CIVIL RIGHTS—NEWSPAPER ADVERTISEMENTS FOR EMPLOYMENT OPPORTUNITIES LOCATED IN SOUTH AFRICA, WHICH DO NOT ON THEIR FACE RECITE DISCRIMINATORY CONDITIONS, DO NOT VIOLATE MUNICIPAL ANTIDISCRIMINATION LAWS.

Between August 1970 and December 1973, the *New York Times* published approximately 19 advertisements for employment opportunities available in the Republic of South Africa. Some of these advertisements included detailed job descriptions and required qualifications for managerial positions and teaching positions in various South African universities, but none contained any reference to race or racially based discrimination.[1] On October 12, 1972, the American Committee on Africa, with two other groups and one individual,[2] filed a complaint with the New York City Commission on Human Rights, alleging that, *as a matter of law,* there existed in the Republic of South Africa discrimination in employment based on race, color, and national origin; that the purpose and effect of certain South African laws was to deny nonwhite workers equal access to job opportunities; and that the advertisements in the *New York Times* expressed this discrimination in violation of the New York City antidiscrimination laws.[3] After a review of certain South African statutes, which had been introduced as evidence by the complainant, the Commission under the heading of "Conclusions of Law,"[4] found that the advertisements were expressive of discrimination in employment within the prohibition of the Administrative Code of New York City,[5] and that such advertisements constituted aiding and abetting unlawful discriminatory practices in employment in violation of that code.[6] On review of the Commission hearing, the Supreme Court of New York County set aside the Commission order and entered judgment for the *New York Times.*[7] The Appel-

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[1] The advertisements ranged in size from short, six-line, one column notices to a full-sized, four column box display. Specified reply addresses were given in New York, Washington, London and South Africa but personal interviews could also be arranged in New York.

[2] New York Times Co. v. City of New York Comm'n on Human Rights, 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. 1974).

[3] *Id.* at 1047, 362 N.Y.S. 2d at 322.

[4] There were no findings of fact.

[5] The Administrative Code prohibits employers or employment agencies from printing or causing to be printed "any statement, advertisement or publication" which "expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin or sex, or any intent to make such limitation, specification or discrimination, when based upon a bona fide occupational qualification." NEW YORK, N.Y. ADMIN. CODE § B1-7.0 (i)(d).

[6] It is unlawful "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden" by the terms of the antidiscrimination laws. NEW YORK, N.Y. ADMIN. CODE § B1-7.0(6).

[7] The court ruled that the Commission, in effect, had questioned the employment methods and practices of a foreign government and the Commission's jurisdiction did not extend to activities conducted within other countries. New York Times Co. v. New York Comm'n on Human Rights, 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. 1974).

late Division of the Supreme Court affirmed.[8] On appeal to the Court of Appeals of New York, *held,* affirmed. Advertisements which merely refer to the Republic of South Africa as the situs of employment and which do not recite on the surface any discriminatory conditions, do not express discrimination within the meaning of the New York City antidiscrimination laws since such advertisements do not thereby aid and abet invidious discrimination practices which may exist within the Republic of South Africa. *New York Times Co. v. New York City Commission on Human Rights*, 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977).

New York State has established strong prohibitions against discrimination in general, as evidenced both in the statutory law of the state and in the decisions of its courts.[9] The New York legislature has declared that practices of discrimination against any of its citizens because of race, creed, color, or national origin are a matter of concern for the state, since discrimination threatens not only the rights and proper privileges of its inhabitants, but also the very institutions and foundations of a free democratic state.[10]

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[8] New York Times Co. v. City of New York Comm'n on Human Rights, 49 A.D.2d 851, 374 N.Y.S.2d 9 (App. Div. 1975). The Appellate Division affirmed the lower court decision holding that the "language of the advertisements is not such as to indicate an intent on the part of the petitioner to participate in a program of discrimination." *Id.* at 852, 374 N.Y.S.2d at 10.

[9] The scope of the Civil Rights Law is expressed in the Consolidator's Note on the Civil Rights Law of New York:

> The proposed "Civil Rights Law" embraces these principles of organized society commonly expressed in documents known as "Bill of Rights," and such other related principles as have not found expression in any of the other consolidated laws. Such of these principles as now exist in the State Constitution and also in the statutes have been omitted from this chapter, as the State Constitution is the highest and best repository for them, and are so numerous and so scattered through the body of our laws that it is impracticable and inexpedient to disturb them. Those that are contained in the proposed compilation are (1) such of the historic principles as found their last statutory expression in this State in the Revised Statutes, except those contained in the State Constititution, and (2) such related matter as seems appropriate to the "Civil Rights Law."

N.Y. CIV. RIGHTS LAW (McKinney 1971).

[10] The Executive Law, which describes the purposes of the statute, expresses the legislature's concern in this area:

> (1). This article shall be know as the "Human Rights Law"
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> (3). The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intel-

The Constitution of New York State contains general safeguards designed for the protection of individual civil rights.[11] But in order to supplement these constitutional safeguards, numerous statutes have been enacted to insure the specific prevention of discrimination based on race, creed, or color in certain areas. The main statutory provisions regarding civil rights are found in the Civil Rights Law,[12] which reflects the general principles of the New York Constitution and those principles of public policy which have not been expressed in other consolidated laws of the state. Additionally, forceful public sanctions against discrimination, as represented by the Civil Rights Law, have been strengthened by liberal statutory interpretation.[13] To fortify the statutory expression of this public

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lectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, and in commercial space and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

N.Y. EXEC. LAW § 290 (McKinney 1974).

[11] N. Y. CONST. art. I.

[12] Sections 40 to 45 of the Civil Rights Law deal with the subject of equal rights in places of public accommodation and amusement. For example, Section 40 provides:

All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any such place shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color or national origin, or that the patronage or custom thereat, or any person belonging to or purporting to be of any particular race, creed, color or national origin is unwelcome, objectionable or not acceptable, desired or solicited. The production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any person being the owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any civil or criminal action that the same was authorized by such person . . . .

N. Y. CIV. RIGHTS LAW (McKinney 1974).

[13] The Civil Rights Law is considered to be in derogation of the common law and thus is restrictive of the liberty which a citizen ordinarly enjoys to deal only with those persons with whom he chooses to hold business relations. *See* Christie v. 46th Street Theatre Corp., 265 A.D. 255, 39 N.Y.S.2d 454, *aff'd* 292 N.Y. 520, 54 N.E. 206, *cert. denied* 320 U.S. 710 (1943). For this reason and because of the penal nature of the statute, it has at times been given a strict construction by the courts. *See* Delaney v. Central Valley Golf Club, 28 N.Y.S. 2d 932, *aff'd* 289 N.Y. 577, 43 N.E.2d 716, 31 N.Y.S.2d 834, (1942); *see also* Beckett v. Pfalffle, 157 N.Y.S. 247 (1916). However, it has also been clarified that where the statute is deemed to be remedial in application, a liberal construction will be given effect. In Hobson v. York Studios,

policy, statutes of more particular application also have been passed.[14]

Article 15 of the Executive Law is known as the Human Rights Law. The statute designates certain discriminatory practices to be unlawful and creates a State Commission Against Discrimination.[15] This Commission[16] was created to maintain the constitutional guarantee of civil rights, as well as to effectuate the legislative policy against discrimination and violations of state law.[17] Against this broad background, the New York City antidis-

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Inc., 208 Misc. 888, 145 N.Y.S.2d 162 (1955), an interracial couple brought an action before the Municipal Court of the City of New York to recover the statutory penalty under section 41 of the Civil Rights Law by alleging the defendant refused to rent them a room in his hotel because of their color. Judge Wahl, writing for the majority, held the evidence established that the plaintiffs had experienced discrimination because of their race and in reference to the Civil Rights Law noted, "[A] liberal intent conceived the statute. The proper office of Civil Rights legislation is to search out hostility to our public policy and apply the proper remedy." *Id.* at 892, 145 N.Y.S.2d at 166.

[14] For example, a life insurance company doing business within the state may not discriminate between persons on a racial basis. N.Y. INS. LAW § 209 (McKinney 1974). N.Y. JUD. LAW § 460 (McKinney 1974) states that "race, creed, color, national origin or sex" will not constitute cause for refusing a person the bar examination or admission to practice as an attorney or counselor. N.Y. GEN. BUS. LAW § 174 (McKinney 1974) provides that no license shall be granted to conduct an employment agency where the agency name directly or indirectly expresses or connotes discrimination; agencies licensed prior to the act are allowed to use the name provided that they display under the name, wherever it appears, a statement to the effect that the services are rendered without limitation, specification, or discrimination as to race, color, creed or national origin.

[15] N.Y. EXEC. LAW §§ 290-301 (McKinney 1974) are of particular interest here. *See* N.Y. EXEC. LAW § 290 (1).

> Section 291 announces equality of opportunity to be a civil right:
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> (1) The opportunity to obtain employment without discrimination because of race, creed, sex, color or national origin is hereby recognized and declared to be a civil right.
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> (2) The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of race, creed, color or national origin, as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.

Section 293 creates a state division of human rights. Finally, section 296 specifically designates unlawful discriminatory practices.

[16] The Division for Human Rights was formerly known as the State Commission Against Discrimination.

[17] The Division for Human Rights "is empowered to receive, investigate, and pass upon complaints alleging violation of the law, and it may in the proper conduct of its duties hold hearings and conduct investigations." N.Y. EXEC. LAW § 295 (McKinney 1974). The procedure to be followed by a person claiming to be aggrieved by an unlawful discrimination practice is set forth in section 297 and under the same section, the Commission may establish rules of practice to govern, expedite, and effectuate the prescribed procedure. Section 298 provides for the enforcement of Commission orders, and for judicial review of such orders. This section provides that the findings of the Commission as to the facts shall be conclusive if supported by sufficient evidence on the record considered as a whole. Hence, a judicial review of the findings of the Commission is limited to the question of whether the findings are, upon the entire record, supported by evidence so substantial that an inference of the

crimination ordinances provide a supplement on the municipal level.[18] The New York City laws contain, *inter alia,* specific provisions which prohibit discriminatory practices, both direct and indirect, in advertising for employment.[19]

The New York courts often have given expression to this local antidiscrimination policy in their decisions.[20] Specifically, the courts have expressed intolerance for indirect as well as direct means of discrimination.[21] This intolerance is particularly evident in the field of advertising, where "code" words or phrases implying discriminatory practices in the solicitation of clientele or the selection of employees have been held to be violative of various antidiscrimination statutes.[22]

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existence of the fact found may be reasonably drawn. For a discussion of this point *see* Holland v. Edwards, 307 N.Y. 38, 119 N.E. 2d 581 (1954).

[18] *See* Feigenblum v. Comm'n on Human Rights of the City of New York, 53 Misc. 2d 360, 278 N.Y.S.2d 652 (Sup. Ct. 1967) in which the court held the evidence before the Commission supported its findings that a landlord refused to rent an apartment to an applicant because of her color, which constituted a violation of the Civil Rights Law. The court specifically commented that, by the state legislature's enacting the statute to give New York City concurrent jurisdiction with the State Commission on Human Rights, the legislature conclusively demonstrated its intention not to grant exclusive jurisdiction to the state in the field of discrimination in housing.

[19] *See* note 5 *supra.*

[20] *See, e.g.*, State Division of Human Rights v. Killian Manufacturing Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603 (1974), in which the court notes that the State of New York has been a leader in the field of equal employment opportunity. *See also* Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954), in which the court expressed the view that indirect discrimination, although more subtle, is as deplorable as direct discrimination and should not be tolerated. City of Schenectady v. State Division of Human Rights, 37 N.Y.2d 421, 373 N.Y.S.2d 59 (1975), stands for the principle that the courts should make certain that the legislative purpose behind the Human Rights Law is not thwarted by a strict judicial construction of the statute and a "battle with semantics."

[21] In Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954), Judge Field observed, "[o]ne intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive for we deal with an area in which 'subtleties of conduct . . . play no small part.'" *Id.* at 119 N.E.2d. at 584. *See also,* Hobson v. York Studios Inc., 208 Misc. 888, 145 N.Y.S.2d 162 (1955); State Division of Human Rights v. Killian Manufacturing Corp., *supra* note 20.

[22] An important case in this area is Camp-of-the-Pines, Inc. v. New York Times Co., which involved an action by the owners of a summer vacation camp against the *New York Times* for breach of a contract to publish advertisements designed to solicit customers. The camp facilities could only be used by "members" and in order to join the vacation club, written applications, satisfactory references, and annual dues were required; consequently, the resort owners had requested that the words "Selected Clientele" be included in its advertisement. Acting in compliance with a notification from the District Attorney of New York County that newspapers which published such advertisements would be prosecuted for a violation of § 40 of the Civil Rights Law, the *New York Times* refused to print the requested words in the ad. In holding for the defendant newspaper the court commented,

> [u]se of the words "selected clientele" is a mask and a subterfuge. It is merely a cloak and disguise and an indirect means to hide discrimination. As a practical

One of the major issues in the instant case is whether or not a geographic reference to the nation of South Africa, contained in an advertisement for employment within that country, was to be considered as a code word denoting discrimination and, therefore, in violation of the New York City Administrative Code.[23] Judge Jasen, writing for the majority, reached the result that such a geographic reference was not to be considered a code word for discrimination by analyzing the relevant administrative code provisions and by using a narrow definition of code word.[24] According to the majority, the test under the statute was not an evaluation of the actual existence of discrimination which the evidence presented at the Commission hearing tended to emphasize, but, rather whether the particular advertisement expressed discrimination in employment on its face, either directly or indirectly.[25] It was unquestioned that the advertisements did not directly express discrimination.[26] Consequently, the court employed a definitional approach as to what would constitute a code word read indirectly. The majority reasoned, "[c]ode words are discriminatory additions

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matter, such words as "selected clientele" connote in the public mind that colored persons, Jews, and others who are not lily-white need not apply to the plaintiff for accommodation. That the alleged requirement of joining the vacation club is sham, insincere, and mere pretence is clearly shown by a letter written to a prospective customer. . .

Camp-of-the-Pines, Inc. v. New York Times, 184 Misc. 389, 53 N.Y.S.2d 475, 484 (1945). *But see* Trowbridge v. Katzen, 23 Misc. 2d 111, 203 N.Y.S.2d 736 (1960), where the trial court in overruling a Commission order, held that the phrase, "Serving Christian Clientele since 1911," described the type of persons who had predominantly patronized the resort described, and its use did not imply that non-Christians were not wanted as patrons. The trial court compared the phrase to other permissible phrases commonly found in resort advertisements, such as "Italian cuisine," "French cooking," and "Kosher diet observed." The court furthermore distinguished the *Camp-of-the-Pines* case, stating that the phrase involved in that case—"selected clientele"—was unacceptable because it suggested that the applicants to the vacation club were selected from certain persons only, rather than simply denoting the predominant type of people who had joined the vacation club. *Cf.* United States v. Hunter, 459 F.2d 205 (2d Cir. 1972), *cert. denied* 409 U.S. 934. *But see* Hodgson v. Approved Personnel Service, Inc., 529 F.2d 761, 765 (4th Cir. 1975).

[23] The court limited its scope of review to two main issues: (1) a determination of whether there is support, as a matter of law, for the Commission's finding that the *Times* violated the antidiscrimination laws, and (2) whether such a finding would be precluded by either principles of foreign policy or principles regarding freedom of the press. The Commission then contended that the court was limited to a narrow scope of review under the substantial evidence test. However, the court noted that the test for review applies only when the Commission action under review concerns factual findings. The court freed itself from this standard by emphasizing that the Commission made no factual determination here; rather its decision was characterized as a conclusion of law based upon an undisputed set of facts. The court reasoned, "[t]he issue is simply whether or not the Commission properly analyzed the law and we hold that it did not." 41 N.Y. 2d at 349, 361 N.E. 2d at 966, 393 N.Y.S.2d at 315.

[24] *Id.* at 349-51, 361 N.E. 2d at 967, 393 N.Y.S.2d at 315-17.

[25] Id. at 350, 361 N.E. 2d at 966-67, 393 N.Y.S.2d at 316.

[26] 79 Misc. 2d at 1047, 362 N.Y.S. 2d at 322.

to otherwise complete advertisements; the purpose is to signal the existence of an unlawful criterion. While employment location is an essential ingredient to complete lawful advertisement and its mention is crucial to the advertisement, a discriminatory code word adds nothing but invidous unfairness. It is the code word, not the geographic reference, which expresses discrimination."[27]

The dissent agreed with the majority's position on this point but emphasized more strongly the line of decisions holding that disguised discrimination in advertising through the use of code words is not to be allowed.[28] The dissent disagreed with the distinction made by the majority between a code word for discrimination and a geographic reference, which is, it recognized, a valid part of an employment advertisement. In dissent, Judges Fuchberg and Cooke concluded that a term which signals discrimination might also convey other information, such as the location of an employer, but such an attribute did not render the term any less discriminatory.[29]

Although the majority opinion devoted much discussion to the statutory basis for its reversal of the Commission's findings, it also relied heavily on the position that municipal agencies, such as the New York City Commission, should not be allowed to formulate their own foreign policy through the enforcement of antidiscrimination statutes.[30] It was the majority's position that the Commission considered the discriminatory policies of the government of South Africa to be an integral part of the advertisements in the *Times* and that the order of the Commission, though directed at the *New York Times,* was really an attempt to impose an economic boycott against South Africa.[31]

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[27] 41 N.Y. 2d at 351, 361 N.E. 2d at 967, 393 N.Y.S. 2d at 316.

[28] The dissent cites the following cases for support: City of Schenectady v. State Division of Human Rights, 37 N.Y. 2d 421, 373 N.Y.S. 2d 59 (1975). United States v. Hunter, 459 F.2d 205, *cert. denied* 409 U.S. 934 (2d Cir. 1972), holding that newspaper advertisements which stated that certain apartments for rent were located in a "white home" indicated a racial preference, and therefore were prohibited by the Civil Rights Act of 1968, 42 U.S.C. § 3604 (c) (1970); Camp-of-the-Pines, Inc. v. New York Times Co., 184 Misc. 2d 111, 53 N.Y.S.2d 475 (1945); Hodgson v. Approved Personel Service, Inc., 529 F.2d 761 (4th Cir. 1975), stating that "trigger words" in advertising can be discriminatory, and if found to be discriminatory are violative of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (e) (1970).

[29] The dissent contends that

> [a]n advertisement setting forth South Africa as the location of the employment clearly connotes, as effectively as code words, that "Only Whites Need Apply." It also seems to us that it begs the question to place significance in the fact that the place name was part of an otherwise "complete lawful advertisement." Obviously a word which signals discrimination does no less because it conveys other information as well.

41 N.Y.2d at 359, 361 N.E.2d at 972, 393 N.Y.S.2d at 321.

[30] *Id.* at 352-53, 361 N.E.2d at 968. *See also,* Reeves *Act of State Doctrine and the Rule of Law—A Reply,* 54 AM. J. INT'L L. 141 (1960), for a discussion of policy reasons why state and municipal courts should not make decisions regarding the actions of foreign states committed within those states.

[31] 41 N.Y.2d at 351-52, 361 N.E.2d at 968, 393 N.Y.S.2d at 316-17.

Precedent on both state and federal levels, essentially those decisions representing the Act of State Doctrine, exist in support of the principle that states and state agencies should not interfere with the foreign policy authority of the federal government.[32] The essence of the Act of State Doctrine is the principle that domestic courts of the United States should not make decisions regarding acts of foreign nations committed within boundaries of those nations, for the reason that such decisions affect foreign policy, an area exclusively reserved for federal action.[33] While the cases cited by the majority may well have been factually distinguishable from the *Times* situation, the majority based its position on that same broad principle of noninterference by domestic courts contained in those cases;[34] thus, the impact of the factual distinctions was minimized.

The dissent was again at odds with this argument propounded by the majority and contended that the majority's application of the classic Act of State Doctrine cases was erroneous. Stressing the factual distinctions which the majority opinion had ignored, the dissent took the position that, while it had been held that the courts of the United States lack jurisdiction to review acts or policies of foreign nations occurring within those nations, the action under review by the New York City Commission—the placement of employment advertisements in the *New York Times*—was within New York State and, thus, was reviewable.[35] The dissent further noted that the Commission's action was not aimed at the South African government; it merely ordered a New York corporation to stop running discriminatory advertisements which aided and abetted discrimination occurring else-

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[32] In support of its position, the majority cites the following for support: Hatch v. Baez, 7 Hun. 596, 599 (N.Y. Sup. Ct. 1876) where the court, in this early New York decision, declared that "the universal comity of nations and the established rules of international law require the courts of one country . . . to abstain from sitting in judgment on the acts of another government, done within its own territory," and Underhill v. Hernandez, 168 U.S. 250, 252 (1897). In that famous decision, an American citizen, forcibly detained in Venezuela for several days by revolutionaries, subsequently brought a tort action against one of the military commanders of the successful insurgents, who, prior to judicial consideration of the case, was recognized by the United States as the government of Venezuela. In the opinion, Chief Justice Fuller stated: "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The Supreme Court, in this opinion, described the Hatch v. Baez decision, *supra*, as having "foreshadowed" the case of Underhill v. Hernandez.

[33] *See* Reeves, note 31. *See generally* Mann, *International Delinquencies Before Municipal Courts*, 70 L.Q. REV. 181 (1954), for a broad, theoretical commentary on the consequences of municipal action regarding foreign states.

[34] 41 N.Y.2d at 353, 361 N.E.2d at 972, 393 N.Y.S.2d at 318. *See generally* Comment, *The Act of State Doctrine—Its Relation to Public and Private International Law*, 62 COLUM. L. REV. 1278 (1962) for an excellent historical discussion of the act of state doctrine and a discussion of the feasibility of administration of public international law by municipal courts.

[35] 41 N.Y.2d at 361, 361 N.E.2d at 972, 393 N.Y.S.2d at 322.

where.[36] In essence then, the dissent rejected both the majority's notion of an attempted economic boycott and its conservative approach to the relationship between the decisions of the domestic courts of the United States and foreign policy.

Besides the obvious differences in statutory and case law interpretation, the majority and dissent disagreed about the judicial approach to be applied when the courts and agencies of the United States become involved in disputes with foreign policy overtones.[37] The majority need have gone no further than statutory analysis in order to substantiate its decision. But this case may represent a regression from the broad inroads made by the New York courts against indirect discrimination in advertising. It is, perhaps, a more cautious approach to statutory interpretation, reflecting the court's evaluation of a potentially volatile situation from the standpoint of foreign policy, and may have been chosen in preference to a broad decisional alternative which could be easily misconstrued and misused.

The majority may have taken an overly cautious position in assuming that the Commission was in fact trying to impose an economic boycott against the country of South Africa. As the dissent pointed out, the order given by the Commission was aimed only at the *New York Times*. On the other hand, the majority's conclusion is plausible when one considers that the evidence presented at the Commission hearing dealt almost entirely with South African law as being discriminatory.[38] The agency's open criti-

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[36] The dissent comments, "South Africa is not a party to this proceeding. Above all, the order of the Commission makes no attempt to decide or determine the rights of South Africa to engage within that nation what we would regard as discrimination." *Id.* at 360.

[37] The case of Zchernig v. Miller, 389 U.S. 429 (1968), succinctly expresses the majority view in the principal case. That decision involved the question of whether or not residents of East Germany, who were heirs of United States citizens, could properly inherit personal property in the State of Oregon, under the probate law of Oregon. The United States Supreme Court, reviewing the decision of the Oregon Supreme Court, reasoned it

> inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in witholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several states, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the nation's foreign policy.

Id. at 440.

Another author has expressed a similar view:

> The executive, by virtue of its power to negotiate treaties and conduct diplomatic relations, represents the nation in the drafting of international conventions and the development of customary diplomatic practice—primary sources of international law. Irrespective of whether the executive's view of international law is deemed binding on the judiciary, the courts can not gracefully make an independent finding on a point of international law that is at variance with the nation's diplomatic position as delineated by the executive.

Comment, *supra* note 34, at 1307.

[38] 41 N.Y.2d at 347-48, 361 N.E.2d at 965, 393 N.Y.S.2d at 314.

cism was directed more at South African policies than at the *New York Times*.[39] From such a perspective the court's reluctance to affirm such action is understandable.

Finally, it should be noted that while the dissent's analysis of the case law relating to the Act of State Doctrine may be sound, it does not effectively counter the majority position. The dissent argues technical points of application of specific case holdings to the situation at bar; however, the majority stance apparently has at its base the doctrine's policy considerations of noninterference by domestic courts in sensitive areas of foreign affairs. While the approach of the court may be a cautious one, it is preferable to an approach which could jeopardize both the effectiveness and uniformity of United States foreign policy.

Nancy L. Rumble

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[39] *Id.* at 358, 361 N.E. 2d at 969, 393 N.Y.S. 2d at 320.