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## State User Fees and the Dormant Commerce Clause

Dan T. Coenen

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## State User Fees and the Dormant Commerce Clause

Dan T. Coenen\*

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## I. INTRODUCTION

The law takes shape as great principles collide in the context of concrete cases. In the field of constitutional law, the task of reconciling key precepts falls, of necessity, to the Supreme Court. Indeed, much of the Court's work involves delineating the borders of competing constitutional principles that the Court itself has created.<sup>1</sup>

This Article considers the interplay of two central tenets of the Court's dormant commerce clause jurisprudence.<sup>2</sup> The first of these principles exempts from the general proscription on discrimination against interstate commerce a state's actions as a "market participant," rather than as a "market regulator."<sup>3</sup> The second principle, in contrast, renders the nondiscrimination rule fully applicable to the imposition of state "user fees."<sup>4</sup>

Part II of this Article shows why these doctrinal pronouncements stand in an unsteady tension. It also explains how this tension revealed itself in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*,<sup>5</sup> when two dissenters attacked the majority for overriding the market-participant exception by outlawing state discrimination in fixing public-landfill fees.<sup>6</sup> Part III explains

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1. See, for example, Bernard Schwartz, *The Unpublished Opinions of the Burger Court* 414 (Oxford U., 1988) ("The difficult constitutional cases are . . . those in which conflicting rights—each by itself deserving of judicial protection—are at issue. The courts must then . . . define the precise course and texture of the interface between the competing rights.").

2. See *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 854, 133 L. Ed. 2d 796 (1996).

3. See notes 12-23 and accompanying text.

4. See notes 24-29 and accompanying text.

5. 511 U.S. 93 (1994).

6. *Id.* at 109, 114-16 (Rehnquist, C.J., dissenting).

why the dissenters' reading of *Oregon Waste Systems* was misguided. Although that decision pointed up the long-latent strain between the Court's market-participant and user-fee cases, it did not resolve—in the public landfill context or otherwise—the ostensible contradiction created by these competing bodies of law.

Part IV explains how this doctrinal conflict could emerge. For years the Court has treated state tax cases and state regulation cases as falling into distinct analytical categories for dormant commerce clause purposes. Part IV shows how the creation of this doctrinal dichotomy may have led the Court to gloss over the intrinsic incompatibility of its broadly stated market-participant and user-fee rules.

Finally, Part V offers what the Supreme Court has not yet provided: a synthesis of these clashing principles that comports with both existing caselaw and sound dormant commerce clause policy. Close inspection reveals that, although the Court has declared the user-fee anti-discrimination rule in categorical terms, it actually has applied that rule only to state charges associated with roads, airports, and other channels of interstate movement. These decisions are correct, according to the synthesis proposed in this Article, because of the compelling need to safeguard access to the essential avenues of interstate trade. This channels-of-commerce principle, however, does not dictate that states must make public landfills—as well as many other government facilities unconnected with interstate movement—available to in-state and out-of-state users on equal terms. Rather, states may impose discriminatory fees for the use of such facilities because such charges are constitutional under the market-participant exception to the dormant Commerce Clause.

## II. THE USER-FEE/MARKET-PARTICIPANT ISSUE

For more than a century, the Supreme Court has read the Commerce Clause to mean that the states must “sink or swim together”<sup>7</sup> as parts of a “federal free trade unit.”<sup>8</sup> In keeping with this “dormant” or “negative” component of the Commerce Clause, the Court has proclaimed that a state’s “differential treatment of in-state and out-of-state economic interests . . . is virtually *per se* invalid” even

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7. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

8. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 538 (1949).

in the absence of preemptive federal legislation.<sup>9</sup> Under this rule, for example, a state may not inhibit sales by traveling representatives of nonresident firms to give a competitive edge to local retailers.<sup>10</sup> Likewise, a state may not impose a greater tax on nonresident buyers of private landfill services than it imposes on similarly situated residents.<sup>11</sup>

This "principle of nondiscrimination,"<sup>12</sup> however, is subject to an important exception. The Court has declined to apply it when a state discriminates against interstate commerce in distributing its own resources.<sup>13</sup> In *Hughes v. Alexandria Scrap Corporation*,<sup>14</sup> for example, the Court considered a law under which Maryland paid cash bounties for the disposal of Maryland-titled junk cars.<sup>15</sup> The problem was that Maryland in effect made its bounties more readily available to in-state than to out-of-state processors.<sup>16</sup> Despite this discrimination, the Court upheld the program. The Court reasoned that Maryland had not burdened nonresident traders through a discriminatory exercise of its regulatory or taxing powers. Rather, the state had entered "the market as a purchaser," utilizing its own resources to favor in-state industry.<sup>17</sup>

*Alexandria Scrap* provided the doctrinal springboard for judicial recognition of the "market-participant exception" to the dormant

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9. *Oregon Waste Systems*, 511 U.S. at 99.

10. *Welton v. Missouri*, 91 U.S. 275 (1876).

11. *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Nat'l Resources*, 504 U.S. 353, 367-68 (1992).

12. *Id.* at 360 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)).

13. For discussions of the Court's key decisions—and their soundness and implications—see, for example, Laurence H. Tribe, *American Constitutional Law* § 6-11 (Foundation Press, 2d ed. 1988); Thomas K. Anson and P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71 (1980); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395 (1989); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 98-109 (1988); Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097 (1988); Paul S. Kline, *Publicly-Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine*, 96 Dickinson L. Rev. 331 (1992); Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 Ariz. St. L. J. 559 (1990); Michael J. Polelle, *A Critique of the Market Participation Exception*, 15 Whittier L. Rev. 647 (1994); David Pomper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. Pa. L. Rev. 1309 (1989); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487 (1981); Michael Wells and Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073 (1980).

14. 426 U.S. 794 (1976).

15. *Id.* at 797.

16. *Id.* at 802.

17. *Id.* at 808.

Commerce Clause.<sup>18</sup> Invoking this exception, the Court has held that no violation of the Commerce Clause occurs when states prefer residents over nonresidents in hiring workers,<sup>19</sup> selling goods,<sup>20</sup> or purchasing services for governmental use.<sup>21</sup> In none of these cases, however, has the Court squarely considered the constitutional status of one common form of state “marketplace” activity: the charging of fees to secure compensation for government services or assets. Even so, the Court’s oft-expressed willingness to protect states as market participants has led observers to find that the fixing of state fees enjoys immunity from commerce clause attack. Lower courts have reached this conclusion,<sup>22</sup> and leading commentators have declared without hesitation that “[t]he selling of state-owned resources to local residents at a lower price [than] the state charges to out of state interests is consistent with commerce clause principles because the state is acting as a ‘market-participant.’ ”<sup>23</sup>

The problem with this seemingly straightforward application of the market-participant principle is that it clashes with another tenet of the Court’s dormant commerce clause jurisprudence—namely, that a state “user fee” is unconstitutional if it “discriminates against interstate commerce.”<sup>24</sup> In *Guy v. Baltimore*,<sup>25</sup> for example, the Court considered a fee charged for use of a city-owned wharf by vessels that carried only out-of-state goods. Essentially anticipating the modern market-participant doctrine, the city argued that this fee structure should escape dormant commerce clause scrutiny because of the city’s proprietary interest in its docks.<sup>26</sup> The Court, however, rejected this

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18. See generally sources cited in note 13.

19. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 205-06 (1983).

20. *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980).

21. *American Yearbook Co. v. Askew*, 339 F. Supp. 719, 725 (M.D. Fla. 1972) (three-judge panel), *aff’d mem.*, 409 U.S. 904 (1972). Following the Court’s formal articulation of the market-participant doctrine, it reiterated its *American Yearbook* ruling in the *Reeves* decision. *Reeves*, 447 U.S. at 437 n.9; *id.* at 450 (Powell, J., dissenting).

22. See note 99 and accompanying text (collecting cases). See also *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 717 (3d Cir. 1995) (“When a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice. . .”).

23. John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 8.9 at 307 (West, 5th ed. 1995).

24. *Evansville-Vanderburgh Airport Authority v. Delta Airlines*, 405 U.S. 707, 717 (1972).

25. 100 U.S. 434 (1879).

26. See Collins, 63 N.Y.U. L. Rev. at 108 n.392 (cited in note 13) (noting that in *Guy* “Chief Justice Waite dissented on grounds that sound like market participant immunity”).

argument on its way to invalidating the discriminatory fee.<sup>27</sup> Following the lead of *Guy*, later cases have repeatedly insisted that “[a] user fee is valid only to the extent it ‘does not discriminate against interstate commerce.’”<sup>28</sup> The Court, moreover, has not confined this principle by narrowly defining the term “user fee.” Instead, it has suggested that this term broadly embraces any “specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.”<sup>29</sup> In short, the Court’s user-fee cases suggest that discrimination against interstate commerce is barred with respect to *all* state charges imposed for the enjoyment of *any* state-supplied services or property.

The Court’s user-fee and market-participant decisions do not—to say the least—stand comfortably together. The “market participant” label would seem to fit easily, after all, when a state disposes of property or services for a price.<sup>30</sup> No less significantly, the market-participant exception reflects the underlying policy notion that state claims to autonomy are strongest when the state transfers resources that are the state’s own.<sup>31</sup> Yet precisely the same policy operates when a state fixes user fees, for such fees by definition are charged for the use of “facilities and services” provided by the state itself.<sup>32</sup>

The Court has yet to face up to the seeming contradiction that marks its market-participant and user-fee decisions. This doctrinal strain, however, lurked just beneath the surface in the Court’s recent *Oregon Waste Systems* decision.<sup>33</sup> The issue in that case was whether Oregon could impose a higher in-state-disposal “surcharge” on waste

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27. See notes 75-77, 111-17 and accompanying text.

28. *Oregon Waste Systems*, 511 U.S. at 104 n.6 (quoting *Northwest Airlines v. Kent County*, 510 U.S. 355, 369 (1994)).

29. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981) (emphasis added). See *id.* at 622 n.12 (distinguishing user fees from taxes). See also note 101 (quoting user-fee definition set forth in *Oregon Waste Systems*). Compare *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) (considering the constitutionality under the Equal Protection Clause of a “user fee for bus service”).

30. See, for example, Collins, 63 N.Y.U. L. Rev. at 106 (cited in note 13) (“When states impose charges . . . for state services or for use of state property, their actions are often literally those of market participants.”).

31. See Coenen, 88 Mich. L. Rev. at 422 (cited in note 13) (“[I]t is useful to recall that states are people—people who have banded together. One collective activity in which a state’s citizens may engage is the accumulation of property. . . . [I]t seems sensible that when a state government distributes state resources, it may—on behalf of all its citizens—pick and choose among proper recipients.”); Varat, 48 U. Chi. L. Rev. at 523 (cited in note 13) (“Like other groups free to combine their members’ efforts to produce collective benefits to be shared among the group, political communities, including states, have a prima facie justification for limiting distribution of their public goods to those who combined to provide them.”).

32. *Commonwealth Edison*, 453 U.S. at 621.

33. *Oregon Waste Systems*, 511 U.S. at 93.

generated outside Oregon's borders than on waste generated inside the state.<sup>34</sup> In litigating this question, Oregon sought to characterize its surcharge as a "user fee," rather than a "tax."<sup>35</sup> Writing for a seven-member majority, however, Justice Thomas rejected in a footnote the state's effort to take advantage of the "user fee" moniker. As he explained, user fees are "charge[s] imposed by the State for the use of state-owned or state-provided . . . facilities. . . ."<sup>36</sup> In *Oregon Waste Systems*, however, it was "undisputed that . . . the landfills in question are owned by private entities . . ."<sup>37</sup> It thus followed easily that, whatever else the Oregon surcharge might be, it was not a "user fee."<sup>38</sup> Justice Thomas, however, did not stop here. In a single sentence (which inspires much that follows), he added the following observation: "Nevertheless, even if the surcharge could somehow be viewed as a user fee, it could not be sustained as such, given that it discriminates against interstate commerce."<sup>39</sup>

These twenty-seven words—though seemingly supported by more than a century of Supreme Court jurisprudence<sup>40</sup>—drew a stinging rebuke from Chief Justice Rehnquist. Pointing to the passage, the Chief Justice chided the majority for its "dubious assertion."<sup>41</sup> "[I]f the State owned and operated a park or recreational facility," the Chief Justice observed, "it would be allowed to charge differential fees for in-state and out-of-state users of the resource."<sup>42</sup> The Chief Justice also noted that, while past decisions had blocked state discrimination against nonresident users of *private* landfills, those same decisions had distinguished cases that involved "disposal of out-of-state solid

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34. *Id.* at 95.

35. Respondent's Brief at 9, 11, 13, 40, *Oregon Waste Systems, Inc. v. Department of Env. Quality of Oregon*, 511 U.S. 93 (1994) (Nos. 93-70, 93-108). In particular, the state sought to invoke the "compensatory fee" label, so as to sidestep the effect of the Court's earlier and strict "compensatory tax" decisions. See note 230. Oregon's theory was that it could impose a higher fee on out-of-state landfill users so long as that fee did not exceed Oregon's reasonable costs in supervising, and otherwise dealing with, the in-state handling of out-of-state waste. *Oregon Waste Systems*, 511 U.S. at 96. See generally Steve Yarborough, Casenote, *Compensatory Fee or Protectionist Tax: Oregon's Surcharge on Out-of-State Waste*, 34 Nat. Resources J. 497, 502-03, 514 (1994) (seeking to distinguish Oregon's surcharge from compensatory tax). Interestingly, the Court had rejected much the same argument for upholding a discriminatory fee more than a century earlier in the *Guy* case. See notes 74-77 and accompanying text.

36. *Oregon Waste Systems*, 511 U.S. at 103 n.6 (quoting *Commonwealth Edison*, 453 U.S. at 621).

37. *Id.*

38. *Id.*

39. *Id.* at 103-04 n.6.

40. See notes 24-29 and accompanying text.

41. *Oregon Waste Systems*, 511 U.S. at 114 (Rehnquist, C.J., dissenting).

42. *Id.* (Rehnquist, C.J., dissenting).



waste at landfills *owned by the government*. . . ."<sup>43</sup> The Chief Justice's point was clear. In his view, if a state-owned park could raise charges for nonresidents and a state-owned landfill could exclude nonresidents altogether, then a state-owned landfill surely could deal with nonresidents but charge them higher user fees. The Chief Justice thus condemned the majority's "sweeping ruling" because it made "no distinction between publicly and privately owned landfills."<sup>44</sup>

This exchange between Justice Thomas and Chief Justice Rehnquist points up a long-dormant difficulty in the Court's dormant commerce clause caselaw. What is the answer to the question whether a state-owned landfill can charge nonresident users higher fees than it charges its own residents? And what about state discrimination in fixing charges for public colleges and hospitals, agricultural extension services, toll roads, campsites, resort cabins, and the myriad other discrete and tangible benefits state governments may sell for a price. With respect to these questions, the Court's "states can't discriminate" user-fee cases seem set on a collision course with its "states can discriminate" market-participant cases.

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43. *Id.* (emphasis added) (Rehnquist, C.J., dissenting). See note 45.

44. *Oregon Waste Systems*, 511 U.S. at 114 (Rehnquist, C.J., dissenting). Although the point is peripheral to the main subject of this Article, the reasoning that underpins the Chief Justice's attack is subject to criticism on at least two grounds. First, the Chief Justice cited only *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1978), in support of his assertion that states can price-discriminate in fixing charges for park use free from commerce clause constraints. In *Baldwin*, however, the Court confronted and rejected only a Privileges and Immunities Clause attack, and did so only with respect to discriminatory hunting license—as opposed to state park—fees. *Id.* at 378-88. The Court, however, has made it clear that the Privileges and Immunities Clause and dormant Commerce Clause are not coextensive. *United Bldg. & Constr. Trades Council v. Mayor and Council*, 465 U.S. 208, 219-20 (1984). See also note 57 (noting difference in clauses' treatment of corporations). Second, after citing *Baldwin* for the compatibility of the Commerce Clause and discriminatory park fees, the Chief Justice added: "More recently we upheld such differential fees under a reasonableness standard in [*Northwest Airlines*] . . ." *Oregon Waste Systems*, 511 U.S. at 115 (Rehnquist, C.J., dissenting). In fact, the Court did no such thing because *Northwest Airlines* did *not* involve "differential" fees at all. Rather, the question in *Northwest Airlines* was whether a user-fee scheme—under which a public authority charged "commercial airlines" 100% of the costs generated by their use of airport runways, while charging "general aviation" users 20% of costs allocated to them—should be found to discriminate between interstate and intrastate commerce. *Northwest Airlines*, 510 U.S. at 359-60. Rejecting the argument (on the facts presented) that "general aviation is properly categorized as intrastate commerce," the Court refused to find any discrimination against interstate commerce in the case. *Id.* at 372. Indeed, the underlying premise of the Court in *Northwest Airlines* was that the user fee would be unconstitutional if, in fact, it discriminated against interstate commerce. In these circumstances, the suggestion by the Chief Justice that *Northwest Airlines* authorizes state price discrimination against persons engaged in interstate activity was off the mark.

III. THE MESSAGE OF *OREGON WASTE SYSTEMS*

Chief Justice Rehnquist's dissenting opinion in *Oregon Waste Systems* did more than merely highlight the tension between the Court's market-participant and user-fee caselaw; it also denounced the majority for overriding the market-participant rule with the user-fee anti-discrimination principle when a state fixes charges for public landfill use. If the Chief Justice's reading of the majority opinion is right, *Oregon Waste Systems* itself goes far toward setting the boundary between the Court's market-participant and user-fee rules. Thus, the first question presented by any inquiry into this subject is whether—as Chief Justice Rehnquist suggested—the majority opinion in *Oregon Waste Systems* dictates that a state must charge nonresidents the same public-landfill fees it charges its own residents. For three separate reasons, the answer is “no.”

First, the majority's one-sentence treatment of discriminatory user fees in its footnote six was just that—one sentence in a footnote. In that sentence, the Court did not recognize the tension between its user-fee and market-participant cases; it did not discuss that tension; and it did not profess to reconcile any conflict between these contesting lines of authority. Indeed, in footnote nine of its opinion, the majority observed that it had “no occasion to decide whether Oregon could validly accomplish its limited cost spreading through the ‘market participant’ doctrine. . . .”<sup>45</sup> Particularly in light of this explicit disclaimer, it would be wrong to read footnote six as setting forth a major and controversial pronouncement about how the market-participant rule operates in public-landfill and other user-fee cases.<sup>46</sup>

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45. *Oregon Waste Systems*, 511 U.S. at 106 n.9. The Court had made the same point in earlier landfill cases. See *Fort Gratiot Sanitary Landfill*, 504 U.S. at 358-59 (“Nor does the case raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities.”); *id.* at 366 n.7 (distinguishing earlier decision on ground that “private landfills . . . are neither publicly produced nor publicly owned”); *Philadelphia*, 437 U.S. at 627 n.6 (“We express no opinion about New Jersey’s power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources. . . .”).

46. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 716 (3d Cir. 1995) (citing footnote nine of *Oregon Waste Systems* as indicating that “the Court has . . . left unanswered the question as to what effect government ownership of a waste facility would have on otherwise discriminatory waste measures”). See also *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 387 n.5 (1992) (“It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.”).

Second, whatever the majority meant to say in the final sentence of footnote six, that sentence was unnecessary to the Court's decision in the case. The Court already had rejected Oregon's effort to characterize its surcharge as a user fee in the footnote's immediately preceding passages.<sup>47</sup> As a result, the Court's one-sentence invocation of the user-fee anti-discrimination principle, whatever its intended meaning, constituted at most the briefest dictum, which provides no proper embodiment of a seminal constitutional ruling.<sup>48</sup>

Third, and most important, the sentence that concludes footnote six is susceptible of a reading that says nothing whatsoever about the market-participant doctrine. That sentence states only that the user-fee anti-discrimination principle would control "if the surcharge could somehow be viewed as a user fee."<sup>49</sup> The sentence thus focuses on "*the* surcharge"—that is, the surcharge that Oregon *actually imposed*. Because this charge concerned only waste placed in private landfills,<sup>50</sup> the sentence is not a statement about a *hypothetical* fee charged for *public* landfill use, as the Chief Justice apparently assumed. In other words, the more plausible reading of Justice Thomas's critical sentence is that if the *actual* charge placed by Oregon on *private* landfill use were somehow characterized as a user fee, such a user fee would not pass constitutional muster. On this reading, however, the Court in *Oregon Waste Systems* made no statement about the scope of the market-participant rule, since that rule could and would concern only charges for access to *public* landfills.<sup>51</sup> In short, Chief Justice Rehnquist's suggestion that the sentence set forth a "sweeping ruling" that controls charges for both "publicly and privately owned landfills"<sup>52</sup> greatly overstated what the majority had done.

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47. See notes 33-39 and accompanying text.

48. See, for example, *Third National Bank in Nashville v. Impac Limited, Inc.*, 432 U.S. 312, 319 n.9 (1977) ("[D]ictum is . . . not controlling [when] 'the very point is presented for decision.'" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheaton) 264, 399 (1821))); *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases.").

49. *Oregon Waste Systems*, 511 U.S. at 104 n.6.

50. See notes 36-37 and accompanying text.

51. See notes 13-23 and accompanying text.

52. *Oregon Waste Systems*, 511 U.S. at 114 (Rehnquist, C.J., dissenting).

## IV. THE ROOTS OF THE USER-FEE/MARKET-PARTICIPANT PROBLEM

The fact that *Oregon Waste Systems* failed to resolve the tension between the Court's user-fee and market-participant decisions does not mean that the tension does not exist. Nor does it mean that the Court's opinion in *Oregon Waste Systems* will play no role as judges identify and struggle with this problem. Lower courts surely will notice, for example, that *Oregon Waste Systems*, in describing the Court's nearly contemporaneous decision in *Northwest Airlines, Inc. v. Kent County*,<sup>53</sup> set forth the user-fee nondiscrimination principle in stark and sweeping terms.<sup>54</sup> *Northwest Airlines*, in turn, relied on *Evansville-Vanderburgh Airport Authority v. Delta Airlines*,<sup>55</sup> in which the Court, in upholding a user fee, deemed it critical that the fee was not "discriminatory against interstate commerce."<sup>56</sup> Read for all they are worth, these broad condemnations of discriminatory user fees raise doubts about far more than the landfill fees of immediate interest to Chief Justice Rehnquist. They also place in constitutional jeopardy differential charges for such activities as catching state fish,<sup>57</sup>

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53. 510 U.S. 355 (1994).

54. See note 28 and accompanying text.

55. 405 U.S. 707 (1972).

56. *Id.* at 717. The unqualified breadth of the Court's past pronouncements in its user-fee cases is suggested by the appellant's brief in a pre-*Oregon Waste Systems* case. As the appellant in that case stated: "The decisions of this Court have long established that the Commerce Clause prohibits state taxes that expressly favor in-state over out-of-state commerce. The same standard of nondiscrimination is applicable to state . . . fees for the use of public facilities." Appellant's Brief at 16, *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (No. 86-357) (citations omitted). See generally notes 24-29 and accompanying text.

57. As already pointed out, the Court's prior decisions do not conclusively establish the constitutionality or unconstitutionality of discriminatory hunting and fishing license fees under the dormant Commerce Clause and the market-participant exception. See note 44. Perhaps the Court will find the Commerce Clause wholly inapplicable in some or all of these cases. For example, the Court—in reliance on textual explicitness—might conclude that the Privileges and Immunities Clause provides the exclusive basis for challenging all state laws that overtly discriminate between *individual* residents and nonresidents, including those laws that concern recreational hunting and fishing fees. See *Carlson v. State, Commercial Fisheries Entry Comm'n*, 919 P.2d 1337, 1340-41 (Alaska 1996). If the Court did find such laws subject to only Privileges and Immunities Clause challenge, it presumably would uphold them on the ground that they do not infringe "fundamental" interests. See *Baldwin*, 436 U.S. at 388 (holding that elk-hunting license fee discrimination against nonresidents did not offend the Privileges and Immunities Clause because elk hunting is not a fundamental right).

The Court, however, has not previously viewed the Privileges and Immunities Clause as automatically displacing the operation of the dormant Commerce Clause in all cases involving discrimination between resident and nonresident individuals. See, for example, *White*, 460 U.S. at 206-15 (evaluating state discrimination between resident and nonresident workers under the dormant Commerce Clause, but applying the market-participant exception). See also *Edwards v. California*, 314 U.S. 160, 172-73 (1941) (striking down a prohibition on bringing indigent nonresidents into a state on commerce clause grounds); *W.C.M. Window Co. Inc v. Bernardi*, 730

camping in state parks,<sup>58</sup> purchasing state products and services,<sup>59</sup> and obtaining a public college education.<sup>60</sup>

F.2d 486 (7th Cir. 1984) (rejecting the view, in hiring preference case, that the Privileges and Immunities Clause "preempts" commerce clause review); *Gulch Gaming Inc v. State of South Dakota*, 781 F. Supp. 621 (D.S.D. 1991) (invalidating state statute limiting non-resident investors in gambling operations under the Commerce Clause). More significantly for present purposes, the adoption of such an approach would hardly make discriminatory user-fee questions under the Commerce Clause disappear. Such an approach, for example, would not speak to a state's imposition of higher fees on *foreign corporations* for commercial fishing licenses because the Privileges and Immunities Clause is wholly inapplicable to corporations. See, for example, *Paul v. Virginia*, 75 U.S. (8 Wallace) 168, 180-82 (1868). Nor would it deal with state discrimination between individuals in fixing fees based not on residence itself, but on the locus of some commercial activity—such as where the individual engages in most of his or her productive work. See *Pawa v. McDonald*, 921 F. Supp. 227 (D. Vt. 1996) (discrimination based on where individual's car is registered).

The Court also might sidestep application of the dormant Commerce Clause to recreational hunting or fishing fee differentials on the theory that hunting and fishing does not involve "commerce" within the meaning of the Clause. See *Terk v. Ruch*, 655 F. Supp. 205, 215 (D. Colo. 1987) (holding that unharvested game is not an "article[ ] of commerce"); *Shepherd v. State Dep't of Fish and Game*, 897 P.2d 33, 42 (Alaska 1995) (same); *Clajon Production Corp. v. Petera*, 854 F. Supp. 843, 860 n.323 (D. Wyo. 1994) (same), *aff'd*, 70 F.3d 1566, 1571 n.11 (10th Cir. 1995) (finding no standing to assert commerce clause claim but also noting that plaintiffs have a "legally protected interest under the Commerce Clause"). See also *LCM Enterprises v. Town of Dartmouth*, 14 F.3d 675, 678 (1st Cir. 1994) (noting that district court found no standing for plaintiffs to challenge town's discriminatory boat-mooring fee under the Commerce Clause "because they used their boats only for recreational purposes and did not engage in any commercial activity that would be affected by the use fee" but also noting that the commerce clause issue was not raised on appeal). Compare *Lopez v. United States*, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (possession of gun near a school does not involve "economic activity" subject to regulation pursuant to Congress's commerce power). Indeed, the holdings of some courts suggest that state discrimination in fixing fees for even *commercial* fishing licenses is immune from commerce clause attack on this ground. See, for example, *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F. Supp. 1287, 1306 (E.D. Va. 1982) ("[T]he Court is not convinced that the Commerce [C]lause reaches a State law whose effect is to prohibit a nonresident commercial crabber from catching crabs in Virginia. Plaintiffs have not established that unharvested crabs are articles of commerce."). Some hoary cases lend support to this position. See, for example, *McCready v. Virginia*, 94 U.S. 391, 396 (1876). More recent decisions, however, cast doubt upon it. See *Carlson v. State*, 798 P.2d 1269, 1277 n.4 (Alaska 1990) (discussing Supreme Court cases). See also *Davrod Corp. v. Coates*, 971 F.2d 778, 790 (1st Cir. 1992) (upholding state statute restricting commercial fishing boat length against commerce clause challenge); *Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893, 902 (E.D.N.Y. 1989) (invalidating state statute restricting commercial boat length on dormant commerce clause grounds).

58. Perhaps states are prepared to argue that charging nonresidents higher fees for access to lands—like charging nonresidents higher fees for access to fish or game—does not involve disposal of an "article of commerce." See note 57. This approach, however, seems counter-intuitive; most people paying a fee for a campsite would, for example, view themselves as engaging in a commercial exchange. In addition, most transactions of this sort—for example, the sale of access rights to a campground or a state park—can readily be characterized as involving the sale of *services*, to which the dormant Commerce Clause has been held to extend. See note 59.

Perhaps an even more troubling implication of defining "commerce" not to reach such activities as the purchase of access rights to state campsites or parks (and, perhaps, for that matter, state fish or game) is that such a definition might well free states to exclude nonresidents even from private campground or recreational areas (or fish farms or hunting preserves). Indeed, such a definition might well preclude Congress from acting affirmatively to bar state discrimination against nonresidents seeking to use wholly private facilities because "there is no

'two-tiered definition of commerce.' The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979) (quoting *Philadelphia*, 437 U.S. at 621-23).

The Court might respond to these difficulties by defining "commerce" to exclude only *public* transactions with respect to such activities. Drawing this sort of public/private distinction, however, would seem inevitably to rest on the same notion of public ownership that underlies the market-participant exception. See note 31 and accompanying text. Deciding whether to define "commerce" narrowly in this way would thus provide no escape from the overarching question addressed in this Article: Whether the state-ownership-driven market-participant concept should trump the Court's broadly stated user-fee anti-discrimination rule.

59. With respect to state goods, see notes 96-97 and accompanying text. With respect to state services (for example, in the form of agricultural or small-business consulting services) states might seek to escape the market-participant/user-fee conundrum by asserting that the dormant Commerce Clause reaches only "the transportation, purchase, sale, and exchange of commodities." *Webber v. Virginia*, 103 U.S. 344, 351 (1880) (emphasis added). More recent decisions, however, leave no doubt that the anti-protectionism principle covers the purchase and sale of services as well. See, for example, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39-44 (1980) (invalidating a state law barring out-of-state bank ownership of trust advisory businesses). Indeed, the proper view of the Court's many recent landfill cases is that they involve not "'sales' of . . . waste," *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 340 n.3 (1992), but purchases of "the service of processing and disposing of it," *C & A Carbone, Inc. v. Clarkston*, 511 U.S. 383, 391 (1994).

60. As with game- and park-related fees, see note 57, the Court has never specifically found that differential public-school tuition charges comport with the dormant Commerce Clause. There are, however, strong indications that the Court would find no commerce clause problem if the question were squarely presented. See, for example, *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (stating, in applying the Equal Protection Clause, that the "Constitution permits a State to restrict eligibility for tuition-free education to its bona fide residents"); *Reeves*, 447 U.S. at 442 (1980) (suggesting concern that the Commerce Clause's preclusion of discrimination in sales of state-made cement would logically undermine state discrimination in other areas, including education); *Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) (noting, in an equal protection case, that "[t]he State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates"). See also *Sturgis v. Washington*, 368 F. Supp. 38, 42 (W.D. Wash. 1973) (three-judge panel) (upholding, against equal protection attack, higher tuition for nonresident students of a public university), *aff'd mem.*, 414 U.S. 1057 (1973); *Starns v. Malkerson*, 326 F. Supp. 234, 241 (D. Minn. 1970) (same), *aff'd mem.*, 401 U.S. 985 (1971). Moreover, the lower courts have concluded without difficulty that discriminatory policies in charging tuition pose no dormant commerce clause problems. See *Harris v. Hall*, 572 F. Supp. 1054, 1058 (E.D.N.C. 1983) (invoking *Martinez* to reject a commerce clause challenge to school district tuition charge imposed only on nondomiciliaries, including an elementary school student temporarily residing with grandmother); *Landwehr v. Regents of University of Colorado*, 396 P.2d 451, 453 (Colo. 1964) (rejecting a challenge to university tuition for nonresidents that is three times larger than tuition paid by residents, without citation to authority, on ground that there is "no basis whatever for the contention . . . that the statute violates [the Commerce Clause]"). See also *Hawaii Boating Ass'n v. Water Transportation Facilities Division*, 651 F.2d 661, 665 (9th Cir. 1981) (suggesting, in rejecting commerce clause challenge to landing-berth boat fees, permissibility of imposing differential tuition). The problem is that the courts have not explained *why* tuition differentials comport with the dormant Commerce Clause and, in particular, the Court's repeated condemnation of discriminatory user fees. This Article, among other things, seeks to fill this void.

In short, as surely as the market-participant cases suggest that such differential charges are exempt from commerce clause scrutiny, the Court's user-fee decisions give cause to conclude they are *per se* invalid. How can it be that a tension so stark and unsettling has crept into the Court's dormant commerce clause caselaw? The answer may lie in the Court's longstanding bifurcation of the dormant commerce clause world into two separate hemispheres—one occupied by cases involving state taxes and the other by cases concerning state regulatory programs.<sup>61</sup>

As even the commerce clause neophyte knows, state tax cases are controlled by the four-part test set forth in *Complete Auto Transit, Inc. v. Brady*.<sup>62</sup> Under this test, a state tax survives commerce clause challenge only if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."<sup>63</sup> In contrast, the Court has examined cases that involve state regulatory measures using a different "two-tiered" approach.<sup>64</sup> Under this mode of analysis, the court first determines whether the challenged policy "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce."<sup>65</sup> After the court has made this initial characterization choice, it then applies the operative legal test: "If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"<sup>66</sup> In short, the Court has treated state taxation and state regulation as falling into separate analytical categories for purposes of the dormant Commerce Clause.<sup>67</sup>

Against this backdrop, it makes sense to view the Court's market-participant decisions—which concerned state activities not even

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61. See notes 62-67 and accompanying text.

62. 430 U.S. 274 (1977).

63. *Id.* at 279.

64. *Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488, 494 (6th Cir. 1996).

65. *Hughes*, 441 U.S. at 336.

66. *Oregon Waste Systems*, 511 U.S. at 99 (citations omitted) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

67. Tribe, *American Constitutional Law* § 6-15 at 442 n.3 (cited in note 13) ("[T]he Supreme Court's historically more formalistic approach to tax problems has led to the evolution of a distinct body of doctrines. . ."); Polelle, 15 *Whittier L. Rev.* at 653 (cited in note 13) ("[T]he Court has adopted and applied a set of factors that operate more like a checklist than a balancing test. The net result has been an approach that is more likely to sustain a state tax rather than a state regulation under similar circumstances.").

remotely resembling taxation<sup>68</sup>—as involving judicial removal of would-be state “regulation” cases from the otherwise-applicable dormant commerce clause two-step test. The Court’s own rhetoric lends support to this understanding. In *Alexandria Scrap*, for example, the Court upheld Maryland’s subsidy program because the state “ha[d] not sought . . . to regulate the conditions under which [trade] may occur.”<sup>69</sup> Similarly in *Reeves, Inc. v. Stake*,<sup>70</sup> the Court parried the dormant commerce clause challenge to a preference for residents in distributing state-made cement by deeming the state a “market participant, rather than . . . a market regulator.”<sup>71</sup> And in *White v. Massachusetts Council of Construction Employers, Inc.*,<sup>72</sup> the Court reiterated its view that the distinction “between States as market participants and States as market regulators makes good sense and sound law.”<sup>73</sup> As these passages reveal, the market-participant principle originated, and has continued to operate, as a means of avoiding the two-step inquiry normally applicable in commerce clause regulation cases.

In contrast, the Court has tended to group its commerce clause user-fee and tax cases together, for the understandable reason that both involve state-imposed monetary exactions.<sup>74</sup> In the *Guy* case,<sup>75</sup> for example, the Court struck down the city’s discriminatory dock charge because the Court deemed it “a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax . . . .”<sup>76</sup> “Such exactions, in the name of wharfage,” the Court explained, “must be regarded as taxation upon inter-state commerce.”<sup>77</sup> The Court again connected up its user-fee and tax cases in *Complete Auto Transit*, when it drew upon user-fee precedents in

68. See notes 14-21 and accompanying text.

69. *Alexandria Scrap*, 426 U.S. at 806 (emphasis added).

70. 447 U.S. 429 (1980).

71. *Id.* at 436 (emphasis added).

72. 460 U.S. 204 (1983).

73. *Id.* at 207 (quoting *Reeves*, 447 U.S. at 436) (emphasis added).

74. This is *not* to say that the Court has consistently treated user fees and taxes identically for dormant commerce clause purposes. In fact, during the era in which the Court flatly harred state taxation of interstate commerce, it specifically distinguished user fees, which in general it found to be permissible. See, for example, *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 97 (1893) (“That by [a charge] the city receives something which it may use as revenue, does not . . . make it a tax.”). What is noteworthy, however, is that even in this bygone era the Court recognized the need to treat together and reconcile its commerce clause tax and user-fee cases. See generally Parts V.B.a-d and accompanying text.

75. *Guy v. Baltimore*, 100 U.S. 434 (1879). See notes 25-27 and accompanying text.

76. *Guy*, 100 U.S. at 443.

77. *Id.*



forging the modern four-part test.<sup>78</sup> Then, in *Commonwealth Edison Co. v. Montana*,<sup>79</sup> the Court went one step further when it suggested that user fees were subject to even *stricter* constitutional scrutiny than ordinary forms of state taxation.

The issue in *Commonwealth Edison* was whether a severance tax for coal—ninety percent of which was shipped outside the state—violated the *Complete Auto Transit* requirement that taxes be “fairly related to the services provided by the state.”<sup>80</sup> Relying on past user-fee decisions, the challenger argued that the assessment ran afoul of the fairly-related requirement because annual proceeds from the severance tax represented about one hundred times the annual cost to the state for roads, police, schools, and other public services generated by in-state coal mining.<sup>81</sup> In the Court’s eyes, however, the challengers “completely misunderstood the nature of the inquiry under the fourth prong,”<sup>82</sup> which was satisfied by the simple fact that the tax was assessed in proportion to the amount of coal extracted from the earth.<sup>83</sup> In adopting this refinement of the *Complete Auto Transit* test, the Court distinguished earlier user-fee cases, in which it had required a tight fit between the amount of the fee charged and the value of the services provided by the state. The Court explained that “‘user’ charges ‘are not true revenue measures’”<sup>84</sup> or “a tax, as that term is thought of in a technical sense.”<sup>85</sup> Rather, user fees “‘partak[e] . . . of the nature of a rent charged by the State, based upon its proprietary interest in its public property. . . .’”<sup>86</sup> For these reasons, the Court—while not retreating from prior decisions

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78. *Complete Auto Transit*, 430 U.S. at 279. See notes 62-63 and accompanying text. The Court in *Complete Auto Transit* seemed to draw on its user-fee precedent—particularly in support of the “unrelated to services provided” prong—when it cited *Ingels v. Morf*, 300 U.S. 290 (1937) and *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). See *Complete Auto Transit*, 430 U.S. at 278 n.6. See also notes 119, 125 and accompanying text (discussing *Ingels* and *Clark*).

79. 453 U.S. 609 (1981).

80. *Complete Auto Transit*, 430 U.S. at 279.

81. *Commonwealth Edison*, 453 U.S. at 620 n.10.

82. *Id.* at 621.

83. *Id.* at 626-27. In particular, the Court in *Commonwealth Edison* broadly rejected the view that “the Commerce Clause gives residents of one State [such] a right of access at ‘reasonable’ prices to resources located in another State” that a hefty tax imposed on the severance of those resources is subject to “reasonableness” attack. *Id.* at 619. Indeed, the Court even rejected the “assertion that Montana may not ‘exploit’ its ‘monopoly’ position by exporting tax burdens to other States” through imposition of the coal tax. *Id.* (emphasis added). See also *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259 (1922) (rejecting the view that Pennsylvania’s virtual monopoly on anthracite coal barred it from imposing severance tax, about 80% of which was applied to coal exported from state).

84. *Commonwealth Edison*, 453 U.S. at 622 n.12 (quoting Paul J. Hartman, *State Taxation of Interstate Commerce* 20 n.72 (Dennis, 1953)).

85. *Id.* (quoting Hartman, *State Taxation* at 122 (cited in note 84)).

86. *Id.*

imposing a strict fair-relation requirement with respect to “user fees”—found those precedents inapplicable to the “ordinary tax” involved in *Commonwealth Edison*.<sup>87</sup>

In distinguishing its earlier user-fee cases, the Court overlooked the irony that marked its analysis. This irony existed because in *Commonwealth Edison* the Court relied on the state’s “proprietary interest in its public property”<sup>88</sup> to justify heightened dormant

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87. See, for example, Tribe, *American Constitutional Law* § 6-15 at 443 (cited in note 13) (“The Court saw no need for a factual inquiry into the relationship between the revenues generated by the tax and the value of the benefits and services conferred on the coal companies . . . because the severance tax was not a user fee but a general revenue tax.”). For an illustration of the significance of the post-*Commonwealth Edison* difference between user fees and taxes with respect to the fair-relation standard, compare *Western Oil and Gas Ass’n v. Cory*, 726 F.2d 1340, 1344 (9th Cir. 1984) (finding constitutional violation in fixing of pipeline corridor rent because “throughput charge is not directed toward compensating the State for the use of the land” when calculated without regard either to “wear and tear” from use or assessed value), *aff’d per curiam* by an equally divided Court, 471 U.S. 81 (1985), with *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1345-46, 131 L. Ed. 2d 261 (1995) (finding no “fair relation prong” problem with sales tax applied to bus-ticket purchase because in tax cases the state is not “limited to offsetting the public costs created by the taxed activity”; thus a taxpayer can “be made to . . . contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct “benefit”” (quoting *Goldberg v. Sweet*, 488 U.S. 252, 267 (1989))). Other cases that highlight the significance of this feature of *Commonwealth Edison* include *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1285 n.12 (2d Cir. 1995) (noting required difference in applying “fairly related” requirement to a “user fee” and a “tax”); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516, 518 (11th Cir. 1990) (stating that “user fee cases are not measured by the same standard as general revenue tax cases” and noting that the distinctive prohibition on charges “manifestly disproportionate to the services rendered” is applicable solely to “user fees” after *Commonwealth Edison*); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1059 & n.8 (9th Cir. 1987) (characterizing charge for pipeline easement as a “user fee[] [which] must be proportional to the value of the services rendered” even though “the level of taxation . . . lies almost exclusively within the determination of the taxing jurisdiction”). See also *Reidy Terminal, Inc. v. Director of Revenue—Missouri*, 989 S.W.2d 540 (Mo. 1995) (en banc) (applying *Evansville-Vanderburgh* fair relation requirement to invalidate fee charged to above-ground storage tank owner to help fund insurance program for underground storage tanks); *Hartley Marin Corp. v. Mierke*, 474 S.E.2d 599, 608 n.13 (W. Va. 1996) (suggesting difference between analysis of “user” fees or tolls” and “general revenue tax,” but obliquely concluding, on facts presented, “we find it unnecessary to characterize the [challenged charge] as a general revenue tax or otherwise”). The confusion that pervades this field is evidenced by a recent Fourth Circuit decision that suggests that user fees are subject to a *more lenient* dormant Commerce Clause analysis than state taxes. See *Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139, 142-43 (4th Cir. 1994) (suggesting that a less stringent standard applies to user fees than to taxes and characterizing the charge on a charity-solicitor as a “user fee”). This assertion is hardly surprising, given the Supreme Court’s endorsement of this view in pre-*Complete Auto Transit* user-fee cases. See, for example, *Evansville*, 405 U.S. at 712-13 (indicating that state authority to impose charges on interstate movement is heightened when “a State at its own expense furnishes special facilities for the use of those engaged in commerce” (quoting *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915))). See generally notes 118-20 and accompanying text.

88. *Commonwealth Edison*, 453 U.S. at 622 n.12 (quoting Hartman, *State Taxation* at 122 (cited in note 84)).

commerce clause scrutiny of user fees, even though only one term earlier the Court had purported to exempt state "proprietary activities" altogether from dormant commerce clause attack.<sup>89</sup> Perhaps the Court did not pause to consider the market-participant principle in *Commonwealth Edison* because it neglected, in the context of a tax case, even to notice that it was there. The Court was traveling in one hemisphere, and it failed to see what was happening in the other. In particular, it missed the fact that the state's status as a proprietor was paradoxically dictating heightened judicial scrutiny in dormant commerce clause "tax" cases, while simultaneously dictating reduced judicial scrutiny in cases involving state "regulations."

## V. RECONCILING THE COURT'S USER-FEE AND MARKET-PARTICIPANT DECISIONS

### A. *The Case Against a User-Fee Exception to the Market-Participant Rule*

Like *Oregon Waste Systems*, the *Commonwealth Edison* case highlights the tension that has been building beneath the Court's "user-fee" and "market-participant" jurisprudence. The pathway to releasing that tension is not clearly marked. Any such effort, however, must proceed from a logical beginning-point—by asking whether there is some functional difference between state discrimination in fixing user fees and state discrimination by way of other resource-distribution policies (such as resident-favoring subsidies or outright refusals to deal with nonresidents) that the Court has upheld in its past market-participant decisions.

It might be said that when a state charges a monetary fee, it is appropriate to prohibit discrimination against interstate commerce because a state must lie in the bed it makes. In other words, if a state imposes a "user fee," it must stand ready to defend the "fee" in terms of the actual value of the "use" of government facilities the purchaser receives.<sup>90</sup> Arguably, it follows from this view that a state may not

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89. *Reeves*, 447 U.S. at 439. See generally notes 12-21 and accompanying text.

90. See *Massachusetts v. United States*, 435 U.S. 444, 462 (1978) ("A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost . . . provided that the charge is structured to compensate the government for the benefit conferred. . . ."); *Atlantic and Pacific Telegraph Co. v. Philadelphia*, 190 U.S. 160, 164 (1903) ("True it is often said that a license tax is in its nature arbitrary. . . . But such observations are pertinent only in case the license is resorted to for the purposes of revenue. When it is

discriminate against nonresidents in charging user fees because nonresidents necessarily receive no greater value than do residents in buying precisely the same service from the state.

The difficulty with this analysis is that it lacks support in considerations of fairness and logic. Basic market theory teaches that a reasonable fee is what a willing buyer and seller agree upon, and the law in general eschews judicial second-guessing of prices fixed by contracting parties.<sup>91</sup> Nor do dormant commerce clause concerns about facilitating free-flowing trade necessarily favor imposition of a constitutional price-discrimination prohibition on the states. This is the case because a state unable to charge discriminatory fees for its goods will have two, and only two, choices: (1) to transfer its goods to in-staters and out-of-staters on equal terms,<sup>92</sup> or (2) to transfer its goods to in-staters, while not making those goods available to out-of-staters at all.<sup>93</sup> The selection of the latter course of action (a plausible choice given state officials' built-in loyalty to only their own constituents, and a permissible choice under the market-participant exception<sup>94</sup>) would hardly comport with the commerce clause preference for maximum unimpeded movement of goods and services across state lines.<sup>95</sup>

Put differently, creating an exemption for discriminatory user fees from the market-participant principle would produce a profound anomaly—as illustrated by *Reeves*.<sup>96</sup> In that case, the Court upheld

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authorized only in support of police supervision the expense of such supervision determines the amount of the charge. . . ."). The Court in *Commonwealth Edison* suggested a receptiveness to this "sleep in your own bed" line of reasoning. See *Commonwealth Edison*, 453 U.S. at 622 n.12 ("Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, [the Court] ha[s] required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered. . . .'" (quoting *Clark*, 306 U.S. at 599)).

91. See, for example, *Hardesty v. Smith*, 3 Ind. 39, 42 (1851) ("Where . . . there is no fraud, or warranty, express or implied, or mistake as to facts, the parties are bound by the contracts they make."). See generally Restatement (Second) of Contracts § 79 (1979).

92. See *Guy*, 100 U.S. at 434.

93. See *Reeves*, 447 U.S. at 429.

94. See note 93 and accompanying text.

95. See *Reeves*, 447 U.S. at 445 ("It would be odd indeed to find that when a state becomes less parochial . . . its purpose becomes suspect under the Commerce Clause." (quoting *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 787 (N.J., 1977))). Compare *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50 n.9 (1983) (rejecting a claim of access to school mailboxes by a union rival of teachers' exclusive bargaining representative, which did have access; and stating "[this] attempt to build a public forum . . . is untenable; it would invite schools to close their mail systems to all but school personnel").

96. 447 U.S. 429 (1980).

South Dakota's decision to restrict to South Dakotans sales of cement produced by a state-owned plant. If South Dakota can wholly exclude potential out-of-state buyers from purchasing state-made cement, however, it surely should be able to trade with out-of-staters, but simply charge them a higher price. The *greater* power of total exclusion logically should include the *lesser* power of only partial exclusion through the fixing of price.<sup>97</sup> And if a state can price-discriminate against non-residents in selling cement, it also should be free to price-discriminate in the sale of other goods or services.

In the landfill context, lower courts have reached precisely this conclusion. Thus, just as surely as courts have recognized that state-owned landfills may freely turn away out-of-staters under the market-participant exception,<sup>98</sup> they have recognized too that public landfills may let out-of-staters in, while charging them higher fees.<sup>99</sup> Are these cases wrongly decided in light of the user-fee anti-discrimination rule?

It might be said that the rule is simply inapplicable in landfill cases. Such cases, the argument runs, do not involve a "user fee" at all; instead they involve a "charge" or a "price." This effort to substitute labels to skirt the tension between the user-fee and market-participant cases has its enticements. Its basic advantage is that it frees courts to exempt such items as college "tuition" or camping site "rentals"—traditionally thought to be fixable in ways that favor state

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97. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1512, 134 L. Ed. 2d 711 (1996) ("[W]e do not dispute the proposition that greater powers include lesser ones. . ."); *FERC v. Mississippi*, 456 U.S. 742, 765 (1982) (where "Congress could have pre-empted the field" there is no constitutional violation where "Congress adopted a less intrusive scheme" that merely required states to "consider the suggested federal standards"). In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), the Court, in applying the dormant Commerce Clause, made precisely the point that a "limited preference" is less objectionable than a "total denial." *Id.* at 956. Moreover, a footnote in *Reeves* itself offers evidence that the fixing of prices—including discriminatory prices—is among the sort of activities protected by the market-participant principle. It states that "[t]here should be little question that South Dakota at least could exact a premium on out-of-state purchases to compensate it for the State's investment and risk" and describes this "added markup" as a "permissible result." 447 U.S. at 444 n.17. See Collins, 63 N.Y.U. L. Rev. at 106-07 (cited note 13) (citing *Reeves* for the proposition that a "state participating in the market may charge less to local commerce than to its external competitors. . .").

98. See, for example, *Medical Waste Associates Ltd. v. Mayor and City Council of Baltimore*, 966 F.2d 148, 151 (4th Cir. 1992) ("[T]he City . . . could have built and operated the medical waste facility itself and reserved the entire capacity of the facility for its residents."). See also *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. at 351 (Rehnquist, C.J., dissenting) ("Alabama may, under the market participant doctrine, open its own facility catering only to Alabama customers.").

99. *Hazardous Waste Treatment Council v. State of South Carolina*, 945 F.2d 781 (4th Cir. 1991); *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989); *Lefrancois v. State of Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Systems, Inc. v. Metropolitan Service Dist.*, 643 F. Supp. 127 (D. Or. 1986).

residents—from the Court’s broadly stated anti-discrimination rule.<sup>100</sup> The disadvantage of this approach is that it makes no sense. Charges for use of a camp, college, or hospital *do* constitute user fees for the simple reason that they reflect *fees* paid to *use* state facilities and services. The Supreme Court has recognized as much.<sup>101</sup>

It does not advance constitutional analysis simply to declare that some state-imposed contractual charges are “user fees,” while others are not—especially in light of the Court’s repeated insistence that the “practical effect” of an exaction, rather than its label, should control for commerce clause purposes.<sup>102</sup> The critical question thus becomes whether sound constitutional policy supports the view that certain user fees, but not others, are properly sheltered from dormant commerce clause attack.

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100. See notes 57-60 (discussing tuition differentials and discriminatory park, camping, and hunting fees). See also Lisa Heinzerling, *The Commercial Constitution*, 1995 S. Ct. Rev. 217, 258 (“The benefits of public institutions such as schools, universities and libraries . . . have all, traditionally and uncontroversially been distributed according to place of residency”). The variety of ways in which the state can sell goods or services should not be underestimated. See, for example, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (sale of hospital services by state); *New York v. United States*, 326 U.S. 572 (1946) (sale of bottled water by state); *LCM Enterprises, Inc. v. Town of Dartmouth*, 14 F.3d 675 (1st Cir. 1994) (rental of boat moorings by state); *Hawaii Boating Ass’n*, 651 F.2d at 661 (rental of berths in recreational boat harbor by state); *Cole v. Housing Authority of City of Newport*, 435 F.2d 807 (1st Cir. 1970) (rental of housing by state); *International Organization of Master, Mates & Pilots v. Andrews*, 626 F. Supp. 1271 (D. Alaska 1986) (state-owned ferries). See also *American Commuters Ass’n v. Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967) (rejecting nonresidents’ claims of equal access to public magnet high school, state-awarded college scholarships, and low-price fishing license under the Privileges and Immunities Clause); *Westchester County v. Koch*, 438 N.Y.S. 2d 951 (Sup. Ct. 1981) (rejecting equal protection challenges to city practice of providing lower public bus fares to certain residents).

101. See note 29 and accompanying text. In *Oregon Waste Systems*, the Court explained that user fees are “charge[s] imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.” 511 U.S. at 103 n.6 (quoting *Commonwealth Edison*, 453 U.S. at 621). In contrast, the Court noted that “tax payments are received for the general purposes of the [government] . . .” *Id.* at 104 (quoting *Flast v. Cohen*, 392 U.S. 83, 128 (1968)). The Supreme Court’s definition of user fees comports with common usage. See, for example, Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich. L. Rev. 895, 901 (1992) (stating that “transfers of value to the government . . . for specific services (such as a subway ride or college education) . . . are called user fees”).

102. See, for example, *Commonwealth Edison*, 453 U.S. at 615 (“[O]ur goal has . . . been to . . . focus[] on the ‘practical effect of a challenged tax.’” (quoting *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 405, 443 (1980))); *Complete Auto Transit*, 430 U.S. at 279 (“[T]he Court has applied this practical analysis in approving many types of tax. . . .”); *Nippert v. Richmond*, 327 U.S. 416, 431 (1946) (“Not the tax in . . . words, but its practical consequences . . . are our concern.”).

*B. The Channels-of-Commerce Reconciliation of the User-Fee and Market-Participant Cases*

Is there a constitutional principle that draws a logical line between permissibly and impermissibly discriminatory state user fees? In fact there is. On close examination, the Court's user-fee decisions are fully reconcilable with its market-participant decisions and in effect reflect a limit on the market-participant exception to the dormant Commerce Clause. Under this "exception to the exception," even though a state typically may discriminate against outsiders in charging for state-provided property and services, it may not do so when affording access to roads, waterways, and other channels of interstate trade. The propriety of this doctrinal synthesis is supported by: (1) the Court's actual user-fee decisions; (2) the historical underpinnings of the Commerce Clause; (3) economic logic that resonates with underlying commerce clause theory; and (4) the Court's modern commerce clause cases that deal with state regulation of transportation corridors.

1. The Court's Decisions

The actual decisions in which the Court has recognized and applied its user-fee anti-discrimination principle comport fully with the "channels-of-commerce" synthesis offered here. As we already have seen, the Court has stated its prohibition on discriminatory user fees in strict and sweeping terms.<sup>103</sup> At least so far, however, the Court has limited its application of the principle to cases involving (1) state waterway improvements; (2) state roads; and (3) state airports.

*a. The Wharfage Cases*

The Court's initial encounters with state user fees grew out of legal challenges to local waterway charges. The earliest attacks directed at such charges rested on the constitutional provision that bars states from imposing "any Duty of Tonnage."<sup>104</sup> Invoking this clause, the Court prohibited states from taxing vessels for the use of unimproved waters and shorelines.<sup>105</sup> The Court, however,

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103. See notes 28-29 and accompanying text.

104. U.S. Const., Art. I, § 10, cl. 3.

105. See, for example, *Transportation Co. v. Wheeling*, 99 U.S. 273, 283 (1878); *Packet Co. v. Keokuk*, 95 U.S. 80, 88-89 (1877); *Cannon v. New Orleans*, 87 U.S. (20 Wallace) 577, 581 (1874).

simultaneously held that states had broad power to fix charges—commonly called “wharfage” fees—to secure compensation for the use of state-owned docks and other waterway improvements.<sup>106</sup> Indeed, the Court was so solicitous of state autonomy in these cases that it upheld wharfage charges even when explicitly computed on the basis of a ship’s “tonnage.”<sup>107</sup>

Faced with this state-protective interpretation of the Duty of Tonnage Clause, shipowners turned to the Commerce Clause. Applying the Commerce Clause, however, the Court continued to validate state charges for state-made improvements, even when imposed on vessels moving in interstate commerce.<sup>108</sup> In initially articulating this principle, the Court implied that the Commerce Clause would bar public wharf owners from fixing charges that were “unreasonable” or “excessive.”<sup>109</sup> In later decisions, however, the

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106. See, for example, *Packet Co. v. Catlettsburg*, 105 U.S. 559, 561 (1881) (distinguishing a tax from monies “paid for the use of [the city’s] wharf or improved landing-place”); *Vicksburg v. Tobin*, 100 U.S. 430, 432 (1879) (upholding city ordinance exacting “wharfage-fees by way of compensation for the use of an improved wharf”); *Packet Co. v. St. Louis*, 100 U.S. 423, 430 (1879) (“[T]he city was not prohibited by the [Commerce Clause] from collecting the wharfage fees . . . as reasonable compensation for the use of its wharves.”); *Packet Co.*, 95 U.S. at 84-85 (“[A] charge for services rendered or for conveniences provided is in no sense a tax. . . .”); *Cannon*, 87 U.S. at 582 (holding that a city that is “the owner of [wharves], built by its own money, [may] exact and receive [a] reasonable compensation”); *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 Howard) 299, 314 (1851) (distinguishing “charges for wharfage or towage, or any other local port-charges for services rendered” from “imposts, or duties on imports, exports, or tonnage”). The Court has reaffirmed this rule in more recent decisions. See, for example, *Clyde Mallory Lines v. Alabama ex rel. Comm’n*, 296 U.S. 261, 266-67 (1935) (upholding a fee charged for each vessel entering port to defray the costs of policing harbor).

107. See *Ouachita Packet Company v. Aiken*, 121 U.S. 444, 448 (1887); *Transportation Co. v. Parkersburg*, 107 U.S. 691, 704 (1882); *Packet Co.*, 95 U.S. at 88.

108. See, for example, *Clyde Mallory Lines*, 296 U.S. at 267 (“[C]harges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible.”); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 217 (1885) (striking down, under the Commerce Clause, a tax on goods and persons ferried across state lines, but noting that “charges . . . by way of compensation for the use of the property employed, or for facilities afforded for its use” are permissible). The Court has extended this principle to waterway improvements other than wharves. See, for example, *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 295 (1887) (waterway improvements resulting from clearing, dredging, and work on embankment); *Huse v. Glover*, 119 U.S. 543, 548-49 (1886) (canal locks).

109. See *Packet Co.*, 105 U.S. at 565 (permitting city to charge for wharf use “not . . . based exclusively on a reimbursement of the cost of the wharf,” but nonetheless barring fees that are “excessive” or “an abuse of the power confided to the trustees”); *Packet Co.*, 100 U.S. at 429 (upholding wharfage “not out of proportion to the advantages and benefits enjoyed in the use of the improved wharf”).



Court retreated from this view and held that the reasonableness of wharfage charges was strictly a matter of "local" law.<sup>110</sup>

The Court's hands-off approach to assessing the reasonableness of wharfage charges did not resolve a separate issue: Could states charge fees for state-owned waterway improvements that *discriminated* against interstate commerce? This issue surfaced in *Guy v. Baltimore*.<sup>111</sup> In *Guy*, Baltimore defended a discriminatory fee structure, arguing that, as a wharf owner, it constitutionally could fix wharfage charges at any level for any user.<sup>112</sup> The shipowner, in response, pointed to a growing line of decisions that condemned state discrimination against interstate commerce.<sup>113</sup> The Court divided on the issue, with Chief Justice Waite reasoning in dissent that the state should be able to discriminate in fixing fees for its own wharves, so long as it sought nothing more than "reasonable compensation" from interstate traffic.<sup>114</sup> In the majority's view, however, Baltimore's ownership of the wharves did not protect its discriminatory user fee against constitutional attack. The city could "permit the public wharves, which it owns, to be used without charge."<sup>115</sup> The city could "also exact wharfage fees, equally, from all who use its improved wharves."<sup>116</sup> The city's outright discrimination in fixing fees, however, unconstitutionally operated "to hinder, obstruct, or burden inter-state commerce in the interest of commerce wholly internal to that State."<sup>117</sup>

#### *b. The Road Cases*

Once the Court had navigated its way through the nineteenth-century wharfage cases, a distinctly twentieth-century cluster of disputes made claims upon its docket. These cases involved fees imposed on motorists for the use of state highways. In particular, truck and bus operators argued that road-use charges, as applied to

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110. See *Ouachita Packet Co.*, 121 U.S. at 448 (affirming city's ability to charge wharfage, even when unreasonable in amount, absent contrary state law or federal legislation); *Transportation Co.*, 107 U.S. at 700 (recognizing "undoubted rule of universal application that wharfage . . . must be reasonable," but ascribing rule to local, rather than federal constitutional, law).

111. 100 U.S. 434 (1879).

112. *Id.* at 441.

113. See *id.* at 437 (listing decisions).

114. *Id.* at 444.

115. *Id.* at 442.

116. *Id.*

117. *Id.* at 443. Nor did the Court's decision in *Guy* stand alone. In *Tobin*, 100 U.S. at 431, the Court noted, in upholding a fee for the use of a state-owned wharf, that it was "uniformly collected."

cross-border movements, violated the Supreme Court's then-categorically-stated ban on state taxation of interstate commerce.<sup>118</sup> The Court, however, rebuffed these challenges. Although states could not tax interstate traffic *per se*,<sup>119</sup> they could force interstate shippers and travelers to pay a fee for the use of state property in the form of state roads.<sup>120</sup>

The fighting issue in the state road cases concerned how states could structure their charges. In particular, the Court struggled through a series of challenges to "flat" license fees imposed on interstate and intrastate road users without apportionment for the number of miles traveled in the state.<sup>121</sup> The Court signaled in these cases, in curious contrast to its earlier wharfage decisions,<sup>122</sup> that the Commerce Clause required charges for the use of state thoroughfares to be "reasonable."<sup>123</sup> Perhaps because of *Guy*, however, the Court encountered no cases of outright discrimination against interstate

118. See, for example, *Minnesota Rate Cases*, 230 U.S. 352, 400 (1913) ("[T]he States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it, or upon persons or property in transit in interstate commerce.") (citations omitted); *Telegraph Co. v. Texas*, 105 U.S. 460, 466 (1881) (invoking principle to invalidate tax on telegraph messages passing over company's lines); *Case of the State Freight Tax*, 82 U.S. (15 Wallace) 232, 278 (1872).

119. See, for example, *Ingels*, 300 U.S. at 296.

120. *Id.* at 294 (concluding that a state can collect fees "demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power"); *Hendrick*, 235 U.S. at 624 (distinguishing "direct tax" from "charge for the use of valuable facilities"); *Minnesota Rate Cases*, 230 U.S. at 405 (stating that states "may . . . exact tolls for the use of artificial facilities provided under its authority"). See also *Case of the State Freight Tax*, 82 U.S. at 277-78 ("We concede the right and power of the . . . owners, . . . be [they] the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership. . . . A tax is a demand of sovereignty; a toll is a demand of proprietorship.").

The Court has applied the same principle to other users of public thoroughfares. See *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 97 (1893) (distinguishing tax from "charge . . . imposed for the privilege of using the streets, alleys and public places" of city to erect telegraph poles).

121. These cases are collected and discussed in *American Trucking Ass'ns*, 483 U.S. at 292-94, and *Evansville*, 405 U.S. at 715-16.

122. See notes 109-10 and accompanying text.

123. *Sprout v. City of South Bend*, 277 U.S. 163, 170 (1928). See, for example, *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 185-86 (1931) ("[A] State . . . may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which . . . will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege. . . ."). See also *Western Union Telegraph*, 148 U.S. at 105 (holding, in a statutory case, that in charging for placement of telegraph poles along city streets "all that [the city] can insist upon is, in this respect, reasonable compensation . . . ; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental," so that the "inquiry must be open in the courts").

traffic in the imposition of vehicle license charges or road tolls.<sup>124</sup> Nevertheless, the Court made it clear in its rulings that discrimination in fixing highway user fees would offend the Commerce Clause.<sup>125</sup>

### c. *The Airport Cases*

The Court's wharfage and highway decisions set the stage for its most recent appraisals of user fees in cases involving government-owned airports. In the seminal case, *Evansville-Vanderburgh Airport Authority v. Delta Airlines*,<sup>126</sup> commercial airlines attacked two one-dollar-per-passenger fees imposed for the use of public airport facilities.<sup>127</sup> The Court, however, upheld the fees, emphasizing that they were levied for the use of a "facility provided at public expense."<sup>128</sup> Finding its "decisions concerning highway tolls" particularly instruc-

124. Indeed, the Court in *Guy* had rejected Baltimore's claimed power to discriminate in fixing fees for use of its wharf by reasoning that "[t]he city can no more do this than it or the State could discriminate against the citizens and products of other States in the use of the public streets or other public highways." 100 U.S. at 442. See also *Western Union Telegraph*, 148 U.S. at 98-99 (noting that access to streets and roads for the "ordinary traveller, whether on foot or in a vehicle, . . . is a use open equally to citizens of other States with those of the State in which the street is situate").

125. See *Aero Mayflower Transit Co. v. Railroad Commissioners*, 332 U.S. 495, 501-03 (1947) (upholding two flat truck taxes "imposed 'in consideration of the use of the highways' " because "[n]either exaction discriminates against interstate commerce"); *Morf*, 298 U.S. at 410 (concluding that a state may charge a "toll for the privilege of entering and using the highways . . . if non-discriminatory"); *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285, 289 (1935) (upholding annual flat license fee laid upon motor vehicle transport solely to fund upkeep of state roads because "it is exacted without hostility to foreign or interstate transactions"); *Sprout*, 277 U.S. at 169-70 (permitting states to impose "non-discriminatory regulations" on users of local highways including "license fee no larger . . . than is reasonably required to defray the expense of administering the regulations" and "a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways"); *Clark*, 274 U.S. at 557 (upholding certificate fee imposed on motor transportation company because "[t]here is no suggestion that the tax discriminates against interstate commerce"); *Kane v. New Jersey*, 242 U.S. 160, 168 (1916) (upholding a state's ability to secure compensation for the use of its highways if it "does not involve discrimination against nonresidents"); *Hendrick*, 235 U.S. at 624 (citing cases for proposition that "where a State at its own expense furnishes special facilities for the use of those engaged in commerce," the charge imposes no unlawful burden on interstate commerce if it is "fixed according to some uniform, fair and practical standard"). See also *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 76 (1939) (quoting *Hendrick's* "uniform, fair and practical standard" with approval). In *Clark*, the Court found no unconstitutional discrimination because exempted intrastate truckers engaged in a business different in character from the interstate and intrastate motor vehicle transporters subjected to the challenged license fee. By thus evaluating the claim of unlawful discrimination on the merits, the Court made clear its continued adherence to the anti-discrimination principle of *Guy*. *Clark*, 274 U.S. at 557.

126. 405 U.S. 707 (1972).

127. The case involved two separate \$1 fees, one imposed by New Hampshire and one imposed by the Airport Authority of Evansville, Indiana. *Id.* at 709-11.

128. *Id.* at 714.

tive,<sup>129</sup> the Court reasoned that “a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed.”<sup>130</sup> As in its wharfage and highway cases, however, the Court emphatically insisted that the fee not be “discriminatory against interstate commerce”<sup>131</sup> and, in its analysis of the case, focused on whether such discrimination was present.<sup>132</sup> In the end, however, the Court found no constitutional problem because “both interstate and intrastate flights are subject to the same charges.”<sup>133</sup>

The Court’s reaffirmation of the user-fee anti-discrimination rule in *Evansville* preceded its recognition of the market-participant exception to the dormant Commerce Clause in *Alexandria Scrap*<sup>134</sup> and its progeny.<sup>135</sup> Given the Court’s endorsement of even stark discrimination in these more recent state resource distribution cases, one might conclude that it has overridden *sub silentio* the anti-discrimination principle set forth in *Evansville* and earlier user-fee decisions. The Court’s market-participant rulings, however, give no hint of any such intention, and the Court has adhered to its user-fee precedents in the post-*Alexandria Scrap* context.<sup>136</sup> Indeed, as we already have seen, the Court reiterated the user-fee anti-discrimination rule only

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129. *Id.* at 715.

130. *Id.* at 714.

131. *Id.* at 717.

132. *Id.*

133. *Id.* Perhaps the most troubling aspect of the *Evansville* case was that the challenged user charges were imposed entirely on commercial air flights, the “vast majority” of which were interstate in nature, *id.*, while no fees were imposed on users of private, noncommercial planes, who, presumably, made many intrastate journeys. This fact took on greater significance when the Court indicated that the fees actually charged would not be deemed unconstitutionally “excessive in relation to costs incurred by the taxing authorities,” *id.* at 719, unless they exceeded *all* airport costs, including those costs specifically associated with intrastate noncommercial travel. *Id.* at 719-20. It was enough for the Court to find that “[c]ommercial air traffic requires more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes,” *id.* at 718, so that the facilities existed “primarily” to meet commercial aviation’s “special needs.” *Id.* at 719. It is an interesting question whether the Court would be as tolerant of a comparable exemption for non-commercial users if the record contained evidence that airport costs were substantially attributable to local, non-commercial operations.

134. See notes 14-18 and accompanying text.

135. See notes 19-21 and accompanying text.

136. See *Massachusetts*, 435 U.S. at 464 (reiterating the *Evansville* test, including the requirement that charges “not discriminate against interstate commerce”); *American Trucking Ass’n v. Scheiner*, 483 U.S. 266, 296 (1987) (applying *Evansville-Vanderburgh* standard). Lower courts have also adhered to the user-fee anti-discrimination principle. See, for example, *Wallach v. Brezenoff*, 930 F.2d 1070, 1072 (3rd Cir. 1991); *Alamo Rent-A-Car*, 906 F.2d at 519-21; *Western Oil and Gas Ass’n*, 726 F.2d at 1344.

three terms ago in its *Oregon Waste Systems* decision.<sup>137</sup> Even more significantly, during that same term the Court directly applied the anti-discrimination rule in evaluating an airport user fee in *Northwest Airlines*.<sup>138</sup> How, in light of the market-participant principle, can these recent user-fee decisions be explained?

*d. Pulling Together the User-Fee Decisions*

The unifying theme of the Court's past user-fee cases is recognizable upon reflection. Its cases involving state waterways, roads, and airports are tied together by a common thread: Each involved a state charge for access to an important conduit of interstate movement.

It follows that the central message of these cases—when read in light of their facts—is that the Court has strictly barred discrimination in setting fees for the use of the “channels of interstate commerce.”<sup>139</sup> Another message is that the Court, at least in its holdings,<sup>140</sup> has so far gone no further.<sup>141</sup> Perhaps it should. After all, when a state charges a fee for the use of a state road—no less so than when it charges a fee for use of a state library, campground, or landfill—it is controlling access to a facility built and owned by the state itself.<sup>142</sup> Given this reality, should the Court overrule the anti-discrimination principle set forth in its past user-fee decisions in light of its recent and repeated recognition of the market-participant exception?

Many of us sense that a negative answer to this question is proper because the “transportation cases raise a discrete set of concerns.”<sup>143</sup> But why? We might say that restrictions on access to wa-

137. See note 39 and accompanying text

138. *Northwest Airlines*, 510 U.S. at 369.

139. Coenen, 88 Mich. L. Rev. at 451 n.335 (cited in note 13).

140. See notes 24-29 and accompanying text (discussing not the holdings, but the broad language, of Court's past decisions).

141. See *Northwest Airlines*, 510 U.S. at 372 (citing “*Evansville's* instruction that *airport tolls* be nondiscriminatory” (emphasis added)); *id.* at 866 (citing *American Trucking Ass'ns*, 483 U.S. at 268-69, as a case “invalidating state *highway* use taxes” (emphasis added)).

142. See notes 31-32 and accompanying text.

143. *Swin Resource Systems*, 883 F.2d at 254. For a similarly conclusory suggestion that cases involving state-owned channels of interstate commerce fall outside the market-participant principle, see *Shell Oil Co.*, 830 F.2d at 1057 (expressing worry about city's exploitation of “lands held in a sovereign capacity that are recognized transportation corridors,” given the special importance of “publicly controlled transportation corridors . . . to the free flow of commerce”); *Western Oil and Gas Ass'n*, 726 F.2d at 1343 (expressing concern that “control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce”). See also *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69, 77 (7th Cir.

terways, roads, and airports clog the very "arteries of the national market."<sup>144</sup> With no less rhetorical exuberance, we might add that the "channels of commerce" are "essential to the market itself" and to the very "ability to do business."<sup>145</sup>

But so what? It is fair to say, for example, that basic building materials are "essential to the market" and to the "ability to do business." It is an unusual business, after all, that can operate with no roof over its head. Yet in *Reeves* the Court held that states could discriminate against nonresidents in affording access to even the most indispensable building supplies if those supplies were produced by the state itself.<sup>146</sup> Why, then, can states not similarly discriminate in providing access to state-produced highways, waterway improvements, and airports? The answer to this inquiry lies in the historical purposes of the Commerce Clause and the policy concerns that have animated its modern "dormant" component.

## 2. The Purposes of the Commerce Clause

### a. *The Pro-Transportation Purpose of the Commerce Clause*

It is well-known that the Framers forged the Commerce Clause to neutralize obstructions to interstate trade that had arisen under the Articles of Confederation.<sup>147</sup> It is less well known that the Framers' concerns focused largely on state interference with the *transit* of articles of commerce.<sup>148</sup> In particular, as the Framers crafted the Constitution, they feared state threats to the free move-

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1975) (finding no commerce clause violation because "we are not confronted with a situation in which legislation has reduced the effectiveness of a means of transportation itself").

144. Coenen, 88 Mich. L. Rev. at 450 (cited in note 13).

145. Gergen, 66 Tex. L. Rev. at 1132-33 & n.188 (cited in note 13). See also Regan, 84 Mich. L. Rev. at 1184 (cited in note 13) (noting "the special importance of an effective transportation network" to interstate commerce). Of course, the economic importance of transportation to the economy of the nation cannot be gainsaid. As one economist has explained: "[T]he unique position which transportation occupies in economic activity arises from the reduction by it of the resistances of time and space to the production of economic goods and services." Dudley Frank Pegrum, *Transportation: Economics and Public Policy* 19 (Irwin, 3d ed. 1973). See also Russell E. Westmeyer, *Economics of Transportation* 6 (Prentice-Hall, 1952) ("[I]mproved transportation also makes possible a division of labor on a geographical or territorial basis which has contributed importantly to increased production and higher standards of living.").

146. *Reeves*, 447 U.S. at 429.

147. See, for example, *Alexandria Scrap*, 426 U.S. at 807-08; *H.P. Hood & Sons*, 336 U.S. at 535-39.

148. See Collins, 63 N.Y.U. L. Rev. at 54 (cited in note 13).

ment of commerce resulting from the exploitation of favorable locations along important trade routes.<sup>149</sup> As the Court itself explained in one of its earliest applications of the dormant Commerce Clause:

[P]robably the *transportation* of articles of trade from one State to another was the *prominent idea* in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired.<sup>150</sup>

This constitutional history lends potent support to the Court's repeated insistence that "freedom of transportation between the States" is secured by the Commerce Clause even in the absence of congressional action.<sup>151</sup> More importantly for present purposes, this history helps justify the "channels of commerce" reconciliation of the Court's market-participant and user-fee decisions offered here. To nationalist Constitution-writers whose "prominent idea" was protecting "the transportation of articles of trade," a distinctively aggressive judicial role in ensuring equal access to roads, airports, and waterways could hardly have seemed an unwelcome development.

#### *b. The Anti-Tariff Purpose of the Commerce Clause*

The channels-of-commerce synthesis of the Court's user-fee and market-participant decisions also comports with a separate and long-recognized purpose of the Commerce Clause: To eradicate state-imposed protective tariffs.<sup>152</sup> Why does the Framers' focused concern

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149. As Professor Collins reports, "writings at the time of the Convention . . . decried exploitation of favorable geography to tax goods passing through ports on the way to or from less favored states." Collins, 63 N.Y.U. L. Rev. at 53 (cited in note 13). A useful discussion of this history appears in Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 228-30 (1957). See also *Cook v. Pennsylvania*, 97 U.S. 566, 574 (1878) ("In granting to Congress the right to regulate commerce . . . the framers . . . believed that they had sufficiently guarded against . . . taxation by the States which would interfere with the freest interchange of commodities. . .").

150. *Case of the State Freight Tax*, 82 U.S. at 275 (emphasis added). The Court added that: [I]f one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. . . . It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government.  
Id. at 280.

151. *Gloucester Ferry Co.*, 114 U.S. at 217 (striking down state tax on persons and goods transported interstate by ferry). See *Covington Bridge v. Kentucky*, 154 U.S. 204, 222 (1894).

152. "The national commerce power, it was hoped, would put an end to . . . *protective tariffs* on imports from other states." Gerald Gunther, *Constitutional Law* 93 (Foundation Press, 12th ed. 1991) (emphasis added). See, for example, *Walling v. Michigan*, 116 U.S. 446, 457-58 (1886)

about tariffs cast a shadow over discriminatory user fees associated with state-owned pathways of trade? Because, absent a prohibition on this form of discrimination, states can impose tariffs in fact, though not in name.

Consider *West Lynn Creamery, Inc. v. Healy*.<sup>153</sup> In that case, the Court invalidated a tax placed by the state in effect on sales of out-of-state, but not in-state, milk.<sup>154</sup> This taxing scheme was unconstitutional in the Court's eyes because it amounted to a "tariff" that protected in-state dairy farmers from out-of-state competition.<sup>155</sup> If the state were free to charge discriminatory fees for use of state roads, however, it could readily replicate the "tariff" struck down in *West Lynn Creamery*. To accomplish this result, the state need only place a "fee" on those highway users who transport milk produced in other states.<sup>156</sup>

This illustration reveals the critical point: If a state can freely fix fees for the use of traffic corridors within its borders, it can skew in favor of private in-state producers every manner of commerce as surely as it can by imposing tariffs.<sup>157</sup> The anti-tariff purpose of the Commerce Clause thus strongly supports a special constitutional prohibition on state discrimination in affording access to the pathways of interstate movement.

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("[T]he object of vesting in Congress the power to regulate commerce . . . was to insure uniformity of regulation against conflicting and discriminating state legislation.").

153. 512 U.S. 186 (1994).

154. *Id.* at 196.

155. *Id.* at 194-96.

156. As stated by Professor Brown: "For these purposes it matters not whether the exaction is a tariff or toll on the entrance of goods, or a tax on transportation." Brown, 67 *Yale L. J.* at 229 (cited in note 149). Compare Collins, 63 *N.Y.U. L. Rev.* at 51-52 & n.68 (cited in note 13) (noting that prohibition on state duties on ships was "needed to make . . . effective" the import-export clause's prohibition of "tariffs on goods" and that "[t]he Court has mirrored these provisions in its rules for other forms of transport under the commerce clause").

157. See *Oregon Waste Systems*, 511 U.S. at 105 n.8 (expressing concern about state charges that "would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds" (quoting *Government Suppliers Consolidating Services v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992))). See also *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994) (distinguishing cable television from newspapers, and subjecting it to closer government regulation, in part because "by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude").



### 3. Commerce Clause Policy

The potential for imposing *de facto* tariffs by way of discriminatory transportation-corridor user fees goes far toward revealing their incompatibility with modern dormant commerce clause policy. This is so because—in keeping with efficiency-driven concerns about the location of productive activity—the Court repeatedly has used the Commerce Clause to nullify state laws that “neutralize advantages belonging to the place of origin.”<sup>158</sup>

The special threat to efficiency posed by discriminatory infrastructure access policies flows in large part from each state’s ability to capitalize on its unique physical location. As a leading commentator has explained, “[t]he most durable form of market power is state control over ports and trade routes. . . .”<sup>159</sup> Thus, absent judicial supervision, the state—“like a private monopolist”—can and will leverage these resources to “raise prices and restrict trade.”<sup>160</sup>

These “economic realities”<sup>161</sup> were not lost on the Court when it ruled in *Reeves* that South Dakota could exclude nonresidents from sales of state-made cement.<sup>162</sup> In fact, the Court emphasized that South Dakota lacked a durable monopoly position with respect to the

158. *G.A.F. Seelig, Inc.*, 294 U.S. at 527. See also *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) (upholding compensatory use tax on theory that it does not put a “clog upon the process of importation”).

159. Collins, 63 N.Y.U. L. Rev. at 71 (cited in note 13). See also Westmeyer, *Economics of Transportation* at 8 (cited in note 145) (“It is no accident that many of the world’s great commercial centers developed at or near points where navigable rivers entered the ocean or at the confluence of two rivers or other bodies of water. London, Rotterdam, Hamburg, Constantinople, Cairo, and Shanghai are but a few of such Old World points which come to mind.”). Building on another key theme of modern dormant commerce clause policy, Professor Collins adds the following thought on the political dynamics that generate trade-route premiums:

Few local interests are benefited by trucks, trains, buses, telegraph wires, or pipelines crossing a state. Market adjustments overcome some costs, but monopoly power over geographic routes, sunk costs of prior investments, and related factors for other markets allow a significant degree of permanent cost exporting. Weak local political restraint is straightforward. It corresponds to the self-interest of the state as a whole rather than to that of local trade associations. Political temptation to extract a high price for passage is constant over time.

Collins, 63 N.Y.U. L. Rev. at 73 (cited in note 13). Collins further notes that:

Where a state burdens commerce in transit by charging merchants for the use of state-owned property with geographic advantages, costs are exported just as effectively as when state taxes or regulations exploit geography to impose on commerce in transit. Local political restraint on charges is then just as weak as in regulation or tax cases. Charges are subject to none of the discipline that subsidies evoke.

*Id.* at 107.

160. *Id.* at 71.

161. *Complete Auto Transit*, 430 U.S. at 279.

162. *Reeves*, 447 U.S. at 429.

market in cement. In particular, the Court stressed that cement produced at the South Dakota plant had no intrinsically unique characteristics.<sup>163</sup> Instead, it was a commodity available from many other sources, including South Dakotans who previously had dealt with the South Dakota plant.<sup>164</sup> No less important, South Dakota did not possess unique access to limestone or other materials needed to make cement.<sup>165</sup> Thus, other states and private entrepreneurs could enter the cement production business in competition with South Dakota.<sup>166</sup>

The opposite is true with respect to state operation of roads and other corridors of interstate commerce. Each state necessarily has unique control of trade routes and trading hubs situated within it.<sup>167</sup> In addition, at least in modern times, ownership of road systems and other avenues of commerce has tended to be monopolized by the states. A variety of factors explain why this is the case. State ownership of road systems, for example, reflects economies of scale, the sensibility of averting massive (and inefficient) private toll transaction costs, the states' possession of the eminent-domain power, and the near-universality of citizen interest in utilizing transportation infrastructure.<sup>168</sup> State ownership of roads also comports with the distinctive value of comprehensive planning in this context and the

163. *Id.* at 444.

164. *Id.* at 444 n.17. See Collins, 63 N.Y.U. L. Rev. at 100 (cited in note 13) (noting that the Court's market-participant decisions, including *Reeves*, "involved competitive markets not dominated by the state").

165. *Reeves*, 447 U.S. at 444.

166. *Id.*

167. See *Crandall v. Nevada*, 73 U.S. (6 Wallace) 35, 46 (1867) (striking down tax due to concern that "one or more States covering the only practicable route of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other").

168. See Paul A. Samuelson and William D. Nordhaus, *Economics* 48-49 (McGraw-Hill, 12th ed. 1985) (describing "the building of highways" as the sort of activity well-suited to government as "[p]rivate provision of these public goods will not occur because the benefits of the goods are dispersed so widely across the population that no single firm or consumer has an incentive to provide them"); Pegrum, *Transportation* at 12 (cited in note 145) ("The provision of streets and highways is scarcely feasible on a private basis to any great extent."). Pegrum explains that:

Government in one way or another is always called upon to assist in the process of supplying transport facilities to the territories it encompasses . . . . [I]t arises from the fact that governmental powers have to be exercised in order to secure feasible routes, to provide streets and roads where organization under private ownership is not practicable; to develop waterways and harbors, adequate navigation aids; and so forth . . . . [E]conomic considerations . . . seem to make government participation in supplying transport unavoidable . . . .

*Id.* at 16.

states' extraordinary interest in maximizing highway safety.<sup>169</sup> These realities—together with the enormous barriers to private entry into key transportation infrastructure “markets”—have left little room, as a practical matter, for private entrepreneurs to compete in any meaningful fashion with state-owned road systems and other transportation facilities.<sup>170</sup> For this reason, the risk of market distortion will be much greater if states are permitted to fix discriminatory rates for the use of roads, waterways or airports than if the state is permitted to set such rates for goods (like cement) or services (like education) that are widely available from private sources.

Finally, whenever a state inhibits free movement through transportation corridors, the deepest concerns underlying the Commerce Clause come into play. At bottom, the dormant commerce clause principle reflects a design not so much to foster economic prosperity as to breed national cohesion and solidarity.<sup>171</sup> Yet if states can freely impede access to transportation corridors, cross-border visits will diminish. Such a result is profoundly at odds with the purpose of encouraging national attachments and loyalties, for there seems to be no better way to instill identity with the nation as a whole than to facilitate free movement through its far-flung and diverse regions.<sup>172</sup> Concerns about fostering national cohesiveness—especially

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169. *Hendrick*, 235 U.S. at 622.

170. This is not to say that there is *no* competition with respect to transportation services and infrastructure. For example, most railroads—and railroad corridors—are privately owned. State attempts to extract undue returns for use of state airports or roads thus may be disciplined by the competitive threat posed by railways. There are, however, obvious and significant limits to the competitive threats that railroads pose. For example, it is often the case that goods carried to a rail terminus must be moved by truck to their ultimate destination. As a result, even if the principal carriage of goods is by rail, the state may impose a *de facto* tariff by way of charges for the road-use leg of the trip. See notes 152-57 and accompanying text.

171. See, for example, Regan, 84 Mich. L. Rev. at 1114 (cited in note 13) (positing that the Framers “feared not merely for the economic health, but also and even more for the political viability of the infant United States”). See generally Coenen, 88 Mich. L. Rev. at 433 (cited in note 13) (collecting sources).

172. As stated in a leading treatise on transportation economics: “The unification of units of governments is aided by transportation. In Western Europe, an improved transportation system has had some unifying effect and has tended to mitigate somewhat the intense racial, religious, political, and economic differences which have accumulated over many centuries.” Frank H. Mossman and Newton Morton, *Principles of Transportation* 5 (Ronald Press, 1957). See also Emory Richard Johnson, *Transportation: Economic Principles and Practices* 545 (Appleten-Century, 1940) (“[In the constitutional period] problems were multiplied by the isolation of one colony from others. Each grew to be self-governing and self-contained in its political prejudices. Colonies were jealous of their neighbors and could not adjust their ideas through travel among the colonies.”); Pegrum, *Transportation* at 13-14 (cited in note 145) (“One of the earliest requirements of this country immediately after the attaining of independence was a system of transportation that would make a unified political life possible through adequate communication and interchange among the members of the new nation.”); Westmeyer, *Economics of Transportation*, at 12 (cited in note 145) (“Good roads . . . have played an

when viewed in light of recognized liberty interests in unimpeded interstate travel and a long legal tradition of affording broad access to the means of movement<sup>173</sup>—thus support the Court’s insistence that states not discriminate in affording access to key channels of interstate transportation.

#### 4. The Modern Regulatory Transportation Cases

Commerce clause decisions outside of the user-fee context confirm the special importance of protecting open access to the corridors of interstate commerce. In interpreting the “affirmative” side of the Commerce Clause, for example, the Court has held that Congress’s power is at its zenith when it legislates to safeguard the “channels” and “instrumentalities” of interstate trade.<sup>174</sup> Even more important, the Court has displayed a special sensitivity to mobility values in a trilogy of decisions considering state road-use regulations under the dormant Commerce Clause.<sup>175</sup>

First, in *Bibb v. Navaho Freight Lines*,<sup>176</sup> the Court applied the dormant Commerce Clause to invalidate an Illinois law that required the use of contour mudguards by trucks and trailers on state roads. Then, in *Raymond Motor Transportation, Inc. v. Rice*,<sup>177</sup> the Court struck down a Wisconsin requirement that truck lengths not exceed

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especially important role in this connection. By bringing the people of all parts of the United States into contact with one another . . . there is an opportunity for all to benefit from a comparison of ideas and practices and from an understanding of each other’s problems.”).

173. As to the “right to travel,” see, for example, *United States v. Guest*, 383 U.S. 745, 757 (1966) (holding that “[t]he constitutional right to travel . . . and necessarily to use the highways . . . in doing so, occupies a position fundamental to the concept of our Federal Union”); *Northwest Airlines*, 510 U.S. at 363 (citing “the traditional American right to travel among the States” (quoting S. Rep. No. 93-12, 93d Cong., 1st Sess. 17 (1973))). See also *Wallach*, 930 F.2d at 1072 (“[A] user fee impermissibly burdens a citizen’s constitutionally protected right to travel [when it] discriminates against interstate travellers. . .”). As to a tradition of access, see, for example, *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (“Ownership does not always mean absolute dominion. . . . Thus, the owners of privately held bridges, ferries, turnpikes, and railroads may not operate them as freely as a farmer does his farm.”); *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 303 (1905) (“Generally speaking, public sidewalks and streets are for use by all, upon equal terms. . . .”); *County Commissioners v. Chandler*, 96 U.S. 205, 208 (citing as “elementary in the common law” that “the entire public has the right to use” a bridge built by a private corporate franchisee of the state); *Covington Drawbridge Co. v. Shepherd*, 62 U.S. (21 How.) 112, 124 (1858) (holding that a private franchisee operating a bridge “is liable to answer in damages if it refuses to transport individuals on being paid or tendered the usual fare”).

174. *Lopez*, 115 S. Ct. at 1629-30.

175. See generally Tribe, *American Constitutional Law* § 6-7 (cited in note 13) (discussing the truck-safety cases).

176. 359 U.S. 520 (1959).

177. 434 U.S. 429 (1978).

fifty-five feet. Finally, in *Kassel v. Consolidated Freightways Corp.*<sup>178</sup> the Court jettisoned an Iowa statute that barred the use of sixty-five-foot double tractor trailers.

Because each of the measures challenged in these cases imposed conditions on access to state-owned property in the form of state roads, the Court could have applied the market-participant principle broadly to shield the measures from dormant commerce clause attack.<sup>179</sup> The Court, however, did not take this route. Instead, focusing solely on the strength of proffered state safety justifications (and not at all on state proprietary interests), the Court struck down even facially nondiscriminatory truck safety rules on the ground that they unduly stifled the free interstate movement of goods.<sup>180</sup>

At bottom, these road-regulation decisions reflect the same principle that has driven the Court's past user-fee decisions. Each set of cases involved claimed rights of access to state-owned transportation corridors. Yet in each set of cases the Court declined to apply the market-participant exception for the same reason: Because there exists a dominant federal interest in ensuring full and equal access to the avenues of interstate movement and trade.

##### 5. A Possible Limit on the Transportation-User-Fee Anti-Discrimination Rule

Some economists might fault the foregoing analysis—and the total ban on discriminatory transportation user fees it advocates—on the ground it reaches too far. On this view, the problem presented by

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178. 450 U.S. 662 (1981).

179. See Coenen, 88 Mich. L. Rev. at 450 (cited in note 13) (setting out the argument that "[e]ach state's interest in channeling state benefits to its own citizenry gives rise to a . . . claim that the state should be able to limit the use of its roads as it wishes").

180. See also *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189 (1938) (upholding truck weight rules, but observing that although "State may rightly prescribe uniform regulations adapted to promote safety upon its highways," it "may not, under the guise of regulation, discriminate against interstate commerce"); *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925) (invoking the Commerce Clause to overturn the denial of a certificate of convenience and necessity to a trucker). The Court also has declined, in other dormant commerce clause cases, to accede to state property-based claims to exercise plenary control over access to state highways. In *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), for example, the issue was whether the state could bar construction of interstate, but not intrastate, gas pipelines under state-owned road beds. In defending its program, that state argued broadly that "[t]he State having control of the public highways may grant privileges to its own citizens and refuse them to others. . . ." *Id.* at 233-34. The Court, however, struck down the program, stating: "The power of the State of Oklahoma over highways is much discussed. . . ; the appellant contending for a power practically absolute. . . . This discrimination is beyond the power of the State to make. . . . [N]o state can . . . discriminate against . . . interstate commerce. . . ." *Id.* at 261-62.

the state's powerful market position with respect to transportation infrastructure is not that it facilitates price discrimination, but instead that it invites state action that "exports the costs of state government" to outsiders through the imposition of monopoly prices.<sup>181</sup> If this is the essential problem, the argument goes, states should be free to price-discriminate so long as they can show that they are not extracting monopoly profits from interests outside the state.

Assume, for example, that the State of Clairoid imposes a fee of one dollar per one hundred miles of road use on transporters of out-of-state agricultural produce, while placing no fee on transporters of in-state produce. Assume also that, if a hauler of out-of-state produce challenged this discrimination, Clairoid could bring in a raft of well-credentialed economists to testify that the one dollar fee is fair in light of comparable charges for road use in other states, the state's costs in supplying its road services, and the like. In these circumstances, it is improbable that a court would say that Clairoid is "export[ing] the costs of state government" to out-of-staters because, according to the evidence, the state is charging nothing more than a reasonable price. Under a cost-exporting-centered analysis, the Clairoid fee thus should be upheld.

The challenger, however, could counter this analysis by arguing that the Commerce Clause guards not only against cost-exporting, but also against state action "that protects local producers from the competition of out-of-state producers."<sup>182</sup> Plainly, Clairoid's fee structure distorts "the geographical distribution of enterprise"<sup>183</sup> in this way by increasing the marginal cost of every item of trucked-in produce, while not increasing the cost of marketing local farm products at all.

Clairoid, however, can respond to this point by noting that the Court has "never held . . . that every state law which obstructs a national market violates the Commerce Clause."<sup>184</sup> In particular, the state would urge that its grant of free road use for the transport of in-state produce is nothing more than a permissible business subsidy.<sup>185</sup> On this view, as surely as the state could give its farmers outright cash grants, it can give them what—in economists' eyes—is the same thing: access to costly facilities without the need to pay. As a result,

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181. Richard A. Posner, *Economic Analysis of Law* 638 (Little, Brown, 4th ed. 1992).

182. *Id.*

183. *Id.*

184. *West Lynn Creamery*, 512 U.S. at 207 (Scalia, J., dissenting).

185. See, for example, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277-78 (1988).

Clairoid would say, the court should recognize and apply a fair-fee-and-subsidy exception to the general ban on discriminatory transportation-infrastructure user fees. At least one lower court decision lends credence to this approach.<sup>186</sup>

Unfortunately for Clairoid, many good reasons counsel against judicial recognition of this limitation on the anti-discrimination rule. First, if the state genuinely wishes to subsidize in-state farmers, it can do so through the front door, rather than the back. Indeed, by forcing states to subsidize in-state industry (if at all) through outright cash payments (as opposed to user-fee exemptions), courts properly implement commerce clause values by heightening the visibility of—and resulting political checks upon—state favoritism of local enterprises.<sup>187</sup>

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186. The case is *Salorio v. Glaser*, 414 A.2d 943 (N.J. 1980), in which the court applied the Privileges and Immunities Clause to a New Jersey "Emergency Transportation Tax" ("ETT") that—due to exemptions afforded to New Jersey commuters resulting from their obligation to pay New York income tax—was paid only by New Yorkers who commuted to work in New Jersey. The court concluded that notwithstanding these New Yorkers' receipt of a credit against their own otherwise-owing New York income tax for ETT payments, the ETT was a "discriminatory tax" subject to "close scrutiny" under the Privileges and Immunities Clause. *Id.* at 953. The court, however, also indicated that the tax should be sustained so long as the tax "burden on New York commuters [was] substantially commensurate with the benefit they derive[d] from their use of New Jersey's transportation facilities." *Id.* at 954-55. This passage and others like it could be read to mean that "it is permissible to require nonresidents to pay up to 100% of the pro rata expenditures regardless of what percentage of their pro rata share residents are in fact paying." *Carlson*, 798 P.2d at 1277-78.

For at least three reasons, however, *Salorio's* apparent vindication of discriminatory fees must be taken with a grain of salt. First, in a more recent case, which involved residence-based discrimination in fixing charges for commercial fishing licenses, the Supreme Court of Alaska specifically rejected this aspect of the *Salorio* case. As stated by the Alaska Supreme Court:

[*Salorio*] seems to add up to the general proposition that a state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment. Such a principle seems economically indistinguishable from imposing a facially equal tax on residents and nonresidents while making it effectively unequal by a system of credits and exemptions. Such schemes have been struck down by the United States Supreme Court.

*Id.* at 1278.

Second, in evaluating *Salorio*, it may be important that the taxing schemes of New York and New Jersey, in their overall operation, effected no discrimination at all. Perhaps *Salorio's* validation of a "discriminatory tax" measured by benefits imposed on nonresidents was—or in the future will be—limited to these distinctive circumstances.

Finally, *Salorio* concerned only the Privileges and Immunities Clause. To be sure, the court in *Carlson* suggested that "it is difficult to believe that a license fee differential which passes muster under the privileges and immunities analysis would nonetheless be an unconstitutional discrimination against interstate commerce." *Id.* at 1341 n.1. In fact, however, the Court has recognized that the Privilege and Immunities and Commerce Clauses are not coextensive. See note 57. *Salorio* is thus of questionable doctrinal relevance to the dormant commerce clause questions addressed in this Article.

187. See, for example, Coenen, 88 Mich. L. Rev. at 480-81 (cited in note 13). This is not to say that a state may never subsidize local commerce by way of user-fee reductions or waivers.

Second, discrimination in fixing transportation-corridor user fees threatens important purposes of the Commerce Clause even if the state does not charge cost-exporting monopoly prices. For example, the imposition of discriminatory road user fees might well engender retaliatory measures from neighboring states.<sup>188</sup> And discrimination of itself—particularly in the area of interstate mobility—may send a signal of hostility to the notion of union that rests at the core of the dormant Commerce Clause.<sup>189</sup>

Third, courts should reject Clairoid's fair-fee-and-subsidy approach because of difficulties in its application. How can we tell if the fee charged to outsiders really is fair? What evidence should count in making this decision? And does the relevant evidence in the particular case, which invariably will be extensive and technical, sufficiently support the state's position? These questions reveal that application of Clairoid's proposed rule would both engender administrative headaches and invite states to try to "sneak by" fee structures that, despite state protestations to the contrary, do export costs. The best way to ensure that interstate commerce is not impeded by cost-exporting user fees is to impose a wholesale ban on discriminatory fee-setting. Such a rule will protect out-of-staters by tying their fates directly to those of in-staters, whose political muscle should typically ensure that states avoid exacting excessive prices for the use of transportation infrastructure.<sup>190</sup>

Most important of all, Clairoid's position cannot prevail because the Supreme Court already has rejected it by repeatedly insisting that transportation-related user fees must be *both*

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See Walter Hellerstein and Dan Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 866-68 (1996) ("[T]he fixing of user fees for . . . non-transportation-related benefits ordinarily should escape Commerce Clause challenge under the protective umbrella of the market-participant principle."). It is to say, however, that the heightened risks to interstate commerce posed by discriminatory transportation-infrastructure user fees may well justify judicial insistence on outright subsidization in the specialized transportation context.

188. See, for example, *H.P. Hood & Sons*, 336 U.S. at 532 (noting that "rivalries and reprisals . . . were meant to be averted by subjecting commerce between the states to the power of the nation"). See also Coenen, 88 Mich. L. Rev. at 434 (cited in note 13) (suggesting that risk of retaliation is lessened when state adopts resident-favoring spending measures).

189. See notes 171-72 and accompanying text.

190. See *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."). See generally Tribe, *American Constitutional Law*, § 6-5 at 411-12 (cited in note 13).



“nondiscriminatory” and “reasonable.”<sup>191</sup> Indeed, in *Guy*,<sup>192</sup> Chief Justice Waite advocated precisely the position taken by our hypothetical state. Just like Clairoid, he urged that the state should be able to forego “making any . . . charge for landing and depositing the products of the State” at its wharf, so long as carriers of out-of-state products were charged nothing more than “reasonable compensation.”<sup>193</sup> Chief Justice Waite, however, found himself writing in dissent. The possible “reasonableness” of the wharfage fee did not matter to the majority; the fee’s discriminatory character, without more, rendered it unconstitutional.<sup>194</sup>

## 6. Summary

In sum, considerations of authority, history, and policy support recognition of a potent constitutional interest in keeping open the channels of interstate commerce. From this premise it follows that fees charged for “the buyer’s enjoyment of the privilege of using [state] roads”—as well as other publicly owned corridors of trade—must be free of “discrimination against interstate commerce.”<sup>195</sup> This principle, however, does not require states to avoid discrimination in pricing such articles as resort reservations, bottles of mineral water, or bags of cement.<sup>196</sup> It is for this reason that—despite their ostensible incompatibility<sup>197</sup>—the Court’s “states can discriminate” market-participant decisions and its “states cannot discriminate” user-fee decisions are reconcilable.<sup>198</sup>

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191. See notes 121-33 and accompanying text.

192. 100 U.S. 434 (1879).

193. *Id.* at 444 (Waite, C.J., dissenting).

194. See notes 111-17 and accompanying text (discussing *Guy*).

195. *Jefferson Lines*, 115 S. Ct. at 1345. See also *id.* at 1349 (1995) (Breyer, J. dissenting) (noting that “interstate travel itself [is] the very essence of interstate commerce”).

196. See notes 96-97, 100 and accompanying text.

197. See notes 24, 30-32 and accompanying text.

198. A case that illustrates the potential dangers of missing this distinction is *Western Oil and Gas Ass’n*, 726 F.2d at 1343. There, the Ninth Circuit found that the Court’s “user fee” jurisprudence—including its bar on disproportionality of the fee to the benefit conferred—should apply to “rents” charged by the state to use lands across which firms had installed petroleum pipelines. The court was wrong in its reasoning to the extent that it broadly suggested that the Court’s “user fee” authorities controlled simply because these rents constituted “a specific charge imposed by the State for the use of state-owned . . . facilities.” *Id.* at 1344 (quoting *Commonwealth Edison*, 453 U.S. at 621). Rather, the “user fee” authorities were dispositive because the state was exercising “control over the channels of interstate commerce.” *Id.* at 1343 (emphasis added). It was this fact—together with the state’s practical “monopoly” over potential pathways of petroleum traffic, see Coenen, 88 Mich. L. Rev. at 441-42 & nn.285, 335 (cited in note 13)—that properly justified the Court’s refusal to apply the market-participant exception in the case.

This channels-of-commerce harmonization of the Court's user-fee and market-participant cases also reveals that Chief Justice Rehnquist's dissent in *Oregon Waste Systems* was both wrong and right.<sup>199</sup> The synthesis shows that the Chief Justice was wrong in his reading of the majority opinion, by underscoring that the opinion (which did *not* concern a state charge for use of wharves, roads, or airports) was not intended (as the Chief Justice's dissent suggested) to address the status of discriminatory public-landfill charges under the Court's past "user fee" decisions.<sup>200</sup> The synthesis also shows, however, that Chief Justice Rehnquist was correct in suggesting that the Court's past user-fee decisions do not bar state discrimination in fixing charges for public landfill use.<sup>201</sup> Hard questions will arise about the proper scope of a principle that requires open and equal access to the corridors through which people and property move.<sup>202</sup> It should at least be clear, however, that the principle is inapplicable when the case concerns nothing more than fees charged for the state-supplied service of placing trash in the ground.

### C. Merging the Market-Participant and User-Fee Principles

#### 1. Constitutional Limits on Discriminatory "User Fees" Outside the Channels-of-Commerce Context

All that precedes teaches that the Court's past user-fee decisions outlaw only discriminatory charges imposed for use of the avenues of interstate trade. To say this, however, is not to say that every other charge that the state calls a user fee should escape dormant commerce clause scrutiny. This is so for two reasons.

First, the market-participant exception itself is subject to limits that cut across cases involving state charges for the use of state

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199. See notes 40-44 and accompanying text (discussing *Oregon Waste Systems* dissent).

200. See notes 49-52 and accompanying text.

201. See notes 40-44 and accompanying text.

202. See, for example, Coenen, 88 Mich. L. Rev. at 450-53 (cited in note 13) (examining whether the "channels-of-commerce" principle, or one like it, restricts a state's ability to discriminate in affording access to state-owned farmers market or other "exchange" facility); Collins, 63 N.Y.U. L. Rev. at 89 n.270 (cited in note 13) (arguing that principle applicable to "goods or passengers in transit" also logically should apply "to communications enterprises that are location-specific"). See also *Transport Limousine of Long Island, Inc. v. Port Authority of New York and New Jersey*, 571 F. Supp. 596 (E.D.N.Y. 1983) (finding 8%-of-revenues charge by government for right to operate a limousine counter at airport constitutional under either the market-participant exception or *Evansville* analysis).

resources. When a product falls within the "natural resources exception" to the market-participant principle, for example, the state should not be able to disfavor nonresidents when setting prices for that resource any more than the state can prohibit nonresidents from purchasing it altogether.<sup>203</sup> Similarly, the Court has suggested that, notwithstanding the market-participant principle, the dormant Commerce Clause limits a state's power to condition sales of its own goods and services on the buyer's agreement to deal only with private in-state commercial interests.<sup>204</sup> To the extent this restriction on so-called "downstream restraints" is operative, it should outlaw the conditioning of price breaks on a buyer's agreement to deal only with resident businesses.<sup>205</sup> In short, any natural-resources, downstream-restraint or other limitation on the market-participant exception should come into play in cases that involve discriminatory user fees, including cases outside the transportation context.<sup>206</sup>

The second difficulty with triggering the market-participant principle whenever the state cries "User Fee!" is illustrated by *Oregon Waste Systems*. Although Oregon described its waste surcharge as a "user fee,"<sup>207</sup> the Court rejected this characterization "[b]ecause . . . the landfills in question [were] owned by private entities. . . ."<sup>208</sup> For Chief Justice Rehnquist, however, the "user fee" shoe seemed to fit. For him, even though the state did not own the landfills involved in the case in the technical sense, prospective landfill space was "a good publicly produced and owned" as a result of state programs aimed at land conservation and environmental protection.<sup>209</sup> Viewed through this lens, the surcharge *was* a user fee in the sense that it constituted a charge for use of land that, through state effort and investment, remained available to hold buried garbage.

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203. See Coenen, 88 Mich. L. Rev. at 453-60 (cited in note 13) (discussing natural-resource exception to the market-participant rule). Indeed, a natural resources exception may expose some (although probably not most) discriminatory waste disposal charges to invalidation under the dormant Commerce Clause. *Id.* at 460-62.

204. See *id.* at 463-73 (discussing downstream-restraints exception).

205. For example, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), a four-justice plurality invalidated Alaska's conditioning of its sale of state-owned timber on the buyer's agreement to process the timber in the state. Under the principle stated here, it would not alter the result in *South-Central Timber* if Alaska conditioned a price reduction—rather than the sale itself—on the buyer's agreement to the in-state processing term.

206. See *New Energy Co.*, 486 U.S. at 275 (suggesting that it makes no difference for purposes of commerce clause analysis that discrimination puts an "out-of-state product . . . at a substantial commercial disadvantage" instead of mandating "total elimination of all transport of the subject product").

207. See note 35 and accompanying text.

208. *Oregon Waste Systems*, 511 U.S. at 103 n.6.

209. *Id.* at 111 (Rehnquist, C.J., dissenting).

The basic problem with Chief Justice Rehnquist's argument is that it relies on such a strained and abstract concept of state-owned property as to render the concept infinitely expandable. In fact, a private corporation developed, owned, and operated the landfill site involved in *Oregon Waste Systems*; the state did not. To advance the argument in these circumstances that the waste disposer nonetheless was using up "a good publicly produced and owned" (a good that, in the Chief Justice's view, apparently included all cubic feet of undeveloped land in the state not yet containing trash) is too exotic to tolerate.<sup>210</sup>

Another problem with Chief Justice Rehnquist's argument is that it tears down the long-recognized distinction between user fees and taxes. In a loose sense, all taxes are "user fees." Taxpayers pay taxes, after all, to receive in return such benefits as police protection, fire protection, and the many other services that state employees, using state property, supply.<sup>211</sup> Yet if all taxes were characterized as payments for state goods and services, the market-participant exception to the dormant Commerce Clause would swallow up the entire corpus of commerce clause cases that have restricted state taxing powers for well more than a century.<sup>212</sup>

The essence of a tax is that its payment is made *involuntarily* to fund in a *general* way the state's many services. A user fee, in contrast, is paid *voluntarily* for a *focused* state benefit as part of a *discrete exchange*.<sup>213</sup> In *Oregon Waste Systems* no focused, state-provided

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210. See *Fort Gratiot Sanitary Landfill*, 504 U.S. at 366 & n.7 (emphasizing that "private landfills . . . are neither publicly produced nor publicly owned" and that the "public good" analysis applicable to groundwater that a state has acted to conserve is not "even arguably relevant" to a private landfill case). Compare *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566, 1575 (M.D. Ala. 1993) (rejecting city's argument that it could hoard solid waste by "vesting title" in the waste in itself by ordinance because the Court had previously "condemned anticipated efforts" to manipulate the market-participant rule in this way).

211. Collins, 63 N.Y.U. L. Rev. at 79 (cited in note 13) ("Taxes collected pay for governmental services. . ."), Shaviro, 90 Mich. L. Rev. at 909 (cited in note 101) (describing taxes as an "imperfect substitute for user fees, made necessary by the public goods problem").

212. See notes 10-11, 62-63, 75-79 and accompanying text.

213. See Samuelson and Nordhaus, *Economics* at 49 (cited in note 168) ("I need not buy a hamburger or a wool sweater, but I must pay my share of the taxes used to finance defense, police, and public education."); Shaviro, 90 Mich. L. Rev. at 904 (cited in note 101) (distinguishing taxes from user fees, described as "market-style exchanges of value for specific goods or services"). See also notes 84-87 and accompanying text. Notably, the distinction between user fees and taxes is relevant in a wide variety of legal settings. For example, courts have had to determine whether charges by federal agencies are authorized fees for benefits granted, see 31 U.S.C. § 9701(b) (1994 ed.) (authorizing agencies to fix charges for "a service or thing of value"), or are in substance taxes that can be imposed only by Congress itself, see

*quid pro quo* was offered in return for payment of Oregon's waste surcharge. Rather, the benefits received from the state by the surcharge-paying waste disposer were the ability to operate against the backdrop of Oregon's laws, to transport its garbage safely through the state, and then to deal with a landfill business that was subject, like other local businesses, to suitable forms of state regulation. In short, the state's effort to call its surcharge a user fee did not alter the essential reality that the surcharge was a tax.

So it will be in many cases. Indeed, once it is seen that the principal impact of the "user fee" characterization (outside the channels-of-commerce context) is to trigger application of the state-protective market-participant principle, it should become unnecessary even to ask in dormant commerce clause cases whether the "user fee" label fits. Instead the relevant "single inquiry" is whether "the challenged 'program constituted direct state participation in the market.'"<sup>214</sup> In many cases, answering this inquiry will be easy. In harder cases, courts should look to the analytical considerations discernible in the

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*Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 349 (1974) ("[W]e are to construe the [Independent Offices Appropriation] Act to cover only 'fees' and not 'taxes.'" (citations omitted)); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-43 (1974) (finding charge for permit a fee). Courts have also had to determine whether levies are taxes subject to priority in bankruptcy proceedings or are fees not entitled to such priority. See *In re Jenny Lynn Mining Co.*, 780 F.2d 585, 588-89 (6th Cir. 1986) (classifying surcharge as non-tax fee); *In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982). Whether a charge is characterized as a user fee or as a tax determines its susceptibility to attack under the Export Clause, U.S. Const., Art. I, § 9, cl. 5. Compare *Pace v. Burgess*, 92 U.S. 372 (1876) (finding no constitutional violation because a tobacco stamp charge constitutes fee for regulatory service) with *United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995) (harbor-maintenance charge fails because it is a tax). The resolution of this question is also of significance in determining the applicability of the intergovernmental tax immunity doctrine. See, for example, *Massachusetts*, 435 U.S. at 453-70. Some cases raise the question whether exactions are taxes subject to state constitutional requirements of uniformity and equality or are fees not subject to such requirements. See *Newman v. City of Indianola*, 232 N.W.2d 568 (Iowa 1975) (holding that special assessment for local improvement does not constitute tax); *Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources*, 462 S.E.2d 349 (W. Va. 1995) (holding that solid waste assessment charge is regulatory fee rather than tax); *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.Ed.2d 527 (W. Va. 1983) (holding that "fire service fee" constitutes ad valorem property tax). In a recent decision, the Idaho Supreme Court found the user-fee/tax characterization issue dispositive in deciding whether a charge imposed on petroleum distributors had to go into the state's Clean Water Trust Fund or be dedicated to highway purposes. *V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund*, 1996 WL 364793 at \*2-3 (Idaho July 2, 1996). Whether a charge is characterized as a "fee" or a "tax" may even have consequences in applying the "nexus" prong of the *Complete Auto Transit* dormant commerce clause test. See *Ferndale Laboratories*, 79 F.3d at 493-94; *Department of Banking & Finance, State of Florida v. Credicorp, Inc.*, 684 So. 2d 746 (Fla. 1996). See notes 62-63 and accompanying text (setting forth *Complete Auto Transit* standard). The proper characterization of governmental charges as taxes or user fees in these contexts is beyond the scope of this Article.

214. *White*, 460 U.S. at 208 (quoting *Reeves*, 447 U.S. at 436).

Court's past decisions for determining whether the market-participant description applies.<sup>215</sup>

The state, for example, clearly is participating in the market when it fixes a "user fee" for a discrete state-made product, such as a bag of cement.<sup>216</sup> The state is not a market participant, however, when it purports to impose a "user fee" for granting the bare right to engage in a regulated commercial activity. Courts, for example, should not permit a state to discriminate between residents and non-residents in fixing a fee for a building-contractor license. In such a case the state, in a loose sense, is transferring "property."<sup>217</sup> The mere issuance of a license, however, does not bring into play the central policy concerns that underlie the market-participant principle.<sup>218</sup> It does not embody a "return of capital" supplied by state citizens as taxpayers to a favored subgroup;<sup>219</sup> it does not reflect the sort of experimental use of state resources our federal system is designed to encourage;<sup>220</sup> it does not involve the sort of inherently costly activity that provides a built-in check on excessive resident-favoring state action;<sup>221</sup> and it does not concern state behavior even remotely akin to that typically engaged in by a private trader.<sup>222</sup> In short, imposition of a business-license charge—whether or not denominated by the state as a "user fee"—does not involve market participation. Thus, the dormant commerce clause anti-discrimination principle should remain applicable to, and invalidate, a residence-based license fee differential.<sup>223</sup>

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215. See, for example, Coenen, 88 Mich. L. Rev. at 441-43 (cited in note 13) (outlining a four-part framework for evaluating market-participant issues); Benjamin C. Bair, Note, *The Dormant Commerce Clause and State-Mandated Preference Laws in Public Contracting: Developing a More Substantive Application of the Market-Participant Exception*, 93 Mich. L. Rev. 2408, 2419-25 (1995) (discussing exception's underlying rationales).

216. *Reeves*, 447 U.S. at 440.

217. See, for example, *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (deeming horse trainer license a "clear property interest" for purposes of fourteenth amendment procedural due process protection).

218. See Coenen, 88 Mich. L. Rev. at 419-41 (cited in note 13).

219. See *id.* at 421-26.

220. See *id.* at 426-30.

221. See *id.* at 430-35.

222. See *id.* at 435-38.

223. Accord, *Chance Management Inc. v. State of South Dakota*, 97 F.3d 1107, 1120 (8th Cir. 1996) (Lay, J., dissenting) (stating that "granting and denial of public licenses clearly constitutes market regulation outside the market participant exception," citing Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 Iowa L. Rev. 407 (1995)). See *Welton v. Missouri*, 91 U.S. 275, 282 (1875) (striking down peddler license fee that exempted peddlers of in-state goods). See also *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 380 (1939) (striking down inspection fee, which greatly exceeded cost of inspection, imposed only on importers of cement).

## 2. A Proposed Step-by-Step Approach

The foregoing discussion suggests that "user fee" cases should trigger a logical chain of judicial inquiry. First, the court should ask whether the challenged charge involves the levying of a tax or the state's participation in the market. In general, the latter label will fit when the state imposes a fee for the use or receipt of specific state-owned property or the delivery of a discrete service provided by state-paid personnel.<sup>224</sup> Second, if the charge is a tax, the court should—as in *Commonwealth Edison*<sup>225</sup>—apply the four-part *Complete Auto Transit* test.<sup>226</sup> If the charge is not a tax, the court should deem the market-participant exception presumptively applicable and then inquire whether any exception to that exception is operative.<sup>227</sup> At this stage of the inquiry, attention should focus on whether the state has discriminated in affording access to the infrastructure of interstate trade. If this limitation on the market-participant exception is triggered, the court should assess the fee under the distinctive "user fee" jurisprudence typified by cases like *Evansville-Vanderburgh Airport Authority*<sup>228</sup> and *Northwest Airlines*,<sup>229</sup> including by applying their ban on discriminatory charges.<sup>230</sup> If this limitation on the

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See generally *United States Shoe Corp.*, 907 F. Supp. at 413 (finding that alleged user fee constitutes tax for purposes of Export Clause because "court looks to substance over nomenclature").

224. See notes 19-21, 213 and accompanying text.

225. See notes 79-87 and accompanying text.

226. See note 63 and accompanying text.

227. See notes 203-06 and accompanying text.

228. See notes 126-33 and accompanying text.

229. See note 139 and accompanying text.

230. See notes 28, 131-32, 137-39 and accompanying text. Application of the nondiscrimination principle will in turn raise the question of whether and when that principle, even if applicable, admits of exceptions. See, for example, *Oregon Waste Systems*, 511 U.S. at 101 n.5 ("Of course, if out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state waste. . ."). Notably, in *Toomer v. Witsell*, 334 U.S. 385, 399 (1948), and *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952), the Court struck down under the Privileges and Immunities Clause commercial fishing license fees imposed on nonresidents that greatly exceeded fees imposed on residents. In doing so, however, the Court observed that "[t]he state is not without power . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 398-99. See *Baldwin*, 436 U.S. at 405 (Brennan, J., dissenting); Tribe, *American Constitutional Law* § 6-35 at 538 (cited in note 13) ("Montana could constitutionally charge nonresidents more for elk hunting privileges to the extent that their presence imposed added costs on the state or to the extent that residents, through taxes other than license fees, contributed more to the state's wildlife management program."). These broad suggestions in privileges and immunities clause cases that the Court might sustain discriminatory fees "to compensate for . . . taxes which only residents pay," however, seem inapplicable for dormant commerce clause purposes in light of the Court's recent—and strict—"compensatory tax doctrine" decisions. See, for example, *Fulton Corp.*, 116 S. Ct. at 852-

market-participant exception is not triggered, the court should consider whether the natural-resources or downstream-restraint or another limitation is applicable. If no exception to the market-participant principle applies, the court should find the fee constitutional.<sup>231</sup>

Working through this process in concrete cases will raise inevitable difficulties.<sup>232</sup> Adopting this general methodology, however, will solve the overarching problem pointed up by *Oregon Waste Systems*: It will reconcile the Supreme Court's dormant commerce clause jurisprudence in the state-taxation, market-participant, and user-fee fields.

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53. Indeed, the Court appeared to reject precisely this "expansive loophole" to its "carefully confined compensatory tax jurisprudence" in the *Oregon Waste Systems* decision. *Oregon Waste Systems*, 511 U.S. at 105 n.8.

231. Of course, the market-participant exception itself has drawn significant criticism, and recent commentaries have called for its repudiation, particularly in light of the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). For a critique of this attack on the market-participant rule, see Dan T. Coenen, *The Impact of the Garcia Decision on the Market-Participant Exception to the Dormant Commerce Clause*, 1995 U. Ill. L. Rev. 727.

232. For example, this Article does not specifically consider the proper treatment of what might be described as "administrative" or "regulatory" fees—that is, fees charged not for use of tangible property (for example, a campsite) or some government-provided service otherwise available in the private market (for example, education), but instead for the cost of administering a focused, but quintessentially governmental, regulatory program (for example, a government charge imposed on private aviators for policing private aviation). It at least seems logical, however, to say that regulatory fees associated with interstate transportation should be no less subject to dormant commerce clause scrutiny than fees charged for the use of tangible physical improvements, actually owned by the state, in the form of roads. The latter, after all, would seem to present a more appealing (though ultimately unsuccessful) case for application of the market-participant exception. Beyond this, the proper characterization and treatment of administrative fees will be left behind for others to analyze, save for the observation that courts often seem to treat such charges merely as a subspecies of user fees. See *Massachusetts*, 435 U.S. at 463 n.19 ("Quite simply, we think there is no basis for the position that user fees are constitutional only when the [government] has some sort of a right of property. A user-fee rationale may be invoked whenever the [government] is recovering a fair approximation of the cost of benefits supplied."); *Center for Auto Safety*, 37 F.3d at 143-44 (rejecting an argument that "user fee" label fits only "when a state seeks to recoup the costs of operating a specific state facility or of providing specific quantifiable services" and characterizing charge imposed on solicitation-by-mail charities as user fee because such charities "use the state's apparatus for regulating charities" whereby "donor confidence is enhanced"). See also *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 50 (1st Cir. 1984) ("[T]he Commerce Clause does not prevent states from charging for services they provide.").



## VI. CONCLUSION

"The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law."<sup>233</sup> This Article has sought to untangle the seemingly contradictory pronouncements of the Supreme Court in its dormant commerce clause user-fee and market-participant decisions. The synthesis offered here draws upon the principle that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."<sup>234</sup> This maxim should guide application of the Court's decisions that broadly proclaim that state user fees may not discriminate against interstate commerce, for each of those decisions in actuality involved a distinctive form of state-owned property: A corridor through which interstate commerce moves. Courts should continue to apply a strong anti-discrimination principle in this class of user-fee cases. Courts should not, however, extend this principle further.

This refinement of the Court's user-fee anti-discrimination rule will serve two important purposes. First, it will vindicate the particularly potent policies at work when states threaten to impede access to the essential infrastructure of interstate trade. Second, it will supply a much-needed reconciliation of the Supreme Court's deeply discordant market-participant and user-fee decisions.

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233. Benjamin N. Cardozo, *The Paradoxes of Legal Science* 4 (Columbia U., 1928).

234. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).