Constitutional Law - State Buy American Statute Held a Valid Exercise in Economic Protectionism

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CONSTITUTIONAL LAW—STATE “BUY AMERICAN” STATUTE HELD A VALID EXERCISE IN ECONOMIC PROTECTIONISM.

Trojan Technologies, Inc. v. Pennsylvania (1990)

I. Introduction

Many states have responded to the burgeoning trade deficit, the increasing rate of unemployment, and the persistent threat of economic recession by enacting protectionist procurement legislation. These protectionist provisions, commonly referred to as “Buy American” statutes, are designed to indirectly promote domestically produced goods—and thereby the American economy—by imposing restrictions on the

1. The tendency to employ protectionist measures in times of economic distress has been widely documented. See J. KLINE, STATE GOVERNMENT INFLUENCE IN U.S. INTERNATIONAL ECONOMIC POLICY 87 (1983) (addressing expanded use of trade-restrictive actions in response to increased import penetration of domestic markets); H. MILNER, RESISTING PROTECTIONISM 5 (1988) (noting that economic distress and instability are key indicators of increased protectionist activity); Kentworthy, The Constitutionality of State Buy-American Laws, 50 UMKC L. REV. 1 (1981) (recognizing use of protectionist provisions in direct response to growing problems of economic recession, unemployment and fear of increased penetration of domestic markets by foreign firms).

To date, at least 28 states have enacted some form of Buy American legislation. Note, United States and Japanese Government Procurement: The Impact on Trade Relations, 62 WASH. U. L.Q. 127, 140 n.65 (1984); see, e.g., ALA. CODE §§ 39-3-1 to 39-3-4 (1975 & Supp. 1990) (requiring all firms undertaking public works projects to “agree[] to use ... [only] materials, supplies, and products manufactured, mined, processed or otherwise produced in the United States”); ILL. REV. STAT. ch. 48, paras. 1801-1807 (1986) (mandating that “[e]ach contract for ... public works ... contain a provision that steel products used or supplied in performance of that contract ... [be] manufactured or produced in the United States”); IND. CODE ANN. §§ 5-16-8-1 to 5-16-8-5 (West 1989) (requiring acceptance only of bids using domestic steel products unless bid is 15% greater than foreign counterpart); Md. STATE FIN. & PROC. CODE ANN. §§ 17-301 to 17-306 (1988 & Supp. 1990) (directing that only American steel products be used in performance of public works contracts); N.Y. STATE FIN. LAW § 146 (McKinney 1989) (requiring that only steel items “made in whole or substantial part in the United States” be used in public works contracts); Pa. STAT. ANN. tit. 73, §§ 1881-1887 (Purdon Supp. 1990) (mandating that only domestically produced steel be used in public works contracts); W. VA. CODE §§ 5-19-1 to 5-19-4 (1990) (requiring all aluminum, glass, or steel products used in public works contracts be domestically produced).

The federal government has accorded similar preference to domestic producers in federal purchasing decisions since 1933. 41 U.S.C. §§ 10a-d (1988) (directing that “only such ... articles, materials, and supplies as have been mined or produced in the United States ... be acquired for public use”). But see Paton, Buy America Becomes Rallying Point for Firms, WASH. BUS. J., Dec. 4, 1989, at 11 (noting widespread purchase of foreign products in national defense projects despite directives of Buy American Act of 1933 and belief that this abuse “hurts U.S. manufacturers and leaves the U.S. overly dependent on foreign technology”).

(905)
procurement of foreign products when goods are purchased by or for the enacting state.2

In Trojan Technologies, Inc. v. Pennsylvania,3 the United States Court of Appeals for the Third Circuit evaluated the constitutionality of Pennsylvania’s Buy American provision.4 The statute at issue, the Pennsylvania Steel Products Procurement Act,5 requires all steel products purchased by any public agency engaged in a public works contract to be domestically produced.6 According to the Trojan Technologies court, the Act is not unconstitutional but rather represents a valid exercise in economic protectionism.7

The Third Circuit's opinion in Trojan Technologies definitively established the constitutional standards to be applied by courts in the Third Circuit when evaluating the validity of sub-national protective procurement legislation.8 Additionally, the court’s commerce clause analysis,

2. See Kentworthy, supra note 1, at 1-2 (addressing belief that protectionist legislation benefits domestic industry and its workers by increasing demand for domestically produced goods beyond what would normally occur); see, e.g., Pa. Stat. Ann. tit. 73, § 1883 (Purdon Supp. 1990) (noting that “Buy American” requirement is designed to “aid and promote the development of the steel industry of the United States”).
4. Id.
6. Pa. Stat. Ann. tit. 73, §§ 1881-1887. Pertinent definitions under this statute include:

   "Steel products." Products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed . . . from steel made in the United States . . . ."

   "'Public Agency.'"

(1) the Commonwealth and its departments, boards, commissions, and agencies;
(2) counties, cities, boroughs, townships, school districts, and any other governmental unit or district;
(3) the State Public School Building Authority, the State Highway and Bridge Authority, and any other authority now in existence or hereafter created or organized by the Commonwealth;
(4) all municipal or school or other authorities now in existence or hereafter created or organized by any county, city, borough, township or school district or combination thereof; and
(5) any and all other public bodies, authorities, officers, agencies or instrumentalities, whether exercising a governmental or proprietary function.

   "'Public Works.' Any structure, building, highway, waterway, street, bridge, transit system, airport or other betterment, work or improvement whether of a permanent or temporary nature and whether for governmental or proprietary use.” Id. § 1886.
7. Trojan Technologies, 916 F.2d at 905.
8. For a complete discussion of the constitutional standards applied by the Third Circuit in Trojan Technologies, see infra notes 20-53 and accompanying text. For an analysis of the Third Circuit’s application of these standards, see infra notes 60-90 and accompanying text.
specifically its market participant discussion, established the bright-line rule that local government units are mere subdivisions of the state. As such, the court concluded that a state can assert market participant status regardless of whether its participation in the marketplace occurs through central state agencies or through local governmental units.

This casebrief submits that while most of the Third Circuit's analysis provides useful guidance to courts in the Third Circuit, it's market participant analysis may have improperly established a bright-line rule where a more case-specific approach appears warranted.

II. Facts and Procedural History

On March 3, 1978, Pennsylvania enacted the Pennsylvania Steel Products Procurement Act (the Act). The Act requires all suppliers contracting with any public agency involved in a public works project to utilize only steel products comprised of American-made steel. Appellant Trojan Technologies, Inc. (Trojan), a Canadian corporation, produces a UV-2000 light water-disinfection system. The system uses steel components in its frame and its control box, and it is therefore considered a "steel product" under the Act. Moreover, several Pennsylvania municipalities purchased the system for installation in wastewater and sewage treatment facilities, and the Act therefore requires

9. Trojan Technologies, 916 F.2d at 911. According to the Trojan Technologies court, there is "no compelling analytical difference between a local government unit and central state agencies." Id.

10. Id. The market participant exception to the commerce clause is of particular importance in this setting since it allows the enacting state to avoid a commerce clause challenge altogether. See Coenen, Untangling the Market-Participant Exemption to the Dormant Commerce Clause, 88 Mich. L. Rev. 995 (1989). For a more complete discussion of the Third Circuit's market participant analysis, see infra notes 27-39 and accompanying text.


12. Pa. Stat. Ann. tit. 73, §§ 1884-1886. The Act considers a product to be comprised of domestic steel "only if at least 75% of the cost of the articles, materials and supplies [contained in the product] have been mined, produced or manufactured . . . in the United States." Id. § 1886.

13. Trojan Technologies, 916 F.2d at 905. The UV-2000 system is designed for use in industry, potable water plants, and residences. Id.

14. Id. The UV-2000 contains between four and eight ultraviolet lamps. Id. These lamps are located within a UV Module, which, in turn, is encased within a stainless steel frame. Id. In addition, the control box, which monitors the UV-2000's operations, is composed entirely of stainless steel. Id.

Although these steel components constitute less than 15% of the system's total cost, the system is nonetheless considered a "steel product" because the statutory definition of steel product expressly includes machinery and equipment listed in United States Department of Commerce Standard Industrial Classification 35, and sewage purification equipment is a classification included within this category. Trojan Technologies, Inc. v. Pennsylvania, 742 F. Supp. 900, 904-05 (M.D. Pa. 1990).
that all steel utilized in the system be American-made.\textsuperscript{15}

On July 11, 1988, the Pennsylvania Attorney General's Office requested documentation from Trojan confirming that the UV-2000 complied with the Act.\textsuperscript{16} Before providing the requested documentation, Trojan and its exclusive distributor in Pennsylvania, Kappe Associates, Inc. (Kappe), filed suit in the United States District Court for the Eastern District of Pennsylvania challenging the validity of the Act and seeking an injunction to prevent its enforcement.\textsuperscript{17} After a motion by defendants, the case was transferred to the Middle District of Pennsylvania where, on cross motions for summary judgment, the court found the Act constitutional and denied the plaintiffs' request for injunctive and declaratory relief.\textsuperscript{18} Trojan and Kappe appealed this decision to the United States Court of Appeals for the Third Circuit.\textsuperscript{19}

III. DISCUSSION

On appeal to the Third Circuit, Trojan and Kappe challenged the constitutionality of the Act on five different grounds. Appellants contended that (1) the Act is preempted by various statutes and agreements which govern foreign commerce,\textsuperscript{20} (2) application of the Act violates the

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\item \textbf{Trojan Technologies}, 916 F.2d at 905. Pennsylvania municipalities are explicitly included within the statute's definition of public agency. PA. STAT. ANN. tit. 73, § 1886. Furthermore, the statute's expansive definition of public works clearly includes the maintenance of waste-water and sewage treatment facilities since these facilities at the very least constitute an improvement of a temporary nature for governmental use. \textit{Id.}
\item \textbf{Trojan Technologies}, 916 F.2d at 905. In addition to requesting documentation from Trojan, the Pennsylvania Attorney General's Office also requested information from the municipal authorities that had purchased the system confirming their compliance with the Act's requirements. \textit{Id.}
\item \textit{Id.} Because Trojan did not provide the Attorney General with the requested information before beginning suit, there has been no final determination as to whether the statute was violated, nor have any sanctions as yet been imposed. \textit{Id.}
\item \textbf{Trojan Technologies}, 742 F. Supp. at 905. The district court first concluded that the Act does not violate the commerce clause because the "public agencies applying the Act are no more than market participants . . . ." \textit{Id.} at 902. The court next found that since the Act does not "bring Pennsylvania into contact with a foreign government or with foreign affairs," it does not interfere with the federal government's exercise of its foreign affairs power. \textit{Id.} at 903. Finally, the district court determined that the Act is not preempted by any of the asserted statutes or agreements, nor is its language unconstitutionally vague. \textit{Id.} at 903-04.
\item \textbf{Trojan Technologies}, 916 F.2d 903.
\item \textit{Id.} at 905-09. Article VI of the United States Constitution establishes the supremacy of federal law, the "Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2. According to this provision, if a state law directly conflicts with a legitimate federal law, the state law must be invalidated to preserve "federal supremacy." \textit{See} L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479-81 (2d ed. 1988) (noting that "[c]ourts assess the validity of state regulation in independent constitutional terms only when Congress has not chosen to act").
\end{itemize}
foreign commerce clause, the Act impermissibly impedes the federal government's exercise of the foreign relations power, the Act is unconstitutionally vague and application of the Act violates the equal protection clause.

A. Preemption

In analyzing appellants' contentions, the Third Circuit first examined whether the Act is preempted by any federal statutes or trade agreements. According to the Trojan Technologies court, the Act is not


22. Trojan Technologies, 916 F.2d at 913-14. Article I, section 10 of the United States Constitution mandates that "[n]o State shall enter into any Treaty, Alliance, or Confederation . . . ." U.S. Const. art. I, § 10. This section further provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ." U.S. Const. art. I, § 10. These directives embody the general constitutional principle that all foreign policy is formulated and administered at the national level, rather than being delegated to the individual states. L. Tribe, supra note 20, § 4-6, at 230. For a complete discussion of the Third Circuit's foreign affairs analysis, see infra notes 40-45 and accompanying text.

23. Trojan Technologies, 916 F.2d at 914-15. In the context of state law, the vagueness doctrine arises by implication from the fourteenth amendment of the United States Constitution. According to that provision, "[n]o State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Because due process requires "that persons be given fair notice of what to avoid, and that the discretion of law enforcement officials . . . be limited by explicit legislative standards," an indefinite or vague provision "runs afoul of . . . [this] concept" and therefore should be found void. L. Tribe, supra note 20, § 12-31, at 1038. For a discussion of the vagueness doctrine and how the Third Circuit applied it to state Buy American legislation, see infra notes 46-50 and accompanying text.

24. Trojan Technologies, 916 F.2d at 915. The equal protection clause of the United States Constitution directs that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1. For a complete discussion of the Third Circuit's equal protection analysis, see infra notes 51-53 and accompanying text.

25. Trojan Technologies, 916 F.2d at 906. For a list of the five statutes and agreements asserted by appellants as preempting Pennsylvania's Buy American provision, see supra note 20.
preempted by federal law because none of the asserted agreements or statutes "constitutes a comprehensive scheme so pervasive that it must exclude all state action with respect to foreign steel nor are they otherwise sufficient to support an inference of Congressional intent to preempt state buy-American legislation."²⁶

Appellants contended that each of the cited enactments alone creates an inference of congressional intent to preempt. Trojan Technologies, 916 F.2d at 906. Additionally, appellants asserted that consideration of the agreements "in toto" reveals an effort by Congress to establish a comprehensive scheme which forecloses the possibility of "supplemental state activity." Id.

In Schneidewind v. ANR Pipeline Co., the Supreme Court developed a framework for use in determining whether federal law preempts state legislation. 485 U.S. 293, 299-300 (1988). The Schneidewind Court held that state legislation is proscribed if one of three conditions is satisfied: (1) Congress explicitly occupies the regulatory field at issue; (2) Congress completely, although not explicitly, occupies the entire field of regulation, leaving no opportunity for the imposition of supplemental state law; or (3) compliance with both the state and the federal law is not possible. Id.

The Third Circuit adopted this framework in Trojan Technologies. Trojan Technologies, 916 F.2d at 906. Moreover, the Trojan Technologies court concluded that if the allegedly preempted field is considered a traditional function of the state, then the congressional intent to preempt must be clear and manifest. Id. (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). According to the Third Circuit, state procurement policy is such a field. Id.

²⁶ Id. at 909. In undertaking its preemption analysis, the Trojan Technologies court first addressed the scope of the United States-Canada Free Trade Agreement. Id. at 906-08. According to the Third Circuit, this agreement committed both the United States and Canada "to actively strive to achieve, as quickly as possible, multilateral liberalization of international government procurement policies." Id. at 906 (quoting Free Trade Agreement, Jan. 2, 1988, United States-Canada, art. 1301, 27 I.L.M. 281). The court declined to find preemption, however, because it found the agreement's language "hortatory rather than mandatory." Id. In fact, the court continued, "rather than explicitly preempting state buy-American statutes, the Agreement seems tacitly to acknowledge and permit them... [because] [t]he Annex... specifies fifty-four federal agencies for coverage [and] [i]mplicit in this specific designation omitting the states is Congress' acquiescence in, if not endorsement of, state buy-American statutes." Id. at 907. The Trojan Technologies court also noted that the Agreement concerns fair trade, as opposed to free trade. Id. In concluding that this emphasis on fair trade negates a finding of preemption, the court explained that achieving United States-Canadian reciprocity in sub-national government procurement may require more than national legislation. While it is clear that, on the United States' side, Congress would have authority to act preemptively in this area as an exercise of its power over foreign commerce, it is not at all clear that the Canadian Parliament has [such preemptive] authority.

Id. at 907 n.6.


The Trojan Technologies court next addressed the Agreement on Government Procurement, explaining that, although it contained language intended to promote equal treatment of both foreign and domestic products and suppliers, it
B. The Foreign Commerce Clause

The Third Circuit next considered whether application of the Act can withstand a commerce clause challenge. Of particular importance in the court's analysis was the threshold inquiry of whether Pennsylvania was acting as a market participant when it enforced the provisions of the Act in purchases by local governmental units. The Trojan Technologies court began its market participant analysis by examining the Seventh Circuit's opinion in *W.C.M. Window Co. v. Bernardi.* In *Window,* the Seventh Circuit held that for purposes of the market participant exception to the commerce clause, a municipality does not represent a mere exten-

...too purports to include only federal agencies within its scope. *Trojan Technologies,* 916 F.2d at 908. According to the court, the exemption accorded state agencies is especially evident because a provision in the Agreement explicitly requires the national government to attempt to persuade local governments as to the advantages of free trade. *Id.* For a discussion of the Agreement on Government Procurement, see generally Note, *supra* note 1, at 150-60.

Additionally, the *Trojan Technologies* court evaluated whether the Steel Import Stabilization Act preempted Pennsylvania's Buy American provision. *Trojan Technologies,* 916 F.2d at 908. In declining to find preemption, the court noted that this provision merely "establishes a mechanism for imposing quantitative limits on United States' steel imports. It does not, however, include regulations of price, quality or other terms of trade that if present would indicate comprehensive regulation." *Id.*

Similarly, the *Trojan Technologies* court concluded that both the Trade Act of 1974 and the Trade Agreements Act of 1979 contain language too general to indicate "comprehensive regulation." *Id.* at 908-09. The court determined that, at most, the agreements suggest that Congress was aware of state activities influencing foreign commerce and that it nonetheless chose to restrict itself to only "persuasive appeals rather than mandatory preemption." *Id.* at 909. For a more detailed discussion of the Trade Act of 1974, see generally V. Canto, *The Determinants and Consequences of Trade Restrictions in the U.S. Economy* 7-9 (1986). For a more detailed discussion of the Trade Agreements Act of 1979, see generally P. Ehrenhaft & C. Meriwether, *The Trade Agreements Act of 1979: Small Aid for Trade?*, 58 Tul. L. Rev. 1107 (1984).

27. *Trojan Technologies,* 916 F.2d at 909-13. The court's commerce clause analysis involved an examination of two separate issues. *Id.* First, the court evaluated whether Pennsylvania was entitled to market participant protection. *Id.* at 910-11. Second, the court examined whether the foreign origin of the restricted products should affect the outcome of its commerce clause analysis. *Id.* at 912.

28. *Id.* at 910. A state enacting Buy American legislation can avoid a commerce clause attack altogether if it can successfully bring its activities within the market participant exception; therefore, the extent of direct participation in the marketplace required before the state can qualify for this exception is an essential inquiry. *See generally* Coenen, *supra* note 10.

Appellants Trojan and Kappe asserted that market participant status was not available to Pennsylvania because the state was not the actual purchaser of the UV-2000 disinfection system; the purchases were instead consummated by local governmental units. *Trojan Technologies,* 916 F.2d at 910. The appellants contended that these local governmental units were separate and distinct from the state and that any control exercised by the state over their purchases was therefore an act of market regulation rather than market participation. *Id.*

29. 730 F.2d 486 (7th Cir. 1984).
sion of the state, but is rather a separate and distinct entity.\textsuperscript{30} The Third Circuit rejected the Court's distinction and instead concluded that because under Pennsylvania law local governmental units/municipalities "exist only by grace of state authority and with such powers as the state affirmatively provides," the state must also have the ability to impose restrictions on the powers of these local bodies.\textsuperscript{31}

In reaching this conclusion, the 	extit{Trojan Technologies} court purported to adhere to the Supreme Court's holding in 	extit{White v. Massachusetts Council of Construction Employers, Inc.}\textsuperscript{92} In 	extit{White}, the Court upheld a directive by the City of Boston mandating that all city and federally funded construction projects be completed by a work force comprised of at least fifty percent Boston residents.\textsuperscript{33} In so holding, the Court found it inconsequential that the order effectively controlled contracts to which the city itself is not a party, namely employment contracts between private contractors and their employees.\textsuperscript{34} Analogizing the factual scenario in

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\item \textsuperscript{30} 	extit{Id.} at 495-96. In so holding, the Seventh Circuit invalidated an Illinois statute that required all public works contractors to hire only Illinois-resident employees. \textit{Id.} at 496. The court noted that the state's preference law would have survived a commerce clause challenge if its application had been limited solely to construction projects in which the state participated either administratively or financially. \textit{Id.} at 495. The statute applied, however, to "every public construction contract in Illinois, even if the purchaser is a local school board, or for that matter the local dog catcher," and the court therefore concluded that market participant status was unavailable. \textit{Id.} at 495-96.

The Seventh Circuit acknowledged that for many purposes local governmental units are divisions of the state, but it nonetheless concluded that for commerce clause analysis there is both an analytical and a quantitative difference between a state mandating activity by a state agency and a state requiring the same activity of local governmental units. \textit{Id.} at 496. According to the court, the analytical difference results from the general lack of state supervision and/or funding in the majority of local public works projects. \textit{Id.} Explaining the quantitative difference, the court noted that because a large percentage of public contracting occurs at the local level, to extend market participant protection to cover all participation by the state, whether through its own agencies or through local governmental units, "could do great damage to the principles of free trade on which the negative commerce clause is based." \textit{Id.}

\item \textsuperscript{31} 	extit{Trojan Technologies}, 916 F.2d at 911. The Third Circuit rejected the Court's analytical distinction between central state agencies and local governmental units. \textit{Id.} According to the court, because "[b]oth exist only through affirmative acts of the state . . . [there is] no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of [these] bodies." \textit{Id.} Additionally, the 	extit{Trojan Technologies} court declined to adopt the Court's quantitative distinction. \textit{Id.} In its opinion, although local municipalities may conduct more public contracting than central state agencies, this fact alone should not impair a public entity's ability to claim market participant protection because "[t]o accept [such an] argument would suggest the curious result that identical legislation adopted by small and large states might suffer different constitutional fates." \textit{Id.}

\item \textsuperscript{32} 460 U.S. 204 (1983).

\item \textsuperscript{33} \textit{Id.} at 205 n.1.

\item \textsuperscript{34} \textit{Id.} at 211 n.7. To the extent the Mayor's executive order purported to restrict only "a discrete, identifiable class of economic activity in which the city [was] a major participant," the City's restrictions were held permissible under the
White to the facts in Trojan Technologies, the Third Circuit deduced that 
"[i]f employees of a private contractor can be thought to be in relation-
ship with the city, we think it equally clear that suppliers of a local public 
entity can be thought to be ‘supplying for the state.’" 35

After determining that Pennsylvania qualified for market participant 
status, the Trojan Technologies court then considered whether the fact that 
the excluded products were of foreign origin should affect the outcome 
of its commerce clause analysis. 36 While recognizing that statutes which 
affect foreign commerce are "subject to a more rigorous and searching 
review," 37 the court nonetheless concluded that the Act can withstand 
this heightened scrutiny since it (1) does not create any danger of multi-
taxation 38 and (2) does not require an accommodation of "conflict-
ing policy among multiple national sovereigns." 39

market participant exception to the commerce clause. Id. (emphasis added). 
According to the Court, the city was a "major participant" in the public 
contracts at issue because it "expend[ed] its own funds in entering into [the] 
contracts . . . ." Id. at 214-15.

Although the executive order also purported to restrict projects financed 
with federal funds, these particular restrictions were justified without recourse 
to the market participant exception because they were specifically directed by 
Congress. Id. at 213. Moreover, no dormant commerce clause issue existed for 
the federal funding since "Congress, unlike a state legislature . . . , is not limited by 
any negative implications of the Commerce Clause in the exercise of its spend-
ing power." Id. at 213.

35. Trojan Technologies, 916 F.2d at 911.
36. Id. at 912. Because the products being proscribed by the Act are of 
foreign origin, appellants contended that application of the Act unconstitu-
tionally impairs Congress' ability to regulate foreign commerce. Id.
37. Id. (citing Reeves, Inc. v. Stake, 447 U.S. 429, 437 n.9 (1980)). The 
Reeves Court recognized that "Commerce Clause scrutiny may well be more rig-
orous when a restraint on foreign commerce is alleged." Reeves, 447 U.S. at 437 
n.9 (citing Japan Line, Ltd. v. City of Los Angeles, 441 U.S. 434 (1979)).

In Japan Line, the Supreme Court addressed the issue of whether a state may 
constitutionally impose a "nondiscriminatory ad valorem property tax on for-
eign-owned instrumentalities (cargo containers) of international commerce." 
Japan Line, 441 U.S. at 435-36. In striking down the tax as a violation of the 
foreign commerce clause, the Court noted that imposition of the tax would 
result in multiple taxation and would contradict federal policy already in exist-
ence. Id. at 451-54. According to the Court, possible impairment of federal uniformity 
was especially evident since "American-owned containers are not taxed in Japan 
[and] [t]he risk of retaliation by Japan . . . is [therefore] acute, and . . . [will] be 
felt by the Nation as a whole." Id. at 458.

Relying on the Supreme Court's opinion in Japan Line, the Trojan Technologies 
court surmised that this "more rigorous and searching scrutiny" is satisfied if the 
state statute (1) does not create a danger of multiple taxation and (2) does not 
interfere with federal uniformity in an area where such uniformity is essential. 
Trojan Technologies, 916 F.2d at 912 (citing Japan Line, 441 U.S. at 446-48).

38. Trojan Technologies, 916 F.2d at 912. The Trojan Technologies court noted 
that multiple taxation is not a concern implicated by the Act. Id. Clearly, the Act 
does not impose taxes on foreign products; rather, it proscribes the purchase of 
such products altogether. See Pa. STAT. ANN. tit. 73, §§ 1881-1887 (Purdon 

39. Trojan Technologies, 916 F.2d at 912. According to the Third Circuit,
C. The Foreign Affairs Power

The Third Circuit next evaluated whether application of the Act unconstitutionally interferes with the federal government’s exercise of its foreign affairs power.\(^{40}\) Recognizing the well-settled rule that “any state law that involves the state in the actual conduct of foreign affairs is unconstitutional,”\(^{41}\) the Trojan Technologies court noted that an exception exists for state action that only has “some incidental or indirect effect in foreign countries.”\(^{42}\) The court concluded that because the language of the Act precludes the purchasing public agency from focusing its procurement decisions on the ideologies of the foreign government involved,\(^{43}\) the statute does not directly interfere with the foreign relations power of the federal government.\(^{44}\) Furthermore, the court observed state procurement policy is not an area that requires national uniformity. \textit{Id.} Because “Congress is aware of state activity to restrict procurement of foreign goods . . . and yet has not imposed a policy of national uniformity,” the court concluded that state procurement policy “fits comfortably within the Supreme Court’s observation that nothing in ‘the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.’” \textit{Id.} (quoting Wardair Canada, Inc. v. Florida Dep’t of Revenue, 477 U.S. 1, 13 (1985)).

40. \textit{Id.} at 913-14. Appellants contended that “the Act intrudes into foreign policy or international affairs, which is an area within the exclusive control of the federal government.” Trojan Technologies, 742 F. Supp. at 903.

41. Trojan Technologies, 916 F.2d at 913 (citing United States v. Pink, 315 U.S. 203, 233 (1942)). This rule, which was espoused by the Supreme Court in United States v. Pink, derives from the notion that the “formulation and administration of foreign affairs is vested exclusively in the federal government.” \textit{Id.} In Pink, the Court noted:

[T]here are limitations on the sovereignty of the States. 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. \textit{It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees.} Pink, 315 U.S. at 233 (emphasis added).

42. Trojan Technologies, 916 F.2d at 913 (quoting Zschernig v. Miller, 389 U.S. 429, 433 (1968)). The “incidental or indirect effect” exception developed because almost any state action will have some effect, however remote, on foreign nations. These “incidental effects,” however, are not what the foreign affairs power is intended to proscribe. See Clark v. Allen, 331 U.S. 503, 517 (1947) (upholding state statute under foreign affairs analysis since statute only created an “incidental or indirect effect in foreign countries”).

43. Pa. Stat. Ann. tit. 73, § 1884 (Purdon Supp. 1990). Under section 1884 of the Act, “[e]very public agency shall require that every contract document for the construction . . . of public works contain a provision that . . . only [domestically produced] steel products . . . shall be used or supplied . . . .” \textit{Id.} As such, the Act prohibits the purchase of foreign products altogether, regardless of the political philosophy of their source. \textit{Id.}

44. Trojan Technologies, 916 F.2d at 913. In finding no direct impact on the federal government’s exercise of foreign affairs, the Third Circuit compared the Act with the statute at issue in Zschernig v. Miller, 389 U.S. 429 (1968). Trojan Technologies, 916 F.2d at 913. In Zschernig, the Supreme Court reviewed a statute which directed that non-resident aliens could not inherit from the estate of an Oregon resident unless the alien could establish that: (1) his/her government
that “while it is possible that sub-national government procurement restrictions may become a topic of intense international scrutiny, . . . that possibility alone cannot justify this court’s invalidation of [the Act].”

D. The Vagueness Doctrine

The Trojan Technologies court then addressed appellants’ contention that the Act is void for vagueness. The court emphasized that the Act permitted Americans to inherit on the same terms as its citizens, (2) Americans could receive in the United States the funds from foreign estates, and (3) his/her government would not confiscate the proceeds obtained from the Oregon estate. Zschernig, 389 U.S. at 430-31. Because the Oregon statute permitted “minute inquiries” by administrative agencies into the nature of the foreign government involved, the Court invalidated the statute as directly interfering with the effective exercise of foreign policy. Id. at 435.

Unlike the Oregon statute, the Act at issue in Trojan Technologies “applies to steel from any foreign source, without respect to whether the source country might be considered friend or foe.” Trojan Technologies, 916 F.2d at 913. The Third Circuit therefore found the Zschernig Court’s primary concern inapplicable and concluded that the Act does not directly interfere with foreign affairs. Id.

45. Trojan Technologies, 916 F.2d at 913. According to the Third Circuit “[t]his is especially true [since] Congress has recently directed its attention to such restrictions and has taken no steps to preempt them through federal legislation.” Id. at 913-14. Looking to “Congress’ evident concern with achieving freer trade on a reciprocal basis,” the court suggested that “to strike Pennsylvania’s statute would amount to a judicial redirection of established foreign trade policy—a quite inappropriate exercise of the judicial power.” Id. at 914.

46. Id. at 914. The Third Circuit first outlined the controlling vagueness doctrine, as articulated by the Supreme Court in Grayned v. City of Rockford, 408 U.S. 104 (1972). Trojan Technologies, 916 F.2d at 914. The court determined that “a statute should be struck as vague if (1) it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) it fails to provide explicit standards to the enforcing officer.” Id.

The Trojan Technologies court also noted that economic regulation is accorded a more permissive vagueness test. Id. (quoting Village of Hoffman Estate v. Flipside, Hoffman Estate, Inc., 455 U.S. 489, 498-99 (1982)). The rationale behind subjecting such regulation to a more lenient vagueness standard lies in the more narrow nature of the subject matter regulated and in the fact that the “businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.” Id. (quoting Hoffman Estate, 455 U.S. at 498-99). Appellants argued, however, that because the sanctions imposed by the Act are “commercially devastating,” the Act should undergo “relatively strict vagueness review.” Id. The Third Circuit rejected the premise that the sanctions were in fact “commercially devastating,” and therefore accorded the Act “the more deferential standard usually attendant on commercial regulation.” Id.

According to appellants, the Act was unconstitutionally vague on several counts. First, appellants asserted that the Act did not clearly identify how much steel must be contained in the product before it is considered a steel product. Id. Appellants illustrated this point by inquiring whether a “written report on a public project held together with a staple is a ‘steel product’” under the Act, or whether a wooden chair, which is used by a public agency is considered a “steel product” because it is held together by steel nails. Trojan Technologies 742 F. Supp. at 904.

In addition, appellants asserted that the Act failed to provide standards for determining when steel is “United States steel.” Trojan Technologies, 916 F.2d at
would not be found unconstitutionally vague unless appellants were able to establish that the Act is excessively ambiguous as applied to their activity.\textsuperscript{47} Because the UV-2000 disinfection system is clearly included within the statutory definition of steel product, the Third Circuit concluded that the Act’s language is sufficiently explicit to “[giv][e] appellants ample warning that their product is within the Steel Act’s ambit.”\textsuperscript{48} Moreover, the court found that the term “United States steel” is not inherently vague considering the Act’s explicit requirement that the steel used in a steel product be American-made.\textsuperscript{49} According to the court, “the difficulty facing appellants is not that the definition of United States steel is vague but that as a matter of commercial practice it may not always be easy to find steel that satisfies the requirement.”\textsuperscript{50}

E. The Equal Protection Clause

Finally, the Third Circuit considered whether application of the Act violates the equal protection clause.\textsuperscript{51} Relying on the Supreme Court’s

\textsuperscript{47} Trojan Technologies, 916 F.2d at 915. In support of this assertion, the Third Circuit relied upon the Supreme Court’s opinion in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). Trojan Technologies, 916 F.2d at 915. In Hoffman Estates, the Court held that “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” Hoffman Estates, 455 U.S. at 495.

\textsuperscript{48} Trojan Technologies, 916 F.2d at 915. The statutory definition of steel product explicitly includes machinery and equipment listed in the United States Department of Commerce Standard Industrial Classification 35, and sewage purification equipment is a classification included within this category. Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990).

\textsuperscript{49} Trojan Technologies, 916 F.2d at 915. According to the court, Pennsylvania is merely “err[ing] on the side of caution in requiring clear affirmative evidence that [the] steel being used is entirely of United States origin . . . .” Id.

\textsuperscript{50} Id. The court noted that “[i]nability to satisfy a clear but demanding standard is different from inability in the first instance to determine what the standard is.” Id.

\textsuperscript{51} Id. Appellants asserted that the Act “attempt[ed] to protect the United States steel industry by discriminating against foreign competition.” Id. (quoting Appellants’ Brief, at 18). Relying on Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), the appellants contended that “[s]uch purpose . . . is illegitimate under the equal protection clause.” Trojan Technologies, 916 F.2d at 915.

In Metropolitan Life, the Supreme Court invalidated a statute that imposed a significantly lower tax rate on domestic insurance companies than on out-of-state insurance companies. Metropolitan Life, 470 U.S. at 883. According to the Court, the domestic preference tax violated the equal protection clause because it “[gave] the ‘home team’ an advantage by burdening all foreign corporations seeking to do business within the State, no matter what they or their States do.” Id. at 878.
recognition that “the Equal Protection Clause permits economic regulation that distinguishes between groups that are legitimately different—as local institutions so often are,”52 the Third Circuit determined that there was no basis for finding an equal protection violation.53

IV. Analysis

Since the United States Supreme Court has expressly reserved opinion on whether state Buy American legislation is unconstitutional,54 the validity of these protectionist provisions remains an area of great uncertainty.55 Disputes arising from such legislation revolve primarily

52. *Trojan Technologies*, 916 F.2d at 915 (quoting *Northeast Bancorp*, Inc. v. Board of Governors, 472 U.S. 159, 180 (1985) (O’Connor, J., concurring)). In *Northeast Bancorp*, the Supreme Court upheld a state banking act that prohibited a bank holding company in one state from acquiring a bank located in another state unless the other state had provided reciprocal privileges to the first state’s banking organizations. *Northeast Bancorp*, 472 U.S. at 164, 177. Through its equal protection analysis, the Court concluded that banking is an activity of “profound local concern.” *Id.* at 177 (citing *Lewis v. B.T. Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980)). Consequently, the state’s interest in protecting such a “local” industry was found sufficient to successfully defeat an equal protection challenge. *Id.* at 177-78.

53. *Trojan Technologies*, 916 F.2d at 915. In finding no basis for an equal protection violation, the *Trojan Technologies* court implied that the Pennsylvania steel industry is such a “local” industry. *Id.*


In *Bethlehem Steel*, a California appellate court struck down a California Buy American provision which required that all public works contractors use only those products manufactured in the United States. *Id.* at 229, 80 Cal. Rptr. at 806. The court reasoned that “the California Buy American Act is an unconstitutional encroachment upon the federal government’s exclusive power over foreign affairs, and constitutes an undue interference with the United States’ conduct of foreign relations.” *Id.* at 224, 80 Cal. Rptr. at 802.

In contrast, the New Jersey Supreme Court, in *K.S.B. Technical Sales*, upheld the New Jersey Buy American provision at issue, concluding that it did not unconstitutionally interfere with the formulation and administration of foreign affairs. *K.S.B. Technical Sales*, 75 N.J. at 303, 381 A.2d at 789. The provision, which required use of domestically produced goods in government purchase contracts, was held to be a permissible exercise in economic protectionism. *Id.* at 302-03, 381 A.2d at 789. According to the *K.S.B. Technical Sales* court, “the New Jersey Buy American provisions . . . do not impermissibly interfere with the federal government’s conduct of foreign affairs,” nor do they “constitute proscribed state action under the Commerce Clause, at least in the absence of federal legislation.” *Id.* at 303, 381 A.2d at 789 (citations omitted); accord *Delta Chem. Corp.* v. *Ocean County Util. Auth.*, 231 N.J. Super. 180, 554 A.2d 1581 (N.J. Super. Ct. Law Div. 1988) (upholding New Jersey Buy American provision which was different from protectionist provision at issue in *K.S.B.*).

Moreover, although several commentators have addressed the issue, there has not been a consensus of opinion as to either the proper analysis to be ap-
around three constitutional issues: the preemption doctrine, the foreign affairs power and the foreign commerce clause. The Third Circuit's opinion in Trojan Technologies definitively resolved each of these issues by clearly establishing the constitutional standards to be applied by courts when evaluating state Buy American provisions. First, through its preemption analysis, the Trojan Technologies court adopted the position that no currently existing federal law precludes states from enacting preferential procurement policies. Second, through its examination of the foreign affairs power, the court intimated that a state's procurement activities will not intrude on the federal government's "formulation and administration of foreign affairs" provided the activity accords "no opportunity for state administrative officials or judges to comment on . . . the nature of foreign regimes." Finally, the Trojan Technologies court's foreign commerce clause analysis, specifically its discussion of the mar-

plied to these provisions or the correct conclusion to be reached. See Kentworthy, supra note 1, at 20 (analyzing validity of Buy American provision under commerce clause, foreign affairs power, and United States treaty obligations under General Agreement on Tariffs and Trade, and concluding that "a strong argument could be made in support of the validity of . . . state Buy-American laws"); Note, Foreign Commerce and State Power: The Constitutionality of State Buy American Statutes, 12 CORNELL INT'L J. 109, 126 (1979) [hereinafter Note, Foreign Commerce] (concentrating on foreign commerce clause analysis to evaluate state Buy American provisions and concluding that, were correct commerce clause analysis employed, these statutes would probably be found unconstitutional); Note, State Buy-American Laws—Invalidity of State Attempts to Favor American Producers, 64 MINN. L. REV. 389, 412 (1980) [hereinafter Note, State Buy-American Laws] (examining state Buy Americanism under commerce clause and foreign affairs power, and postulating that either theory provides "independent grounds for invalidating state buy-American preferences").

56. See Bethlehem Steel, 272 Cal. App. 2d 221, 80 Cal. Rptr. 800 (evaluating state Buy American legislation under preemption doctrine and foreign affairs power); K.S.B. Technical Sales, 75 N.J. 272, 381 A.2d 774 (evaluating state Buy American provision under preemption doctrine, foreign affairs power and commerce clause); J. KLINE, supra, note 1, at 89-90 (noting that litigation over constitutionality of state Buy American provision usually involves preemption doctrine, foreign commerce clause and foreign affairs powers); Kentworthy, supra note 1, at 8 (recognizing that state Buy American provisions are often attacked as violating preemption doctrine, foreign commerce clause and foreign affairs power).

It should be noted that since the vagueness and equal protection analyses are statute specific, these issues have not uniformly arisen in the context of Buy American litigation. This casebrief will therefore limit its analysis to an evaluation of the validity of state Buy American provisions under the preemption doctrine, the foreign affairs power and the foreign commerce clause.

57. Trojan Technologies, 916 F.2d at 909. According to the Third Circuit, the current federal policy reflects an "explicit negotiating strategy" that permits state legislation, pending the reciprocity of foreign governments. Id. Moreover, the court concluded that while the federal government has the authority to find state Buy American legislation "antithetic to the national interest," it has yet to exercise this authority. Id.

58. Id. at 913. After reviewing the Supreme Court's foreign affairs analysis in Zschernig, the Third Circuit concluded that a state statute that applies even-handedly to all foreign products will not have the direct impact on foreign affairs

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ket participant exception, established the bright-line rule that, for purposes of a commerce clause analysis, a local governmental unit is a mere extension of the state.\textsuperscript{59} As such, the state can maintain its market participant status regardless of whether purchases are consummated by a central state agency or a local governmental unit.

A. Preemption

According to the Third Circuit, "Congressional intent to preempt [a state's procurement policy] must be 'clear and manifest.'"\textsuperscript{60} After examining federal policy as reflected in the agreements and statutes at issue, the Trojan Technologies court concluded that a state's ability to enact Buy American legislation remains "unadulterated."\textsuperscript{61}

Commentators have attacked this position as being inconsistent with the tenet that federal trade agreements and statutes represent "the supreme law of the land."\textsuperscript{62} However, a review of the agreements, as well as an examination of the underlying federal policy reveals an acquiescence to, if not an acceptance of, the ability of states to enact restrictive trade provisions. First, none of the asserted agreements purports to include state governments within its ambit.\textsuperscript{63} As such, it would seem which concerned the Zschernig Court. \textit{Id.} For a discussion of the holding in Zschernig, see infra notes 72-78 and accompanying text.

\textsuperscript{59} Trojan Technologies, 916 F.2d at 912. Under Pennsylvania law, local governmental units "exist only by grace of state authority," and the Trojan Technologies court therefore concluded that these local bodies are analogous to central state agencies. \textit{Id.} at 911-12.

\textsuperscript{60} \textit{Id.} at 906 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). Whenever an allegedly preempted field is one which "has been traditionally occupied by the States," the congressional intent to preempt must be "clear and manifest." \textit{Id.} (quoting \textit{Jones}, 430 U.S. at 525). Because the Third Circuit found government procurement to be such a field, the court required a showing of clear and manifest intent to preempt. \textit{Id.}

\textsuperscript{61} \textit{Id.} at 909. The Trojan Technologies court noted that although Congress and the Executive have complete authority to preempt state procurement policy, they have yet to exercise that authority. \textit{Id.}

\textsuperscript{62} See Zachary, \textit{Constitutionality of Buy-American Acts Under the Commerce and Supremacy Clauses}, 8 Va. J. Int'l. L. 151, 160 (1967) (noting that although state enactments pertain only to state governmental activity, such provisions still impermissibly restrict the federal government's ability to actively pursue trade agreements and treaties); Note, \textit{State Buy-American Laws}, supra note 55, at 392-99 (noting that General Agreement on Tariff and Trade represents "supreme law of the land" and therefore leaves "little latitude for the operation of state buy-Americanism").

anomalous to find state Buy American provisions preempted simply because they appear to be inconsistent with the general promotion of liberalized world trade. Moreover, the federal government's trade liberalization efforts have recently become focused upon establishing fair trade, as opposed to free trade. By adopting this "reciprocity" approach, the government intimates that federal policy on international trade has not yet reached the point where all trade restrictions must be abandoned. Finally, a federal Buy American provision, which has


64. See R. BALDWIN, TRADE POLICY IN A CHANGING WORLD ECONOMY 216-17 (1988) (recognizing increased emphasis placed on fair trade to ensure "a level playing field" where foreign markets are as open as domestic markets); V. CANTO, supra note 26, at 1 (noting that "the call for 'free' trade has been joined by an admonition to seek 'fair' trade," and that ". . . an increasing number of people have advocated protectionist policies in an effort to create a favorable balance of trade"); Comment, Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government, 81 NW. U.L. REV. (1987) (addressing use of section 301 of Trade Act as vehicle to accomplish fair trade through use of trade reciprocity).

65. See V. CANTO, supra note 26, at 15-17. According to the reciprocity theory, if any nation fails to eradicate domestic barriers to American-made products, the United States will respond by imposing its own "restrictions and/or tariffs on [that nation's] exports to the U.S." Id. at 15-16. This economic rationale suggests a return to the "beggar-thy-neighbor" approach advocated in the early 1930's, since it "requires negotiations with all countries before extension of the U.S. most-favored-nation (minimum) tariff structure." Id. at 16. At least one critic of the reciprocity approach has noted, however, that the "grim experience of the early 1930's [should] amply demonstrate[] that this movement toward [reciprocity, and therefore] protectionism, . . . [may be] self-defeating, impoverishing foreign countries and U.S. citizens alike." Id. at 16.

66. The federal policy of reciprocity would not be furthered by the eradication of all domestic preference provisions since many foreign governments still retain protectionist measures. See V. CANTO, supra note 26, at 15-16. Japan, for example, recently restricted the construction of the foundation of their new International Airport solely to Japanese firms. Blustein, Not Quite Perfect: Japan's New Airport Sinks, Phila. Inquirer, Jan. 5, 1990, at 1-A, col. 3. Some critics have viewed this restriction as reflective of Japan's continued reluctance to open its markets to foreign participation. Id. at 4-A, col. 1; see also N. FIELEKE, THE INTERNATIONAL ECONOMY UNDER STRESS 135 (1988) (noting Japan's implementation of "formidable 'invisible' barriers" in form of "[g]overnment procurement policies, the wholesale and retail distribution systems, the setting of product standards, and the testing of products against these standards").

Additionally, the potential threat of retaliation against the United States for permitting states to enact their own protectionist policies is most likely minimal since many foreign governments have adopted protectionist tendencies in their own purchasing decisions. See Note, State and Local Anti-South Africa Action as an
been in existence since 1933, requires federal agencies purchasing products for use in the United States to expend up to six percent more to obtain domestically produced commodities. The fact that this provision exists and has served as the model for many analogous sub-national procurement provisions further supports the Third Circuit's conclusion that state Buy American provisions are not inconsistent with federal policy on international trade.

B. The Foreign Affairs Power

As noted by the Trojan Technologies court, any state law which directly involves the state in foreign affairs is unconstitutional. However, because Pennsylvania's Buy American provision applies evenhandedly to all foreign sources, the Third Circuit surmised that application of this provision does not violate the foreign affairs power but rather has only an "incidental or indirect effect in foreign countries."  

Although this position has been criticized as permitting "an embargo on foreign products [which] amounts to a usurpation by [the] state of the power of the federal government to conduct foreign trade policy," a review of Supreme Court opinions which examine the foreign affairs power supports the Third Circuit's holding in Trojan Technologies.

67. 41 U.S.C. §§10a-10d (1988). The federal Buy American Act was enacted to alleviate the economic distress of the Depression and to retaliate against other countries that had enacted their own protectionist measures. See Note, Foreign Commerce, supra note 55, at 110-11. The protectionist provision is still in effect today and governs the purchase of all products "acquired for public use." 41 U.S.C. §§10a-10d. For the statutory language of the federal Buy American provision, see supra note 1.

68. Trojan Technologies, 916 F.2d at 913 (citing United States v. Pink, 315 U.S. 203 (1942)).


70. Trojan Technologies, 916 F.2d at 913 (quoting Zschernig v. Miller, 389 U.S. 429, 433 (1968)).

71. Bethlehem Steel Corp. v. Board of Comm'rs, 272 Cal. App. 2d 221, 225, 80 Cal. Rptr. 800, 803 (1969). According to the Bethlehem Steel court, state Buy American legislation represents "a particular onus to foreign nations since it may appear to be the product of selfish provincialism, rather than an instrument of justifiable policy." Id. at 228, 80 Cal. Rptr. at 805. Thus, the court continued, this legislation is an "impermissible attempt by the state to structure national foreign policy to conform to its own domestic policies." Id.
ologies. In Zschernig v. Miller, for example, the Supreme Court invalidated an Oregon escheat statute which restricted the ability of foreigners to inherit property from Oregon estates unless the foreign nation provided reciprocal rights to Oregon residents. In striking down the statute, the Court concluded that the provision represented "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." It is significant, however, that the Zschernig Court did not overrule Clark v. Allen, a case which upheld a California statute almost identical to the statute at issue in Zschernig. In finding the two cases consistent, the Zschernig Court noted that, unlike the statute at issue in Clark, the Oregon statute involved "minute inquiries concerning the actual administration of foreign law . . . [and] the credibility of foreign diplomatic statements . . . ." As such, it would appear that the Supreme Court's primary concern in the foreign affairs arena focuses upon whether or not the state statute at issue permits "minute inquiries" into the nature of foreign governments. Because state Buy American provisions accord governmental purchasers no such opportunity, the Trojan Technologies court correctly held that such provisions do not directly interfere with the formulation and administration of foreign affairs.

C. The Foreign Commerce Clause

In determining if a state’s discriminatory activities violate the commerce clause, it must first be determined whether the state is able to claim protection under the market participant doctrine. Clearly, a

73. Id. at 490-31, 441. For a complete discussion of the Zschernig case, see supra note 44 and accompanying text.
74. Zschernig, 389 U.S. at 432.
76. Clark, 331 U.S. at 506 n.1. In order to inherit under the California Probate Code, a foreign legatee had to establish that his/her country afforded United States citizens reciprocal rights to inherit from the estates of persons dying in those foreign countries. Id.
77. Zschernig, 389 U.S. at 435. According to the court, these "minute inquiries" impermissibly affected "international relations in a persistent and subtle way." Id. at 440.
78. See Borchers & Dauer, Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components, 40 Hastings L. J. 87, 115 (1988) (noting that only statutes which require "nonjudgemental construction of foreign standards" are permissible).
79. Although the commerce clause generally prohibits activities which are designed to promote local interests by discriminating against states or foreign countries, the United States Supreme Court has consistently recognized an exception to this doctrine when a state or municipality is acting as a market participant rather than a market regulator. See Reeves, Inc. v. Stake, 447 U.S. 429, 436-
state government that directly participates in the marketplace is accorded market participant protection.\textsuperscript{80} The analysis becomes more complex, however, when the participation in the marketplace is not by the state itself but rather through local governmental bodies and units.\textsuperscript{81}

The Third Circuit adopted the position that there is "no compelling analytical difference between a local government unit and central state agencies."\textsuperscript{82} This conclusion, however, fails to consider the fact that local governmental units/municipalities possess characteristics which make them distinguishable from the state in several respects. First, local governments today are often financially independent of the state.\textsuperscript{83} Moreover, a local governmental unit often has the capacity to sue and be sued as a separate and distinct body.\textsuperscript{84} Consequently, it would appear

\textsuperscript{80} 39 (1980). As noted by one commentator, this distinction has enabled "the Court [to] shield from Commerce Clause attack blatant favoritism of local interests when a state or municipality [acts as a participator in the marketplace]." Coenen, supra note 10, at 395.

Some commentators have argued that this exception should not extend to the realm of foreign commerce. See Note, Foreign Commerce, supra note 55, at 119-20 (noting that traditional balancing test should be applied to all regulations burdening foreign commerce). It is submitted, however, that while regulations on foreign commerce are clearly subjected to a more rigorous scrutiny, there is no indication that the market participant exception has been proscribed in such a setting. Moreover, Professor Tribe has explicitly endorsed the use of the market participant exception in the context of a foreign commerce clause analysis. L. Tribe, supra note 20, § 6-21, at 469 (distinguishing between state regulation of foreign commerce and state participation in foreign commerce and noting that while former activity is tightly proscribed, there is nothing prohibiting latter activity); see also, Note State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign, 54 U. Cin. L. REV. 543, 556-61 (1985) (noting that state can maintain market participant status even though foreign commerce may be affected).

\textsuperscript{81} 80. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976). According to the Alexandria Scrap Court, "[n]othing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Id. (footnotes omitted).

81. In analyzing whether the latter characterization should be accorded protection under the market participant exception, it must further be determined whether the municipality is an entity unto itself or is simply acting as an extension of the state. See generally Coenen, supra note 10. If the local body is found to be an independent unit then the state's regulation will be regulatory rather than proprietary in nature, and market participant status will be unavailable. Id.

82. Trojan Technologies, 916 F.2d at 911. The court concluded that local governments derive all of their power from the state itself and, therefore, the state should have the ability to restrict this power. Id.

83. Coenen, supra note 10, at 482. As noted by one commentator, "[d]ifferent localities impose different taxes, issue different types and numbers of bonds, and save or spend the resources they gather depending on local preferences." Id. As such, when the state mandates that a local governmental unit distribute its own resources according to state policy, the state is not "redistributing its own largess," but is rather regulating the distribution of another. Id.

84. See, e.g., Rogers v. Brockett, 588 F.2d 1057 (5th Cir.), cert. denied, 444
that the state should not be accorded market participant protection when its only participation in the marketplace occurs through the guise of these seemingly independent local bodies.

The Supreme Court, in *White v. Massachusetts Council of Construction Employers, Inc.*, 85 recognized that the commerce clause does not restrict market participant status to the confines of privity of contract. 86 However, the Court's holding in *White* relied upon the fact that the city was a financial participant in the public works project at issue. 87 Although the Third Circuit asserted that the state, as the "ultimately controlling public purchaser," is sufficiently involved in all projects included within the Act's ambit, 88 the *White* Court appeared concerned with the extent of financial participation, as distinct from theoretical control. 89 Relying on the Supreme Court's holding in *White*, it would seem that a proper evaluation of Pennsylvania's market participant status should include an inquiry into whether Pennsylvania was a "financial participant" in the project at issue. If sufficient financial involvement is found, then the state should be accorded protection under the market participant exception. If, however, the state has not "expended its own funds" towards completion of the project, then the state's activities would seem regulatory in nature and market participant status should be unavailable. 90

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86. *Id.* at 211 n.7. According to the *White* Court, when a city's regulation "covers a discrete, identifiable class of economic activity in which the city is a major participant[,] [e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Id.*

87. *Id.* at 214-15. The Court articulated its reliance on this limitation when it held, "[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant." *Id.* (emphasis added).

88. *Trojan Technologies*, 916 F.2d at 911.

89. *White*, 460 U.S. at 214-15. The Court's analysis consistently emphasized the fact that the executive order only purported to include within its ambit projects explicitly permitted by the federal government or in which the city itself financially participated. *Id.* at 211 n.7, 212-13, 214-15. Moreover, the Court defined "major participant" as including only those projects in which the city had "expended only its own funds." *Id.* at 214-15. As such, the Court's holding clearly emphasized the degree of financial control exercised by the city, as distinct from theoretical control.

90. A determination that the state is acting as a market regulator, as opposed to a market participant, does not end the inquiry into whether the state statute violates the commerce clause. To the contrary, a state statute may still be upheld if it is able to withstand the traditional balancing test espoused by the Supreme Court in *Pike v. Bruce Church, Inc.* See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this test, the state must establish a legitimate purpose for the statute and that no less onerous alternative exists. *Id.* at 142.
V. Conclusion

While once the uncontested leader in world trade, the United States now suffers from a burgeoning trade deficit. This simple statistic has buoyed the popularity of sub-national protectionist procurement legislation. But are these Buy American statutes constitutionally permissible exercises in economic protectionism or are they impermissible vehicles of discrimination which allow American industry to guarantee sales while producing inferior products? Because the United States Supreme Court has expressly reserved opinion on the constitutionality of such legislation, this remains an area of great uncertainty.

In Trojan Technologies, Inc. v. Pennsylvania, the Third Circuit resolved this dispute by establishing the constitutional standards to be applied by courts in the Third Circuit when evaluating these state Buy American provisions. First, through its preemption analysis, the court indicates that there are no currently existing federal laws which preclude the enactment of state Buy American legislation. Second, through its foreign affairs analysis, the court suggests that a state Buy American provision will not directly impede the formulation and administration of foreign affairs if the statute does not permit “minute inquiries” into the nature of foreign regimes. Finally, through its foreign commerce clause analysis, the court directs that the state can successfully assert market participant status, and thereby avoid a commerce clause challenge altogether, regardless of whether the actual purchases are completed by central state agencies or the more independent local governmental units.

It is submitted that the Trojan Technologies court’s analysis of the preemption doctrine and the foreign affairs power provides useful guidance for determining the validity of sub-national procurement legislation. It is further submitted, however, that the court’s foreign commerce clause analysis, particularly its evaluation of the market participant exception, may have improperly established a bright-line rule where a more case specific approach appears warranted. If a state is itself a major financial participant in a public works project covered by the state’s Buy American provision, then the state should clearly be afforded market participant status. If, however, the state is merely monitoring the participation of others, then the state should be forced to forego market participant status. In any analysis, this suggests that the more traditional commerce

91. R. BALDWIN, supra note 64, at 20 (noting “the emergence and subsequent decline of the United States as a hegemonic power”); Stern & London, Deficits in Trade and Leadership, 13 THE WASHINGTON Q. No. 4, at 105 (1990) (noting that “[a]s U.S. growth slumped during the 1970s, Germany, Japan, and the Asian newly industrialized countries (NICs) emerged as full-scale, world-class competitors”).

92. J. KLONE, supra note 1, at 87 (noting that “[t]he primary device used by states to assist their internal industries is the restriction of certain state procurement to goods produced in the United States, so-called buy-American provisions”).
clause test. According to this test, the statute will only be upheld if the state is able to establish a substantial state interest, and that no less onerous alternative exists.

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