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phy of the Burger Court—if it makes good sense, it makes good law. Since the Court bases its holding primarily on personal assumptions about human nature (sense rather than fact or stare decisis), the observer finds himself wondering what cases and data the Court might have considered. The only comfort to be found is in the fact that there really was not much new in *Janis* since the erosion of the exclusionary rule had begun several years earlier. The limited effect of this ruling is yet to be seen vis-a-vis law enforcement and the IRS. However it certainly exemplifies the apparent willingness of the present Court to tamper with Constitutional safeguards without giving the potential effect of its ruling a full and fair hearing.

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Proprietary Powers: A New Policy Tool for the States?

The Supreme Court of the United States held that a state plan under which a bounty was paid to scrap metal processors for the processing of automobile hulks was an exercise of the state's proprietary power and not subject to the restrictions of the commerce clause. By so holding the Court avoided the need to balance state interests against the burden placed by the plan upon interstate commerce. This article discusses the effect of the Court's decision not to apply the balancing test and argues that state actions of this type should not be shielded from commerce clause scrutiny.

Alexandria Scrap Corporation, a Virginia scrap processor, brought an action challenging the constitutionality of a statutory scheme[1] through which Maryland, in an effort to protect its environment, sought to accelerate the rate at which old automobile hulks were destroyed. By offering a bounty for the destruction of such hulks, Maryland hoped to bring about an increase in the destruction rate. Under an amended version of the plan, domestic scrap processors were allowed to recover the bounty upon filing of proof that the

1. The law, as amended, is set forth at 6 MD. ANN. CODE art. 66 1/2, § 5-201 to 210. (Cum. Supp. 1976).

car was destroyed and upon filing with the state an indemnity agreement between the party supplying the hulk and the processor. Foreign (out of state) processors were required, under the scheme, to file proof of title to the hulk.[2] The requirement that foreign processors file proof of title instead of an indemnity agreement placed before them a difficult hurdle not faced by Maryland processors. Before a three-judge panel of the United States District Court for the District of Maryland, Alexandria Scrap argued that the plan was repugnant to the commerce clause and denied foreign processors equal protection of the laws.[3] The district court, finding for Alexandria Scrap on both of these grounds, enjoined appellants, officials of the State of Maryland, from continuing to allow only to Maryland processors the right to claim the bounty on the basis of an indemnity agreement.[4] On appeal, the United States Supreme Court *held,* reversed: A statutory scheme for the protection of the environment which provides for the payment of a bounty to scrap processors for the destruction of hulks formerly titled in state and which makes it substantially more difficult for foreign processors to claim bounties under the scheme is not violative of the commerce clause as the state is merely exercising its proprietary powers in order to bid up the price of hulks, and the commerce clause was not intended to restrict the state in its exercise of its proprietary powers. The plan does not deny foreign processors equal protection of the laws as the scheme impinges upon no fundamental interest, and there is a rational relationship between the statutory means chosen

2. The Maryland statutory scheme, as originally enacted, allowed both foreign and domestic processors of scrap steel to collect a bounty for the destruction of a hulk without any proof of title. 6 MD. ANN. CODE art. 66 1/2, § 11-1002.2(f)(5) (1957). In 1974, § 11-1002.2(f)(5) was amended to require that domestic processors submit a copy of an indemnity agreement between the processor and the party supplying the hulk. Foreign processors wishing to claim under the bounty provisions would be required to submit proof of title. 6 MD. ANN. CODE art. 66 1/2, § 11-1002.2(f)(5) (Cum. Supp. 1976).

3. Under the initial version of the plan, Maryland would pay a bounty to any scrap processor who destroyed a hulk formerly registered in Maryland. It was anticipated that the processors would pass a portion of the bounty along to their suppliers. The effect of the bounty system was, as anticipated, to increase the supply of hulks to processors and to accelerate the rate at which hulks were destroyed. Under the amended plan, bounties would still be paid to both foreign and domestic processors. However, because it was often difficult for the suppliers of hulks to produce the proofs required by Maryland of foreign processors in order to collect the bounty, the suppliers often took their hulks to Maryland processors. Plaintiff-appellee, the third largest processor of hulks under the pre-1974 plan, suffered a dramatic shrinkage in his supply of Maryland titled hulks after the effective date of the amended plan.

4. Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46 (D. Md. 1975).

by the legislature and the policy goals sought. *Hughes v. Alexandria Scrap Corp.*, 96 S.Ct. 2488 (1976).[5]

The Supreme Court has historically viewed the commerce clause as a limitation upon the states' power to enact legislation affecting interstate commerce. The Court has sought to prevent the states from erecting barriers "to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand."[6] It has forbidden the states to enact legislation for the purpose of,[7] or which has the practical effect of, discriminating against interstate commerce.[8] The Court has also struck down laws which burden interstate commerce even though they do not discriminate against it.[9] Statutes which have the practical effect of requiring a foreign business to relocate in the regulating state have incurred special disfavor.[10] The Court's determined effort in this area derives its impetus from concerns of great historical significance. The existence, under the Articles of Confederation, of extensive barriers to trade among the states was a major factor in the calling of the Annapolis and Philadelphia Conventions.[11] Since the establishment of the Constitution, and in furtherance of the federalist principles set forth therein, the Court has sought to insure that state lines do not become barriers to the free flow of trade.[12]

Though the Court has been concerned about the impact of state policies on interstate commerce, not all state policies which impinge on interstate commerce have been struck down. The Court has recognized the states' broad police power to enact legislation to promote the safety and welfare of their people. Legislation designed to

5. This note will focus on the commerce clause aspects of the case and will not examine the equal protection issues raised.

6. 96 S. Ct. at 2494.

7. *E.g.*, Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); Best & Co. v. Maxwell, 311 U.S. 454 (1940); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

8. *E.g.*, Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

9. Minnesota v. Barber, 136 U.S. 313 (1890).

10. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Toomer v. Witsell, 334 U.S. 385 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

11. Bane, *Interstate Trade Barriers—General Introduction*, 116 IND. L.J. 121, 122 (1940).

12. For an effective discussion of the historical objectives of the policy, see Justice Jackson's majority opinion in H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. at 539. The Court's concern with the possible divisive and damaging effect of competitive protectionism is powerfully expressed by Justice Cardozo in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

protect such basic interests has often received the blessings of the Court even though the legislation has had an adverse impact on interstate commerce.[13] In such instances the Court has applied a "balancing test" in which it has attempted to balance the importance of the state act in promoting the safety and well-being of state citizens against the burden the act imposes on the free flow of commerce.[14] In these attempts the Court has been particularly influenced by the existence of less burdensome alternative methods to achieve the states' goals. Where such alternative methods exist, burdensome state policies fail even where the state is acting in an area of legitimate state concern.[15]

While the commerce clause has been interpreted as a limitation upon a state's governmental power to discriminate against or otherwise burden interstate commerce, there is no decision of the Court which places commerce clause limitations on a state in the exercise of its proprietary powers.[16] When exercising these powers, a state is to be treated as a private individual, specifically, as a private businessman;[17] hence the constitutional limits ordinarily imposed on state action are inapplicable.[18] It is important to note that past decisions recognizing the proprietary powers of government have involved instances where the government has been in the process of procuring some good necessary to the performance of its governmental function.[19] These cases have not involved state policies intended

13. *E.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938); Mintz v. Baldwin, 289 U.S. 346 (1933); Bradley v. Public Utils. Comm., 289 U.S. 92 (1933); Crossman v. Lurman, 192 U.S. 189 (1904).

14. Great A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

15. Great A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

16. The Court did summarily affirm a lower court decision to the effect that states were not limited by the commerce clause while exercising their proprietary powers. American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

17. *Id.* at 721.

18. *E.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Heim v. McCall, 239 U.S. 175 (1915); Atkin v. Kansas, 191 U.S. 207 (1903).

19. *E.g.*, Atkin v. Kansas, 191 U.S. 207 (1903) dealt with the conviction of a government contractor for violating a state law making it illegal for a contractor to employ men working on a government construction contract for more than eight hours a day. Heim v. McCall, 239 U.S. 175 (1915) involved a New York statute requiring that New York citizens be hired on state construction projects before citizens from other states. Perkins v. Lukens Steel Co., 310

directly to bring about change in general economic or social conditions. In this regard *Hughes* is a departure from past decisions.

The *Hughes* decision turns on the Court's characterization of Maryland's statutory scheme to rid its environment of automobile hulks by offering a bounty to the scrap industry for the processing of such hulks. The application of the label "purchase of goods" to this attempt by the state to speed up the "scrap cycle" determines the outcome of the case. The Court reasons that Maryland has merely entered the market to bid up the price of hulks so that towers and owners of hulks will be more willing to supply hulks to scrap processors. In effect, Maryland is purchasing the processing of hulks. This kind of entry into the market by the state, as an exercise of its proprietary powers, is not "a burden which the Commerce Clause was intended to make suspect."[20] The commerce clause, the Court tells us, was designed to protect against embargoes or tariffs established by one state against others. It was not intended to apply to a state's entry "into the market as a purchaser, in effect, of a potential article of interstate commerce. . . ."[21] While Maryland's action does affect the flow of hulks across state lines, the bounty system does not create a barrier to that flow. We are told that the hulks stay within Maryland in response to market forces and, we may infer, not because Maryland has erected a barrier. Since this was not the type of state action against which the commerce clause was intended to protect, the Court reversed the district court decision and held that the Maryland plan was not inconsistent with the commerce clause. Nothing in the commerce clause bars a state from discriminating in its purchasing policy in favor of its citizens.[22]

In *Hughes*, the Court significantly expanded the concept of state proprietary powers. In past decisions, proprietary acts had involved the actual process of state procurement for governmental consumption. In these cases the state had been acting in its capacity as a businessman.[23] In *Hughes*, the state was attempting to solve a

U.S. 113 (1940) involved a challenge by government contractors of Congress' power to require that those selling to the federal government pay their employees a minimum wage set by the Secretary of Labor. The Florida statute involved in American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972) required that the state government let contracts for the printing of a certain class of books only to firms who would do the printing in Florida.

20. 96 S.Ct. at 2496.

21. *Id.* at 2497.

22. *Id.*

23. *Id.* at 2496.

problem affecting the public welfare. In exercise, therefore, of its police powers, the state offered incentives which it hoped would lead to a change in the behavior of certain economic sectors. At no time was the state acting in its capacity as a businessman, seeking to procure goods for consumption in the process of governing. The description of such activity as "proprietary" is a major expansion of the concept.

The Court states that Maryland's action is not the kind of burden which the commerce clause was intended to make suspect. Yet discriminatory purchasing policies have long been regarded as important impediments to trade.[24] Maryland's particular policy is likely to have a greater impact within the economic sector affected than most such purchasing policies. Since the Maryland scheme makes it more difficult for foreign processors to collect the bounty it has many of the attributes of a subsidy to Maryland scrap processors. Maryland's policy is designed to alter market forces in favor of domestic processors. Its effect is to put foreign competitors at a disadvantage as, other things being equal, domestic firms will be able to buy at higher prices and sell at lower prices without sacrificing profits. Discriminatory taxes which do not bar foreign firms from the market but do place the firms at a competitive disadvantage have been struck down consistently.[25] A discriminatory subsidy program clearly can put foreign firms at a disadvantage and can lead to the kind of competitive escalation against which the Court has fought for so long.[26] Since statutory schemes such as Maryland's in the instant case can promote precisely those kinds of discriminatory problems the commerce clause has been interpreted as prohibiting, characterization of such schemes as an exercise of proprietary powers which are not subject to commerce clause restraint may give rise to future difficulties of interpretation.

However, as the Court has chosen to designate Maryland's bounty plan an exercise of the state's proprietary powers, a question may still be raised as to why the Court has indicated that in approving such plans it will not even balance the competing interests of

24. Melder, *The Economics of Trade Barriers*, 16 IND. L.J. 127, 139-41 (1940).

25. *E.g.*, Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Best & Co. v. Maxwell, 311 U.S. 454 (1940); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

26. *E.g.*, Great A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

nation and state. The balancing test has hitherto involved the Court in making fine decisions of economic policy, and the Court's activism in rooting out discrimination has left the states few economic tools to effect economic and social policy. In *Hughes,* the Court may be indicating that it will allow the state a wide range of discretion in the use of certain limited policy tools. Positive incentives, such as bounties and subsidies, might be attractive to the Court since there are built in political limits on the use of subsidies. After all, bounty-subsidy money comes out of the state budget and must compete with other interests. Thus, subsidy programs must contend with countervailing forces which do not confront discriminatory regulations or taxes. In addition, positive incentives may be felt to be particularly suited to pursuing goals of social policy as they are often seen as being less coercive, and hence less likely to arouse political opposition.

By labeling the Maryland statutory scheme an exercise of its proprietary powers and by holding such an exercise beyond the intended scope of the commerce clause, the Court precluded use of the balancing test developed under the commerce clause cases. While it is commendable that the Court may wish to return some measure of policy discretion to the states, it seems unfortunate that the Court abandoned the option to review the economic impact of policies such as Maryland's. Such policies can be disruptive of trade and can lead to competitive retaliation. It would seem that the "balancing test" developed under the commerce clause cases could also be effective in reviewing state attempts to further public welfare through exercise of state proprietary powers. The test was designed to give important state interests their appropriate weight. The Court should not have abandoned the test in *Hughes.*

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Shutting the Federal Habeas Corpus Door

In a recent decision the Supreme Court has halted the prior trend of increasing the scope of federal review available to state prisoners. The case broke with a substantial history of decisions by denying habeas corpus to state prisoners who asserted fourth amendment violations. The author suggests that the rationale of