CONSTITUTIONAL LAW—PUBLIC CONTRACTS—STATE REQUIREMENT THAT ONLY AMERICAN MANUFACTURED PRODUCTS BE USED IN PUBLIC WORKS PROJECTS HELD VALID—*K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

The North Jersey District Water Supply Commission (Commission) was created in 1916 for the purpose of developing and distributing the water supply sources in the northern half of the state.[1] In 1974, the Commission was ordered to construct a water treatment facility to improve the quality of the water supply.[2] In compliance with the order, the Commission prepared a set of specifications for construction of the new facility.[3] Pursuant to state law, the specifications required that only American-manufactured products, where available, be used.[4]

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[1] N.J. STAT. ANN. §§ 58:5-1 to -2 (West 1966). At present, the North Jersey District Water Supply Commission serves eight municipalities—Newark, Clifton, Paterson, Passaic, Bloomfield, Glen Ridge, Kearny and Montclair. K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 277, 381 A.2d 774, 776 (1977), *appeal dismissed*, 435 U.S. 982 (1978). The statutory scheme permits municipalities, who wish to develop, acquire and operate a water supply system for the municipalities' use, to petition for a commission. N.J. STAT. ANN. § 58:5-2 (West 1966). Once established, the Commission became a "body corporate," *id.* § 58:5-7, with the power to "acquire by purchase or condemnation" all property necessary to provide "a sufficient water supply" for the contracting municipalities. *Id.* § 58:5-16. The costs of construction and acquisition of water supply facilities are to be borne by the contracting municipalities in proportion to their water contract demands. *Id.* § 58:5-22. Payment of the costs of operation of the Commission is to be made by the municipalities on a pro rata basis. *Id.* § 58:5-23. Whenever any work to be done by the Commission involves an expenditure over two thousand dollars, the Commission is required to prepare specifications for the work to be performed and submit the specifications for public bidding, awarding the contract to "the lowest responsible and qualified bidder." *Id.* § 58:5-20.

[2] The New Jersey Department of Health ordered the Commission to construct the plant, and the Commission refused. State v. North Jersey Dist. Water Supply Comm'n, 127 N.J. Super. 251, 256, 317 A.2d 86, 89 (App. Div.), *certif. denied*, 65 N.J. 578, 325 A.2d 712, *cert. denied*, 419 U.S. 999 (1974). The state successfully brought suit to require the Commission to comply with the directive. 127 N.J. Super. at 259, 317 A.2d at 90.

[3] K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 277–78, 381 A.2d 744, 776 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

[4] K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 278, 381 A.2d 774, 776 (1977), *appeal dismissed*, 435 U.S. 982 (1978). The Commission cited N.J. STAT. ANN. § 40A:11-18 (West 1978) as authority for the Buy-American specifications. 75 N.J. at 278, 381 A.2d at 776. The Supreme Court of New Jersey noted that both the lower courts correctly held that the applicable statutory provisions were N.J. STAT. ANN. §§ 52:33-2 and -3 (West 1955). 75 N.J. at 278, 381 A.2d at 776. The state's Buy-American scheme encompasses all facets of state governmental operations. State work is governed by N.J. STAT. ANN. §§ 52:33-1 to -4 (West 1955). The Local Public Contracts Law governs work done for counties, municipalities, and their agencies. *Id.* §§ 40A:11-1 to -39. Another statute governs all other public works. *Id.* §§ 52:33-1 to -4. A contractor who fails to comply with these provisions may not be awarded any public contracts for three years. *Id.* § 52:33-4.

K.S.B. Technical Sales Corporation (K.S.B.), a wholly owned subsidiary of a West German manufacturer, filed suit in the United States District Court for the District of New Jersey, seeking to restrain the Commission from accepting bids on the grounds that the Buy-American specification was unconstitutional.[5] The district court abstained from ruling in order to give the New Jersey state courts the opportunity to rule on questions of state law.[6]

K.S.B. and Linda Fazio, a taxpayer in a municipality serviced by the Commission, filed suit by order to show cause seeking a declaration by the chancery division that the state's Buy-American scheme was unconstitutional.[7] The trial court held that title 53, sections 33-2 and 33-3 of the New Jersey Statutes Annotated unconstitutionally conflicted with the General Agreement on Tariffs and Trade (GATT).[8] However, due to the speculative nature of the plaintiffs' injuries and the injury to the public interest which would result if the project

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[5] K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 150 N.J. Super. 533, 538–39, 541, 376 A.2d 203, 205–07 (Ch. Div.), *modified*, 151 N.J. Super. 218, 376 A.2d 960 (App. Div.), *rev'd*, 75 N.J. 272, 381 A.2d 744 (1977), *appeal dismissed*, 435 U.S. 982 (1978). The grounds asserted to warrant the rejection of the Buy-American specifications were preemption by a "treaty" of the United States, interference with the federal foreign affairs power, and undue burdening of foreign commerce. 150 N.J. Super. at 541, 376 A.2d at 207.

[6] K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 150 N.J. Super. 533, 540, 376 A.2d 203, 206 (Ch. Div.), *modified*, 151 N.J. Super. 218, 376 A.2d 960 (App. Div.), *rev'd*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978). A conservator was appointed to collect and hold the bids until further order of the court. 150 N.J. Super. at 539, 376 A.2d at 206.

[7] K.S.B. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 150 N.J. Super. 533, 540, 376 A.2d 203, 206–07 (Ch. Div.), *modified*, 151 N.J. Super. 218, 376 A.2d 960 (App. Div.), *rev'd*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978). The Commission argued that, because K.S.B. was only a subcontractor and not entering into a direct contractual arrangement with the Commission, the corporation lacked standing to bring suit. 150 N.J. Super. at 541–42, 376 A.2d at 207. K.S.B. argued that because it was denied the opportunity to submit a bid, the sufficiently adverse interests of the parties were evident, establishing its standing. *Id.* at 592, 376 A.2d at 207. The trial court held for the corporation. *Id.* The Commission also challenged Fazio's standing, on the ground that she sought to advance K.S.B.'s pecuniary interest, and not her interest as a taxpayer. *Id.* at 542, 376 A.2d at 208. The trial court disagreed, *id.*, and the supreme court, while refusing to discuss the corporation's standing, held that Fazio clearly had standing. K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 279–80, 381 A.2d 774, 777 (1977), *appeal dismissed*, 435 U.S. 982 (1978); *see* Camden Plaza Parking, Inc. v. City of Camden, 16 N.J. 150, 158–59, 107 A.2d 1, 5 (1954).

[8] K.S.B. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 150 N.J. Super. 533, 547–48, 376 A.2d 203, 210–11 (Ch. Div.), *modified*, 151 N.J. Super. 218, 376 A.2d 960 (App. Div.), *rev'd*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978). Additionally, the trial court found that the Buy-American statute did not conflict with the commerce clause of the United States Constitution. 150 N.J. Super. at 545–47, 376 A.2d at 209–10.

were further delayed, the Commission was permitted to use the bids that had already been submitted.[9]

The parties cross-appealed, and the appellate division, while accepting the trial court's reasoning with regard to the unconstitutionality of the statute,[10] modified the trial court's decision by restraining the Commission from using the bids.[11]

In *K.S.B. Technical Sales Corp. v. North Jersey Water Supply Commission*,[12] the Supreme Court of New Jersey reversed the lower court.[13] The court, in an opinion by Justice Schreiber, held that the New Jersey Buy-American scheme did not conflict with the provisions of the General Agreement on Tariffs and Trade (GATT),[14] nor substantially interfere with the exclusive federal power to conduct foreign affairs,[15] and was not unconstitutionally overburdening on foreign commerce in violation of the commerce clause.[16]

THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The General Agreement on Tariffs and Trade was negotiated at Geneva in 1947, at the same time discussion regarding the formation of an International Trade Organization (ITO) was being conducted.[17]

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[9] K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 150 N.J. Super. 533, 548–50, 376 A.2d 203, 211 (Ch. Div.), *modified*, 151 N.J. Super. 218, 376 A.2d 960 (App. Div.), *rev'd*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

[10] K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 151 N.J. Super. 218, 226–28, 376 A.2d 960, 964–65 (App. Div.), *rev'd*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

[11] K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 151 N.J. Super. 218, 228–31, 376 A.2d 960, 965–66 (App. Div.), *rev'd*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978). The appellate division discussed the law of competitive bidding in the state and found the Buy-American specification to be a condition of the bid which could not constitutionally be waived. 151 N.J. Super. at 229, 376 A.2d at 965; *see, e.g.*, L. Pucillo & Sons, Inc. v. Mayor & Council, 73 N.J. 349, 356, 375 A.2d 602, 605 (1977); Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 412, 341 A.2d 327, 331–32 (1975); Township of Hillside v. Sternin, 25 N.J. 317, 325–26, 136 A.2d 265, 269–70 (1957); Case v. Trenton, 76 N.J.L. 696, 700, 74 A. 672, 673–74 (Ct. Err. & App. 1909). On this ground, the court invalidated the entire procedure followed by the Commission. 151 N.J. Super. at 229–31, 376 A.2d at 965–66.

The appellate court also amplified the trial court's holding with regard to the applicability of GATT, and discussed the commercial aspects of the sale of water by governmental bodies. *Id.* at 324–25, 376 A.2d at 963.

[12] 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

[13] 75 N.J. at 303, 381 A.2d at 789.

[14] *Id.* at 289, 381 A.2d at 782.

[15] *Id.* at 292–93, 381 A.2d at 784.

[16] *Id.* at 302, 381 A.2d at 789.

[17] Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 251 (1968). GATT was intended as only a temporary measure until the formation of the ITO. *Id.* at 251–52. But when Congress failed to permit American participation

GATT is an executive agreement, applicable in the United States by the Protocol of Provisional Application, also signed in 1947.[18] The domestic law effect of GATT in the United States is dependent upon its status as a "treaty"[19] under the supremacy clause of the Constitution.[20] The predominant theory favoring the validity of GATT as a "treaty" under the supremacy clause is that GATT is an executive agreement entered into by the President pursuant to authority delegated to him by Congress in the Reciprocal Trade Agreements Act of 1945.[21]

The most important case to address the validity of an executive agreement entered into pursuant to a congressional delegation of authority was *Field v. Clark*.[22] The Supreme Court, through Justice Harlan, held that the Tariff Act of 1890 did not unconstitutionally delegate legislative power and treaty making to the President.[23] The *Field* opinion outlined the long history of the investing of authority in the Executive Branch[24] "in matters arising out of the execution of statutes relating to trade and commerce with other nations."[25] The

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in the ITO, the organization collapsed. *Id.* at 252. GATT thus became the general regulatory agency for world trade. *Id.*

[18] *Id.* at 253.

[19] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 141–144 (1965). International treaty obligations under the Constitution may be established in the following ways: through an agreement negotiated by the President, ratified by a two-thirds vote in the Senate, *id.* § 130 & Comment a; an executive agreement of the President, acting under authority delegated by an act of Congress, *id* § 131 & Comment a; or by an executive agreement concluded by the President acting under the executive's constitutional power to conduct foreign affairs, *id.* § 132 & Comment a. *See generally* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945).

[20] U.S. CONST. art. VI, cl. 2.

[21] Act of July 5, 1945, ch. 269, 59 Stat. 410 (1945). Professor Jackson has considered closely the arguments regarding the validity of GATT under this theory. Jackson, *supra* note 17, at 254–60. For a discussion of the validity of the Reciprocal Trade Agreements Act and its validity as to the issue of constitutional delegation of legislative power, see Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 251 (1939).

[22] 143 U.S. 649 (1892).

[23] *Id.* at 694. The Tariff Act provided that whenever the President determined that the government of any country which exported certain duty-free goods into the United States had imposed "reciprocally unequal and unreasonable" duties on American agricultural products, it was within his power to suspend the duty-free status of the importing country and impose duties upon such goods. Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567, 612 (1891). The plaintiff had imported woolen goods, which were covered by the act and upon which a duty was imposed. 143 U.S. at 662–64.

[24] 143 U.S. at 682–91. Justice Harlan referred to The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813), which upheld a statute providing that when either Great Britain or France "cease[d] to violate the neutral commerce of the United States," Act of May 1, 1810, ch. 39, 2 Stat. 605–06 (1810), the President was empowered to permit the importation of goods, otherwise prohibited. 11 U.S. (7 Cranch) at 388–89.

[25] 143 U.S. at 691.

decision was largely based upon the long standing practice of vesting discretion in the execution of legislation in the Executive Branch.[26] The rationale for the decision in *Field* was that the President was not making law, but merely executing the will of Congress as expressed in the statute, when he imposed duties upon the goods of countries which in his opinion discriminated against American goods.[27] The *Field* decision affirmed the principle that Congress may vest discretionary authority to act in foreign trade matters in the President.[28] The decision is the benchmark for all future cases where the domestic law effect of an executive agreement entered into pursuant to a delegation of congressional authority is at issue.[29]

All the parties in *K.S.B.* conceded that the domestic law significance of GATT is equivalent to that of a treaty.[30] However, it is important to examine the historical development of the doctrine which equates executive agreements with treaties. In *Missouri v. Holland*,[31] the Supreme Court held that even in the instance where Congress could not constitutionally act by domestic statute alone, a treaty, and statutes enacted thereunder, still superseded inconsistent state law.[32] This interpretation of the treaty power was expressly applied to a dispute involving the construction of an executive agreement in *United States v. Belmont*.[33] The issue in *Belmont* was

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[26] *Id.* at 691, 693–94.

[27] *Id.* at 693. For a discussion of how the rationale of *Field v. Clark* is implicated in the validity of GATT, see Jackson, *supra* note 17, at 283–84.

[28] 143 U.S. at 694.

[29] *E.g.*, J. W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) (if act of Congress contains "intelligible principle" to which person authorized to fix rates must conform, there is no unconstitutional delegation of legislative power); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) ("treaty" for purposes of Circuit Court of Appeals Act includes compact authorized by Congress, and entered into by President, without ratification). It is under this theory that the validity of GATT is most often asserted. Jackson, *supra* note 17, at 254–60.

[30] 75 N.J. at 280, 381 A.2d at 778; RESTATEMENT, *supra* note 19, §§ 141–144.

[31] 252 U.S. 416 (1920). The issue before the Court in *Holland* was whether the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918), unconstitutionally interfered with rights reserved to the states by the tenth amendment. 252 U.S. at 430–31.

[32] 252 U.S. at 433–34. Clearly, a treaty negotiated by the President and ratified by two-thirds of the Senate supersedes inconsistent state law. *E.g.*, Asakura v. City of Seattle, 262 U.S. 332 (1924); Missouri v. Holland, 252 U.S. 416 (1920); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[33] 301 U.S. 324 (1937). The issue in *Belmont* arose out of the negotiations leading to the recognition of the Soviet Government by the United States. *Id.* at 330. A condition of recognition imposed upon the Soviets by the President, who was acting pursuant to his independent powers regarding foreign affairs, was that the Soviets assign all claims they had against American nationals to the United States government. *Id.* at 326, 330. The government then made demand upon the executors of the estate of August Belmont, in whose bank a Russian corporation had deposited funds prior to the nationalization of all such assets by the Soviets in 1918, to turn the

whether the agreement made between the President and the Soviet Government, which assigned all the claims of the latter against American nationals, superseded a New York state law which would have made the contested sums the property of the defendants.[34] Justice Sutherland, writing for a unanimous Court, adopted the principles of *Missouri v. Holland*, and found for the government.[35] The *Belmont* Court declared that complete power over foreign affairs was vested in the federal government and could not be interfered with by the states, who were powerless in this sphere.[36] The *Belmont* decision, together with *United States v. Pink*,[37] constitutes the theoretical basis upon which executive agreements are considered to have the same domestic law effect as treaties ratified by the Senate.[38] These cases settle the dispute as to the existence of any residuum of power in the field of foreign affairs in the states.[39]

Having established the grounds upon which to assert that inconsistent state law provisions must yield to GATT, it is important to examine closely the provisions of GATT which are involved in the instant case. "The products of the territory of any contracting party imported into the territory of any other contracting party,"[40] under Article III of GATT, "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all

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deposits over. *Id.* at 325–26. When Belmont's executors refused, the government filed suit. *Id.* at 326.

[34] *Id.* at 327.

[35] *Id.* at 331–32.

[36] *Id.* One year earlier, Justice Sutherland wrote the opinion of the Court in another case involving the plenary power of the national government over foreign affairs. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), discussed in notes 75–82 *infra* and accompanying text. Justice Sutherland was the foremost spokesman on the Court for an interpretation of the Constitution giving no power over foreign affairs to the states. For an expanded exposition of Justice Sutherland's views on this subject, *see* G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS, 25–47, 116–26 (1919). *See also* Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1, 11–12 (1973).

[37] 315 U.S. 203 (1942).

[38] The *Pink* case involved the same executive agreement as *Belmont*. *Id.* at 211. The government brought suit against the Superintendent of Insurance for New York to require him to turn over the New York assets of a Russian insurance company, of which over $1 million remained after policyholders' claims were paid. *Id.* at 210–11. The Court reaffirmed the decision in United States v. Belmont, 301 U.S. 324 (1937), indicating that all executive agreements have the same effect as treaties. 315 U.S. at 226, 230.

[39] "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." United States v. Pink, 315 U.S. at 233. Additionally, the Court declared that "the policies of the States become wholly irrelevant . . . when the United States . . . seeks enforcement of its foreign policy in the courts." *Id.* at 233–34; *see* McDougal & Lans, *supra* note 19, at 314–16.

[40] GATT, pt. II, art. III, para. 4, 62 Stat. 3681 (1948).

laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[41] However, this provision is inapplicable "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."[42] An examination of the foregoing provisions indicates that neither the federal nor the state governments may enact legislation favoring domestic goods over foreign goods of signatory nations, either through tariff or import restrictions enacted by Congress, or through excessive inspection and quality control standards on the part of the states.[43] This is true unless the legislation places a requirement upon a governmental agency purchasing in its capacity as a governmental agency, and not acting in the commercial sphere.[44]

In *Territory of Hawaii v. Ho*,[45] the Supreme Court of Hawaii struck down a state statute which had required any retailer who sold eggs of foreign origin to display a sign so indicating.[46] The supreme court, applying the *Belmont-Pink* doctrine[47] held that the placard statute conflicted with Article III, paragraph 4 of GATT because it singled out a product of foreign origin for discriminatory treatment.[48] The case illustrates how GATT operates as a check upon state legislation which discriminates in favor of domestic products, even though the burden placed upon imports may be minimal.[49] However, under

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[41] *Id.*

[42] *Id.*, para. 8(a).

[43] *Cf.* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) (economic barriers to introduction of milk produced outside state, through inspection requirements held invalid under commerce clause); Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) (inspection cost for imported cement sixty times actual cost, where no such charge imposed on domestic cement, held invalid under commerce clause).

[44] GATT, pt. II, art. III, para. 8(a), 62 Stat. 3681 (1948).

[45] 41 Haw. 565 (1957).

[46] *Id.* at 565–66.

[47] *Id.* at 568. For a discussion of the *Belmont-Pink* doctrine and its origins, see notes 33–39 *supra*.

[48] 41 Haw. at 570. The court examined the legislative history of the placard statute, and found that its purpose was to protect domestic production. *Id.* The court also determined that no public health or safety danger existed because the eggs were imported, and declared the statute to be "a disguised restriction on international trade." *Id.* at 571. The court did not address the issue of GATT's validity, but merely assumed it. *See id.* at 567.

[49] *See* Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism*, 12 STAN. L. REV. 355, 357, 373–75 (1960). Some commentators have argued that the provisions of GATT are not binding on the states, since article XXIV, paragraph 12 of GATT provides that national governments are only required to take reasonable steps to assure compliance with GATT's provisions. *Id.* at 373–74. An examination of this position is beyond the scope of this Note. For a critical evaluation of this theory, see Jackson, *supra*

the exception for governmental uses in Article III, paragraph 8(a) of GATT, a statute which establishes a preference for domestic goods over foreign goods is valid if the following conditions are met: (1) the purchases themselves must be made by a governmental body; (2) for governmental purposes; (3) not for commercial sale, or for use in the production of goods for commercial sale.[50]

This provision of GATT was construed by the California District Court of Appeals in *Baldwin-Lima-Hamilton Corp. v. Superior Court.*[51] The issue as to whether the purchasing agent for San Francisco could accept a bid which had not complied with a specification requiring the use of domestic materials in the construction of a municipal power station,[52] necessitated the court's examination of the governmental use exception of GATT.[53] The court, in holding the specification unconstitutional, determined that "the generation of

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note 17, at 302–11. Professor Jackson's conclusion is that the supremacy clause of the Constitution renders this argument invalid, due to the mandatory effect of that provision on inconsistent state legislation. *Id.* at 311.

[50] GATT, pt. II, art. III, para. 3, 62 Stat. 3681 (1948).

[51] 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (Dist. Ct. App. 1962). The manner in which the case came before the court is somewhat unusual. The City of San Francisco had published a contract proposal requesting the submission of bids for the delivery of equipment to be used in construction of a municipal power station. *Id.* at 806–07, 25 Cal. Rptr. at 801. Both Baldwin and the Allis-Chalmers Manufacturing Company submitted bids for the project. *Id.* at 807, 25 Cal. Rptr. at 801. Both bids were rejected and the project was readvertised, with the requirement that all materials used in computing the new bids be of domestic manufacture as required by statute. *Id.* Both companies resubmitted bids, with Baldwin submitting one bid in compliance with the contract specification, which was higher than that of Allis, and one bid calculated to include certain component parts manufactured outside the United States. *Id.* at 807–08, 25 Cal. Rptr. at 801. Upon the advice of the city attorney that the domestic-manufacture specification was unconstitutional, the city purchasing agent accepted the plaintiff's second bid. *Id.* at 808, 25 Cal. Rptr. at 802. Allis then petitioned the California superior court for a writ of mandate commanding the purchasing agent to award the contract to Allis. *Id.* at 808–09, 25 Cal. Rptr. at 802. Baldwin then intervened, *id.* at 809, 25 Cal. Rptr. at 803, arguing that under GATT, as applied to the state through the supremacy clause, the specification requiring that all parts be of domestic manufacture was unconstitutional. *Id.* at 810–12, 25 Cal. Rptr. at 803–04. Baldwin therefore requested that an order, requiring the purchasing agent to award the contract to Baldwin, be issued. *Id.* at 810, 25 Cal. Rptr. at 803. The superior court, while finding the statute upon which the specification was based unconstitutional, declined to issue the relief requested by Baldwin. *Id.* at 811–12, 25 Cal. Rptr. at 804. Baldwin then filed in the Supreme Court of California for a writ of prohibition ordering the superior court to refrain from its order that the contract be readvertised. *Id.* at 812, 25 Cal. Rptr. at 804. The action was then transferred to the district court of appeal. *Id.*

[52] The court upheld the decision of the lower court, requiring that the contract be readvertised, on the ground that it was inequitable and an abuse of discretion to accept the bids of one who had not complied with the specifications of the contract. *Id.* at 824, 25 Cal. Rptr. at 811. The court also held that to allow the bids to stand would violate the requirement that all municipal works contracts be awarded on the basis of "full and fair competitive bidding." *Id.*

[53] *Id.* at 819–20, 25 Cal. Rptr. at 808–09.

electric power for resale" did not come within the exception.[54] The *Baldwin-Lima-Hamilton* case is important because it is the only reported case prior to the New Jersey supreme court's decision in *K.S.B.* that applied the relevant provisions of GATT to invalidate a state statute requiring that all government projects be constructed from domestic materials.[55]

The trial court and the appellate division, in their analyses of the governmental use exception and its applicability in *K.S.B.*, determined that the Commission, while a governmental body, was engaged "in the production of goods for resale" and hence was not entitled to the exemption.[56] In determining that the trial court correctly applied GATT, the appellate division examined the nature of the business of supplying water, relying on prior New Jersey decisions regarding the distribution of water by municipalities to their residents.[57] After ascertaining that water constituted "goods for sale,"

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[54] *Id.* at 819–20, 25 Cal. Rptr. at 809. It is important to note, however, that the version of GATT used by the California district court of appeal, in determining whether the exemption applied, differs from that applied by the New Jersey supreme court in *K.S.B. Compare* GATT, pt. II, art. III, para. 5, 61 Stat. A19 (1947) *with* GATT, pt. II, art. III, para. 8(a), 62 Stat. 3681 (1948). The later version, paragraph 8(a), was part of a protocol which modified Part II of GATT, by adding the word "commercial" to the provisions regarding resale on production of goods for sale. Both the chancery division and appellate division opinions in the *K.S.B.* case cite to the earlier version. 151 N.J. Super. at 224, 376 A.2d at 962; 150 N.J. Super. at 548, 376 A.2d at 210. The significance of the modification in the governmental use exception paragraph will be discussed at note 59 *infra*.

[55] The *Baldwin-Lima-Hamilton* decision provoked much critical commentary. *See, e.g.*, Comment, *GATT, The California Buy American Act, and the Continuing Struggle Between Free Trade and Protectionism*, 52 CALIF. L. REV. 335 (1964); Note, *State Buy-American Policies–One Vice, Many Voices*, 32 GEO. WASH. L. REV. 584 (1964) [hereinafter cited as *State Policies*]; Note, *California's Buy-American Policy: Conflict with GATT and the Constitution*, 17 STAN. L. REV. 119 (1964). These authors supported the *Baldwin-Lima-Hamilton* court's decision, both on legal and public policy grounds, specifically that economic protectionism was a thing to be avoided if at all possible and that free trade should be encouraged, for both economic and non economic reasons. *E.g.*, Comment, *supra* at 349; *State Policies*, *supra* at 606; Note, *supra*, 17 STAN. L. REV. at 137.

[56] 151 N.J. Super. at 226, 376 A.2d at 963; 150 N.J. Super. at 548, 376 A.2d at 211. While agreeing with the trial court that the governmental use exception did not apply in this case, the appellate court amplified upon the trial court's analysis. 151 N.J. Super. at 224–28, 376 A.2d at 963–65.

[57] 151 N.J. Super. at 224–25, 376 A.2d at 963; *see* Reid Dev. Corp. v. Township of Parsippany-Troy Hills, 10 N.J. 229, 233–34, 89 A.2d 667, 670 (1952) (supplying water is a proprietary function of a municipality); Mayor of Jersey City v. Town of Harrison, 71 N.J.L. 69, 70, 58 A. 100, 101 (Sup. Ct. 1904), *aff'd*, 72 N.J.L. 185, 62 A. 265 (Ct. Err. & App. 1905) (contract between two municipalities for sale of water is "sale of goods" within the meaning of that term in Statute of Frauds). *See also* Canavan v. City of Mechanicville, 229 N.Y. 473, 476–78, 128 N.E. 882 (1920) (regardless of whether activity is for profit, furnishing of water by "water corporation" is "sale of goods" within meaning of Uniform Sales Act, and not a governmental function).

the court then applied the *Belmont-Pink* doctrine[58] to pre-empt the challenged statute, as an unreasonable burden upon the importation of foreign goods in violation of Part II, Article III, paragraph 4 of GATT.[59]

In its reversal, the supreme court unanimously rejected the lower courts' reasoning with respect to the applicability of the governmental use exception.[60] The supreme court agreed with the courts below that GATT's status as an executive agreement was irrelevant for the purposes of determining whether inconsistent state statutes would be pre-empted by its provisions.[61] However, the court differed sharply with the appellate division's interpretation of

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These decisions are in large part based upon the once widely held theory which separated activities of government bodies into governmental and proprietary functions. *E.g.*, Canavan v. City of Mechanicville, 229 N.Y. at 476, 128 N.E. at 883. *See also* New York v. United States, 326 U.S. 572, 579 (1946) (governmental tax immunity not approvable when state government pursues activity capable of being engaged in by private enterprise). The New Jersey supreme court has since rejected this distinction between governmental and proprietary functions in a number of contexts. B.W. King, Inc. v. Town of West New York, 49 N.J. 318, 324–26, 230 A.2d 133, 137 (1967) (governmental-proprietary distinction no longer applicable in fixing tort liability of municipality); Township of Washington v. Village of Ridgewood, 26 N.J. 578, 584, 141 A.2d 308, 311 (1958) (governmental-proprietary distinction irrelevant to controversy regarding interpretation of zoning ordinance). *See generally* 18 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.90 (3d ed. 1977).

[58] *See* notes 33–39 *supra* and accompanying text.

[59] 151 N.J. Super. at 228, 376 A.2d at 964. The court also referred to the *Baldwin-Lima-Hamilton* decision, *see* notes 43–47 *supra*, as support for its conclusion. 151 N.J. Super. at 228, 376 A.2d at 965. Both the trial court and the appellate division applied the original version of GATT, which was adopted in 1947. *See* note 54 *supra*. As a result, neither court had the opportunity to examine the question as to whether the Commission's activity constituted "commercial sale." GATT, pt. II, art. III, para. 8(a), 62 Stat. 3681 (1948). However, upon close examination of the appellate division opinion, it is reasonable to conclude that that court would have held that the Commission's activity was indeed commercial, and would have invalidated the specification and the statute anyway. This conclusion is based upon the court's clear reliance on the governmental-proprietary distinction as a basis for determining that water constituted goods for sale. *See* 151 N.J. Super. at 224–26, 376 A.2d at 963.

[60] 75 N.J. at 289, 381 A.2d at 782. Even if the supplying of water by the Commission constituted "the production of goods for sale," in the words of the court, "it is clear . . . that these Commission operations [the collection of water and its treatment] are not for the purposes of effecting 'commercial' sales." *Id.* From this perspective, it becomes a matter of great importance that the lower courts used the incorrect version of the GATT governmental use exception. *See* note 54 *supra*. However, as stated above, *see* note 59 *supra*, it seems clear that the appellate court would have reached the same conclusion even if the amended version of GATT had been examined; and therefore, the supreme court's emphasis on the effect of the word "commercial" upon the result in this case seems misplaced. *Compare* 75 N.J. at 285–89, 381 A.2d at 780–82 *with* 151 N.J. Super. at 224–26, 376 A.2d at 963.

[61] *See* 75 N.J. at 280–81, 381 A.2d at 777–78. For a discussion of the theoretical and legal justifications for this position, see notes 19, 33–39 *supra* and accompanying text.

earlier cases regarding the status of water as "goods for commercial sale," at least as it is supplied by the Commission.[62]

Before examining the issue regarding whether water constitutes "goods for commercial sale," the supreme court examined the statutory functions and operations of the Commission.[63] The Commission is a creature of statute and is composed of the member municipalities.[64] Its function is to provide "a sufficient water supply" to the member municipalities.[65] In 1962, the New Jersey legislature supplemented the act which created the Commission with an act declaring that it is "in the public interest and . . . the policy of the State to foster and promote . . . the prompt, efficient and economical transmission, treatment, filtration, distribution and use of the water supplies acquired and developed by the State."[66] Most importantly, in the eyes of the court, it had been recognized by the Legislature that the Commission is performing "public and essential governmental functions."[67]

The court then directed its inquiry to the nature of water.[68] However, the focus of the review was not with regard to whether water constituted "goods," but whether the furnishing of water by the

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[62] 75 N.J. at 285–89, 381 A.2d at 780–82.

[63] *Id.* at 282–85, 381 A.2d at 779–80. In so doing, the supreme court framed the issues in a different manner than the courts below. Both lower courts merely examined whether the sale of water by the Commission constituted production of goods for sale and concluded that such activity was outside the governmental use exception. 151 N.J. Super. at 226, 376 A.2d at 963; 150 N.J. Super. at 548, 376 A.2d at 211. The supreme court felt it necessary to examine closely the activities and statutory powers of the Commission in order to ascertain whether the construction of a water treatment facility, for use in the treatment of water to be distributed by the Commission to the public, constitutes a purely governmental purpose, and not a commercial purpose. 75 N.J. at 282, 381 A.2d at 778.

[64] *See* note 1 *supra*.

[65] N.J. STAT. ANN. § 58:5-16 (West 1966).

[66] *Id.* § 58:5-33. The act also granted additional powers to the Commission in order to better enable it to construct and operate new facilities designed to purify the water being supplied. *Id.*

[67] *Id.* § 58:5-35. In addition, the court referred to two cases which described the Commission as a public body whose primary function is that of a "public trustee" providing essential governmental services. North Jersey Dist. Water Supply Comm'n v. City of Newark, 103 N.J. Super. 542, 549, 248 A.2d 249, 252 (Ch. Div.), *aff'd*, 52 N.J. 134, 244 A.2d 113 (1968); City of Bayonne v. North Jersey Dist. Water Supply Comm'n, 30 N.J. Super. 409, 414, 105 A.2d 19, 22 (App. Div. 1954).

In *North Jersey Dist. Water Supply Comm'n v. City of Newark*, the issue before the court was the construction of a contract among the participating municipalities. 103 N.J. Super. at 546, 248 A.2d at 251. In discussing the rate structure of the Commission, the court described the Commission as "a public body . . . exercising public and essential government functions," whose purpose is "to secure and maintain adequate supplies of potable water." *Id.* at 549, 248 A.2d at 252 (citations omitted).

[68] 75 N.J. at 285–89, 381 A.2d at 780–82.

Commission constituted commercial activity.[69] The court determined that although it has been recognized that rights to water may be privately owned,[70] the fundamental character of water as a natural resource[71] warranted the conclusion that the Commission's operations were not commercial in nature, and therefore were exempted from the application of Article III, paragraph 4 of GATT.[72]

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[69] *Id.* at 289, 381 A.2d at 782. As stated by the court, "it [is] unnecessary to resolve" whether the sale of water by the Commission constitutes the sale of goods, because the purpose of the Commission is not to effect "commercial sales." *Id.*

The court suggested that the Commission's activity might better be characterized "as a sale of a 'service,' " on the grounds that as a natural resource, water is not produced, but distributed. *Id.* at 288, 381 a.2d at 782. As support for this theory, the court cited *In re* West New York, 25 N.J. 377, 136 A.2d 654 (1957), and *In re* Glen Rock, 25 N.J. 241, 135 A.2d 506 (1957), *overruled on other grounds*, City of N. Wildwood v. Board of Comm'rs, 71 N.J. 354, 365 A.2d 465 (1976). In *In re West New York*, the New Jersey supreme court was faced with the issue of whether a municipality could impose an ad valorem property tax upon the water flowing through the mains located in the municipality. 25 N.J. at 379–80, 136 A.2d at 655–56. While deciding against the municipality, the court determined that water was not a product, nor considered by the water company as an asset, and that supplying water was the provision of services. *Id.* at 384–85, 136 A.2d at 658–59.

In *In re Glen Rock*, the dispute centered upon the jurisdiction of the Public Utilities Commission over the rates charged by municipally-owned water companies. 25 N.J. at 245, 135 A.2d at 507. Holding that the Commission lacked jurisdiction, the court was required to interpret a section of the Home Rule Act, N.J. STAT. ANN. § 40:62-24 (West 1967) which declares when municipal activity would be considered the activity of a public utility. 25 N.J. at 246, 135 A.2d at 508. The court determined that the words "other product" as used in the statute did not include water. *Id.* at 247, 135 A.2d at 509.

[70] 75 N.J. at 286, 381 A.2d at 781. While recognizing the rights of a riparian owner to divert water flowing through his land to private uses, the court noted as well that riparian rights did not extend so far as to permit such owners to enter into the business of supplying water. *Id.*; *see* McCarter v. Hudson County Water Co., 70 N.J. Eq. 695, 701–02, 65 A. 489, 492 (Ct. Err. & App. 1906), *aff'd*, 209 U.S. 349 (1908).

The issue in *McCarter* was whether the commerce clause prohibited a state from preventing a riparian owner from diverting the water flowing through his land and selling it in another state. 70 N.J. Eq. at 700–01, 65 A. at 491–92. The Court of Errors and Appeals held that it was unlawful for a riparian owner to sell water for non-riparian uses, basing its decision on the power of the state to protect the public health and welfare. *Id.* at 719, 721, 65 A. at 499, 500. In reaching its decision, the court declared that the state's power over these natural resources within its boundaries was absolute, and that the protection of these resources, of which water was one, is one of the paramount duties of government. *Id.* at 701, 65 A. at 492. For a discussion of the *McCarter* case, and the New Jersey court's subsequent treatment of this issue, see Hanks, *The Law of Water in New Jersey*, 22 RUTGERS L. REV. 621, 657–63 (1968).

[71] 75 N.J. at 286, 381 A.2d at 780–81; *see* Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 305, 294 A.2d 47, 52 (1972).

[72] 75 N.J. at 287–89, 381 A.2d at 782. In reaching this conclusion, the court rejected the rationale relied upon by the appellate division, namely that the Commission's activity is a proprietary function of government, therefore rendering it commercial activity not exempted by Article III, paragraph 8(a) of GATT. *Id.* at 287–89, 381 A.2d at 781–82. For a discussion of the governmental-proprietary distinction, and its rejection by the New Jersey courts, see notes 57–60 *supra* and accompanying text.

THE FOREIGN AFFAIRS POWER

The second major issue which confronted the supreme court in *K.S.B.* was whether the New Jersey Buy-American scheme was preempted as an impermissible state intrusion into the realm of foreign affairs, an area constitutionally reserved to the federal government.[73] While there is little controversy over the existence of an exclusively federal foreign affairs power, the scope of this power has long been the subject of debate.[74]

The seminal decision on the extent of the federal foreign affairs power is *United States v. Curtiss-Wright Export Corp.*[75] In that case, the United States Supreme Court, in an opinion by Justice Sutherland, gave the most comprehensive treatment to date concerning the nature of the foreign affairs power.[76] The issue before the Court was the validity of a congressional resolution authorizing the President to prohibit arms sales to certain countries.[77] Justice Sutherland began his inquiry by discussing the differences between the federal government's power over foreign affairs and its powers

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[73] 75 N.J. at 289, 381 A.2d at 782–83.

[74] Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 903–05, 919–21 (1959); *see* Lofgren, *supra* note 36, at 29–32. Much of the debate in this area has centered upon Justice Holmes' statement in Missouri v. Holland, 252 U.S. 416 (1920), that the treaty power of the federal government extends beyond Congress' power over domestic affairs, which is subject to the restraints of our system of enumerated powers. *Id.* at 433. Professor Henkin's view is that the foreign affairs power extends to any matter of international concern, and is a power limited only by congressional restraint. For a discussion of this thesis, see Henkin, *supra* at 922–26. Professor Lofgren, while acknowledging that the federal foreign affairs power is indeed far-reaching, takes the position that its exercise is limited only to subjects delegated to the federal government by the Constitution. Lofgren, *supra* note 36, at 29–31.

[75] 299 U.S. 304 (1936).

[76] Earlier cases dealing with the foreign affairs power only presumed is existence, and merely examined its extent with regard to the specific issue involved in the case. *See, e.g.*, Burnet v. Brooks, 288 U.S. 378, 396 (1933) (foreign affairs power discussed with regard to taxation of non-resident aliens); Mackenzie v. Hare, 239 U.S. 299, 311–12 (1915) (foreign affairs power discussed with respect to congressional power to regulate immigration and nationalization); Field v. Clark, 143 U.S. 649, 691–92 (1892) (foreign affairs power discussed with respect to congressional delegation to President of power to fix tariff rates); Penhallow v. Doane, 3 U.S. (3 Dall.) 53, 80–82 (1795) (Paterson, J.) (foreign affairs power as related to congressional authority to create court with jurisdiction to hear war prize cases).

[77] 299 U.S. at 314. The resolution was passed in response to an armed conflict between Bolivia and Paraguay. *Id.* at 311–12. The resolution, and the subsequent prohibition of arms sales by the President, were an attempt to have the belligerents initiate negotiations. *Id.* at 312. The resolution provided criminal sanctions for violation of the ban. *Id.* Curtiss-Wright was indicted on a charge of conspiracy to sell arms to Bolivia, in violation of the resolution. *Id.* at 311. Curtiss-Wright demurred on the ground that the joint resolution was void as an unconstitutional delegation of congressional power to the President. *Id.* at 314.

over domestic matters.[78] His central premise was that the states had no residuum of power in the field of foreign affairs because the powers of external sovereignty passed to the federal government directly from the British Crown.[79] It was Justice Sutherland's position that the powers of external sovereignty, "as necessary concomitants of nationality," do not rely upon affirmative grants of power in the Constitution.[80] According to Justice Sutherland, the President, as the sole representative of the nation in its dealings with foreign powers, is vested with great authority and discretion in this realm.[81] As a result, participation in the exercise of these powers on the part of Congress and the states is severely limited.[82]

Questions as to the validity of state activity in the area of foreign affairs have arisen in a variety of contexts. In *Hines v. Davidowitz*,[83] a Pennsylvania statute requiring that aliens residing in the state register annually with the department of labor and industry was challenged.[84] A similar requirement was subsequently imposed by Congress.[85] The issue upon which the case was decided was whether state activ-

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[78] *Id.* at 315. Justice Sutherland implied that it was obvious that fundamental differences between these powers existed. *Id.*

[79] *Id.* at 315–18. Justice Sutherland believed that the doctrine of enumerated powers only acted as a limitation upon the federal government's power to regulate internal affairs. *Id.* at 316. He took this position, because in his view, the states, in their individual capacities, never possessed the attributes of external sovereignty. *Id.*; *see* Penhallow v. Doane, 3 U.S. (3 Dall.) 53, 80–81 (1795) (Paterson, J.). Even before the Declaration of Independence, the states acted as a unit when dealing with problems with other nations. 299 U.S. at 316. Therefore, Justice Sutherland asserted that the states had no power to deal with foreign affairs, and could not delegate or limit the federal government in the exercise of these powers. *Id.* at 316–17.

[80] 299 U.S. at 318. As support for this interpretation, Justice Sutherland cited Justice Story's treatise on the Constitution. *Id.* at 317 n.1. Justice Story's discussion of the Constitution and the events leading up to its enactment, focused on the colonial period and the history of the nation under the Articles of Confederation. During this period, the states always acted in concert when dealing with foreign powers. From this practice, Justice Story, and Justice Sutherland, concluded that the powers of external sovereignty had vested in the national government from the time of the signing of the Declaration of Independence. *See* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 210–216 (3d ed. 1858). For a less expansive interpretation of the legal effect of this early history, see Lofgren, *supra* note 36, at 13–17.

[81] 299 U.S. at 319–20. Justice Sutherland examined early commentary on the nature of the President's authority, and concluded this was indeed the intention of the framers. *Id.* at 319–21.

[82] *Id.* This conclusion was recognized by the New Jersey supreme court in the *K.S.B.* case. 75 N.J. at 290, 381 A.2d at 783.

[83] 312 U.S. 52 (1941).

[84] *Id.* at 59. The challenged statute also provided for fines and/or imprisonment for those aliens who failed to register. *Id.* at 59–60.

[85] *Id.* Congress had passed the Alien Registration Act in 1946, ch. 439, 54 Stat. 670 (1946), the registration and identification provisions of which were more lenient than those contained in the state statute. 312 U.S. at 60–61.

ity concurrent with the federal government was constitutionally permissible.[86] After the examination of the federal power to regulate naturalization and immigration, the Court determined that state activity in this sphere was pre-empted by the Constitution, as an area where uniformity was desirable if not necessary, and invalidated the state statute.[87]

In a similar case, *De Canas v. Bica*,[88] the Court held that a California statute prohibiting an employer from knowingly hiring an illegal alien was not unconstitutional as a regulation of immigration, nor pre-empted by the Federal Immigration and Nationality Act.[89] The Court declared that *Hines* was completely consistent with this result because Congress had not manifested an intent to prohibit state regulation in the field of employment.[90]

In *Clark v. Allen*,[91] it was asserted that the foreign affairs power invalidated a California statute which prohibited non-resident aliens from inheriting real or personal property of a California decedent unless a reciprocal right for American citizens existed in that country.[92] In an opinion by Justice Douglas, the Court upheld the statute as it applied to personal property.[93] Justice Douglas reasoned that the California statute would have only an "incidental or indirect effect in foreign countries," and unless clear federal policy indicated to the contrary, the question of succession to property was one of local concern.[94]

The foreign affairs power was used in *Zschernig v. Miller*[95] to invalidate an Oregon statute which conditioned the rights of non-

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[86] 312 U.S. at 67–68.

[87] *Id.* at 73–74. The decision rested upon the premise that congressional intent was manifest in its desire to afford a uniform system of naturalization and immigration, and that to allow the states to regulate in this sphere was fraught with the danger of offending another country. *Id.* at 62–64, 74.

[88] 424 U.S. 351 (1976).

[89] *Id.* at 365. The California court of appeal, in declaring the statute unconstitutional, relied upon *Hines*. De Canas v. Bica, 40 Cal. App. 3d 976, 978–79, 115 Cal. Rptr. 444, 445 (Ct. App. 1974), *rev'd*, 424 U.S. 351 (1976).

[90] 424 U.S. at 362. The Court relied in large part upon congressional enactments in the area which specifically stated that the federal acts "[were] *intended to supplement State action.*" *Id.* at 362 (emphasis in original); *see, e.g.*, Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041, 2051 (1976).

[91] 331 U.S. 503 (1947).

[92] *Id.* at 506, 516. The issue with respect to the validity of a devise of real property to the plaintiffs was resolved by reference to a treaty concluded between Germany and the United States, which provided for reciprocal rights to inherit real property. *Id.* at 507–14.

[93] *Id.* at 516–17. The Court had previously determined that the treaty provisions, discussed in note 92 *supra*, did not apply with respect to personalty. 331 U.S. at 514–16.

[94] 331 U.S. at 517.

[95] 389 U.S. 429, *rehearing denied*, 390 U.S. 974 (1968).

resident aliens to inherit from Oregon residents upon the heir's demonstration that reciprocal rights existed on behalf of the United States citizen, and that the foreign country would not confiscate personalty passing to the non-resident heir.[96] Justice Douglas, again writing for the Court, found that the statute and others like it were being used to validate extensive investigation into the nature of the government of the foreign nation, in order to determine if property would be confiscated.[97] The Court re-examined *Clark* and held that it was still valid insofar as an investigation under a statute of its type required only "a routine reading of foreign laws," for a determination to be made.[98]

Analysis of the foregoing cases serves to indicate what should be the relevant considerations in a determination of the validity of state activity challenged under the foreign affairs power. *Hines* makes it clear that state activity in an area expressly reserved to the federal government, or one in which uniformity is desirable and congressional intent is manifest, will be struck down under the supremacy clause.[99] Similarly, legislation in spheres traditionally reserved to the states, where federal supremacy interests are not asserted, will be validated as incidental activity permissible under the Constitution.[100] But when state activity becomes deeply involved in an evaluation of questions of political ideology or interpretation of foreign law questions, that activity will be inimical to national interests and struck down.[101]

In *Bethlehem Steel Corp. v. Board of Commissioners of the Department of Water and Power*,[102] California's Buy-American statutes were struck down as having " 'a direct impact upon foreign relations,' " interfering with the federal government's power to regulate foreign trade.[103] The court examined the federal government's policy

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[96] 389 U.S. at 440–41. The Oregon statute provided that property which was non-inheritable under the statute would escheat to the state. *Id.* at 430 n.1.

[97] *Id.* at 433–34. Justice Douglas declared that inheritance rights were being conditioned upon the " 'democracy quotient' " of the particular nation, *id.* at 435, and were subject to the foreign policy attitudes of individual judges. *Id.* at 434–37.

[98] *Id.* at 432–33. Justice Douglas also indicated that *Clark* was merely an examination of the California statute on its face, and that it required that a statute of its kind cannot have more than an "incidental" effect abroad. *Id.* at 432–33. This distinction served to prevent *Clark* from being overruled by *Zschernig*. *See In re* Estate of Kish, 52 N.J. 454, 466, 246 A.2d 1, 8 (1968).

[99] *See* notes 83–87 *supra* and accompanying text.

[100] *See* notes 88–94 *supra* and accompanying text.

[101] *See* notes 94–98 *supra* and accompanying text.

[102] 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (Ct. App. 1969).

[103] *Id.* at 229, 80 Cal. Rptr. at 805 (citations omitted). The California Buy-American scheme, CAL. GOV'T CODE §§ 4300–4305 (West 1966), required all public works contracts to contain specifications mandating that only domestic materials be used, and provided that failure to com-

with regard to foreign trade, as it was expressed in various treaties and executive agreements, including GATT.[104] The court declared this area to be of national concern and beyond the competence of state legislatures.[105] The court then applied *Zschernig* and found that the potentiality for embarrassment of the national government as a result of California's protectionist policy was very great, and that the scheme had more than an " 'incidental or indirect effect' " upon foreign trade.[106]

The issue as to whether the foreign affairs power precluded New Jersey from enforcing its Buy-American scheme was raised for the first time in the *K.S.B.* case in the supreme court.[107] The court recognized that states are severely limited in their exercise of legislative power regulating matters related to foreign affairs.[108] In addressing the question as to whether the New Jersey Buy-American scheme unduly interfered with the federal domain, the court determined that the principle established by *Zschernig* and *Clark* was that if a state statute, on its face, has only an incidental impact upon foreign affairs and does not require a detailed examination of the policies of another nation, it is valid.[109]

Justice Schreiber then examined the challenged statutes in light of *Zschernig* and *Clark*, and determined that the legislature clearly did not intend the detailed assessment of the political and economic climate of foreign nations which was condemned in *Zschernig*.[110] Jus-

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ply would result in a suspension from the awarding of such contracts for a period of three years. *Id.* § 4304.

[104] 276 Cal. App. 2d at 226, 80 Cal. Rptr. at 803.

[105] *Id.* at 226–27, 80 Cal. Rptr. 803. The court discussed *Curtiss-Wright*, *Belmont*, and *Pink*, and determined that these cases indicated a clear constitutional mandate that state governments refrain from activity in the sphere of foreign relations. *Id.* at 225–26, 80 Cal. Rptr. at 802–03. For a discussion of the *Belmont-Pink* doctrine, see notes 33–39 *supra* and accompanying text. *Curtiss-Wright* is discussed in notes 75–82 *supra* and accompanying text.

[106] 276 Cal. App. 2d at 228–29, 80 Cal. Rptr. at 805. The court discussed the possibility of retaliatory action by affected nations, as well as the necessity for uniformity of treatment of foreign goods. *Id.* For a critical evaluation of *Bethlehem Steel*, see Note, 3 N.Y.U. J. INT'L L. POL. 164 (1970).

[107] 75 N.J. at 289, 381 A.2d at 782–83.

[108] *Id.* at 290, 381 A.2d at 783.

[109] *Id.* at 290–91, 381 A.2d at 783–84. In his discussion of these cases, Justice Schreiber pointed out that while *Zschernig* had invalidated the Oregon probate statute because it encouraged a detailed examination of the policies of foreign states, the fact that *Clark* was not overruled clearly indicates that state regulation which only incidentally affects foreign affairs is permissible, and that such determinations may be made upon a facial examination of the challenged enactment. *Id.* at 290–91, 381 A.2d at 783; *see* notes 95–106 *supra* and accompanying text.

[110] 75 N.J. at 291, 381 A.2d at 783. Justice Schreiber based this conclusion on the fact that the challenged statutes apply uniformly to all foreign goods, prohibiting their use, unless the cost of comparable domestic materials is "unreasonable" or "inconsistent with the public interest." *Id.* at 291, 293, 381 A.2d at 783, 784; N.J. STAT. ANN. §§ 52:33-2, 3 (West 1966).

tice Schreiber then focused upon the *Bethlehem Steel* decision. The California decision was distinguished upon the ground that the Buy-American scheme struck down in *Bethlehem Steel* was much more restrictive than New Jersey's plan.[111] Additionally, the *Bethlehem Steel* court failed to examine the governmental use exemption of GATT in declaring the California scheme unconstitutional.[112]

THE COMMERCE CLAUSE

It is well settled that congressional power to regulate foreign commerce is coextensive with the power to regulate interstate commerce.[113] Equally important is the principle that despite the language of the Constitution authorizing Congress to regulate foreign and interstate commerce,[114] states may enact legislation in areas affecting commerce, in the absence of congressional action or inaction pre-empting the field.[115] The fundamental purpose of the commerce clause is to prevent the states from establishing barriers to the free flow of goods from other states and nations.[116]

Traditionally, the commerce clause has been invoked to invalidate state regulation in the private sector designed to give domestic producers an economic advantage over producers from other states or nations through the erection of trade barriers of the granting of concessions not available to out-of-state producers.[117] However, the

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Perhaps more importantly, in light of the *Hines* and *De Canas* decisions, discussed *supra* notes 83–90, the New Jersey Buy-American provisions are fundamentally the same as the Federal Buy-American Act, 41 U.S.C. §§ 10a-10d (1976). *Compare* N.J. STAT. ANN. §§ 52:33-2 to -3 (West 1966) *with* 41 U.S.C. §§ 10a–10b (1976). Except for GATT, no federal enactment requires that the states not discriminate in favor of domestic products, in an area generally reserved to the states themselves, as in *De Canas*.

[111] 75 N.J. at 292–93, 381 A.2d at 784. *Compare* CAL. GOV'T CODE §§ 4300–4305 (West 1966) *with* N.J. STAT. ANN. §§ 52:33-2 to-3 (West 1966).

[112] 75 N.J. at 293, 381 A.2d at 784. For a discussion of the governmental use exception of GATT, see notes 41–44, 56–72 *supra* and accompanying text. Justice Schreiber concluded that the inclusion of the governmental use exception in GATT indicated federal acceptance of restrictive state purchasing policies. *See* 75 N.J. at 293, 381 A.2d at 784.

[113] Pittsburgh & S. Coal Co. v. Bates, 156 U.S. 577, 587 (1895); The License Cases, 46 U.S. (5 How.) 504, 578 (1847).

[114] U.S. CONST. art. I, § 8, cl. 3.

[115] Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 318–19 (1852).

[116] Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370 (1976); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 446–47 (1827).

[117] *E.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (Arizona statute requiring all melons grown in state be packaged in approved containers before shipping to other states held invalid); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) (Florida statute favoring local milk producers, not involving state purchases, held invalid under commerce clause); Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) (imposition of inspection requirement

treatment of state legislation which places conditions upon those who wish to deal with the state or its subdivisions has been very different.[118]

In *Garden State Dairies of Vineland, Inc. v. Sills*,[119] the New Jersey supreme court was faced with the issue of whether a state could constitutionally favor local milk producers when making purchases for its own use.[120] In remanding the case, the court held that while the state scheme requiring certification of domestic purchases was not per se unconstitutional, there was a possibility that it imposed an "undue burden" on interstate commerce.[121]

The rationale of the *Garden State Dairies* decision was explicitly rejected by the United States District Court for the Northern District

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and fee on imported cement, where similar requirement not imposed on domestic cement, held transparent discrimination against foreign commerce); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1934) (refusal to issue license to sell milk unless producer complied with minimum price required to be paid to domestic producers declared invalid as equivalent to imposition of customs duties on imports); *see* Melder, *The Economics of Trade Barriers*, 16 IND. L.J. 127, 133–39 (1940).

[118] It is well established that absent strong countervailing considerations, states are free, under the fourteenth amendment, to establish the terms and conditions upon which those who wish to deal with them are to be governed. *E.g.*, Heim v. McCall, 239 U.S. 175 (1915) (state statute requiring that only United States citizens be employed to work on public works projects held not violative of equal protection); Atkin v. Kansas, 191 U.S. 207 (1903) (state statute requiring all government contractors to abide by state maximum hours law held not to violate equal protection). *But see* Sugarman v. Dougall, 413 U.S. 634 (1973) (state statute prohibiting employment of resident aliens in civil service positions held unconstitutional). The general principle underlying these cases may be found in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), where it was stated "[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127.

[119] 46 N.J. 349, 217 A.2d 126 (1966).

[120] *Id.* at 353, 217 A.2d at 127–28. The New Jersey legislature had enacted a provision which required that all state agencies who purchased milk for use in state institutions obtain a certification from the seller that he would purchase an amount of milk produced in New Jersey equal to that supplied to the agency. N.J. STAT. ANN. §§ 52:25-23,:27B-61 (West 1955). Garden State Dairies filed a complaint alleging that, although it operated a dairy in New Jersey, it was unable to satisfy the certification requirement and therefore was unable to bid on a contract to supply milk to New Jersey State Hospital. 46 N.J. at 352, 217 A.2d at 127. The plaintiff sought a declaration that the statute was an unconstitutional burden on interstate commerce. *Id.* at 353, 217 A.2d at 127.

[121] 46 N.J. at 358, 217 A.2d at 130. The court, in reaching this conclusion, examined *Atkin* and *Heim*, 46 N.J. at 354, 217 A.2d at 128; *see* note 118 *supra*. The court questioned whether the rationale of those cases applied as broadly as it once had, but the tenor of those decisions led to the conclusion that it would be inappropriate to declare the certiication scheme invalid without an examination of its economic effects. 46 N.J. at 354–55, 358, 217 A.2d at 128–30. The case was remanded because the plaintiff's attack was on the face of the statute. *Id.* at 358–59, 217 A.2d at 130–31. In so holding, the court distinguished Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964), where the Supreme Court declared a Florida statute favoring local milk producers unconstitutional, without first examining the burdens placed on interstate commerce, on the ground that the case did not involve purchase by the state itself. 46 N.J. at 357, 217 A.2d at 130.

of Florida in *American Yearbook Co. v. Askew*.[122] The three-judge panel upheld a Florida statute requiring that all public printing was to be performed by Florida printers.[123] In resolving the commerce clause issue, the court held that while state regulation of trade in the private sector is subject to commerce clause restrictions, these restraints are inapplicable to statutes imposing conditions on state purchases.[124]

The first case in which the Supreme Court discussed the constitutional implications of state entry into the market as a purchaser of goods was *Hughes v. Alexandria Scrap Corp.*[125] The Court was faced with the question of whether the imposition of additional requirements upon an out-of-state corporation seeking to avail itself of a state subsidy program unduly burdened interstate commerce.[126] In

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[122] 339 F. Supp. 719, 725 (N.D. Fla.), *summarily affd*, 409 U.S. 904 (1972).

[123] 339 F. Supp. at 725. American Yearbook was a printer of school yearbooks, and did not have a printing facility in Florida. *Id.* at 720. The Florida statute was attacked on the grounds that it constituted an unconstitutional delegation of power to the state department of general services, that the statute denied American Yearbook equal protection in violation of the fourteenth amendment, and that the statute placed an undue burden on interstate commerce. *Id.* The delegation question and the equal protection issue were decided in favor of the state. *Id.* at 721, 723.

[124] *Id.* at 725. The district court distinguished *Polar Ice Cream* on the same grounds as the New Jersey supreme court did in *Garden State Dairies*. *Id.* at 724–25. The New Jersey decision was rejected because "[t]o subject every job specification to an *ad hoc* measurement of its effect on interstate commerce would unduly interfere with state proprietary functions if not bring them to a standstill." *Id.* at 725.

American Yearbook was summarily affirmed by the Supreme Court, 409 U.S. 904 (1972). Summary affirmances have precedential value only with regard to "the precise issues presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173, 176 (1977). The *K.S.B.* court accepted *American Yearbook* as precedent "for the proposition that facially restrictive state purchasing statutes are permissible under the Commerce Clause where the state is purchasing . . . for its own end use." 75 N.J. at 297, 381 A.2d at 787.

[125] 426 U.S. 794 (1976).

[126] *Id.* at 801–02. The state of Maryland, in seeking to alleviate problems resulting from the abandonment of automobiles on the state's highways, instituted a program by which scrap processors licensed by the state would receive bounties for the destruction of any vehicle titled in Maryland. *Id.* at 796–97. A licensed processor would be required to share his bounty equally with any wrecker licensed by the state who delivered a vehicle to him. *Id.* However, it was not necessary to have a processing plant in Maryland in order to become licensed. *Id.* at 799. In order to avoid suits for conversion of vehicles claimed not to have been abandoned, a processor was required to obtain certain specified documents by which title could be established. *Id.* at 798. However, title did not necessarily have to be established for certain vehicles classified as "hulks" under the statute as originally enacted. *Id.* at 798–99.

In 1974, the subsidy program was amended to require that title be established for "hulks" in the same manner as that for other abandoned vehicles. *Id.* at 800. However, the documentation required of a Maryland processor was less severe than that required of an out-of-state processor. *Id.* at 800–01. Alexandria Scrap Corporation, a Virginia processor brought suit alleging that the 1974 amendment denied it equal protection of the laws under the fourteenth amendment, and

upholding the state scheme, Justice Powell, writing for the Court, held that the commerce clause was not intended to regulate commerce created when the state itself entered the market as a purchaser.[127] The decision was largely based upon the premise that traffic in the subsidized article would not have existed but for the state program.[128] Additionally, no effort was made by the state to prevent the flow of such articles in interstate commerce, thereby rendering traditional "undue burden" analysis inapplicable.[129] Because Congress had not acted in this particular area of commerce, it was deemed perfectly permissible for states to prefer their own residents in programs of this type.[130]

In passing upon the merits of the commerce clause issue, the *K.S.B.* court found the *Alexandria Scrap* decision to be controlling.[131] Justice Schreiber interpreted *Alexandria Scrap* and *American Yearbook* to stand for the proposition that state legislation with respect to purchases for its own end use, absent federal action, is not subject to traditional commerce clause restrictions.[132] Consequently, the court held that the legislature's Buy-American scheme was not an unconstitutional burden on foreign commerce.[133] In reaching this

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that the amendment placed an unreasonable burden on interstate commerce. *Id.* at 802. A three-judge district court granted summary judgment to Alexandria Scrap on both claims, and enjoined the state from further enforcing the amendments. Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46 (D. Md. 1975), *rev'd*, 426 U.S. 794 (1976).

[127] 426 U.S. at 805–06, 809.

[128] *Id.* at 809 n.18. However, as Justice Powell indicated, no evidence was adduced by the parties as to the relevant market statistics with regard to the hulk market before the subsidy program was instituted, thereby making it impossible for the Court to rest its decision solely on that basis. *Id.*

[129] *Id.* at 806, 808 n.17. Justice Powell declared that the unusual part of the case was not that the issue was before the Court for the first time, but rather that the scheme had been characterized as a burden on interstate commerce at all. *Id.* at 807.

[130] *Id.* at 810 & n.19. In a footnote, Justice Powell indicated that the Court in *Alexandria Scrap* was not taking a position on whether Congress could constitutionally prohibit states from "selective participation" in the hulk market. *Id.* at 810 n.19; *see* National League of Cities v. Usery, 426 U.S. 833 (1976) (tenth amendment is bar to congressional extension of Fair Labor Standards Act to include all state employees).

The court's decision in *Alexandria Scrap* is discussed in Note, 31 U. MIAMI L. REV. 729 (1977). *See also The Supreme Court 1975 Term*, 90 HARV. L. REV. 5, 58–63 (1976).

[131] 75 N.J. at 300, 381 A.2d at 788. While *Alexandria Scrap* dealt only with commerce among the states, Justice Schreiber did not consider that fact a sufficient justification for distinguishing the case. *Id.* at 299, 381 A.2d at 788.

[132] *Id.* at 298, 381 A.2d at 787.

[133] *Id.* at 300-01, 381 A.2d at 788–89. In reaching this result, Justice Schreiber examined the argument that *American Yearbook* and *Alexandria Scrap* only permitted states to favor their own residents, without regard to national interests, in the Buy-American context. *Id.* at 298, 381 A.2d at 787. Such a reading would require that promoting the national economy be considered not of legitimate local concern. *Id.* Justice Schreiber, in dismissing this proffered in-

conclusion, the court was forced to review its holding in *Garden State Dairies*.[134] Justice Schreiber considered the result in *Garden State Dairies* to be the product of precedent then prevailing and declared the court's approach in that case "no longer viable in light of *Alexandria Scrap*."[135]

In evaluating the impact of the New Jersey supreme court's decision upholding the state's Buy-American scheme in government procurement, it is important to understand the pervasiveness of this policy in our federal system. A 1963 survey conducted by the National Association of State Purchasing Officials indicated that well over one-third of the states employed restrictive purchasing policies, either by statutory requirement or unofficial policy.[136] Because New Jersey's Buy-American scheme does not mandate purchase preferences for New Jersey products, it is by and large one of the less restrictive schemes presently in effect.[137] It has been estimated that the repeal of the Federal Buy-American Act[138] would result in a saving of at least one hundred million dollars annually, while increasing customs revenues by a similar amount.[139]

Buy-American legislation has been attacked successfully upon a number of grounds, including pre-emption under GATT,[140] under

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terpretation of these cases, called such a position incongruous with the general principles which underlie the commerce clause and rejected it out of hand. *Id.*

[134] *Id.* at 299, 381 A.2d at 787; *see* notes 119–24 *supra* and accompanying text.

[135] 75 N.J. at 299, 381 A.2d at 787. As additional justification for the court's decision that the New Jersey Buy-American scheme did not run afoul of the commerce clause, Justice Schreiber referred to the court's earlier holding that the Commission's activity was a proper governmental purpose, unrelated to activity in the private sector. *Id.* at 300, 381 A.2d at 788; *see* notes 63–72 *supra* and accompanying text. This, coupled with the fact that Congress has approved the policy of preference for domestic material in federal public works projects, *see* note 110 *supra* and accompanying text, was a clear indication that New Jersey's Buy-American scheme, modeled after the federal scheme, was consistent with national policy. 75 N.J. at 301–02, 381 A.2d at 788–89.

[136] *State Policies*, *supra* note 55, at 585 (citing National Association of State Purchasing Officials Committee on Competition in Governmental Purchasing, *1963 Survey on In-State Preference Practices, Domestic v. Foreign Purchasers* (unpublished compilation by NASPO, 1313 East 60th St., Chicago, Illinois 60637)).

[137] *Compare* N.J. STAT. ANN. §§ 52:33-2, -3 (West 1955) *with* ALA. CODE tit. 41, § 16-57 (1975); HAW. REV. STAT. § 103-42 to 46 (1976 & 1978 Supp.); IOWA CODE ANN. § 73.1-.11 (West 1973 & 1978–1979 Cum. Supp.); MASS. GEN. LAWS ANN. ch. 7, § 22 (West 1973); OKLA. STAT. ANN. tit. 61, § 51 (West Cum. Supp. 1978–1979); PA. STAT. ANN. tit. 71, § 639 (Purdon 1962 & 1978–1979 Cum. Supp.).

[138] 41 U.S.C. §§ 10a–10d (1976).

[139] *See State Policies*, *supra* note 55, at 598.

[140] Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (Dist. Ct. App. 1962); Territory of Hawaii v. Ho, 41 Haw. 565 (1957); *see* notes 47–55 *supra* and accompanying text.

the foreign affairs power,[141] under the commerce clause,[142] and as a violation of statutes mandating competitive bidding.[143] The supreme court's decision in *K.S.B.* is the first reported case to uphold a Buy-American scheme against attack on any of these grounds.

The Supreme Court's decisions in *Alexandria Scrap* and *National League of Cities v. Usery*[144] are strong indications that states will be permitted to experiment with their local economies free from federal interference. This consideration buttresses the New Jersey supreme court's decision to interpret the GATT governmental uses exemption broadly, and is crucial to an understanding of the *K.S.B.* decision.[145] Similar justifications exist for the narrow view taken by the court with respect to the foreign affairs power issue.[146]

The significance of *K.S.B.* should not be underestimated. It is a clear indication that state courts once constrained to reject state programs that arguably conflicted with overall federal goals now feel free to uphold them when it is in the best interests of the state.[147] The "new federalism" as it has developed under the Burger Court has clearly begun to take hold in the form of state economic programs designed to combat local problems.[148] Through this decision, the

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[141] Bethlehem Steel Corp. v. Board of Comm'rs of the Dept. of Water & Power, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (Ct. App. 1969); *see* notes 102–07 *supra* and accompanying text.

[142] City of Columbus v. Miqdadi, 195 N.E. 2d 923, 925, 928 (Columbus Mun. Ct. 1963); City of Columbus v. McGuire, 195 N.E.2d 916, 923 (Columbus Mun. Ct. 1963); State v. Jacobson, 80 Ore. 648, 658, 157 P. 1107, 1112 (1916).

[143] American Inst. for Imported Steel, Inc. v. County of Erie, 32 App. Div. 2d 231, 233, 302 N.Y.S.2d 61, 64 (1969); Texas Highway Comm'n v. Texas Ass'n of Steel Importers, Inc., 372 S.W.2d 525, 527, 529–30 (Sup. Ct. Tex. 1963).

[144] 426 U.S. 833 (1976); *see* note 130 *supra*.

[145] *See* notes 63–72 *supra* and accompanying text. While the North Jersey District Water Supply Commission is a governmental agency, the sale of water might just have easily been considered a commercial function. *See* notes 51–52 *supra*. *See also State Policies*, *supra* note 55, at 593.

[146] *See* notes 109–110 *supra* and accompanying text. While Justice Schreiber's assertion that New Jersey's Buy-American scheme had only an indirect effect on foreign affairs may be correct in an individual state's case, the aggregate economic effect of state Buy-American policies may be somewhat more substantial. *See generally* Melder, *supra* note 117, at 127–30.

[147] *Compare* K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774 (1977) *with* Garden State Dairies of Vineland, Inc. v. Sills, 46 N.J. 349, 217 A.2d 126 (1966). *See* Ferguson v. Skrupa, 372 U.S. 726 (1963) (doctrine that due process authorizes courts to declare economic legislation unconstitutional when they believe legislature has acted unwisely, discarded in favor of proposition that courts should not substitute their economic beliefs for judgment of legislature).

[148] *See generally* Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty"* in National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

New Jersey supreme court has indicated that, absent a strong constitutional policy to the contrary, it will leave the legislature relatively free to construct solutions for local economic problems.

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