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# STATE MARKET POWER AND ENVIRONMENTAL PROTECTION: A STATE'S RIGHT TO EXCLUDE GARBAGE IN INTERSTATE COMMERCE

CHARLES T. DuMARS\*

## I. INTRODUCTION

There is no doubt that the engines of production in the United States have generated great wealth. This wealth includes a gross domestic product in dollar amounts not previously imagined, as well as a standard of living supported by an apparently unlimited supply of tangible luxuries. Ours is a society of disposable everything, from diapers to lighters to telephones. Plastics abound and provide an apparently low cost alternative to the use of glass and paper. The low cost of plastics is only "apparent" because the true costs of utilization of these non-recyclable substances are just beginning to be understood. Space for disposal of solid wastes was previously considered limitless and available at no cost. Space for landfills, like clean air, was believed to be a widely available and inexpensive commodity. We now realize that the price of clean air is high. Costs include scrubbers that are placed on coal fired power plants, catalytic converters on automobiles, and ethanol fuels. All of these costs are passed on to consumers. Likewise, as the finite nature of landfill space is being realized, the cost of this scarcity will be felt in the price of disposable goods.

Until the science fiction perpetual motion machine is developed, a by-product of all production will be waste matter. For example, when a factory produces a styrofoam cup, at least two waste disposal costs are incurred. First, there is the cost of disposing of the wastes from the factory, such as unused materials, refuse, and industrial solid and liquid wastes. Second, there is the cost of disposing of the cup after someone has used it.

Obviously, in a private economic system, the goal of the industry producing the cup is to produce the best product at the least cost. Industry will therefore seek to dispose of its wastes using the least costly alternative. It will only reduce the quantity of waste it produces if it is cheaper to reduce waste than to dispose of it. Similarly, it will only incinerate the waste it produces, rather than dispose of it in a landfill, if doing so makes economic sense. Members of the society at large respond to these same economic signals. They will only cease to use the styrofoam cup when it is cheaper to use paper than to pay the cost of utilizing styrofoam. If styrofoam cups are cheap and can simply be taken

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to the landfill at low cost, the consumer will continue to buy these cups.

In general, landfill space becomes expensive only when the fill itself becomes visible and noxious to the private rights of others or otherwise pollutes the environment. This aversion to visibility is often first reflected in the "not in my backyard" syndrome in the state where the industry is located. The most economic solution is often simply to transport the waste to an area that is not someone's backyard, where the consequences of disposal are not visible, and where no one entity or group of entities is directly affected. The best example of this solution is ocean disposal. The ocean does not belong to any one person, and the effects of disposal are generally not visible. Today, however, it is more accurate to say that the results of ocean disposal have not been visible in the past. The effects of ocean disposal are becoming very visible as wastes wash up on the backyard beaches of eastern seaboard states.

If ocean disposal is not a viable option, the next best alternative is to move the wastes to an area of low population at a great distance from the regional population centers that generate the waste. Under this scenario, the wastes are not visible and are not in anyone's backyard, or if they are in someone's backyard, that person has such a big yard he does not mind. Using this option, a producing state may provide an excellent quality of life, made possible by the high tax revenues generated by the waste producing industry, while exporting the industrial garbage to a low population state miles away.

If garbage export costs are cheap and the costs of producing the products is low, consumers will continue to purchase the products. What occurs, in effect, is a trade-off of landfill space in low population states for low cost products throughout the country. The big winner is, of course, the garbage exporting state because it gets both an industrial tax base and low cost products. The loser may be the garbage receiving state because it takes the garbage as a *quid pro quo* for low priced goods, and, in effect, subsidizes the balance of the union by accepting out-of-state garbage.

This article explores the commerce clause implications raised if a less populated state refuses to accept out-of-state garbage at a state-owned landfill. The following hypothetical illustrates the issue.

State R (the receiving state), pursuant to legislative mandate, passes a law which provides that state tax monies raised by the tourist industry will be used to construct a state landfill, which will be of the highest quality in terms of environmental protection. The state also allows any private hauler to come to the landfill if he brings garbage from within the state. The prices for dumping are subsidized by tax revenues. The landfill is constructed through bids issued to the private sector and is operated under contract by a private firm. The landfill is, however, owned by State R. All other private landfills are ordered closed, are purchased by the state through condemnation proceedings, and are operated by the state in a similar manner. In addition, the State R legislature passes a bill outlawing the sale of styrofoam and disposable kitchenware and requires recycling of all beverage cans and bottles. A private garbage

hauler from State E arrives at the state-owned landfill and demands to dump his industrial wastes from a styrofoam manufacturing plant in State E, as well as municipal wastes from State E containing styrofoam products, disposable glass bottles, and cans.

The question addressed in this article is whether the "state market participant exception" to the dormant commerce clause permits State R to deny access to the out-of-state solid waste producer described in this hypothetical. The author's answer is yes, State R can exclude these wastes. State R (receiving state) has elected to recycle, to restrict the amount of waste it generates, and to provide a high level of environmental protection by owning and subsidizing its waste disposal industry. There is no categorical market imperative either in the commerce clause or in fundamental economic theory that allows State E garbage producers to undercut State R environmental policies by exporting domestic styrofoam, glass, and industrial wastes from State E to State R. The choices are clear for State E. If State E garbage producers cannot export to State R, they will be forced to look elsewhere or internalize the costs of their own waste production. The implications for State R, if it is forced to receive the wastes, are also clear. If State R cannot refuse the waste, it will have no motivation either to recycle or to provide expensive environmental protection measures. The balance of interests tips in favor of State R. Supreme Court caselaw is consistent with this result.

This article does not discuss challenges under the privileges and immunities clause<sup>1</sup> or the equal protection clause<sup>2</sup> as these are explored well elsewhere. Nor does it discuss federal preemption.<sup>3</sup> Rather, it explores only whether the dormant commerce clause rationale of maintaining a free economic interstate market is sufficiently powerful to deny a state

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1. An excellent discussion of the role of the privileges and immunities clause and the market participant doctrine can be found in Rodgers, *The Limits of State Activity in the Interstate Water Market*, XXI LAND & WATER LAW REV. 357 (1986). The privilege and immunities clause is very unlikely to come into play in these cases because the clause relates to the rights of human citizens to live and work in a state with the same rights as others. It is unlikely that a privilege of United States citizenship includes the right to operate a dump that accepts garbage from another state. It is the "residence" of the garbage, not the "residence" of the business owner, that precludes the operation of the dump.

2. See discussion of equal protection in Rodgers, *supra* note 1. Absent discrimination against a suspect class of individuals or in violation of a fundamental right, the standard for equal protection review is whether the discrimination is rational and whether the classification substantially furthers the asserted state objective. See generally *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). In the author's view, there is no fundamental right to produce garbage and move it interstate other than may exist under the commerce clause. If the commerce clause is the basis for the right, then the market participant doctrine is invoked and the equal protection analysis is no longer relevant. In addition, the desire on the part of the state refusing to accept the garbage to reduce waste and to protect the state's environment is clearly rational, and most legislation of the type discussed would accomplish this result.

3. In the author's view, there is a significant difference between disposal of hazardous or radioactive wastes and disposal of normal industrial or municipal wastes. The former are extensively federally regulated, and it is not suggested that the arguments made here with respect to industrial and municipal wastes are applicable to hazardous or radioactive wastes. For a good discussion of preemption, see Rodgers, *supra* note 1; Campbell, *State Ownership of Hazardous Waste Disposal Sites: A Technique for Excluding Out-of-State Waste?*, 14 ENVTL. L. 177, 191 (1983).

the right to operate a landfill exclusively for the industrial and municipal wastes generated by its residents.<sup>4</sup>

## II. HISTORICAL BACKGROUND

Article I, section 8 of the United States Constitution enumerates the powers of Congress, one of which is the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>5</sup> The explicit congressional power "to regulate Commerce . . . among the several States . . .," together with the negative implication that states may not invade that province,<sup>6</sup> sparks the debate in commerce clause disputes. The debate always requires a resolution that inherently affects the balance between state and federal power. Indeed, the history of commerce clause adjudication is a history of the search for the balance of federal-state power that best serves the society's needs at a particular time while recognizing that those needs continually change and become increasingly complex. The historical origin of the clause itself provides only a small piece of the information necessary to understand how the clause applies to the complex political and economic disputes that characterize the modern cases. Any attempt to suggest possible outcomes in commerce clause challenges, however, must necessarily begin with a review of the provision's origins.

The foremost problem of the federal union under the Articles of Confederation may have been its inability to tax.<sup>7</sup> The failure of the Confederation may also be attributed, however, to the absence of national regulatory power over commerce and to the resulting commercial "interstate brawls."<sup>8</sup> Trade barriers and acts of economic retribution among the states became so prevalent that in 1786 the Virginia Assembly felt

4. The best discussion of the market participant doctrine is contained in Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). It should be compared with Kovacs & Anderson, *States as Market Participants in Solid Waste Disposal Service—Fair Competition or the Destruction of the Private Sector*, 18 ENVTL. L. 779 (1988). Another author has also explored this question thoroughly and thoughtfully. See Pomper, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Post Industrial Natural Responses, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989).

5. U.S. CONST. art. I, § 8, cl. 3. In a case of first impression, the Tenth Circuit recently held that the commerce clause limits the taxing powers of Indian tribes, as well as those of the states, and that "the standard to be used in applying [the Indian commerce] clause is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade . . . measured by [the] traditional analyses." *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 545 (10th Cir.), cert. granted, 449 U.S. 820 (1980), *aff'd*, 455 U.S. 130 (1982). For a discussion of the Indian commerce clause, see Kovnat, *Solid Waste Regulation in Indian Country*, 21 N.M.L. REV. 121 (1990).

6. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2 (1978).

7. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 108 (3d ed. 1963); S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 304 (1965).

8. "There were enough interstate brawls to cause great disquiet. The New York assembly in 1787 assessed heavy entrance and clearance fees on all vessels coming from or bound to New Jersey and Connecticut; New Jersey retaliated by taxing the lighthouse on Sandy Hook \$30 a month." S. MORISON, *supra* note 7, at 304. See generally Sholley, *The Negative Implication of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

compelled to propose what became the Annapolis Convention "to take into consideration the trade of the United States [and] to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony."<sup>9</sup> Although only five states sent representatives and nothing substantive resulted, the report of the Annapolis Convention was one catalyst for the Constitutional Convention of 1787.<sup>10</sup> The records of the Constitutional Convention,<sup>11</sup> the *Federalist Papers*,<sup>12</sup> and the histories of the period<sup>13</sup> all indicate that the framers of the Constitution sought to overcome interstate rivalries and parochial protection of local economic interests. It is this purpose that modern Supreme Court opinions continue to describe as the original intent of the commerce clause.<sup>14</sup>

If the framers clearly intended to free national commerce from the strictures of state protectionism when they gave Congress the power "[t]o regulate Commerce . . . among the several States . . .,"<sup>15</sup> it is curious

9. Resolution of the General Assembly of Virginia, Proposing a Joint Meeting of Commissioners from the States to Consider and Recommend a Federal Plan for Regulating Commerce (Jan. 21, 1786), *reprinted in* GOVERNMENT PRINTING OFFICE, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 38 (1927) [hereinafter DOCUMENTS].

10. It was . . . to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.

W. RUTLEDGE, A DECLARATION OF LEGAL FAITH 25 (1947).

While the Annapolis Convention was primarily concerned with removing barriers to commerce, the participants clearly recognized that this problem was linked with other aspects of the federal system.

In this persuasion, your Commissioners submit an opinion, that the Idea of extending the powers of their Deputies, to other objects, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention; they are the more naturally led to this conclusion, as in the course of their reflections on the subject, they have been induced to think, that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the foederal [sic] government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System.

Proceedings of the Commissioners to Remedy Defects of the Federal Government, Annapolis, Maryland (Sept. 14, 1786), *reprinted in* DOCUMENTS, *supra* note 9, at 41-42.

11. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 308 (rev. ed. 1937); 3 *id.* at 478, 547-48. *See generally* S. PADOVER, TO SECURE THESE BLESSINGS 215-19 (1962).

12. THE FEDERALIST NOS. 7, 11-12 (A. Hamilton), 41-42 (J. Madison).

13. 1 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 502 (1854); M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 5-10 (1913); 1 F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 266-75 (1901).

14. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979); Exxon Corp. v. Governor of Md., 437 U.S. 117, 151 (1978) (Blackmun, J., concurring in part and dissenting in part); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 807 (1976); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

15. U.S. CONST. art. I, § 8, cl. 3. The purpose of the commerce clause is similar to that of the import-export clause, which provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . ." U.S. CONST. art. I, § 10, cl. 2. The import-export clause was intended, among other purposes, to prevent seaboard states from discrim-

that they did not expressly address state interference with interstate commerce.<sup>16</sup> The Convention, however, was pervaded by a fundamental division between delegates who advocated a strong central government and those committed to state sovereignty as the primary principle of the union.<sup>17</sup> An attempt to fashion language on state interference with interstate commerce could easily have led to a breakup of the Convention. The need to skirt that issue in order to reach consensus on the Constitution as a whole<sup>18</sup> may be the best explanation why the Constitution does not clearly delegate certain regulatory powers over commerce to the states and certain powers to the Congress.<sup>19</sup>

The framers' inability to reach closure on this issue did not bother Chief Justice Marshall in *Gibbons v. Ogden*.<sup>20</sup> In striking down a steamboat license monopoly granted by the New York legislature, the Chief Justice found that the state charter conflicted with a federal coastal licensing law. The federal licensing law was upheld as a valid exercise of the commerce power. He concluded that the conflicting state license violated the supremacy clause.<sup>21</sup> Marshall's decision established the foundation for the theory of the exclusivity of federal power over commerce.<sup>22</sup>

inating against inland states by taxing overseas imports and exports. 3 M. FARRAND, *supra* note 11, at 328-29. See also *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976). This purpose of nondiscrimination is common to both clauses.

16. It has been suggested that the framers may have believed that the privileges and immunities clause, U.S. CONST. art. IV, § 2, was a sufficient limitation on state parochialism. L. TRIBE, *supra* note 6, at § 6-2.

17. See generally A. KELLY & W. HARBISON, *supra* note 7, at 114-47.

18. As Alfred North Whitehead remarked: "The [framers] had an uncommonly clear grasp of the general ideas that they wanted put in [the Constitution], then left the working out of the details to later interpreters . . ." THE DIALOGUES OF ALFRED NORTH WHITEHEAD 204 (L. Price ed. 1954).

19. An early commerce clause scholar suggested that the framers knew they could not grasp all the implications of the grant of the commerce power; therefore, they were unwilling to impose a categorical limitation on state action, preferring to leave such limitations to a fair application of the congressional power. F. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 30 (1937).

Justice Jackson read the commerce clause silence as placing an affirmative duty on the Court to promote the economic best interest of the country. "[E]ven more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 535 (1949). It is not clear, however, that the commerce clause must be read as embracing a constitutionally compelled doctrine of national free trade. See *infra* note 22.

20. 22 U.S. (9 Wheat.) 1 (1824).

21. *Id.* at 221.

22. Chief Justice Marshall's opinion was not without ambiguity concerning whether the commerce power was exclusively federal.

The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent . . . .

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New York . . . have . . . come into collision with an act of Congress . . . . Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power (to regulate commerce . . .) or,

If, as has always been understood, the sovereignty of Congress though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.<sup>23</sup>

The principle that Congress' commerce power reigns supreme when it acts legislatively has been extended to cases where Congress has not acted. In this context, the so-called "dormant commerce clause" applies and the court balances the need for the free flow of interstate goods against the state's interest in regulation.<sup>24</sup>

### III. THE STATE REGULATION CASES

The modern dormant commerce clause test for balancing state and federal interests is most clearly articulated in *Pike v. Bruce Church, Inc.*<sup>25</sup>

Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one

in virtue of a power to regulate their domestic trade and police.

*Id.* at 208-10. Professor (later Justice) Frankfurter attributed the confusion in the Marshall opinion to the Chief Justice's desire to move cautiously in cementing his federalist doctrine.

Marshall's use of the commerce clause greatly furthered the idea that though we are a federation of states we are also a nation, and gave momentum to the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community.

F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 18-19 (W. Mendelson ed. 1973).

The ambivalence remains over whether the negative implication of the commerce clause is principally a device that helps to allocate the balance of state and federal power or whether it embodies the principle of national free trade. Unresolved by Chief Justice Marshall, this debate was perhaps most classically framed by Justices Frankfurter and Jackson. *See supra* notes 19-22 and accompanying text. Not surprisingly, this same debate sharply divides the present Court. *Compare* *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (5-4 decision) (Blackmun, J.) ("Restraint in this area is also counseled by considerations of state sovereignty [and] the role of each State 'as guardian and trustee for its people.' . . .") with *id.* at 453 (Powell, J., dissenting) ("[T]he Commerce Clause long has been recognized as a limitation on [state] sovereignty, consciously designed to maintain a national market and defeat economic provincialism.").

23. *Gibbons*, 22 U.S. (9 Wheat.) at 197. In a concurring opinion, Justice Johnson came to the issue more directly. He would have held that, irrespective of the federal law, the New York license was invalid as an invasion of the power left exclusively to Congress. "The inferences, to be correctly drawn, from this whole article, appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce . . ." *Id.* at 236.

24. The Court has stated that it found it necessary to fill in the "great silences" in the Constitution with respect to the commerce power in order to assure the prosperity of the nation. This author argues elsewhere that the Constitution is not silent on this point. *See* DuMars and Tarlock, *New Challenges to State Water Sovereignty*, 29 NAT. RESOURCES J. 331 (1989). The Constitution states that the Congress can regulate this area. It does not say the Court should overturn state legislation in this area when Congress has not acted. *See also* DuMars, *Evaluating Congressional Limits on a State's Severance Tax Equity Interest in its Natural Resources: An Essential Responsibility for the Supreme Court*, 22 NAT. RESOURCES J. 673 (1982).

25. 397 U.S. 137 (1970).



of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>26</sup>

Pre-*Pike* decisions often failed to formulate a test, and post-*Pike* decisions invariably begin their analyses with the *Pike* formulation. Each of the commerce clause regulation cases in which the Supreme Court used a balancing approach can be explained by some or all of the components of the *Pike* test: (1) evenhandedness; (2) legitimacy of the local public interest; (3) burden imposed on commerce in relation to local benefit; and (4) least intrusive means.<sup>27</sup>

### A. *Evenhandedness*

The evenhandedness component of the *Pike* test focuses on whether the legislation discriminates against interstate commerce.<sup>28</sup> While the cases do not require absolute equality of treatment of interstate and intrastate commerce, if the Court finds discrimination<sup>29</sup> it will scrutinize the state legislation more closely and require the state to offer greater justification for the statute.<sup>30</sup> Indeed, in cases that involve facial discrimination similar

26. *Id.* at 142 (citation omitted). *Pike* invalidated a state statute that required Arizona cantaloupes to be packed in the state. The Court suggested, however, that state regulations that affect public health or safety might be subjected to a lesser standard of scrutiny. *Id.* at 143-44.

27. Most recently, the Court has restated the *Pike* test as a three-pronged test:

Under [the] general rule, we must inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

*Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

28. Although *Pike* states the test for discrimination separately from that for burden, the two tests often employ the same balancing approach. This approach analyzes the state objective, the purpose behind that objective, and the means chosen to achieve the particular end. For a recent articulation of the discrimination and burden components of *Pike* as a single test, see *supra* note 27.

29. Theoretically, a finding of discrimination against interstate commerce may be overcome by the absence of less restrictive means to protect a legitimate state interest, but no decision fully applies this analysis. In fact, a finding of discrimination usually sounds the death knell of a state statute challenged on commerce clause grounds. When the Court upholds a statute, it often resorts to formalistic tests in order to avoid pronouncing the statute discriminatory. See, e.g., *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (Maryland's prohibition against oil producers or refiners operating retail service stations burdened commerce only incidentally; therefore, it was not discriminatory.).

30. The evenhandedness requirement of *Pike* parallels the nondiscrimination requirement of the privileges and immunities clause, U.S. CONST. art. IV, § 2. The privileges and immunities clause ensures to citizens of each state the same rights of state citizenship held by citizens of any other state into which they venture. It prohibits a state from discriminating against nonresidents when "there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). See also *Hicklin v. Orbeck*, 437 U.S. 518 (1978). The Court has allowed preferential treatment of residents over nonresidents only when such treatment is supported by a valid reason that bears a close relationship to the degree of discrimination. One example of a legitimate reason for preferential treatment is the protection of wildlife. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

to a trade barrier,<sup>31</sup> if the state itself is not involved as a "market participant," the lack of evenhandedness triggers an almost *per se* rule of invalidity.<sup>32</sup> A facially discriminatory statute regulating private activity that encourages retaliation by sister states<sup>33</sup> or requires action by a sister state to make its application evenhanded<sup>34</sup> will also receive close scrutiny. Even when the statute is evenhanded on its face, the Court will examine the practical effect of the statutory scheme to determine whether it is discriminatory in operation. When the effect is clearly discriminatory and without substantial justification, the statute will fall.<sup>35</sup>

### B. *Legitimacy of the Local Public Interest*

As a legacy of the old distinction between "police power" and "regulation of commerce,"<sup>36</sup> the modern cases focus on the nature of the protected local interest. To the extent that these cases maintain the old distinction, they can be viewed as presenting a hierarchy of local interests.<sup>37</sup> The more legitimate the local interest, the less judicial scrutiny the Court seems to require.

At the bottom of the hierarchy are regulatory statutes which discriminate against out-of-state sellers of products.<sup>38</sup> If the purpose<sup>39</sup> or predominant effect<sup>40</sup> of a regulation is to protect local markets from interstate competition, the regulation is clearly suspect. Somewhat higher in the hierarchy is a state's interest in the safety of its citizens. In the train and truck regulation cases, the Court gave safety regulations a strong presumption of validity when they conflicted with the commerce clause.<sup>41</sup> At the top of the hierarchy, state regulation of public health receives great deference from the Court, second only to the circumstance where the state is acting

31. The difficulty of overcoming clear and demonstrable discrimination is well illustrated by the milk regulation cases. *See, e.g.,* Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) (attempt to reserve local market for local milk held invalid discrimination against interstate commerce); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (invalidating a requirement that milk sold in the city be pasteurized within five miles of city); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (striking down a prohibition against in-state resale of milk purchased outside the state at prices below state minimum).

32. *See infra* text accompanying notes 70-74.

33. *See, e.g.,* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Public Util. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).

34. *See* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976).

35. *E.g.,* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (North Carolina restriction on the labeling of apples shipped into state discriminated against the interstate sale of Washington apples).

Although one might also expect that a law discriminatory on its face but evenhanded in its operation will pass constitutional muster, *Hughes v. Oklahoma*, 441 U.S. 322 (1979), suggests that this is not the case. "Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose . . ." *Id.* at 337.

36. *See infra* text accompanying notes 44-47.

37. *See generally* L. TRIBE, *supra* note 6, §§ 6-6 to -8, 6-12.

38. *But see infra* notes 78-81 and accompanying text.

39. *See, e.g.,* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

40. *See, e.g.,* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

41. *See* Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

as a market participant.<sup>42</sup> The quarantine cases, in which the Court upheld statutes prohibiting the importation of diseased cattle or decayed or noxious food,<sup>43</sup> are the clearest example of the Court's deference to state health regulations despite direct and substantial impacts on commerce.<sup>44</sup>

As the interest protected by the regulation moves from the economic sphere toward public safety and health, it becomes more likely that the statute will withstand commerce clause attack. *Raymond Motor Transportation, Inc. v. Rice*<sup>45</sup> establishes, however, that the mere recitation of a health or safety purpose will not suffice; the regulation must actually further the interest asserted. In that case, the Court struck down a state-imposed truck length limitation because the state failed to produce evidence to counter the plaintiff's massive evidence that the law did not contribute to highway safety.<sup>46</sup>

### C. Burden on Commerce in Relation to Local Benefit

The third component of the *Pike* test asks whether "the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits."<sup>47</sup> This balancing of state and federal interests has been a constant theme in commerce clause adjudication.<sup>48</sup> For example, in *Bibb v. Navajo Freight Lines, Inc.*,<sup>49</sup> the Court used a balancing approach to strike down an Illinois requirement that trucks have contour mudguards. Because contour mudguards were not measurably safer than the straight ones allowed in forty-five other states, the showing of added safety was insufficient to outweigh the burden on interstate commerce.<sup>50</sup>

42. See *infra* notes 77-98 and accompanying text.

43. *Mintz v. Baldwin*, 289 U.S. 346 (1933) (unhealthy cattle); *Price v. Illinois*, 238 U.S. 446 (1915) (food preservative); *Asbell v. Kansas*, 209 U.S. 251 (1908) (unhealthy cattle); *Crossman v. Lurman*, 192 U.S. 189 (1904) (adulterated foods).

44. Although these cases have been rationalized on the theory that the prohibited products were "not proper subjects of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935), they are more fairly understood as balancing cases in which the states' interest in prohibiting noxious products reasonably outweighed the interference with commerce. L. TRIBE, *supra* note 6, at 28 n.43 (Supp. 1979).

45. 434 U.S. 429 (1978).

46. The Court clearly understood that safety, like other legitimate state interests, must be weighed against interference with interstate commerce. *Id.* at 443. It has been suggested, however, that if safety justifications are supported by the factual record, "the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Id.* at 449 (Blackmun, J., concurring).

47. 397 U.S. at 142. *Pike* seems to suggest that the balancing of burden and local benefit will take place only if the statute's "effects on interstate commerce are . . . incidental." *Id.* This reversion to the old direct-versus-indirect formula plays little part in modern commerce clause analysis. As a practical matter, statutes found to withstand the *Pike* balancing test are also found to have an incidental effect on commerce. See, e.g., *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978). Statutes that fail the test are found to have a substantial or direct effect on commerce. See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

48. L. TRIBE, *supra* note 6, § 6-12, at 341.

49. 359 U.S. 520 (1959).

50. The burden included the cost of installing the contour mudguards (\$30 or more per vehicle) as well as the delay caused by changing mudguards. *Id.* at 525, 527.

#### D. Least Intrusive Means

Even if a particular regulation furthers a legitimate local purpose, the *Pike* test will not permit it to burden commerce when the purpose "could be promoted as well with a lesser impact on interstate activities."<sup>51</sup> This least-intrusive-means requirement traditionally has been applied to state regulations that serve a legitimate state purpose but are discriminatory on their face or in effect.<sup>52</sup> Even the most compelling and legitimate local purpose will not save a discriminatory regulation unless there are no "reasonable nondiscriminatory alternatives" available that are "adequate to conserve" the local interest.<sup>53</sup> Thus, the least-intrusive-means test applies a rigid bottom line to an otherwise flexible standard.

In *Hughes v. Oklahoma*,<sup>54</sup> an Oklahoma statute prohibiting the interstate sale of Oklahoma minnows was challenged on commerce clause grounds.<sup>55</sup> After finding that the law facially discriminated against interstate commerce,<sup>56</sup> the Court unequivocally stated: "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."<sup>57</sup> The Court's language suggests that the least-intrusive-means requirement of *Pike* is, like the strict scrutiny standard found in the equal protection cases, virtually impossible to overcome.<sup>58</sup>

51. 397 U.S. at 142. The Court first clearly articulated a least-intrusive-means test in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The *Pike* formula incorporated essentially the same test.

52. See *Hunt*, 432 U.S. 333; *Dean Milk Co.*, 340 U.S. at 354. In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Court restated this prong of the *Pike* test expressly in terms of discrimination: "whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Id.* at 336.

53. *Dean Milk Co.*, 340 U.S. at 354.

54. 441 U.S. 322.

55. *Hughes* expressly overruled *Geer v. Connecticut*, 161 U.S. 519 (1896), which held that because the state "owned" the wild game within its borders, the state's control over the game was outside the scope of the commerce clause. 441 U.S. at 335; see *Geer*, 161 U.S. at 530-32. By overruling *Geer*, *Hughes* removed the only barrier to commerce clause scrutiny of the Oklahoma statute.

56. "It forbids the transportation of natural minnows out of the State for purposes of sale, and thus 'overtly blocks the flow of interstate commerce at [the] State's borders.'" *Hughes*, 441 U.S. at 336-37 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

57. *Id.* at 337. Applying this strict scrutiny, the Court held the statute repugnant to the commerce clause because "Oklahoma ha[d] chosen to 'conserve' its minnows in the way that most overtly discriminate[d] against interstate commerce." *Id.* at 338.

58. The strict scrutiny standard of the equal protection cases has been criticized as a result-oriented label that virtually seals the fate of the challenged regulation. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). "[T]here are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights." L. TRIBE, *supra* note 6, § 16-6, at 1000. See *Matson v. Lewis*, 410 U.S. 679 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973).

As recently stated by Justice Blackmun:

I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable

## IV. THE NATURAL RESOURCE CASES

The Supreme Court has characterized certain state regulations as placing the state "in a position of economic isolation"<sup>59</sup> that effectuates economic protectionism<sup>60</sup> or tends toward "economic Balkanization."<sup>61</sup> The Court consistently<sup>62</sup> has used this analysis in cases that involve the isolation of a state's natural resources from interstate businesses and consumers in sister states.<sup>63</sup>

In *West v. Kansas Natural Gas Co.*,<sup>64</sup> the Court was confronted with an Oklahoma statute that in effect prohibited the shipment of natural gas outside the state. The Court struck down the statute<sup>65</sup> as purposeful discrimination against interstate commerce.<sup>66</sup> Similarly, when West Virginia sought to prevent natural gas pipeline companies from shipping natural gas out of the state until all local needs were met, the Court in *Pennsylvania v. West Virginia*<sup>67</sup> held that the commerce clause prohibited the state's "attempt to regulate the interstate business to the advantage of the local customers."<sup>68</sup> The Court in these early cases did not reject

himself to vote to strike legislation down.

*Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring).

59. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

60. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

61. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). See Friedman, Hardy & Wuliger, *Balkanization of Interstate Energy Markets: New Variations of Sovereign Self-Interest*, 30 CASE W. RES. L. REV. 291 (1980).

62. E.g., *Hughes* 441 U.S. 322; *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). See also *supra* text accompanying notes 18-30.

63. Similarly, the Court has invalidated an attempt by Mississippi to withhold its markets from producers in a sister state that did not provide reciprocal rights to Mississippi producers. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976). The Mississippi regulation was invalid because it invited "a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.* at 380 (quoting *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951)). Relying on the free trade concept that underlies the commerce clause, the Court reasoned that the commerce clause precludes "the threat of economic isolation as a weapon to force sister states to enter into even a desirable reciprocity agreement." *Id.* at 379.

64. 221 U.S. 229 (1911).

65. *Id.* at 262. The Court relied on the logic of *State ex rel. Corwin v. Indiana & Ohio Oil, Gas & Mining Co.*, 120 Ind. 575, 22 N.E. 778 (1889), an Indiana case that had invalidated a similar law. The *Corwin* court had reasoned as follows: (1) when brought to the surface and put in pipes, natural gas is a "commercial product" that can be transported, bought, and sold; (2) if natural gas can be kept in state, so can all other commercial products such as corn, wheat, lead, and iron, which would result in the "annihilation of interstate commerce"; and (3) therefore, the statute prohibiting shipment out of state violates the commerce clause. *West*, 221 U.S. at 256-57 (quoting *Corwin*, 120 Ind. at 578, 22 N.E. at 779).

66. *West*, 221 U.S. at 250.

67. 262 U.S. 553 (1923).

68. *Id.* at 597-98. "A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928). In addition to regulations that favor local customers, those whose purpose or effect is to favor local producers have been invalidated on commerce clause grounds. E.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1948); *Toomer v. Witsell*, 334 U.S. 385 (1948).

conservation of natural resources as a legitimate state end;<sup>69</sup> rather, it precluded regulations that preferred in-state private purchasers over out-of-state private purchasers.

This invalidation of state regulatory discrimination appears most clearly in *City of Philadelphia v. New Jersey*.<sup>70</sup> There, the Court invalidated a New Jersey law that prohibited private landfill operators from making space available to private out-of-state garbage collectors who sought to haul out-of-state garbage to the private dumps.<sup>71</sup> The Court found the "evil of protectionism"<sup>72</sup> in the statute that precluded interstate access to the private dumps while allowing intrastate access.<sup>73</sup> The Court applied "a virtually *per se* rule of invalidity" to this regulation which, on its face, preferred private in-state haulers of garbage over private parties hauling garbage from out-of-state.<sup>74</sup>

## V. THE MARKET PARTICIPANT DOCTRINE

The Court has created an exception to the dormant commerce clause which arises when the state is acting not as a market regulator but as a participant in the marketplace, either as a seller or as a buyer. Under the market participant doctrine, a state or state subdivision that acts as a market participant rather than a market regulator "is not subject to the restraints of the Commerce Clause."<sup>75</sup> The Court has expressly reserved the question addressed by this article: whether state operation of a landfill may fall within the market participant doctrine.<sup>76</sup> This question has,

69. The modern cases, of course, specifically recognize "the States' interests in conservation . . . as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). Nondiscriminatory regulations aimed at conservation will therefore survive commerce clause scrutiny. In *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950), the Supreme Court let stand a state-imposed increase in oil wellhead prices as a valid measure to discourage the wasting of gas. The Court concluded that "[i]nsofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide." *Id.* at 188.

70. 437 U.S. 617 (1978).

71. *Id.* at 628.

72. *Id.* at 626. It is interesting to note that in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court declined to define what makes an item a "natural resource." It simply said cement is not one. "Cement is not a natural resource, like coal, timber, wild game, or minerals. It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." *Id.* at 443-44 (citations omitted). This distinction was challenged by Justice Powell in dissent.

73. Consequently, the Court found it unnecessary to reach the *Pike* balancing test. "This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case." 437 U.S. at 626.

74. *Id.* at 624, 628.

75. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983). Application of the distinction between "market participant" and "market regulator" has, however, occasioned considerable dispute in the Supreme Court's jurisprudence. The author of each of the three opinions that applied the doctrine—*Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (Powell, J.); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (Blackmun, J.); *White*, 460 U.S. 204 (Rehnquist, J.)—authored a dissent in the next, the pattern being maintained by Justice Rehnquist's dissent in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 101 (1984), the principal case in which application of the doctrine resulted in a conclusion that the state was not a market participant.

76. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978).

however, been addressed by state and lower federal courts with mixed results.<sup>77</sup>

In *Hughes v. Alexandria Scrap Corp.*,<sup>78</sup> the Supreme Court upheld Maryland's statutory scheme to rid the state of derelict automobiles, even though the scheme entailed two types of discrimination: (1) Maryland paid bounties to in-state scrap auto bulk processors while refusing to pay bounties to out-of-state processors on the same terms; and (2) Maryland paid bounties only for vehicles formerly titled in Maryland.<sup>79</sup> The Court held that the statutory scheme was consistent with the commerce clause because Maryland was participating in the market rather than regulating it.<sup>80</sup> The majority stated, "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."<sup>81</sup>

In *Reeves, Inc. v. Stake*,<sup>82</sup> the Court upheld a South Dakota policy of confining the sale of cement by a state-operated cement plant exclusively to South Dakota residents to meet their demand during a "serious cement shortage."<sup>83</sup> The Court affirmed "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators," concluding that "South Dakota, as a seller of cement, unquestionably fits the 'market participant' label."<sup>84</sup> Reeves, a Wyoming corporation that had purchased about 95% of its cement from South Dakota's state-operated plant for over twenty years, was forced to cut production by over 75% as a result of the policy.<sup>85</sup>

In *White v. Massachusetts Council of Construction Employers, Inc.*,<sup>86</sup> the Court held that an executive order of the Mayor of Boston, which

77. Government ownership was recognized as market participation not subject to commerce clause limitations in: *Swin Resource Systems, Inc. v. Lycoming County*, 678 F. Supp. 1116 (M.D. Md.), *aff'd*, 883 F.2d 245 (3rd Cir. 1989), *cert. denied*, 110 S.Ct. 1127 (1990); *Lafrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Sys. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987); *Harvey & Harvey v. Delaware Solid Waste Authority*, 600 F. Supp. 1369 (D. Del. 1985); *Shayne Bros. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Comm'rs of Charles County v. Stevens*, 473 A.2d 12, 299 Md. 203 (1984). When the state acts to regulate a market where it is not a participant, or acts to regulate beyond the extent of its own participation, courts apply commerce clause standards. See *J. Filiberto Sanitation v. State of N.J. Dep't of Env'tl. Protection*, 857 F.2d 913 (3rd Cir. 1988); *Washington State Bldg. and Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Industrial Maintenance Service, Inc. v. Moore*, 677 F. Supp. 436 (S.D. W. Va. 1987); *Al Turi Landfill v. Town of Goshen*, 556 F. Supp. 231 (S.D.N.Y.), *aff'd*, 697 F.2d 287 (2nd Cir. 1982); *Shayne Bros., Inc. v. Prince George's County*, 556 F. Supp. 182 (D. Md. 1983).

78. 426 U.S. 794 (1976).

79. *Id.* at 797, 801.

80. *Id.* at 809-10.

81. *Id.* at 810 (footnotes omitted). The best legal opinion discussing the high court's views in this area is *Swin Resource Systems, Inc. v. Lycoming County, Pa.*, 883 F.2d 245 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 1127 (1990). Much of the discussion here simply paraphrases Judge Becker's views as expressed in that opinion.

82. 447 U.S. 429 (1980).

83. *Id.* at 432.

84. *Id.* at 436, 440.

85. *Id.* at 433, 452 n.4.

86. 460 U.S. 204 (1983).

required all construction projects funded in whole or in part either by city funds or city-administered federal funds to be performed by a work force of at least 50% city residents, was "well within the scope of *Alexandria Scrap and Reeves*."<sup>87</sup> Justice Blackmun dissented, arguing that the city "ha[d] imposed as a condition of obtaining a public construction contract the requirement that *private firms* hire only Boston residents for 50% of specified jobs."<sup>88</sup> Thus, Boston was regulating the hiring practices of private employers.<sup>89</sup> The majority agreed with Justice Blackmun that for an action to fall within the market participant doctrine, there must be "limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business."<sup>90</sup> The Court did not define those limits with precision because "[i]n this case . . . [e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'"<sup>91</sup>

The limits on the extension of the market-participant doctrine were reached in *South-Central Timber Developments, Inc. v. Wunnicke*.<sup>92</sup> In *Wunnicke*, a plurality struck down Alaska's requirement that timber taken from state lands be processed in-state prior to export. The plurality held that

[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but [does not] allow [it] to . . . impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.<sup>93</sup>

The Alaska policy crossed the line distinguishing participation from regulation because the conditions it attached to its timber sales amounted to "downstream regulation of the timber-processing market in which it is not a participant."<sup>94</sup>

#### A. *The Market Participant Doctrine and Natural Resources*

A central question not yet answered by the court is whether the market-participant doctrine will be applied with full force to allocation of natural resources. Unlike a manufactured product or the provision of services, a state cannot manufacture a natural resource. While it may seem "just" for South Dakota to favor its citizens in the sale of manufactured cement from a state-owned cement plant, it may not seem just for a state to favor its own citizens when selling a rare mineral if the state happens to be endowed with the bulk of the nation's supply of this rare mineral and other states are dependent upon it.

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87. *Id.* at 211 n.7, 205 n.1.

88. *Id.* at 217.

89. *Id.*

90. *Id.* at 211.

91. *Id.* at 211 n.7.

92. 467 U.S. 82 (1984).

93. *Id.* at 97.

94. *Id.* at 99.



The Supreme Court has only alluded to this issue. In *Reeves*, the Court noted that

[c]ement is not a natural resource, like coal, timber, wild game, or minerals. It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement . . . . Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by *happenstance* are found there, those limits do not apply here.<sup>95</sup>

Similarly, in *Sporhase v. Nebraska*,<sup>96</sup> a case which struck down a Nebraska statute that restricted out-of-state sales of groundwater, the Court cited *Reeves*, concluding that "given [Nebraska's water] conservation efforts, the continuing availability of groundwater in Nebraska is *not simply happenstance*; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."<sup>97</sup> The Court went on to describe, in dictum, the circumstances under which Nebraska might reserve its groundwater solely for in-state uses. In *Wunnicke*, the Court noted that an "element[ ] . . . not present in *Reeves*" but present in the Alaska case was the "involve[ment]" of a "natural resource."<sup>98</sup>

In the Third Circuit case of *Swin Resource Systems, Inc. v. Lycoming County, Pennsylvania*,<sup>99</sup> Judge Becker was not persuaded that the market participant doctrine does not apply to natural resources. He pointed out that the Court in *Alexandria Scrap* stated clearly that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."<sup>100</sup> The opinion in *Reeves* quotes this same language, emphasizing its "unmistakably broad terms."<sup>101</sup>

### *B. The Market Participant Doctrine and State Sales of Landfill Space*

Judge Becker's opinion in *Swin Resource Systems, Inc.* is persuasive in concluding that irrespective of whether the market participant doctrine applies to natural resources, landfill space is not a naturally occurring

95. 447 U.S. at 443-44 (emphasis added; citations and footnotes omitted).

96. 458 U.S. 941 (1982).

97. *Id.* at 957 (emphasis added).

98. 467 U.S. at 96; *cf.* *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982) (characterizing *Reeves* as establishing that "a state may confine to its residents the sale of products it *produces*" and refusing to characterize as market participation New Hampshire's efforts to limit out-of-state sale of hydro-electric power generated by a privately owned power company from a river assertedly owned by the state).

99. 883 F.2d 245 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 1127 (1990).

100. *Id.* at 249 (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (footnotes omitted)).

101. 447 U.S. at 436.

resource which the state is obligated to share with the entire nation. He concluded:

This [landfill space] is not a case in which a state has hoarded a resource like coal or oil that is geologically peculiar to that state (although even with respect to such a natural resource, the Supreme Court has permitted states to exploit their monopoly position by exporting tax burdens to other states through facially neutral tax statutes . . .). Nor is this a case in which a state has used its ownership of land to discriminate against the transportation of goods in interstate commerce. The[] right-of-way or transportation cases raise a discrete set of concerns, as open 'channels of commerce . . . are essential to the market itself' because they are 'essential to [an outsider's] ability to do business in the state.'<sup>102</sup>

Judge Becker went on to hold that the market participant doctrine should be applied with full force to landfill space.<sup>103</sup> First, he reasoned that construction of a landfill to meet modern ecological requirements requires expense on the part of the state in the same way that construction of a cement plant involves expense.<sup>104</sup> Second, the fact that a landfill is located on land does not make the landfill a natural resource, as virtually all businesses are located on land.<sup>105</sup> Third, the state expends money to acquire the land on which the landfill is located, just as South Dakota spent money in *Reeves* to build the cement plant.<sup>106</sup> Fourth, unlike the extraction of resources such as coal, which generates jobs and resource taxes, dumps are noxious uses put in place as a sacrifice of the people in the area.<sup>107</sup> Fifth, the land space is not there by "happenstance." While coal resources are providentially located in a particular state, landfills are permitted as a result of political choice.<sup>108</sup> Finally, the scarcity of landfill space in the garbage-producing state may be a politically created shortage because the state of exportation has elected not to locate dumps within the state and simply prefers to export the waste.<sup>109</sup> As stated by Judge Becker, "[n]either the sacrifice nor the political character of much of the shortage of land available for landfill constructions can be ignored."<sup>110</sup>

While, as discussed above, the members of the Supreme Court are plainly not always in agreement as to the rationale behind the market participant doctrine, two fundamental bases for the doctrine have emerged. First, state government reflects the will of the people of a state who are exercising their private choices collectively in the form of a public trust. The people of a state voluntarily submit themselves to the taxing process

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102. *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 254 (3rd Cir. 1989).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

in hopes that their collective wealth will be used to better their collective self interest. State tax monies are collected, pooled, and spent on projects that serve the needs of the state's citizens. As necessary, state monies are spent on state roads, schools, fire and police protection, water systems, universities, parks, and other accoutrements of a civilized society. In addition, state monies are spent on research in the area of environmental quality and are used to subsidize industries that conform to environmental quality standards established by the state. Monies not spent are placed in financial institutions within the state. No one seriously argues that when a state legislature decides in which savings and loan institution it will place its money, it must advertise nationally for the best price. It may select only institutions within the state. Nor does anyone seriously argue that a state is obligated to extend its highway construction work across the state line into another state or that state scholarships must be given to citizens from other states. Thus, one basis for the market participant doctrine is the Court's view that the state *qua* state is simply serving its constituents, as it is obligated to do, when it builds a landfill exclusively for its citizens, builds a cement plant as in *Reeves*, or when it purchases junk car hulks as in *Alexandria Scrap*. As Justice Black stated in *Reeves*, the market participant doctrine enables "the people [acting through their local government] to determine as conditions demand . . . what services and the functions the public welfare requires."<sup>111</sup>

A second market participant rationale is based on the basic freedom of choice that any proprietor may exercise in deciding from whom it wishes to purchase or to whom it wishes to sell. For example, suppose a non-profit corporation purchased land in an area such as Texas and built a model city the size of Rhode Island. No one would seriously argue that, absent restrictions on individual liberties or privileges and immunities of national citizenship, this development would be constrained in deciding to whom it sold lots. More specifically, no one would seriously argue that this private development must accept out-of-state garbage at its private dump. Thus, the market participant doctrine is also based in part on the fundamental right in a free market economy to exercise proprietary choice. Why should the state, as a proprietor, be foreclosed from making the same market choices available to the private sector as long as a specific guarantee of the Constitution is not violated?

The dissenting judge in *Swin Resource Systems, Inc.* argued that the rationale of *Garcia v. San Antonio Metropolitan Transportation Authority*<sup>112</sup> has *sub silentio* overruled the market participant doctrine because the true safeguards against abuses under the commerce clause lie not in judicially imposed limits on the clause, but in the procedural political safeguards present in our federal system of government. These safeguards include state representation in the Senate, the electoral college, and the

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111. 447 U.S. 429, 438 n.11 (1980).

112. 469 U.S. 528 (1985).

doctrine of separation of powers, all of which exist to preclude abuses of state sovereignty.<sup>113</sup>

The argument that *Garcia* requires states to go to Congress to obtain the right to preclude an interstate garbage carrier from hauling trash to a state-created dump turns the commerce clause on its head. As discussed above, the Supreme Court, in its commerce clause decisions, stepped into what it perceived as a regulatory void to ensure that goods can move in interstate commerce and to prevent balkanization by states. The Court stated that it moved into this area to fill in the "great silences" contained in the commerce clause itself.<sup>114</sup> A review of the cases discussed above illustrates that the commerce clause has been neither silent nor dormant. The commerce clause is not silent because it states expressly that the *Congress* (not the Court) has the power to regulate interstate commerce. The commerce clause is not dormant because, even when Congress has not acted, the Court has consistently used the clause to strike down state laws which the Court considers violative of broadly shaped, judicially fashioned prohibitions against trade restraint or violative of principles of antitrust laws loosely applied to the states.

Perhaps the most euphoric moment for the Court in the exercise of the commerce clause came when Justice Jackson in *Hood & Sons v. DuMond*<sup>115</sup> baldly stated that the Court itself had ensured the prosperity of the nation by its interpretations of the commerce clause. He stated that "even more than by interpretation of its written word, this court has advanced the solidarity and prosperity of this nation by the meaning it has given to these great silences of the Constitution."<sup>116</sup>

Whatever prosperity the Court may have brought to the nation through its interpretations of the commerce clause—an issue explored below in the discussion of whether a state-owned dump creates a monopoly—surely the Court never anticipated that it was rewriting the commerce clause to provide that states can place no regulations on commerce unless authorized to do so by the Congress. It is certainly true that a state law establishing a state-owned landfill may be preempted by a federal law regulating the same area. It hardly follows from this rule, however, that a state must go to Congress to obtain a federal law to allow it to operate a state facility exclusively for its citizens. It is patently absurd to suggest that the Court in *Garcia* was somehow suggesting that all state-operated facilities impacting commerce are unconstitutional until authorized by Congress. It is likewise absurd from a practical standpoint to suggest that an individual state or county could routinely muster the political clout to get congressional approval for all public welfare activities that might impact on commerce.

This complete *sub silentio* federal preemption view is inconsistent with the plain language of the Court. "Nothing in the purposes animating

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113. *Swin Resource Systems, Inc.*, 883 F.2d at 260.

114. *Hood & Sons v. DuMond*, 336 U.S. 525, 535 (1949).

115. *Id.*

116. *Id.*

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."<sup>117</sup> As the Court stated succinctly in *Reeves*, "the competing considerations in cases involving state proprietary actions often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."<sup>118</sup> Given these factors, *Alexandria Scrap* wisely recognized that, as a rule, the adjustment of interests in this context is a task better suited for Congress than the Court.<sup>119</sup> This rule means that if state market participation is bad for the federal union, the activity should be preempted by the Congress. It does not mean that a state must go to Congress to get authorization for state market participation.

The dissenting judge in *Swin Resource Systems, Inc.* also argued that *South Central Timber* foreclosed state market participation in landfills because it prohibited states from regulating activities "downstream" by placing discriminatory conditions on private entities that buy from the state.<sup>120</sup> He concluded that excluding out-of-state wastes imposes conditions "upstream" of the landfill activity; therefore, such state regulation is also precluded.<sup>121</sup> The unconstitutional "upstream condition" is that the waste must come from within the state to be accepted at the landfill.<sup>122</sup>

This argument misses the point of *South Central Timber*. The State of Alaska was using conditions on sales of timber to encourage purchasers to process logs in Alaska, thereby favoring in-state processors over out-of-state processors. The county landfill in *Swin Resource Systems, Inc.* was not encouraging in-state hauling of garbage or encouraging in-state citizens to produce more garbage; it was simply, as in *Alexandria Scrap*, allocating its wealth to solve the problem of refuse generated in-state.

### C. *Reservation of State Landfill Space Exclusively for State Citizens and Economic Efficiency*

The political and economic arguments against the state acting as market participant and operating a landfill solely for its citizens include, *inter alia*, that a state should not be involved in waste management because waste management is more efficiently left to the private sector. Second, if the state is involved, it is unfair for the state to exercise the choice to have waste management become an exclusive function of the state. Third, if solid waste disposal is an exclusive function of the state, waste facilities must be open to waste from other states or the following negative results will occur:

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117. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (footnotes omitted).

118. 447 U.S. at 439.

119. *Id.*

120. 883 F.2d 245, 259 (3rd Cir. 1989).

121. *Id.*

122. *Id.*

1. There will be retaliation from sister states who will refuse to accept garbage from the receiving state until all states are forced to dispose of their own refuse in their own state;
2. State dumps will be inefficient from an economic perspective because a state does not operate on the same profit motives as the private sector. Furthermore, state operators will create unfair competition because states will subsidize their own dumping operations;
3. From a national perspective, there will be economic inefficiency because states may cordon off areas proximate to industry and artificially raise transportation costs;
4. State waste management will constitute resource hoarding and, in effect, allow states to control markets and achieve results similar to those prohibited by anti-trust laws; and
5. The prices of goods will increase due to higher priced refuse disposal costs because of the "artificial" limitations on available landfill space. Furthermore, there will be an increase in illegal dumping.

The argument that private dump operators may be more efficient than state dump operators may be correct in terms of cost to the consumer because the private dump operator is operating on a profit motive. When one is concerned about the costly environmental protection measures required by the state, however, the private operator may be more likely to cut corners to maximize profits. The state, on the other hand, gains nothing by non-compliance with environmental regulation and externality costs to society as a whole may be reduced.

If there are good "economic" efficiency reasons to have the private sector involved in the waste business, they can be satisfied by allowing private contractors to compete for the contracts to haul waste and to construct and operate the facilities. Such contracts will not alter the fact that the state is the owner of the facilities, having purchased the land and paid for the landfill's construction.

As to the overall "unfairness" arguments, state disposal of waste has been a traditional function of government for centuries. If the state has the police power to be the exclusive seller of liquor and the controller of dangerous substances, it likewise has the police power exclusively to dispose of solid wastes in the public interest.

As to the alleged negative economic efficiency results from denying out-of-state wastes access to state-owned dumps, the following responses may be appropriate. Regarding possible retaliation from sister states, it is not at all clear that states will respond by closing their own dumps. If states do respond in this manner, such a closure will not necessarily cause problems. For example, if a state constructs its own waste facilities for its own citizens, it will not need to send its wastes elsewhere and seek access to dumps in a sister state. Thus, a retaliatory law in another state will not harm the state being denied access. Moreover, if the retaliating state constructs the dump with its own funds, there is no reason to allow access to wastes from another state, nor will there be demand from other states because they will be handling their own wastes.

In addition, the specter of all states denying access to other states' garbage in order to protect their environment is hardly what history has taught us about competition between the states. Historically, states have been willing to exploit their environments in order to obtain jobs and wealth for their citizens. A good example is the development of coal fields in Appalachia without adequate reclamation procedures. Even worse, some states have even exploited their children by allowing them to work at young ages and at low wages to attract industry. Congress has been forced to pass laws prohibiting states from squandering their resources, not laws ensuring that they are made available.<sup>123</sup> Thus, it is extremely unlikely that all states will close their doors to out-of-state wastes for environmental protection reasons.

Finally, if sufficient financial incentives are made available, some states will be willing to accept out-of-state waste. If all of the externality costs associated with environmental protection in waste disposal are paid, states will accept the wastes. Assuming the worst, if a state cannot find another state willing to accept its wastes, it can require industry to internalize the costs of waste management through incineration or other methods by subsidizing recycling or encouraging production which produces less waste. This hardly seems like a disastrous result.

The arguments that states should not operate dumps because states do not operate on a profit motive and that a state dump will provide unfair subsidized competition also require very little discussion. The market is filled with numerous entities that do not operate strictly on "for profit" principles. Nonprofit corporations such as churches and research foundations participate in the market, as do sentimental people who choose not to sell things because profit has become irrelevant to them. For the state also to participate without pure "self interest" motives will not create any gross distortion of the market. Further, one can argue that when only the state owns landfills, the state is not distorting a market because it is simply electing not to allow the existence of a market, either interstate or intrastate. The state is not subsidizing its own competition in a market; it is simply not allowing a market to develop. In such a case, the state concludes that the private sector can compete for the right to construct the dump, to sell land to the state for the dump, to haul wastes to the dump, and even to operate the dump. The state also concludes, however, that ownership of dumps is an exclusive function of the state which is subsidized by the state with resident taxpayer dollars.

From a purely national economic perspective, the argument that it is economically inefficient to have states set up exclusive disposal sites to handle only wastes from industry located within the state may have merit. In a free market, industries will logically locate proximate to markets, labor supplies, areas with good transportation systems, and raw materials. Another logical and economically efficient choice is to locate near an

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123. *Compare* United States v. Darby, 312 U.S. 100 (1941) with *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

inexpensive place to dispose of wastes. If an industry is located near the border of a state that has ample waste disposal area, it may be economically more efficient to move wastes across the state line. One can also argue, however, from a purely national economic perspective, that municipal garbage trucks should be forced to cross the state line and pick up waste from an industry in a nearby state and that the geographically nearest police and fire protection should always be made available to the most proximate industry, irrespective of state lines. If it is economically inefficient to withhold access to dumps because of state lines, it is also economically inefficient to force in-state police, fire, and garbage service to come from a great distance when closer service is available from a nearby state.

As inefficient as it may seem, this nation is composed of separate states. This national federal-state partnership was created when the Founding Fathers drafted a Constitution placing local police power in state government. Until someone is willing to redraft the Constitution to eliminate the basic federal-state structure, states will continue to exercise the constitutional right to refuse to collect garbage from nearby states and to not extend police and fire protection across state lines. States will also likely attempt to refuse to accept out-of-state garbage, even though it may be economically inefficient from a national perspective for them to exercise this choice. Interstate compacts may be appropriate to achieve greater economic efficiency, but this is a matter of choice by the states.

The argument that not allowing interstate access to waste disposal sites constitutes resource hoarding and a state monopoly in violation of antitrust principles is also misplaced. First, it is generally a "happenstance" event when one discovers oil in his or her backyard. It is fortuitous that the natural resource exists there because nature, not man, put it there. The resource exists as a source of future revenues for the state and as fuel for the nation as a whole, not as a result of a state's investment of its revenues.

Development of a waste disposal site is not a happenstance event that gives rise to cries of "Eureka!" Rather, waste disposal sites are an obnoxious but necessary by-product of growth and industrial development. As described above, these sites are costly to develop and may potentially contaminate the air and the groundwater and require extensive monitoring. Furthermore, the scarcity of dump sites in a state that produces the waste may be a reflection of political and economic choice. Industry may not be able to dispose of waste in the state where it is produced either because it is too costly, given state regulations, or because it is too much trouble. One cannot create a coal deposit, but a state can build a furnace to incinerate garbage, start a recycling program, prohibit the sale of nonreturnable bottles, or pay a bounty for aluminum cans. If a state elects not to do these things, it may be creating its own waste disposal scarcity.

As to the state acting as a monopolist, none of the accoutrements of monopolistic behavior are present in state management of landfills. First,



numerous states have space for landfills, and it is doubtful, if not impossible, that any one state can control this entire market. If a state elects not to accept out-of-state waste, this is a political/market choice. Second, a monopoly would exist only if a group of states conspire to control the market and intentionally distort it to gain an unfair market advantage through unfair higher prices for disposal. The decision not to accept out-of-state wastes is the antithesis of unfair monopoly. The state is declining revenues by exercising a political choice. It is not raising the price of waste disposal space to gain an unfair market advantage; it is losing money. Further, proving a monopoly does exist as a result of one state's activities will be virtually impossible. When Montana placed a thirty percent severance tax on coal, ninety percent of which was shipped out-of-state, thereby indirectly collecting tax revenues from out-of-state users of coal, the Supreme Court declined to find a monopoly by the State of Montana. The Supreme Court concluded:

The threshold questions whether a state enjoys a "monopoly" position and whether the tax burden is shifted out of state, rather than borne by in-state producers and consumers, would require complex factual inquiries about such issues as elasticity of demand for the product and alternate sources of supply. . . . It has been suggested that 'the formidable evidentiary difficulties in appraising the geographical distribution of industry, with a view toward determining a state's monopolistic position might make the Court's inquiry futile.'<sup>124</sup>

Finally, in the unlikely event a state is considered to be exercising a monopoly power, Congress can make the state's activities subject to the anti-trust laws and the legal tools for ferreting out unfair trade practices can be applied. As stated by Justice White in his concurring opinion in *Commonwealth Edison* regarding the Montana tax, "there is particular force in the argument that the tax here and now is unconstitutional."<sup>125</sup> If Congress considered it, Congress would preempt it, because "surely Montana and other similarly situated States do not have the political power to impose their will on the rest of the country."<sup>126</sup>

The arguments that a state's refusal to accept out-of-state wastes will increase costs of waste disposal in some states and that there will be an increase in illegal dumping may be factually correct in the short run. It does not follow, however, that an out-of-state ban is ultimately bad for the nation. Part of the true cost of producing a product or of society's use of nonrecyclable products is the cost of waste disposal. Assuming, *arguendo*, that the options of disposing of wastes in the ocean or in a sister state are not available, the costs of more expensive methods of disposal must be passed on to the consumer. One can argue persuasively that society is better off if disposal costs are paid up-front and if these costs are borne by the consumer. Simply because wastes have been out

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124. *Commonwealth Edison v. Montana*, 453 U.S. 609, 619 n.8 (1981) (citations omitted).

125. *Id.* at 637.

126. *Id.*

of sight in the past does not mean that their disposal costs have been paid. What "out-of-sight" disposal often means is that future generations will be forced to pay cleanup costs for past consumption. Any action which causes the present generation of consumers to pay for present waste disposal costs is a positive one. As to the possibility of illegal dumping, while dumpers may rebel and dump illegally, it is possible to curb that rebellion through a combination of education and stiffer penalties for such illegal activities.

## VI. CONCLUSION

By excluding out-of-state waste, a state is simply making a choice that any market participant may make—the choice not to participate in the market. Some states elect to allow private lotteries; others do not. Some states elect to allow gambling as a source of revenue; some do not. Some states may elect to allow a private waste disposal industry to develop and accept out-of-state wastes; others may not. The by-products of not participating in the market are not wild marketplace distortions, as argued by some; rather, there may be the positive results of increased efficiency in industry and modification of consumer behavior.

There is a fundamental distinction between state "market participant" exclusion of interstate garbage and the classic commerce clause case where the interstate businessman seeks to cross the border to a sister state and sell his wares. Encouraging the generation of more interstate business and helping the nation move forward as one national economic unit is a positive goal that was anticipated by the framers of the Constitution. In contrast, encouraging the generation of garbage is not something the national body politic must do to survive. Garbage is a noxious but inevitable by-product of production and societal growth. State ownership of waste disposal sites encourages the reduction of garbage and forces internalization of waste disposal costs so that these costs are paid by present generations. This is not the creation of trade barriers that destroy the nation; rather, it is rational environmental protection behavior that promotes the nation's prosperity.