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State Buy-American Laws - Is There a Judicial Solution?

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NOTES

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I. INTRODUCTION

State buy-American statutes are among the most peculiar of legislative responses to problems of unemployment and low levels of economic growth in the United States. Designed to decrease unemployment among American workers by promoting the development of American industry, the statutes typically require that purchasers of goods to be used in state-subsidized projects prefer products manufactured in America over those made in foreign countries,

often regardless of price or quality.[1] State buy-American statutes are presently in effect in a number of states,[2] despite criticism that they constitute devices of economic protectionism for domestic goods and barriers to a unified United States foreign economic policy.[3]

Frustrated by the lack of state legislative response to these criticisms of buy-American statutes, opponents, such as the foreign manufacturers suffering monetary loss as a result of a buy-American policy, have sought judicial redress by raising constitutional objections to the statutes. This effort has met with some degree of success. In 1969, for example, a California Court of Appeals declared the California buy-American statute an unconstitutional state intrusion into the field of foreign affairs, an area reserved to the federal government by the United States Constitution.[4] While the California court's reliance on the foreign affairs doctrine has been criticized,[5] the decision has generally been regarded as correct due to other considerations. Specifically, commentators have argued that the foreign commerce clause of the United States Constitution precludes state discrimination against foreign manufactured goods.[6]

The recent New Jersey Supreme Court decision in *K.S.B.*

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1. HAW. REV. STAT. § 103-24 (1976), for example, provides that "[i]n all expenditures of public money for any public work or in the purchase of materials or supplies, preference shall be given to American products, materials and supplies."

2. *See* National Association of State Purchasing Officials Committee on Competition in Governmental Purchasing, 1963 Survey on In-State Preference Practices: Domestic vs. Foreign Purchases, *reproduced in* Note, *State "Buy-American" Policies—One Vice, Many Voices*, 32 GEO. WASH. L. REV. 584, 608 (1964). The states acknowledging preference for domestic goods were Alabama, California, Colorado, Connecticut, Indiana, Maine, Massachusetts, Montana, New Jersey, New Mexico, Oklahoma, Pennsylvania, Virginia, and West Virginia. *See, e.g.*, CAL. GOV'T CODE §§ 4300-4305 (West 1966); HAW. REV. STAT. § 103-24 (1976); MASS. GEN. LAWS ANN. ch. 7, § 22(17) (West 1976); MONT. REV. CODES ANN. § 82-1920(293.10)(1947); N.J. STAT. ANN. § 52:33-2 (West 1955); OKLA. STAT. ANN. tit. 61, § 51 (West 1963); 71 PA. CONS. STAT. ANN. § 639 (Purdon 1962). A California state court has declared the California statute unconstitutional. *See* note 4 *infra* and accompanying text.

3. *See, e.g.*, Note, *California's Buy-American Policy: Conflict with GATT and the Constitution*, 17 STAN. L. REV. 119, 137 (1964).

4. Bethlehem Steel Corp. v. Board of Comm'rs, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969). The statute provided:

> The governing body of any political subdivision, municipal corporation, or district, and any public officer or person charged with the letting of contracts for (1) the construction, alteration, or repair of public works or (2) for the purchasing of materials for public use, shall let such contracts only to persons who agree to use or supply only such unmanufactured materials as have been produced in the United States, and only such manufactured materials as have been manufactured in the United States, substantially all from materials produced in the United States.

CAL. GOV'T CODE § 4303 (West 1966).

5. *See, e.g.*, 3 N.Y.U. J. INT'L L. & POL. 164, 172-73 (1970).

6. *Id.*

Technical Sales Corp. v. North Jersey District Water Supply Commission[7] raises anew the difficult issues concerning the constitutionality of state buy-American statutes. The New Jersey statutes governing public works challenged in *K.S.B.* provide in relevant part:

> [N]otwithstanding any inconsistent provision of any law, and unless the head of the department, or other public officer charged with the duty by law, shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only domestic materials shall be acquired or used for any public work.[8]

In upholding this statute, the *K.S.B.* court rejected a three-pronged constitutional challenge alleging that the statute (1) violated the "dormant" commerce clause of the United States Constitution; (2) was preempted by the General Agreement on Tariffs and Trade; and (3) constituted an impermissible state intrusion into the field of foreign affairs. This Note will consider these constitutional challenges to state buy-American statutes, concluding that such laws, in light of both early and recent Supreme Court decisions, are indeed valid under the Constitution. The Note neither condemns nor favors the policy considerations underlying state buy-American statutes, but only suggests that those seeking removal of restrictions on state government purchases direct their efforts to the legislative rather than the judicial process.

II. Buy-American Laws and the Commerce Clause

A. *Traditional Commerce Clause Analysis*

The United States Constitution provides that Congress shall have the power to regulate both interstate and foreign commerce.[9] In *Gibbons v. Ogden*,[10] the Supreme Court indicated that because this power is vested exclusively in Congress, it is functional even when dormant; the unexercised commerce power provides a barrier to state legislation which is unduly burdensome to commerce.[11]

Virtually all decisions defining the scope and effect of the "dormant" commerce clause with respect to state legislation have arisen in the interstate commerce context. The Supreme Court has consistently invalidated state legislation that obstructs incoming

7. 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 98 S. Ct. 1635 (1978).

8. N.J. Stat. Ann. §§ 52:33-2, to -3 (West 1955) (governing all New Jersey public works projects).

9. U.S. Const. art. I, § 8, cl. 3.

10. 22 U.S. (9 Wheat.) 1 (1824).

11. *See, e.g.*, Weber v. Freed, 239 U.S. 325 (1915); Welton v. Missouri, 91 U.S. 275 (1875); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

commerce by discriminating against out-of-state commerce. In *Welton v. Missouri*[12] the Court struck down a state statute requiring a license fee from dealers in out-of-state goods, stating that the commerce power protects goods from any burden imposed by the state because of their out-of-state origin.[13] This protection was defined further in *Dean Milk Co. v. City of Madison,*[14] in which the Court developed a two-pronged test to evaluate the validity of discriminatory state legislation. Under the *Dean Milk* standard, state laws that discriminate against interstate commerce in favor of local enterprise are invalid unless (1) justified by legitimate local interests, (2) viewed in light of less restrictive alternatives to protect such local interests.[15]

Although the types of local interests that are legitimate for purposes of the *Dean Milk* analysis have not been clearly identified, it is certain that mere economic welfare will not justify state discrimination against interstate commerce. In *Baldwin v. G.A.F. Seelig, Inc.,*[16] the Court indicated that although a state may regulate to protect the health of its residents, it may not intervene simply to "make them rich."[17] This theme was more recently emphasized in *Polar Ice Cream & Creamery Co. v. Andrews,*[18] in which the Court struck down a Florida statute requiring milk distributors to accept supplies from designated local producers. The Court emphasized the intent of the Florida regulatory scheme to preserve a market for local producers by discriminating against other producers and interstate commerce.[19]

An analysis similar to that utilized in *Dean Milk* should also be applicable in the foreign commerce context. Although several early decisions distinguished between the foreign and interstate commerce powers,[20] regarding the former as a stronger source of authority for congressional legislation and a greater barrier to state legislation, the prevailing view indicates that the powers are coextensive. In *Pittsburg & Southern Coal Co. v. Bates*[21] the Court stated that the interstate commerce power was as absolute as the

12. 91 U.S. 275 (1875).
13. *Id.* at 282.
14. 340 U.S. 349 (1951).
15. *Id.* at 354.
16. 294 U.S. 511 (1935).
17. *Id.* at 523.
18. 375 U.S. 361 (1964).
19. *Id.* at 376.
20. *See, e.g.,* Brolan v. United States, 236 U.S. 216, 222 (1915).
21. 156 U.S. 577 (1895).

power to regulate commerce with foreign nations.[22] This statement indicates that a challenge to state legislation under either commerce power would necessitate the same form of judicial analysis. Similarly, in the *License Cases*[23] the Court stated that "[t]he power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it."[24]

In addition, the purposes animating the commerce clause require that state laws burdening foreign commerce undergo the same scrutiny as those burdening interstate commerce. In *H.P. Hood & Sons v. DuMond*[25] Justice Jackson expressed the underlying purpose of the commerce clause as follows:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall he encouraged to produce hy the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreigu state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[26]

This two-fold purpose of the commerce clause in insuring competitive markets for producers and protecting consumer interests applies, at least in part, in the foreign commerce context. While the authors of the Constitution may not have been particularly concerned with preserving a competitive market for foreign producers, they clearly intended to protect consumer interests by insuring that consumers could obtain goods of the highest quality at the lowest possible price without interference by state legislation and regulation. This concern necessarily requires scrutiny of discriminatory state laws whether or not the object of that discrimination is a foreign product or goods produced in another state.[27] Only by applying the *Dean Milk* analysis to invalidate state laws that discriminate against foreign commerce without protecting a legitimate local

22. *Id.* at 587-88.

23. 46 U.S. 590, 5 How. 504 (1847).

24. *Id.* at 675, 5 How. at 577.

25. 336 U.S. 525 (1949).

26. *Id.* at 539.

27. Courts at all levels have held discriminatory state legislation violative of the commerce clause. *See, e.g.*, Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) (excessive state inspection fee for foreign and not domestic cement); Tupman Thurlow Co. v. Moss, 252 F. Supp. 641 (M.D. Tenn. 1966) (state statute requiring sellers of foreign meats to register and obtain a license); City of Columbus v. McGuire, 25 Ohio Op. 2d 331, 195 N.E.2d 916 (1939) (municipal ordinance requiring sellers of merchandise from communist nations to purchase and post license authorizing proprietor to sell such goods).

interest can the commerce clause adequately protect consumer interests.

Applying only traditional commerce clause analysis to state buy-American statutes, it is clear that such laws violate the commerce clause. Designed to protect domestic industry and thereby promote the local economy, buy-American statutes have the intended and immediate effect of securing the state government purchase market for domestic producers by discriminating against foreign production. The *Dean Milk* test requirement that legitimate local interests justify such discrimination is not satisfied because the clear intent of buy-American statutes is to protect only the economic interests of domestic producers. The statutes' disregard for the relative quality of foreign goods further demonstrates that legitimate local interests such as the health or safety of the state's citizens are not motivating factors. Therefore the dormant commerce clause, as traditionally interpreted by the courts, invalidates such state legislation.

B. *The Effect of* Hughes v. Alexandria Scrap

Traditional commerce clause analysis typically involved situations in which a state interfered with commerce through prohibition or burdensome *regulation* that affected the market for an out-of-state product. An example of such regulation would be a state tax imposed only on goods produced out-of-state. Such a tax interferes with incoming commerce because it forces the out-of-state producer either to increase his price for such goods or choose not to market his product in the state at all. The effect of buy-American statutes is quite different. The statutes are applicable only to the state itself after it has entered the marketplace as a *purchaser*. They do not regulate incoming commerce in the same manner that a state tax does, but rather govern the state's role as a purchaser of goods, requiring it to purchase only domestic goods when available.

In *Hughes v. Alexandria Scrap Corp.*[28] the Supreme Court for the first time distinguished the effect of the dormant commerce clause on the state as a discriminatory regulator and the state as a discriminatory purchaser. The *Hughes* decision involved a commerce clause challenge to certain Maryland statutes designed to rid the state of abandoned automobiles ("hulks").[29] The statutes provided for the collection of hulks by licensed processors who could

28. 426 U.S. 794 (1976).

29. MD. ANN. CODE art. 66 ½, §§ 5-201 to 5-210 (1970) (repealed 1977), § 11-1002.2 (1975 Supp.) (repealed 1977).

claim a bounty from the state for such hulks upon proper documentation as to the ownership of the hulks. The documentation requirements for Maryland processors differed from those for out-of-state processors, the latter being more difficult and expensive.[30] This discrimination impeded the flow of hulks to out-of-state processors, thus securing a major portion of the Maryland bounty for local processors.[31] Writing for the Court, Justice Powell initially addressed the traditional commerce clause cases in which state legislation interfered with the natural functioning of the interstate market through prohibition or burdensome regulation of private enterprise.[32] Distinguishing these cases from the situation in which the state itself entered the market as a potential purchaser of an article of interstate commerce, the Court upheld the challenged statutory scheme, stating that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[33]

The Court's unique departure from traditional commerce clause analysis in *Hughes* is subject to varied interpretations. The precise circumstances under which a state, after entering the marketplace as a purchaser, may discriminate against goods produced out-of-state are uncertain. At least two interpretations, however, have been formulated to explain the Court's decision that states may be exempt from commerce clause review under certain circumstances.

(1) The States as Subsidizers of Social Welfare Programs

The most restrictive interpretation of the *Hughes* decision proposes that the commerce clause does not apply to discriminatory state action that occurs in the context of state subsidization of social welfare programs, even if such programs affect the flow of commerce

30. Maryland processors needed only to submit an indemnification agreement executed by the transferor of the hulk in favor of the processor to show that the processor was protected against potential conversion claims by third parties arising from the destruction of a hulk. Out-of-state processors were not permitted to submit such agreements, but were required to show a certificate of title, a police certificate vesting title, or a bill of sale from a police auction. 426 U.S. at 800-01.

31. Alexandria Scrap Corporation submitted an affidavit showing a 31.8% decline in the receipt of bounty-eligible hulks from Maryland sources at a time when receipts increased from other states. *Id.* at 801 n.11.

32. *Id.* at 806.

33. *Id.* at 810 (footnotes omitted). Justice Powell noted that his reference to the absence of congressional action implied no view as to whether Congress could prohibit the selective participation of a state in the market. *Id.* at 810 n.19.

from outside the state. The theory underlying this conclusion excludes, by definition, social welfare programs from the constrictions of the dormant commerce clause. Accordingly, a state may legitimately reserve social welfare benefits to its own citizens and may discriminate with regard to expenditures made pursuant to such programs. The concurring opinion of Justice Stevens in *Hughes* espouses this analysis,[34] emphasizing that the commerce involved in the *Hughes* case would not have existed but for a Maryland subsidy program.[35] Legislation that discriminates against out-of-state processors by effectively denying to them the right to receive Maryland subsidization[36] is no more invalid than Maryland's refusal to pay, for example, unemployment benefits to residents of other states.

If the *Hughes* decision does stand for the proposition that the states may avoid commerce clause restrictions only when providing for social welfare programs, state buy-American statutes must still overcome a strong commerce clause challenge. Although all state expenditures pursuant to buy-American laws are for social welfare purposes since they are for government use, the discrimination exercised is in favor of all United States citizens, not just those of the particular state. The analogy to the typical state social welfare expenditures or to the Maryland subsidy in *Hughes* is no longer valid; state buy-American statutes may not be justified by the states' right to favor their own citizens in providing social welfare benefits. The crucial question then becomes whether a state may exercise its right to discriminate by making social welfare expenditures in favor of all United States citizens, at the expense of foreign commerce. The answer is uncertain, but courts should find persuasive the argument that if a state may legislate parochially with regard to the state, it should also be able to do so in favor of the nation.[37] If the commerce clause, as indicated by *Hughes,* allows a state to discriminate against both interstate and foreign commerce while dispensing social welfare benefits for its own citizens, it seems logical that the commerce clause would allow the state to discriminate against either form of commerce individually. Under this interpretation, buy-American statutes, which confer social welfare benefits on all United States citizens while discriminating against foreign trade, are not in violation of the commerce clause.

34. *Id.* at 814.
35. *Id.* at 815.
36. *Id.* at 815-16.
37. The *K.S.B.* court adopted this approach. *See* 75 N.J. at 298, 381 A.2d at 787.

(2) The State as a Purchaser

The *Hughes* decision may be read more broadly to hold that a state's status as a purchaser rather than a regulator renders commerce clause restrictions on state action inapplicable. The theory underlying such a doctrine assumes that a state's discriminatory purchasing practices do not frustrate the purposes of the commerce clause in the same manner as state legislation prohibiting or burdening the sale of foreign goods. Thus the state, when acting as a purchaser, is by definition exempted from commerce clause restrictions and may discriminate with respect to its purchases as any individual purchaser may do. Justice Powell's analysis in the *Hughes* decision supports this interpretation. Quoting Justice Jackson's language in *H.P. Hood & Sons v. DuMond*,[38] Justice Powell identified the commerce clause purposes of insuring free access for any producer to any market and protecting consumer interests by prohibiting exclusion of out-of-state products by discriminatory state regulation.[39] In light of these purposes, Justice Powell concluded that state action as a discriminatory purchaser does not frustrate the objectives of the commerce clause because the state has not denied an out-of-state product access to the local market, nor has the state burdened the out-of-state product with a discriminatory tax or regulation.[40]

The state as a purchaser interpretation of *Hughes* finds support in *American Yearbook Co. v. Askew*,[41] a 1972 district court decision summarily affirmed by the Supreme Court. In upholding a Florida statute requiring all state government printing to be done by Florida printers, the district court declared that while state trade regulations are clearly subject to commerce clause restrictions, statutes that merely specify the conditions of state purchases are not.[42]

(3) Conclusion

Only the New Jersey Supreme Court has addressed the commerce clause challenge to state buy-American statutes.[43] Although the *K.S.B.* decision does not discuss the possible alternative interpretations of *Hughes*, it implicitly adopts the "state as a purchaser" analysis proposed above and thus relies on the *Hughes* decision to

38. *See* text accompanying note 25 *supra*.
39. 426 U.S. at 808.
40. *Id.* at 809-10.
41. 339 F. Supp. 719 (M.D. Fla. 1972), *summarily aff'd*, 409 U.S. 904 (1972).
42. *Id.* at 725.
43. 75 N.J. at 293-302, 381 A.2d at 784-89.

uphold the New Jersey buy-American statute.[44] This appears to be the better view of *Hughes*. The majority's analysis in *Hughes*, as expressed by Justice Powell, is not dependent on the factor of state social welfare expenditures,[45] but rather seeks to determine whether the state was discriminating justifiably as a purchaser or improperly as a regulator attempting to insulate a local market. This definitional approach to the commerce clause is not without logic. Considering the purposes animating the commerce clause,[46] it is reasonable to conclude that the Framers were concerned only with the power to *regulate* interstate and foreign commerce. State regulatory powers present the greatest potential for abuse in undermining competitive markets to the detriment of consumer interests. Although state action as a purchaser does have an indirect effect on commerce, it does not possess the potential to commit the abuses that the commerce clause seeks to prevent.[47] In addition, state action as a purchaser merely represents the collective exercise of the right to discriminate in the purchase of goods possessed by each individual within a state. Thus, the incidental effect on commerce is only that which would result if all persons within a state chose individually to discriminate in favor of state or American products.

In sum, it is submitted that this broad interpretation of *Hughes* is correct, leaving little question that state buy-American statutes would survive a commerce clause challenge. Since the statutes only govern the state as a purchaser of products for state government use, they do not frustrate the underlying purpose of the commerce clause by inhibiting the free flow of foreign commerce into the state through burdensome regulation; access to the market in a buy-American state remains available to foreign products and no burdensome tax or regulation is placed on foreign products. Because *Hughes* excludes the state as a purchaser from traditional commerce clause restrictions, buy-American statutes represent only the manifestation of a state's right to discriminate against foreign goods in making its own purchases.

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44. *Id.* at 300, 381 A.2d at 788.

45. Justice Powell indicated that his analysis was not dependent on the existence of state subsidization, noting that the Court

> would hesitate to hold that the Commerce Clause forbids state action reducing or eliminating a flow of commerce dependent for its existence upon state subsidy instead of private market forces. Because the record contains no details of the hulk market prior to the bounty scheme, however, this issue is not clearly presented.

426 U.S. at 809 n.18.

46. *See* text accompanying note 26 *supra*.

47. *See* text accompanying notes 34-42 *supra*.

III. BUY-AMERICAN LAWS AND THE PREEMPTION DOCTRINE: THE EFFECT OF GATT[48]

The United States Constitution provides for the supremacy of legitimate federal enactments over conflicting state law.[49] This supremacy is accorded not only to federal legislative action, but also to international agreements to which the United States is a party. In *United States v. Pink*[50] the Supreme Court held that a state law must yield if it is inconsistent with, or impairs the policy or provisions of, a treaty or international agreement.[51]

The General Agreement on Tariffs and Trade (GATT)[52] arguably has preempted state buy-American laws in Part II, Article III, paragraph 4, which provides:

> The products of the territory of a contracting party imported into the territory of any other contracting party *shall be accorded treatment no less favourable than that accorded to like products of national origin* in respect of all laws, regulations and requirements affecting their international sale, offering for sale, purchase, transportation, distribution or use.[53]

State buy-American laws plainly violate this provision by requiring that only domestic materials be purchased or used for any public program paid for by the state. However, GATT contains two potential exemptions to the general provisions of paragraph 4. Part II, Article III, paragraph 8(a) provides that the "provisions of this article shall not apply to laws, regulations or requirements governing the *procurement by governmental agencies of products purchased for governmental purposes* and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."[54]

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48. This discussion of GATT and its possible preemption of state buy-American statutes is intended only as a general overview. For a more complete discussion, see Note, *supra* note 3, at 126-32.

49. U.S. CONST. art. VI, cl. 2 provides in relevant part that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, . . . shall be the supreme Law of the Land . . . ." For an example of the supremacy of United States treaties over state law, see Kolovrat v. Oregon, 366 U.S. 187 (1961)(treaty granting inheritance rights to Yugoslavian citizens in the United States superseded Oregon statute conditioning inheritance rights of aliens on reciprocal rights of United States citizens to inherit in alien's home country).

50. 315 U.S. 203 (1942).

51. *Id.* at 230-31.

52. October 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, vol. I, *as amended by* Second Protocol of Rectifications to the General Agreement on Tariffs and Trade, September 14, 1948, 62 Stat. 3671, T.I.A.S. No. 1888; Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, September 14, 1948, 62 Stat. 3679, T.I.A.S. No. 1890.

53. 62 Stat. at 3681 (emphasis added).

54. *Id.* (emphasis added).

Although some dispute exists concerning whether the governmental use exemption applies only to the federal goverment or to both the federal and state governments, the generally accepted view includes state governments within the exemption.[55] The *K.S.B.* court adopted this position in considering a preemption challenge to the New Jersey buy-American statutes, utilizing the exemption to hold that the statutes were not preempted by GATT.[56] Thus, to the extent that a buy-American law regulates government purchases for purposes other than commercial resale, GATT is not preemptive—indeed it was apparently drafted with such legislation in mind.

Another potential exemption from the provisions of GATT is contained in section I of the Protocol of Provisional Application of GATT, which provides that the signatory governments undertake to apply "Part II of the Agreement to the fullest extent *not inconsistent with existing legislation.*"[57] Although there is some question whether existing *state* legislation was intended to be included within this exemption, the courts have ignored this provision in considering preemption challenges to buy-American statutes, many of which were enacted prior to GATT. In *Baldwin-Lima-Hamilton v. Superior Court*[58] a California court held GATT preemptive of the California buy-American law because the state had made purchases for the purpose of commercial resale, ignoring the fact that the California statute was enacted prior to GATT.[59] In the *K.S.B.* decision, the court went to great lengths to avoid the "commercial resale" exception to the governmental use exemption, despite the fact that a much easier route may have been available—the existing legislation exemption.[60]

In sum, the GATT preemption challenge to state buy-American laws should fail, at least to the extent that such laws are concerned with the regulation of government purchases that are not intended for commercial resale. In addition, state buy-American statutes that

55. There is no language in GATT to indicate that "governmental" refers only to the federal government. One writer has also suggested that certain provisions of GATT may indicate that the treaty was intended to recognize the existence of political subdivisions, thus lending support to the application of the governmental use exemption to state governments. *See* Note, *supra* note 2, at 592. Part III, Article XXIV, paragraph 6 provides that "[e]ach contracting party shall take such reasonable measures as may be available to it to assure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory." 61 Stat. pt. 5, at 67-68.

56. 75 N.J. at 281, 381 A.2d at 778.

57. 61 Stat. pt. 6, at 2051 (emphasis added).

58. 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962).

59. *Id.* at 819, 25 Cal. Rptr. at 809.

60. 75 N.J. at 281-89, 381 A.2d at 778-82.

existed prior to the enactment of GATT may be exempt from its provisions regardless of the purposes of the government purchases.

IV. BUY-AMERICAN LAWS AND THE FEDERAL POWER OVER FOREIGN AFFAIRS

The conduct of international affairs is generally considered to require a "broad national authority."[61] In *Perez v. Brownwell*[62] Justice Frankfurter recognized that the federal government

> must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.[63]

Accordingly, the Supreme Court has consistently held that the power to formulate and conduct United States foreign policy is vested in the federal government.[64] This is an implicit power, not dependent on an express constitutional delegation of authority—"[t]he States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensible to its functioning effectively in the company of sovereign nations."[65]

The federal power over the conduct of foreign affairs is exclusive.[66] The Constitution prohibits states from entering into any agreement or compact with a foreign nation and from engaging in war unless actually invaded.[67] Furthermore, this federal power may not be curtailed or interfered with by any state. As demonstrated in *United States v. Pink*, a state law must yield if inconsistent with the provisions of a treaty or agreement entered into by the federal government.[68]

Although a state may not enter into an international agreement

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61. Hines v. Davidowitz, 312 U.S. 52, 68 (1941).

62. 356 U.S. 44 (1958).

63. *Id.* at 57.

64. *See* United States v. Pink, 315 U.S. 203 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

65. 356 U.S. at 57.

66. United States v. Pink, 315 U.S. 203, 233 (1942).

67. U.S. CONST. art. I, § 10 provides in relevant part:

> No State shall enter into any Treaty, Alliance, or Confederation; . . . .
>
> . . . .
>
> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

68. 315 U.S. at 230-31.

nor pass laws in conflict with federal foreign policy, the effect of the *unexercised* federal foreign affairs power as a barrier to state legislation raises a number of questions. For example, may states enact legislation that has an incidental or indirect effect on foreign affairs? If so, how great an effect may such legislation have before it is regarded as an unconstitutional intrusion into the field of foreign affairs reserved to the federal government? Finally, do state buy-American statutes unconstitutionally intrude into that exclusively federal domain?

A. The Early Decisions

Early Supreme Court decisions indicated that the states were not completely barred from enacting legislation that had an effect on foreign affairs. In *Hines v. Davidowitz*[69] the Court considered a challenge to the 1939 Pennsylvania alien registration act based on the theory that the Federal Alien Registration Act superseded and invalidated the Pennsylvania act. Although striking down the Pennsylvania legislation on the ground that concurrent state power in the field of foreign affairs is restricted to the narrowest of limits,[70] the Court did note that state power, at least in the area of alien registration, *is not controverted except in the presence of federal laws.*[71] In *United States v. Pink* the United States challenged a New York court decision concerning title to the assets of an American branch of a Russian insurance company nationalized by the Soviet Union. Because an agreement between the United States and the Soviet Union had already determined title to these assets, the Supreme Court reversed the lower decision. In doing so, however, the Court stated that treaties with foreign nations would not be construed so as to derogate from the authority and jurisdiction of the states unless clearly necessary in order to effectuate national policy.[72]

These early Supreme Court decisions focused on the impact of state action on an announced policy of the United States with respect to foreign affairs—an analysis essentially concerned with the preemption of state action by federal legislation. The decisions did not address, however, the effect of the unexercised federal foreign affairs power on state action. Justice Douglas' opinion in *Clark v. Allen*[73] best illustrates the Court's limited concern in reviewing al-

69. 312 U.S. 52 (1941).
70. *Id.* at 68.
71. *Id.* at 66.
72. 315 U.S. at 230.
73. 331 U.S. 503 (1947).

leged state intrusion into the realm of foreign affairs. In *Clark* the Court considered a challenge to a provision of the 1942 California Probate Code that conditioned the right of nonresident aliens to acquire personal property on the existence of reciprocal rights for American citizens to acquire property in the nations of which such aliens were citizens. Petitioner argned that the provision intruded into the realm of foreign affairs, an area exclusively reserved by the Constitution to the federal government.[74] In upholding the state statute the Court dismissed the argument as "farfetched."[75] Justice Douglas acknowledged that local law may be invalidated by an overriding federal policy, such as a treaty that provides for different or conflicting arrangements, but pointed out that no such treaty existed in *Clark*. This analysis clearly reflected the Court's belief that the unexercised federal foreign affairs power provides no barrier to state legislation that might affect relations between the United States and other nations.

B. *The Effect of* Zschernig v. Miller

In *Zschernig v. Miller*[76] the Supreme Court formulated a new constitutional doctrine, holding that state legislative action may unconstitutionally intrude into United States foreign policy even in the absence of a treaty or other federal action. *Zschernig* involved a challenge to an Oregon inheritance statute[77] that permitted nonresident aliens to inherit from estates in Oregon only upon proof of (1) a reciprocal right of United States citizens to take property on the saine terms as a citizen or inhabitant of the foreigu nation; (2) the right of United States citizens to receive payments in the United States froin estates in the foreign nation; and (3) the right of foreign heirs to receive the proceeds of the Oregon estate without confiscation by the foreign government.[78] The Court held that the application of the Oregon statute produced an impermissible intrusion into the field of foreign affairs. Justice Douglas' majority opinion attempted to distingnish his earlier opinion in *Clark,* stating that the statute involved in *Clark* required only a "routine reading" of foreign law.[79] In contrast, the Oregon statute in *Zschernig,* according to Douglas, required "minute inquiries" into the actual administration of foreign law and the credibility of foreigu diplomatic state-

74. *Id.* at 517.
75. *Id.* at 516-17.
76. 389 U.S. 429 (1968).
77. OR. REV. STAT. § 111.070 (1957)(repealed 1969).
78. For the precise language of the statute, see 389 U.S. at 430 n.1.
79. *Id.* at 433.

ments concerning inheritance rights in other nations.[80] Utilizing an analysis strikingly similar to that employed in the early commerce clause decisions, Douglas found that the Oregon statute constituted a level of state involvement in foreign affairs and international relations that had more than an "incidental or indirect" effect in foreign nations.[81] In the Court's opinion, judicial application of the statute would adversely affect the power of the federal government to deal with foreign policy problems. Justice Douglas expressed particular concern with certain anti-communist statements made by the Oregon courts in applying the statute, recognizing the potential for "disrnption or embarrassment."[82]

Justice Stewart, concurring in the decision, disapproved of the Oregon statute on its face. He expressed concern that such a statute would invariably lead to probate court evaluation of the policies of foreign nations.[83] Justice Harlan, concurring only in the result, and Justice White, dissenting, rejected the theory that the unexercised foreign affairs power could invalidate state legislation, arguing that absent a treaty or express constitutional provision, the federal power to conduct foreign policy provides no barrier to state legislation.[84]

The *Zschernig* decision's application to state buy-American laws has produced varying results. In *Bethlehem Steel Corp. v. Board of Commissoners of the Department of Water and Power*[85] a California Court of Appeals relied on a broad interpretation of the *Zschernig* decision in striking down the California buy-American statute. Without explanation, the court held that the statute had a direct impact on United States foreign affairs and was therefore unconstitutional under *Zschernig*. In contrast, the *K.S.B.* court took a narrower view of the *Zschernig* decision and upheld the New Jersey buy-American statute. The *K.S.B.* court analyzed those factors that disturbed Justice Douglas in evaluating the Oregon inheritance statute in *Zschernig,* concluding that the New Jersey statute required no inquiry into the policies of other nations, but instead applied to *all* foreign nations, regardless of their policies.[86] The court rejected the contention that the *Zschernig* doctrine prohibited state legislation having *any* effect on foreign affairs and thus found no authority for striking down the New Jersey buy-American statute

80. *Id.* at 435.
81. *Id.* at 434.
82. *Id.* at 437 & n.8.
83. *Id.* at 442.
84. *Id.* at 458-62.
85. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).
86. 75 N.J. at 291, 381 A.2d at 783.

as an impermissible state intrusion into the field of foreign affairs.[87]

K.S.B.'s narrow application of the *Zschernig* doctrine has received wider acceptance. For example, in *Goldstein v. Cox*[88] the district court for the Southern District of New York upheld a state statute that conditioned the distribution of property from an estate to a nonresident alien upon a showing that the recipient would ultimately have the benefit of such property without confiscation by the foreign government involved. The court refused to invalidate the New York statute in the absence of a showing that the statute was applied in a manner that would jeopardize relations with a particular nation. Specifically, the court sought evidence of any "animadversions" toward a foreign nation resulting from a judicial application of the statute.[89] Finding none, the court refused to declare the statute an unconstitutional intrusion into the field of foreign affairs.

Because of the unique purposes for which buy-American statutes are employed, the application of *Zschernig* in determining whether such laws constitute an impermissible state intrusion in the field of foreign affairs is of little use. Although the decision does provide limited authority for concluding that the state buy-American statutes are unconstitutional, *Zschernig* should not be applied in this area. The concerns of Justice Douglas that resulted in the *Zschernig* decision are not present in the buy-American field. First, the statutes do not require American courts or other governmental institutions to evaluate the laws and policies of other nations. Buy-American statutes discriminate against all foreign nations whether or not such nations also have buy-national acts or make expenditures under an implicit buy-national policy. Thus buy-American statutes do not threaten to jeopardize relations with particular foreign nations.

Second, buy-American statutes do not require American courts to examine the truthfulness of representations made by spokesmen for other nations. Again, because the statutes apply to *all* foreign nations, they provide no opportunity for such inquiries. In addition, state buy-American statutes do not present the opportunity for American courts or government officials to make derogatory remarks concerning the policies of foreign nations.

The concerns of the Supreme Court in *Zschernig* might be more applicable if a buy-American statute conditioned the use of foreign

87. *Id.* at 293, 381 A.2d at 784.
88. 299 F. Supp. 1389 (S.D.N.Y. 1968).
89. *Id.* at 1393.

goods on the nondiscrimination of that foreign nation with regard to the purchase of American goods. In such a situation, American courts would be required to inquire into the laws and policies of other nations, and the statutes might perform a more coercive function on the policies of other nations. The states would in effect be stating the conditions under which a foreign nation could expect its products to receive nondiscriminatory treatment in the United States. Such discretion would certainly merit evaluation as a possible state intrusion into the field of foreign affairs. In fact, however, state buy-American statutes do not have this discriminatory anti-foreign effect, but rather are strictly pro-American in effect. Thus, the *Zschernig* concerns should not apply.

Any attempt to "fill out" the *Zschernig* doctrine that the unexercised foreign affairs power acts as a barrier to state legislation requires great speculation. It is uncertain what types of state legislation constitute a direct and impermissible effect on foreign affairs in the absence of further case law on the subject. Of particular interest in the buy-American area, however, is the question whether the federal government can validate otherwise unconstitutional state legislation by *consent* to such legislation. Specifically, has the federal government impliedly consented to state buy-American statutes by providing specific exemptions for them in GATT?

C. *Federal Consent to State Law*

As noted previously, the General Agreement on Tariffs and Trade expressly exempts state buy-American laws from its restrictions.[90] Within the context of GATT, this provision may be interpreted as implicit federal consent to, or at least acquiescence in, state law that provides for state government discrimination against foreign goods when making purchases for government use. The court in *Bethlehem Steel* expressly refused to discuss this arguable consent in its application of the *Zschernig* doctrine to buy-American statutes.[91] The *K.S.B.* court, on the other hand, stated that the exemption indicates that the federal government has not foreclosed state action that does not have a significant and direct effect on foreign affairs.[92] In light of the uncertain scope of the *Zschernig* doctrine and its applicaton in the buy-American area, an analysis of the effect of federal consent to state action challenged under the unexercised foreign affairs power is important in considering the

90. *See* notes 48-60 *supra* and accompanying text.
91. 276 Cal. App. 2d at 227 n.9, 80 Cal. Rptr. at 804 n.9.
92. 75 N.J. at 302, 381 A.2d at 789.

constitutionality of state buy-American statutes. A possible analogy can first be drawn to the unexercised foreign commerce power.

(1) Federal Consent and the Unexercised Commerce Power

In *Cooley v. Board of Wardens*[93] the Supreme Court stated that if the United States Constitution prohibited the states from enacting legislation regulating interstate commerce, Congress could not in any manner regrant or reconvey that power to the states.[94] Subsequent cases, however, refute this contention. In *Leisy v. Hardin*[95] the Court applied a dormant commerce clause analysis to invalidate an Iowa law that prohibited the sale of intoxicating liquors as applied to beer brewed in Illinois and offered for sale in its original package in Iowa. In reaching this decision, however, the Court stated that since the exchange of commodities such as beer was interstate commerce and thus demanded uniform regulation by the federal government, the state had no power to interfere *in the absence of congressional permission.*[96] The Court expressly recognized the possibility that Congress might grant to the states the power to regulate commerce in certain areas in *Prudential Insurance Corp. v. Benjamin.*[97] In that case the Court considered a New Jersey corporation's challenge to a three percent tax on insurance premiums received from business done in South Carolina. Because no similar tax was required of South Carolina corporations, the Court assumed that the tax was discriminatory and thus in violation of the dormant commerce clause. The Court nonetheless held that the McCarrie Act of 1945 validated the tax by providing that no act of Congress be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposed a fee or tax upon such business.[98] Thus the Court held that congressional consent prevailed over dormant commerce clause considerations.

(2) Federal Consent in the Interjurisdictional Compact Context

The concept of federal consent to state action otherwise barred by constitutional provisions also arises in the interjurisdictional compact context. The Constitution provides that the states may enter into interjurisdictional compacts *only with the consent of*

93. 53 U.S. (12 How.) 299 (1851).
94. *Id.* at 317.
95. 135 U.S. 100 (1890).
96. *Id.* at 125.
97. 328 U.S. 408 (1946).
98. *Id.* at 429-31.

Congress.[99] In the event of such consent, however, a state may enter into agreement with other states or compacts with foreign nations. The problem of defining "congressional consent" has generally arisen in the interstate compact context.[100] In *Virginia v. Tennessee*[101] the Supreme Court upheld an agreement which established a boundary line between Virginia and Tennessee, concluding that Congress had consented to the agreement by exercising jurisdiction over the area in question according to the terms of the agreement for an extended period of time without question or dispute.[102] The Court required no express congressional approval of the agreement and stated that consent to state action is to be given effect whether the consent precedes the action or is given after an agreement is consummated.[103]

(3) Federal Consent and the Preemption of State Law Regulating Aliens

In *DeCanas v. Bica*[104] the Supreme Court considered a challenge to a California statute[105] that prohibited employers from knowingly employing aliens not entitled to lawful residence in the United States. The statute was challenged on the ground that the Immigration and Nationality Act (INA)[106] preempted such state action. In upholding the California statute, the Court distinguished *Hines v. Davidowitz*[107] and *Pennsylvania v. Nelson,*[108] two cases striking down state regulation of aliens on preemption grounds. The Court placed particular emphasis on the fact that in *DeCanas* there was evidence that "Congress sanctioned concurrent state legislation on the subject covered by the challenged state law."[109] The evidence referred to was an INA provision that stated that the INA was intended to "supplement state action" and that compliance with the INA would not excuse compliance with appropriate state law and regulation.[110]

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99. *See* note 67 *supra.*

100. *See, e.g.,* Wharton v. Wise, 153 U.S. 155 (1894); Virginia v. Tennessee, 148 U.S. 503 (1893).

101. 148 U.S. 503 (1893).

102. *Id.* at 522.

103. *Id.* at 525.

104. 424 U.S. 351 (1976).

105. CAL. LAB. CODE § 2805 (West Supp. 1978).

106. 8 U.S.C. §§ 1101-1503 (1976).

107. 312 U.S. 52 (1941).

108. 350 U.S. 497 (1956).

109. 424 U.S. at 363.

110. *Id.* at 362 (quoting 7 U.S.C. § 2051 (1976)).

(4) Conclusion

Considering the breadth of the federal consent concept, future courts applying the *Zschernig* doctrine should examine the possibility that federal consent may validate state laws that otherwise impermissibly affect foreign affairs. The heavy use of commerce clause language in *Zschernig* lends itself to the analogy to commerce clause decisions and thus to the applicability of the federal consent concept. Indeed, the dormant commerce clause decisions and the foreign affairs power are based on similar considerations—the need for national uniformity in matters which significantly affect the nation as a whole.

Moreover, the Constitution expressly contemplates the validation of state action by federal consent in certain areas concerned with foreign affairs. Although states are prohibited from entering into agreements with foreign nations, Congress may validate such action by express or implied consent.[111] There is no constitutional justification for allowing such consent with regard to state treaty making, while not allowing such consent with regard to the implied prohibitions on state action supplied by the *Zschernig* doctrine. Thus, assuming that the federal government has expressed consent to state buy-American laws in the GATT exemptions, a strong argument arises that the federal foreign affairs power does not affect the validity of such statutes.

V. Conclusion

It is submitted that state buy-American statutes neither conflict with existing federal law nor violate the provisions of the United States Constitution. Thus foreign manufacturers who have been the subject of the discriminatory effect of state buy-American statutes, and opponents of the economic protectionism fostered by such laws, should not find judicial relief. The *K.S.B.* decision portends the judicial reaction to constitutional challenges to such legislation, especially in the state courts. Moreover the Supreme Court has refused to hear an appeal of the *K.S.B.* decision,[112] ending judicial alternatives to those seeking to overturn the New Jersey buy-American statute.

Assuming that the state legislatures that have enacted buy-American laws will not voluntarily repeal them, what are the alternatives available to the opponents of such laws? Congressional legis-

111. *See* text accompanying notes 99-103 *supra.*

112. K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 98 S. Ct. 1635 (1978).

lation prohibiting state government discrimination against foreign products presents one possible solution. Such legislation is clearly authorized by the constitutional grant to Congress of the power to regulate commerce with foreign nations.[113] The validity of such legislation, however, is questionable in light of the Supreme Court's decision in *National League of Cities v. Usery*,[114] in which the Court invalidated the 1974 amendments to the Fair Labor Standards Act[115] that applied minimum wage and maximum hour provisions to the state government employees. The Court stated that Congress could not, under the commerce power, make wage and hour provisions with regard to functions and services which state governments have traditionally afforded their citizens and which are matters essential to the separate and independent existence of the states.[116] While the constitutional theory underlying such a holding is unclear,[117] the *Usery* prohibitions may well be applicable to a congressional attempt to regnlate the policy decisions underlying state government purchases by abolishing state buy-American statutes.

Alternatively, and in avoidance of the *Usery* problems, congressional refusal to exempt state government legislation from the restrictions of future international trade agreements could result in the preemption of state buy-American laws to the extent that they violate such agreements. Certainly GATT, absent the governmental use and existing legislation exemptions, would preclude discriminatory state government purchases under many circumstances.[118]

Neither of these legislative alternatives seems probable. Past federal sanction of state buy-American statutes, as well as the enacting of the federal Buy-American Act[119] indicate legislative support for such laws. This support may well increase in light of current economic instability and balance-of-trade deficits. Furthermore, from a strictly political viewpoint, one can easily imagine the legis-

113. *See* text accompanying notes 9-11 *supra*.

114. 426 U.S. 833 (1976).

115. 29 U.S.C. §§ 201-219 (1976).

116. 426 U.S. at 855.

117. For a discussion of possible theories, see Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

118. *See* notes 48-60 *supra* and accompanying text.

119. 41 U.S.C. §§ 10a-10d (1976). The impact of the Federal Buy-American Act is demonstrated by tbe Title of Resolution to the Oklahoma buy-American statute. It reads: "[a] 'Buy American' Resolution; taking cognizance of the desirability of purchasing products and supplies produced in the United States, *and of Federal legislation encouraging such practices;* and directing state agencies to adhere to that practice with certain exceptions." OKLA. STAT. ANN. tit. 61, § 51 (West 1963)(emphasis added).

lative reluctance to repeal legislation protecting domestic goods from foreign competitors. In sum, state buy-American statutes are apparently here to stay.

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