

# LINKING INTERNATIONAL MARKETS AND GLOBAL JUSTICE

BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, AND LEGAL CHANGE. By *Christopher McCrudden*. Oxford and New York: Oxford University Press. 2007. Pp. li, 680. Cloth, \$225; paper, \$95.

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## INTRODUCTION

The U.S. government is the planet's largest purchaser of goods and services;<sup>1</sup> worldwide, states spend trillions of dollars on procurement each year.<sup>2</sup> Yet legal scholarship has devoted relatively limited attention to the conceptual and normative issues that arise when states enter the market. Should states as purchasers be permitted to “discriminate” to advance social objectives—say, racial justice—in ways that would be unlawful when they act as regulators? Is each country free to strike its own balance between the pursuit of economic and social objectives through procurement, or do international trade norms limit state discretion in the name of economic efficiency? Should states be permitted to use procurement to advance social objectives, like environmental protection or worker rights, in other states?

Government procurement is often viewed as a legal labyrinth of arcane tendering procedures, murky supplier qualifications, and obscure challenge mechanisms. In *Buying Social Justice: Equality, Government Procurement, and Legal Change* (“BSJ”), Christopher McCrudden<sup>3</sup> challenges this understanding and details how procurement law and policy is profoundly linked with the pursuit of social justice. By demonstrating that we can—and should—understand procurement as being not simply about the purchase of pens and paper clips but also as a potentially powerful vehicle for advancing

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1. U.S. SMALL BUS. ADMIN., AN INTRODUCTION TO THE U.S. SMALL BUSINESS ADMINISTRATION (SBA) 8 (2007), available at [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_abt\\_overview\\_english.doc](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_abt_overview_english.doc).

2. ORG. FOR ECON. COOPERATION & DEV., THE SIZE OF GOVERNMENT PROCUREMENT MARKETS 29 (2002) [hereinafter OECD], available at <http://www.oecd.org/dataoecd/34/14/1845927.pdf>.

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diverse social goals, the book subverts conventional views of procurement and identifies new areas of scholarly inquiry and public debate.

*BSJ* covers an enormously wide range of topics, including the history of the use of procurement for social purposes (Chapters 2–4, 10–14); the theoretical arguments for and against the use of procurement policy for social ends (Chapter 5); the trajectory of procurement policy in numerous developed and developing states (Chapters 6–10); the on-again, off-again nature of international negotiations over procurement (Chapters 8, 11–14); procurement policy’s influence on the corporate social responsibility movement (Chapter 12); and the international legality of various domestic procurement programs (Chapters 15–17). As even this highly abbreviated list of topics suggests, *BSJ* is an extraordinarily ambitious text that resists easy summary.

This Review examines both the details and the rhetorical structure of McCrudden’s arguments. Specifically, it analyzes some of the issues *BSJ* discusses that are of special interest to international lawyers, including particularly the legality of one country using its procurement policy to advance social goals abroad (e.g., when several U.S. states passed laws designed to address human rights in Burma). In this context, I elaborate on McCrudden’s analysis in several regards. Specifically, I examine the rules that govern the state’s ability to pursue social goals as a regulator and as a market actor. Does the state have greater freedom when acting in one capacity than in the other? Would differential treatment permit states to pursue through the back door objectives that they are legally unable to pursue through the front door?

In addition, this Review examines the structure of McCrudden’s argument. Much of *BSJ* relies on a problematic distinction between pursuit of economic goals and pursuit of social goals through procurement. Although the distinction is commonly found in the literature, *BSJ* itself demonstrates that it obscures as much as it reveals. Moreover, as explained more fully below, McCrudden’s framing of the issues, mode of analysis, and understanding of the relative centrality of formal legal norms shares much with two literatures that *BSJ* straddles—scholarship analyzing government procurement law, and writings on the relationship between international trade and human rights. However, with its virtually exclusive focus on formal legal rules and doctrinal analysis, *BSJ* is as interesting for what it omits—namely, sustained discussion of the empirical effects of international procurement policy—as for what it includes. Indeed, while *BSJ* is ostensibly about legal history and legal analysis, the text can also be read as implicitly demonstrating the limits of legal analysis and the shortcomings associated with approaching social problems exclusively through a legal lens.

*BSJ* is a valuable addition to the literature on procurement. Although some of its arguments are not fully persuasive, this impressive text invites us to rethink the relationships between procurement and social justice. To highlight some of *BSJ*’s most important contributions, this Review proceeds as follows. Part I briefly summarizes the economic importance of government procurement, the history of government efforts to use procurement to serve social goals, and the move toward international rules in this area. Part II reviews the

international norms governing procurement, as well as McCrudden's analysis of the legality of one state using procurement policy to address human rights conditions in other states. It also addresses an issue that *BSJ* largely elides: given that a state can use various policy instruments to advance the same social objective, should the law permit states to pursue certain ends through procurement but prohibit them from pursuing the same ends through regulation? In this context, I identify some anomalies in current law. Part III locates McCrudden's book within the larger debates over trade and human rights. It shows that *BSJ* uses modes of argumentation and conceptual frameworks common to this larger literature, and identifies some of the limitations associated with these frameworks. Ironically, however, these limitations point the way toward a justification for giving states wide latitude in using procurement to pursue social objectives.

### I. A BRIEF INTRODUCTION TO GOVERNMENT PROCUREMENT

Public procurement—"the purchasing by government from private sector contractors, usually on the basis of competitive bidding, of goods and services that government needs" (p. 3)—is the primary mechanism by which public monies are spent.<sup>4</sup> The economic impact of procurement is enormous. The U.S. government now spends over \$400 billion on procurement each year,<sup>5</sup> and spending by U.S. states, municipalities, and other subnational governmental units, in the aggregate, significantly exceeds federal spending.<sup>6</sup> In 1998, total procurement (both consumption and investment) for all levels of government in industrialized states was estimated to be \$4.73 trillion, an amount equivalent to 82.3% of total world merchandise and commercial services exports.<sup>7</sup>

Given their economic clout, it is not surprising that governments have often used their purchasing power as a tool to advance public policy objectives. *BSJ* describes efforts by the United States and European countries in the nineteenth and twentieth centuries to use procurement as a tool of national industrial policy, including addressing regional disparities (pp. 25–31); ensuring fair working conditions, such as minimum wage and maximum hours (pp. 37–48); and employing both disabled ex-servicemen and disabled workers (pp. 56–62).

These early efforts had transnational dimensions that prefigure many contemporary concerns, particularly regarding the ability to impose

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4. For current purposes procurement should be distinguished from state trading, which is the commercial activity of state-owned enterprises.

5. MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MORE DOLLARS, LESS SENSE: WORSENING CONTRACTING TRENDS UNDER THE BUSH ADMINISTRATION, at i (Comm. Print 2007), available at <http://oversight.house.gov/features/moredollars/moredollars.pdf>.

6. Procurement by sub-federal bodies was estimated to be \$616 billion in fiscal year 2007 and \$585 billion in fiscal year 2006. Trade Policy Review Body, *Report by the Secretariat: Trade Policy Review: United States*, 68, WT/TPR/S/200 (May 5, 2008).

7. OECD, *supra* note 2, at 7–8.

requirements on foreign companies and the economic impact of such requirements on domestic firms. For example, in a 1909 legislative debate in the United Kingdom over a resolution requiring government contractors to pay prevailing wages, a member of Parliament argued that “unless it were found possible to impose similar conditions upon foreign competitors, any extension of the Fair Wages Clause must inevitably cause hardship amongst English contractors and unemployment amongst English working men” (p. 51). This comment foreshadows contemporary concerns that strong domestic regulation can disadvantage national firms that compete in international markets.

The early developments reveal another international dynamic that continues: states’ propensities to use procurement policy to favor local producers by excluding foreign competition. Since 1844, the United States has had legislation requiring some federal agencies to purchase domestic goods (p. 26), a policy currently codified in the Buy American Act (“BAA”).<sup>8</sup> This complex federal statute requires, in effect, “that materials, supplies, articles, or (since 1990) services that are acquired for public use should be substantially American” (p. 26; footnote omitted).

McCrudden properly emphasizes the international concerns driving this legislation. First, the specific motivation for the 1933 BAA was the concern that a German firm would win a contract for the power plant at the Hoover Dam (p. 27). The BAA was also motivated by a general desire to “retaliat[e]” against discriminatory practices of other states (p. 27). For example, since 1920 the British had required that materials used for Treasury-financed construction “be of British origin and all manufactured articles of British manufacture” (p. 27). Several U.S. legislators wished to respond in kind. Senator Bingham, of Connecticut, summarized the argument: “There is only one way to meet a perfectly reasonable national movement of that kind and that is the so-called ‘buy American’ movement” (p. 27).

The prominence of international concerns in early procurement debates, including concerns over international competitiveness and evidence of “tit for tat” exclusionary policies, did not, however, produce international agreement in this area. Indeed, prior to World War II there were virtually no multilateral instruments addressing procurement. During the later stages of the War, the United States engaged the Allies in discussions over the shape of the post-War international economic order.<sup>9</sup> In particular, the United States circulated a draft agreement providing that government procurement be subject to the same nondiscrimination principles that would govern other trade measures.<sup>10</sup> However, the United Kingdom and other states objected to

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8. 41 U.S.C. §§ 10a–d (2000).

9. For an authoritative account, see DOUGLAS A. IRWIN ET AL., *THE GENESIS OF THE GATT* (2008).

10. U.S. Dept. of State, *Suggested Charter for an International Trade Organization of the United Nations*, U.S. Dept. of State Pub. 2598, Commercial Policy Series 93 (1946).

these provisions, and they were eventually dropped.<sup>11</sup> In their place, a clause specifically excluding government procurement from the general nondiscrimination norms was added. The resulting text became the basis for the General Agreement on Tariffs and Trade (“GATT”). Thus, the GATT—which would become the central multilateral instrument governing international trade from 1947 through 1994—explicitly excluded government procurement from its nondiscrimination provisions.

However, by the 1960s, thinking about procurement started to change, and a movement toward multilateral rules began. In 1961, the European Community began a long process of limiting discrimination in government procurement by adopting two “General Programmes”—in essence, action plans—seeking gradually to reduce restrictions on access to government contracts (p. 105). Shortly thereafter, a procurement dispute between Belgium and the United States arising out of a change to the BAA sparked negotiations at the Organization of Economic Cooperation and Development (“OECD”) (pp. 186–209). The OECD created a working group to explore ways of limiting discrimination against foreign suppliers, and by 1967 the working group had produced a draft code of conduct.

These developments paved the way for negotiations at the GATT that, in 1979, resulted in an international agreement on rules to liberalize and improve the transparency of procurement.<sup>12</sup> In some ways, this treaty was a remarkable accomplishment, as it reversed more than fifty years of trade policy and law. Specifically, it provided that each party was prohibited from discriminating against other parties in the area of procurement. However, coverage was limited in a number of important respects. First, the agreement covered only central governments, not subnational governments, and only goods, not services. Second, purchases had to be above a certain threshold to be covered by the agreement. Third, the agreement did not extend to all GATT parties; the treaty’s membership consisted almost exclusively of OECD states. Finally, the agreement covered only purchases by government bodies listed by parties in an Annex to the treaty. The listing of agencies in the Annex “was the subject of multilateral negotiations in which states attempted to arrive at a rough balance of procurement value commitments offered by each state party” (p. 101). For example, when the European Community did not offer to cover certain entities, the United States withdrew coverage of, inter alia, the Transportation and Energy Departments, the Army Corps of Engineers, and the Tennessee Valley Authority.<sup>13</sup> Thus, although the agreement represented a significant diplomatic development, its practical effect was limited.

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11. P. 98. For the standard history of these negotiations, see Annet Blank & Gabrielle Marceau, *The History of the Government Procurement Negotiations Since 1945*, 5 *PUB. PROCUREMENT L. REV.* 77, 82–83 (1996).

12. *Agreement on Government Procurement*, MTN/NTM/W/211/Rev.2, Apr. 12, 1979, available at [http://www.wto.org/gatt\\_docs/English/SULPDF/91990048.pdf](http://www.wto.org/gatt_docs/English/SULPDF/91990048.pdf).

13. See H.R. REP. NO. 96-317, at 96 (1979).

Over time major trading nations, including the United States, sought to extend the scope and coverage of this agreement, and, in 1993, trading states entered into a new Government Procurement Agreement (“GPA”).<sup>14</sup> This treaty entered into force on January 1, 1996, and substantially extended coverage in several respects.<sup>15</sup> Perhaps most significantly, the GPA covers services as well as goods, and it covers subnational as well as central governmental authorities. Due to these and other changes, the agreement is estimated to cover ten times the value of purchases subject to the earlier procurement treaty.<sup>16</sup> In addition, the GPA contains complex rules regarding the transparency of domestic procurement systems, including detailed provisions designed to publicize contract opportunities and award procedures, limit discretion in competitive procedures, and enable interested parties to challenge procurement procedures and decisions.<sup>17</sup>

On the other hand, the GPA is far from comprehensive. Membership is very limited: only forty WTO members—the overwhelming majority of which are developed states—are party to the agreement.<sup>18</sup> Moreover, coverage is still limited to governmental units listed in Annexes to the GPA, i.e., parties can exempt certain agencies from GPA coverage.<sup>19</sup> In addition, the treaty only applies when procurement exceeds a certain threshold, which varies depending upon the type of procurement and the level of government making the purchase.<sup>20</sup> Finally, states can include “General Notes” in their schedules, which provide for additional exceptions (p. 102). Notably, several states have taken exceptions for procurement programs designed to advance social goals. For example, the United States excluded “purchases under small or minority-owned business preference programs” and certain “state programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans, and women” from GPA coverage.<sup>21</sup>

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14. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GPA], available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf).

15. For extended analysis of the agreement, see SUE ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO* (2003), and Bernard M. Hoekman & Petros C. Mavroidis, *Basic Elements of the Agreement on Government Procurement*, in *LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT* 13 (Bernard M. Hoekman & Petros C. Mavroidis eds., 1997). At the same time, treaties entered into force creating the World Trade Organization (“WTO”). In the discussion that follows, I shall use the terms GATT and WTO interchangeably.

16. World Trade Org., General Overview of WTO Work on Government Procurement, [http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm) (last visited Oct. 20, 2008).

17. See GPA, *supra* note 14, arts. IX, XIII, XVII, XX.

18. GPA parties include Canada; the European Communities, including its twenty-seven member states; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; and the United States. World Trade Org., *supra* note 16.

19. See GPA, *supra* note 14, art. I(1) & app. I.

20. See *id.* art. I(4) & app. I.

21. H.R. Doc. No. 103–316, vol. 1, at 1040 (1994).

The complexity of the international rules governing procurement is compounded by the fact that numerous other international legal instruments address procurement—and not always in a consistent manner. Many recent bilateral and regional trade agreements contain chapters on government procurement, including, for example, the North American Free Trade Agreement and every other trade agreement the United States has negotiated since 1994 (p. 223). In addition, various international bodies address procurement outside the context of trade agreements, including the World Bank,<sup>22</sup> the UN Environment Programme,<sup>23</sup> the Inter-American Agency for Cooperation and Development,<sup>24</sup> and the UN Commission on International Trade Law.<sup>25</sup> In addition, the Council of Europe, UN General Assembly, and numerous other international bodies work on the closely related fields of bribery and corruption.<sup>26</sup>

On the one hand, this extensive activity represents a sea change from the postwar era, when it proved impossible to develop international rules to discipline government discretion in this area, including the discretion to discriminate against foreigners. On the other hand, as we shall see below, the resulting norms are often vague and difficult to discern, and the practical effect of this activity is difficult to measure. One of *BSJ*'s central inquiries is whether existing rules strike an appropriate balance between procurement's diverse goals. Hence, we turn to a more detailed analysis of the international norms in this area.

## II. THE REGULATION OF GOVERNMENT PROCUREMENT

We can read *BSJ* as an extended defense of using procurement as a tool for advancing social values. To understand and evaluate *BSJ*'s argument, it is useful to distinguish (i) among different types of procurement laws, and (ii) between the authority states have when they act as regulators and when they act as buyers. As we shall see, states often have more discretion to pursue social objectives as market participants than they do as regulators. However, *BSJ*'s failure to offer a persuasive normative rationale for why states should have greater discretion as purchasers renders the text more

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22. WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS (rev. 2006), available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-10-06-ev1.doc>.

23. See, e.g., UNITED NATIONS ENVIRONMENT PROGRAMME, PLANNING FOR CHANGE: GUIDELINES FOR NATIONAL PROGRAMMES ON SUSTAINABLE CONSUMPTION AND PRODUCTION 29 (2008) (encouraging "sustainable procurement").

24. See, e.g., Organization of American States, *Annual Report of the Secretary General 2002–2003* OEA/Ser.D/III.53 (English) (2003), available at [http://www.oas.org/SGInfAnnual/2003/English/Annual\\_Report.pdf](http://www.oas.org/SGInfAnnual/2003/English/Annual_Report.pdf).

25. See, e.g., U.N. Comm'n on Int'l Trade Law, *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment* (June 15, 1994), available at <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>.

26. See, e.g., Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT'L ECON. L. 275 (2001).

effective as a descriptive account of state practice than as a prescriptive guide for lawmakers or reformers.

### A. *Different Strategies in Pursuit of Social Justice*

Much of *BSJ* turns on the distinction between the state as regulator and the state as market participant. In light of this distinction, we can usefully distinguish three types of measures: one type explicitly discriminates against outsiders (Type I law); a second type “discriminates” to achieve social goals within the polity, such as racial equity or environmental protection (Type II law); a third type seeks to advance social goals within another jurisdiction (Type III law).

International trade law disfavors measures that facially discriminate against foreign goods. GATT Article III provides that imported goods receive treatment “no less favourable” than “like products of national origin”—the so-called national treatment obligation.<sup>27</sup> Laws that facially discriminate against foreign products are likely to violate this or other WTO nondiscrimination provisions.

As discussed above, the GATT originally exempted government procurement from the national treatment obligation. Hence, procurement could legally be—and often was—used to discriminate overtly against foreign producers. However, over time states viewed this carve out for government procurement as increasingly problematic, and the national treatment obligation is at the heart of the GPA. Thus, under contemporary trade law, states generally are not permitted to facially discriminate against foreign goods, whether the state is acting as a regulator or as a purchaser.<sup>28</sup>

International trade law treats Type II measures, such as those that promote environmental protection, labor conditions, and other domestic social objectives, quite differently. With respect to the state as regulator, the GATT generally does not address a state’s efforts to advance social objectives. Rather, the GATT is centrally concerned that states regulate in a nondiscriminatory manner; thus, the GATT prohibits states from discriminating against “like products” (p. 473). A critical issue is whether products are “‘like products’ despite the fact that one was produced in a labour rights-friendly way and the other by means of the most egregious breaches of fun-

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27. General Agreement on Tariffs and Trade, art. III, para. 4, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

28. This is only true, of course, for those WTO members that are parties to the GPA. For other WTO members, the operative norm remains that found in GATT Article III(8), which excludes government procurement from the national treatment obligation.

It is interesting to compare these rules with dormant commerce clause analysis of state laws that facially discriminate against commerce from sister states. Both WTO and U.S. law generally prohibit discrimination against outsiders when the state acts as a regulator. However, the regimes diverge significantly with respect to the state’s ability to discriminate when it is a purchaser. U.S. law permits states, as purchasers, to explicitly favor in-state interests over out-of-state interests, *see Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), while the GPA strictly limits this power. We might expect precisely the opposite result: since the commitments to a single market and unified polity are dramatically stronger in the U.S. context, we might expect that the ability to discriminate against outsiders would be greater in the international context.

damental labour rights” (p. 473). This question is an instantiation of the more general question of whether states can properly distinguish between products because of the processes used to produce them. Dispute panels have approached this question in different ways,<sup>29</sup> and the GATT-legality of process-based trade restrictions is uncertain.<sup>30</sup>

But even if a measure violates the national treatment obligation, it may fall into one of the GATT’s general exceptions. GATT Article XX permits, under certain conditions, trade measures necessary to protect public morals; necessary to protect human, animal or plant life or health; relating to the products of prison labor; and relating to the conservation of exhaustible natural resources (pp. 494–98). To date, no dispute panel has interpreted the GATT’s “public morals” exception,<sup>31</sup> and scholars are divided over whether it could be successfully invoked to justify measures against foreign products produced under conditions that violate labor or human rights.<sup>32</sup> Article XX provisions on health and natural resources have been interpreted in several cases involving environmental issues. For current purposes, it is sufficient to note that dispute panels have shown increasing deference to trade-restrictive measures that protect human safety and environmental resources.<sup>33</sup> Thus, when acting as regulators, states have substantial discretion to advance their social agendas—though the precise amount of discretion they possess remains unclear.

Turning to the governing norms in the procurement context, the GPA includes a national treatment provision (p. 474). Moreover, even if a measure

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29. A highly controversial GATT panel used the product-process distinction to find that a process-based U.S. environmental measure violated Article III. Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R – 39S/155 (Sept. 3, 1991) (unadopted report); Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407 (1992) (critiquing panel report). McCrudden notes that in a more recent dispute, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001), the Appellate Body took “an important step away from the doctrine.” P. 478.

30. Article III prohibits treatment that is less favorable; the mere fact that like domestic and foreign products are treated differently is not sufficient to establish less favorable treatment. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, para. 137, WT/DS161/AB/R & WT/DS169/AB/R (Dec. 11, 2000). Rather a panel must examine “whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.” *Id.* If different treatment does not affect the foreign product’s competitive opportunities then there is no violation of Article III.

31. The General Agreement on Trade in Services includes an exception for “measures . . . to protect public morals or to maintain public order.” General Agreement on Trade in Services, art. XIV, Dec. 15, 1993, 33 I.L.M. 44 (1994) [hereinafter GATS]. A panel found that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.” Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 6.465, WT/DS285/R (Nov. 10, 2004). The panel found that U.S. laws designed to counter underage and pathological gambling fell within the scope of the GATS exception.

32. See Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689 (1998); Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT’L ECON. L. 43 (2008).

33. For excellent discussions, see Steve Charnovitz, *The WTO’s Environmental Progress*, 10 J. INT’L ECON. L. 685 (2007), and Henrik Horn & Petros C. Mavroidis, *The Permissible Reach of National Environmental Policies*, 42 J. WORLD TRADE 1107 (2008).

runs afoul of the GPA's national treatment clause, the GPA has an exceptions provision that is similar to Article XX in many respects (pp. 491–506).

However, there are at least two other ways that states may have greater discretion to pursue social objectives when acting as market participants than they do when acting as regulators. First, as noted above, the GPA permits states to take detailed exceptions in “general notes” in their schedules (p. 102). Several states, including the United States, Canada, Japan, and Korea, have exempted from GPA coverage procurement laws aimed at promoting small or minority-owned businesses (p. 218).

Second, McCrudden offers a strategy for states to use procurement to pursue their social goals “lawfully, without having to resort to the exceptions provisions” (p. 488). The suggestion, in effect, is to move away from statute and regulation and “instead focus on using contract terms” (p. 489). Thus, a state might add a contract condition requiring a contract-winning firm to use only lumber that was sustainably harvested. McCrudden argues that this approach would be consistent with the GPA, which he reads as permitting the imposition of any contract term, so long as it is nondiscriminatory (p. 489). This contractual approach invites us to redefine what the state is purchasing: a state might wish to purchase not lumber, but lumber that is sustainably produced. More broadly, through procurement, the state may seek to purchase the public good of social justice.<sup>34</sup>

As discussed in Part III below, McCrudden's advocacy of a contractual approach is a key analytic move that opens significant lines of inquiry. However, this move—as McCrudden acknowledges—is highly “controversial” as a doctrinal matter (p. 489). It is not clear why a treaty would restrict a state's ability to condition procurement on, say, human rights grounds through tendering, bidding, and awards procedures, but permit an end-run around these provisions through the careful drafting of contract terms. Moreover, a norm that encourages states to pursue social goals through imposition of contract terms rather than through general procurement rules would be in serious tension with one of the GPA's central objectives, which is to increase transparency in procurement processes.

Thus far, we have focused on measures designed to promote interests *within* the regulating state. Of greater interest to international lawyers are domestic laws that seek to advance social objectives outside their borders, which I have labeled Type III laws. Sometimes these laws target a particular foreign jurisdiction (e.g., the Massachusetts-Burma law).<sup>35</sup> Other times,

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34. Pp. 538–52. For other approaches to using government contracts to promote public values, see Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006), and Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003).

35. In 1996, Massachusetts passed legislation limiting state agencies from buying goods or services from firms doing business in or with Burma. In 1998, Japan and the European Community (“EC”) each filed a WTO complaint against the United States, alleging that the law violated the GPA. Pp. 292–93. Contemporaneously, a trade association challenged the law in federal court. Eventually, the U.S. Supreme Court ruled that a federal statute imposing sanctions on Burma exempted the state statute. Pp. 295–97. As a result, the EC and Japan dropped their complaints, and no WTO body ever passed on the legality of the Massachusetts law.

measures are directed less at a jurisdiction than at a particular social problem. For example, a Michigan executive order restricts expenditures of state funds in ways that would contribute to the violation of internationally recognized workers' rights.<sup>36</sup> What legal norms should govern situations where one state seeks to advance social objectives in other states? Specifically, should international law treat these measures more like Type I measures that discriminate against outsiders, or more like Type II regulations designed to pursue social goals?

For the most part, the GATT analysis for regulations with extraterritorial aims is similar to that set out above for Type II laws, particularly with respect to the GATT's nondiscrimination norms. It is unclear whether Article XX could be used to justify a GATT-illegal measure designed to promote interests outside the jurisdiction of the regulating state, and the Appellate Body has carefully avoided resolution of this issue.<sup>37</sup> The uncertainty surrounding whether Article XX is available heightens uncertainty as to whether importing states can regulate to protect resources located outside their territories.

However, although *BSJ* does not discuss it, another regulatory mechanism to promote social objectives abroad is available—at least to some states. A GATT provision known as the Enabling Clause<sup>38</sup> authorizes developed states to extend preferential tariff treatment to goods from developing states. Many of the largest trading nations—including the United States, Canada, and the European Union—have used this authority to extend preferential tariffs to poorer nations.<sup>39</sup> Some of these programs grant an additional tariff preference to developing states that have taken specified steps to address particular social issues. For example, current EU law provides additional tariff benefits to developing states that have ratified and implemented specific human rights treaties and at least seven of eleven listed environmental and “good governance” treaties.<sup>40</sup>

The Enabling Clause provides that preferences must be “generalized, non-reciprocal and non-discriminatory.”<sup>41</sup> The WTO Appellate Body has found that the requirement to extend preferential treatment in a “non-discriminatory”

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36. Mich. Exec. Dir. No. 2004–2 (Mar. 24, 2004), available at [http://www.michigan.gov/gov/0,1607,7-168-36898\\_36900-88888--,00.html](http://www.michigan.gov/gov/0,1607,7-168-36898_36900-88888--,00.html).

37. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

38. *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter Enabling Clause].

39. See, e.g., UN Conference on Trade and Development, *Generalized System of Preferences List of Beneficiaries*, UNCTAD/ITCD/TSB/Misc.62/Rev.2 (2006) (listing beneficiaries for each of the Generalized System of Preferences programs currently in operation). For a discussion of the economics and the politics behind these programs, see Jeffrey L. Dunoff, *Dysfunction, Diversion and the Debate over Preferences: (How) Do Preferential Trade Policies Work?*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* (Joel P. Trachtman & Chantal Thomas eds., forthcoming 2009).

40. Council Regulation 980/2005, 2005 O.J. (L 169) 1.

41. Enabling Clause, *supra* note 38, at para. 2(a) fn.3.

manner does not mandate identical treatment of all developing countries. Rather, developed states can limit additional preferences only to those developing countries that have common “development, financial and trade needs.”<sup>42</sup> Thus, states seem to have substantial discretion to regulate in ways designed to promote social conditions abroad.

The analysis is quite similar for procurement laws designed to promote social objectives abroad. Again, states would seem to have broad discretion to use procurement for this purpose, subject to GPA’s nondiscrimination norms. Notably, McCrudden claims that the Massachusetts-Burma law does not violate the national treatment obligation. He argues that both foreign and domestic suppliers “are treated equally favourably: both are subjected to a difference in treatment regarding their engagement in Myanmar” (p. 482). Moreover, McCrudden argues that the product-process distinction may not be applicable to procurement measures (pp. 481–83), which would grant states even broader discretion. In addition, states can presumably protect Type III procurement laws, like other procurement laws, through exceptions in their general notes (pp. 102, 218). Finally, McCrudden argues that the goals of the Massachusetts-Burma law can be achieved through contract terms. He specifically suggests adding a contract term prohibiting firms from operating in Burma for the duration of the contract (p. 489). As noted above, the GPA-consistency of this contractual approach is an open question.<sup>43</sup>

#### B. *The Problematic Distinction Between the State as Regulator and the State as Market Participant*

This highly abbreviated doctrinal analysis begs a normative analysis of whether the rules that limit a state’s discretion when it acts as regulator should govern the state when it acts as purchaser, and whether the law should permit procurement to be used to address social conditions in other states. To answer these questions, we would need a theory of the state as market participant. Scattered throughout *BSJ* are hints of what such a theory would look like.

The leading arguments for why the state as purchaser should enjoy wide discretion to discriminate to advance social objectives draw a sharp distinction between the state’s role when it acts as regulator and as a market participant.<sup>44</sup> This approach views regulation—the compelling or forbidding of private action through the exercise of raw governmental power—as the

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42. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004). For an analysis and critique of the Appellate Body’s reasoning in this dispute, see Jeffrey L. Dunoff, *When—and Why—Do Hard Cases Make Bad Law? The GSP Dispute*, in *WTO LAW AND DEVELOPING COUNTRIES* 283 (George A. Bermann & Petros C. Mavroidis eds., 2007).

43. See *supra* text accompanying note 34.

44. For example, the U.S. Supreme Court expressly invokes this distinction in justifying the market participant exception to the dormant Commerce Clause. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

quintessential state action. The state's uniquely coercive powers, including powers to imprison, fine, and seize property, justify strong and comprehensive legal constraints on government action.

In contrast, when the state buys or sells, it exercises no essentially governmental powers. Instead, when it enters the marketplace, it is, in effect, another private actor. Because the state acts in a very different capacity when it buys, it should not be subject to the constraints that apply when it regulates. Under this approach, the state should enjoy the same wide freedoms that private citizens do in choosing from whom to buy.<sup>45</sup>

However, there are difficulties with this argument. Many suggest that it rests on a distinction between the state as regulator and the state as market actor that is largely illusory. As Hersch Lauterpacht observed in a different context, even when the state is "ostensibly removed from the normal field of its political and administrative activities, the state nevertheless acts as a public person for the general purposes of the community as a whole. . . . [T]he state always acts as a public person. It cannot act otherwise."<sup>46</sup>

A variation on this critique would suggest that individuals, whether on their own or acting collectively through states, often wish to encourage or discourage various behaviors through their purchasing decisions. In these circumstances, market activity has a self-consciously political dimension. That is, as a buyer seeking to advance social objectives, the state embodies two components that cannot be fully disaggregated. McCrudden appears to be sympathetic to this argument: "When the government makes purchases, it acts in the name of its citizens and ought to uphold certain standards" (p. 378).

It is not entirely clear, however, how these critiques—which problematize the distinction between the state as regulator and the state as buyer—cut as a doctrinal or a normative matter. If the state acts on behalf of its citizens, expresses public values, and seeks to encourage or discourage behavior when acting as both regulator and purchaser, then it seems appropriate to subject both activities to the same (or similar) legal constraints. Paradoxically, however, many who insist that the state as buyer is not simply another private actor and who view procurement as a way to extend the state's reach beyond that permitted through regulation also insist that the state should be free to "discriminate" as buyer in various ways that it cannot as regulator.

Framed in these terms, this debate overlooks other possibilities. For example, perhaps the dichotomous debate over whether the state as regulator is "like" or "not like" the state as buyer misleads insofar as it masks a continuum. At one end of the continuum are situations where the government is a relatively minor player in a large market with many buyers and sellers—such as when the state buys pencils and paper clips. In these cases, with respect to the relevant market, the government is akin to a private party, and it

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45. This is a primary justification for the so-called market participant exception to the dormant Commerce Clause that states enjoy in the procurement context.

46. H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 224 (1951).

may be appropriate for the government to enjoy greater discretion than it does as regulator.<sup>47</sup> At the other end of the continuum are situations where the state is a monopsonist buyer, such as when it buys highly specialized military equipment. In these circumstances, governmentally imposed conditions on procurement seem functionally analogous to regulation; it follows that the constraints on government discretion should be functionally analogous to the constraints the state faces as a regulator.

Another possibility—which finds ample support in the domestic context—is that grounding doctrine in the conventional distinction between the state as regulator and the state as market participant will not generate satisfactory or coherent results<sup>48</sup> because it prompts us to ask the wrong questions, thus diverting our attention from more salient inquiries.<sup>49</sup> Indeed, as described more fully in Part III below, while some of *BSJ*'s arguments rely upon a problematic distinction between regulation and procurement, one of the text's important virtues is that it helps to highlight limitations of the conventional debates, and thus begins to point us toward a more sophisticated theoretical account of government procurement.

### III. PROCUREMENT AND SOCIAL JUSTICE

*BSJ* stands at the intersection of two debates central to recent WTO law and politics: (i) the “linkage” debate, which examines the tensions between market liberalization and restrictions on market activity to advance social objectives; and (ii) the “procurement” debate, which explores the discretion states have in setting their procurement policies, particularly to discriminate against outsiders. *BSJ* is an admirable effort to connect these dialogues; as McCrudden explains, “[t]he purpose of this book [is] to provide a bridge between these [two debates], a framework in which such a discussion can take place in the specific context of procurement linkages” (p. 576). Given *BSJ*'s effort to provide a framework linking these debates, it is appropriate to examine the analytic and argumentative framework that McCrudden employs.

As explained in more detail below, two aspects of *BSJ*'s framework are problematic. First, while parts of *BSJ* set forth a sophisticated argument that subverts the distinction between pursuit of economic and noneconomic goals through procurement, much of the book relies on, and hence rein-

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47. This is not an argument that the state should be entirely free of restraint. Just because a private party in the marketplace can, for example, invidiously discriminate on the basis of race does not mean the state should “enjoy” the same power.

48. Many of the leading efforts to bring coherence to the doctrinal disarray in this area have appeared in this journal. See, e.g., Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

49. Focusing on the traditional distinction effectively asks us to evaluate the relative importance of a state's proprietary powers as opposed to its regulatory powers. But there seems to be little basis for creating a hierarchy of state functions and powers in this way, and *BSJ* does not attempt to do so.

scribes and reinforces, this distinction. Second, *BSJ* rests on questionable assumptions about the empirical effect procurement law has on official and private behavior. As noted in Part II above, the GPA grants states very wide latitude to pursue a broad range of social-justice objectives. *BSJ* provides little evidence that international procurement norms have dissuaded states from pursuing social policies, and substantial anecdotal evidence suggests that in several respects the GPA's impact has been marginal. Nevertheless, as elaborated below, the difficulties in *BSJ*'s arguments point toward an important justification for affording states wide latitude in pursuing social goals through procurement policy.

#### A. *The Value of Balancing Trade and Social Values*

*BSJ* offers a thoughtful analysis of the various dimensions of procurement law. However, this analysis is rendered less persuasive than it might otherwise be by deep tensions in the book's treatment of the distinction between using procurement for economic and for social purposes. Like most of the writers in the two debates he straddles, McCrudden locates his analysis within a framework defined by the potential conflicts between pursuit of trade or economic objectives, on the one hand, and social objectives, such as labor or human rights, on the other. And, as with much linkage scholarship, *BSJ*'s goal appears to be striking a balance between these potentially opposing goals.<sup>50</sup> As McCrudden frames the inquiry: "[I]s there a way of harnessing . . . the presence of the state in the market for social purposes without causing . . . detriment to the market as the primary means of generating wealth in society? Can the two be brought into alignment to achieve optimum economic, political, and social results?" (p. 114). Of course, articulating the issue in this way presupposes a strong distinction between "trade" and "social" values.<sup>51</sup> Under this approach, social values such as labor rights, human rights, and environmental preservation are by definition excluded or external to the trade system; their inclusion requires some form of justification or exception.<sup>52</sup>

For current purposes, I am less interested in this distinction's descriptive accuracy or its problematic doctrinal and political consequences<sup>53</sup> than in the fact that key parts of *BSJ* are aimed at subverting this particular conceptualization of linkage issues. Consider, for example, McCrudden's extended

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50. Similar balancing imagery is found in much of the linkage literature. See, e.g., Frank J. Garcia, *The Salmon Case: Evolution of Balancing Mechanisms for Non-Trade Values in WTO*, in *TRADE AND HUMAN HEALTH AND SAFETY* 133 (George A. Bermann & Petros Mavroidis eds., 2006).

51. See, e.g., James Thuo Gathii, *Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis*, 7 *WIDENER L. SYMP. J.* 137 (2001); Andrew T.F. Lang, *Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System*, 70 *MOD. L. REV.* 523, 536, 538 (2007).

52. Lang, *supra* note 51, at 538.

53. See Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 *Nw. J. INT'L L. & BUS.* 759 (1996–97).

argument that we should broadly understand the subject matter of procurement contracts as including social objectives (pp. 522–31). “If the subject matter of the contract can itself be the delivery of the social policy, then social issues are no longer ‘secondary’ to the contract, but central to it . . . .” (p. 524).

In other words, those parts of *BSJ* that frame the issue presented as how best to balance the competing demands of economic and social values tend to reinforce and perpetuate precisely the conceptual framework that other parts of *BSJ* persuasively critique.<sup>54</sup> McCrudden’s critique suggests that it is impossible to separate the “trade” dimension of a procurement contract from the “social” dimensions of that contract. And even if this insight leads McCrudden to suggest a legal strategy that is, as noted above, doctrinally suspect, McCrudden’s critique has the considerable conceptual virtue of problematizing the conventional distinction between pursuit of “economic” and “social” values. Moreover, as discussed in Section III.C below, the critique can be used to help construct an argument for why states should have ample discretion to pursue “social” goals through procurement.

### B. *BSJ’s Legal Centralism*

Another problematic aspect of *BSJ’s* analysis is its overly sanguine treatment of international procurement law’s ability to constrain state behavior. As a result, *BSJ* overemphasizes the role of legal doctrine and underanalyzes the empirical effects of international procurement norms.

Like the literature it straddles, *BSJ* adopts an approach that we might label “legal centralism.”<sup>55</sup> As Andrew Lang and Robert Wolfe suggest, a critical dimension of the legal centralist approach as found in trade scholarship is a foundational assumption regarding “the extent to which WTO obligations are central . . . [to] policy-making processes and the degree of importance which national policy-makers place upon them in practice.”<sup>56</sup> Thus, one of *BSJ’s* central themes is “the role of law” (pp. 16–17), and the book purports to devote substantial attention to “the [GPA’s] effects, [both] direct and indirect” on procurement law across states (p. 301). However, despite *BSJ’s* richly textured review of procurement developments in various countries, the text provides little detail regarding the extent to which WTO law influences either the drafting of procurement laws or the application of those laws in day-to-day decision making in different states.

Of course, whether WTO obligations are central or peripheral to decisionmaking depends, in the first instance, on whether relevant governmental

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54. See Lang, *supra* note 51, at 538 (making a similar observation about linkage scholarship); Dunoff, *supra* note 53 (same).

55. The term originates in legal pluralist thought and connotes an understanding of law as “an exclusive, systematic and unified hierarchical ordering of normative propositions.” John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 3 (1986).

56. Andrew T.F. Lang, *Re-thinking Trade and Human Rights*, 15 TUL. J. INT’L & COMP. L. 335, 349 (2007); see also Robert Wolfe, *See You in Geneva? Legal (Mis)Representations of the Trading System*, 11 EUR. J. INT’L REL. 339 (2005).

and private actors are knowledgeable about these rules. *BSJ* provides little evidence to suggest either that relevant parties systematically consider the relevance of WTO norms or that states systematically undertake GPA compliance review. However, substantial indirect and anecdotal evidence suggests that many of the relevant actors do not systematically rely upon or refer to GPA norms. For example:

- In at least some respects, GPA parties systematically ignore GPA provisions. For example, GPA parties are obliged to collect and provide to the WTO on an annual basis various procurement statistics. According to the WTO website, as of July 2008, not a single GPA party had submitted statistics for 2007, only one party submitted statistics for 2006, and only two parties submitted statistics for 2005 and 2004.<sup>57</sup>
- In critical instances, lawmakers are ignorant of the GPA's existence and requirements. For example, the key sponsor of the Massachusetts-Burma law, Representative Byron Rushing, was apparently not even aware of WTO rules on procurement when he wrote the bill: "I had no idea we were party to the Government Procurement blah-blah."<sup>58</sup>
- There is little evidence that states systematically monitor procurement practices in other states or raise issues concerning GPA compliance. For example, although WTO dispute settlement is the most active international dispute system in history—with over 370 complaints notified to the WTO through June 2008, resulting in over 100 adopted panel and Appellate Body reports—it appears that only four disputes involved procurement issues.<sup>59</sup>
- The private actors most directly affected by the GPA do not use available mechanisms to ensure GPA compliance. The GPA requires that private parties aggrieved by alleged violations of the treaty have access to domestic fora. However, to date, it does not appear that a single case alleging a GPA violation has been filed before U.S. courts or administrative agencies.

While hardly conclusive, these observations suggest skepticism about one of *BSJ*'s fundamental empirical premises—that the GPA importantly affects state officials and private parties. Strikingly, in a book that details multiple domestic procurement regimes, little attention is devoted to examining the influence of GPA norms within international political and legal cultures, national regulatory structures, or domestic trading and legal communities—and what little evidence is presented suggests that the GPA has had "relatively little effect" (p. 222).<sup>60</sup>

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57. Figures obtained from WTO website. See Statistics Reports under Article XIX:5 of the GPA, [http://www.wto.org/english/tratop\\_e/gproc\\_e/gpstat\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpstat_e.htm) (last visited Oct. 26, 2008).

58. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1134 n.23 (2000) (quoting Representative Rushing).

59. See, e.g., WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/33 (June 3, 2008).

60. Other studies suggest that international efforts to reform domestic procurement systems have met with limited success. See, e.g., OECD/DAC WORLD BANK ROUND TABLE, INTERNATIONAL

Moreover, even if policy makers consider GPA norms controlling, these norms are highly indeterminate and are qualified by a complex series of exceptions and exemptions. As Part II above suggests, the GPA and a plethora of other international norms may be sufficiently vague and ambiguous that a state can pursue virtually any procurement policy it wishes and plausibly claim that it is complying with the rules. In these circumstances, we should not simply assume that GPA obligations are central to state decisions.

To be sure, *BSJ* would not be the first text to overstate international law's role in influencing state behavior. And identifying the gap between the law and practice does not render legal analysis inconsequential. But it does suggest the desirability of reframing traditional debates over international procurement rules, many of which are premised on an empirically problematic view of international law's role in this area.

### C. *Toward a Theory of Procurement*

Paradoxically, juxtaposing these two aspects of *BSJ*'s argumentative structure suggests the outline of a justification for why international law should grant states wide latitude to pursue social objectives through procurement, including being able to use procurement to advance social objectives in other states.

As parts of *BSJ* persuasively argue, it is not conceptually possible to completely separate procurement's economic and social effects. Government purchases necessarily implicate social concerns: state hiring in connection with the building of, say, large public works projects, can either ameliorate or exacerbate existing racial or regional patterns of underemployment. In a globalized age marked by highly integrated international markets and state purchases totaling trillions of dollars per year, government procurement inevitably affects social conditions abroad. It is becoming increasingly clear that the importation of certain goods may help subsidize and entrench abusive human rights practices in foreign lands, and the purchase of other products may contribute to unsustainable production practices abroad.

Governments surely have legitimate interests in addressing these social effects, either because problematic social conditions abroad generate spillover effects that impact domestic interests, or because states have an interest in not financially supporting activities that they find morally objectionable. Under this latter principle, the Massachusetts law could be understood to represent "repulsion by the people of Massachusetts, as represented by the legislature, at the prospect of collaborating even indirectly with the notably

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BENCHMARKS AND STANDARDS FOR PUBLIC PROCUREMENT SYSTEMS, para 3 (2003), available at <http://www.oecd.org/dataoecd/35/7/2488588.pdf> ("[D]evelopment of public procurement systems worldwide, that can deliver on the basic principles of a well functioning system, contribute to better governance and reduce the opportunity for corruption, has been slow"); see also Robert R. Hunja, *Obstacles to Public Procurement Reform in Developing Countries*, in PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 13 (Sue Arrowsmith & Martin Trybus eds., 2003).

tyrannical regime that currently controls Burma.”<sup>61</sup> Moreover, to the extent Type III laws are genuinely motivated by and aimed at social conditions abroad, they do not reflect the local protectionism that violates the GPA’s national treatment obligation.

One objection to this line of argument is that procurement is an *inefficient* mechanism for promoting social justice; most economic analysis suggests that “[d]irect legislation . . . and not the use of indirect financial incentives or sanctions that have unacceptable or unpredictable distorting effects, are seen as the best way of enforcing required norms without unacceptable side-effects” (p. 119). Moreover, procurement might also be seen as an *ineffective* policy tool as procurement laws may be largely ineffective outside of those areas of economic activity that are particularly dependent upon government contracts (p. 119).

Note, however, that these objections implicitly assume the relative superiority of prescriptive regulation over procurement as a tool for constraining or changing behavior. But this assumption may overstate the effectiveness of traditional regulation, which typically is less than entirely successful in achieving its goals and often produces unwanted and unintended consequences. We’ve seen above some of the ways that many states fail to comply with “regulatory” treaties such as the GPA. In addition, highly visible domestic experience suggests that regulations and litigation aimed at promoting the types of social goals advanced through procurement laws often enjoy only limited success, and that the government’s power of the purse is at times the most effective way of advancing certain social goals.<sup>62</sup>

From a scholarly perspective, McCrudden’s analysis points toward a future research agenda involving a detailed consideration of the relative efficacy of procurement and regulation. Without investigating the relative success of procurement and regulation as alternative mechanisms, it is impossible to sensibly answer the larger questions that *BSJ* raises about the appropriate use of procurement policy to advance social ends. To be sure, such a comparative inquiry is difficult and, at best, likely to yield recommendations that are contingent and qualified. Yet without engaging in this form of comparative analysis, it is difficult to generate meaningful empirical, doctrinal, or normative claims about the appropriate scope and details of procurement law. Moreover, whatever level of success regulation has in promoting social objectives domestically, such laws will invariably have less success at modifying conditions abroad. Hence, the inadequacy of other forms of regulatory tools—the limits of the law—offers an additional justification for using procurement to advance social ends.

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61. Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 *FORDHAM L. REV.* 2189, 2191 (2001) (analogizing the Supreme Court’s decision striking down the Massachusetts law to *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842)).

62. GARY ORFIELD, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968* (1993) (detailing Southern resistance to school desegregation orders and how conditionality of federal funding helped to advance racial integration).

## CONCLUSION

*BSJ*'s singular achievement is to highlight how the state's power of the purse is—and should be—used to promote social values. The book provides an impressive review of procurement developments in multiple jurisdictions, and Christopher McCrudden deserves praise for the breadth of his research, the care with which he develops his arguments, and the analytical rigor of his claims.

Today, international procurement law is not high on the diplomatic agenda. But this could quickly change. A legal challenge to a South African law designed to promote black economic empowerment is currently pending.<sup>63</sup> Should this dispute, or another, produce a ruling where international norms threaten procurement laws designed to promote social objectives, procurement will move quickly to the center of the international legal and political stage. If and when this occurs, *Buying Social Justice* will provide a thoughtful and thorough guide to the issues that will need to be addressed.

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63. *Piero Foresti v. Republic of South Africa*, No. ARB/(AF)/07/1 (ICSID (W. Bank) registered Jan. 8, 2007). Status updates on the case are available on the ICSID website. International Centre for Settlement of Investment Disputes, List of Pending Cases, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last visited Jan. 5, 2009).