Foreign Commerce and State Power: The Constitutionality of State Buy American Statutes

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FOREIGN COMMERCE AND STATE POWER:
THE CONSTITUTIONALITY OF STATE
BUY AMERICAN STATUTES

More than half the states in the United States have statutes or policies that favor domestically produced goods over goods of foreign origin for purposes of state government purchasing. Unsuccessful contract bidders have, upon occasion, attacked the constitutionality of these statutes and policies. The most recent decision assessing the validity of such statutes is *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*. The New Jersey Supreme Court in that case held that a New Jersey Buy American statute, which required state government agencies to purchase only American-made goods, did not violate the foreign commerce clause of the U.S. Constitution.

In reaching its decision, the New Jersey court relied on *Hughes v. Alexandria Scrap Corp.*, a United States Supreme Court opinion interpreting the interstate commerce clause. The New Jersey court's reliance on *Alexandria Scrap* raises new questions about the constitutionality of state statutes and policies that give preference to domestically produced goods in public contract bids. It also provides a basis for reexamining the relationship between the interstate and foreign commerce powers and for reevaluating the proper scope of the *Alexandria Scrap* holding.

This Note briefly surveys the history and background of Buy American statutes. It then discusses the *K.S.B. Technical Sales* and *Alexandria Scrap* decisions and examines the factors that distinguish them. A proposal is made that foreign commerce cases be analyzed under a rubric distinct from that under which interstate commerce cases are treated. The Note concludes by assessing the strengths and weaknesses of such a bifurcated approach to commerce clause analysis.

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2. U.S. CONST. art. I, § 8, cl. 3 provides that "[t]he Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States." The constitutional powers over interstate and foreign commerce have developed in related fashion, and most jurists denominate the quoted passage from the Constitution as simply the commerce clause. Although there is technically but one clause, a few commentators distinguish between the foreign and interstate commerce "clauses." See, e.g., Note, *Alternative Theories for Establishing a Federal Common Law of Foreign Judgments in Commercial Cases: The Foreign Affairs Power and the Dormant Foreign Commerce Clause*, 16 VA. J. INT'L L. 635 (1976). See also notes 48-57 infra and accompanying text. For the sake of simplicity, this distinction is followed here.
In 1933, at the depth of the Great Depression, Congress enacted the federal Buy American Act.\(^4\) That legislation required federal government agencies to purchase for their needs only domestically made or produced products, unless the cost of the domestic goods would be "unreasonable" or unless the purchase would be "inconsistent with the public interest."\(^5\) The purposes of the Act as revealed by its legislative history were: to provide relief from unemployment;\(^6\) to protect domestic business from foreign competition;\(^7\) to retaliate against similar policies followed by foreign

\(\text{4. 41 U.S.C. §§ 10a-10c (1976).}\)
\(\text{5. The Act provides:}\)
\(\text{[U]nless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials and supplies mined, produced, or manufactured . . . in the United States, shall be acquired for public use.}\)
\(\text{41 U.S.C. § 10a (1976). This section also makes exceptions for items acquired for use outside the United States and for items not available in the United States in "sufficient and reasonably available commercial quantities . . . of a satisfactory quality." Id.}\)
\(\text{The federal regulations that implement the Buy American Act provide specific guidelines for determining the reasonableness of cost. For example, 41 C.F.R. § 1-18.603-1 (1977) states:}\)
\(\text{A determination shall be made that the use of domestic construction material would unreasonably increase the cost where, with respect to each particular construction material:}\)
\(\text{(a) A bid or proposal offers nondomestic construction material . . . the cost of which, plus 6 percent thereof, is less than the cost of comparable domestic construction material; and}\)
\(\text{(b) That bid or proposal offers the lowest price of any received, after adding to each bid or proposal, for evaluation purposes, 6 percent of the cost of all nondomestic construction material . . . .}\)
\(\text{Section 1-18.603-3 authorizes deviations from the requirements of the quoted section in accordance with procedures set forth in 41 C.F.R. § 1-1.009-2 (1977). Subpart 1-6.1 of the same title contains similar provisions that govern supply and service contracts other than construction contracts. 41 C.F.R. §§ 1-6.100-105 (1977).}\)
\(\text{The relatively flexible provisions of the federal Buy American Act as implemented by the regulations contrast sharply with some of the state statutes. See, e.g., Cal. Gov't Code §§ 4300-4305 (West 1966). Framed as a flat prohibition against government purchases of foreign-made goods, id. § 4303, the California statute has twice been held unconstitutional by that state's appellate courts, see note 14 infra. Other states, such as New Jersey, have patterned their statutes after the federal Act, although the state enactments usually have less refined bidding standards than those of the federal statute and regulations. See note 19 infra.}\)
\(\text{6. 76 Cong. Rec. 3254 (1933) (statement of Sen. Vandenberg).}\)
states; and to eliminate loopholes in legislative appropriations allowing government agencies to purchase imported goods.

Since the enactment of the federal Buy American Act, at least six states have passed legislation requiring state governmental agencies to purchase only American-made goods. Nineteen more states have Buy Local statutes, which prohibit state governmental agencies from purchasing goods produced or manufactured outside the state. These Buy Local statutes have the effect of precluding the purchase by state government agencies of goods produced or manufactured outside the United States, as well as of goods produced or manufactured in the United States but outside the enacting state. Some commentators have therefore found the Buy Local legislation "open to the same objections as the Buy American acts." In addition to those states that have enacted Buy American or Buy Local statutes, some states give preference to American-made goods in public contract bids as a matter of policy, even though they do not statutorily restrict the purchase by state agencies of foreign-made goods. Altogether, between one-half and two-thirds of the states have statutes or policies that favor American-made goods over foreign-made goods.

Despite this substantial body of state law, few courts have considered the validity of such state statutes or policies under the foreign commerce clause. This paucity of litigation may be attributable to the fact that the

8. 76 CONG. REC. 3175 (1933) (statement of Sen. Bingham).
9. See Gantt & Speck, supra note 7, at 381-82.
13. In 1964, the National Association of State Purchasing Officials conducted a survey of state bidding and purchasing practices. The Association found that seven states which had no statutory restrictions on purchases of foreign materials nevertheless gave preference to domestic goods as a matter of state policy. The author has been unable to locate any more recent survey of the subject. For a discussion of the 1964 survey, see Note, "State "Buy American" Policies—One Vice, Many Voices," 32 GEO. WASH. L. REV. 584, 585-88 (1964).
14. The trial court in Bethlehem Steel Corp. v. Board of Comm'rs, No. 899165 (L.A. Co. Super. Ct. 1966) stated in dictum that the California Buy American Act, CAL. GOV'T CODE §§ 4300-4305 (West 1966), was repugnant to the commerce clause. Reporter's Transcript of oral opinion of the court, Dec. 22, 1966, noted in 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 684-85 (1970). On appeal, one justice wrote a concurring opinion in which he found that the California statute was an "unconstitutional intrusion into the congressional power "[t]o
statutes have not always been diligently enforced.15 The validity vel non of these provisions is, however, important to domestic and foreign private enterprise and to state governments, because of the substantial effect government spending has on both private markets and public economic well-being.16 Moreover, as world trade competition becomes keener,17 producers and suppliers are likely to press for more rigorous adherence to and enforcement of state Buy American statutes and policies.


15. See Brief for Plaintiffs at 6, K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 81 A.2d 774 (1977) (on file at the Cornell International Law Journal): "Although the Commission had gone to public advertising for bids on the average of four or five times per year over the past twenty-six years, its chief engineer, who participated in the process each time, testified that the Buy American specifications were not included on a single prior occasion."

16. The amount of state and local purchases has increased substantially in the last 25 years. In 1950, state and local government purchases totalled $20 billion, according to the U.S. Bureau of Economic Analysis. The preliminary figures for 1976 indicate that state and local purchases will total $232 billion, an increase of over one thousand percent in only twenty-four years. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1977, at 429 (1977).

17. A recent New York Times editorial noted that

[The depressed state of most industrial economies is creating fierce competition for international markets, threatening profits and jobs in dozens of American industries. The United States has already backed away from open trade in steel, shoes, TV sets, sugar and textiles. And similar limits on imports of goods competing with ailing domestic industries are probably on the way.

N.Y. Times, July 5, 1978, at A16, col. 1. Similarly, the Chief of the Antitrust Division of the U.S. Department of Justice has noted that "[t]here have been increasing demands for protection for the steel, color television, footwear and textile industries, with a host of others knocking at the door looking for governmental relief from competitive pressures." Remarks by John H. Shenefield, Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the AI-ABA Course of Study on International Antitrust (May 26, 1978), reprinted in [1978] 5 TRADE REG. REP. (CCH) ¶ 50,371, at 55,810-11. Industry efforts to impede the flow of imports into the American marketplace by invoking legal remedies are leading to increased litigation on issues of foreign trade. See, e.g., Zenith Radio Corp. v. United States, 98 S. Ct. 2441 (1978).}
II

RECENT DEVELOPMENTS

A. JUDICIAL INTERPRETATION OF THE COMMERCE CLAUSE:

K.S.B. TECHNICAL SALES AND ALEXANDRIA SCRAP

The New Jersey Supreme Court's decision in K.S.B. Technical Sales represents the most authoritative judicial pronouncement to date on the validity of state Buy American statutes under the foreign commerce clause.18 In that case, the North Jersey Water Supply Commission, a state agency created to develop water supply facilities for northern New Jersey municipalities, sought to include in its bidding specifications a provision requiring that only American-made goods be used in the construction of a water treatment plant. K.S.B. Technical Sales Corp., a wholly owned subsidiary of a West German manufacturer of pumping equipment, sought to enjoin

18. The New Jersey court also determined that the New Jersey statutes did not conflict with article III of the GATT, supra note 14, and that they were not an unconstitutional intrusion upon the exclusive foreign affairs power of the federal government.

The GATT is a multilateral international agreement that requires the contracting parties to treat foreign and domestic products equally with respect to all laws affecting their purchase, sale, transportation, and use. The New Jersey court found that the New Jersey statute did not conflict with the GATT because the GATT exempts from its provisions all laws "governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view . . . to use in the production of goods for commercial sale." GATT, supra note 14, art. III, para. 8(a), 62 Stat. 3681 (1948) (original version at 61 Stat. A-19 (1947)).

The plaintiff argued that this exception did not apply because the goods in question were being purchased by a state agency for use in the production of goods that would be resold commercially. See Reply Brief for Plaintiffs at 6-11, K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774 (1977) (on file at the Cornell International Law Journal).


To support its argument that the New Jersey statute impinged upon the exclusive foreign relations power of the federal government, the plaintiff in K.S.B. Technical Sales relied on the California appellate court decision in Bethlehem Steel Corp. v. Board of Comm'n, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969). 75 N.J. at 292-93, 381 A.2d at 784. The New Jersey court declined to follow the California court's analysis, choosing instead to take the view propounded by two commentators who criticized the California decision, see Note, supra note 12; Note, 3 N.Y.U. J. Int'l L. & Pol. 164 (1970).

Since the GATT and the foreign affairs power have already been the subject of such extensive research, this Note does not deal with them except as they incidentally affect commerce clause analysis. See notes 59-68 infra and accompanying text. For the response of other courts to arguments similar to those made in K.S.B. Technical Sales, see note 14 supra.
the inclusion of the Buy American requirement in the bidding specifications.

The Commission derived its authority to include the Buy American clause from two New Jersey statutes. The Commission derived its authority to include the Buy American clause from two New Jersey statutes. K.S.B. Technical Sales claimed that those statutes infringed upon the constitutional authority of Congress to regulate foreign commerce since they were framed as "a wide-angle, all-inclusive prohibition against any product not produced in the United States." The corporation urged the court to rule that the statutes were constitutionally infirm when tested against the rule applied by New Jersey courts to commerce power enactments.

The New Jersey Supreme Court acknowledged that when the state attempts to regulate the activity of private parties in a manner that affects interstate or foreign commerce, courts must balance the "local public interest against the extent of the burden" on commerce and consider "the availability of less onerous alternatives." The court distinguished the situation presented in *K.S.B. Technical Sales*, stating that it involved "the legal impact of the state's entry into the marketplace as a purchaser of goods, rather than as a regulator of the commercial activities of others." Having used

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> Notwithstanding 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.

This section shall not apply with respect to domestic materials to be used for any public work, if domestic materials of the class or kind to be used are not mined, produced or manufactured, as the case may be, in the United States in commercial quantities and of a satisfactory quality.

Section 52:33-3 states:

> Every contract for the construction, alteration or repair of any public work in this state shall contain a provision that in the performance of the work the contractor and all subcontractors shall use only domestic materials in the performance of the work; but if the head of the department or other public officer authorized by law to make the contract shall find that in respect to some particular domestic materials it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular material, and a public record made of the findings which justified the exception.


21. Id. at 15.

22. 75 N.J. at 294, 381 A.2d at 785.

23. Id. at 294-95, 381 A.2d at 785.
the facts of K.S.B. Technical Sales to set it apart from other commerce clause cases, the court went on to apply a different legal standard. The applicable rule, according to the court, was the one developed by the United States Supreme Court in Hughes v. Alexandria Scrap Corp.—"a state's legislation with respect to its purchase of goods and materials for its own end use, at least in the absence of federal action, is not subject to the usual Commerce Clause restrictions."24

At issue in Alexandria Scrap was the validity of an amendment to a complex Maryland statutory scheme designed to alleviate the growing aesthetic problem of abandoned automobiles.25 The statute established a system of monetary bounties and penalties to encourage prompt reprocessing of junk automobiles. The amendment established different eligibility requirements for in-state and out-of-state processors to obtain the bounties. Alexandria Scrap argued that the more restrictive requirements applied against out-of-state processors constituted an undue burden on interstate commerce. The Supreme Court rejected this contention and, for the first time in its history,26 distinguished between state interference "with the natural functioning of the interstate market . . . through burdensome regulation" of private trade27 and "the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce."28 Although the former kind of state action was subject to the traditional com-

24. Id. at 298, 381 A.2d at 787.
25. The Maryland statutes have been rewritten and recodified since the Supreme Court decided Alexandria Scrap. See MD. TRANSP. CODE ANN. §§ 15-501 to -514 (1977). In both the original and recodified versions, the legislature authorized the state to pay bounties to private scrap processors who destroy junk automobiles formerly titled in Maryland. MD. ANN. CODE art. 66 1/2, § 5-205 (1957); MD. TRANSP. CODE ANN. § 15-512 (1977); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 796-99 (1976). Originally, bounties for hulks (a special class of abandoned automobiles more than eight years old) were paid to both Maryland and out-of-state processors without any requirement of title documentation. MD. ANN. CODE art. 66 1/2, § 11-1002.2(05 (1957); 426 U.S. at 796-97. But in 1974, the Maryland legislature amended the statute by adding language that required processors to produce documentation of statutory title. 1974 Md. Laws 1725; 426 U.S. at 800. The amended statute has been recodified without substantive changes. MD. TRANSP. CODE ANN. § 25-210 (1977). The amendment made the requirements for out-of-state processors more onerous than for processors situated in the state. This discouraged suppliers from taking their hulks out of Maryland, and out-of-state processors were no longer able to obtain the bounties they had previously received. The plaintiff, a scrap processor whose Virginia business was located not far from the Maryland border, claimed that the 1974 amendment violated the commerce clause by impeding the free interstate flow of junk automobiles. 426 U.S. at 802.
26. Justice Powell, writing for the majority, stated:

[U]ntil today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

426 U.S. at 808 (1976).
27. Id. at 806.
28. Id. at 808.
merce clause scrutiny, according to the Court, the latter kind of state action was not.

The Alexandria Scrap decision is significant because it discarded the traditional balancing test for determining whether state action violates the interstate commerce clause. In place of the balancing test, the court established a zone of immunity that protects certain types of state action from commerce clause attack, even though that state action substantially affects interstate commerce. The New Jersey Supreme Court's decision in K.S.B. Technical Sales is equally significant because it extends the novel analysis of Alexandria Scrap to create a comparable zone of immunity for state action that substantially affects foreign commerce.

B. DISTINCTIONS BETWEEN ALEXANDRIA SCRAP AND K.S.B. TECHNICAL SALES

The New Jersey Supreme Court's heavy reliance upon Alexandria Scrap to establish a zone of immunity for state action that substantially affects foreign commerce does not at first seem unreasonable. But closer inspection of the court's analysis reveals that it is flawed. Important distinctions exist with respect to the purpose and effect of the statutes challenged in each of the two cases. Moreover, because foreign commerce was at issue in K.S.B. Technical Sales, rigid application of the Alexandria Scrap analysis cannot adequately account for the important international commerce considerations present in K.S.B. Technical Sales.

The basic dissimilarity in the purposes of the statutes under attack in Alexandria Scrap and K.S.B. Technical Sales forms a fundamental distinction between the two cases. The Maryland statute at issue in Alexandria Scrap was enacted pursuant to a recognized police power purpose: environmental improvement. By contrast, economic protectionism is the primary and perhaps exclusive purpose of the New Jersey Buy American statute challenged by the plaintiffs in K.S.B. Technical Sales. Whereas Maryland's statute is designed to promote the purely local interest of reducing the eyesore of abandoned automobiles, the intended economic protective effect of the New Jersey statute is not limited to that state's economy. Indeed, the ancillary effect of the New Jersey provision may be to harm local interests by increasing state government spending without correspond-

29. See note 35 infra.
30. Indeed, Justice Powell saw fit to state in dictum that "Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment." 426 U.S. at 809.
31. The Court has placed "repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 532 (1949).
The statutes challenged in the two cases also differ markedly in their effect on commerce. The legislation at issue in *K.S.B. Technical Sales* bars state agency purchases of any foreign-made goods. It thus applies to everything from paper clips to water purification equipment. The Maryland statute in *Alexandria Scrap*, however, affects only one limited category of goods, junk automobiles, thereby impeding the total flow of commerce less than the New Jersey statute.

The two statutory schemes are further distinguishable on the grounds that the New Jersey statute directly affects foreign commerce whereas the Maryland enactment only incidentally affects interstate commerce. The statute in *K.S.B. Technical Sales* prohibits outright any purchases of foreign-made products by state agencies. By contrast, the statute in *Alexandria Scrap* only makes it less likely that Maryland will have to pay bounties to out-of-state processors. As the *Alexandria Scrap* Court stated, the Maryland statute has "an impact upon the interstate flow of [junk automobiles] only because . . . Maryland effectively . . . made it more lucrative for . . . suppliers to dispose of their [junk automobiles] in Maryland rather than take them outside the State."

The decision of the New Jersey court to create an area of state action immune from commerce clause scrutiny also overlooks important foreign commerce considerations. A statute such as that passed by Maryland may incidentally affect relations with a neighboring state or its citizens. The neighboring state can, however, respond in any manner that does not violate the Constitution. When a state statute affects relations with a foreign nation, however, any retaliatory action taken by the foreign nation is likely

32. For example, a foreign contractor might enter the lowest bid on a government contract being let by the State of New Jersey, but have his bid rejected because the goods were manufactured abroad. If the next lowest bid had been entered by an Ohio contractor and if the award was subsequently made to him, then goods manufactured in Ohio would be used in the project and Ohio would receive the economic benefits of increased employment, greater tax revenues, and other localized economic multiplier effects. New Jersey, however, would receive none of these benefits. Moreover, New Jersey taxpayers would have to bear the burden of the more expensive Ohio goods, which the New Jersey state agency had to purchase because the state Buy American statute barred the agency from accepting the foreign contractor's low bid.

33. The Court has frequently expressed its view that the total impact upon commerce is an important criterion. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

34. *See* note 19 *supra*.

35. *See* text accompanying note 25 *supra*. In his opinion for the majority, Justice Powell stressed the fact that "Maryland has not sought to prohibit the flow of hulks." 426 U.S. at 806. But the implication of the statement when read in context is that the fact of prohibition is insignificant if the state enters the market as purchaser. In other words, the Court would stress the significance of an absolute prohibition only when the state is acting as a regulator of private trade.

36. 426 U.S. at 806 (footnote omitted).
to be targeted at the entire United States and not just at the state whose statute impeded the flow of foreign commerce. Thus, "the nation, not the state, would have to answer for state-created difficulties with foreign powers."37  Moreover, unlike the situation in which friction exists between two states, no constitutional limitations restrict the permissible types of retaliation that a foreign nation may employ against a state's discriminatory purchasing policy.

The importance of these considerations should not be underestimated. "In an era when 25 to 40 percent of the gross national product of most countries passes through public budgets, discrimination against foreign products by governmental selective purchasing constitutes an important barrier to world trade from a purely quantitative point of view."38  The courts should not allow erection of such a significant barrier without first carefully evaluating the potential impact on commerce between nations. This the New Jersey court did not do. Rather, the court felt compelled to apply to K.S.B. Technical Sales the broad holding of Alexandria Scrap that a state's purchasing activities are entirely excludable from commerce clause review.39  Had the New Jersey court instead been willing to recognize the substantial distinctions in the purposes and effects of the New Jersey and Maryland statutes, it might well have applied the traditional commerce clause balancing test40 and reached a different result.41

III
A PROPOSAL TO REVITALIZE THE FOREIGN COMMERCE CLAUSE

Although there may be some justification for deviating from the normal commerce clause standard of review when a state's purchasing activity

40. The standard of review in commerce clause cases is a qualified balancing test that weighs the following factors: the need or desirability of uniform regulation throughout the nation, the legitimacy of the local interest, the degree to which the state regulation discriminates against interstate commerce, the effect on commerce, and the availability of alternative regulatory schemes to promote the same state interests. See Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); California v. Zook, 336 U.S. 725, 728 (1949); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319-21 (1851). In Pike, the court stated: "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden [on interstate commerce] that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.
incidentally affects interstate commerce, the Court in *Alexandria Scrap* did not articulate any such justification and commentators have struggled to supply one.

At the root of the decision in *Alexandria Scrap* may lie the Court's concern over the states' continued "ability to function effectively in a federal system." By creating "an area of state action [that] plainly burdens commerce . . . [that is] not easily susceptible of principled limitation," and that is immunized from commerce clause analysis, the *Supreme Court* apparently hoped to afford the states an enclave secure from encroaching federal regulation and congressional preemption. The result of *Alexandria Scrap* and the motivation behind it are not troublesome. What is troublesome is that the *Alexandria Scrap* holding is so broadly framed as to bring within its ambit the clearly distinguishable case presented in *K.S.B. Technical Sales*. The result of the latter case suggests a need to reconcile the Court's desire to reduce the restrictions on state power to regulate commerce with the need to prevent foreign commerce cases from falling under the new approach. To accomplish this, the Court should separate interstate commerce analysis from foreign commerce analysis and preserve in foreign commerce cases the traditional, flexible balancing test that has so well served its purpose of weighing federal interests.

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42. The Court stated simply that "[i]n light of 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." *426 U.S.* at 810 (footnotes omitted). Justice Brennan, in his dissent, stated: "It is true that the Court disclaims any conclusion today respecting congressional power to legislate in this area, . . . and I hope that is so. I confess a logical difficulty, however, in understanding why, if the instant state action is not 'the kind of action with which the Commerce Clause is concerned,' there can be any congressional power to legislate in this area." *426 U.S.* at 822 n.4 (citation omitted).

43. Two commentators have suggested possible rationales for the decision in *Alexandria Scrap*, but both have been dubious of the validity of their own efforts to justify the decision. See *18 B.C. INDUS. & COM. L. REV. 893* (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 58-63 (1976).


against those of the state. To partition interstate from foreign commerce analysis in this fashion would mark a return to the historical relationship between the two clauses and would produce a number of benefits.

A. HISTORICAL RELATIONSHIP OF FOREIGN COMMERCE TO INTERSTATE COMMERCE CLAUSE

Although the U.S. Constitution enumerates within the same clause the powers of Congress to regulate foreign and interstate commerce, these powers have not always been considered coextensive. At the turn of this century, four dissenting justices in Champion v. Ames (the Lottery Case) argued that Congress lacked the power under the commerce clause to prohibit by statute the interstate carriage of lottery tickets. In advancing this contention, they pointed to the difference in scope between the interstate and foreign commerce powers:

[T]he power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken diverso inuitu, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other.

Similarly, in Brolan v. United States, the Court distinguished, albeit in dictum, between the foreign and interstate commerce powers. In fact, "[f]rom almost the beginning of the Republic [until the United States Supreme Court decision in NLRB v. Jones & Laughlin Steel Corp.] it [was] asserted that the power over foreign commerce is greater than that over domestic commerce." By negative implication, the right of the states to

47. The seminal cases in the foreign commerce field are: Brown v. Maryland, 25 U.S. (12 Wheat.) 262 (1827) (state statute requiring importers of foreign goods to purchase import license violates foreign commerce clause); Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) (protection against competitive effect of foreign cement in the Florida market held not sufficient local purpose to keep foreign cement out by charging exorbitant inspection fees).

49. 188 U.S. 321 (1903).
50. Id. at 373 (dissenting opinion).
51. 236 U.S. 216 (1915).
52. Id. at 222.
53. 301 U.S. 1 (1937).
54. 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 232 (1963). In Thurlow v. Mass. (the License Cases), 46 U.S. (5 How.) 504 (1847), Chief Justice Taney wrote: "The 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." Id. at 578. Professor Schwartz, however, asserts that "[i]t has not, all the same, been until our own day that this has really become an accurate statement." 1 B. SCHWARTZ, supra, at 234.
regulate matters incidentally affecting interstate commerce was thought to exceed their right to enact legislation that either potentially or actually affected foreign commerce. The Jones & Laughlin decision, however, marked the beginning of the relaxation of restrictions on congressional power over interstate commerce, and the interstate commerce and foreign commerce powers were soon viewed as being of roughly equivalent scope. In recent years, courts have therefore applied essentially the same balancing test in interstate and foreign commerce cases to determine whether state action violates either part of the commerce clause. As a result the portion of the commerce clause that refers to foreign commerce has lapsed into dormancy.

B. BENEFITS OF PROPOSAL

To partition interstate commerce analysis from foreign commerce analysis would thus represent a return to the historical understanding of the relationship between those two powers. The Supreme Court would be free both to expand existing areas of immunity for state regulation that affects interstate commerce and to develop new areas of immunity. Yet state regulation of foreign commerce could not fall within these newly created areas of immunity, and lower courts could be directed to apply the traditional balancing test when a state sought to regulate commerce in a way that affected foreign commerce. The net effect of this approach would be to permit the expansion of state power within the United States without unduly affecting the relations of the United States with other nations. The proposed separation of interstate from foreign commerce analysis would have other salutary effects as well: it would reduce lower court reliance on the discredited "foreign affairs" doctrine, and it would eliminate the need to resort to the often problematic preemption analysis.

I. Foreign Affairs Power

The U.S. Constitution makes no express grant of power to Congress or the President to regulate foreign affairs. It does grant specific powers relating to foreign affairs to one or more of the political departments, but

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56. 1 B. Schwartz, supra note 54, at 233-34.
57. See note 40 supra.
58. Revival of the foreign commerce clause would also foster the establishment of a federal common law standard for foreign commerce litigation involving private international law. See Note, supra note 2, at 656-60 (1976).
59. For scholarly examinations of the foreign affairs power, see 2 B. Schwartz, supra note 54, at 210 (1963); The Federalist Nos. 3-5 (J. Jay), 42 (J. Madison), 80 (A. Hamilton).
60. For example, U.S. Const. art. I, § 8, cl. 10 grants Congress the power "[t]o define and punish . . . Offences against the Law of Nations"; U.S. Const. art. II, § 2, cl. 2 grants the
"the organic provisions delegating such specific powers fall far short of covering comprehensively the whole field of foreign affairs." In *United States v. Curtiss-Wright Export Corp.*, Justice Sutherland, writing for a majority of the Supreme Court, took the position that the power of the federal government to conduct external relations does not depend upon any affirmative grant in the Constitution. Rather, he reasoned, the foreign affairs power vests in the federal government as a necessary concomitant of nationality.

Legal scholars have vigorously attacked Justice Sutherland's opinion in *Curtiss-Wright*, and the Supreme Court has itself occasionally rejected broad interpretations of the foreign relations power. Yet the California Court of Appeals in *Bethlehem Steel Corp. v. Board of Commissioners* relied heavily on *Curtiss-Wright* in holding that California's Buy American Act was unconstitutional. According to the court, the Act constituted an impermissible interference with and "usurpation . . . of the power of the federal government to conduct foreign trade policy." *Bethlehem Steel* exemplifies the sort of unjustifiably broad holding that is likely to result when a court applies the *Curtiss-Wright* doctrine in order to achieve a favorable result. The delicate balance between state and federal power in a federal system clearly requires a more sensitive evaluation of issues bearing on U.S. foreign trade relations than can be made by invocation of the "exclusive" foreign affairs powers of the federal government. The best alternative to the approach followed by the *Bethlehem Steel* court is to divide interstate commerce analysis from foreign commerce analysis and to continue to apply the balancing test in foreign commerce analysis. To do so would provide a basis upon which courts presented with cases such as *Bethlehem Steel* could rest their decisions without having to resort to discredited constitutional doctrines.

President the power "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," and to "appoint Ambassadors [and] other public Ministers and Consuls."

61. 2 B. SCHWARTZ, supra note 54, at 96.
63. Id. at 317.
67. Id. at 225, 80 Cal. Rptr. at 803.
2. Preemption

As an alternative to the partitioning of foreign commerce analysis from interstate commerce analysis, courts could continue to apply a single commerce clause test to both foreign and interstate cases, but resort to preemption analysis whenever state action in the foreign commerce context threatens the integrity of the federal government more than state action in the interstate context. Congress has legislated extensively in the field of foreign trade, and no court would require great imagination to perceive actual or potential conflict between a state law that affects foreign commerce and a federal statutory scheme regulating the same subject. Yet this method of recognizing differences between cases involving foreign commerce and those concerning interstate commerce is not a desirable alternative to development of an independent body of law interpreting the commerce clause power over foreign commerce.

The preemption doctrine is rooted in the supremacy clause of the Constitution. It is less a doctrine, however, than a loose aggregation of disparate tests that were developed in widely varying fact situations and are replete with interpretational difficulties. Commentators have found that courts which purport to apply preemption analysis are often "in actuality implementing constitutional principles external to the supremacy clause . . . ." If the court rationalizes its decisions on the basis of preemption analysis "when it is actually motivated by other constitutional considerations, the Court can only earn the disrespect of the legal profession and the public." Moreover, courts should apply preemption analysis only after making an initial determination that uniformity of regulation, i.e., federal


70. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

71. For differing attempts to categorize the preemption tests applied by the courts, compare Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism, 60 HARV. L. REV. 262 (1946) with Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208 (1959). The above-mentioned notes also deal with many of the interpretational problems faced by the courts. Examples of these problems are: What constitutes "conflict"? To what sources does the court look for indications of congressional intent? What is "subject matter"? See also Note, Pre-emption and the Commerce Clause Revisited: The 1975 Washington Tanker Law, 17 NAT. RESOURCES J. 691 (1977).


73. Id. at 224.
In foreign commerce cases, however, the very point in issue is whether uniformity is required, since foreign commerce necessarily involves the relationship of the United States as a nation with other countries. Furthermore, the courts must frequently act as interpreters of congressional intent when applying preemption analysis. Yet when Congress has expressed no view whether uniformity of regulation is required in a particular area, the courts are placed in the difficult position of making Congress speak when it manifestly has not spoken. The result is a fiction that may produce results embarrassing to the courts. Development of a body of case law in which the courts openly and candidly weigh the federal interest in maintaining uniform foreign trade regulation against legitimate local interests would eliminate many of the problems of categorization and interpretation inherent in preemption analysis and would promote less obfuscatory analysis of important national issues.

C. Drawbacks of the Proposal

Such an approach is admittedly not without problems, the most important of which is to reconcile foreign commerce holdings with interstate commerce holdings when both touch on different aspects of the same subject. In *K.S.B. Technical Sales*, for example, the court seemed troubled by the prospect of striking down a Buy American statute when the United States Supreme Court, in *American Yearbook Co. v. Askew*, had summarily affirmed a district court decision upholding a similar Buy Local statute. In *American Yearbook*, the plaintiff company, whose printing presses were located outside Florida, attacked the validity of a Florida statute that restricted public contract printing job awards to the lowest responsible bidder.
who would do the printing within the state. The district court upheld the Florida statute in the face of the plaintiff's commerce clause argument, and the United States Supreme Court summarily affirmed.

To support its decision in *K.S.B. Technical Sales*, the New Jersey Supreme Court cited the need to make the outcome of that case consistent with *American Yearbook*:

"It would be odd indeed to find that when a state becomes less parochial and chooses in its own purchases to prefer the products of the nation, as opposed to those of the state, its purpose becomes suspect under the Commerce Clause."

This argument at first seems convincing, since a statute that requires a state agency to purchase only products made within the state precludes the purchase both of goods made in other states and of goods made in other nations. The effects of the Buy Local and Buy American statutes are different, however. The Buy Local statute will in nearly all instances have a lesser impact on foreign commerce than a Buy American statute because the latter type of statute makes the entire nation, rather than a single state, the primary market from which goods must be purchased. American products are likely to be "reasonably available" more often than products from, for example, Oklahoma, California, or New Jersey. As a result, a statute authorizing a state to purchase foreign goods only when they are not reasonably available in the United States will effectively preclude foreign competitors from making bids except under the most unusual circumstances. Under a Buy Local statute, by contrast, foreign competitors are free to bid against out-of-state competitors if goods are not available in the enacting state.

This quantitative difference in the effect on foreign commerce of Buy Local and Buy American statutes is thus a major distinction between the two types of measures. Many Buy Local statutes are also distinguishable from Buy American statutes because the Buy Local provisions frequently refer only to a particular interest. The Florida statute in *American Yearbook*, which pertained only to printing contracts, is illustrative of this pat-

79. FLA. STAT. ANN. §§ 283.01, 283.03 (West 1975).
81. Nearly all state Buy Local statutes give preference to goods manufactured or produced within the state only if they are available in marketable quantities or are of the same price and quality as goods available abroad. See note 11 supra. For example, N.J. STAT. ANN. § 52:33-2 (West 1955) gives a preference to domestic materials only if available "in commercial quantities . . . of a satisfactory quality." The use of the term "reasonably available" is meant here to embrace all the varying provisos attached to Buy Local and Buy American statutes.
tern. By contrast, the New Jersey statute, like Buy American statutes of other states, disfavors all foreign-made goods. These two distinctions make the New Jersey court’s reluctance to strike down a Buy American statute in light of the *American Yearbook* holding unfounded. In similar situations, the courts should simply weigh the applicable foreign commerce considerations against the possibility of producing anomalous results before rendering a decision.

**CONCLUSION**

The importance of the New Jersey Supreme Court’s decision in *K.S.B. Technical Sales v. North Jersey District Water Supply Commission* may ultimately lie not in its determination that the New Jersey Buy American statute is constitutional, but rather in its implications for analysis of future foreign commerce cases. By mechanically applying the holding of *Hughes v. Alexandria Scrap Corp.*, an interstate commerce case, to the facts of *K.S.B. Technical Sales*, the New Jersey court in effect expanded the area of immune state action created by the United States Supreme Court in *Alexandria Scrap* to include actions affecting foreign commerce.

The recent trend in United States Supreme Court decisions favoring expansion of state power and the Court’s recent invocation of the long-latent tenth amendment indicate a judicial impulse toward its pre-*Jones & Laughlin* stance. If this trend continues, the Court should consider treating foreign commerce cases not as mutations of interstate commerce cases, but rather as separate and distinct entities. This would allow continued application of the traditional commerce clause balancing test in foreign commerce cases such as *K.S.B. Technical Sales*, while enabling the Court to formulate tests in the interstate context that tend to favor state power.

*J. Allen Miller*