Washington University Law Review

Volume 71
Issue 2 *Corporate Sentencing*

January 1993

Northern Enclosure: State Preference Statute Guiding Local Government Purchasing Practices Qualifies for Immunity Under Market-Participant Doctrine: Big Country Foods v. Board of Education, 952 F.2d 1173 (9th Cir. 1992)

H. Christopher Boehning
Washington University School of Law

NORTHERN ENCLOSURE: STATE PREFERENCE STATUTE GUIDING LOCAL GOVERNMENT PURCHASING PRACTICES QUALIFIES FOR IMMUNITY UNDER MARKET-PARTICIPANT DOCTRINE

Big Country Foods v. Board of Education, 952 F.2d 1173 (9th Cir. 1992).

In *Big Country Foods v. Board of Education*[1] the United States Court of Appeals for the Ninth Circuit concluded that the market-participant doctrine exempts an Alaska statute that establishes an in-state product[2] preference for products purchased by state and local governmental entities from traditional Commerce Clause[3] scrutiny.[4]

Big Country Foods ("Big Country") is a distributor of milk harvested in the state of Washington.[5] Prior to the enactment of Alaska's preference statute, Big Country had successfully bid to supply milk to the Anchorage School District.[6] In May 1988, however, the school district applied the Alaska preference statute to the district's milk supply contracts.[7] Consequently, even though Big Country submitted the lowest

1. 952 F.2d 1173 (9th Cir. 1992).

2. The Alaska statute provides, in pertinent part:

> When agricultural products are purchased using state money, only agricultural products harvested in this state shall be purchased whenever priced no more than seven percent above products harvested outside the state, available, and of like quality compared with agricultural products harvested outside the state.

ALASKA STAT. § 36.15.050(a) (1987). The statute, after a 1988 amendment, currently reads: "When agricultural products are purchased by the state or by a school district that receives state money. . . ." ALASKA STAT. § 36.15.050 (1992).

3. The Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl.3. Although a grant of power to Congress to regulate commerce among the states, it has long been held that the Commerce Clause also prohibits discriminatory actions by states which burden interstate commerce. *See* New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988). This aspect of the Commerce Clause is commonly referred to as the "dormant Commerce Clause." *See, e.g.*, Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 398-99 (1989).

4. *See infra* notes 12-46 and accompanying text.

5. *Big Country Foods*, 952 F.2d at 1175.

6. Big Country had been the successful bidder in five of the last eight years. *Id.*

7. Alaska receives federal funds under the National School Breakfast Program, 42 U.S.C. § 1773 (1988), and the National School Lunch Program, 42 U.S.C. §§ 1751-1769 (1988). *Id.* Because participants in these programs must procure milk "in a manner that provides maximum open and free competition," *id.* (quoting 7 C.F.R. § 3015.182 (1991)), the Anchorage School District sought guidance from the United States Department of Agriculture ("USDA") before awarding the contract in accordance with the Alaska preference statute. *Id.* The USDA advised the school dis-

bid, the district awarded the milk supply contract to an in-state distributor.[8]

Big Country filed a complaint in federal district court in Alaska seeking to invalidate the Alaska preference statute under the Commerce Clause.[9] The district court dismissed the claim.[10] On appeal, the Ninth Circuit affirmed and held that because school districts are creatures of the state, the Anchorage School District's purchasing practices under Alaska's preference statute constituted market participation, which the Supreme Court has exempted from scrutiny under established dormant Commerce Clause jurisprudence.[11]

The Supreme Court's decision in *Hughes v. Alexandria Scrap* spawned the market-participant doctrine.[12] *Alexandria Scrap* involved a Maryland program designed to rid the state of old automobile hulks, in which

---

trict that adherence to the command of the Alaska preference statute was "not prohibited" by any applicable federal regulation. *Id.*

8. 952 F.2d at 1175. Big Country submitted the lowest bid, $360,000. Northern Dairies and Matanuska Maid Dairy submitted bids of $384,625 and $385,000, respectively. *Id.* Under the Alaska preference statute's seven percent bidding preference, the contract was awarded to Matanuska. *Id.* Matanuska is owned by the State of Alaska and supplies Alaska-produced milk. *Id.*

9. *Id.* Modern dormant Commerce Clause jurisprudence places state statutes found to burden interstate commerce into one of three categories. First, statutes that burden interstate commerce only incidentally are upheld unless the burden is "clearly excessive in light of the putative local benefits." Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Second, when statutes affirmatively discriminate against interstate commerce, the burden is placed on the state to establish that the discrimination "serves a legitimate local purpose" that could not be served by "available nondiscriminatory means." *Id.* (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)). Finally, laws that represent "simple economic protectionism" are subject to a "virtually *per se* rule of invalidity." *See* New Energy Co. v. Limbach, 486 U.S. 269, 278-79 (1988) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

10. Big Country sought a declaratory judgment and preliminary injunction. *Big Country Foods*, 952 F.2d at 1175. The district court denied the preliminary injunction, and the Ninth Circuit affirmed on appeal. *See* Big Country Foods v. Board of Educ., 868 F.2d 1085 (9th Cir. 1989). Big Country also claimed that the USDA failed to enforce applicable federal regulations. *See supra* note 7. The court granted summary judgment for the federal defendants and dismissed all other claims against all defendants. *Big Country Foods*, 952 F.2d at 1175.

11. *Big Country Foods*, 952 F.2d at 1179. The Ninth Circuit also held that Big Country lacked standing to challenge the USDA or the state's alleged failure to follow applicable federal regulations. *Id.* at 1177. *See supra* note 7.

Big Country Foods marks the first case in which the Ninth Circuit has found the market-participant doctrine applicable. *See Big Country Foods*, 952 F.2d at 1177 n.3 (citing Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 72 (1990); Shell Oil Co. v. City of Santa Monica, 830 F.2d 1052 (9th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); Western Oil & Gas Ass'n v. Cory, 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided court*, 471 U.S. 81 (1985); Washington State Bldg. & Const. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

12. 426 U.S. 794 (1976).

the state paid a "bounty" to scrap processors who destroyed old vehicles.[13] Although the scheme favored in-state scrap processors,[14] the Court held that this program was exempt from any Commerce Clause challenge because the state had not sought to *regulate* the interstate market in automobile hulks, but had entered the market itself as a participant.[15] The Court reasoned that nothing in the purposes "animating" the Commerce Clause prohibits a state from participating in the market and exercising the right to favor its own citizens over others.[16]

After *Alexandria Scrap* [17] established the market-participant doctrine, the Supreme Court's holding in *Reeves, Inc. v. Stake* [18] signified the doc-

13. To encourage wrecking companies to move abandoned vehicles through the scrap processing cycle, Maryland paid a bounty for the destruction of vehicles by scrap processors. *Alexandria Scrap*, 426 U.S. at 797. Licensed wreckers and scrap processors shared the bounty either directly, through a licensing scheme, or indirectly, through higher market prices paid. *Id.*

14. *Id.* at 802. Because Maryland wanted to ensure that vehicles processed under the bounty program were truly abandoned, it required title documentation for all vehicles. *Id.* at 798-99. In the case of a "hulk," a Maryland scrap processor could comply with the required title documentation by having the supplier sign an indemnity agreement. *Id.* at 801. Out-of-state processors, however, were required to provide either a certificate of title, a police certificate vesting title, a bill of sale from a police auction or, if supplied by a licensed wrecker, a Wrecker's Certificate. *Id.* As a result of the more onerous requirements, wreckers tended to deliver hulks to in-state processors. *Id.* at 802.

15. *Id.* at 806. The Court thereby distinguished the classic Commerce Clause regulation cases. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); H.P. Hood & Sons v. Dumond, 336 U.S. 525 (1949). *See also supra* note 9. The Court conceded that Maryland's actions had an effect on interstate commerce, but by permissible entrance into the market, not by impermissible regulation. *Alexandria Scrap*, 426 U.S. at 806.

16. *Alexandria Scrap*, 426 U.S. at 810. The Court also upheld the Maryland program against an equal protection challenge. *Id.* at 810-14.

17. It is interesting to note that *Alexandria Scrap* was decided the same day as National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In *National League of Cities*, the Court held that "the [T]enth [A]mendment imposed affirmative limits on Congress' commerce power where its use threatened state sovereignty." Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L.J. 559, 574 (1990). Under *National League of Cities*, the Tenth Amendment served as a restraint on congressional action only when Congress addressed areas of traditional government function. *Id.* The need to distinguish between a state acting in a "proprietary capacity" and a state engaging in a "government function" has led some to suggest that the market-participant doctrine has its theoretical basis in *National League of Cities*. *Id.* at 581. In fact, Justice Brennan's dissent in *Alexandria Scrap* suggests this justification for the doctrine's genesis. 426 U.S. at 822 n.4 (Brennan, J., dissenting). This theory has led some to argue that in the wake of *Garcia*, which held that the "sovereign/proprietary distinction was devoid of judicially discoverable standards and could not form the basis for Tenth Amendment limitations on congressional authority," Manheim, *supra*, at 575, the market-participant doctrine is dead. *Id.* at 623. *See* Swin Resource Sys. v. Lycoming County, 833 F.2d 245, 257 (3d Cir. 1989) (Gibbons, C.J., dissenting) (*Garcia* eliminated market-participant doctrine); Christine Hunter Kellett, *The Market Participant Doctrine: No Longer "Good Sense" or "Sound Law,"* 9 TEMP. ENVTL. L. & TECH. J. 169 (1990).

18. 447 U.S. 429 (1980).

trine's maturation. In *Reeves*, the Court upheld a South Dakota policy that confined the sale of cement produced at a state-owned facility to in-state purchasers in a time of shortage.[19] The Court reaffirmed its distinction between states acting as market participants and states acting as market regulators.[20] Moreover, the Court recognized the state sovereignty concerns underlying the market-participant doctrine.[21]

The Court applied the market-participant doctrine again in *White v. Massachusetts Council of Construction Employers*[22] and upheld an executive order of the Mayor of Boston[23] requiring that a work force com-

19. South Dakota constructed a cement plant in 1919 to meet the needs of its citizenry. *Reeves*, 447 U.S. at 431. For twenty years, the plant had supplied Reeves, a Wyoming ready-mix concrete distributor, with cement which it then distributed in northern Wyoming. *Id.* at 432. Confronted with a cement shortage in 1978, South Dakota reaffirmed its in-state preference policy and decided to supply all in-state needs before selling to others. *Id.* at 432-33. As a result, Reeves was unable to purchase cement from the South Dakota facility and was forced to cut production. *Id.* at 433.

20. *Id.* at 436. The Court reviewed its decision in *Alexandria Scrap*, and noted that the distinction between market participants and market regulators made "good sense and sound law." *Reeves*, 447 U.S. at 436. The Court continued: "As [*Alexandria Scrap*] explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market." *Id.* at 436-37 (citations omitted).

21. *Reeves*, 447 U.S. at 438. In addition to state sovereignty, the Court suggested at least two additional factors supporting a hands-off approach: the right of a private trader to choose his trading partners, *id.* at 438-39, and the long-recognized practical difficulty associated with assessing state "proprietary" activities under traditional Commerce Clause jurisprudence. *Id.* at 439.

Commentators have suggested a number of possible justifications for the market-participant doctrine. Professor Coenen has articulated five: (1) fairness—a state should be able to spend its funds as it chooses; (2) values of federalism, including the need to preserve state autonomy and the desire for experimentation by smaller units of government; (3) the cost of state preferences and subsidies serving as an independent check to lessen the need for judicial scrutiny; (4) the text of the Commerce Clause only relates to regulation of commerce; and (5) Congress remains capable of becoming involved if it determines that exempt state practices threaten interstate commerce. Coenen, *supra* note 3, at 420, 421-41.

Professor Tribe has suggested that the doctrine represents an exception for state activities that "create commerce." LAWRENCE H. TRIBE, CONSTITUTIONAL CHOICES 144-46 (1985). Professor Regan has argued that the doctrine may be justified because programs excluded under its auspices typically involve state spending activities which represent a lesser threat to a national marketplace. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1193-1202 (1986).

22. 460 U.S. 204 (1983).

23. The executive order provided in pertinent part:

> On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:
>
> a. at least 50% by bona fide Boston residents. . . .

prised of at least fifty percent city residents perform city-sponsored construction projects.[24] The Court summarized the principle enunciated in *Alexandria Scrap* and *Reeves* that the Commerce Clause does not restrain a state or local government when the entity enters the market as a participant.[25] In the Court's view, these cases require only a single inquiry: whether the challenged program constitutes direct state participation in the market.[26] The Court concluded that the City of Boston acted as a market participant and thus the Commerce Clause did not apply to the city's actions.[27]

A divided Court readdressed the market participation doctrine's application[28] in *South Central Timber Development v. Wunnicke*.[29] *Wunnicke* involved a challenge to an Alaska statute requiring that timber harvested from state land and sold by the state be processed within the state prior to export.[30] A plurality of the Court found the market-participant doctrine inapplicable, holding that the Alaska statute constituted

---

White, 460 U.S. at 204 n.1.

24. *Id.* at 204.

25. *Id.* at 208 (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 435-36 n.7 (1980)). The Court noted that:

> If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.

Id. at 210.

26. *Id.*

27. *Id.* at 214-15. The Court concluded that the Supreme Judicial Court of Massachusetts erred in considering the executive order's effect on interstate commerce because such an inquiry would only have been necessary if the court found the city acted as a market regulator. *Id.* at 209-10.

The Court considered the executive order as it applied to projects funded entirely with city revenue and projects funded in part with federal monies. *Id.* at 209. Projects funded entirely with city money were exempt from Commerce Clause analysis because the City was a market participant. *Id.* at 214. Because the applicable federal regulations sanctioned local hiring preferences, the Court concluded that no dormant Commerce Clause issue was involved for the federally-funded projects. *Id.* at 213-14.

28. *See* Manheim, *supra* note 17, at 580 n.176 (only Justices Burger and Rehnquist have consistently voted for immunity; Justice White has consistently voted against, and the others justices have switched votes based on the nature of the state activity).

29. 467 U.S. 82 (1984).

30. The Alaska Department of Natural Resources was planning to sell state-owned timber. Pursuant to the Alaska statute, the sale required "primary manufacture" within the state. *Wunnicke*, 467 U.S. at 84. When the state sold timber with the primary-manufacture requirement, it sold at a lower price than it otherwise would. *Id.* The typical method of complying with the primary-manufacture requirement was to slab the logs along one side at a facility within the state. *Id.* at 85. South-Central did not own a processing facility in Alaska. *Id.* at 85-86.

market regulation.[31] The *Wunnicke* court limited the market-participant doctrine to state activity that occurs within the market in which the state participates.[32]

Against this backdrop, three circuits have wrestled with the question whether the market-participant doctrine applies to a state statute establishing the purchasing policies of *local* governmental entities.[33]

---

31. *Id.* at 98-99. The district court found the Alaska statute violated the Commerce Clause. *Id.* at 86-87. The Ninth Circuit, noting that similar primary-manufacture requirements are imposed on timber sales from federal land, found the actions implicitly authorized by Congress. *Id.* at 87. Rejecting this reasoning, the Court found it necessary to analyze the Alaska statute under the Commerce Clause. *Id.*

Only four Justices joined in the Commerce Clause analysis. Justices Powell and Burger, who joined the plurality with respect to the congressional authorization issue, would have remanded back to the Ninth Circuit for the Commerce Clause issues. *Id.* at 101 (Powell, J., concurring in part).

32. *Id.* at 97. The Court added, "[u]nless the 'market' is narrowly defined, the doctrine has the potential of swallowing up the rule that states may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." *Id.* at 97-98. Then, the Court rejected the state's assertion that even if the market-participant doctrine was inapplicable, the burden imposed on interstate commerce was slight. *Id.* at 99-101.

Dissenting, Justice Rehnquist argued that under existing precedent, Alaska could accomplish its objective in many ways. *Id.* at 103 (Rehnquist, C.J., dissenting). For example, under *Alexandria Scrap*, the state could directly subsidize the Alaska primary-processing industry; or, under *Reeves*, the state could choose to sell its timber only to companies that operate primary processing plants in Alaska. *Id.* In Justice Rehnquist's view, it was "unduly formalistic to conclude that the one path chosen by the State as best suited to promote its concerns is the path forbidden it by the Commerce Clause." *Id.*

Since *Wunnicke* in 1984, the Supreme Court has considered the market-participant doctrine only three times. In Wisconsin Dep't of Indus. v. Gould, 475 U.S. 282, 289 (1986), the Court indicated that a Wisconsin statute prohibiting state purchases from repeat labor law violators was not activity as a market participant, but was "tantamount to regulation." *Id.* at 289. Nevertheless, the Court held the statute was preempted by federal law. *Id.* at 283, 291.

In New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988), the Court refused to apply the market-participant doctrine to an Ohio ethanol tax credit scheme. *Id.* at 277. The Court held that the Ohio activity, granting tax credits to in-state ethanol producers, was "neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity." *Id.*

In Wyoming v. Oklahoma, 112 S. Ct. 789 (1992), a rare original jurisdiction case, the Court implied that the market-participant doctrine may have been applicable to an Oklahoma scheme requiring electric power plants producing power for sale in Oklahoma to burn at least 10% Oklahoma coal, at least as the statute applied to a state-owned power plant. *Id.* at 803. However, to the extent the statute applied to privately owned power plants, the Court held it violated the Commerce Clause. *Id.* at 802. The entire statute was deemed invalid because the "state-owned" provision was not severable. *Id.* at 803. Further indicating its implied approval of the market-participant doctrine, the Court stated that "[w]e leave to the Oklahoma [l]egislature to decide whether it wishes to burden this state-owned utility when private utilities will otherwise be free of the Act's restrictions." *Id.* at 804.

33. Prior to adoption of the market-participant doctrine in *Alexandria Scrap*, state statutes establishing guidelines for the purchasing practices of state and local governmental units had long been presumed constitutional. *See* Note, *Home-State Preferences in Public Contracting: A Study in*

In *W.C.M. Window Co. v. Bernardi*,[34] the Seventh Circuit concluded that the market-participant doctrine did not apply[35] to an Illinois preference statute requiring workers from Illinois to perform all public improvement projects within the state.[36] The court noted that it would have upheld the statute under *White* if the Illinois legislature had limited the statute's application to state-funded projects.[37] The court determined that the Illinois legislature had gone too far because the preference applied to *every* public construction contract.[38] The court concluded that

---

Economic Balkanization, 58 IOWA L. REV. 576 (1973). In one case referred to often, American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972), a three-judge district court denied a Commerce Clause challenge against a Florida statute requiring all public printing to be performed in-state. The court declined to follow Garden State Dairies of Vineland v. Sills, 217 A.2d 126 (N.J. 1966), in which the New Jersey Supreme Court struck down a New Jersey statute requiring any producer who sold milk to a state agency to certify that during the preceding year the producer purchased New Jersey milk in an amount at least equal in quantity to the amount it planned to sell to the state agency and that the same practice would hold true during the year in which the sale was to take place. *American Yearbook*, 339 F. Supp. at 725. The *American Yearbook* court stated that to "subject every job specification to an ad hoc measurement of its effect on interstate commerce would unduly interfere with state proprietary functions." *Id.*

34. 730 F.2d 486 (7th Cir. 1984).

35. *Id.* at 496. Professor Coenen has established a four-part test to determine whether the state activity deserves immunity in light of the policies underlying the market-participant doctrine. Coenen, *supra* note 3, at 441. Courts must inquire:

> (1) whether the program reflects an effort of local citizens to reap where they have sown;
> (2) whether invalidation of the program is consonant with the underlying values of federalism, including in particular the values of local experimentation and optimal responsiveness to local concerns;
> (3) to what extent the program threatens the underlying [C]ommerce [C]lause values of a free market and unified nation; and
> (4) whether the state bears the appearance of "participating in," rather than "regulating" the market.

Id.

Applying this test to the Illinois preference statute in *W.C.M. Window*, Professor Coenen concluded that the Seventh Circuit correctly invalidated the statute. *Id.*, at 482.

36. *W.C.M. Window*, 730 F.2d at 489. The statute provided that the contractor on "any public works project or improvement for the State of Illinois or any political subdivision, municipal corporation or other governmental unit thereof shall employ only Illinois laborers on such project or improvement." *Id.* (quoting ILL. REV. STAT. ch. 48, para. 271 (1981)). The statute provided for exceptions if labor was unavailable or incapable of performing the required work. *Id.* Violation of the preference law was a misdemeanor punishable by jail or fine. *Id.*

W.C.M. Window was hired by the public school board of Decatur, Illinois for a window replacement project. *Id.* W.C.M. Window subcontracted the work to Custom Contracting, an unincorporated association of Missouri residents. *Id.* E. Allen Bernardi, the Director of the Illinois Department of Labor, filed suit in state court against W.C.M. Window for violating the Illinois preference law. *Id.* at 490. W.C.M. Window countered by filing suit in federal district court. *Id.*

37. *Id.* at 493 (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935)).

38. *Id.* "The preference law applies to every public construction contract in Illinois, even if the purchaser is a local school board, or for that matter the local dog catcher." *Id.*

when performing commerce clause analysis, courts need not view a local governmental unit as part of the state.[39] Thus, the court found that the local school board, rather than the state, was the market participant because the school board completely funded[40] the project at issue.[41] The court distinguished between allowing a state to favor its own citizens in transactions by adopting a policy governing activities in which the state directly participates and permitting a state to require a local governmental unit to adopt the same policy.[42]

The Third Circuit, in *Trojan Technologies v. Pennsylvania*,[43] construing a Pennsylvania "buy-American"[44] statute establishing guidelines for the purchasing practices of state and local governmental entities, disagreed with the Seventh Circuit's reasoning in *W.C.M. Window*.[45] After

39. *Id.* at 495. "Government in Illinois as in all states is decentralized, and local school boards . . . have substantial autonomy, including authority to levy taxes to support the schools." *Id.*

40. *Id.* An affidavit submitted by the school superintendent indicated that the project was funded solely with local funds. *Id.* The court indicated that it would have upheld a state statute limited to projects financed in whole or in part by the state or to those projects administered by the state. *Id.* Assuming that the school receives at least a minimum of state funding, one may question such a distinction. To the extent that state funding has saved the school from spending local tax revenue on some items, it is difficult to assert that any project is entirely locally funded. Thus, one could argue, in the absence of state funding, the school might not have been able to commit resources to the window replacement project.

Given that money is fungible, one might also question the practical difficulties associated with Professor Coenen's "sowing and reaping" justification for the market-participant doctrine. *See supra* note 35. In light of federal funding of state and local government programs, it is questionable how a court would know when a state is spending its "own" money. *See generally* J. RICHARD ARONSON & JOHN L. HILLEY, FINANCING STATE AND LOCAL GOVERNMENTS, 49-50 (4th ed. 1986) (federal grants represented 20% of state and local government expenditures in 1984).

41. *W.C.M. Window*, 730 F.2d at 495. The court characterized the state as a regulator, "telling thousands of local government units that they must not give construction contracts to employers of non-residents." *Id.* The court recognized that more public contracting is done at the local level than at the state level. *Id.* The court reasoned that applying the market-participant doctrine to cases where the state's relationship was regulatory "could do great damage to the principles of free trade on which the negative commerce clause is based." *Id.*

42. *Id.* at 496. In addition, the Seventh Circuit found the statute invalid under the Privileges and Immunities Clause of Article IV. *Id.* at 496-98. *See* U.S. CONST., art. IV, § 2, cl. 2.

43. 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2814 (1991).

44. The Pennsylvania Steel Products Procurement Act required "suppliers contracting with a public agency in connection with a public works project to provide products whose steel is American-made." *Id.* at 903 (citing PA. STAT. ANN. tit. 73, § 1884 (1991)).

45. *Trojan Technologies*, 916 F.2d at 911. Trojan Technologies is a Canadian corporation that manufactured a "UV-2000" ultraviolet light water-disinfection system. *Id.* at 905. Several Pennsylvania municipalities and sewer authorities purchased the system for use in wastewater and sewage-treatment facilities. *Id.* In July 1988, the Pennsylvania Attorney General's office requested documentation from Trojan Technologies concerning compliance with the Pennsylvania "buy-

recognizing the single inquiry of *White*,[46] the court confronted the Seventh Circuit's holding that courts need not view local political entities as part of the state when applying the market-participant doctrine.[47] The Third Circuit stated that both local governmental units and state agencies derive their authority from the state.[48] Consequently, given that a state may validly impose a "buy-American" requirement on its central state agencies, the court found no reason to view local entities differently.[49] Drawing an analogy from *White*,[50] the court characterized local entities as "supplying for the state."[51] Finally, the court asserted that the purposes underlying the Commerce Clause did not require a broad prohibition against state regulation of local municipal purchases.[52] Assuming that local entities could adopt similarly protectionist purchasing practices, the Third Circuit found no reason to prevent the state, as the source of all local power, from imposing a similar limit.[53]

In *Big Country Foods v. Board of Education*,[54] the Ninth Circuit agreed with the Third Circuit's rationale and held that Alaska's price-preference statute constituted market participation immune from Com-

---

American" statute. *Id.* Trojan Technologies did not provide any documentation, and instead filed suit, challenging the constitutionality of the Pennsylvania statute. *Id.*

46. *Id.* at 910. *See supra* text accompanying note 26.

47. *Trojan Technologies*, 916 F.2d at 910.

48. *Id.* at 911. "We find no compelling analytical difference between a local government unit and central state agencies. Both exist only through affirmative acts of the state. A municipality derives authority from the state." *Id.* (citing United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 215 (1984)).

49. *Id.* Stating that the Supreme Court had never mentioned the "quantum of market purchases," in deciding prior cases, the court also dismissed the *W.C.M. Window* court's argument that the volume of purchasing activity undertaken at the local level militated against extending the doctrine to cover such state statutes. *Id. See supra* note 41.

50. In *White*, the Mayor of Boston's executive order required that all city and federally funded construction projects be performed by a work force of at least half Boston residents. *See supra* notes 22-27 and accompanying text. The Supreme Court rejected the argument that the executive order effectively regulated employment contracts between private contractors and their employees by characterizing the contractor and his employees as "working for the city." *Trojan Technologies*, 916 F.2d at 911 (citing *White*, 460 U.S. at 211 n.7).

51. *Trojan Technologies*, 916 F.2d at 911. If "employees of a private contractor can be thought to be in relationship with the city, we think it equally clear that suppliers of a local public entity can be thought to be 'supplying for the state.'" *Id.*

52. *Id.* at 912. The court quoted *Reeves* for the proposition that the Commerce Clause responds to state taxes and regulatory measures that impede "free *private* trade in the national marketplace." *Id.* (quoting *Reeves*, 447 U.S. at 437).

53. *Id.* For a similar argument, see the discussion of Justice Rehnquist's dissent in *Wunnicke*, *supra* note 32.

54. 952 F.2d 1173 (9th Cir. 1992).

merce Clause scrutiny.[55] The court first acknowledged that Alaska's preference statute discriminates against interstate commerce for the purpose of protecting Alaska's milk producers from economic competition.[56] The court then addressed Alaska's assertion that the market-participant doctrine validates the preference statute.[57]

Recognizing the split between the circuits, and restating the positions articulated in *W.C.M. Window* and *Trojan Technologies*, the Ninth Circuit stated that political subdivisions exist at the will of the state.[58] The court observed that the Constitution should not penalize a state for exercising the state's power through smaller, localized units.[59] Moreover, the court found the assertion that all political subdivisions are separate from the state contradicted the notion that such entities derive their authority from the state.[60] Furthermore, the court concluded that a compromise rule, requiring courts to consider some political subdivisions as separate for market-participant analysis, would lead to troubling case-by-case inquiries.[61] Therefore, the court determined that the market-participant doctrine applied even though Alaska uses local school districts to facilitate its milk purchasing program.[62]

The Ninth Circuit's holding failed to consider the market-participant doctrine's underlying justifications.[63] While the Supreme Court's decisions do not clearly state the bedrock on which the market-participant

55. *Big Country Foods*, 952 F.2d at 1179. *See supra* notes 1-9 and accompanying text for a discussion of the facts of *Big Country Foods*.

56. *Big Country Foods*, 952 F.2d at 1177.

57. *Id.*

58. *Id.* at 1179.

59. *Id.*

60. *Id.*

61. *Id.* The court noted that the parties' reliance on *W.C.M. Window* "led the parties here to argue over the extent of Alaska state control of local school districts." *Id.*

62. *Id.* The court rejected Big Country's argument that Alaska's use of federal funds made the market-participant doctrine inapplicable, reciting the single inquiry command of *White*. *Id.* at 1180. "Federal funds provide the wherewithal to make the milk purchases, but it is Alaska that is the direct participant in the market." *Id.* The court recognized the "public policy" arguments advanced by Professor Coenen, *see supra* note 35, but concluded that consideration of these factors would "extend the debate beyond the 'single inquiry' [of *White*]." *Big Country Foods*, 952 F.2d at 1180.

The court also rejected Big Country's argument, based on New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988), that Alaska was acting in its sovereign capacity as provider of public education. *Big Country Foods*, 952 F.2d at 1180-81 (stating that Alaska was "simply making a decision as to what it will pay for a product bought on the open market").

63. *Id.* at 1179.

doctrine stands, the doctrine's foundation is nonetheless discernable.[64] Considered in light of these well-established justifications, state statutes establishing purchasing policies for local political subdivisions do not warrant immunity from traditional dormant Commerce Clause scrutiny.[65]

Viewing the Supreme Court's market-participant doctrine decisions from *Alexandria Scrap* to *Wunnicke*, several justifications for the doctrine appear. First, the doctrine reflects the Court's concern with the preservation of state sovereignty.[66] Second, the doctrine protects a state's ability to choose its trading partners without interference from the courts.[67] Finally, the doctrine embodies the Court's reluctance to police the diverse activities undertaken by a state in its proprietary capacity.[68] While these factors may militate in favor of immunity when a state enters the market on its own, they lend little support to affording immunity to state statutes that establish rules for local governments seeking to enter the market.[69]

Big Country Foods overextends the single inquiry command of *White*.[70] At a minimum, courts should consider the market-participant doctrine's foundations before characterizing a state as either a market participant or market regulator. By failing to consider the purposes underlying the market-participant doctrine, the Ninth Circuit's holding in *Big Country Foods* extends immunity beyond the doctrine's proper domain.

H. Christopher Boehning

---

64. *See supra* note 21 and accompanying text.

65. *See supra* notes 21, 33, 35, 62.

66. *See supra* note 21 and accompanying text.

67. *See supra* note 21.

68. *Id.*

69. *See supra* notes 33, 35. *See also Trojan Technologies*, 916 F.2d at 912 (characterizing Pennsylvania's "buy-American" statute as "state regulation of local municipal purchases."). It is difficult to see how invalidation of a state statute establishing rules for local government purchases under the Commerce Clause impedes state sovereignty any more than invalidation of a state statute of the type struck down in *Wunnicke*. Both tend to regulate "downstream." *See supra* note 32 and accompanying text. Moreover, if it is appropriate for a state to choose its trading partners free from interference, it seems only fair to extend that same freedom to local governments. Finally, the practical problems associated with policing state proprietary activities are not present when the challenged policy is clearly articulated in a state statute.

70. *See supra* notes 26, 62 and accompanying text.