powers: "[the president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls."\textsuperscript{191} The SCOTUS determined that Massachusetts' act sabotaged the powers of the president to conduct diplomacy,\textsuperscript{192} and concluded that the state act hindered the president's authority to "speak for the Nation with one voice in dealing with other governments."\textsuperscript{193}

The State argued that Congress never expressly preempted the state from acting; therefore, the State contended that implied permission was present.\textsuperscript{194} The State elaborated by asserting that Congress refused to ultimately determine whether states can enact legislation that places sanctions on other state and local governments.\textsuperscript{195} Specifically, the State argued that none of the various state and local economic sanctions against South Africa in the 1980s were preempted by the federal act.\textsuperscript{196} In the end, the State asked the SCOTUS to conclude that because of Congress' continued silence on state sanctions targeting foreign nations, Congress intended to grant implied approval – especially because Congress has in fact expressly preempted state sanction laws before.\textsuperscript{197} However,

\begin{itemize}
\item \textsuperscript{187} Crosby, 530 U.S. at 373-74; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570.
\item \textsuperscript{188} Crosby, 530 U.S. at 375.
\item \textsuperscript{189} Id. at 376.
\item \textsuperscript{190} Id. at 381.
\item \textsuperscript{191} Id. at 381 (quoting U.S. Const. art. II, § 2, cl. 2).
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id. at 386-87.
\item \textsuperscript{195} Id. at 387.
\item \textsuperscript{196} Id.; see, e.g., Bd. of Trs. of the Emps. Ret. Sys. v. Baltimore, 562 A.2d 720, 744-49 (Md. 1989) (holding that a state sanction against South Africa was not preempted by the Comprehensive Anti-Apartheid Act of 1986).
\item \textsuperscript{197} Crosby, 530 U.S. at 387; see Export Administration Act of 1979, 50 U.S.C. § 4607(c) (1988).
\end{itemize}
the Court stated that the State’s argument of implied approval was “unconvincing.”\footnote{Crosby, 530 U.S. at 387.} It noted that Congress’ lack of expressed preemption essentially means nothing because courts can then apply the implied preemption doctrine.\footnote{Id. at 387-88.} Additionally, the Supremacy Clause does not rely upon expressed congressional approval.\footnote{Id. at 388.}

Further, the Court dismissed the State’s argument that the state sanctions against South Africa were not preempted by noting that the SCOTUS never determined whether or not Massachusetts’ South Africa laws were preempted or even valid.\footnote{Id.}

\section*{C. National Foreign Trade Council v. Giannoulias}

On June 25, 2005, after the government of Sudan committed various atrocities against individuals in the country’s Darfur region, Illinois adopted an act to put economic pressure on Sudan in the form of state sanctions.\footnote{Nat’l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 733 (N.D. Ill. 2007); Elizabeth Trachy, State & Local Economic Sanctions: The Constitutionality of New York’s Divestment Actions and the Sudan Accountability & Divestment Act of 2007, 74 ALB. L. REV. 1019, 1032 (2010-2011).} The Illinois Sudan Act had two main prongs.\footnote{Id.} First, the act amended the Deposit of State Moneys Act by requiring the state treasury to divest state funds from commercial instruments of Sudan and any company that did business with Sudan.\footnote{Id. at 679 (citing 40 ILL. COMP. STAT. ANN. 5 § 1-110.5 (West 2007)).} Second, the Illinois Sudan Act amended the Illinois Pension Act to prohibit retirement funds from investing in any company that did business with Sudan.\footnote{Giannoulias, 523 F. Supp. 2d at 733.} The National Foreign Trade Council (the “NFTC”), eight Illinois municipal pension funds, and eight beneficiaries of public pension funds brought suit against the Treasurer of Illinois, the Attorney General of Illinois, and the Secretary of the Illinois Department of Financial and Professional Regulation.\footnote{Id. at 737.} The plaintiffs challenged the act on the grounds that it was preempted by federal law, interfered with the federal government’s authority to conduct foreign affairs, and violated the Foreign Commerce Clause.\footnote{Id. at 737.
First, the United States District Court of the Northern District of Illinois struck down the amendment to the Moneys Act because federal law preempted it. The defendants argued that this amendment was not preempted by federal law by citing to the Board of Trustees v. Baltimore, which stated there is a strong presumption against preemption in areas traditionally regulated by the states, such as pension funds. The Giannoulias court found the defendant’s argument unpersuasive, however, because it concluded that the court in Board of Trustees did not cite any authority that determined state laws are presumed not to be preempted by federal foreign affairs laws. Conversely, the Giannoulias court determined that “when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field.” The district court examined the difference between the Moneys Act and federal policy and determined that federal law preempted the amended Moneys Act because the “lack of flexibility, extended geographic reach, and impact on foreign entities interfere[d] with the national government’s conduct of foreign affairs.”

When the district court analyzed whether the Illinois Sudan Act intruded on the federal government’s authority to conduct foreign affairs, it noted that there was minimal case law on the issue. The court reasoned that the act could influence multinational companies to withdraw from Sudan, which would be “more than an ‘incidental or indirect effect in foreign countries.’” Further, the Illinois Sudan Act impacted the national government’s ability to regulate Sudanese relations. Therefore, the district court concluded that the amended Moneys Act would interfere with the federal government’s ability to address the Sudanese government.

After the district court found the amended Moneys Act unconstitutional on the above-noted two grounds, it analyzed whether the

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208. *Id.* at 741-42.
209. *Id.* at 740 (citing Bd. of Trs. of the Emps.’ Ret. Sys. v. Baltimore, 562 A.2d 720, 741 (Ct. App. Md. 1989)).
210. *Id.* The court noted, since the federal government possesses such a strong interest in regulating foreign affairs, it is not surprising that the defendants did not cite any such authority. *Id.*
211. *Id.* (citing Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 76 (1st Cir. 1999)).
212. *Id.* at 741-42.
213. *Id.* at 742.
214. *Id.* (citing Clark v. Allen, 331 U.S. 503, 517 (1947)).
215. *Id.* The district court found that the Illinois Pension Code did not intrude upon the federal government’s authority to conduct affairs. *Id.* Although it found that this provision merely barred state pension funds from investing in companies that did business with Sudan, this provision could only have a “hypothetical impact on the national government’s conduct of foreign affairs.” *Id.*
216. *Id.* at 745.
part of the act that amended the Illinois Pension Code violated the dormant Foreign Commerce Clause. The court opined that this provision violated the dormant Foreign Commerce Clause because it burdened foreign commerce "by limiting the ability of banks and corporations to conduct business with Sudan and entities tied to Sudan." The defendants argued, however, that Illinois was acting as a market participant; therefore, the dormant Foreign Commerce Clause does not apply. However, as mentioned above, it is not conclusive that the market participant exception applies to foreign commerce. Nonetheless, this court opined that it did not need to determine whether the market participant exception applied to the dormant Foreign Commerce Clause because Illinois was not exclusively acting as a market participant. Since the amendment to the Pension Code affected municipal pension funds, it was acting as a market regulator. Without the protection of the market participant exception, the court held that the Pension Code amendment violated the dormant Foreign Commerce Clause.

Two weeks after the Giannoulias decision, Congress proposed the Sudan Accountability and Divestment Act (the "SADA") to protect state and local sanctions against Sudan from constitutional challenges. The SADA authorizes "State and local governments to divest assets in companies that conduct business operation[s] in Sudan, [and] to prohibit United States Government contracts with such companies." The SADA resolves the constitutional issues challenged in Giannoulias by authorizing such state sanctions. The legislation balances two essential interests — the federal government’s authority to manage foreign policy and the "ability of State and local governments to invest and divest their funds as they see fit." The SADA strikes "an appropriate balance by targeting state action in such a way that permits state divestment measures

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217. See Trachy, supra note 202, at 1032-33.
218. Id.
220. Id. at 748.
221. Id.
222. Id.
223. Id. at 749.
224. Trachy, supra note 202, at 1034.
226. Trachy, supra note 202, at 1036.
227. Id. (citing S. REP. NO. 110-213, at 3 (2007)). The Tenth Amendment “may reserve to the states the power to determine with whom an individual state may deal...” Id.; see U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
based on risks to profitability, economic well-being, and reputations, arising from association with investments in a country subject to international sanctions.\textsuperscript{228} The SADA supports the actions of state and local governments in regards to the sanctions against Sudan and expressly states that the sanctions are not preempted by federal law.\textsuperscript{229}

Although President George W. Bush signed the SADA, he attached a signing statement that cast doubt upon whether states were actually allowed to enact sanctions.\textsuperscript{230} In his signing statement, President Bush declared that the SADA “purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy.”\textsuperscript{231} Further, he stressed that the Constitution grants the exclusive authority to conduct foreign affairs to the federal government; therefore, he asserted, “the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.”\textsuperscript{232} Thus, while the SADA was enacted, the question remains as to whether state sanctions enacted with Congressional approval may still be unconstitutional because they interfere with the federal government’s authority to conduct foreign affairs.\textsuperscript{233}

V. CONSTITUTIONAL ANALYSIS OF ANTI-BDS LEGISLATION

In order to analyze whether the state anti-BDS laws are unconstitutional, the first step is to determine the specific purpose for their enactment.\textsuperscript{234} This issue begs the question of whether the state anti-BDS laws were enacted to affect the foreign affairs of the nations or whether they were enacted to serve a legitimate local purpose.\textsuperscript{235} Reaching a conclusion on this inquiry will either resolve or greatly narrow the following constitutional analysis of the state anti-BDS laws.\textsuperscript{236}

\textsuperscript{228} S. REP. NO. 110-213, at 3 (2007).
\textsuperscript{229} Id.
\textsuperscript{230} Trachy, supra note 202, at 1037.
\textsuperscript{231} Presidential Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 WEEKLY COMP. PRES. DOC. 1646, 1646 (Dec. 31, 2007).
\textsuperscript{232} Id.
\textsuperscript{233} Trachy, supra note 202, at 1038.
\textsuperscript{234} See Fenton, supra note 13, at 571.
\textsuperscript{235} Id.
\textsuperscript{236} Id. at 573.
On the surface, the anti-BDS laws are merely a form of selective investment practices that divest money from companies that the states do not morally agree with; however, deeper consideration points to another purpose.\textsuperscript{237} The political and public interests in creating the anti-BDS laws were to take a firm stand on the Israeli-Palestinian conflict.\textsuperscript{238} The Israeli-Palestinian conflict is a delicate situation that must be handled with care.\textsuperscript{239} For decades, the United States has conducted foreign policy to help the Israelis and the Palestinians reach an agreement over land.\textsuperscript{240} Allowing states to take a position on the Israeli-Palestinian conflict will likely hinder the United States from conducting diplomacy with the Israelis and Palestinians.\textsuperscript{241} Thus, since the anti-BDS laws were enacted to speak out against the Israeli-Palestinian conflict, and they likely interfere with the federal government conducting diplomacy, state anti-BDS laws are likely unconstitutional.\textsuperscript{242}

A. \textit{Intrusion into Foreign Affairs Analysis}

Conducting the nation’s foreign affairs is a crucial matter. For this reason, the Constitution and case law assign this responsibility to the president and Congress, not to the states.\textsuperscript{243} Any state action that interferes with the federal government’s ability to conduct foreign affairs is forbidden.\textsuperscript{244} Since the state anti-BDS laws protect and include the Israeli settlements in the West Bank, the states are promoting Israel’s occupation of a territory that the Palestinian’s want for their own state.\textsuperscript{245} The West Bank causes controversy because Israel continues to build settlements in this territory.\textsuperscript{246} Including Israeli settlements in the state anti-BDS legislation may compromise the president’s ability to conduct diplomacy relating to the Israeli-Palestinian dispute over the West Bank.

\textsuperscript{237} See id. at 574.
\textsuperscript{238} See id.
\textsuperscript{239} See generally JillAllison Weiner, \textit{Israel, Palestine, and the Oslo Accords}, 23 FORDHAM INT’L L.J. 230, 234 (1999). Israelis and Palestinians have been fighting since before Israel’s independence in 1948. \textit{Id}.
\textsuperscript{240} See \textit{generally Oslo Accords}, supra note 2.
\textsuperscript{242} See \textit{generally Fenton, supra} note 13, at 574.
\textsuperscript{243} See, e.g., U.S. v. Pink, 315 U.S. 203, 233 (1942); Hines v. Davidowitz, 312 U.S. 52, 63-64 (1941). Primarily, the president is in control of conducting diplomacy with foreign nations. See Crosby, 530 U.S. at 381.
\textsuperscript{244} \textit{Id}. at 740 (citing Bd. of Trs. of the Emps.’ Ret. Sys. v. Baltimore, 562 A.2d 720, 746 (Ct. App. Md. 1989)).
\textsuperscript{245} See \textit{generally Perry & Mohyeldin, supra} note 20.
\textsuperscript{246} Perry & Mohyeldin, supra note 20.
State sanctions, such as the anti-BDS laws, are designed to affect foreign nations, which would naturally affect the federal government’s ability to conduct diplomacy in that specific nation; however, courts analyzing state sanctions are split on this issue. The Gian­noulias court determined that state sanctions against Sudan would hinder the federal government from dealing with the Sudanese government. Additionally, in Crosby, the Court ruled that state sanctions against Burma prevented the president from conducting diplomacy in Burma. Conversely, the Maryland Court of Appeals in Board of Trustees of Employees’ Retirement System v. Baltimore, that analyzed local sanctions against South Africa, determined that the state sanctions would have a minimal effect on foreign relations.

The Maryland Court of Appeals seemingly overlooked the very purpose of the sanction against South Africa — to change the behavior of the South African government. While the court ruled that the sanctions against South Africa would only have a “minimal and indirect” effect on South Africa, enacting local legislation on the intricate matter of the South African apartheid regime very likely hindered the federal government from conducting diplomacy. The local sanction against South Africa further complicated the already intense foreign conflict.

Like the delicate foreign affairs issues present in the other sanction cases, the Israeli-Palestinian conflict is an issue best handled by presidential diplomacy. Presidents have conducted diplomacy over the Israeli-Palestinian conflict for decades. Presidents have been the mediators between the Israelis and Palestinians during peace discussions over the years, working hand in hand with leaders from both groups. Currently, the federal government’s goal is to help the Israelis and Palestinians reach an agreement on the Israeli settlements in the West Bank, because many believe the settlements are halting peace negotiations.

249. Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 381 (2000). While the SCOTUS largely skirted the issue of the state’s intrusion into foreign affairs, it still determined that the sanctions against Burma hindered the president from conducting diplomacy. See id.
251. See generally Fenton, supra note 13, at 574.
252. See generally id.
253. See generally id.
254. See generally Fisher, supra note 42.
255. Oslo Accords, supra note 2.
256. Id.
257. See generally Munoz, supra note 34.
Notably, the states and President Obama seemed to hold opposing views on the Israeli settlements.\textsuperscript{258} In President Obama’s signing statement to the Trade Act, he expressed his hesitation in shielding the Israeli settlements from harm due to boycotts, while the state anti-BDS laws include and support the Israeli settlements.\textsuperscript{259} President Obama’s reservation about including and protecting the Israeli settlements in the Trade Act was predicated on the fact that it could prevent him from conducting diplomacy.\textsuperscript{260}

President Obama’s reservations about protecting Israeli settlements is direct evidence that the states are likely not permitted to take a stand on the Israeli-Palestinian conflict by enacting anti-BDS laws.\textsuperscript{261} During a land dispute of this nature, having the president express his view on the settlements while the states express the opposite view jeopardizes the Nation’s foreign policy goals to achieve peace between the Israelis and Palestinians. For this reason, the state anti-BDS laws will likely impede the federal government’s authority to conduct its foreign relations over the Israeli-Palestinian conflict, thus violating the constitution.\textsuperscript{262}

\textbf{B. Violation of the Commerce Clause Analysis}

Anti-BDS laws discriminate against any company, foreign or domestic, that supports the BDS Movement by boycotting Israel, which is a violation of the dormant Foreign Commerce Clause.\textsuperscript{263} Courts rarely uphold laws that violate the dormant Foreign Commerce Clause.\textsuperscript{264} The only way for the state anti-BDS laws to survive under a dormant Foreign Commerce Clause analysis is to fall within the market participant exception.\textsuperscript{265} The states with anti-BDS laws would be considered market participants since they are deciding whom to contract with and whom to invest in, rather than working within their usual governmental capacity as market regulators; however, the SCOTUS has never determined whether the market participant exception applies to the dormant Foreign

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\textsuperscript{258.} Kampeas, \textit{supra} note 75.
\textsuperscript{259.} Id. While President Trump does not and likely will not enforce President Obama’s signing statement, President Obama’s signing statement is evidence that the federal government must be able to speak with one voice when it comes to a delicate situation such as Israeli settlements. See DaCosta v. Nixon, 55 F.R.D. 145, 145 (E.D.N.Y. 1972).
\textsuperscript{260.} Kampeas, \textit{supra} note 75.
\textsuperscript{261.} See id.
\textsuperscript{262.} See generally Zschernig v. Miller, 389 U.S. 429, 429 (1968).
\textsuperscript{263.} See Japan Line, Ltd. v. Los Angeles, 441 U.S. 434, 434 (1979).
\textsuperscript{264.} See generally id.
\textsuperscript{265.} See, e.g., South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984).
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Commerce Clause, and lower courts provide limited authority on the issue.\textsuperscript{266}

The court in \textit{Board of Trustees of Employees’ Retirement System v. Baltimore}, analyzing the sanction against South Africa, referenced the fact that the SCOTUS had never applied the market participant exception to the dormant Foreign Commerce Clause.\textsuperscript{267} Instead of being wary of this, the court determined that the local sanction would still be protected under the market participant exception.\textsuperscript{268} While the \textit{Giannoulias} court recognized the harm that state sanctions could have on diplomatic powers, it did not concretely determine whether the market participant exception applied to the dormant Foreign Commerce Clause.\textsuperscript{269}

It is unlikely that the SCOTUS would rule that state sanctions should be protected under the market participant exception since state sanctions take a stand on fragile foreign conflicts.\textsuperscript{270} It is more important for the Nation to speak with one voice on foreign affairs, than to extend the market participant exception to the dormant Foreign Commerce Clause.\textsuperscript{271} Since the anti-BDS laws likely hinder the president from conducting foreign policy related to the Israeli-Palestinian conflict, it is extremely unlikely that the SCOTUS will extend the market participant exception to the states; therefore, the state anti-BDS laws are likely unconstitutional under the dormant Foreign Commerce Clause, currently.

While the anti-BDS laws are likely unconstitutional under the dormant Foreign Commerce Clause, Congress’ proposed “Combating BDS Act of 2017” could prevent that constitutional challenge.\textsuperscript{272} If passed, the proposed act would give the states expressed approval from Congress to divest state funding from companies that boycott Israel.\textsuperscript{273} While it is well established that Congress can authorize

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\item \textsuperscript{266} Hutchens, \textit{supra} note 132, at 446; see, \textit{e.g.}, Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999) (stating it is more important for the nation to speak with one voice when conducting foreign affairs than to extend the market participant exception to the dormant Foreign Commerce Clause); Nat’l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 748 (N.D. Ill. 2007) (opining that it is “not a foregone conclusion” whether the market participant exception applies to the dormant Foreign Commerce Clause); Antilles Cement Corp. v. Calderon, 288 F. Supp. 2d 187, 197 (D.P.R. 2003) (ruling that the market participant exception does not apply to the dormant Foreign Commerce Clause); Bd. of Trs. of the Emps.’ Ret. Sys. v. Baltimore, 562 A.2d 720, 753 (Md. 1989) (applying the market participant exception to the dormant Foreign Commerce Clause in a state sanction case).
\item \textsuperscript{267} \textit{Bd. of Trs. of the Emps.’ Ret. Sys.}, 562 A.2d at 752.
\item \textsuperscript{268} \textit{Id.} at 753.
\item \textsuperscript{269} \textit{Giannoulias}, 523 F. Supp. 2d at 745, 748.
\item \textsuperscript{270} See Natsios, 181 F.3d at 66; \textit{Antilles Cement Corp.}, 288 F. Supp. 2d at 197.
\item \textsuperscript{271} See \textit{id}.
\item \textsuperscript{273} \textit{Id}.
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state action that would otherwise violate the dormant Commerce Clause, the SCOTUS has never opined whether the federal government can authorize state action that violates the dormant Foreign Commerce clause.274 If the federal government can authorize state action that would violate the dormant Foreign Commerce Clause, the next issue is which federal branch could give the states this permission.275 Ultimately, it depends on what the state action is intruding on, either a presidential area of foreign relations, a congressional area of foreign relations, or a shared area of foreign relations.276

On its face, the anti-BDS laws fall into the realm of affecting foreign commerce, since they are divesting from companies that participate in the Israeli boycotts and are restricting pension fund distribution.277 In actuality, the anti-BDS laws were enacted to change the behavior of the Palestinian-led BDS Movement and its supporters, which interferes with the president’s diplomatic power over the Israeli-Palestinian conflict.278 Since the anti-BDS laws affect foreign commerce as well as the Nation’s diplomacy, the anti-BDS laws will likely need Congressional and presidential authorization to survive.279 When signing the SADA, an act nearly identical to the proposed Combating BDS Act of 2017, President Bush expressed his hesitation that the act was unconstitutional, most likely because the act hindered him from conducting diplomacy.280 If President Bush’s hesitation is any indication of the future of the proposed Combating BDS Act of 2017, state anti-BDS laws may not receive the authorization that they need to withstand constitutional scrutiny.

275. Id. at 284.
276. Id. at 284-85. In other words, if the state action is purely affecting commerce, Congress should be able to authorize the state action. Id.; see U.S. CONST. art. I, § 8, cl. 3. If the state action is intruding on the president’s diplomatic power, the president should be able to authorize the state action. Schaefer, supra note 274, at 285; see U.S. CONST. art II, § 2, cl. 1.
277. See Schaefer, supra note 274, at 286.
278. See id.
279. See id. The president can express his approval via signing the Combating BDS Act of 2017, if it gets passed in both houses of Congress. See generally id.
C. Preemption by Existing Federal Law Analysis

Congress controls the extent to which the state anti-BDS laws are preempted.\textsuperscript{281} Since Congress did not expressly preempt states from sanctioning supporters of the BDS Movement, the primary issues are whether Congress intended to occupy the field with the Trade Act, or whether the state anti-BDS laws stand as an obstacle to the federal government achieving its goal to put pressure on the BDS Movement.\textsuperscript{282} In order to determine whether Congress intended to preempt the anti-BDS laws, there is mixed authority.\textsuperscript{283}

On one side, the court that analyzed the Baltimore sanctions against South Africa would determine that the anti-BDS laws would receive a strong presumption against preemption because the anti-BDS laws are monitoring state investments, which is a traditional duty of the states.\textsuperscript{284} Further, that court determined that there must be compelling evidence to show that Congress intended to preempt the state sanction.\textsuperscript{285} The Giannoulias court that analyzed the Illinois sanction against Sudan, however, rejected that argument.\textsuperscript{286} Since Congress acted in an area of foreign relations when it passed the Trade Act, the Illinois state court would opine that there is a strong presumption that Congress intended to occupy the field, thus preempting the state anti-BDS laws.\textsuperscript{287} Knowing that preemption is disfavored, it is likely that the Giannoulias court incorrectly determined that the state sanction against Sudan was preempted by federal law.\textsuperscript{288} Rather, the Baltimore court correctly determined that presumption is not lightly presumed in instances similar to the state anti-BDS laws.\textsuperscript{289}

One of the Trade Act’s primary goals is to discourage companies from boycotting Israel, which is the same goal as the state anti-BDS

\textsuperscript{281} See U.S. CONST. art. VI, cl. 2; Garcia & Garvey, supra note 9, at 6.


\textsuperscript{283} See Bd. of Trs. of the Emps.’ Ret. Sys. v. Baltimore, 562 A.2d 720, 741 (Md. 1989) (stating that in areas where states traditionally regulate, there is a “strong presumption against finding federal preemption”); but see Nat’l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 740 (N.D. Ill. 2007) (stating “when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field”).

\textsuperscript{284} See Bd. of Trs. of the Emps.’ Ret. Sys., 562 A.2d at 741. The Maryland Court of Appeals stated that monitoring state investments is clearly an area where states traditionally regulate; therefore, the state sanction was not preempted. Id.

\textsuperscript{285} Id. (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

\textsuperscript{286} See Giannoulias, 523 F. Supp. 2d at 740 (citing Bd. of Trs. of Emps’ Ret. Sys., 562 A.2d at 741).

\textsuperscript{287} Id.

\textsuperscript{288} See California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987) (stating “preemption is not to be lightly presumed”).

\textsuperscript{289} See Bd. of Trs. of the Embs.’ Ret. Sys., 562 A.2d at 741.
laws. It is unlikely that a court will determine that Congress intended to occupy the field against the BDS Movement because, if anything, the states are helping Congress achieve its goal to dissuade economic warfare against Israel. The state anti-BDS laws do not hinder the federal government’s goal to prevent boycotts against Israel; conversely, the anti-BDS laws promote the federal government’s goal. Thus, it is unlikely that Congress intended to preempt the states from acting against the BDS Movement.

VI. CONCLUSION

While the state anti-BDS laws were created to stand by their ally, Israel, the anti-BDS laws may cause more harm than good. Due to the intricate nature of the Israeli-Palestinian conflict, it is best to allow the federal government, specifically the president, to speak out on the conflict, rather than the states. The primary issue with the state anti-BDS laws is the inclusion of the highly disputed Israeli settlements in the West Bank. Since the Israeli settlements are at the heart of the Israeli-Palestinian conflict, the states should not speak out about this delicate issue. This inclusion may harm the president’s ability to conduct foreign policy with the Israelis and Palestinians. Further, since the state anti-BDS laws discriminate against foreign commerce, they also likely violate the dormant Foreign Commerce Clause. However, it is unlikely that the state anti-BDS laws are preempted by federal law, since the anti-BDS laws support federal legislation sanctioning companies that boycott Israel. Even still, the future of the state anti-BDS laws and future state sanctions to come is unknown due to the lack of authority from the SCOTUS. Since the states may very well affect foreign affairs by establishing state sanctions, the SCOTUS must determine once and for all whether states are permitted to target foreign nations in the form of state sanctions.

292. See U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (stating the president is the “sole organ of the nation in its external relations, and its sole representative with foreign nations”).
294. See generally Bd. of Trs. of the Emps.’ Ret. Sys., 562 A.2d at 744 (citing Zschernig v. Miller, 389 U.S. 429, 441 (1967)).