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Constitutional Law

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CONSTITUTIONAL LAW

I. STATUTORY RESIDENT BIDDER PREFERENCE IS CONSTITUTIONAL

In *Gary Concrete Products, Inc. v. Riley*[1] the South Carolina Supreme Court upheld the constitutionality of a resident bidder preference section in the South Carolina Procurement Code.[2] This provision, section 11-35-1520(9)(d) of the South Carolina Code,[3] favors State residents when the State purchases supplies, services, and goods. The supreme court affirmed the order of the trial judge and upheld this relatively new code section against equal protection and commerce clause challenges.[4]

The appellant, Gary Concrete Products (Gary), a Georgia corporation which manufactures and sells reinforced concrete pipe, submitted bids for purchases by the State of South Carolina. Although Gary was the lowest bidder in several counties, the State awarded the contracts for those counties to resident bidders as authorized by Code section 11-35-1520(9)(d).

Gary alleged that this preference section violated the commerce clause of the United States Constitution[5] by imposing an unlawful burden on interstate commerce. The court, relying primarily on *Hughes v. Alexandria Scrap Corp.*[6] and *Reeves, Inc. v. Stake*,[7] reasoned that the commerce clause does not limit a

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1. 285 S.C. 498, 331 S.E.2d 335 (1985).

2. S.C. CODE ANN. § 11-35-1520(9)(d) (1986)(effective July 31, 1981) provides in part:

> Competitive procurements made by any governmental body shall be made from a responsive and responsible vendor resident in South Carolina: (i) for procurements under $2,500,000 if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than two per cent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid was submitted . . . .

S.C. CODE ANN. § 11-35-1520(9)(d) (1986).

3. S.C. CODE ANN. § 11-35-1520(9)(d) (1986).

4. 285 S.C. at 506, 331 S.E.2d at 339-40.

5. U.S. CONST. art. I, § 8.

6. 426 U.S. 794 (1976)(nothing in 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).

7. 447 U.S. 429 (1980)(the commerce clause is aimed principally at limiting state

state's ability to operate freely within a market or to favor its own citizens over others when the state is acting as a market participant.[8] Recognizing that a state may not impose conditions that have a substantial regulatory effect outside the market in which the state is a participant,[9] the court in *Gary Concrete* concluded that the State was merely choosing its trading partners to favor residents. The court found no market regulation and considered the factual situation to be consistent with *Reeves*. Consequently, the court held that the Board's actions and the preference section were not subject to commerce clause scrutiny.[10]

Gary also contended that the preference section violated the equal protection clause of both the United States and the South Carolina Constitutions. The majority of the court relied upon *State ex rel. Medlock v. South Carolina Family Farm Development Authority*[11] in denying the plaintiff's equal protection claim. In *Medlock* the court stated the three requirements that are necessary to satisfy equal protection. First, the classification must bear a reasonable relation to the legislative purpose sought to be effected. Second, the members of the class must be treated alike under similar circumstances and conditions. Last, the classification must rest on some reasonable basis.[12]

The court in *Gary Concrete* found that the first requirement was satisfied because the classification between residents and nonresidents bore a reasonable relation to the legislative purpose of directing benefits from State purchases to those citizens and taxpayers who funded the State treasury.[13] The court also deemed the second requirement satisfied. Although Gary alleged differential treatment between two groups of nonresidents, the court found that those groups were not similarly situated since one group was legitimately favored under the preference

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taxes and regulatory measures that impede free private trade in the national market place and does not limit the ability of the states themselves to operate freely in the free market).

8. 285 S.C. at 501, 331 S.E.2d at 337.

9. *Id.* at 503, 331 S.E.2d at 338 (citing South-Central Timber Dev. v. Wunnicke, 467 U.S. 82 (1984)).

10. 285 S.C. at 503, 331 S.E.2d at 338.

11. 279 S.C. 316, 306 S.E.2d 605 (1983).

12. *Id.* at 321, 306 S.E.2d at 609 (citing Bauer v. S.C. Housing Auth., 271 S.C. 219, 246 S.E.2d 869 (1978)).

13. 285 S.C. at 505, 331 S.E.2d at 339.

section because of its taxpaying status.[14] The court then addressed the third requirement, noting that the legislature should decide whether the classification is reasonable and that the court will not set aside that determination unless it is plainly arbitrary.[15]

Generally, the primary purpose of competitive bidding statutes is to obtain the advantages of free and fair competition and to secure the best work or supplies at the lowest price practicable.[16] Public officers are, therefore, frequently charged to award state contracts to the lowest responsible bidder.[17] Competitive bidding statutes, however, may require the granting of a preference to bidders in particular categories.

For example, in *Schrey v. Allison Steel Manufacturing Co.*[18] the plaintiff claimed a preference under a statutory provision providing that contractors who had paid state and county taxes for two successive years immediately prior to bid submission were to be given a five percent advantage over nontaxpaying contractors.[19] The Supreme Court of Arizona held that this statutory preference withstood allegations that it violated the equal protection clause. The court reasoned that Arizona, in contracting for the expenditure of tax money, had a reasonable basis for granting a preference to taxpaying contractors who had made a contribution to the funds from which they were to reap a benefit.[20]

Similarly, in *Equitable Shipyards, Inc. v. State Department of Transportation*[21] a foreign shipbuilder brought an action challenging the constitutionality of a bidding preference statute's application to the awarding of a ferry construction contract. The statute established a preference for shipbuilding firms located in the State of Washington as long as their bids did not exceed by more than six percent the lowest comparable bid of

14. *Id.* at 506, 331 S.E.2d at 339.

15. *Id.* at 504, 331 S.E.2d at 338.

16. Equitable Shipyards v. State Dep't of Transp., 93 Wash. 2d 465, 473, 611 P.2d 396, 401 (1980).

17. State *ex rel.* Capital Business Equip. v. Gates, 155 W. Va. 64, 180 S.E.2d 865 (1971).

18. 75 Ariz. 282, 255 P.2d 604 (1953).

19. *Id.* at 285, 255 P.2d at 606. The statute addressed the allocation of contracts for public work to be performed on behalf of the state.

20. *Id.* at 287, 255 P.2d at 607.

21. 93 Wash. 2d 465, 611 P.2d 396 (1980).

any shipbuilding firm located outside the state.[22] The Supreme Court of Washington identified the underlying policy of the statute as granting a preference to those who contribute to the economy through construction activities within the State.[23] Since the preference statute was closely allied with economic legislation, the court deemed rational basis scrutiny appropriate. The Washington court held that a rational relationship existed between the purposes of the preference statute and its classifications of in-state and out-of-state shipbuilding firms.[24]

The dissent in *Gary* opined that the preference section violated the equal protection clause because it conflicted with express legislative purposes of the South Carolina Procurement Code.[25] State competitive bidding statutes must be construed to ascertain and effectuate the legislative intent expressed in the statutes.[26] Because the purpose relied upon by the majority in *Gary Concrete* is not expressly set forth in the purposes section of the statute, the appellant's claim and the dissenting opinion appear to be justified.

The *Gary Concrete* decision is, however, consistent with precedents from other jurisdictions, such as *Schrey* and *Equitable Shipyards*. Although the court inferred a purpose not expressly found in the statute—directing benefits from State purchasers to State taxpayers—the decision appears to be correct.

Glenn R. Goodwin

II. BUSINESS OPPORTUNITY SALES ACT UPHELD

In *Tousley v. North American Van Lines, Inc.*[27] the Fourth Circuit Court of Appeals held that South Carolina's Business

22. *Id.* at 468-69, 611 P.2d at 399.

23. *Id.* at 478, 611 P.2d at 404.

24. *Id.*; *see also* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)(government enjoys the unrestricted power to fix the terms and conditions upon which it will make needed purchases); Heim v. McCall, 239 U.S. 175 (1915); City of Denver v. Bossie, 83 Colo. 329, 266 P. 214 (1928)("the State may buy of whom it will"); Cunningham's Ski Shop v. Berle, 96 Misc. 2d 137, 408 N.Y.S.2d 938 (Sup. Ct. 1978).

25. 285 S.C. at 506-07, 331 S.E.2d at 340 (Gregory, J., dissenting); *see* S.C. CODE ANN. §§ 11-35-20(c), (e), (f) (1986).

26. *See, e.g.*, McMillen Feed Mills v. Mayer, 265 S.C. 500, 510-11, 220 S.E.2d 221, 226 (1975).

27. 752 F.2d 96 (4th Cir. 1985).

Opportunity Sales Act (BOSA)[28] was not preempted by the Interstate Commerce Act (ICA)[29] and did not violate the commerce clause of the United States Constitution.[30] The court also declined to allow recovery of punitive damages under BOSA.[31]

David Tousley, responding to a newspaper advertisement, attended a seminar in Spartanburg presented by a recruiting representative of North American Van Lines. At the seminar, the representative told Tousley that as an owner-operator for North American he could expect a net income of $16,000 to $19,000 per year.[32] The next day Tousley paid the representative $400 to enroll in North American's driver training school in Indiana. While at the school, Tousley purchased a truck and entered into a security agreement and contract with North American. Tousley hauled freight for the company for two years, but realized "considerably less income" than the amounts stated by the representative.[33] Tousley terminated his relationship with North American, and being unable to refinance the truck, he consented to its repossession by the company. He then instituted an action based on common-law fraud and violations of BOSA. A district court denied recovery for fraud,[34] but found North American in violation of BOSA.[35] Tousley was awarded $1200 treble damages, $5000 punitive damages, and $22,500 in attorney's fees.

On appeal North American first contended that the ICA[36] and its regulations showed congressional intent to preempt the

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28. S.C. CODE ANN. §§ 39-57-10 to -80 (1976). BOSA requires those who sell business opportunities in South Carolina to register with the Secretary of State in order to provide the purchaser of such an opportunity with relevant information, S.C. CODE ANN. §§ 39-57-30, -50 (1976), to post a security bond or establish a trust account, S.C. CODE ANN. § 39-57-40, and requires that the written contract between the parties contain certain information and that a copy of the contract be given to the purchaser. S.C. CODE ANN. § 39-57-70 (1976).

29. 49 U.S.C. §§ 10,101-11,901 (1982).

30. U.S. CONST. art. I, § 8, cl. 3.

31. 752 F.2d at 104-05.

32. 752 F.2d at 99. Tousley was also told that his gross income before expenses should be $71,000. In addition, North American offered to train Tousley as a driver, sell him a truck, and dispatch him and his truck to locations where he could pick up freight for transportation. *Id.*

33. *Id.* at 99-100.

34. *Id.* at 100 n.5.

35. *Id.* at 99.

36. *See* 49 U.S.C. § 11,107 and its pursuant regulations, *infra* note 42.

regulation of the trucking industry. The preemption argument has its roots in the supremacy clause of the United States Constitution.[37] Such a preemption may either be explicit[38] or evidenced by clear congressional intent.[39] The *Tousley* court used a two-tiered inquiry to determine if the regulation of the industry had been preempted by the ICA. The court determined whether Congress in passing the statute intended to occupy the field. Second, the court considered whether the state statute was void because it conflicted with federal regulation.[40]

In looking at section 11,107 of the ICA[41] and its regulations,[42] the court of appeals found that "no pervasive regulatory scheme or dominant federal interest" existed in regulating matters covered by BOSA because the state act only applied to "pre-contractual activities,"[43] which were not covered by the federal act. The court also rejected North American's contention that the Interstate Commerce Commission had determined, in adopting 49 C.F.R. section 1057.12(i),[44] that negotiations of vehi-

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37. U.S. CONST. art. VI, § 2. This clause has been held to invalidate state laws that "interfere with or are contrary to, the laws of congress . . . ." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

38. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

39. 331 U.S. at 230. The *Tousley* court stated that this congressional intent may be evidenced by a "scheme of federal regulation so pervasive" as to infer that there is no room for state regulation or by a dominant federal interest in the field. 752 F.2d at 101 (citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978)). The *Tousley* court also stated that if the field is not preempted by pervasive regulation, preemption may still occur if "there is an 'irreconcilable conflict between federal and state standards.'" 752 F.2d at 101 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984)).

40. 752 F.2d at 101 (citing *Silkwood*, 464 U.S. at 256). North American conceded that the ICA did not explicitly prevent South Carolina from regulating the sale or leasing of trucks within the state. 752 F.2d at 100.

41. 49 U.S.C. § 11,107(a)(1)-(4) (1982).

42. 49 C.F.R. § 1057 (1985). These regulations "impose lease requirements, including that the agreements be in writing, that receipts identifying equipment be given, that certain records be kept, that terms of compensation be clearly specified, and that insurance requirements be met." 752 F.2d at 101.

43. 752 F.2d at 101.

44. Section 1057.12(i) provides:

> The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease agreement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

49 C.F.R. § 1057.12(i) (1985).

cle lease agreements were to be free from governmental regulations. The court read the Commission's statements[45] as evidence that "the agency appears to be declining to regulate [the precontractual] aspect of leasing arrangements."[46] The court stated that when the federal government declined to regulate an area, "the state retains 'the implied reservation of power to fill out the scheme.' "[47] Thus, the court found no congressional intent in the ICA to occupy the field of truck leasing to the exclusion of BOSA.[48]

In addressing North American's contention that BOSA specifically conflicted with the purpose and objectives of the ICA, the *Tousley* court sought to discern the purposes behind the potentially conflicting statutes. The court determined that section 11,107 and its regulations were intended to encourage truth-in-leasing by disclosure of certain information at the time of leasing; whereas, BOSA was intended to regulate conduct of a seller prior to execution of an agreement.[49] The court found that the requirements of the South Carolina statutes complimented rather than conflicted with the ICA truth-in-leasing policy by facilitating true arm's-length transactions.[50]

North American next contended that BOSA violated the commerce clause of the United States Constitution.[51] The *Tousley* court held that BOSA did not provide for direct state regulation of interstate commerce. The court noted that BOSA was enacted to serve a legitimate public interest and implied that any regulation of interstate commerce was incidental and, thus,

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45. The court considered the following statements of the Commission:

> The intent of the rule is not to prohibit freely negotiated sales or rental transactions between carrier lessees and their lessors. The thrust of the rule is only to prohibit lessees from imposing sales or rental agreements on lessors as a precondition to leasing arrangements . . . . Lessors and lessees are still completely free to bargain at arm's length and negotiate the sale or rental of any products, equipment, or services.

752 F.2d at 102 (quoting Lease and Interchange of Vehicles, *ex parte* No. MC-43 (Sub-No. 7), 131 M.C.C. 141, 156 (1979)).

46. *Id.*

47. *Id.* (citing KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922, 934 (5th Cir. 1983)).

48. 752 F.2d at 102.

49. *Id.* at 102-03.

50. *Id.* at 103.

51. U.S. CONST. art. I, § 8, cl. 3 states: "Congress shall have power . . . [t]o regulate commerce . . . among the several states."

permitted.[52] The court also found that although Tousley's training and the execution of the contract and security agreement took place outside of South Carolina, "the pre-contractual conduct implicated in this case"[53] was completed within the State. Thus, North American's contention that BOSA regulated business practices outside the state in violation of the commerce clause was also found to be without merit.

After deciding that North American's activities were not exempted from regulation by the South Carolina Unfair Trade Practices Act (UTPA)[54] and that the company's liability for violations of BOSA was a factual question properly submitted to the jury, the *Tousley* court addressed the issue of damages. The court found that the district court properly trebled the $400 of actual damages awarded by the jury.[55] The court, however, reversed the award of $5000 punitive damages by holding that the award of treble damages under UTPA "would seem to comprise the entire statutory damage scheme."[56] The court stated that if the legislature had intended that punitive damages be recoverable for a violation of BOSA, the Act would have specifically provided for them.[57] Finally, the court upheld the awarding of $22,500 in attorney's fees to Tousley.

Because *Tousley* is the first federal decision concerning the application of South Carolina's BOSA, it is important for any guidelines that it gives for the future application of the Act. The

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52. 752 F.2d at 103. The court quoted *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), which stated that a "state statute must be upheld if it regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . ." *Id.* at 640 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

53. The conduct referred to included the advertising, recruiting, and initial payment of $400. 752 F.2d at 103.

54. S.C. CODE ANN. §§ 39-5-20 to -160 (1976). Under S.C. CODE ANN. § 39-57-80(e) (1976), the violation of any BOSA provision an unfair trade practice under § 39-5-40 of the UTPA. The *Tousley* court held that § 39-5-40, which exempts transactions "permitted under laws administered by any regulatory body or officer acting under statutory authority of . . . the United States . . .," from the UTPA, did not apply since BOSA dealt with pre-contractual activities not covered by the ICA. 752 F.2d at 104.

55. 752 F.2d at 104-05. The UTPA provides that if a violation is wilful or knowing the court has the discretion to treble the actual damages. S.C. CODE ANN. § 39-5-140(a) (1976).

56. 752 F.2d at 104.

57. *Id.* The court cited the following statutes as specifically allowing punitive damages: S.C. CODE ANN. § 56-15-110(3) (1976)(violation of motor vehicle dealers regulations); S.C. CODE ANN. § 15-69-210 (action to recover possession of personal property). *Id.*

court's reasoning, in holding that BOSA is not preempted by the ICA, appears to be correct. The ICA does not attempt to regulate the precontractual activities covered by BOSA.[58] One possible exception not recognized by the court is section 39-57-70 of BOSA.[59] This statute requires that business opportunity contracts be in writing and contain certain required information. In addition, the statute requires that a copy of the contract be given to the purchaser upon signing.[60] These requirements do not appear to fit into the "pre-contractual" category; rather, they affect the form of the contract itself. Therefore, this statute may be subject to preemption by federal statutes or regulations that detail contractual requirements. The ultimate outcome of *Tousley* would not have been affected by this omission because other violations of BOSA provisions dealing with precontractual activities were present.[61]

In addition, the *Tousley* court's holding that punitive damages were not contemplated by BOSA could have an effect beyond the instant case. If South Carolina courts adopt the Fourth Circuit's reasoning, any state statute that does not specifically allow punitive damages may be read as excluding such damages. It is clear from BOSA's language that if North American had been found liable for common-law fraud, punitive damages would have been allowed.[62] The *Tousley* court appears to have interpreted the statutory language that the "purchaser . . . shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection"[63] to prohibit the recovery of actual damages more than once. This would explain why the court only trebled the $400 in actual damages rather than allowing Tousley to recover $400 in actual damages for the BOSA violation and $400 damages as a result of an unfair trade practice which could have been trebled under section 39-5-140(a).

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58. *See supra* notes 45-46 and accompanying text.

59. S.C. CODE ANN. § 39-57-70 (1976).

60. *Id.*

61. *See* S.C. CODE ANN. § 39-57-30 (1976), which requires a seller to make written disclosures to a purchaser at least 48 hours prior to the execution of a business opportunity contract or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first.

62. S.C. CODE ANN. § 39-57-80(d) (1976) provides: "The remedies provided herein shall be in addition to any other remedies provided for by law or equity."

63. S.C. CODE ANN. § 39-57-80(a).

Tousley, therefore, is important in establishing the validity of the Business Opportunity Sales Act. The court's holding that BOSA does not violate the commerce clause may have a far-reaching effect. A contrary decision could have made BOSA ineffective except in cases in which all activities take place within the State. While holding that BOSA does not directly regulate interstate commerce, the court left open the question of the permissible extent of regulation that BOSA may impose on business practices which take place partially out of state.[64] Because of the paucity of judicial precedent construing the Act, however, the exact parameters of BOSA have yet to be determined.

James Michael Magee

III. DUAL RATE SCHEME PURSUANT TO SPECIAL LEGISLATION

In *Duke Power Co. v. South Carolina Public Service Commission*[65] the South Carolina Supreme Court held that Act 1293 of 1966,[66] which created a dual rate structure for electricity users in Greenwood County as part of the County's sale of its electrical system to Duke Power Company, was not unconstitutional special legislation. The court, however, implicitly reaffirmed its willingness to strike down legislation which it considers "special."[67] Thus, South Carolina remains among jurisdictions that construe their state constitutional admonishments against special legislation as prohibitory rather than "cautionary" and "advisory."[68] The case is a good example of the court's willingness in certain situations to uphold a law that is manifestly "special" or "local."[69]

In 1965 the Duke Power Company offered to buy Greenwood County's electrical system from the Greenwood County

64. The court would impliedly allow some "incidental" regulation of out-of-state business activities but would prohibit any regulation of activities that take place "wholly outside the state's borders." 752 F.2d at 103.

65. 284 S.C. 81, 326 S.E.2d 395 (1985).

66. 1966 S.C. Acts 3294, No. 1293, § 4, subsection 3.

67. 284 S.C. at 91, 326 S.E.2d at 400-01.

68. *See* J.L. Underwood, Separate but Inseparable: The Constitutional Relationship Among the Branches of the South Carolina Government 65 (1985)(unpublished manuscript)(citing Powell v. Durden, 61 Ark. 21, 31 S.W. 740 (1895)).

69. 284 S.C. at 91-93, 326 S.E.2d at 401-02.

Electric Power Commission. The Power Commission, created by South Carolina statute, did not have the authority to sell the system.[70] The South Carolina General Assembly, therefore, passed Act 1293 of 1966, which authorized the sale based on certain conditions, one of which included the following language:

> The rates to be charged for . . . all connections which exist at the consummation of the sale shall be the lower of the rates charged by the Greenwood County Electric Power Commission and Duke Power Company and the same shall not be grounds for any claim alleging discrimination. The rates to be charged for electric power for connections after the date of the sale shall be the applicable rates of Duke Power Company . . . .[71]

The dispute in *Duke Power* centered around this particular provision since it effectively froze rates at the 1966 level for certain Greenwood County residents who were connected to the old system in 1966. Ratepayers coming onto the system after 1966 paid Duke's systemwide rate. In 1981 Duke's rate was 220% to 350% greater than the rate had been in 1966. This rate increase resulted in adjacent residents paying vastly different rates for electricity.[72]

On January 26, 1981, Duke applied to the Public Service Commission (PSC) for a rate increase covering those Greenwood residents still on the frozen 1966 rates.[73] The PSC dismissed the application for lack of jurisdiction based on Act 1293 of 1966.[74] The circuit court affirmed, and the South Carolina Supreme Court upheld the circuit court's ruling in a three-to-two decision.[75] On appeal Duke Power argued, *inter alia*,[76] that the por-

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70. 1934 S.C. Acts 2020, No. 1095; 1939 S.C. Acts 544, No. 329. These acts empowered Greenwood County to borrow funds to finance its electric system and created the Power Commission. The statutes did not, however, give the Commission authority to sell the property. 284 S.C. at 86, 326 S.E.2d at 398.

71. 1966 S.C. Acts 3294, No. 1293, § 4, subsection 3.

72. 284 S.C. at 87-88, 326 S.E.2d at 399.

73. Brief of Appellant-Respondent at 11.

74. 284 S.C. at 88, 326 S.E.2d at 399.

75. *Id.* at 88, 326 S.E.2d at 399. The opinion written by the trial judge was adopted, as modified, by the supreme court.

76. Duke argued that its contract with Greenwood County did not perpetually freeze some residents' rates because the PSC retained jurisdiction to alter the contract's terms in the public interest. The two dissenters, Justices Gregory and Littlejohn, appeared to agree with this argument. *See* 284 S.C. at 103-04, 326 S.E.2d 407-08 (Little-

tion of the Act authorizing the *sale* of the electrical system was constitutional, but the portion freezing the rates at their 1966 level for certain Greenwood residents was an unconstitutional special law that was prohibited by article III, section 34 of the South Carolina Constitution.[77]

The court agreed with Duke that Act 1293 of 1966 was "special" because it treated certain locations in Greenwood County more favorably than others and had no general application throughout the state.[78] The court, however, noted a major exception to the general rule that article III, section 34, prohibits special laws only where general laws can be made applicable.[79]

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john, C.J., dissenting); *id.* at 102-03, 326 S.E.2d at 407 (Gregory, J., dissenting). The court, however, declared that the intent of the parties governed, and the clear intent of the parties at the time of contracting was that the 1966 residents would enjoy the old rates with no time limit. *Id.* at 89, 326 S.E.2d at 399-400.

Duke also claimed that Act 1293 violated the equal protection clauses of both the Fourteenth Amendment to the United States Constitution and article I, section 3 of the South Carolina Constitution. *Id.* at 93, 326 S.E.2d at 402. The court rejected this claim. Its rationale was similar to the rationale it used in rejecting the "special legislation" argument. *Id.* at 94-96, 326 S.E.2d at 402-04.

Duke further challenged the rates under S.C. CODE ANN. § 58-27-840 (1976), which prohibits discriminatory utility rates. The court held that Duke, having worked in 1965 and 1966 to further passage of Act 1293 and to get Greenwood County voter approval for the sale of the electrical system (voter approval was another condition of the sale), was estopped to challenge the validity of the statute. 284 S.C. at 99, 326 S.E.2d at 405 (citing South Carolina & W. Ry. v. Ellen, 95 S.C. 68, 78 S.E. 963 (1913); 16 Am. Jur. 2d *Constitutional Law* § 207-09 (1979)).

The court also disposed of the claim of individual petitioners who alleged discriminatory rates under S.C. CODE ANN. § 58-27-840 (1976). The court held that the individuals had no standing to challenge the dual rate structure. 284 S.C. at 96-98, 326 S.E.2d at 404-05. The individuals failed to show, other than by speculation, that their rates would decrease if the rates of the pre-1966 Greenwood residents were increased. The petitioners, therefore, had no individual stake in the litigation. *Id.*

77. *Id.* at 36 (emphasis added). Article III, § 34 of the South Carolina Constitution states in pertinent part:

> The General Assembly of this state shall not enact local or special laws concerning any of the following subjects or for any of the following purposes to wit:
>
> . . .
>
> IX. [W]here a general law can be made applicable, no special law shall be enacted . . .
>
> X. The General Assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operation: Provided, that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws.

S.C. CONST. art. III, § 7.

78. 284 S.C. at 91, 326 S.E.2d at 401.

79. *Id.* at 91-92, 326 S.E.2d at 401; *accord* Shillito v. City of Spartanburg, 214 S.C.

When the General Assembly has constitutional authority to legislate specifically or directly in an area, the prohibition of article III, section 34, subsection IX, does not apply.[80] The General Assembly has specific constitutional authority to regulate utilities under article IX, section 1 of the South Carolina Constitution.[81] Therefore, the court reasoned that article III, section 34, was inapplicable to the General Assembly's decision to sell a county-owned utility system to a private company.[82]

The principle underlying the court's decision in *Duke Power*, that legislation which affects only one locale or county is not necessarily unconstitutional special legislation, is well grounded in South Carolina precedent.[83] At the opposite extreme, however, the supreme court has held that legislation which affects twenty-three counties in the state may be an impermissible local law.[84] Consequently, no litmus test exists for determining the number of counties a law must affect to avoid the "special legislation" label.

In the past, the court has struck down a local law when a uniform law already existed. The court has interpreted the existence of a general law as evidence that the legislature believes that a uniform approach to the problem is practicable and desirable.[85] In *Duke Power* the court found no general law covering the sale of a county's electrical system to a private utility. The court, therefore, found no inconsistency in enforcing Act 1293 of 1966.

As noted by one commentator, "the constitutional lore of

11, 51 S.E.2d 95 (1948); *see* Sansing v. Cherokee County Tourist Camp Bd., 195 S.C. 7, 10 S.E.2d 157 (1940); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939).

80. 284 S.C. at 91, 326 S.E.2d at 401 (citing City of Columbia v. Smith, 105 S.C. 348, 89 S.E. 1028 (1916)).

81. S.C. CONST. art. IX, § 1 provides: "The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest."

82. 284 S.C. at 92, 326 S.E.2d at 401.

83. *See* Kalk v. Thornton, 269 S.C. 521, 238 S.E.2d 210 (1977)(provision in new municipal incorporation statute to limit statute's operation to incorporation proceedings begun after specific date held valid, although statute only affected certain area in Horry County); *see also* Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970), *cert. denied*, 400 U.S. 986 (1971).

84. Dean v. Spartanburg County, 59 S.C. 110, 37 S.E. 226 (1900).

85. J.L. Underwood, *supra* note 68, at 172; *see* State v. McIver, 270 S.C. 242, 241 S.E.2d 747 (1978); Gillespie v. Blackwell, 164 S.C. 115, 161 S.E. 869 (1932); State v. Ferri, 111 S.C. 219, 97 S.E. 512 (1918).

special legislation has long been murky and confusing."[86] Early courts noted specious distinctions.[87] Although sound principles support the result reached in *Duke Power*, equally valid principles could have been found to support the opposite result. The court, nevertheless, held that the provisions of Act 1293 of 1966, which created a dual rate structure for electricity users of Greenwood County as part of the sale of its electrical system to Duke Power Company, was valid. The sale of Greenwood's electrical system was a unique problem that lent itself to special treatment by the legislature. When encountered with similar dilemmas, the legislature may enact "special" legislation, even though this legislation provides for disparate treatment of South Carolina residents. This gives the legislature the flexibility necessary to meet the localized needs of its constituents.

J. L. Rogers, Jr.

86. Horrack, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109 (1936)(cited in J.L. Underwood, *supra* note 68, at 175 n.9).

87. *Id.*