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Constitutional Law -- Commerce Clause -- State Purchasing Activity Excluded from Commerce Clause Review -- Hughes v. Alexandria Scrap Corp.

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Constitutional Law—Commerce Clause—State Purchasing Activity Excluded from Commerce Clause Review—*Hughes v. Alexandria Scrap Corp.* [1] Appellee, a Virginia scrap processing firm (Alexandria), challenged the constitutional validity of a 1974 amendment[2] to a Maryland regulatory scheme[3] (the Act) seeking to rid the State of the unsightly environmental problem created by abandoned automobiles.[4] At the heart of the Maryland remedial scheme is a "bounty"[5] paid by the State for each abandoned automobile previously titled in Maryland[6] and recycled by a scrap processor licensed[7] under the Act.[8] This bounty was designed to create a financial incentive inducing vehicle suppliers to deliver abandoned automobiles to scrap processors by allowing the processors to pay amounts higher than the prevailing market price for such vehicles.[9] In order to obtain the bounty, the amended Act required that scrap processors present the Maryland Motor Vehicle Administration with one of five enumerated methods of documenting title[10] for each bounty-eligible vehicle processed by the scrap processor.

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[1] 426 U.S. 794 (1976).

[2] 1974 Md. Laws, c. 465, *as codified in* MD. ANN. CODE art. 66 1/2, § 11-1002.2(f)(5) (Supp. 1975).

[3] MD. ANN. CODE art. 66 1/2, §§ 5-201-210 (1970).

[4] 426 U.S. at 796.

[5] MD. ANN. CODE art. 66 1/2, § 5-205 (1970). The current bounty is $16.00. MD. ANN. CODE art. 66 1/2, § 5-205 *as amended* (Supp. 1975). The statute requires that this bounty be split evenly between the scrap processor and the licensed "wrecker" who delivers the vehicle. *Id.* A wrecker must be licensed as such under the act if it is "engaged in the business of purchasing or otherwise acquiring vehicles for the benefit of the materials contained therein or parts thereof." MD. ANN. CODE art. 66 1/2, § 5-201.1(b). If the vehicle is delivered to a scrap processor by an unlicensed vehicle supplier—towing services, vehicle haulers, or governmental agencies—the entire "bounty" is paid to the scrap processor. *Hughes*, 426 U.S. at 797. In practice, however, a large portion of the bounty paid to the scrap processor is rebated to the unlicensed supplier to assure continuing deliveries. *Id.* at 797-98 n.5. Alexandria, for example, rebates $14.00 of the $16.00 "bounty" to its unlicensed suppliers. *Id.*

[6] MD. ANN. CODE art. 66 1/2, § 5-205 (1970 and Supp. 1975).

[7] In order to be qualified to participate in the "bounty" program, scrap processors must first obtain a license from the Maryland Department of Motor Vehicles. MD. ANN. CODE art. 66 1/2, § 5-201 (1970). This license entitles any scrap processor, whether or not it is located in Maryland, to participate in the program. *Id.* Seven of the sixteen licensed processors that participated in the program were firms conducting their operations outside Maryland's borders. *Hughes*, 426 U.S. at 799.

[8] The bounty payments were designed to promote removal of abandoned vehicles from the countryside by speeding the operation of the "scrap cycle." *Hughes*, 426 U.S. at 796. The scrap cycle is the course an automobile follows from abandonment by its owner, to the auto wrecker who salvages parts and markets the hulk, to the scrap processor who reduces the hulk to scrap marketable to steel mills, and finally to the steel mills where the scrap is converted into new, usable steel. *Id.*

[9] *Id.* at 797.

[10] MD. ANN. CODE art. 66 1/2, § 5-205 (1970 and Supp. 1975). With these title documentation requirements, the statute sought to eliminate the possiblity of conversion suits brought by vehicle owners claiming that they had not abandoned their vehicles. *Hughes*, 426 U.S. at 798. Fear of such suits constituted a major impediment to the operation of the scrap cycle. The Act originally provided four methods by which transfer of

The crucial factor leading to the *Hughes* litigation arose from the Act's amended provision dealing with documentation requirements for those bounty-eligible vehicles which are both over eight years old and without an engine or otherwise totally inoperable (hulks).[11] This amendment placed a different burden for documenting title to these vehicles on licensed processors whose plants are located outside Maryland than on those processors whose plants are located within the State.[12] For vehicles in this "hulk" classification, Maryland scrap pro-

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title to the vehicles could be documented. First, a vehicle owner or his assignee may endorse a valid Certificate of Title to the vehicle supplier or scrap processor. MD. ANN. CODE art. 66 1/2, § 5-203.1 (1970). Second, a person in possession of an abandoned vehicle may apply to the local police department which may issue a Certificate of Authority to deliver the vehicle for scrapping after the department has given a statutorily-required three-week notice to previous owners. MD. ANN. CODE art. 66 1/2, § 11-1002.2(f). Third, the purchaser of an abandoned vehicle at a police auction may obtain an Auctioneer's Bill of Sale permitting him to deliver the vehicle to a scrap processor. MD. ANN. CODE art. 66 1/2, § 11-1002.2(d). Fourth, a licensed wrecker may secure a "Wrecker's Certificate" upon compliance with a statutory notice procedure. MD. ANN. CODE art. 66 1/2, § 5-203(b), (c). As originally enacted, the Act also provided for an exception from any title documentation requiremnt for those vehicles classified under the statute as "hulks." Title to vehicles falling within the "hulk" classification was obtained coincident with possession. MD. ANN. CODE art. 66 1/2, § 11-1002.2(f)(5) (1970 and Supp. 1975). The 1974 Amendment effectively eliminates this exception, by requiring title documentation for hulks in the form of an indemnity agreement. *Id.* (Supp. 1975). This fifth documentation requirement, however, was available only to Maryland scrap processors, who were allowed to prove title to hulks simply by obtaining an indemnity agreement from the vehicle supplier. *Id.* Under this amendment, out-of-state processors were relegated to the first four methods of documenting title. *See Id.*

[11] *See* MD. ANN. CODE art. 66 1/2, § 11-1002.2(f)(5) (1970).

[12] *Id.* § 11-1002.2(f)(5) (1970 and Supp. 1975), provides, as amended:

> Notwithstanding any other provisions of this section, any person, firm, corporation, or unit of government upon whose property or in whose possession any abandoned motor vehicle is found, or any person being the owner of a motor vehicle whose title certificate is faulty, or destroyed, or any agent designated and authorized by a unit of government to remove an abandoned motor vehicle from public or private property, may dispose of the motor vehicle to a wrecker or scrap processor without the title and without notification procedures of subsections (a) and (b) of this section, if the motor vehicle is over eight years old and has no engine or is otherwise totally inoperable. *In those cases only a scrap processor whose plant is physically located and operating in this State shall execute an indemnity agreement that shall be filed with the Motor Vehicle Administration. The indemnity agreement shall contain the name, address and signature of the person delivering the vehicle. The indemnity agreement and the manufacturer's serial or identification number shall be satisfactory proof that the vehicle has been destroyed and shall be acceptable for payment of the full bounty authorized by § 5-205 if the vehicle identified in the indemnity agreement was titled in this State. Otherwise, for the purpose of administering the provisions of this section, the provisions of § 5-205 shall not apply.*

The 1974 amendment did not change the wording of the original section but added the italicized portions.

The legislative rationale for discriminating between licensed scrap processors operating within Maryland's borders and those licensed processors operating outside the State is unclear. There is no legislative history regarding the purpose of the amendment. Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46, 63 (D. Md. 1975). However, the amendment may have been deliberately designed to redirect delivery of

cessors need only supply an indemnity agreement signed by the vehicle supplier to document title to the vehicle and thus obtain the bounty.[13] In contrast, out-of-state processors like Alexandria had to provide the Motor Vehicle Administration with one of the other enumerated documents of title, which were much more difficult to obtain than indemnity agreements.[14]

As an out-of-state processor, Alexandria's access to Maryland vehicles proved extremely vulnerable to the type of changes made by the 1974 amendment, particularly since ninety-six per cent of the Maryland vehicles it processed fell into the "hulk" classification.[15] After the effective date of the amendment creating the different hulk title documentation requirements, Alexandria suffered a dramatic decline in the number of bounty-eligible hulks delivered to it.[16] Vehicle suppliers for the most part began delivering their abandoned automobiles to Maryland processors rather than to those located out-of-state.[17] Alexandria attributed this decline to the operation of the amendment, which made it easier for the vehicle suppliers merely to sign an indemnity agreement than to go through the lengthy alternative procedures required when they delivered vehicles to out-of-state processors.[18]

Following this decline, Alexandria filed suit in the Maryland district court seeking both a declaratory judgment that the amendment violated the commerce and equal protection clauses and an injunction restraining Maryland from enforcing it.[19] Alexandria contended that the amendment created an unconstitutional burden on in-

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hulks toward Maryland processors and away from their licensed out-of-state competitors. This possibility may be inferred from the heading of the proposed amendment, which was "[f]or the purpose of protecting *certain* scrap processors who destroy abandoned vehicles." *Hughes*, 426 U.S. at 826 n.7 (emphasis in the original). Notwithstanding this factor, Maryland contended throughout the litigation that the purpose of the amendment was to promote the State's interest in assuring that its bounty payments went only for the processing of those vehicles which had been actually abandoned in Maryland. *Alexandria Scrap Corp.*, 391 F. Supp. at 63. Since any abandoned vehicle was eligible for the bounty if it was previously titled in Maryland, MD. ANN. CODE art. 66 1/2, § 5-205 (1970 and Supp. 1975), the bounty has to be paid even for those Maryland hulks which are actually abandoned outside the State.

[13] MD. ANN. CODE art. 66 1/2, § 11-1002.2(f)(5) (1970 and Supp. 1975). This requirement created little difficulty for Maryland scrap processors since these indemnity agreements were already required by scrap processors in the normal course of business operations. *Id. See Hughes*, 426 U.S. at 801.

[14] See *supra* note 10.

[15] *Hughes*, 426 U.S. at 800.

[16] "During the six-month period immediately preceding the effective date of the amendment, appellee received 14,253 hulks from Maryland sources. In the six months immediately thereafter, the total was 9,723. This marked a decline of 31.8% in the number of bounty-eligible hulks, at a time when appellee's figures showed an *increase* of 11.9% in the number of vehicles supplied from non-Maryland sources." *Hughes*, 426 U.S. at 801 n.11 (emphasis in original).

[17] *Id.* at 802.

[18] *Id.*

[19] Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46, 48 (D.Md. 1975). With respect to the equal protection issue, Alexandria contended that the amendment violated

terstate commerce in hulks by effectively barring out-of-state processors from access to these bounty-eligible vehicles.[20]

Maryland countered Alexandria's allegations with a two-fold defense. First, the State maintained that commerce clause review of the bounty scheme was inappropriate, since Maryland's activity under the scheme was state proprietary activity, and, as such, constituted a type of activity excluded from commerce clause review.[21] Second, the State contended that the benefit the Act conferred on Maryland outweighed the burden placed on interstate commerce by the amendment's operation.[22]

Rejecting both of Maryland's contentions, the three-judge panel[23] granted summary judgment to the plaintiff and issued an injunction prohibiting Maryland from enforcing the amendment.[24] In reaching its decision that the amendment violated the commerce clause, the district court first determined that although state proprietary activity may be excluded from commerce clause review, Maryland's role under the bounty scheme was "governmental" rather than "proprietary" in nature.[25] The court noted that Maryland's contention that its activities were proprietary in nature "comports neither with established legal principles nor with the facts."[26]

The district court then subjected the bounty scheme to review under the commerce clause. In doing so, the court first recognized that the Maryland scheme did not directly regulate interstate commerce, but only burdened it as an incidental effect of the bounty program's operation.[27] The district court further observed that the bounty scheme was enacted to promote Maryland's legitimate state interest in obtaining an aesthetically-pleasing environment, and that the amendment helped assure that the State's bounty payments went to

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the equal protection clause in that it was not rationally related to promoting the asserted state environmental objective. *Id.* at 56.

[20] *Id.* at 61-62.

[21] *Id.* at 54-55. This "proprietary activity" exclusion to commerce clause review is premised on the theory that government powers are divisible into two categories: "proprietary" and "governmental." A government's proprietary or business power is the means used by the State to act for its private advantage, as opposed to government's "governmental" powers, where the State acts as sovereign. Several courts have held that when a government exercises its proprietary powers, it is not subject to the contraints of the commerce clause. *See, e.g.*, American Yearbook Co. v. Askew, 339 F. Supp. 719, 721-25 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 260, 76 So. 258, 260 (1917); Tribune Printing and Binding Co. v. Barnes, 7 N.D. 591, 597, 75 N.W. 904, 906 (1898). See text at notes 87-109 *infra* for a more detailed discussion of this proprietary exclusion to commerce clause review.

[22] 391 F. Supp. at 56-57, 63.

[23] Since the constitutionality of a state statute was involved in the suit, a three-judge panel was convened pursuant to the dictates of 28 U.S.C. § 2281 (1970) (repealed Pub. L. 94-381 § 1, 90 Stat. 1119 (1970)).

[24] 391 F. Supp. at 63.

[25] *Id.* at 55.

[26] *Id.*

[27] *Id.* at 59.

process vehicles actually abandoned within Maryland's borders.[28] In light of these circumstances, the district court determined that the appropriate standard for reviewing the Maryland amendment under the commerce clause was a test which balanced the benefit it conferred on Maryland against the degree to which the amendment burdened interstate commerce.[29]

The district court's conclusion that a balancing test was the appropriate standard of review followed from its determination that the Supreme Court's 1970 decision in *Pike v. Bruce Church, Inc.*[30] set forth the controlling standard.[31] In *Pike,* the Supreme Court declared that when confronted with state legislation incidentally burdening interstate commerce, whose primary purpose is to promote a legitimate state interest, the legislation should be sustained unless either the benefit it confers is clearly outweighed by the burden it imposes on interstate commerce, or the state goal can be achieved equally well by means less burdensome to interstate commerce.[32] The district court in *Hughes* applied the *Pike* balancing test and held that the 1974 amendment violated the commerce clause. In striking the balance, the district court maintained that the 1974 amendment substantially burdened interstate commerce in vehicle hulks[33] and that the state goals

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[28] *Id.* at 48-49, 63.

[29] *Id.* at 59.

[30] 397 U.S. 137 (1970).

[31] 391 F. Supp. 46, 59.

[32] 397 U.S. at 142.

[33] 391 F. Supp. at 62-63. The district court found that the 1974 amendment burdened interstate commerce in two ways. First, the amendment burdened commerce by "reshaping" the abandoned vehicle market in a manner favorable to Maryland processors and adverse to licensed out-of-state processors. *Id.* This restructuring of the market arose because the differing title documentation requirements left vehicle suppliers with the choice of either delivering the vehicles to Maryland processors and merely signing an indemnity agreement to obtain part of the bounty, or delivering the vehicles to non-Maryland processors and having to go through the burdensome alternative procedures necessary to document title. *Id.* at 62. Referring to this aspect of the amendment, the court observed that:

> [s]ince [this] choice . . . will in many, if not all, instances be made by individuals with no interest in maintaining Alexandria Scrap's economic health and a considerable interest in maintaining their own economic health, the choice which will in most instances be made [i.e., delivery to Maryland processors] is rather predictable and almost inevitable.

Id.

The second way in which the amendment burdened interstate commerce, the district court found, was that the amendment

> not only . . . effectively protect[s] scrap processors with existing plants in Maryland from the pressures of competitors with nearby out-of-state plants, but it implicitly offers to extend similar protection to any competitor who is willing to erect a scrap processing facility within Maryland's boundaries—an offer clearly suspect under Commerce Clause principles.

Id. at 63. This determination followed from the district court's examination of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), in which Justice Stewart, speaking for a unanimous Court, declared that the Court viewed state statutes which, in effect, required business operations to be performed in-state which could be more efficiently accomplished out-of-state as being "virtually per se illegal." *Id.* at 145. *Cf.* Toomer v. Wit-

promoted by the amendment could be achieved equally well by means less burdensome to interstate commerce.[34]

Maryland appealed the district court's decision directly to the Supreme Court[35] on both the commerce clause and equal protection issues. The State did not, however, question the lower court's finding that the bounty scheme fell outside the ambit of the proprietary exclusion.[36] The Court reversed and HELD: "Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[37]

The Court, in reaching its decision, drew a sharp distinction between two different types of state activity burdening interstate commerce. In the first type, the State directly prohibits or indirectly burdens interstate commerce through legislation regulating private conduct.[38] In the second type, the State intervenes directly into the market as a "purchaser" to favor in-state businesses.[39] While observing that the first type of activity is properly a subject of commerce clause review,[40] the Court determined that the second type of activity is not subject to such review.[41] This latter determination flowed from its

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sell, 334 U.S. 385, 403-04, 406 (1948) (South Carolina statute requiring shrimp boats fishing off its coast to dock and pack their catch in the State held unconstitutional); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 12-14 (1928) (Louisiana statute which forbade exporting Louisiana shrimp until they had been shelled and beheaded held unconstitutional).

[34] 391 F. Supp. at 63. The district court found that the state purpose promoted by the Maryland amendment—assuring that the bounty payments went to pay for only those vehicles actually abandoned in Maryland—could be achieved equally well by means less burdensome to interstate commerce by the "simple, nondiscriminatory expedient of denying bounty payments to any processor for any vehicle abandoned outside of Maryland's geographical limits." *Id.* The district court also found that the amendment violated the equal protection clause, since the amendment "creates a classification which has no basis in reason." *Id.* at 58.

[35] *Hughes*, 426 U.S. at 802. Maryland obtained direct appeal through the provisions of 28 U.S.C. § 1253 (1970).

[36] 426 U.S. at 796.

[37] *Id.* at 810 (footnotes omitted).

[38] *Id.* at 806.

[39] *Id.* at 806, 808. The distinction between these two types of state activity which may result in a burden on interstate commerce can be illustrated by the following: in the first type of activity, the State, through its rule-making powers, enacts legislation aimed at regulating private conduct, which, in turn, results in a modification of private behavior in a manner which is adverse to interstate commerce. An example of a burden placed on interstate commerce in this manner is a state statute requiring shrimp boats fishing off its coast to dock in the State and pack their catch there. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385, 403-04, 406 (1948). The second type of state activity which may burden interstate commerce is state purchasing. In contrast to the first type of activity where the State regulates private activity, state purchasing involves direct state entry into the market to obtain items it needs for its own benefit. An example of a burden placed on interstate commerce is a state statute limiting its purchasing of printed forms to those produced by its own citizens. *See, e.g.*, American Yearbook Co. v. Askew, 339 F. Supp. 719, 719-21, 725 (mem.), *aff'd mem.*, 409 U.S. 904 (1972).

[40] 426 U.S. at 806, 808 n.17.

[41] *Id.* at 808-09.

conclusion—made without further explanation—that the commerce clause does not "require independent justification" of the manner in which a State exercises its power to purchase articles of interstate commerce.[42]

Applying this distinction between different types of burdens placed on commerce, the Court concluded that Maryland was a "purchaser" under its bounty scheme.[43] This conclusion was based on the Court's finding that the hulks remained in Maryland "in response to market forces, including that exerted by money from the State",[44] rather than due to state legislation regulating private conduct resulting in an indirect burden on interstate commerce.[45] Accordingly, the burden on interstate commerce created by the amendment resulted from the type of state activity which is not subject to commerce clause review.[46] The Court therefore determined that the commerce clause required neither the application of a balancing test nor any other type of commerce clause review.[47]

Justice Stevens filed a concurring opinion in which he suggested that the critical factor in *Hughes* rested on the hypothesis that the Maryland bounty scheme "created" new commerce which did not exist prior to the Act.[48] Justice Stevens noted that prior Supreme Court cases concerning the commerce clause dealt with state activity which interfered with the natural operation of pre-existing commerce.[49] In contrast, Justice Stevens reasoned that the *Hughes* Court is "dealing with a business that is dependent on the availability of subsidy payments."[50] As such, there is no place for commerce clause review because the commerce clause proscribes only state interference with *existing* commerce, not state activity giving rise to *new* commerce.[51] Justice Stevens thus concluded that *Hughes* was correctly decided because the commerce clause does not "inhibit a State's power to experiment with different methods of encouraging local industry."[52]

Justice Brennan, joined by Justices Marshall and White, vigorously dissented from the majority's exclusion of state purchasing from the scope of commerce clause review.[53] The dissent initially maintained that *all* state activity indirectly burdening interstate commerce

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[42] *Id.* at 809.
[43] *Id.* at 808.
[44] *Id.* at 810.
[45] *Id.* at 809-10.
[46] *Id.* at 810.
[47] *Id.*
[48] *Id.* at 815-16 (Stevens, J., concurring).
[49] *Id.* (Stevens, J., concurring).
[50] *Id.* at 816 (Stevens, J., concurring).
[51] *Id.* at 817 (Stevens, J., concurring). In so concluding, Justice Stevens noted that "the Commerce Clause . . . [was] intended (at least when Congress has not spoken) to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide the basis for questioning a State's right to experiment with different incentives to business." *Id.*
[52] *Id.* at 816 (Stevens, J., concurring).
[53] *Id.* at 817-19 (Brennan, J., dissenting).

must be scrutinized under the *Pike* balancing test.[54] Moreover, the dissent indicated that they would hold facially invalid any state statute which, either on its face or in practical effect, limited state purchasing to goods produced in-state, unless the State could show that some legitimate interest "other than economic protectionism" was promoted thereby.[55]

Although the dissent disagreed with the majority's conclusion that state purchasing activity burdening commerce was exempt from review, it nevertheless argued in the alternative that "even those courts . . . that have concluded that facially restrictive state purchasing statutes are permissible under the Commerce Clause . . . have restricted this conclusion to instances where the State in a 'proprietary' capacity is purchasing items of commerce for end use . . . ."[56] The dissent accordingly suggested that if a "purchasing" exclusion was to be adopted, it should be limited to instances where a State purchases items for its own end use.[57] Under the *Hughes* fact situation, however, the dissent contended that by the bounty scheme, Maryland was merely engaged in price-enhancing activity rather than purchasing items of interstate commerce for its own end use.[58] The dissent therefore maintained that the majority had incorrectly concluded that Maryland's bounty scheme came within the ambit of a purchasing exclusion to commerce clause review.[59]

Since the dissent felt that the *Pike* balancing test was applicable to *Hughes,* the dissenters concluded that the case should have been remanded to the district court for a full trial because it came to the Supreme Court in summary judgment posture.[60] Such a course of action was necessary, in its view, to determine both the degree to which the bounty scheme burdened interstate commerce and the degree to which Maryland's environmental goals could be promoted equally well by means less burdensome to commerce.[61]

The significance of the *Hughes* decision is two-fold. First, it creates a broad exclusion from commerce clause review of state activity which may be characterized as "purchasing." Prior to *Hughes,* no Supreme Court decision had held that any type of state activity was expressly outside the scope of commerce clause review if it in some manner burdened interstate commerce.[62] Second, the decision acquires an additional dimension when read in conjunction with *National*

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[54] *Id.* at 818-19, 827-28 (Brennan, J., dissenting).

[55] *Id.* at 823 (Brennan, J., dissenting).

[56] *Id.* at 824 (Brennan, J., dissenting).

[57] *Id.*

[58] *Id.* The dissent also suggested that the State may have been engaged in purchasing the "service" of scrap processing. *Id.* See discussion of this aspect of the dissent in text at notes 126-31 *infra.*

[59] 426 U.S. at 824 (Brennan, J., dissenting).

[60] *Id.* at 831-32 (Brennan, J., dissenting).

[61] *Id.*

[62] *Cf.* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-72 (1976) (applying a balancing test to state legislation which indirectly created a burden on interstate com-

League of Cities v. Usery,[63] which was decided the same day. *National League of Cities*, by holding that Congress exercising its power under the commerce clause could not regulate the minimum wages and maximum hours of those state employees engaged in providing "traditional governmental functions,"[64] limits the scope of the commerce clause's affirmative grant of power to Congress. Conversely, *Hughes*, by holding that state purchasing activity burdening interstate commerce is not subject to commerce clause review, limits the sphere in which the commerce clause operates negatively to proscribe state legislation which burdens interstate commerce. Taken together, *National League of Cities* and *Hughes* thus seem to represent part of a major restructuring by the Court of the commerce clause's operative scope.

After an introductory discussion of prior Supreme Court precedent regarding the scope of commerce clause review of state legislation burdening commerce, this note will investigate possible rationales underlying the restriction placed upon the scope of that review by the *Hughes* decision. In so doing, the note will examine the "proprietary activity" exclusion from commerce clause review, which, although never expressly sanctioned by the Supreme Court, has nevertheless, been applied by state and lower federal courts in excluding proprietary purchasing activity from commerce clause review. The note will then examine the relationship between this proprietary exclusion and the *Hughes* decision, concluding that the *Hughes* decision may be grounded on an implicit, approving recognition of the proprietary exclusion. Thereafter, the apparent scope of the *Hughes* purchasing exclusion will be compared with the scope of the proprietary exclusion, which will reveal that the scope of the *Hughes* purchasing exclusion may go well beyond the limitations applicable to the proprietary activity exclusion. The possible rationales for this expansive exclusion of all State purchasing from commerce clause review will then be discussed. Finally, the note will examine the nature and scope of the *Hughes* purchasing exclusion and discuss its appropriateness on both public policy and substantive law grounds. It will be submitted that *Hughes* creates an unwarranted exclusion to commerce clause review which should not be followed by the Court in subsequent cases involving state activity alleged to create an indirect burden on interstate commerce.

I. THE IMPACT OF *HUGHES* ON THE SCOPE OF COMMERCE CLAUSE REVIEW

The *Hughes* Court's determination that state purchasing in-

merce); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (same). *But cf.* American Yearbook Co. v. Askew, 409 U.S. 904 (1972), aff'g mem. 339 F. Supp. 719 (M.D. Fla.) (mem.) (affirming in a memorandum opinion a three-judge district court decision which excluded state proprietary activity from commerce clause review).

[63] 426 U.S. 833 (1976).

[64] *Id.* at 852.

directly burdening interstate commerce is excluded from commerce clause review stands in sharp contrast to prior Supreme Court precedent in the commerce clause area.[65] Unlike a situation in which a State enacts legislation aimed directly at curtailing or disrupting interstate commerce,[66] the adverse effect of the Maryland bounty program on interstate commerce arises only incidentally to the primary purpose of the Act, which is to promote the recycling of abandoned automobiles.[67] Prior to its decision in *Hughes,* the Court has always held that such indirect, state-created burdens are within the scope of commerce clause review. Furthermore, the Court has repeatedly held that the appropriate standard by which to judge the validity of this type of legislation is a balancing test.[68] This balancing test applied by the Court is set forth in the Supreme Court's 1970 decision in *Pike v. Bruce Church, Inc.:*

> Where the statute regulates evenhandedly[69] to effectuate a legitimate local public interest,[70] and its effects on interstate

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[65] See note 62 *supra.*

[66] When faced with state legislation aimed *directly* at regulating interstate commerce, the Court has held that the State is totally without legislative authority to do so and has therefore summarily rejected the state legislation. *See, e.g.,* Shafer v. Farmers Grain Co., 268 U.S. 189, 199-200 (1925), which involved a comprehensive North Dakota regulatory scheme governing the sale and transportation of wheat, 90% of which was shipped in interstate commerce. The *Shafer* Court, concluding that the statute was invalid, noted that "a state statute which by its necessary operation directly interferes with or burdens . . . [interstate] commerce is a prohibited regulation and invalid, *regardless of the purpose with which it was enacted.*" *Id.* at 199 (emphasis added). *See also* Lemke v. Farmers Grain Co., 258 U.S. 50, 61 (1922) (statute similar to that involved in *Shafer* held to violate the commerce clause).

[67] *Hughes,* 426 U.S. at 796.

[68] *Cf.* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-72 (1976) (Mississippi statute barring milk and milk products from other States from being sold in Mississippi unless the state from which the milk was imported accepted similar Mississippi products considered by the Court as creating an indirect burden warranting review under a balancing test); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (Arizona statute regulating packaging of fruit created indirect burden on interstate commerce warranting the application of a balancing test).

[69] For cases presenting state statutes which the Court has viewed as taking effect evenhandedly, see Robertson v. California, 328 U.S. 440, 446 (1946) (state regulation of insurance agents applied to all agents whether they represent in-state or out-of-state companies and whether the business done is interstate or local in character); South Carolina State Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 189 (1938) (statute setting truck width and weight maximums). For cases involving state statutes which the Court has viewed as operating in a discriminatory manner against out-of-state producers, see Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 381 (1976) (Mississippi statute barring milk and milk products from other States from being sold in Mississippi unless the state from which the milk was imported accepted milk and milk products produced in Mississippi); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 375-77 (1964) (Florida statute requiring milk distributors to purchase certain classifications of milk from designated Florida producers at a fixed price); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521-22, 528 (1935) (New York statute making it illegal to import milk into the state which was purchased at prices less than those prescribed by New York's minimum price laws).

[70] A wide variety of state statutes have been held to promote a legitimate state in-

> commerce are only incidental,[71] it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits[72]. . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[73]

The Court has concluded that the application of a balancing test is necessary in order to accommodate two conflicting interests.[74] On

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terest. *See, e.g.,* Robertson v. California, 328 U.S. 440, 447 (1946) (state regulation of insurance business); Milk Control Bd. v. Eisenberg Farm Prod., 306 U.S. 346, 352 (1939) (Pennsylvania statute regulating milk industry); Mintz v. Baldwin, 289 U.S. 346, 349-50 (1933) (New York statute requiring that cattle imported into the State be inspected and certified as free from disease).

[71] The following cases involved what the Court characterized as merely incidental burdens on interstate commerce: California v. Thompson, 313 U.S. 109, 114 (1941); Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 353 (1939); South Carolina State Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 189 (1938); Townsend v. Yeomans, 301 U.S. 441, 459 (1937).

In the following cases the Court has found state legislation to create more than an incidental burden on commerce and declared the statutes unconstitutional: Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 377 (1964) (statute requiring commercial buyers of milk to buy certain qualities of milk at fixed prices from designated sellers); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959) (Illinois statute requiring trucks to use an unusual type of mud flap); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (city ordinance, purportedly enacted as a health measure, prohibiting the sale of pasteurized milk unless it had been processed and bottled at an approved pasteurization plant within a five mile radius of Madison).

[72] The burden placed on interstate commerce was held to be clearly excessive in relation to the benefit obtained by the State in Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 380 (1976) (asserted state health interest promoted by Louisiana statute forbidding sale of milk imported from States not having reciprocal sales agreement with Louisiana held outweighed by the burden imposed on the interstate sale of milk from states not having reciprocity agreement): Pike v. Bruce Church, Inc., 397 U.S. 137, 145-46 (1970) (Arizona's interest in identifying place of origin of appellee's canteloupes was outweighed by the burden imposed on interstate commerce if the state were allowed to enjoin the shipping of canteloupes across state borders under an act designed to eliminate deceptive packaging); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959) (minimal state interest in prescribing the use of unusual mudflaps on trucks held insufficient to outweigh the burden statute placed on trucking company engaged in interstate commerce); and Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 783-84 (1945) (state law regulating train lengths so impeded the economic and efficient operation of interstate carriers as to outweigh the minimal state health and safety interest conferred on the State by the statute).

[73] *Pike,* 397 U.S. at 142 (1970) (footnotes added). The Court has noted that the purported goal of the legislation burdening commerce could be achieved by less burdensome means in Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 376-77 (1976); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); Baldwin v. G.A.F. Seelig, 294 U.S. 511, 524 (1935).

[74] *See, e.g.,* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-72 (1976); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 768-69 (1945); Union Brokerage Co. v. Jensen, 322 U.S. 202, 209-10 (1944); Parker v. Brown, 317 U.S. 341, 362 (1943).

the one hand, congressional power under the commerce clause is "plenary" in the interstate commerce area.[75] In light of this plenary grant of power to Congress, it is well settled that the commerce clause, standing alone, bars state activity which infringes upon federal authority in the interstate commerce sphere.[76] On the other hand, notwithstanding this plenary grant of congressional power, it has also been long recognized that the States, absent conflicting federal legislation, retain a "residuum of power"[77] to enact legislation which promotes legitimate state interests, even though such legislation may, in operation, create a burden on interstate commerce.[78] One consequence of applying this balancing test, therefore, is that state legislation seeking to promote a legitimate local interest which indirectly burdens interstate commerce will sometimes be upheld owing to the significance of the local interests involved.[79]

The *Hughes* Court, by rejecting the district court's application of the *Pike* balancing test to the Maryland bounty scheme, held for the first time that a type of state activity which indirectly burdens interstate commerce may be totally excluded from commerce clause review. The creation of this "purchasing" exclusion has the result of sharply restricting the sphere of state activity in which the commerce clause acts to inhibit state legislation from indirectly burdening interstate commerce.

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[75] *See, e.g.*, South Carolina Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 189 (1938).

[76] *Id.* at 185-86.

[77] Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945).

[78] The Court has long recognized that the States have power to "legislate protection of their citizens in matters of local concern", Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976), provided that the benefit thus conferred on their citizens outweighs the resultant burden the legislation places on interstate commerce. See cases cited at notes 70-72 *supra*.

[79] The Court has on occasion upheld state legislation placing an indirect burden on interstate commerce because some social problems are both so local in scope and peculiar in nature that ameliorating state legislation must be sustained as a legitimate exercise of the state's police power. The Court has further noted that the local nature of some state problems may result in their being overlooked by Congress, or, alternatively, that they may be such that Congress is incapable of adequately dealing with them. *See, e.g.*, South Carolina Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185-86, 196 (1937) where, in upholding a South Carolina statute setting truck width and weight maximums against a challenge that the enactment violated the commerce clause, the Court stated:

> [T]here are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the state . . . .

Id. at 185. In such situations, the Court has reasoned that holding the State powerless under the commerce clause to rectify a certain local problem may result in the problem not being corrected at all. *See, e.g.*, Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945) (dicta); South Carolina Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938).

II. POSSIBLE RATIONALES UNDERLYING THE *HUGHES* PURCHASING EXCLUSION

A. *The "Proprietary Activity" Rationale*

Although the *Hughes* purchasing exclusion clearly limits the availability of commerce clause review of certain types of state legislation which create an indirect burden on commerce, the underlying rationale employed by the *Hughes* Court in excluding state purchasing from review is not readily apparent. The *Hughes* Court noted only that "[n]othing in the purposes animating the Commerce Clause" requires that state purchasing activity be subject to the constraints of the clause.[80] In light of this rather obscure language, therefore, reference must be made to the case law in an attempt to elucidate the reasons underlying the Court's decision.

A search of the relevant case law reveals that the only type of state activity excluded from commerce clause review prior to *Hughes* was state proprietary activity alleged to burden interstate commerce indirectly.[81] Moreover, the cases involving this proprietary exclusion uniformly concerned state purchasing activity. It is noteworthy in this respect that the *Hughes* Court similarly characterized Maryland's activity as that of a "purchaser."[82] Although this proprietary exclusion has never been expressly sanctioned by the Supreme Court, the Court has affirmed, in a memorandum opinion, a district court decision expressly based on this proprietary exclusion to commerce clause review.[83]

In light of the foregoing considerations, the fact that Maryland contended at the district court level that the bounty scheme constituted proprietary activity and was thus exempt from commerce clause review[84] acquires increased significance in searching for the rationale underlying the Court's holding. Additionally, several features of the *Hughes* majority opinion seem to suggest that the *Hughes* Court is either (1) implicitly adopting the proprietary exclusion, or (2) using an analysis similar to that employed by courts when applying the proprietary exclusion as a vehicle to create a new, broader exclusion to commerce clause review.[85]

1. The Proprietary Exclusion to Commerce Clause Review.

The proprietary activity exclusion to commerce clause review is premised on the theory that government powers are divisible into two

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[80] 426 U.S. at 810.

[81] See cases cited in note 104 *infra*.

[82] 426 U.S. at 808.

[83] American Yearbook v. Askew, 339 F. Supp. 719, 721, 725 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972).

[84] 391 F. Supp. at 54.

[85] See text at notes 122-29 *infra*.

types: "governmental" and "proprietary."[86] Governmental powers are those exercised by government in its public rule-making capacity,[87] and they constitute the mechanism through which the government acts as sovereign.[88] Thus, for example, a government uses its governmental powers when it operates a police department.[89] In contrast, proprietary powers are those exercised by the State when it acts to promote either its own private advantage or that of its citizens.[90] A government acts in its proprietary role, for example, when it enters

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[86] *See, e.g.*, American Yearbook Co. v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972), where the district court distinguished between these two types of power:

> Governments in the United States traditionally possess two kinds of power: one, governmental or public, in the exercise of which it is a sovereign and governs its people; the other, proprietary or business, by means of which the government acts and contracts for the private advantage of its constituents and of the government itself. Each of these types of power is limited by distinct sets of rules. In order to protect the rights and freedoms of private citizens from oppressive interference, the power of a state to govern is restricted by its own constitution and provisions of the federal constitution as well. When the state exercises its proprietary or business power, however, it is subject to no more limitation than a private individual or corporation would be in transacting the same business. While the line between governmental and proprietary function is none too sharply drawn and is subject to modification as concepts of government are changed to meet the demands of society, one principle remains fixed: the letting of public contracts, particularly those providing for internal needs of government, is a proprietary function.

Id. at 721 (footnotes omitted).

The distinction between proprietary and governmental powers originated in the law of torts in response to the doctrine of sovereign immunity, and out of the dual character of municipal corporations. Municipal corporations, as Dean Prosser notes, have a

> curious dual character . . . [o]n the one hand, they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other they are corporate bodies, capable of much the same acts as private corporations . . . . They are at one and the same time a corporate entity and a government.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 at 977 (4th ed. 1971) (hereinafter cited as PROSSER). As a consequence of this dual character, courts have held that municipal corporations are shielded by the doctrine of sovereign immunity for their governmental acts, but are subject to tort liability for acts done in their private, proprietary capacity. *Id.*

[87] American Yearbook Co. v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972).

[88] *Id.*

[89] *See, e.g.*, Bryant v. Mullins, 347 F. Supp. 1282, 1284 (W.D. Va. 1972); Daniels v. Kansas Hwy. Patrol, 206 Kan. 710, 712, 482 P.2d 46, 48 (1971).

[90] Town of Graham v. Karpark Corp., 194 F.2d 616, 619 (4th Cir. 1952) (listing, as examples of the exercise of proprietary power, municipal contracts relating to water supply, street lighting, gas supply, flood prevention, sewerage and the like); American Yearbook Co. v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972); Henry v. Lincoln, 93 Neb. 331, 333-34, 140 N.W. 664, 665-66 (1913); Hack v. City of Salem, 174 Ohio St. 383, 387, 389, 189 N.E.2d 857, 860-61 (1963). *See generally* 18 E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 53.23-24, 53.29 (3rd rev. ed. 1963 and 1976 Supp.) (hereinafter referred to as MCQUILLIN).

into a contract for the construction of public buildings.[91] While the proprietary/governmental distinction has legal significance in several contexts,[92] its importance for the purposes of commerce clause review stems from the fact that government proprietary activity is subject to only those constitutional limitations applicable to a private citizen doing the same act.[93] Conversely, government action in its "governmental," rule-making capacity triggers the whole panoply of constitutional restraints on the permissible exercise of state power.[94]

Courts have set forth two rationales for the proprietary exclusion to commerce clause review. The first rationale arises from the differing constitutional limitations applicable to government action in its governmental capacity as contrasted with those applicable when acting in its proprietary capacity. Since proprietary activity is subject to only those constitutional limitations applicable to individuals, the government, like the individual, is said to have the right to contract with any party that it wishes without being subject to commerce clause constraints.[95] Consequently, when a State purchases items for its own use, it may limit its purchasing to goods produced in-state in preference to goods produced out-of-state without violating the commerce clause.[96]

The second rationale for the proprietary exclusion is based on a common law presumption that statutes which limit state purchasing to goods produced in-state have such a marginal impact on interstate commerce that these statutes are inherently incapable of violating the commerce clause.[97] This presumption, in turn, is premised on the

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[91] *See, e.g.,* Denver v. Bossie, 83 Colo. 329, 334, 266 P. 214, 216-17 (1928) (construction of state courthouse).

[92] For example, in the law of torts, this distinction is still viable for determining whether the doctrine of sovereign immunity can be asserted by a government as a defense against tort liability. *See* PROSSER, *supra* note 86, § 131 at 975-984.

At one time, this distinction was applied to determine whether state activities were taxable under federal tax laws. Proprietary state activities were taxable, while governmental activities were not taxable under the doctrine of intergovernmental immunity. *See, e.g.,* Ohio v. Helvering, 292 U.S. 360, 368-69 (1934); South Carolina v. United States, 199 U.S. 437, 463 (1905). In 1946 the Supreme Court abandoned this distinction for tax purposes as being untenable. New York v. United States, 326 U.S. 572, 580 (1946).

The proprietary/governmental distinction also has current relevance in the law of municipal corporations for determining whether contracts entered into by elected municipal officers which have a duration longer than their term in office are binding upon their successors. According to this distinction, if the contract is created to further an exercise of the city's proprietary functions, it is binding on the successor officers, while if it is entered into to promote the city's governmental functions, it does not bind the successors. *See, e.g.,* City of Riviera Beach v. Witt, 286 So.2d 574, 574-75 (Fla. App. 1973). *See generally* 10 MCQUILLIN, *supra* note 90, § 29.101 at 491-98.

[93] American Year Book Co. v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972).

[94] *Id.*

[95] *Id.* at 722. *See also* State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 260, 76 So. 258, 260 (1917); Tribune Printing & Binding Co. v. Barnes, 7 N.D. 591, 597, 75 N.W. 904, 906 (1898).

[96] See cases cited at note 95 *supra.*

[97] American Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (M.D. Fla.) (mem.),

theory that state legislation is suspect under the commerce clause only insofar as it creates a significant burden on commerce. Proprietary activity, according to this rationale, is presumed to be incapable of creating a substantial burden on commerce. Thus subjecting such state activity to commerce clause review is considered to be unwarranted.[98]

Three factors have been present in all of the situations to which courts have applied the proprietary exclusion. First, the proprietary exclusion has been applied where the State has been purchasing items for its own private advantage, as opposed to attempting to directly promote some governmental or police power objective.[99] Second, the State has been engaged in actually purchasing items for its own end use; that is, the government was acquiring legal title to and possession of articles of interstate commerce.[100] Third, the exclusion has been applied only in instances where the government has or will become an actual party to a contract for the purchase of goods.[101]

Although each of these three factors has been present in cases applying the proprietary exclusion, the relevant case law does not make clear whether the application of the exclusion is predicated on the coincidence of each of these three elements. Nevertheless, since proprietary activity is, definitionally, activity in which the government is acting for its own private advantage, rather than seeking directly to promote some governmental goal,[102] government action for its private advantage is necessarily a prerequisite to finding that application of the proprietary exclusion is proper. This prerequisite, however, means merely that the State must be acting as a proprietor and thus must be purchasing in a manner designed to conserve the government's financial resources by obtaining business advantages such as favorable con-

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aff'd mem., 409 U.S. 904 (1972); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 261, 76 So. 258, 260 (1917). *But cf.* Garden State Dairies of Vineland, Inc. v. Sills, 46 N.J. 349, 358, 217 A.2d 126, 130 (1966) (criticizing the validity of this presumption in light of the increased amount of State proprietary activity).

[98] *See, e.g.*, State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 261, 76 So. 258, 260 (1917). *Cf.* Field v. Barber Asphalt Co., 194 U.S. 618, 623 (1904).

[99] American Yearbook Co. v. Askew, 339 F. Supp. 719, 721, 725 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972); Ex parte Gemmill, 20 Idaho 732, 741-42, 119 P. 298, 301-02 (1911).

[100] For examples of the types of items acquired, see American Yearbook Co. v. Askew, 339 F. Supp. 719, 720, 725 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972) (school yearbooks); Denver v. Bossie, 83 Colo. 329, 333-34, 266 P. 214, 216-17 (1928) (stone used in public buildings); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 258, 260-61, 76 So. 258, 259-61 (1917) (printed government forms).

[101] Contracts leading to the purchase of goods existed, for example, in American Yearbook Co. v. Askew, 339 F. Supp. 719, 719-20 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972); Denver v. Bossie, 83 Colo. 329, 330, 266 P. 214, 215 (1928); Ex parte Gemmill, 20 Idaho 732, 735, 119 P. 298, 299 (1911); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 256, 76 So. 258, 259 (1917); Allen v. Labsap, 188 Mo. 692, 696, 87 S.W. 926, 927 (1905).

[102] See cases cited at note 99 *supra*.

tract terms.[103] Accordingly, this private advantage limitation does not imply that the items purchased cannot ultimately be used to promote a governmental rather than proprietary goal.[104]

A second prerequisite to the operation of the proprietary exclusion seems to be that the government is acting for its own end use. This condition for applying the proprietary exclusion arises because proprietary activity is necessarily government action for its own private benefit.[105] In this context, the essential feature of private purchasing is the acquisition of either legal rights or possession of the article purchased, or both.[106]

While it therefore appears that a government must be acting both for its private advantage and using the items for its own end use for the proprietary exclusion to apply, the third factor always present in the previous proprietary exclusion cases—the existence of an actual contract—does not appear to be a necessary limitation on the availability of the proprietary purchasing exclusion. This conclusion follows from the fact that a government may obtain legal title to or possession of articles of interstate commerce through means other than contracts.[107] The existence of an actual contract thus does not appear to be a necessary condition for the exclusion, but is instead merely a result flowing from the fact that, in practical terms, the creation of a contractual relationship is the predominant mechanism through which a government purchases items in a modern economy.[108]

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[103] See cases cited at note 104 *infra*.

[104] *Cf.* American Yearbook Co. v. Askew, 719, 720, 725 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972) (printed forms used by the State); Denver v. Bossie, 83 Colo. 329, 330, 333-34, 266 P. 214, 215, 216-17 (1928) (building materials for courthouse); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 258, 260, 76 So. 258, 259-61 (1917) (same); Tribune Printing & Binding Co. v. Barnes, 7 N.D. 591, 593, 597, 75 N.W. 904, 904, 906 (1898) (printed forms).

[105] See cases cited at note 99 *supra*.

[106] For cases which have concluded that the word "purchase" necessarily implies the acquisition of legal rights to or possession of the item purchased, *see, e.g.* First Nat'l Bank & Trust Co. of Chickasha v. United States, 462 F.2d 908, 910 (10th Cir. 1972); Ferraiolo v. Newman, 259 F.2d 342, 344 (6th Cir. 1958); Shar v. Dreyfus, 172 F.2d 140, 142 (2d Cir. 1949), *cert. denied*, 337 U.S. 907.

[107] State purchasing can theoretically be on the basis of bartering, but as a practical matter this method is not likely to be widely used. *See generally* 1 A. CORBIN, CONTRACTS, § 4 at 8-9 (1963 ed. and 1971 Supp.) (hereinafter cited as CORBIN).

[108] A recent case aptly illustrating both the fact pattern and the rationales in which the proprietary exclusion to commerce clause review has been applied is American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972). In *American Yearbook*, plaintiff, engaged in the business of printing and manufacturing school yearbooks, brought a commerce clause challenge to the validity of a Florida statute which required all public printing to be done in the State. *Id.* at 720 n.1. Under the statute, therefore, Florida was purchasing printing services for its own private advantage, was purchasing for its own end use, and was looking to the formation of an actual contract to which it would be a signatory party. Due to this statute, American Yearbook was refused contracts to print yearbooks for state-owned universities because it had no printing facilities in Florida. *Id.* at 720. In examining the validity of the Florida statute, the district court initially drew a distinction between proprietary and governmental activities, concluding that "the letting of public contracts,

2. The Proprietary Exclusion Applied to *Hughes*

Maryland contended at the district court level that its bounty scheme constituted state proprietary activity excluded from commerce clause review.[109] The court rejected[110] this contention and concluded that, in contrast to situations in which the proprietary exclusion has been applied:

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particularly those providing for internal needs of government, is a proprietary function. . . .", since the government is acting for it own private advantage in letting contracts for end use. *Id.* at 721. The court went on to note that differing standards of constitutional review were applicable "between an exercise of a state's proprietary power, such as placing conditions on its own public contracts, and an exercise of governmental power, such as regulation of private industry by placing limitations on private contracts." *Id.* at 722. The court stated that while the commerce clause applied to the exercise of governmental power, proprietary activity was excluded from review since when "the state performs a proprietary function . . . [it] stands in the shoes of a private party who is entitled in most instances to choose where and by whom his printing will be done." *Id.* The court also acknowledged that the proprietary exclusion was based in part upon a presumption that proprietary statutes place only an "insubstantial burden on interstate commerce." *Id.* at 725. Finally, the court drew a sharp distinction between proprietary activity alleged to interfere with interstate commerce and governmental interference with interstate commerce, and concluded, sustaining the Florida statute against the commerce clause challenge, that "[t]rade regulations [relating to private industry] are clearly subject to commerce clause restrictions, but statutes that merely specify conditions of state purchases are not." *Id.* The *American Yearbook* court held, therefore, that because Florida was acting in its proprietary purchasing capacity, the statute was not subject to commerce clause review. *Id.* The *American Yearbook* court relied on two early Supreme Court cases, Field v. Barber Asphalt Paving Co., 194 U.S. 618 (1904) and Atkin v. Kansas, 191 U.S. 207 (1903) as supporting its conclusion that restrictive state proprietary purchasing statutes are immunized from commerce clause review. 339 F. Supp. at 723-24. However, the authority of these cases for the proposition cited is questionable. In *Atkin*, the Court upheld a state statute limiting the working hours of laborers employed by contractors holding state public works contracts to eight hours a day. *Atkin*, 191 U.S. at 224. The *Atkin* Court said that the state had the power to set maximum work hours for laborers in its contracts without violating the commerce clause. *Id.* at 222-23. In doing so, the Court declared that "it belongs to the State, as the guardian and trustee for its people . . . to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Id.* While *Atkin* supports the conclusion that a State may set its own terms for contracts, it does not necessarily support the proposition that a State may discriminate between in-state and out-of-state parties seeking contracts with the State.

One year later, in *Field*, the Court sustained against a commerce clause challenge the validity of a municipal paving contract which required the use of foreign asphalt. *Field*, 194 U.S. at 623. The Court reasoned that although the contract "will in a limited degree affect interstate commerce," it was not one of those "direct interferences with the freedom of such commerce that [can] bring [a] case within the exclusive domain of Federal legislation." *Id.* The facts presented to the *Field* Court, however, did not concern a state statute limiting state purchases to in-state producers, and thus does not necessarily support the conclusion of the *American Yearbook* court that statutes limiting state purchases to in-state producers are not subject to commerce clause review.

[109] 391 F. Supp. at 54.

[110] *Id.* at 55. In rejecting Maryland's contention that the bounty program constituted state proprietary activity, the district court expressly examined the *American Yearbook* decision. *Id.* For a detailed discussion of the *American Yearbook* decision, see note 108 *supra*.

> [Maryland] has not chosen to contract in a business context with scrap processors and to specify conditions with respect to the latters' performance of such contracts. Rather, in electing to act as it did in exercising its police power to preserve the State's natural resources, the State elected to act in a traditional governmental capacity. . . . [Maryland's argument that it was acting in a proprietary capacity] comports neither with established legal principles nor with the facts.[111]

Although Maryland did not raise the issue of whether the bounty program was a proprietary function on appeal to the Supreme Court,[112] the *Hughes* Court, in reaching its decision, nevertheless seemed to apply the type of reasoning advanced in previous proprietary exclusion cases in determining that the bounty scheme was excluded from commerce clause review. In doing so, the Court apparently gave implicit sanction to the proprietary exclusion.

The conclusion that the *Hughes* Court implicitly adopted the proprietary exclusion is supported by several factors. First, the Court developed a distinction in its commerce clause analysis which parallels the governmental/proprietary distinction.[113] The Court distinguished between state legislation leading to a direct "prohibition or . . . burdensome regulation" of interstate commerce—govermental rulemaking activity—which the Court said is subject to commerce clause review, and state legislation dealing with state purchasing activity—proprietary acitvity—which the Court held is not subject to review.[114] This sharp differentiation between types of state action burdening commerce made for the purpose of determining whether commerce clause review is appropriate closely mirrors the distinction drawn by courts in applying the proprietary exclusion.[115]. Second, the *Hughes* Court's decision to exclude the bounty scheme from review was triggered by its characterization of Maryland as being a "purchaser" under the Act.[116] The fact that a State is involved in purchasing activity has previously been a central factor leading courts to conclude that state proprietary activity is present and consequently that this activity is exempt from commerce clause review.[117] Third, the Court's conclu-

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[111] 391 F. Supp. at 55. The district court's finding was consistent with a prior Maryland decision involving a different aspect of the Act which noted, in dicta, that the Act was an exercise of the state's police power, and thus was enacted pursuant to Maryland's governmental powers. Administrator, Motor Vehicles Administration v. Vogt, 267 Md. 660, 675, 299 A.2d 1, 9 (1973).

[112] Brief for Appellee at 8.

[113] 426 U.S. at 806.

[114] *Id.* at 806, 808.

[115] *See, e.g.*, American Yearbook v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972).

[116] 426 U.S. at 808.

[117] American Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (M.D. Fla.) (mem.), *aff'd mem.*, 409 U.S. 904 (1972) (using term "state purchases").

sion that "[n]othing in the purposes animating the Commerce Clause forbids a State . . . from participating in the market and exercising the right to favor its own citizens over others"[118] conforms nearly identically with the language and the conclusion reached in prior decisions by courts which have excluded proprietary activity from commerce clause review.[119] Fourth, the *Hughes* dissent, in criticizing the majority's opinion, stated that the majority was apparently adopting the proprietary exclusion; it then used this determination to argue that if the Court was in fact going to accept the exclusion, it should have expressly limited the availability of the exclusion to instances where the State was an end use purchaser to remain consistent with prior decisions excluding proprietary purchasing from commerce clause review.[120] Finally, in light of the above factors, since the proprietary exclusion is the only exclusion to commerce clause review previously accepted by the courts, the similarity of the language used by courts applying the proprietary purchasing exclusion to the language used by the *Hughes* majority in excluding the bounty scheme from review seems to be more than coincidental. It therefore appears that the *Hughes* Court implicitly adopted the proprietary exclusion for the purposes of commerce clause review in reaching the conclusion that:

> [U]ntil today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State. We do not believe the Commerce Clause was intended to require independent justification for such action.[121]

However, although the *Hughes* decision seems implicitly to adopt the proprietary exclusion to commerce clause review, certain dissimilarities between the facts in *Hughes* and those appearing in prior cases applying the proprietary exclusion suggest that the Court's decision in *Hughes* may not be limited simply to adopting the proprietary exclusion. Instead, the decision may have created a broader exclusion encompassing *all* state "purchasing," regardless of whether the pur-

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[118] 426 U.S. at 810 (footnotes omitted).

[119] *See, e.g.*, American Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (mem.), *aff'd mem.*, 409 U.S. 904 (1972) ("Trade regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not."); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 260, 76 So. 258, 260 (1917) ("[T]he state has a right to make a contract with any one whom it pleases. . . . The law in question [limiting State purchases to in-state businesses] in no way [violates the commerce clause]."); Tribune Printing & Binding Co. v. Barnes, 7 N.D. 591, 597, 75 N.W. 904, 906 (1898) ("Viewed as a question of principle, we are unable to see why the state is forbidden to do what an individual may certainly do with impunity, viz. elect . . . [to] purchase supplies needed in the discharge of its corporate functions . . . from those who produce the same within its own limits . . . .").

[120] 426 U.S. at 824 (Brennan, J., dissenting).

[121] *Id.* at 808-09.

chasing falls within the "proprietary activity" category. This possibility arises because the availability of the proprietary exclusion is predicated on the state purchasing items for its own private advantage and for its own end use.[122] In contrast, the circumstances surrounding *Hughes* are subject to varying interpretations with respect to whether either of these two conditions necessary to the operation of the proprietary exclusion were present in the Maryland bounty scheme. In order to fully understand the scope of the *Hughes* purchasing exclusion, it is thus necessary to compare the traditional limitations applicable to the proprietary exclusion to the facts present in *Hughes*.

The threshold question for comparing *Hughes* with the limitations applicable to the proprietary exclusion is to determine the sense in which Maryland's activity under the bounty scheme can reasonably be characterized as "purchasing." It is noteworthy in this respect that neither the majority opinion nor the dissent offer much by way of analysis to illuminate how this characterization flows from Maryland's payment of bounties for hulks. There are, however, two contractual theories under which Maryland's bounty payments may reasonably be so characterized. These two theories arise as corollaries to the fact that Maryland may be viewed as either a purchaser of a *service*—the delivery and processing of abandoned vehicles—or, alternatively, as a purchaser of *goods*—the abandoned vehicles themselves. The significance of characterizing Maryland as being a purchaser of a service is that Maryland's activities can then be viewed as fitting within the traditional confines of the proprietary exclusion.[123] If, on the other hand, Maryland is characterized as being a purchaser of goods, the State's activity does not fit within the traditional confines of the proprietary purchasing exclusion, since in that case Maryland is neither acting for its private advantage nor purchasing for end use.[124]

As suggested above, the first possible contractual theory under which Maryland may be considered a "purchaser" is that Maryland is a purchaser of a service. According to this theory, the bounty payment constitutes an open offer to a unilateral service contract.[125] More particularly, Maryland creates a statutory offer to pay the bounty to licensed scrap processors, kowing that part of this payment will go to the vehicle suppliers, in return for the aid these processors and

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[122] See text at notes 100-108 *supra*.

[123] See text at notes 126-32 *infra*.

[124] See text at notes 133-37 *infra*.

[125] Corbin defines a "unilateral contract" as

> a promise or group of promises made by one of the contracting parties only, usually assented to by the other or by some one acting on his behalf. . . . A bilateral contract consists of mutual promises, made in exchange for each other by each of the two contracting parties. In the case of a unilateral contract, there is only one promisor; and the legal result is that he is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and he is the only one in whom the contract creates an enforceable legal right.

1 CORBIN, *supra* note 107, § 21 at 52.

suppliers provide Maryland in removing bounty-eligible hulks from Maryland's countryside. The delivery of the abandoned vehicles, in turn, promotes Maryland's environmental objective.

This contractual analysis of the Maryland scheme stems in part from the definition of a bounty as a payment by the State in return for the performance of desired acts which promote a state purpose.[126] Accordingly, the existence of the bounty scheme can be viewed as creating a unilateral contractual offer to enter into a service contract with the licensed scrap processors and vehicle suppliers, the acceptance of which is satisfied by the processors' performance of the conditions of the offer.[127] Support for this theory of the Maryland scheme as constituting a purchase of a service is found in the dissent's characterization of the bounty scheme as a purchase of "scrap processing."[128] Under this service contract approach, Maryland is acting for its private advantage, since it is purchasing the service of removing the abandoned vehicles in the manner the State feels is most beneficially designed to obtain its desired goal. Moreover, the State is acquiring end use of the thing purchased, since the State is the end user of the service.[129] Because Maryland is acting for its private advantage and end use under this analysis of Maryland as a purchaser of services, the *Hughes* decision may thus constitute merely an adoption of the proprietary exclusion since the two essential elements upon which the exclusion is predicated are present. However, even if the *Hughes* decision is limited to excluding traditionally-defined proprietary purchas-

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[126] Webster's Third International Dictionary (1963) defines "bounty" in part as "a reward, premium or subsidy esp. when offered or given by a government: . . . *b*: a grant to encourage an industry . . . *d*: a payment to encourage the destruction of noxious animals."

[127] *See generally* 1 CORBIN, *supra* note 107, at §§ 21, 64. Of particular significance to the analysis of Maryland's bounty offer as creating a unilateral service contract is Corbin's statement that:

> [P]ublished offers of a reward for some desired action are nearly always offers of a unilateral contract. The offeror makes a promise in exchange for which he asks for action or forebearance, not for a promise to act or to forbear. Usually he does not specify the particular acts by which the desired result is to be attained; it is the attainment of the result for which he promises to pay. As in the case of other offerors, he can limit the power of acceptance exactly as he sees fit. He can require the specific mode of producing the result, as well as the result itself; in the absence of such a requirement, the particular mode used is not material, but success in producing the result is essential.

1 CORBIN, *supra* note 107, at § 64.

[128] 426 U.S. at 824 (Brennan, J., dissenting). That the dissent viewed Maryland as a purchaser of services can be adduced from its observation that "it is clear that Maryland in the instant case is not 'purchasing' *scrap processing* for end use . . . ." (inferring that the majority erred by applying the exclusion to an instance where the State is not an end use purchaser).

[129] Maryland, according to this analysis, is an end user of the service because it receives the beneficial result of the service of removing and recycling the hulks: a cleaner state environment. A close analogy to this type of benefit flowing from end use of a service is that provided by service contracts relating to garbage removal, where the benefit flowing from the service is the removal of undesirable items.

ing from commerce clause review, this exclusion is still subject to the criticisms which are set forth in the following section.[130]

However, this view of the Maryland scheme is contradicted by the majority's characterization of Maryland as being a purchaser of goods rather than services. The majority opinion stated that Maryland was a purchaser of an *"article* of interstate commerce."[131] This fact, in turn, brings into play the alternative contractual theory under which Maryland may reasonably be characterized as a purchaser under the bounty scheme. According to this alternative theory, Maryland is a joint purchaser, with the scrap processors, of the *hulks*, since both the State and the processors contribute funds toward the purchase of the hulks from vehicle suppliers. The difficulty with the suggestion that Maryland is a purchaser of goods, however, is that it implies that the State may in some sense "purchase" an item while acquiring no legal rights or title to it.[132] Nevertheless, this seems to be the approach adopted by the majority. The significance of adopting this approach is that if Maryland is viewed as purchasing goods, the *Hughes* decision does not fit within the traditional confines of the proprietary exclusion because Maryland is neither purchasing for its private advantage

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[130] See text at notes 133-182 *infra*. Moreover, if *Hughes* stands for the proposition that only state proprietary activity is excluded from commerce clause review, the decision is also subject to the criticism that the distinction between proprietary and governmental activity has been widely criticized by courts and commentators as being difficult to apply. Among the many cases which have discussed the difficulty of applying the proprietary/governmental distinction in the tort context are Brinkman v. City of Indianapolis, 231 N.E.2d 169, 171 (Ind. App. 1967) ("The governmental-proprietary rule, however, often produces legalistic distinctions that are only remotely related to the fundamental considerations of municipal tort responsibility."); Hack v. City of Salem, 174 Ohio St. 383, 391, 189 N.E.2d 857, 862 (1963) (Gibson, J., concurring) ("[T]he application of the [proprietary/governmental distinction] has caused much difficulty, and in fact the law in this area is a tangle of disagreement and confusion."); Brown v. City of Omaha, 183 Neb. 430, 431, 160 N.W.2d 805, 806 (1968) ("Such distinctions defy logical explanation.").

Among the commentators who have discussed the difficulty of applying the proprietary/governmental distinction, *see* PROSSER, *supra* note 86, § 131, at 979, 982 where he says that:

> [T]he classification of particular functions as governmental or proprietary has proved to be . . . confused and difficult . . . . There is little that can be said for such distinctions except that they exist, that they are highly artificial, and that they make no great amount of sense. Obviously, this is an area in which the law has sought in vain for some reasonable and logical compromise, and has ended with a pile of jackstraws.

See also D. Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325, 325 (1925); E. Fuller and A. Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 443 (1941); J. Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW AND CONTEMPORARY PROBLEMS 214, 219-22 (1942).

[131] 426 U.S. at 808 (emphasis added). The dissent also recognized that the majority seemed to view Maryland as being a purchaser of goods rather than of a service, stating that "the Court concludes[ ] state economic protectionism in 'purchasing' *items* of interstate commerce is not a suspect motive under the Commerce Clause . . . ." *Id.* at 824 (Brennan, J., dissenting) (emphasis added).

[132] See cases cited in note 107 *supra*.

nor for its own end use. Thus, if analyzed in these terms, *Hughes* goes beyond the limitations applicable to the proprietary exclusion in two significant ways, each of which warrants illustration by contrasting the facts of *Hughes* with the traditional elements limiting the proprietary exclusion.

First, as noted earlier, the proprietary exclusion was traditionally applicable only in situations where a State is purchasing items for its private advantage.[133] This private advantage limitation to the proprietary exclusion required that the State, when purchasing, must employ methods and obtain benefits similar to those utilized and obtained by private proprietors when purchasing. That is, the State must be acquiring end use of the item purchased, seeking favorable contract terms, and the like.[134] One corollary of this private advantage limitation is that a government may not directly seek to promote a governmental goal by the act of purchasing *per se*. When a State purchases items for its private advantage, the act of purchasing is correctly characterized as "proprietary" activity even though the ultimate purpose served by the items acquired may be to promote some governmental rather than proprietary state function. Thus, in instances where the article purchased is in turn utilized to promote a governmental end, the purchasing itself is excluded from commerce clause review as being proprietary activity since the State is using proprietary means to accomplish ultimately governmental ends. In these situations, the purchasing is only an *indirect* mechanism effectuating a governmental program or goal. In contrast, the Maryland statute challenged in *Hughes* sought *directly* to promote the State's environmental objectives *by the very act of purchasing*. The purchasing is an integral part of the statutory scheme by which the State's governmental ends are obtained. Therefore, the purchasing, strictly speaking, is not *proprietary* purchasing since Maryland is not using purchasing as an independent mechanism by which the State acts in its private capacity to acquire items needed ultimately to accomplish its public, governmental ends. As a consequence, since the *Hughes* purchasing exclusion seems to be triggered merely by the fact of government purchasing without regard to whether the purchasing is used to promote its private advantage or used directly to promote a governmental goal, the *Hughes* exclusion permits a State to enter the interstate marketplace and purposely disrupt its normal operation in order directly to promote a state governmental goal.

The second way in which *Hughes* goes beyond the limitations of the proprietary exclusion concerns the fact that the proprietary exclusion is applicable only in those circumstances where a State purchases items for its own end use, thereby obtaining legal title to and posses-

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[133] See cases cited in note 100 *supra*. Thus, for example, in *American Yearbook*, set forth at note 109 *supra*, Florida was acting for its private advantage in setting criteria for determining with whom it would contract to purchase printing services and supplies. 339 F. Supp. at 719-20.

[134] See cases cited in note 106 *supra*.

sion of the item purchased.[135] In contrast, by viewing Maryland as a purchaser of goods, as suggested by the *Hughes* majority, it is clear that Maryland is not an end user, since the State is using neither the abandoned vehicles nor the resulting scrap metal. Furthermore, Maryland acquires no legal rights to or possession of the hulks. The Maryland scheme accordingly affects the end use of these hulks only insofar as it redirects the course of purely private ownership and use of these bounty-eligible hulks away from out-of-state residents toward local domiciliaries. Therefore, a second result of the *Hughes* decision is that so long as a State may in some sense be characterized as a purchaser, the State may redirect the course of private ownership of articles of interstate commerce toward in-state businesses and away from their out-of-state competitors without running afoul of the commerce clause.

Summarizing this comparison of the facts in *Hughes* with the elements necessary to the operation of the proprietary exclusion, it appears that if Maryland is treated as a purchaser of services, the *Hughes* decision may constitute merely an implicit adoption of the proprietary exclusion by the Court. Alternatively, if the facts in *Hughes* are interpreted as making the State a purchaser of goods, as suggested by the majority's opinion, then *Hughes* necessarily creates an exclusion to commerce clause review which is broader in scope than the proprietary exclusion. This result flows from the fact that the critical factor for the operation of the *Hughes* exclusion seems to be merely the existence of state activity capable of being characterized as purchasing, while, in contrast, the proprietary exclusion is further predicated on the State acting for its private advantage and end use.[136]

In light of this latter result, although the majority's opinion is cloaked in language which is similar to that employed by courts applying the proprietary/governmental distinction,[137] the use of this distinction in *Hughes* is unjustifiable if Maryland is considered as being a purchaser of goods. Proprietary purchasing activity is definitionally state purchasing for the State's own private advantage and end use.[138] In contrast, *Hughes* seems to exclude state purchasing from review even though the State is not acting for its private advantage and end use, but is instead acting to promote directly its governmental objectives. In these circumstances, Maryland cannot be said to be purchasing in its proprietary capacity. As a result, the Court's decision to exclude such non-proprietary purchasing from commerce clause review cannot be premised on the same rationale under which proprietary purchasing is excluded from commerce clause review, because this would make the analytical distinction between proprietary and governmental activity devoid of any meaning. Accordingly, if the

[135] See text and cases cited at notes 100 & 106 *supra*.
[136] See text at notes 99-107 *supra*.
[137] See text and cases cited at notes 113-20 *supra*.
[138] See text and cases cited at notes 100 & 101 *supra*.

sole aim of the *Hughes* Court is to adopt the proprietary exclusion implicitly, the decision is analytically untenable, since this result leaves the Court in the anomalous position of appearing to adopt the exclusion while simultaneously destroying its analytical basis.

Although *Hughes* may be untenable in terms of merely adopting the proprietary exclusion if Maryland is treated as a purchaser of goods, a possible explanation of the *Hughes* decision is that the Court may have intended to create an exclusion broader in scope than the proprietary exclusion, and to that end was using language similar to the proprietary/governmental distinction only by way of analogy. However, since the proprietary/governmental distinction provides no analytical basis for a broad exclusion encompassing non-proprietary purchasing the underlying rationale for the *Hughes* exclusion of this type of state purchasing from commerce clause review must rest on some other basis.

B. *The "Essential Governmental Functions" Rationale*

Since Maryland's bounty scheme admittedly burdens commerce, the fact that this purchasing is nevertheless excluded from commerce clause review may imply that some countervailing constitutional interest is served by the exclusion, insofar as the exclusion is not premised on the proprietary/governmental distinction. Moreover, since the exclusion inures to the benefit of the States by freeing them from the fetters of the commerce clause in the area of state purchasing, it follows that some constitutionally-protected state right may be involved. By thus narrowing the investigation for the probable rationale underlying the *Hughes* decision to the area of state power under the commerce clause, the relevance of *National League of Cities v. Usery*[139] becomes readily apparent. In *National League of Cities*, the Court held that the commerce clause did not allow federal intrusion into the area of traditional state governmental functions.[140] The significance of *National League of Cities* in this context to the *Hughes* decision is enhanced by Justice Brennan's dissenting comment that *Hughes* may be premised on the same traditional governmental function concept as that set forth by the majority in *National League of Cities*.[141] As noted earlier, if the *Hughes* majority's contention that Maryland is a purchaser of goods is accepted, an alternative rationale for *Hughes* other than the proprietary exclusion is necessary. This fact, coupled with Justice Brennan's comment, requires a careful examination of *National League of Cities*.

National League of Cities involved a commerce clause challenge to the validity of certain amendments[142] to the federally-enacted Fair

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[139] 426 U.S. 833 (1976), *noted in* 18 B.C. IND. & COM. L. REV. 736 (1977).

[140] *Id.* at 852.

[141] *Hughes*, 426 U.S. at 822 n.4 (Brennan, J., dissenting).

[142] *National League of Cities*, 426 U.S. at 836-37. The challenged amendments,

Labor Standards Act.[143] These amendments extended the Act's minimum wage and maximum hours provisions to nearly all persons employed by the States and their political subdivisions.[144] The Court held the amendments invalid insofar as Congress had attempted to regulate the wages and hours of state employees engaged in "traditional governmental functions."[145] The Court reasoned that Congress, notwithstanding its broad power under the commerce clause, could not exercise this power in a manner which impaired the States' ability to function *as States*.[146] This conclusion rested on the Court's determination that the interests of federalism mandated that essential state functions must be free from federal control.[147] The Court drew a distinction, closely analogous to the proprietary/governmental distinction, between "traditional governmental" functions and other governmental activities.[148] In accord with this distinction, the Court held that the commerce clause did not give Congress the power to prescribe the manner in which a State seeks to provide the governmental services which the Court denominated as being "essential" and "traditional,"[149] although Congress did have the power to regulate the wages and hours of those state employees performing other, nontraditional duties.[150]

The Court's determination in *National League of Cities* that con-

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enacted in 1974, amended 29 U.S.C. § 203(d) (1970) to include "public agency" in the definition of an "employer" covered under the Act. Moreover, the definition of "[e]nterprise engaged in commerce or in the production of goods for commerce", *id.* at § 203(s), was amended to include "activit[ies] of a public agency." *Id.* at § 203(s)(5) (1970 and Supp. IV 1974).

[143] *Id.* at §§ 201-219 (1970 and Supp. IV 1974).

[144] *Id.* at §§ 203(d), 203(s)(5).

[145] 426 U.S. at 852.

[146] *Id.* at 845, 852.

[147] *Id.* at 852. The Court noted that under the amendments "Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system' . . . . This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution." *Id.*

[148] *Id.* at 851-52. The Court defined these "traditional governmental functions" as those functions exercised "by the States in their capacities as sovereign governments", *id.* at 852, which comports closely with the usual definition of "governmental" functions in the governmental/proprietary dichotomy. See note 86 *supra*.

[149] 426 U.S. at 852. The Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the commerce clause]." *Id.*

[150] *Id.* at 854 n.18. The Court at this point discussed United States v. California, 297 U.S. 175 (1936), wherein the Court held that congressional legislation under the commerce clause regulating railroads could properly reach a railroad operated by a State. *Id.* at 188-89. The *National League of Cities* Court noted that this decision was "quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18. It is significant that government operation of a transportation system is usually categorized as a "proprietary activity", *see, e.g.*, Tobin v. City of Seattle, 127 Wash. 664, 672, 221 P. 583, 586 (1923).

gressional power under the commerce clause does not extend so far as to allow Congress to restrict a State's choice of the manner in which it decides to provide an essential government service may also provide a partial rationale for the Court's decision in *Hughes*. This possibility takes two alternative forms. First, a State's power to purchase may *itself* be considered an independent essential governmental function when exercised to further a governmental objective. According to this analysis, a State's power to purchase to promote a governmental goal is itself a necessary attribute of State sovereignty similar to the other essential State functions listed by the *National League of Cities* Court. As such, the interests of federalism require that state purchasing for such purposes be free from review under the commerce clause.[151] The second, alternative, rationale for the *Hughes* decision provided by *National League of Cities* is that the latter case may be interpreted as holding that the commerce clause, as either an affirmative grant of power to Congress or as a constraint on state legislation, does not permit federal interference in the *manner* through which a State seeks to pro-

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[151] The analysis that State purchasing, when employed to promote a traditional governmental function, is *itself* a traditional governmental function not subject to review under the commerce clause finds support in the *National League of Cities* Court's statement that:

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

426 U.S. at 845. The Court went on to state that:

> The question we must resolve here, then, is whether these determinations [by the States regarding wages and hours applicable to employees engaged in carrying out traditional governmental functions] are 'functions essential to [the] separate and independent existence [of the States] . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.

Id. at 845-46. If, as the *National League of Cities* Court holds, a State's decision as to the conditions under which it will "purchase" labor in order to promote essential governmental functions is *itself* an essential governmental function such that Congress can not regulate the state's activity in this area, it is only a short step to determine that state "purchasing" of goods, instead of labor, which similarly promotes traditional governmental functions, is likewise an essential state function which the commerce clause does not reach. It is significant that the *National League of Cities* Court, in discussing traditional governmental functions, specifically mentioned "sanitation" as an example. *Id.* at 851. The Maryland bounty program was established to promote environmental cleanliness. According to testimony in Administrator, Motor Vehicle Administration v. Vogt, 267 Md. 660, 299 A.2d 1 (1973), which involved a different aspect of the Maryland bounty scheme, the problem posed by abandoned automobiles "had become a cause for concern in terms of environmental health. There was evidence, for example, that some hulks [had] remained undisturbed so long that they [had] become infested with rodents." *Id.* at 670, 299 A.2d at 6. Therefore, since the bounty scheme promotes a Maryland sanitation goal, which is a traditional governmental function, state purchasing promoting this goal may also be considered a traditional governmental function which would likewise be outside the scope of commerce clause review under the *National League of Cities* rationale.

vide essential governmental services to its citizens.[152] Pursuant to this analysis, Maryland's purchasing under its bounty scheme is not subject to review because purchasing is the mechanism chosen by Maryland through which it seeks to provide the essential governmental service of maintaining a clean environment.[153] While these two alternative theories arising from *National League of Cities* in support of the result reached in *Hughes* are analytically separable, they both provide a rationale for excluding from commerce clause review state purchasing which directly promotes an essential governmental function.

C. *The Proprietary Exclusion and Essential Governmental Function Rationales Combined*

By combining the results of the proprietary exclusion with the results of the essential state functions analysis of state purchasing deduced from *National League of Cities, every* type of state purchasing is excluded from commerce clause review. On one hand, state purchasing for prorpietary purposes is excluded from commerce clause review on the basis of the proprietary exclusion.[154] On the other hand, state governmental, "non-proprietary" purchasing is excluded from commerce clause review under one of the alternative essential governmental function theories provided by *National League of Cities*.[155] Thus, combining these concepts makes the Court's holding in *Hughes* that all state purchasing is excluded from review analytically defensible, although the underlying analytical basis for the purchasing exclusion differs depending upon the purpose animating the state purchasing.

III. CRITICISMS OF THE *HUGHES* PURCHASING EXCLUSION

Regardless of whether *Hughes* is viewed as excluding both proprietary and non-proprietary purchasing from commerce clause review, or whether it is viewed as merely constituting an implicit adoption of the proprietary exclusion, the holding in *Hughes* is vulnerable to criticism on several grounds.

The first criticism is that the decision conflicts with well-reasoned

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[152] The analysis that the commerce clause does not reach the *manner* in which a State seeks to provide an essential governmental function arises from the Court's statement in *National League of Cities* that "Congress [under the Commerce Clause] may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. Following this rationale, it would appear that if Congress in the exercise of its affirmative grant of power cannot prescribe or affect the manner in which States seek to provide essential governmental services, then likewise the commerce clause of its own force fails to prescribe the manner in which a State may permissibly seek to accomplish essential state functions.

[153] See note 152 *supra*.

[154] See text at notes 86-98 *supra*.

[155] See text at notes 142-52 *supra*.

Supreme Court precedent regarding the scope of commerce clause review. Previously, when faced with state action alleged to burden interstate commerce, the Court has subjected *all* such legislation to commerce clause review.[156] In doing so, the Court has observed that "[t]he commerce clause forbids discrimination, whether forthright or ingenious. In each case it is [the Court's] duty to determine whether the statute under attack, whatever its name may be, will in its *practical operation* work discrimination against interstate commerce."[157] The Court has further noted that judicial review of all state action alleged to burden commerce is necessary to achieve the purpose underlying the commerce clause. This purpose, in turn, is to transform the separate States into a national free-trade zone where state boundaries present no obstacles to commerce.[158] Thus, the Court has focused on the effect of the state action on interstate commerce, rather than on the type of state activity involved, in determining whether the statute involved violated the commerce clause.[159] Prior Supreme Court precedent also suggests that arbitrary categories such as "proprietary," "governmental" and "essential State functions" are irrelevant for determining the scope of commerce clause review, since the operation of the commerce clause is triggered by the existence of discrimination against interstate commerce rather than by discriminatory burdens created only by a particular type of state activity.[160] The Court has accordingly pointed out that "[f]ormulas and catchwords are subordinate to [the] overmastering requirement" that one State may not discriminate against the businesses of another.[161] Therefore, in light of these prior cases indicating that the purposes of the commerce clause can only be obtained by applying it broadly to review *any* State activity which burdens commerce, *Hughes,* if interpreted as merely adopting the proprietary exclusion, creates an arbitrary exclusion to

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[156] *See, e.g.,* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71, 381 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[157] Best & Co., Inc. v. Maxwell, 311 U.S. 454, 455-56 (1940) (emphasis added).

[158] Prior Supreme Court cases stating that the purpose of the commerce clause is to create a free trade area within the United States include Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976); H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949); McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

[159] Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 381 (1976); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 376-77 (1964); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). *But cf.* National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (wherein the Court's decision hinged on the type of state activity involved). See text at notes 142-52 *supra.*

[160] See cases cited in note 159 *supra.*

[161] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935). Since Alexandria, in order to obtain the bounty-eligible vehicles, would have to move its operations into Maryland, prior case law suggests that this result on interstate commerce is particularly suspect. In Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970), the Court noted that the practical effect of a State administrator's order was to force respondent company to relocate its business operations in the home State from its current location outside the State. In discussing this effect, Justice Stewart, speaking for a unanimous court, stated that:

commerce clause review that is both unwarranted and contrary to the underlying purpose of the commerce clause.

Furthermore, if *Hughes* creates a broader exclusion to commerce clause review than that created by the proprietary exclusion,[162] the decision is similarly subject to the criticism that it creates an arbitrary exclusion contrary to the purposes animating the commerce clause. Even if *National League of Cities* provides an analytical basis for excluding state purchasing activity which promotes essential state functions, *Hughes* creates an exclusion broader than that required by the considerations of federalism which animated the Court's *National League of Cities* decision. This conclusion stems from the fact that *Hughes* excludes *all* purchasing activity from commerce clause review regardless of whether the state purchasing is for proprietary or governmental ends. Accordingly, even if the *National League of Cities* doctrine is accepted as providing a basis for excluding some state purchasing from commerce clause review, it does not provide an independent justification for excluding proprietary purchasing from review. It is therefore clear that the *Hughes* purchasing exclusion runs counter to prior well-reasoned Supreme Court precedent in the commerce clause area, and accordingly inhibits the free-trade goals inherent in the commerce clause. Moreover, the breadth of the exclusion created by *Hughes* assures that this inhibition will occur even in those instances where no constitutionally-mandated interest in federalism is promoted thereby.

The second criticism to which the *Hughes* purchasing exclusion is vulnerable is that state statutes giving preference to home-state businesses have a potentially significant impact on interstate commerce in light of the expanding economic role the States play in the national economy, both in their governmental and proprietary capacities. Underlying the exclusion of proprietary purchasing activity from commerce clause review is a presumption that preferential state purchasing statutes inherently have a minimal impact on interstate commerce.[163] However, this rationale as to proprietary purchasing was developed in the early part of the twentieth century, when the level of state proprietary spending was indeed rather small.[164] In light of the dramatic increase in state and local spending in the last several de-

> [T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.

Id. See also Toomer v. Witsell, 334 U.S. 385, 403-04, 406 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928).

[162] See text at notes 131-35 *supra*.

[163] See text at notes 97-98 *supra*.

[164] Note, for example, that two of the leading cases in this area, Tribune Printing and Binding Co. v. Barnes, 7 N.D. 591, 75 N.W. 904 and State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258, were decided in 1898 and 1917, respectively.

cades,[165] it is no longer axiomatic that home-state purchasing statutes fail to place a substantial burden on interstate commerce.[166] Therefore, the presumption that preferential purchasing statutes inherently have such a marginal impact as to fail to burden interstate commerce is of dubious factual validity.[167] When the totality of governmental as well as proprietary purchasing is considered, the possible adverse effects preferential state purchasing may have on interstate commerce is indeed substantial, and thus state purchasing should not be totally excluded from commerce clause review.

The third criticism to which the *Hughes* purchasing exclusion is vulnerable is that it allows state purchasing activity to have an adverse effect on the purely private end use of articles of interstate commerce, without subjecting this result to scrutiny under the commerce clause. As the analysis of Maryland as a purchaser of services illustrates, the proprietary exclusion allows States to redirect the course of end use of articles of interstate commerce into the hands of in-state businesses at the expense of out-of-state competitors. A similar result occurs under the analysis of Maryland as a purchaser of vehicles under the amendment, since the legislation involved in *Hughes* concerned state purchasing in which the state was not an end use purchaser of the vehicles. The sole effect of the amendment was to redirect hulks away from Alexandria and other out-of-state processors toward Maryland processors. *Hughes* thus allows States to act in ways which disrupt the normal course of ownership of articles of interstate commerce, so long as its actions can in some fashion be characterized as purchasing.

A likely result of the *Hughes* exclusion is that a State, particularly in times of high unemployment, will be tempted to act in its purchaser capacity to pay a small bounty for goods produced in-state and thereby purposefully redirect interstate commerce away from more efficient out-of-state producers to the "purchasing" State in order to increase employment in the State and to broaden its tax base. As the

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[165] The total amount of direct general expenditures by state and local governments for 1973 was slightly in excess of 181 billion dollars. Statistical Abstract of the United States, 1975.

[166] *See* Note, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 IOWA L. REV. 576, 591-95 (1973), where the author, based on a self-conducted survey and other statistical data, argues that the burden placed on interstate commerce by home-state preference purchasing statutes is significant and that this fact should lead courts to abandon the proprietary exclusion altogether. The total amount of state and local spending, referred to in note 165 *supra*, is particularly significant since the following types of activities have been deemed proprietary: supplying gas, water or electricity; operating ferries, wharves, docks, airports, garages and housing units; constructing an maintaining streets and highways. *See generally*, PROSSER, *supra* note 89, at § 131 at 981; 18 MCQUILLIN, *supra* note 90, § 53.30a at 197-98.

[167] The increasing amount of State and local proprietary activity has already led one court to criticize the proprietary exclusion due to the impact of such activity on interstate commerce. In Garden State Dairies of Vineland, Inc. v. Sills, 46 N.J. 349, 217 A.2d 126 (1966), the New Jersey Supreme Court stated: "in the light of the expanding proprietary activities of the states, [the proprietary exclusion] could prove to be . . . very troublesome . . . and is not to be looked upon with favor." *Id.* at 358, 217 A.2d at 130.

amount of this bounty increases, this redirection of interstate commerce becomes increasingly certain from an economic standpoint. This effect will result in damaging the economies of other States not having similar programs.[168] Therefore, the *Hughes* purchasing exclusion holds the possibility of creating interstate commercial warfare as States compete to create the most favorable mix of "bounties" insulating in-state businesses from out-of-state competition. Yet this result is precisely the situation which the commerce clause was established to prevent, since the goal of the clause is to turn the United States into a free-trade zone where artificial, state-imposed restraints on commerce are not allowed to interfere with the natural operation of the interstate market.[169] In light of such potentially severe ramifications, it therefore seems particularly inappropriate that the *Hughes* Court decided to forego all commerce clause analysis and to hold that the Maryland legislation was not reviewable under the commerce clause.

A fourth criticism to which the *Hughes* purchasing exclusion is vulnerable is that *Hughes* allows a State, in the pursuit of its police power goals, to alter the normal course of private ownership of goods in interstate commerce when acting in its "purchaser" capacity, but is forbidden to achieve the same result on interstate commerce through legislation regulating private conduct enacted in the State's traditional "governmental" role. This result flows from the *Hughes* Court's express acknowledgement that the legislative intention underpinning the Maryland bounty program was to clean up the State's environment.[170] Therefore, as legislation seeking to promote public health and safety, the Maryland act is an exercise of the State's police power.[171] In the past, when confronted with police power enactments alleged to violate the commerce clause, the Court has often held that a police power enactment is subject to review in the same manner as any other legislation.[172] The Court in these cases has reasoned that if a statute is deemed excluded from commerce clause review simply because it is a police power enactment, the commerce clause would not impose any limitations on state action, "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."[173] In contrast to these situations where the Court has held

[168] This result occurs because at some point the amount of the bounty will be greater than any diseconomies resulting from plant relocation, making the choice to remain outside the bounty-conferring state economically irrational.

[169] See text and cases cited at note 160 *supra*.

[170] 426 U.S. at 809. The Court noted that "Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment." *Id.*

[171] *See* Administrator, Motor Vehicle Administration v. Vogt, 267 Md. 660, 675, 299 A.2d 1, 9 (1973), where a Maryland court noted that the statute subsequently involved in *Hughes* was enacted pursuant to the State's police power.

[172] *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

[173] *Id.* at 354.

commerce clause review of police power enactments is appropriate, *Hughes* allows a State to circumvent commerce clause review in situations where the State promotes police power goals by means of state "purchasing." Thus, *Hughes* allows differing commerce clause treatment of similar results merely because the type of state action involved is different. This criticism of *Hughes* is applicable regardless of whether the decision is viewed as simply adopting the proprietary exclusion or as including both proprietary and non-proprietary purchasing. On one hand, if *Hughes* is interpreted as adopting the proprietary exclusion, the decision allows a State to exercise its proprietary purchasing power to promote a police power objective in a manner which redirects the end use of articles of interstate commerce into the hands of in-state businesses at the expense of their out-of-state competitors. On the other hand, if *Hughes* is interpreted as excluding non-proprietary as well as proprietary purchasing, the decision allows a State to intervene directly in the market to promote a governmental objective in its purchaser capacity in a manner which similarly burdens interstate commerce.

The anomaly of this result is highlighted by the *Hughes* Court's indication that the operation of the commerce clause is triggered only by state legislation which both directly prohibits or substantially burdens interstate commerce. Since the practical effect of the 1974 amendment involved in *Hughes* is to require that hulks be processed in Maryland, the *Hughes* purchasing exclusion allows a State to burden interstate commerce to promote police power objectives if it does so in its purchasing capacity, while subjecting exactly the same burden on interstate commerce to commerce clause review if it creates the burden by legislation regulating private behavior. It therefore appears that if Maryland by legislative fiat had required all abandoned automobiles to be processed within Maryland, the Court would have held the legislation to be a proper subject of commerce clause review. Since presumably the commerce clause interest in maintaining a national marketplace remains the same regardless of the manner in which a State interferes with interstate commerce, state purchasing activity should not be accorded the unique position of being totally excluded from commerce clause review.

A fifth criticism of the *Hughes* purchasing exclusion is that the exclusion does not seem susceptible to any limiting principles. The exclusion seems to be triggered simply by the fact of state purchasing, regardless of the degree to which the state activity disrupts interstate commerce. This aspect of the exclusion announced in *Hughes* was particularly troublesome to the dissent, which stated that the exclusion had the possibility of creating the equivalent of a "rampart of customs duties" leading to severe diseconomies in the national market.[174]

There are, however, two possible constructions of the *Hughes* exclusion which would limit the adverse effects of the purchasing ex-

[174] 426 U.S. at 829 (Brennan, J., dissenting).

clusion on interstate commerce. The first possible limitation is suggested by the analysis employed by Justice Stevens in his concurring opinion. Justice Stevens contended that the critical factor in *Hughes* was that the Maryland bounty program *created,* rather than *restricted,* interstate commerce.[175] In doing so, he distinguished between "commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program," and concluded that the situation presented by *Hughes* fell into the latter category.[176] This conclusion led Justice Stevens to determine that *Hughes* was correctly decided since, in his view, the commerce clause does not reach instances in which a State creates new commerce but only applies to situations in which a State disrupts pre-existing commerce.[177] Thus, one limitation to the *Hughes* purchasing exclusion may be that it is triggered only in instances where the State subsidizes a type of business activity which previously did not exist, in order to promote some governmental purpose, but is inapplicable whenever such a subsidy program interferes with the natural operation of a pre-existing interstate market.

Although the Court in the future could apply the limitation suggested by the concurring opinion of Justice Stevens, future use of this suggested limitation would require the Court to ignore three important facts concerning the *Hughes* decision. First, Justice Stevens' assertion that Maryland "created" a market has absolutely no support in the record. Since Alexandria alleged that 40% of its supply of hulks originated in Maryland,[178] the logical inference is that 60% of its supply originated from States in which there were no bounty programs. It is therefore difficult to characterize the interstate market in vehicle hulks as one owing its entire existence to a state subsidy program. Second, Justice Stevens' assertion that Maryland created the market is belied by the majority's note that Alexandria's supplies from non-Maryland sources increased significantly after the effective date of the 1974 amendment.[179] Third, no support can be found for Justice Stevens' position in the broad language employed by the majority, which seemingly excludes *all* state purchasing from commerce clause review.

A second possible limiting principle to the application of the *Hughes* purchasing exclusion is suggested by Justice Brennan's dissent. Justice Brennan intimated that *Hughes* may be limited to instances in which a State is "truly regulating matters of local concern respecting its environment and there is as a practical matter an absence of 'rea-

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[175] *Id.* at 815 (Stevens, J., concurring).

[176] *Id.* (Stevens, J., concurring).

[177] *Id.* at 817 (Stevens, J., concurring).

[178] Appellee's Brief at 18. The figure is for 1974.

[179] 426 U.S. at 801 n.11. The Court noted that in the six months following the effective date of the amendment, the number of bounty-eligible vehicles delivered to Alexandria declined by 31.8% "at a time when appellee's figures showed an *increase* of 11.9% in the number of vehicles supplied from non-Maryland sources." *Id.* (emphasis in original).

sonably nondiscriminatory alternatives, adequate to conserve legitimate local interests.' "[180] However, this suggestion appears to be untenable on two grounds. First, as Justice Brennan admitted, there is no inference in the *Hughes* majority opinion that the purchasing exclusion is limited to such circumstances.[181] Secondly, the district court held that the 1974 amendment violated the commerce clause precisely because there were, in fact, alternative means available to Maryland which were less burdensome to interstate commerce by which the State could promote its legitimate environmental objectives.[182]

In light of these considerations, it appears that both of the possible limitations to the *Hughes* purchasing exclusion suggested by the opinions in *Hughes* seem to be untenable, and thus the development of limiting principles to this exclusion must await future Supreme Court pronouncements on the scope of the purchasing exclusion. Since searching the various aspects of the decision fails to reveal any sure limiting principles, *Hughes,* as it currently stands, provides a mechanism through which States may circumvent the restraints of the commerce clause by acting as a purchaser to promote governmental goals in a manner which creates a burden on interstate commerce, rather than by seeking to promote these governmental goals through regulation of private behavior which, if burdensome to interstate commerce, would be subject to commerce clause review.

CONCLUSION

Hughes v. Alexandria Scrap Corp. constitutes an unwarranted departure from the oft-stated concept that the goal of the commerce clause is to weld the United States into an integrated economic unit where state boundaries present no impediment to commerce. By creating a broad exclusion to commerce clause review whenever a State engages in "purchasing" activity, the Court has potentially created a device by which the States can frustrate this goal of economic integration. The commerce clause operates in an area where the interests of the federal and state governments frequently collide. The importance of these interests on both sides requires continual accommodation. Therefore, in the future, the Court should reject the summary approach taken in the *Hughes* decision. Whenever state legislation is alleged to burden interstate commerce, the Court should

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[180] *Id.* at 829 (Brennan, J., dissenting).

[181] *Id.* In discussing the lack of limiting principles in the majority's opinion, Justice Brennan stated that:

> The Court fails to search for such limiting circumstances and shuts off analysis merely because of the form of the state regulation, thus effectively 'immun[izing]' state 'statutes . . . requiring that certain kinds of processing be done in the home State before shipment to a sister State,' . . . so long as the mode of regulation may be characterized as the state functioning as a 'purchaser.' *Id.*

[182] 391 F. Supp. at 63.

make its determination only by carefully weighing the significance of the burden placed on interstate commerce against the benefit such legislation provides for the State.

WILLIAM L. THORPE

Environmental Law—Water Pollution Remedies—Application of Federal Common Law of Public Nuisance to Intrastate Stream Pollution—*Committee for Consideration of Jones Falls Sewage System v. Train.* [1] The Committee for the Consideration of the Jones Falls Sewage System, together with private individuals and several neighborhood associations, brought suit in federal district court against the United States Environmental Protection Agency (EPA), various individuals and state, municipal, and county agencies[2] to halt the discharge of sewage into the Jones Falls Stream[3] from the local sewage system treatment plant.[4] The plaintiffs alleged that substantial amounts of untreated raw sewage were flowing into the stream as a result of the insufficient capacity of the treatment plant, causing unacceptable levels of coliform and fecal bacteria in the stream.[5] The suit was intially brought under the citizen suit provision of the Federal Water Pollution Control Act Amendments of 1972,[6] which permits citizens to sue any person who has violated the effluent standards established under the Act.[7] The plaintiffs sought injunctive relief

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[1] 539 F.2d 1006 (4th Cir. 1976) (*en banc*).

[2] 375 F. Supp. 1148, 1149 (D. Md. 1974). The following defendants were named in addition to Russell Train, the Administrator of the United States Environmental Protection Agency: F. Pierce Linaweaver, individually and as Director of the Baltimore City Department of Public Works; Mayor and City Council of Baltimore City; C. Elmer Hoppert, Jr., individually and as Buildings Engineer for Baltimore County; and County Executive and County Council of Baltimore County. *Id.* The court later permitted Carl M. Freeman, Trustee, Carl M. Freeman Associates, Inc., and Ralph DeChiaro Enterprises, Inc. to intervene as defendants. 387 F. Supp. 526, 527 (D. Md. 1975).

[3] 375 F. Supp. at 1149. From its origin in Baltimore County the Jones Falls Stream flows through parts of the City of Baltimore, into the Patapsco River, and ultimately into Chesapeake Bay via the Baltimore Harbor. *Id.*

[4] 375 F. Supp. at 1149.

[5] Plaintiffs alleged that in 1973 the plant's capacity was exceeded by three million gallons of sewage per day. 539 F.2d at 1010 (Butzner, J., dissenting).

[6] 33 U.S.C. §§ 1251 *et seq.* (Supp. V 1975).

[7] 33 U.S.C. § 1365 (Supp. V 1975), the citizen suit provision, confers jurisdiction on the district courts. Section 1365(a) provides:

> (a) Authorization; jurisdiction.
>
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or