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NOTES

THE MARKET PARTICIPANT TEST IN DORMANT COMMERCE CLAUSE ANALYSIS—PROTECTING PROTECTIONISM?

The Supreme Court's traditional analysis of state actions under the dormant commerce clause[1] has undergone two important modifications over the past decade.[2] In the first, the Court established a rule under which certain state actions that are within the scope of the dormant commerce clause may be deemed per se invalid, without inquiry into the extent to which the challenged state action burdens interstate commerce or furthers legitimate local objectives.[3] In the second, the Court fashioned a threshold inquiry to determine whether state action constitutes "market participation,"[4] in which case it lies outside the scope of commerce clause scrutiny even if it burdens interstate commerce.[5] Thus, the two developments place certain state actions beyond the traditional reach of the clause and cause others to be subjected to less scrutiny than provided for in traditional analysis.

As a result of these two developments, certain state actions taking the form of market participation will be summarily upheld that would, in

1. *See infra* note 15 and accompanying text (outlining the origin of the dormant commerce clause).

2. *See infra* section I.

3. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978); *see also infra* notes 24-40 and accompanying text.

4. The concept of market participation first appeared in a Supreme Court case in Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808 (1976), where it referred to "the entry by the State itself into the market as a purchaser . . . of a potential article of interstate commerce." In subsequent cases, the Court has expanded the term "market participation" to include all state proprietary action, *see* Reeves, Inc. v. Stake, 447 U.S. 429, 433 (1980) (affirming holding of district court that *Alexandria Scrap* allows a state to act in a proprietary capacity without violating the commerce clause), and compared it to "the long recognized right of a trader . . . freely to exercise his own independent discretion as to parties with whom he will deal," White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 207 n.3 (1983) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

5. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809-10 (1976); *see also infra* notes 41-162 and accompanying text.

a different form, be summarily struck down as invalid per se.[6] The per se rule summarily invalidates state actions that enact trade barriers to interstate commerce.[7] Current analysis under the market participant test allows those obstructions that are classified as market participation to stand.[8] This note begins by describing the origin of this anomaly.[9] It then discusses the Supreme Court's extension of the privileges and immunities clause to reach state actions that implement economic protectionism[10] but avoid commerce clause strictures.[11] Next, the note explains why the privileges and immunities clause has only limited usefulness in reaching such cases.[12] The note proposes modifications of both the market participant test and the per se rule of invalidity that

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6. One such case is White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983), discussed *infra* at notes 110-128 and accompanying text.

7. *See infra* notes 24-40 and accompanying text.

8. *See infra* notes 41-162 and accompanying text.

9. *See infra* notes 15-162 and accompanying text.

10. The term "economic protectionism" has been used by the Court to describe attempts by states to advance or protect the economic interests of its own citizens by restricting the movement of articles of interstate commerce either into or out of the state. *See, e.g.,* City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978). This note employs this traditional meaning of the term.

The dormant commerce clause's proscription of economic protectionism is derived from the constitutional principle that "the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 532 (1949). "The clearest example of [protectionism] is a law that overtly blocks the flow of interstate commerce at a State's border." City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

Some protectionist state measures block the flow of commerce into a state; others attempt to prevent the flow of commerce out of the state. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), illustrates an example of the first type. In that case, the Court invoked the dormant commerce clause to strike down a New York statute designed to insulate resident milk producers from out-of-state competition. *Id.* at 522. The *Baldwin* Court stated:

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another State or the labor of its residents.

Id. at 527.

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), *quoted with approval in* Hughes v. Oklahoma, 441 U.S. 322, 329-30 (1979), illustrates a state's impermissible attempt to obstruct outgoing commerce. The Court in *West* made clear that a state could not, consistent with the dictates of the commerce clause, jealously guard its natural resources (gas, in this case) from export:

> If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. . . .[E]mbargo may be retaliated by embargo, and commerce will be halted at state lines. . . . [Congress's power over interstate commerce] is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.

221 U.S. at 255.

11. *See infra* notes 163-200 and accompanying text.

12. *See infra* notes 201-17 and accompanying text.

would exempt from commerce clause scrutiny only those state actions not motivated solely by economic protectionism and would subject to heightened scrutiny state regulations that discriminate against interstate commerce.[13] Finally, the note discusses *Gould, Inc. v. Wisconsin Department of Industry, Labor & Human Relations,*[14] which the Supreme Court will decide this term. *Gould* highlights the existing inadequacy of dormant commerce clause analysis. Application of the proposed modifications to *Gould* illustrates the benefits of these proposed revisions.

I. THE DEVELOPMENT OF MODERN DORMANT COMMERCE CLAUSE ANALYSIS

A. *Traditional Dormant Commerce Clause Analysis.*

The Supreme Court developed dormant commerce clause doctrine as a check on the power of the states to pass laws that burdened interstate commerce.[15] Justice Marshall first coined the term "dormant" to describe the power of the clause, even in the absence of conflicting federal

13. *See infra* notes 218-40 and accompanying text.

14. No. 84-1484, *prob. juris. noted,* 53 U.S.L.W. 3824 (U.S. May 20, 1985); *see also infra* notes 241-62 and accompanying text.

15. The dormant commerce clause is one of "the great silences of the Constitution." H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949). The Constitution does not expressly prohibit state regulation of interstate commerce; instead, it grants affirmative power to Congress to regulate commerce "among the several States," U.S. CONST. art I. § 8, cl. 3. In a set of early cases, the Supreme Court read into this provision a negative implication, based on the premise that "[w]henever the terms in which a power is granted to congress, or the nature of the power, require[s] that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it," Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819) (Marshall, C.J., construing bankruptcy clause, U.S. CONST. art. I, § 8, cl. 4, granting to Congress power to create bankruptcy laws). Justice Marshall first clearly implied that the commerce clause gave Congress exclusive power that precluded state interference with interstate commerce in dictum in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824) (finding persuasive the argument that "the word 'to regulate' implies in its nature, full power over the thing to be regulated [i.e., commerce]; it excludes, necessarily, the action of all others [i.e., the states] that would perform the same operation on the same thing").

As strong an advocate of centralized national power as he was, however, *see generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426-29 (1819) (upholding constitutionality of the national bank); Frankfurter, *John Marshall and the Judicial Function,* 69 HARV. L. REV. 217, 221 (1955), Marshall recognized that a state should be permitted, in pursuing a legitimate state goal, to take action that affected interstate commerce. *See, e.g.,* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). In *Willson,* Delaware authorized the draining of a swampy, navigable creek to improve health and the property value of adjoining land. *See id.* at 251. Acknowledging that this act would have violated the commerce clause "[i]f Congress had passed any act which bore upon the case . . .," *id.* at 252, Marshall nonetheless concluded that in the absence of preemptive federal legislation, the state's act was not "repugnant to the power to regulate commerce in its dormant state." *Id.* at 253.

statutes, to preempt state regulation affecting interstate commerce.[16] The Court used this judicial creation[17] to prohibit state regulation in those areas where federal rather than state legislation was more appropriate. In this way, the Court promoted the framers' intent to ensure a nationwide economy in which all producers had free access to all consumers, unobstructed by local protectionism.[18]

In its traditional balancing approach to dormant commerce clause cases, the Supreme Court focused not on the *form* but on the *effect* of the

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Marshall's successor, Chief Justice Taney, believed that the commerce clause had no implicit power to invalidate state law, but only functioned to preempt such law when it conflicted with valid federal legislation enacted under the clause. *See, e.g.*, The License Cases, 46 U.S. (5 How.) 504, 574 (1847) (separate opinion) ("[T]he power of Congress over [commerce] does not extend further than the regulation of commerce with foreign nations and among the several States; . . . beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it . . . ."). Thirty-five years earlier, Chancellor Kent expressed a similar view in Livingston v. Von Ingen, 9 Johns. 507, 578 (N.Y. 1812). For a full discussion of the debate between those who, like Marshall, read negative implications into the commerce clause and those who, like Taney and Kent, supported concurrent state and federal jurisdiction over commerce, see Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 565-88 (1936).

The Supreme Court first invalidated a state statute under the dormant commerce clause in The Passenger Cases, 48 U.S. (7 How.) 283, 559 (1849) (invalidating New York and Massachusetts laws requiring that ship masters carrying sick and poor passengers into port post bonds for those that would need medical attention or might become dependent on the state). In the final seminal case, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 317-19 (1851), the Court held that the dormant commerce clause only operated to restrict state regulation of those aspects of interstate commerce so national in character as to require uniformity. This practical approach—which distinguished conditions that could best be addressed by local response from those in which uniformity was required to assure the unimpeded flow of interstate commerce—accounts for the characterization of *Cooley* as the "bridge" to modern commerce clause analysis. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-4, at 324-25 (1978); *see also infra* note 19.

16. Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 253 (1829).

17. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) (restraints on state power to pass laws affecting interstate commerce in absence of federal legislation "appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose").

18. The Court has often justified the development of an implicit constitutional restriction on the power of states to restrict commerce as effectuating the basic purpose of the commerce clause:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units . . . . [W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.

Id. at 623 (citations omitted).

More broadly, the Court has stated that the entire Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). To this end, "no other federal power [than over commerce] was so universally assumed to be necessary" to prevent fractiousness among the states in competition for business. *See* H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 532-34 (1949).

challenged state action.[19] It weighed the effect of burdening interstate commerce against the effect of furthering legitimate state goals.[20] As part of this balancing of burden and benefit, the Court considered whether the subject matter of the state action was one better controlled at the local level,[21] and whether local objectives could be achieved in

19. The balancing approach in its original form was applied formalistically: "direct" burdens on commerce were invalid; "indirect" burdens were permissible. *See, e.g.,* Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925) (distinguishing "incidental" and "direct" restraints). This apparently rigid labelling of state regulations often masked the more fluid balancing of national and local interests that underlay application of the labels. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 273 (2d ed. 1983). Advocacy of a more explicit balancing approach seems to have begun with Justice Stone's dissent in Di Santo v. Pennsylvania, 273 U.S. 34, 43 (1927). J. NOWAK, R. ROTUNDA & J. YOUNG, *supra,* at 274-75. In *Di Santo,* the majority invalidated Pennsylvania's law licensing sellers of steamboat tickets by characterizing it as a direct interference with foreign commerce. *Di Santo,* 273 U.S. at 37. In his dissent, Justice Stone urged that the Court abandon the unhelpful direct/indirect distinction in favor of a more realistic approach:

> [T]he traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions . . . we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.
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> . . . [I]t seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.

Id. at 44 (Stone, J., dissenting).

Stone's dissent became the basis for an influential article by Professor Noel T. Dowling, *Interstate Commerce and State Power,* 27 VA. L. REV. 1, 20-21 (1940), who elaborated Justice Stone's call to the Court to adopt an explicit balancing approach. J. NOWAK, R. ROTUNDA & J. YOUNG *supra,* at 274-75. The Court did so, beginning with Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). In that case, the Court struck down an Arizona law limiting the number of passenger and freight cars that trains could pull. *Id.* at 775-80, 783-84. It posed as the "decisive" question "whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts." *Id.* at 775-76.

20. *See, e.g.,* Lewis v. BT Inv. Managers, 447 U.S. 27, 36 (1980) (acceptable scope of state regulation for commerce clause purposes is often matter of "delicate adjustment"); Pike v. Brnce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960) (in determining whether state regulation has been preempted, courts must keep in mind that the Constitution does not cut off all state regulation of health and safety that has an indirect effect on interstate commerce); Southern Pac. Co. v. Arizona, 325 U.S. 761, 768-69 (1945) (recognizing the "infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accomodation of the competing demands of the state and national interests involved").

21. *See, e.g.,* Southern Pac. Co. v. Arizona, 325 U.S. 761, 767-70 (1945) (states have broad discretion over matters of local concern but none in matters requiring nationwide uniformity).

ways less burdensome to interstate commerce.[22] If the burden on commerce was sufficiently slight in comparison to the benefit to local concerns, the statute was upheld.[23]

B. *The Per Se Rule of Invalidity.*

The Supreme Court recently abandoned the traditional balancing approach in cases "where simple economic protectionism is effected by state legislation" and adopted a "virtually *per se* rule of invalidity."[24] Before the adoption of this new approach in *City of Philadelphia v. New Jersey,*[25] the Court subjected statutes that on their face treated interstate commerce differently from intrastate commerce to the traditional balancing approach, permitting a state to advance reasons for the differential treatment.[26] Under the per se rule, credible, legitimate state purposes for discriminating against interstate commerce are unavailing.[27]

The Court in *City of Philadelphia* struck down a New Jersey statute prohibiting the importation of most solid or liquid wastes originating or collected outside the state.[28] New Jersey strenuously argued that it enacted the law solely to protect the state's environment while additional landfills and alternative disposal methods were developed.[29] The Court deemed irrelevant whether the state's ultimate purpose was to protect its environment, or, as the plaintiffs maintained, to stabilize the cost of waste disposal for New Jersey residents.[30] The Court flatly concluded

22. *See, e.g.,* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951) (in assessing a statute, the issue is whether the discrimination against out-of-state commerce "can be justified in view of the character of the local interests and the available methods of protecting them").

23. *E.g.,* South Carolina State Hwy. Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (upholding regulation limiting the weight and width of vehicles using state's highways).

24. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

25. *Id.*

26. *E.g.,* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951), discussed *infra* note 234; *see also* cases cited *infra* note 34, all of which treat discriminatory state action with the traditional balancing approach.

27. The Supreme Court first coined the phrase "per se rule of invalidity" in Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970), in a narrower context. It classified as "virtually *per se*" invalid "state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* It is clear that although such measures may further legitimate state interests, their primary purpose is to protect a state's own inhabitants from out-of-state competition. *See id.* at 146; H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 538 (1949). The per se rule articulated in *City of Philadelphia* expanded the concept of what is per se impermissible to include statutes that are not primarily intended to benefit the economic interests of state residents, but have that effect. *See infra* notes 32-35 and accompanying text.

28. *City of Philadelphia,* 437 U.S. at 618.

29. *Id.* at 625 (quoting the finding of the New Jersey legislature, set out in the challenged statute, N.J. STAT. ANN. § 13:1I-10 (West 1978), that "the public health, safety and welfare require that the treatment within this State of all wastes generated outside of the State be prohibited").

30. *Id.* at 626-27.

"[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[31]

The per se rule is broadly worded to reach statutes that discriminate against out-of-state commerce either intentionally—for protection of local economic interests—or in effect.[32] To the extent that the holding in *City of Philadelphia* would invalidate statutes passed with the intent of furthering legitimate local objectives,[33] the per se rule goes beyond earlier cases cited in the opinion, all of which struck down statutes with the impermissible aim of protecting local industry from out-of-state competition or enhancing local employment.[34] Supreme Court cases after *City of Philadelphia* have re-emphasized that regardless of their purpose, statutes that discourage the flow of interstate commerce without burdening

31. *Id.* The qualification in the wording of the virtually per se rule, allowing for discrimination against items of interstate commerce for reasons apart from their origin, appears to refer to quarantine laws. *See id.* at 628-29. Quarantine laws have been upheld because they "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." *Id.* at 629. Thus, the qualification of the per se rule is entirely consistent with earlier decisions of the Supreme Court recognizing that "a state may regulate the importation of unhealthy swine or cattle or decayed or noxious foods," Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 525 (1935) (citations omitted). *But see The Supreme Court, 1977 Term,* 92 HARV. L. REV. 57, 62 (1978) (suggesting that Court's qualification is not limited to quarantine laws and leaves door open for the balancing test under circumstances that are still undefined).

32. *See City of Philadelphia,* 437 U.S. at 626 ("[T]he evil of protectionism can reside in legislative means as well as legislative ends.").

33. *See supra* text accompanying note 31. The Court in *City of Philadelphia* made no finding that the challenged statute was passed with protectionist intent. Indeed, the absence of a particularized local benefit was implied by the fact that New Jersey landfill operators were among the plaintiffs challenging the law. *See City of Philadelphia,* 437 U.S. at 619.

34. *See id.* at 624, 627. The Court cited the following cases in support of the "virtually per se rule of invalidity": H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533-40 (1949) (denial to Massachusetts milk distributor of permission to acquire additional facilities in New York held unconstitutional because it was intended to suppress out-of-state competition and it impermissibly burdened interstate commerce; Court distinguished permissible purpose of protecting health and safety of citizens from impermissible purpose of burdening flow of interstate commerce for its own citizens' economic advantage); Toomer v. Witsell, 334 U.S. 385, 403-06 (1948) (statute requiring that shrimp caught in state be packed there impermissibly burdened flow of interstate commerce out of state for purpose of enhancing state employment); Edwards v. California, 314 U.S. 160, 173-77 (1941) (criminal statute punishing transportation into state of indigents, enacted to protect state financial resources, impermissibly discriminated against interstate commerce); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521-26 (1935) (statute requiring that milk brought from out of state be sold at minimum price set by state, designed to protect state farmers from competition, impermissibly discriminated against interstate commerce); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 12-14 (1928) (statute requiring that shrimp caught in state be processed there, designed to benefit local processors, impermissibly blocked flow of items of interstate commerce out of state); Buck v. Kuykendall, 267 U.S. 307, 315-16 (1925) (denial by state of permit to operate auto stage line, based on desire to discourage out-of-state competition, impermissibly burdened interstate commerce).

intrastate commerce to the same extent are per se invalid.[35]

Following the broad rule of *City of Philadelphia,* the traditional test, in which the Court balances the extent to which a state action burdens interstate commerce against the extent to which it benefits local concerns, will be applied only when the statute regulates evenhandedly. To fall within this category, statutes may only burden interstate commerce and out-of-state businesses to the same extent as they do intrastate commerce and in-state businesses.[36] For example, in *Minnesota v. Clover Leaf Creamery,*[37] the Court upheld Minnesota's ban on the retail sale of milk in plastic, nonreturnable containers. Finding that the ban affected commerce in milk to the same extent whether the milk originated inside or outside the state, and thus burdened commerce evenhandedly,[38] the Court applied a balancing approach. It characterized the burden on interstate commerce as slight and the benefit to local conservation efforts as significant.[39] Important in its decision to sustain the law was the absence of less burdensome alternatives that would effectively achieve legitimate state goals.[40]

35. *See, e.g.,* Lewis v. BT Inv. Managers, 447 U.S. 27, 29, 36-37, 44 (1980) (striking down Florida statute restricting ownership of in-state financial services by out-of-state banks, and finding that state's interest in protecting local consumers, though permissible, was irrelevant in light of *effect* of statute, which was to discriminate against interstate commerce).

36. *See City of Philadelphia,* 437 U.S. at 624; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (limiting use of balancing approach to evenhanded regulations of commerce).

Two reasons justify the Court's differential treatment of regulations that evenhandedly burden interstate and intrastate commerce. First, because the burden of evenhanded regulation falls on local economic interests as well as on other states' economic interests, affected voters within the state can use the state's own political processes to check unduly burdensome regulations. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978); *see* South Carolina Hwy. Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938) (fact that state highway regulations "affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse"). Second, the extent to which a statute exempts state economic interests from the burden of regulation often casts doubt on the strength or existence of a permissible objective. *See* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675-78 (1981). For example, an Iowa statute generally prohibited trucks longer than fifty-five feet from using its interstate highways. *See id.* It excepted, however, those trucks travelling to Iowa's border cities, and those carrying livestock. Given the breadth and the nature of the exceptions, the Court doubted the usefulness of the statute in furthering Iowa's articulated purpose of decreasing highway aecidents and road wear. *See id.*

37. 449 U.S. 456, 458, 470 (1981).

38. *Id.* at 471-72. Similar to *City of Philadelphia,* 437 U.S. at 626, the presence among the plaintiffs of Minnesota dairies and plastic bottle producers indicated the absence of protectionist effect, and—if one supposes that protectionist measures often originate with special interest groups—protectionist intent. *See Clover Leaf,* 449 U.S. at 458 n.1; *see also supra* note 33 and accompanying text. Unlike *City of Philadelphia,* the *Clover Leaf* Court found no discriminatory impact in Minnesota's plan. *Clover Leaf,* 449 U.S. at 471-72.

39. *See Clover Leaf,* 449 U.S. at 472-73.

40. *See id.* at 473-74.

C. *The Market Participant Test.*

With its articulation of the market participant test in 1976, the Supreme Court added as a threshold determination whether the challenged state action was the kind of action with which the commerce clause was concerned or, instead, merely "market participation" by the state, and thus beyond the reach of the clause.[41] In contrast to the traditional balancing approach,[42] the market participant test centers on the *form* rather than on the *effect* or *intent* of the state action. Action by the state resembling that of a private trader constitutes market participation.[43] The Court first articulated this test in *Hughes v. Alexandria Scrap Corp.*[44] Subsequently, the Court has elaborated the market participant

41. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810, 814 (1976).

42. *See supra* notes 19-23 and accompanying text.

43. *See supra* note 4.

44. 426 U.S. 794, 810 (1976). The notion that certain types of state actions should be differentiated for the purpose of determining whether the action constitutes an impermissible burden on interstate commerce had arisen in earlier state court decisions and in one lower federal court case. In Reeves, Inc. v. Stake, 447 U.S. 429, 437 n.9 (1980), the Court cited the following state cases to support its proposition that "*Alexandria Scrap* does not stand alone": City of Phoenix v. Superior Court, 109 Ariz. 533, 535, 514 P.2d 454, 456 (1973) (en banc) (upholding against commerce clause challenge state statute giving preference to bids of contractors paying state property taxes); Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 287, 255 P.2d 604, 607 (1953) (earlier case upholding same statute considered in *City of Phoenix*; "the state, in contracting for the expenditure of tax money, had a reasonable basis for granting a five percent preference to contractors who, through the payment of taxes for two years, have made a contribution to the funds from which they are to reap a benefit"); City of Denver v. Bossie, 83 Colo. 329, 333-34, 266 P. 214, 216-17 (1928) (en banc) (upholding against commerce clause attack municipal ordinance requiring that all stone used in public works be worked, dressed, or carved within the city); *Ex parte* Gemmill, 20 Idaho 732, 741-42, 119 P. 298, 301-02 (1911) (statutes requiring that state and county printing, binding, and stationery work be done within state did not violate commerce, due process, or equal protection clauses; the state "acting [for the people] ha[s] a right to enter into contracts and make purchases"); People *ex rel.* Holland v. Bleigh Constr. Co., 61 Ill. 2d 258, 275-76, 335 N.E.2d 469, 479-80 (1975) (holding unconstitutional portions of Illinois statute limiting public works contracts to contractors who used only Illinois laborers, but finding that, in general, state can give preference to its residents on public works, as distinct from regulating private industry); Dixon-Paul Printing Co. v. Board of Pub. Contracts, 117 Miss. 83, 86, 77 So. 908, 908-09 (1918) (upholding against fourteenth amendment challenge state statute allowing bids for public printing contracts only by state residents and absolutely preferring resident printing plants in awarding such contracts); State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 265, 76 So. 258, 261 (1917) (upholding against equal protection, privileges and immunities, and commerce clause challenges a state statute requiring that county supervisors contract only with state residents for blank books and stationery); Allen v. Labsap, 188 Mo. 692, 699-700, 87 S.W. 926, 928 (1905) (rejecting fourteenth amendment, privileges and immunities, and commerce clause challenges in upholding municipal ordinance requiring that rock and granite used in public buildings be dressed within state); Hersey v. Neilson, 47 Mont. 132, 148-49, 131 P. 30, 34 (1913) (upholding against commerce clause attack a statute requiring counties to contract only with in-state suppliers for paper products; "[t]he state speaks through its legislature, and in our opinion has the same right that any individual citizen has to declare that it will procure its supplies . . . from a [state] concern"); Luboil Heat & Power Corp. v. Playdell, 178 Misc. 562, 564, 34 N.Y.S.2d 587, 591 (Super. Ct. 1942) (upholding against commerce clause challenge a resolution by city Board of Estimates giving preference to state suppliers in awards of contracts for all city

test in *Reeves, Inc. v. Stake,*[45] *White v. Massachusetts Council of Construction Employers,*[46] *United Building & Construction Trades Council v. Mayor of Camden,*[47] and *South-Central Timber Development, Inc. v. Wunnicke.*[48] In all but the last of these cases, the Court summarily upheld state activity that, because it discriminated against interstate commerce, would otherwise have been per se invalid under *City of Philadelphia.*[49]

1. Hughes v. Alexandria Scrap Corp. In *Alexandria Scrap,* the Court addressed for the first time "the question whether, when a state enters the market as purchaser for end use of items in interstate commerce, it may [restrict] its trade to its own citizens or businesses within the state."[50] The statutes attacked were designed by Maryland to remove abandoned autos from state highways.[51] Maryland paid a bounty to licensed scrap processors for the destruction of those auto hulks formerly titled in the state.[52] For the scrap processors to receive the bounty, however, they had to obtain specific documentation from the wrecker who

purchases); Tribune Printing & Binding Co. v. Barnes, 7 N.D. 591, 597, 75 N.W. 904, 906 (1898) (upholding against commerce clause attack statute requiring counties to contract only with in-state suppliers of paper products).

Reeves cites, as a federal case consistent with its holding, American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.,* 409 U.S. 904 (1972). In *American Yearbook,* a district court dismissed an action by a yearbook manufacturer challenging the constitutionality of a Florida statute requiring that certain classes of state contracts for printing be performed within the state. *See id.* at 719-20, 720 nn.1-4, 725. The plaintiff attacked the statute as a violation of the commerce clause and the equal protection clause of the fourteenth amendment. *See id.* at 720. In rejecting the equal protection challenge, the district court characterized the award of public contracts as a proprietary function. *Id.* at 721 (citing Heim v. McCall, 239 U.S. 175 (1915), and Atkin v. Kansas, 191 U.S. 207, 222-24 (1903) (upholding state's right to restrict number of hours those employed on city projects could work)). When exercising a proprietary power, a state "is subject to no more limitation than a private individual or corporation would be in transacting the same business." *Id.* The district conrt distinguished, for purposes of commerce clause analysis, instances in which a state statute impermissibly burdened interstate commerce through regulation of private industry, citing as examples Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), and Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). *American Yearbook,* 339 F. Supp. at 724-25.

45. 447 U.S. 429 (1980).

46. 460 U.S. 204 (1983).

47. 104 S. Ct. 1020 (1984).

48. 104 S. Ct. 2237 (1984).

49. *See infra* notes 24-40 and accompanying text.

50. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 821 (1976) (Brennan, J., dissenting) (quoting majority opinion, *id.* at 808); *see id.* at 821 n.3 (Brennan, J., dissenting) (noting that the Court had summarily affirmed American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.,* 409 U.S. 904 (1972)); *cf.* Heim v. McCall, 239 U.S. 175, 190-91 (1915) (rejecting fourteenth amendment and commerce clause challenges to New York City ordinance preferring New York citizens in city public works).

51. *Alexandria Scrap,* 426 U.S. at 796.

52. *Id.* at 797.

supplied the junked cars and submit it to the state.[53] The state required more complete documentation from out-of-state processors than it did from in-state processors,[54] apparently because the legislature had concluded that cars brought to out-of-state processors were less likely to have come from the sides of Maryland roads.[55] Reversing the district court decision,[56] the Supreme Court held that the bounty program violated neither the fourteenth amendment equal protection clause[57] nor the commerce clause.[58]

In upholding Maryland's program, the Court reasoned that not "every action by a state that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden."[59] Although the Court recognized that the effect of the program was to reduce the movement of junked cars interstate,[60] discriminating between in-state processors and out-of-state processors in the purchase of autos was not "the *kind* of action with which the Commerce Clause is concerned."[61] Thus, in articulating its new test, the Court emphasized the form, not the effect, of the state activity.

Still, *Alexandria Scrap* did not unequivocally establish the market participant test as one that completely barred further inquiry into the

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53. *Id.* at 798.

54. *See id.* at 800 & n.10, 801.

55. *See id.* at 813-14.

56. Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46 (D. Md. 1975) (three judge panel).

57. The *Alexandria Scrap* court quickly dispensed with an equal protection challenge to Maryland's plan, subjecting it to only minimum scrutiny. *See Alexandria Scrap,* 426 U.S. at 814. The Court determined that the Maryland program, discriminating between resident and nonresident auto processors, bore a "rational relationship to Maryland's purpose of using its limited funds to clean up its own environment." *Id.* (citing Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) (applying the rational relation test to uphold welfare program) and San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (rational relation test applied to differential educational expenditures by the state)). The statutory classification based on residency did not directly further Maryland's goal of eliminating cars left on Maryland highways. It was, instead, based on the assumption that Maryland auto processors were more likely to supply cars abandoned in Maryland than were non-Maryland auto processors. Since no fundamental right was involved, such a classification, dealing with economic matters, did not have to be drawn with precision. *Alexandria Scrap,* 426 U.S. at 813. As long as Maryland's assumption was reasonable, its statutory scheme did not violate equal protection rights, even though some non-Maryland auto processors might be deprived of a right to sell cars that were in fact abandoned in Maryland. *See id.* at 813 (citing Williamson v. Lee Optical Co., 349 U.S. 483, 489 (1955)).

58. *Alexandria Scrap,* 426 U.S. at 810, 814.

59. *Id.* at 805.

60. *See id.* at 803 & n.13. "The practical effect [of Maryland's program] was substantially the same as if Maryland had withdrawn altogether the availability of bounties . . . to licensed non-Maryland processors." *Id.* at 803 n.13.

61. *Id.* at 805 (emphasis added).

effect of the state statute on commerce.[62] The case is susceptible to the interpretation that the Court found no impermissible burden on interstate commerce, and used the term "market participation" to describe a type of activity that affected commerce without impermissibly burdening it.[63] Certainly, several other aspects of the program, related to the state's purpose, were on the Court's mind: Maryland did not create the program as a protectionist measure;[64] it was using limited funds in an effort to clean up the environment;[65] and the complex statutory scheme was a creative exercise of a "[s]tate's right to experiment with different incentives to business."[66] Thus, while purporting to conclude as a threshold matter that Maryland's action was beyond the scope of dormant commerce clause analysis, the Court subjected the challenged program to many of the balancing considerations employed in traditional dormant commerce clause analysis.[67]

The use of the balancing approach in *Alexandria Scrap* would have been precluded under the per se rule[68] of *City of Philadelphia v. New*

62. The Court contrasts the position of non-Maryland processors with "the position of a foreign business which enters a State in response to completely private market forces to compete with domestic businesses, only to find itself burdened with discriminatory taxes or regulations." *Id.* at 810 n.20.

63. *See id.* at 809-10. As a result of Maryland's bounty program, the flow of auto hulks resting within the state "will tend to be processed inside the State rather than flowing to foreign processors. But no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State." *Id.*

64. *Id.* at 805-06; *cf.* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 42 (1980) ("However important the state interest at hand, 'it may not be accomplished by discriminating against articles of commerce coming from outside the State . . . .' ") (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978)); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (commerce clause reflects "a central concern of the Framers that . . . the new Union would have to avoid the tendencies toward economic Balkanization"); City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (Court has consistently held invalid state actions "isolating the state from the national economy"); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935) ("[O]ne state in its dealings with another may not place itself in a position of economic isolation.").

65. *Alexandria Scrap,* 426 U.S. at 814 (portion of opinion holding that program did not violate equal protection clause); *cf.* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 391 (1978) (upholding state program against privileges and immunities challenge and noting importance of preservation purposes underlying statutory scheme), discussed *infra* note 93 and accompanying text.

66. *Alexandria Scrap,* 426 U.S. at 817 (Stevens, J., concurring).

67. *See, e.g.,* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473-74 (1981) (state has legitimate interest in protecting environment); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 43 (1980) (state has legitimate interest in protecting citizens' financial resources from fraud, although this state interest did not justify burdensomeness of statute in question); Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970) (state has interest in assuring fair financial return to local businesses).

68. *See Alexandria Scrap,* 426 U.S. at 821 (Brennan, J., dissenting) (Court has found this particular burden on interstate commerce to be virtually per se illegal) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970), discussed *supra* note 27).

Jersey.[69] Because the program expressly discriminated against out-of-state commerce, the Court would not have weighed the burden to commerce against the statute's local benefits, but instead would have summarily struck down Maryland's scheme.[70] Therefore, only by finding that the state's action was outside the scope of the dormant commerce clause altogether could the Court have upheld the statute.

Not only did the Court in *Alexandria Scrap* fail to articulate clearly whether the market participant test was a threshold inquiry that could entirely preclude further review, it also left the meaning of the term "market participation" broad and unclear. Although in form Maryland's entry into the marketplace to buy abandoned cars resembled the actions of a private market force,[71] its motive was not typical of a private entity. It bought cars in order to clean up state highways,[72] a motive more frequently associated with governmental than with private enterprise.[73] The Court's preoccupation with form implied that the purpose of the action might be irrelevant to the test.

2. Reeves, Inc. v. Stake. It took the Court's decision in *Reeves, Inc. v. Stake*[74] to remove the market participant test from an ambiguous setting and establish it as a significant restraint on the scope of the dormant commerce clause. The majority opinion, written by Justice Blackmun, achieved this in two ways. First, it firmly asserted that the test is a threshold inquiry that can be dispositive.[75] Second, it confirmed the breadth of the term "market participation" by equating it with any form of "state proprietary action."[76] The Court's elaboration of the test pro-

69. 437 U.S. 617 (1978).

70. *See id.* at 626-27 ("[W]hatever [a state's] ultimate purpose it may not be accomplished by discriminating against articles of commerce . . . .").

71. *See Alexandria Scrap*, 426 U.S. at 809-10 (commerce is not being disrupted by regulation but by market forces, including that exerted by Maryland's participation in the market).

72. *Id.* at 809.

73. *Cf.* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 465 (1981) (legitimate state purpose to remove litter from the environment); Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 388-91 (1978) (power to protect wildlife and natural resources peculiarly within a state's police power).

74. 447 U.S. 429 (1980).

75. *Id.* at 436.

76. *See id.* at 433-34; *see also* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 208-10 (1983).

Courts have been unable to give "principled content" to the concept of state proprietary action. *See* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1014 (1985). Usually courts define it by opposition to state *governmental* action. *See, e.g., id.* at 1013; New York v. United States, 326 U.S. 572, 583 (1946). The Supreme Court has used various criteria for distinguishing proprietary from governmental state actions: how closely the state action resembles that of a private trader, *see, e.g.*, Ohio v. Helvering, 292 U.S. 360, 369 (1934) (state loses its sovereign character when it "enters the market place seeking customers"); South Carolina v. United States, 199 U.S. 437, 461

voked a vigorous dissent from Justice Powell, author of the majority opinion in *Alexandria Scrap.*[77]

In *Reeves* the Court considered the constitutionality of the policy of South Dakota's state-owned cement plant, which required the plant to supply all state customers first and distribute the remaining volume on a first-come, first-served basis.[78] South Dakota implemented the resident preference in 1978 because of production problems and a nationwide shortage.[79] The Court concluded that this form of "state proprietary activity"[80] did not violate the dormant commerce clause because South Dakota was merely acting as a market participant.[81]

(1905) (contrasting state's conduct of functions having "strictly governmental character" with its carrying on "an ordinary private business"); Bank of Kentucky v. Wister, 27 U.S. (2 Pet.) 318, 323 (1829) (state does not act in sovereign capacity as proprietor of bank); how "essential" the state's action is to the operations of governance, *see Garcia,* 105 S. Ct. at 1012-13 (quoting Flint v. Stone Tracy Co., 220 U.S. 107, 172 (1911)); whether the state action is carried on for profit, *see, e.g.,* Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 284 (1973) (implying that state operation of hospitals and training schools was not proprietary was based in part on fact that activity was not for profit and in part on fact that states had exclusively operated these institutions for a long time); and whether the activity is one that has traditionally been carried out by the states, *see id.*; *see also* United States v. California, 297 U.S. 175, 185 (1936).

Indeed, long ago the Court's inability to distinguish proprietary from governmental functions led it to abandon the distinction for purposes of determining what state actions were exempt from federal taxation. New York v. United States, 326 U.S. 572, 583 (1946). Last term the Court abandoned the distinction for purposes of determining what state actions were protected from federal legislation under the commerce clause. Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1015-16 (1985), discussed *infra* notes 240, 258 and accompanying text. This note argues that the distinction is equally unworkable as a basis for limiting the scope of the dormant commerce clause. *See infra* note 240.

77. Reeves, Inc. v. Stake, 447 U.S. 429, 447-54 (1980) (Powell, J., dissenting).

78. *Id.* at 432-33. Prior to implementation of the resident preference, the plant had been supplying Reeves, a Wyoming distributor, with 95% of its cement for twenty years. *Id.* at 432. The advent of the preference policy forced Reeves to cut its business markedly, and it sought to enjoin this discriminatory restriction. *Id.* at 433.

79. *Id.* at 432-33.

80. *Id.* at 434.

81. *See id.* at 440, 446. The procedural history of the case is instructive. Petitioner Reeves sought to enjoin the South Dakota policy of preferring its resident buyers and obtained a permanent injunction from the district court. *Id.* at 433. The court of appeals reversed, relying on *Alexandria Scrap.* Reeves, Inc. v. Kelly, 586 F.2d 1230, 1232-33 (8th Cir. 1978), *vacated and remanded mem.,* 441 U.S. 939 (1979). The Supreme Court granted certiorari, vacated judgment, and remanded the case for further consideration in light of Hughes v. Oklahoma, 441 U.S. 322 (1979). *See* Reeves, Inc. v. Kelley, 441 U.S. 939 (1979) (mem.). *Hughes* used the dormant commerce clause to strike down an Oklahoma statute prohibiting the shipment of minnows caught in Oklahoma for sale out of state. *See* Hughes v. Oklahoma, 441 U.S. 322, 338 (1979). In doing so, the Court overruled Geer v. Connecticut, 161 U.S. 519, 530-32 (1896), which sustained against a commerce clause challenge a statute forbidding interstate transportation of game birds lawfully killed within the state. *Hughes,* 441 U.S. at 325. *Hughes* rejected the notion that the state, as owner of its game birds, could control them however it chose. *Id.* at 329-36. On remand of *Reeves, Inc. v. Kelly,* the Eighth Circuit Court of Appeals distinguished *Hughes* as preventing a state from controlling the interstate movement of *privately owned* articles of trade. Reeves, Inc. v. Kelly, 603 F.2d 736, 737-38 (1979), *aff'd sub nom.*

Comparison of the majority and dissenting opinions illustrates the role of *Reeves* in entrenching and defining the market participant test. The majority implicitly established the market participant characterization as a threshold determination,[82] purporting to rely on the "unmistakably broad terms"[83] of *Alexandria Scrap*. In contrast, Justice Powell, dissenting, declared that this initial characterization did not dispense with further review;[84] instead, the Court should also determine whether the state action impermissibly burdened the flow of interstate commerce.[85] Powell considered the market participant classification not as precluding further scrutiny of the challenged state action, but as describing activity that, *because* it constituted participation by the state as a private market force, did not create an impermissible burden.[86]

In addition to their disagreement about the conclusiveness in *Alexandria Scrap* of labelling Maryland's activity market participation, the majority and dissent differed on what sorts of state action should be completely exempt from commerce clause scrutiny. The majority reasoned that since "the Commerce Clause responds principally to state taxes and regulatory measures,"[87] the state is exempt when acting in its proprietary capacity.[88] Thus, the majority defines market participation in opposition to market regulation.[89] The dissent, on the other hand, would have ex-

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Reeves, Inc. v. Stake, 447 U.S. 429 (1980). (Curiously, the Supreme Court in *Hughes* did not make the same distinction in overruling *Geer* that the Eighth Circuit did. *Compare Reeves*, 603 F.2d at 737-38 *with Hughes*, 441 U.S. at 335-36). The Eighth Circuit again relied on *Alexandria Scrap*, 603 F.2d at 738, and when *Reeves* reached the Supreme Court for the second time, the Court accepted this distinction between control of state resources and private articles of commerce. *See Reeves*, 447 U.S. at 433 n.4.

82. *See Reeves*, 447 U.S. at 436.

83. *Id.*

84. *Id.* at 451 (Powell, J., dissenting).

85. *Id.* (Powell, J., dissenting) (maintaining that after its determination in *Alexandria Scrap* that Maryland was a market participator, the Court went on to determine that its program did not impermissibly burden interstate commerce).

86. *See id.* at 451-52 (Powell, J., dissenting). Powell explained:

> We further stated [in *Alexandria Scrap*] "that the novelty of this case is not its presentation of a new form of 'burden' upon commerce, but that appellee should characterize Maryland's action as a burden which the Commerce Clause was intended to make suspect.". . . The opinion then emphasized that "no trade barrier of the type forbidden by the Commerce Clause . . . impedes th[e] movement [of hulks] out of State." . . . The Court concluded that the subsidies provided under the Maryland program erected no barrier to trade.

Id. at 452 (Powell, J., dissenting) (quoting *Alexandria Scrap*, 426 U.S. at 807, 809-10).

87. *Reeves*, 447 U.S. at 436-37.

88. *See supra* note 76 and accompanying text.

89. The market participation/regulation dichotomy first arose in *Alexandria Scrap*. *See supra* note 71 and accompanying text. Ultimately, in White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 211 n.7, 216-22 (1983), the major point of contention between the majority and dissent became whether or not resident preference in city hiring was regulation. *See infra* notes 122-25 and accompanying text.

cepted only those state actions that constitute an "integral operation in areas of traditional governmental functions."[90] Nonetheless, it is important to an understanding of present dormant commerce clause doctrine that both the majority and dissent recognized that there is a category of cases in which state action will be completely immune from commerce clause attack. Moreover, the majority and dissent agreed that it is the *form* of the action rather than its purpose or effect on interstate commerce that determines whether the action falls into this category.[91]

The majority buttressed its primary assertion, that the commerce clause does not reach market participation, with three additional supports. First, it justified the exception on the basis of the need to protect state sovereignty and the role of each state "as guardian and trustee for its people."[92] The paradox of this reasoning, of course, is that precisely to the extent that the state is acting as guardian of its people, it is acting like a political entity and not like a private market force.[93] In *Reeves,* for example, South Dakota acted like an ordinary market participant until it took the action giving rise to the suit; cutting off the supply of cement to long-time out-of-state customers was purely politically motivated.

The majority in *Reeves* further justified the market participant test as an addition that takes into account "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[94] Considered in conjunction with the Court's concern for the state's role as guardian of its citizens, this reasoning gives to states the opportunity to favor their own citizens, for purely political purposes, as long as the form of their preference resembles that of a private market

90. *Reeves,* 447 U.S. at 449 (Powell, J., dissenting) (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled,* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985)).

91. *Compare* Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980) (characterizing as "basic" the distinction between market participation and regulation) *with id.* at 449 (Powell, J., dissenting) ("The application of the Commerce Clause . . . should turn on the nature of the governmental activity involved.").

92. *Id.* at 438 (quoting Heim v. McCall, 239 U.S. 175, 191 (1915) (upholding against fourteenth amendment and commerce clause attack a New York City ordinance preferring state citizens in hiring for public works)).

93. Creating the market participant exception to protect the state's role as guardian is illogical, not only because that role is inconsistent with the standard of the test—that the state act like a private entity—but also because a state may act as the guardian of its people by *regulating* as well as by *participating* in the market. Varat, *State 'Citizenship' and Interstate Equality,* 48 U. CHI. L. REV. 487, 505-07 (1981); *see also* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 392 (1978) (Burger, C.J., concurring) (Montana's differential licensing fees for resident and nonresident elk hunters "manifest the State's special interest in *regulating* and preserving wildlife *for the benefit of its citizens*") (emphasis added), discussed *infra* notes 208-09 and accompanying text.

94. *Reeves,* 447 U.S. at 439 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

force.[95]

Finally, the Court justified the market participant test as a simplification of traditional dormant commerce clause analysis. Traditional analysis, the Court asserted, often raised politically charged considerations of judicial control over legislative actions.[96] This last justification is logically flawed. First, the Court will still be faced with the complex and politically charged issue of whether the state activity is market participation or market regulation.[97] Second, in theory those cases excluded from commerce clause review will most often be the "simple, unilateral refusals to deal" with nonresidents,[98] and the more complex regulatory programs will remain to be analyzed.

In light of the weaknesses of the Court's rationale, three considerations, present also in *Alexandria Scrap*[99] and resembling traditional balancing approach considerations,[100] may furnish stronger reasons for upholding South Dakota's resident preference.[101]

First, as in *Alexandria Scrap,*[102] the *Reeves* Court confronted the prospect of discouraging what it considered "effective and creative programs for solving local problems."[103] In addition to encouragement of experimentation, a desire to give latitude to a state in distributing and

95. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 436 (quoting *Alexandria Scrap,* 426 U.S. at 810 (footnote omitted)). The *Reeves* Court elaborated on the analogy between a state and a private market force in remarking, "[E]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints . . . ." *Reeves,* 447 U.S. at 439. This remark obscures the fact that complaints arise when the state, acting in its propretary capacity, makes a political choice, for example, favoring its own citizens in the sale or procurement of services. This political decision transforms whatever "private entity" features it has. *See supra* note 93 and accompanying text. Accordingly, the proposed modification to present dormant commerce clause analysis, *see infra* notes 218-40 and accompanying text, separates consideration of those instances in which a state acts in its role as guardian of its people from those in which it behaves exactly like a private market force.

96. *See Reeves,* 447 U.S. at 436.

97. *See, e.g.,* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 211-13 (1980) (city was expending its own funds to benefit the poor and disadvantaged); *cf. id.* at 218-21 (Blackmun, J., dissenting in part) (hiring preference regulates private economic relationships and violates commerce clause).

98. *See id.* at 218 (Blackmun, J., dissenting in part) (distinguishing *Reeves* and *Alexandria Scrap* as "simple unilateral refusals to deal").

99. *See supra* notes 62-66 and accompanying text.

100. *See supra* notes 15-23 and accompanying text.

101. *See* Varat, *supra* note 93, at 549.

102. *See Alexandria Scrap,* 426 U.S. at 814.

103. *Reeves,* 447 U.S. at 441. "[R]eversal . . . would rob South Dakota of the intended benefit of its foresight, risk, and industry [in building the plant]." *Id.* at 446.

preserving limited funds underlies the reasoning of both cases.[104] Finally, as the *Reeves* Court cogently argues, both Maryland's program for clearing its roadsides and South Dakota's for supplying residents with cement demonstrate a clearly permissible goal—to channel state benefits to the residents who, through taxes and otherwise, create these benefits:[105]

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.[106]

As in *Alexandria Scrap,* because South Dakota's policy expressly discriminated against out-of-state commerce, rather than burdening interstate and intrastate commerce evenhandedly, a traditional balancing of burdens and benefits was precluded by the per se rule of *City of Philadelphia.*[107] Thus, the Court considered those elements weighed in the traditional balancing approach to develop a rule removing South Dakota's program from the reach of the dormant commerce clause altogether. *Reeves* also resembled *Alexandria Scrap*[108] in presenting a potential privileges and immunities claim that could not be raised because the plaintiff was a corporation, unprotected by the clause.[109]

3. White v. Massachusetts Council of Construction Employers. Although the facts of *White v. Massachusetts Council of Construction*

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104. *Compare Alexandria Scrap,* 426 U.S. at 814 (referring to "Maryland's purpose of using its limited funds to clean up its own environment") *with Reeves,* 447 U.S. at 441 (referring to state's innovative approach to problem of distributing government largesse).

105. *Reeves,* 447 U.S. at 442 n.16.

106. *Id.* at 442.

107. *See supra* notes 24-40 and accompanying text. In fact, Justice Brennan had argued in *Alexandria Scrap* that the per se rule, as narrowly articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970), discussed *supra* note 27, should have been applied to the facts of *Alexandria Scrap. See Alexandria Scrap,* 426 U.S. at 821.

108. *Alexandria Scrap,* 426 U.S. at 802 (Maryland's program gave an advantage to Maryland auto processors not available to non-Maryland processors).

109. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 178-82 (1868). The Court in *Paul* described a corporation as "the mere creation of local law," *id.* at 181, and held that corporations lacked privileges and immunities clause protection because of both this limited, ficitious nature and the need for states to closely regulate foreign corporations. *Id.* at 182; *see also infra* notes 201, 207 and accompanying text.

Employers[110] presented a new context for debate over the market participant test, many of the same issues discussed in *Reeves* resurfaced. The Court in *White* rejected a dormant commerce clause attack against an order of the mayor of Boston issued pursuant to the state's affirmative action program.[111] The order required that all construction projects funded in whole or in part by city funds be performed by a work force consisting of at least fifty percent bona fide residents of the city.[112]

Justice Rehnquist, writing for the majority, perhaps in response to the contentions of Justice Powell's dissent in *Reeves,* reasserted that "in this kind of case there is 'a single inquiry: whether the challenged program constituted direct state participation in the market.' "[113] Moreover, *White* contained a more explicit statement that the participant/regulator distinction was an absolute threshold inquiry: "[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."[114] Finally, in contrast to Justice Powell's position in *Reeves,* which precluded invalidation under the commerce clause when the state undertook "integral operations in areas of traditional governmental functions,"[115] the Court implicitly established the scope of the commerce clause to exclude all state proprietary actions.[116]

Even more clearly than *Alexandria Scrap* and *Reeves, White* demonstrates that whether the state is regulating or participating in the market depends on the form of its activity rather than the intent or effect.

In terms of intent, the Boston executive order lacked any legitimate local objectives such as those found in *Alexandria Scrap*[117] or *Reeves.*[118] Instead, it was a classic example of a protectionist measure that "directly impede[d] free private trade in the national marketplace."[119] As such,

110. 460 U.S. 204 (1983).

111. *See id.* at 213 & n.11 (finding executive order "harmonious" with federal regulations requiring federally funded projects to offer opportunities to poor and minorities).

112. *See id.* at 206 & n.1. *See generally* Note, *Municipal Employee Residency Requirements and Equal Protection,* 84 YALE L.J. 1684 (1975) (discussing prevalence of residency requirements).

113. *White,* 460 U.S. at 208 (quoting *Reeves,* 477 U.S. at 436 n.7). Powell had argued that the market participant doctrine necessitated a two-step approach. *See Reeves,* 447 U.S. at 451-52 (Powell, J., dissenting), discussed *supra* notes 83-86 and accompanying text.

114. *White,* 460 U.S. at 208.

115. *Reeves,* 447 U.S. at 449 (Powell, J., dissenting) (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled,* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985)).

116. *See White,* 460 U.S. at 208 (appearing to accept state court's equating of market regulation with "nonproprietary" activity).

117. *See supra* notes 62-66 and accompanying text.

118. *See supra* notes 99-106 and accompanying text.

119. *White,* 460 U.S. at 223 (Blackmun, J., dissenting in part); *see also supra* note 10 (defining economic protectionism). Although the executive order may have channeled state benefits to those

the executive order, like the programs in *Reeves* and *Alexandria Scrap,* would have been struck down as per se invalid under the rule of *City of Philadelphia v. New Jersey.*[120] The fact that the Court perfunctorily upheld the executive order after labelling it market participation clearly indicates that certain aspects of the traditional balancing approach—consideration of the commendable purposes of experimentation in the distribution or preservation of state resources, for example—are irrelevant to the test.[121]

In terms of effect, Justice Blackmun, dissenting in part,[122] argued that the resident preference was not simple market participation because it operated to interfere directly with private contractual relationships between contractors hired by the city and subcontractors hired by the contractors.[123] The attempt to govern private economic relationships—in this case, whom the contractors could hire as subcontractors—was, Justice Blackmun argued, the "essence of regulation."[124] Nonetheless, Justice Rehnquist, writing for the majority, strongly implied that the effect of the state's activity on private economic relations was of little or no importance in determining market participation.[125]

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who, through taxes and otherwise, created those benefits, *see Reeves,* 447 U.S. at 442 & n.16, the distinction between a state's power "to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in . . . our law," H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949).

120. *See supra* notes 24-40 and accompanying text.

121. The majority in *White* did not attempt to justify the aims of the executive order, labeling it "parochial favoritism," *White,* 460 U.S. at 213. Instead, it asserted that the question whether the order had a "significant impact on those firms which . . . employ permanent works crews composed of out-of-State residents" was irrelevant to analysis under the market participant test. *Id.* at 209 (citation omitted). Compare Hicklin v. Orbeck, 437 U.S. 518, 526 (1978), an earlier privileges and immunities case in which the Court found "at least dubious" the notion that a state could permissibly attempt to alleviate its unemployment problem by requiring *private* employers to prefer state residents.

122. *White,* 460 U.S. at 215-25 (Blackmun, J., dissenting in part).

123. *See id.* at 217-23 (Blackmun, J., dissenting in part).

124. *Id.* at 219; *see also Reeves,* 447 U.S. at 433 n.4 (accepting lower court's distinction between the facts of *Reeves* and state programs impermissible because they controlled the interstate movement of *privately-owned* articles of trade); Pennsylvania v. West Virginia, 262 U.S. 553, 599-600 (1923) (state cannot prohibit private parties who own a natural commodity from trading it in interstate commerce).

125. *White,* 460 U.S. at 211 n.7. Justice Rehnquist wrote:

> We agree with Justice Blackmun that there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business. . . . We find it unnecessary in this case to define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract.

Id.

In South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237 (1984), a plurality of the Court retreated from the position espoused by Justice Rehnquist. *Id.* at 2245 ("That privity of contract is not always the outer boundary of permissible state activity does not necessarily mean that

Unlike the Alexandria Scrap Corporation, the plaintiffs in *White* could have made a privileges and immunities clause argument but chose not to do so,[126] leaving that issue for resolution in *United Building & Constructions Trades Council v. Mayor of Camden.*[127]

Thus, the market participant test, developed in *Alexandria Scrap* and *Reeves* to sustain programs not conceived to impede the flow of interstate commerce, enabled the program in *White,* which was expressly intended to deny to nonresidents of the city access to the job market, to survive as well.[128] The Court's insistence on examining the form of the state action to the exclusion of considering its intent or effect created an anomaly. As a result, under current analysis, a state behaving like a private entity can achieve protectionist objectives, which traditionally have been considered repugnant to the dormant commerce clause.

4. South-Central Timber Development, Inc. v. Wunnicke. *South-Central Timber Development, Inc. v. Wunnicke,*[129] like *White,* provided the Court with an opportunity to apply the market participant doctrine to a purely protectionist state action.[130] Unlike the situation presented by *White,* the situation in *South-Central Timber* is familiar in dormant commerce clause analysis: a state's attempt to restrict the ex-

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the Commerce Clause has no application within the boundary of formal privity."). The plurality held that the market participation doctrine does not enable the state to escape commerce clause scrutiny when the restriction it is imposing affects private economic relationships outside of the market in which the state is participating. *Id.* at 2246-47. In doing so, the plurality disagreed with Justice Rehnquist, who dissented in *South-Central Timber* and who, according to the plurality, "would validate under the Commerce Clause any contractual condition that the State had the economic power to impose, without regard to the relationship of the subject matter of the contract and the condition imposed." *Id.* at 2246 n.10.

126. *White,* 460 U.S. at 214 n.12.

127. 104 S. Ct. 1020, 1025 n.7 (1984), discussed *infra* notes 173-200 and accompanying text.

128. In contrast to *Alexandria Scrap, see supra* note 57 and accompanying text, the *White* decision did not consider whether resident preference in hiring violated the equal protection clause. If such a claim had been made, however, it would not have fared any better than the equal protection challenge in *Alexandria Scrap.* Because the right to work for the government is not fundamental for purposes of equal protection, *see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (Court has never recognized that right of governmental employment per se is fundamental for equal protection purposes), the Court would have applied only minimal scrutiny and concluded that discrimination against non-residents of the city was rationally related to the city's goal of lowering municipal unemployment. *See* Heim v. McCall, 239 U.S. 175, 177, 191, 194 (1915) (labor law preferring New York citizens over citizens of other states in hiring for public works did not violate fourteenth amendment equal protection clause); *cf.* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646 (1976) (per curiam) (residency requirement for fire department employees did not violate constitutionally protected right to travel).

129. 104 S. Ct. 2237 (1984).

130. *See supra* note 10 (defining protectionism); *cf. South-Central Timber,* 104 S. Ct. at 2239 (purpose of statute was to protect state timber processors).

port of its natural resources for the benefit of its citizens.[131] Long before the advent of the market participant doctrine, the Court had routinely and summarily struck down this sort of restriction;[132] these decisions formed the mainstream of dormant commerce clause doctrine.[133] The confluence of this long line of cases invalidating state restrictions on natural resources and the shorter line of cases developing the market participant test leaves dormant commerce clause doctrine unsettled and in need of revision.

In *South-Central Timber* the Court reviewed an Alaska statute that required in-state processing of timber from state lands.[134] Alaska admitted that it enacted the law to protect existing state processors and encourage the establishment of new ones.[135] In response to a commerce clause challenge by an out-of-state processor, the state made two arguments. First, Alaska asserted that Congress had implicitly authorized Alaska to require in-state processing, and so freed it from the constraints of the dormant commerce clause.[136] Second, Alaska characterized its action as market participation rather than market regulation.[137] According to the state, it was acting like a private trader in choosing the terms on which it was willing to sell its timber; as a market participant, it had a right to sell only to those who promised to process the timber inside the state.[138] To buttress its second argument, Alaska pointed out that it could have achieved the same ends by restricting sale to in-state processors, clearly permissible under *White* and *Reeves,* or by furnishing local

131. *See, e.g.,* Hughes v. Oklahoma, 441 U.S. 322, 329-35 (1979) (discussing history of Court's invalidation of statutes preventing export of natural resources); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 269, 284-87 (1977) (striking down Virginia statute forbidding fishing by non-residents); Toomer v. Witsell, 334 U.S. 385, 403-07 (1948) (invalidating statute requiring shrimp caught in coastal waters off South Carolina to be unloaded and packaged within the state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 12-14 (1928) (striking down statute requiring in-state processing of shrimp); Pennsylvania v. West Virginia, 262 U.S. 553, 595-600 (1923) (striking down state statute limiting export of natural gas); West v. Kansas Natural Gas Co., 221 U.S. 229, 255-56 (1911) (same).

132. *See supra* note 131.

133. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970) (striking down Arizona statute requiring that Arizona cantaloupes be packed within the state, and noting that "the 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").

134. *South-Central Timber,* 104 S. Ct. at 2239 & n.2.

135. *Id.* at 2239 (quoting Governor's policy statement).

136. *Id.* at 2238, 2240-43. To support its argument that Congress implicitly authorized the state to restrict out-of-state processing of state timber, Alaska cited a handful of federal statutes and regulations that, both sides agreed, demonstrated a federal policy to restrict out-of-state shipment of unprocessed Alaska timber from *federal* lands. *Id.* at 2241. The parties disagreed whether this federal policy concerning timber on federal lands implied approval of a parallel state policy governing *state* timber. *Id.*

137. *Id.* at 2240, 2243-47.

138. *Id.* at 2245.

processors with a direct subsidy, an option approved in *Alexandria Scrap*.[139]

In a plurality opinion, the Supreme Court held that Alaska's statute violated the commerce clause.[140] The Court had little difficulty rejecting Alaska's first argument; six of the eight participating Justices agreed that Congress had not implicitly authorized Alaska's action.[141] In contrast, Alaska's second argument sharply divided the Court. A plurality of four decided that Alaska was not merely a market participant;[142] Justices Powell and Burger voted to remand on this issue;[143] Justices Rehnquist and O'Connor dissented.[144]

The plurality concluded that Alaska was not simply acting like a private seller of timber, because the statute forced whoever bought from the state to deal only with in-state processors.[145] Thus, the state's action affected more than just those with whom the state dealt directly; it had "downstream" effects on private contractual arrangements:

> [I]t is clear that the State is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.[146]

The plurality reaffirmed the principle announced in *White* that permissible market participation might affect economic entities beyond those with whom the state dealt (or chose not to deal) directly.[147] Nonetheless,

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139. *Id.* at 2244-45; *see also id.* at 2248-49 (Rehnquist, J., dissenting). The plurality does not clearly state whether a direct subsidy or a policy restricting sale of state timber to in-state processors would evade commerce clause scrutiny. *See id.* at 2243-45 (distinguishing *Alexandria Scrap* and *Reeves*). It rejects the contention that the means of restriction challenged are permissible because other permissible means could have been used to achieve the same end. *Id.* at 2246.

140. *Id.* at 2247.

141. Justice White delivered the opinion of the Court rejecting Alaska's first argument; Justices Blackmun and Stevens joined in this opinion. *Id.* at 2238. Justices Powell, Burger and Brennau concurred. *Id.* at 2247-48. Justice Marshall did not participate. *Id.* at 2247. Justice Rehnquist, joined by Justice O'Connor, dissented. *Id.* at 2248-49.

142. *Id.* at 2238, 2243-47. This plurality was composed of Justices White, Brennan, Blackmun and Stevens.

143. *Id.* at 2248.

144. *Id.* at 2248-49.

145. *See id.* at 2244 (distinguishing *Alexandria Scrap* on the ground that Alaska "imposes conditions downstream"); *id.* (describing as "crucial" to *White* the fact that those affected by the hiring preference were working for the city); *id.* at 2245 (distinguishing *Reeves* in part on the ground that South Dakota restricted sale, not resale, of cement to out-of-state purchasers); *id.* at 2246 (statute "restricts the post-purchase activity of the purchaser rather than merely the purchasing activity").

146. *Id.* at 2245.

147. *Id.* ("privity of contract is not always the outer boundary of permissible state activity").

a state's entry into the market could permissibly influence only a "discrete, identifiable class of economic activity in which [the State] is a major participant."[148] Alaska's measure, in the opinion of the plurality, exceeded these bounds. The statute not only affected the market in which Alaska participated, the timber-selling market, it also affected a market in which Alaska was *not* participating, the timber-processing market.[149]

The dissent cogently demonstrates that the plurality's narrow definition of the "market" in which Alaska participated and the plurality's distinction between restrictions on sale and on resale find little support in the majority opinions of other market participant cases.[150] These prior cases established that the only relevant distinction for purposes of the market participant test is between market participation and regulation.[151] The plurality seemed to concede that Alaska was participating in the timber market.[152] Before *South-Central Timber,* as the dissent argued, this determination would have ended the inquiry and exempted the challenged state action from further commerce clause scrutiny.[153] Thus, one

148. *Id.* (quoting White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 211 n.7 (1983)).

149. *Id.* at 2246-47.

150. *Id.* at 2248 (Rehnquist, J., dissenting).

151. *See White,* 460 U.S. at 208 ("As we said in *Reeves,* in this kind of case there is 'a single inquiry: Whether the challenged program constituted direct state participation in the market.' ") (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 436 n.7 (1980)); *see also* United Bldg. & Constr. Trades Council v. Mayor of Camden, 104 S. Ct. 1020, 1028 (1984) (result in *White* "turned on" the distinction between market participation and regulation). *Reeves* devoted none of its analysis to defining the market in which South Dakota participated; *see,* 447 U.S. at 436 n.7; instead, it focused on whether South Dakota's resident preference was regulation or participation. *See supra* note 74-109 and accompanying text. Likewise, the *White* Court found irrelevant the impact of Boston's hiring preference on private contractual relationships that appeared to be outside of the public projects market in which Boston and Massachusetts participated. *See White,* 460 U.S. at 209-10 & n.6.

152. *South-Central Timber,* 104 S. Ct. at 2244 ("Alaska . . . participates in the timber market, but imposes conditions downstream in the timber-processing market.").

153. *Id.* at 2248-49 (Rehnquist, J., dissenting); *see also id.* at 2246 n.10 (majority asserting that dissent would validate under commerce clause any contractual condition that the state imposed regardless of its effect on private relationships); *supra* note 151.

Previous market participant cases addressed the issue of "downstream" effects of market participation and found such effects irrelevant. For example, the majority in *White* acknowledged that the city's hiring preference affected the private relationships between contractors working for the city and their employees. 460 U.S. at 209-10 & n.6. It deemed this effect "not relevant to the inquiry of whether the city is participating in the marketplace." *Id.* at 209-10. *But cf. id.* at 211 n.7 (conceding "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business"). Indeed, the *South-Central Timber* plurality's emphasis on the downstream effects of market participation represents the partial ascendance of the position taken by the dissent in *White*:

> The city has not attempted merely to choose 'the parties with whom [it] will deal'. Instead, it has imposed as a condition of obtaining a public construction contract the requirement that *private firms* hire only Boston residents for 50% of specified jobs. Thus, the order

may infer that a plurality narrowly defined the term "market" for purposes of market participant analysis because four justices feared that "the [market participant] doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry."[154]

Thus, the plurality apparently recognized that simply by acting in the *form* of a market participant, a state can, with the same intent, achieve the same effect as protectionist regulation that would be summarily invalidated under the per se rule of invalidity.[155] In an effort to prevent the market participant test from rendering the dormant commerce clause impotent, the *South-Central Timber* plurality requires a two-step analysis. First, the court must determine whether the state is acting in a proprietary capacity by merely imposing restrictions in the sale or purchase of goods or services.[156] Second, it must decide whether any burden on commerce that results from the state action is limited to the market in which the state is participating.[157] The second step, in turn, requires determination of the existence and extent of a burden on commerce and the boundaries of the market in which the state is participating.

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directly restricts the ability of private employers to hire nonresidents, and thereby curtails nonresidents' access to jobs with private employers.

460 U.S. at 217 (Blackmun, J., joined by White, J., dissenting) (emphasis in original); *see also id.* at 220 (labelling the hiring preference an "[a]ttempt[ ] directly to constrict private economic choices through contractual conditions"). With this language and reasoning by Justices Blackmun and White in their *White* dissent, compare language from the plurality opinion in *South-Central Timber,* authored by Justice White, with whom, among others, Justice Blackmun joined: "Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners . . . ." 104 S. Ct. at 2246. Likewise, the majority in *Alexandria Scrap* minimized the significance of the effect that Maryland's market participation had on the whole chain of commerce while the dissent, in which Justice White joined, found this effect quite important. *Compare* Hughes v. Alexandria Scrap Corp., 426 U.S. 796, 803, 809-10 *with id.* at 824-26, 824 n.6 (Brennan, J., dissenting).

154. *South-Central Timber,* 104 S. Ct. at 2246.

155. *Id.*

It appears that Justice White has always recognized the market participant test's potentially destructive effect on dormant commerce clause analysis. He is the only Justice who has never voted to exempt state action from commerce clause scrutiny on the basis of the market participant test. In *Alexandria Scrap,* 426 U.S. at 817-32, he joined with Justices Brennan and Marshall in dissent. In *Reeves,* 447 U.S. at 447-54, he dissented along with Justices Powell, Brennan and Stevens. In *White,* 460 U.S. at 215-25, he and Justice Blackmun dissented from that part of the majority opinion that applied the market participant test. In *South-Central Timber,* 104 S. Ct. at 2243-47, Justice White was joined in his refusal to exempt Alaska's statute as market participation by Justices Brennan, Blackmun and Stevens.

156. *South-Central Timber,* 104 S. Ct. at 2246.

157. *See id.*

South-Central Timber's reformulation of the market participant test complicates the present state of dormant commerce clause analysis without improving it. It complicates analysis by leaving three issues unresolved. First, it leaves uncertain what distinguishes market participation from market regulation.[158] Second, it does not supply criteria for defining the relevant market.[159] Third, it does not address whether a state acting as a market participant may affect commerce *outside* the market in which it participates as long as this burden on commerce is slight compared to the local benefit.[160] *South-Central Timber*'s modification does not improve the state of dormant commerce clause analysis because it still permits a state to further classically protectionist goals by acting in the form of a market participant.[161] In this case, for example, rather than requiring whoever bought timber to process it inside the state, Alaska might have validly restricted sale of its timber to in-state processors.[162]

II. EXTENSION OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE FOUR TO MUNICIPAL RESIDENCY REQUIREMENTS

If the market participant test had not placed the programs in *Alexandria Scrap, Reeves* and *White* beyond the reach of the dormant commerce clause, they would have been summarily struck down under the per se rule of *City Philadelphia v. New Jersey*.[163] Programs that advance

158. *See supra* notes 150-53 and accompanying text (discussing lack of precedent for plurality holding).

159. *See id.* at 2246.

160. On one hand, the Court recognizes that market participation may have an effect on economic relationships in addition to those to which the state is a party. *See supra* note 147 and accompanying text. On the other, once the state's participation has an effect beyond its "market," it may be summarily invalidated under the per se rule of invalidity. *See South-Central Timber,* 104 S. Ct. at 2247.

161. *See supra* note 131 (collecting cases striking down classically protectionist statutes); *see also supra* note 34 (same).

162. The Court is equivocal about whether Alaska could permissibly have restricted sale of its timber to in-state processors. *See South-Central Timber,* 104 S. Ct. at 2245; *see also supra* note 139. Nonetheless, it would be difficult to distinguish such a preference from those upheld in *White* and *Reeves. See generally supra* notes 74-128 and accompanying text.

163. 437 U.S. 617 (1978). Under the per se rule of *City of Philadelphia,* a state may not accomplish legitimate local objectives by discriminating against articles in interstate commerce. *City of Philadelphia,* 437 U.S. at 626-27. The Court in *Alexandria Scrap* admitted that Maryland's program decreased the flow of junked cars out of Maryland to out-of-state processors, 426 U.S. at 809, and so favored Maryland residents over non-Maryland residents, *id.* at 810. Indeed, the dissent in *Alexandria Scrap* argued that this intentional burden on commerce constituted protectionism, which the Court had traditionally found impermissible. *Id.* at 821 (Brennan, J., dissenting). Similarly, South Dakota implemented its policy of supplying cement to state citizens first and allocating the rest on a first-come, first-served basis specifically to reduce the flow of cement out of state and preserve supplies for its citizens. *See Reeves,* 447 U.S. at 432-33 (resident preference forced out-of-state cement distributor to cut its production by 76%). Finally, the parties in *White* stipulated that as a result of

legitimate local goals will be summarily struck down if they discriminate against interstate commerce.[164]

Given the Supreme Court's awareness that the challenged state programs in *Alexandria Scrap, Reeves* and *White* could not have survived under the per se rule of *City of Philadelphia v. New Jersey,*[165] one may suppose that the Court developed the market participant test in an effort to protect desirable state programs from the inflexible operation of that rule.[166] Regardless of the Court's intent, however, while the market participant exception protects programs which arguably do not implement economic protectionism—South Dakota's cement plant, for example[167]—it also allows measures such as the hiring preference in *White*[168] to evade commerce clause scrutiny.

In *United Building & Construction Trades Council v. Mayor of Camden,*[169] the Supreme Court extended the privileges and immunities clause to reach the sort of protectionism left intact in *White*. While the extension of the clause was logical,[170] limitations in privileges and immunities clause doctrine remain that prevent its application to all protectionist measures that take the form of market participation.[171] To reach all such actions, modifications in current dormant commerce clause analysis must be made.[172]

Boston's hiring preference, out-of-state workers who would otherwise have been employed in the state would be unemployed, and out-of-state contractors would be discouraged from bidding on public construction. 460 U.S. at 209 n.6. In short, in all three cases the state sought to accomplish its goal by discriminating against out-of-state commerce, a practice explicitly proscribed in *City of Philadelphia.*

164. *See* Lewis v. BT Inv. Managers, 447 U.S. 27, 37 (1980) (the practical operation of a state action, in addition to its purpose, may bring it within the per se rule); *see also supra* notes 24-40 (discussing per se rule of invalidity).

165. *See White,* 460 U.S. at 217 (Blackmun, J., dissenting in part) (arguing that the resident preference is subject to the per se rule); *Reeves,* 447 U.S. at 433 n.4 (distinguishing per se rule of *City of Philadelphia* from the case before it on grounds that per se rule applied only to prevention of flow of commerce in privately owned articles of trade); *Alexandria Scrap,* 426 U.S. at 821 (Brennan, J., dissenting) (even where state is pursuing a clearly legitimate goal, statutes neutralizing competition from other states are virtually per se illegal).

166. Although the first complete articulation of the per se rule of invalidity in *City of Philadelphia v. New Jersey* occurred about two years after the first market participant case—*Alexandra Scrap*—the per se rule originated before *City of Philadelphia.* First mention of the per se rule occurred in Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970), and a specific reference to the rule appeared in *Alexandria Scrap. See Alexandria Scrap,* 426 U.S. at 821 (Brennan, J., dissenting); *see also supra* note 27.

167. *See supra* notes 99-106 and accompanying text.

168. *See supra* notes 117-25 and accompanying text.

169. 104 S. Ct. 1020 (1984), *rev'g* 88 N.J. 317, 443 A.2d 148 (1982).

170. *See infra* notes 194-200 and accompanying text.

171. *See infra* notes 201-17 and accompanying text.

172. *See infra* notes 218-40 and accompanying text.

A. United Building & Construction Trades Council v. Mayor of Camden.

In *United Building & Construction Trades Council v. Mayor of Camden,*[173] the Supreme Court reached an issue left unresolved in *White*:[174] whether a city measure that preferred city residents in hiring violated the privileges and immunities clause.[175] Enacted pursuant to New Jersey's statewide affirmative action program,[176] the Camden ordinance at issue required that at least forty percent of the employees of contractors and subcontractors working on city construction projects be Camden residents.[177] The Court concluded that the ordinance constituted at least a prima facie violation of the privileges and immunities clause, and remanded the case for a determination of whether the city could provide adequate justification for the discriminatory nature of the ordinance.[178] Under privileges and immunities clause doctrine, the state can justify discrimination against nonresidents only with a two-part showing: that a "substantial reason" justifies differential treatment of residents and nonresidents, and that the challenged discrimination bears a "close relation" to legitimate state objectives.[179]

In order to reach the state action challenged in *United Building,* the Court construed the privileges and immunities clause to prohibit discrimination based on municipal residency.[180] Previously the clause had only been used to invalidate discrimination based on state residency.[181] Little

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173. 104 S. Ct. 1020 (1984).

174. *Id.* at 1025 n.7 (explaining that the issue was left open in *White,* 460 U.S. at 214 n.12, because the court below did not reach the issue).

175. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States.").

176. N.J. STAT. ANN. § 10:5-31 to 38 (West 1976 & Supp. 1985-86).

177. CAMDEN, N.J. ORDINANCE MC §§ C(IV)(b), VIII (1984).

178. *United Building,* 104 S. Ct. at 1029.

179. *Id.* at 1029; *see also* Supreme Court v. Piper, 105 S. Ct. 1272, 1280-81 (1985). The Court in *United Building* noted that there was a particular need for remand in this case because of its procedural posture. *United Building,* 104 S. Ct. at 1030. The ordinance was approved following only brief administrative hearings before the Chief Affirmative Action Officer of the New Jersey Treasury Department in 1980. United Building & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 325, 443 A.2d 148, 151 (1982), *rev'd and remanded,* 104 S. Ct. 1020 (1984). The appellant association filed notice of appeal with the Appellate Division of the New Jersey Superior Court, and the New Jersey Supreme Court certified the appeal directly to the state supreme court level from the state agency. *Id.* A recent case following *United Building* found that remand was not warranted when the state had an opportunity in proceedings below to offer facts justifying the state's preferential hiring statute but failed to do so. W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 498 (7th Cir. 1984) (affirming district court's invalidation of Illinois's hiring preference law as violative of the privileges and immunities clause).

180. *United Building,* 104 S. Ct. at 1029-30.

181. *See, e.g.,* Toomer v. Witsell, 334 U.S. 385, 395 (1948) (article IV, section 2 "was designed to insure to a *citizen of State A* who ventures into State B the same privileges which the *citizens of State*

case law or constitutional history supported this extension, as Justice Blackmun, the lone dissenter, demonstrated.[182]

The majority justified its extension in three ways. First, case law suggested that the privileges and immunities clause should be given a flexible reading.[183] Justice Blackmun pointed out, however, that this flexibility traditionally has been used to limit, not extend, the reach of the clause.[184] Second, the majority argued that the extension was consistent with *Mullaney v. Anderson,*[185] in which the clause was used to strike down a statute that discriminated between residents and nonresidents of a territory. To this, Justice Blackmun countered that *Mullaney*'s holding depended on the construction of a federal statute, not on the Constitution.[186] Third, the majority drew an analogy to equal protection and commerce clause decisions in which, respectively, freedom of mobility and the free flow of commerce intrastate were afforded the same constitutional protection as those freedoms exercised interstate.[187] Justice Blackmun criticized the majority's analogy on the ground that the history surrounding the adoption of the clause did not justify its extension.[188]

The history of the privileges and immunities clause undermines rather than supports the extension that occurred in *United Building.*[189]

B enjoy") (emphasis added); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) ("the privileges and immunities secured to *citizens of each State* in the several States, . . . are those . . . which are common to the *citizens in the latter States* under their constitution and laws *by virtue of their being citizens*") (emphasis added).

182. *United Building,* 104 S. Ct. at 1031-37 (Blackmun, J., dissenting).

183. *Id.* at 1029 (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

184. *Id.* at 1036. The Court in *Toomer* did not specifically describe the clause as flexible; instead, it said that the clause did not absolutely bar differential treatment of citizens and noncitizens of a state "where there are perfectly valid independent reasons for it." 334 U.S. at 396. Other Supreme Court decisions have similarly stressed this qualification to the absolute language of the clause, which guarantees equality in "*all* Privileges and Immunities of Citizens in the several States," U.S. CONST. art. IV., § 2, cl. 1 (emphasis added). *See, e.g.,* Supreme Court v. Piper, 105 S. Ct. 1272, 1280-81 (1985) (court rule that restricted bar admission to state resident violated privileges and immunities clause); Hicklin v. Orbeck, 437 U.S. 518, 533-34 (1978) (Alaska preferential hiring statute violated privileges and immunities clause).

185. 342 U.S. 415 (1952). The *Mullaney* Court did not consider whether the privileges and immunities clause would apply to a Territory in the absence of a congressional statute. *Id.* at 419-20 (Congress made the privileges and immunities clause applicable to the Territory of Alaska by statute).

186. *United Building,* 104 S. Ct. at 1036.

187. *See id.* at 1026-27.

188. *Id.* at 1031-34.

189. The history surrounding the adoption of the privileges and immunities clause is sparse. Simson, *Discrimination against Nonresidents and the Privileges and Immunities Clause of Article IV,* 128 U. PA. L. REV. 379, 383 (1979); *see generally* R. HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 9-33 (1918) (outlining the history of the adoption of the clause); Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four,* 9 WM. & MARY L. REV. 1, 2-10 (1967) (same).

The clause is derived from the fourth article of the Articles of Confederation:

At the time the clause was adopted, discrimination on the basis of municipal residency was rarely practiced; what little there was presented a danger insufficient to warrant including such discrimination within the ambit of the privileges and immunities clause.[190] Instead, the framers designed

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> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Austin v. New Hampshire, 420 U.S. 656, 660 (1975) (quoting ART. CONFED. art. IV).

The author of the clause, Charles Pinckney, presented it to the Constitutional Convention as "founded exactly upon the principles of the 4th article," *Austin*, 420 U.S. at 661 n.6 (citing 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (1911); *see also Austin*, 420 U.S. at 660-61 (framers intended no change of substance or intent from the fourth article). The delegates to the Constitutional Convention adopted the privileges and immunities clause almost without debate. *See* 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 at 456, 634 (1965). The framers clearly were concerned about protectionist measures enacted by *states*, as is evident in James Madison's query to William Paterson of New Jersey concerning his proposal for the Union: "Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens [of other states] are entitled to equality of privileges by the Articles of Confederation." *Austin*, 420 U.S. at 661 n.5 (citing 1 M. FARRAND, *supra*, at 317) (brackets in original).

Consistent with the history of the adoption of the privileges and immunities clause, the Supreme Court has construed the clause to prevent discord between states. *See, e.g.*, Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 382 (1978) (quoting *Austin*, 420 U.S. at 660) (the clause "establishes a norm of comity"). Thus, neither constitutional history nor case law supports the notion that the privileges and immunities clause was meant to apply to discrimination on the basis of municipal residency.

Nonetheless, one may argue that retaliation among states is just as likely to occur in response to a state's enactment or toleration of legislation discriminating on the basis of municipal residency as in response to a state's enactment of statutes preferring state residents. For example, Maryland, in an apparently retaliatory mood, has enacted a statute which allows contractors or subcontractors on public works to "refuse to employ workmen who are residents of any state which . . . enforces laws that prohibit Maryland residents from employment as workmen on public works in that state," MD. ANN. CODE art. 21, § 8-503(a) (1981). This statute applies, on its face, whether a Maryland resident is discriminated against as a non-state or a non-municipal resident.

190. *See generally* E. GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT 126-44 (1938). In the seventeenth century, residents of towns and cities depended on the municipal corporation and other local government devices to regulate the price and quality of goods. *Id.* at 126-27. This self-containment and large degree of regulation was even more prevalent in America than in England because of greater distances and communication difficulties between settlements. *Id.* Thus, groups of merchants and tradesmen, and consumers as well, viewed local governmental control as a weapon against foreigners. *Id.* at 129. Nonetheless, with growing populist sentiment and increased mobility, ordinances restricting the activity of foreign traders began to fade as early as 1715, and by the time of the American Revolution had become nearly extinct:

> By 1775 this all-inclusive concept of the municipality had yielded to the force of circumstance; and only the hollow shell of limited trade regulation remained. The local monopolies were largely passing . . . ; the regulation of price and quality alone gave signs of real vitality, even though confining itself to obviously glaring abuses; its detailed and intimate quality had been relegated to the limbo of a former age.

Id. at 160-61.

the clause to guarantee that the rights secured to nonresidents of a state be the same as those given to its residents.[191] The Court has explained that the need for this constitutional guarantee was based on the belief that discrimination favoring state residents was unlikely to be challenged in the state legislatures, and that nonresidents' rights to equal treatment should not have to depend on the "uncertain remedies afforded by diplomatic processes and official retaliation."[192] Applying this reasoning to municipal residency preferences, one may argue that residents of the state who are nonresidents of the favored city can exert pressure through their vote to check such favoritism, since the discrimination on the basis of municipal residency can only exist with the state's approval.[193] Thus, this historical rationale for the privileges and immunities clause does not support extending it to municipal residency preferences.[194]

The lack of a historical or precedential basis for the extension in *United Building* leads one to wonder why it occurred. Justice Rehnquist, writing for the majority, argued that excepting from the reach of the clause "all classifications that are less than statewide would provide the States with a simple means of evading the strictures of the Privileges and Immunities Clause."[195] He cited as an example a state enactment of a resident preference for all its citizens in the northern half of the state and another, separate preference for all its citizens in the southern half.[196] Pursuing Justice Rehnquist's reasoning, one can argue that such a geographical preference—in hiring for state construction projects, for example—would not only evade the privileges and immunities clause, it would also, subsequent to *White,*[197] survive commerce clause attack,[198] equal

191. "The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948); *see also infra* note 209.

192. *Toomer,* 374 U.S. at 395.

193. *See* City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) (municipality derives its authority from the state).

194. *But see United Building,* 104 S. Ct. at 1027 (arguing that nonresidents are as powerless to use state political processes against a municipal-residency preference as they are against a state-residency preference).

195. *See United Building,* 104 S. Ct. at 1027 n.9. Justice Rehnquist's common-sense reasoning may reflect an awareness of the prevalence of resident hiring preference statutes imposed on private contractors. At least twenty-three states had such provisions in 1982. Note, *Construction Worker Residency Requirements: A Constitutional Response,* 17 NEW ENG. L. REV. 461, 461 n.3 (1982).

196. *See United Building,* 104 S. Ct. at 1027 n.9.

197. *See supra* notes 112-28 and accompanying text.

198. *White* reaffirmed the principle that when a state or local government "enters the market as a participant it is not subject to the restraints of the Commerce Clause." 460 U.S. at 208. Thus, it is not necessary that market participation prefer state residents over non-residents. The broad terms of *White* permit state and local governments to do business with whomever they choose as long as they are merely expending their own funds in entering the marketplace. *Id.* at 214-15.

protection clause scrutiny,[199] and analysis under the constitutionally protected right to travel.[200]

B. *Limitations on the Use of the Privileges and Immunities Clause to Prohibit Economic Protectionism.*

Although the privileges and immunities clause operated in *United Building* to allow review of a form of economic protectionism that evaded commerce clause scrutiny, the privileges and immunities clause in its present form will not reach all such instances. Because of the fundamentally different concerns of the privileges and immunities and commerce clauses, and the entrenched limitations on whom the clause protects and on what privileges it protects, privileges and immunities analysis has limited uses in invalidating protectionism.

Perhaps most significantly, privileges and immunities doctrine limits the class which can claim its protection in two ways. First, the guarantee of equal treatment to citizens and noncitizens does not extend to corporations.[201] This limitation precluded a privileges and immunities challenge to the discrimination in *Alexandria Scrap*[202] and *Reeves*.[203] Second, only nonresidents of a state may challenge that state's discriminatory practices.[204] This second limitation barred a privileges and immunities challenge by some of the plaintiffs in both *City of Philadelphia v. New Jersey*[205] and *Minnesota v. Clover Leaf Creamery*.[206] Recent Supreme

199. *See* Heim v. McCall, 239 U.S. 175, 190-93 (1915) (New York City labor ordinance preferring state residents in hiring for public works did not violate fourteenth amendment); *cf.* Massachusetts v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (Court has never recognized a right of governmental employment per se as fundamental for equal protection purposes).

200. McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646 (1976) (per curiam) (residency requirement for fire department employees did not violate constitutionally protected right to travel).

201. *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868) ("The Corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created . . . . The recognition of its existence even by other States . . . depend[s] purely upon the comity of those states. . . .").

202. The party challenging Maryland's program was a Virginia corporation. *Alexandria Scrap*, 426 U.S. at 799.

203. Petitioner in *Reeves* was a Wyoming corporation. 447 U.S. at 432.

204. *E.g., United Building*, 104 S. Ct. at 1027; Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1872). Although the text of the clause appears to prohibit discrimination between state citizens and noncitizens, not between state residents and nonresidents, the Court has found that for purposes of privileges and immunities clause analysis, the terms "resident" and "citizen" are essentially interchangeable. *See* Austin v. New Hampshire, 420 U.S. 656, 662, 662 n.8 (1975).

205. State residents were among the plaintiffs challenging the statute. City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

206. Minnesota dairies and plastic bottle producers joined in the action to overturn the Minnesota law. Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 458 n.1 (1981).

Court decisions have reaffirmed without comment these long-standing restraints on the scope of the clause.[207]

Moreover, the privileges and immunities clause prohibits only discrimination with respect to "fundamental" privileges.[208] "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[209] Although the hiring preference in *United*

207. *See, e.g., United Building,* 104 S. Ct. at 1027 (reasserting the limitation as to nonresidents); Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656 (1981) (corporation unable to challenge discriminatory tax under privileges and immunities clause).

208. *See* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 386-87 (1978). One of the major points of dispute in *Baldwin* was whether this threshold requirement of fundamentality was directly traceable to the "natural rights" threshold first articulated in Corfield v. Coryell, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823) (No. 3,230), *see* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 395-98 (1978) (Brennan, J., dissenting), or whether this test had been abandoned by the Court in later decisions such as Toomer v. Witsell, 334 U.S. 385 (1948), and Mullaney v. Anderson, 342 U.S. 415 (1952). *See Baldwin,* 436 U.S. at 397-402 (Brennan, J., dissenting).

209. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978). The Court applied this standard to a Montana licensing scheme for elk hunting. *See id.* at 388. The discrimination took two forms. First, the nonresident who wished to hunt only elk had to buy a combination license for hunting other types of game; the resident wishing to hunt only elk could buy a single-purpose license. *See id.* at 373. Second, the combination license cost nonresidents $225; the same hunting privileges cost residents only $30. *See id.* at 373-74. The Court characterized the privilege to hunt elk as a recreation and a sport that is "costly and obviously available only to the wealthy nonresident. . . . It is not a means to the nonresident's livelihood." *Id.* at 388. Indeed, the Court has concluded that the privileges and immunities clause is primarily concerned with protecting the right to pursue a livelihood. *See United Building,* 104 S. Ct. at 1028 ("Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity.").

The Court has recognized other privileges in addition to those first identified in Corfield v. Coryell, 6 F. Cas. 546 (E.D. Pa. 1823). *Corfield* described the "natural rights" protected by the clause to include:

> [t]he right of a citizen of one state to pass through, or to reside in any other state, for purpose of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; [and] to take, hold and dispose of property, either real or personal. . . .

Id. at 552. After *Corfield,* Austin v. New Hampshire, 420 U.S. 656, 661 (1975), established that nonresidents could not be charged taxes from which residents were free. Prior to *Austin,* Doe v. Bolton, 410 U.S. 179, 200 (1973), established that nonresidents could not be discriminated against in access to medical services, and Blake v. McClung, 172 U.S. 239, 258-59 (1898), used the clause to give equal rights in state courts to nonresident creditors.

In his dissent in *Baldwin,* Justice Brennan, joined by Justices White and Marshall, cogently argued that the natural rights doctrine articulated in *Corfield* embodied an attempt to vest in each citizen a set of rights that would be federally protected and remain the same wherever the citizen travelled. *See Baldwin,* 436 U.S. at 396-97 (Brennan, J., dissenting). This attempt to supply an absolutist definition for privileges and immunities gave way to a more comparative approach in Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869):

> It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states was concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them; it insures to them in

Building was found to involve a fundamental privilege,[210] the status of other forms of market participation that discriminate against interstate commerce and nonresidents remains unclear.[211]

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other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has justly been said that no provision of the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

Thus, Brennan argued, *Paul* found that the privileges and immunities clause guaranteed that "the measure of the rights secured to nonresidents was the extent of the rights afforded by a State to its own citizens." *Baldwin,* 436 U.S. at 397 (Brennan, J., dissenting) (discussing *Paul,* 75 U.S. at 180). Cases that followed *Paul* and preceded Toomer v. Witsell, 334 U.S. 385 (1948), misread *Paul. See Baldwin,* 436 U.S. at 397 (Brennan, J., dissenting). These intervening cases, Justice Brennan maintained, did not recognize that *Paul's* approach was meant to supersede *Corfield's,* but instead believed *Paul* was meant to supplement the "natural rights" approach of *Corfield. See Baldwin,* 436 U.S. at 397 (Brennan, J., dissenting). And so, before deciding whether the state was discriminating impermissibly, the Court in these cases decided whether or not the asserted privilege was within those described by Justice Washington in *Corfield* as natural rights. *See Baldwin,* 436 U.S. at 397 (Brennan, J., dissenting). According to Brennan, *Toomer v. Witsell* established the modern view of the clause, as one "designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *See id.* at 399 (Brennan, J., dissenting) (quoting *Toomer,* 334 U.S. at 395). After *Toomer,* Justice Brennan concluded, the Court's principal concern, and correctly so, was with the discrimination itself, and whether there was a legitimate reason for it. *See Baldwin,* 436 U.S. at 401-02 (Brennan, J., dissenting).

210. *United Building,* 104 S. Ct. at 1028-29 (noting that many, if not most privileges and immunities clause decisions have concerned "the pursuit of a common calling").

211. To inform the term "fundamental" for purposes of privileges and immunities clause analysis, one may look to what has been deemed fundamental for equal protection clause analysis, although the Court has made it clear that the meaning of the term is not the same in both contexts. *See United Building,* 104 S. Ct. at 1028. For example, the right to work for the government is not fundamental for equal protection clause purposes, *see* Massachusetts v. Murgia, 427 U.S. 307, 313 (1976) (per curiam), but for privileges and immunities clause purposes the privilege to pursue a common calling is "one of the most fundamental." *United Building,* 104 S. Ct. at 1028. The Court's explanation for this difference is inconsistent: Public employment is not fundamental for equal protection purposes because "it is a subspecies of the broader opportunity to pursue a common calling," *id.* at 1028; yet the Court goes on to say that in *United Building* the public works employment opportunities at issue *are* fundamental precisely because government employment falls within this broader fundamental right. *See id.* at 1029. Of course, if the meaning of "fundamental" were the same for purposes of equal protection and privileges and immunities clause analyses, then the privileges and immunities clause would be superfluous, the scope of its protection comprehended by the strict scrutiny standard of equal protection. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 152-56 (1973) (woman's right to choose to have an abortion is "fundamental"; denial of that right is subject to strict scrutiny); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (same as to right to travel); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (same as to right to vote and first amendment rights); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (same as to right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (same as to right to procreate). The list of what Justice Washington deemed "natural rights" in *Corfield v. Coryell,* 6 F. Cas. 546, 552 (E.D. Pa. 1825) (No. 3,230), is also a source for determining what is "fundamental" for purposes of privileges and immunities clause analysis. *See supra* note 209 (listing rights enumerated in *Corfield v. Coryell).* This second approach finds support in the *Baldwin* decision itself. *See* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 387 (1978) (Justice Washington used the term "fundamental" in the modern sense as well as in the natural rights sense); *see also* Antieau, *supra* note 189, at 10-15 (*Corfield* represented the correct interpretation of the privileges and immunities clause). *Contra* Simson, *supra* note 189, at

Finally, despite their common origin[212] and common concerns,[213] the commerce clause and the privileges and immunities clause provide different sorts of protection. In essence, the privileges and immunities clause guarantees personal rights to individuals moving from one state to another,[214] while the commerce clause protects the interstate flow of commerce.[215] Because of this difference, for example, a state pricing scheme requiring that all milk sold to consumers within a state be bought from producers at a minimum price clearly violated the commerce clause, even though it just as clearly treated resident and nonresident milk producers equally.[216]

Thus, the privileges and immunities clause cannot reach many protectionist measures that take the form of market participation and are currently exempt from commerce clause scrutiny; nor can the equal protection clause.[217] In conceiving the market participant test to allow

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383-86 (the clause applies to any privilege or immunity granted to residents but denied to nonresidents). Nonetheless, the precise scope of the term remains unclear and uninformed.

212. *See, e.g.*, Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 379-80 (1978) (privileges and immunities clause and commerce clause both have their source in fourth article of the Articles of Confederation).

213. Compare H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949), in which the Court observed:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any [one area,]

with Toomer v. Witsell, 334 U.S. 385, 395-96 (1948), in which the Court declared that the purpose of the privileges and immunities clause was "to help fuse into one Nation a collection of independent, sovereign states. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."

The constitutional protections for free movement of interstate commerce and equal treatment of nonresidents of a state were believed necessary because nonresidents of a state, lacking the right to vote in state elections, would otherwise be left to the "uncertain remedies afforded by diplomatic processes and official retaliation." Toomer v. Witsell, 334 U.S. 385, 395 (1948); *cf.* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (Court scrutinizes statutes that discriminate against interstate commerce more carefully than those that burden commerce evenhandedly because when local economic interests are burdened, as is often the case in evenhanded regulations, affected citizens can use the state's political processes to curb abuse).

214. *See supra* note 213.

215. *See id.*

216. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519 (1935) (statute required that no milk be sold inside the state that was bought outside the state unless the out-of-state producers were paid the same price which the state required to be paid to in-state milk producers); *see also* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 335, 352 (1977) (facially neutral North Carolina statute requiring that all apples sold there, regardless of their origin, be labelled only with USDA grade, had a discriminatory impact on interstate commerce, and so violated the dormant commerce clause.)

217. *See supra* note 57 and accompanying text; *see also* City of New Orleans v. Duke, 427 U.S. 297, 303-04 (1976) ("[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.").

broader discretion to the states in their market activity, the Court has unduly restricted the scope of the dormant commerce clause, creating a gap through which protectionist measures may pass.

III. PROPOSED MODIFICATIONS TO THE MARKET PARTICIPANT TEST AND TO THE PER SE RULE OF INVALIDITY

The market participant test allows the survival of protectionist measures that take the form of market participation, even though in a different form they would be summarily invalidated under the per se rule of invalidity.[218] This anomaly in current dormant commerce clause analysis results from the emphasis of the market participant test on the *form* of state action rather than its intent or effect. To ensure that such obstructive state measures do not survive constitutional scrutiny, it is proposed that both the market participant test and the per se rule of invalidity be modified. The modifications attempt to coordinate these two branches of dormant commerce clause doctrine and harmonize dormant commerce clause analysis with the most recent Supreme Court decisions addressing the "active commerce clause"[219] and the privileges and immunities clause.

A. *Description of Proposed Modifications.*

1. *The Market Participant Test.* The market participant test should be retained as a threshold inquiry in dormant commerce clause analysis; the entire Court in *Alexandria Scrap* agreed that certain types of state action are completely exempt from review under the dormant commerce clause.[220] However, market participation should be more narrowly and objectively defined.

The Court should abandon the current, unhelpful equation of market participation with state proprietary action.[221] Instead, it should define market participation as occurring when the state enters the market to buy goods or services for its own end use, or to sell goods or services

218. *See supra* notes 69-70, 95, 117-25 and accompanying text.

219. "Active commerce clause" refers to the affirmative grant of power to Congress contained in U.S. CONST. art. I, § 8, cl. 3. Compare the commerce clause in its dormant state, in which it acts as an implicit check on the power of states to regulate interstate commerce, discussed *supra* notes 15-18 and accompanying text.

220. *Cf. supra* note 44 (citing state court cases and a lower federal court case in which state resident preferences in purchasing goods for state's own use or for use in public works withstood commerce clause challenges).

221. *See supra* note 76 and accompanying text.

wholly created by the state[222] and maintained or produced through state taxes and revenues.[223] To be exempt as a market participant, the state should bear the burden of proving that its purchasing or supplying preferences have a sound economic basis, considering the state as a private entity, without regard to the potential or actual economic benefits to its citizens. In meeting this burden, the state must show that its preference created an economic benefit that exceeded or was likely to exceed the benefits obtainable from pursuing nondiscriminatory alternatives. This revised test is designed to exempt state actions from commerce clause strictures only when states behave in the form, and with the intent and impact, of an economically rational private market force.

Under this proposal, on the facts of *Reeves,*[224] South Dakota would have to show that restricting sales of cement to South Dakotans enhanced state revenues beyond the increase that could be realized by raising its price to resident and nonresident customers alike. On the facts of *White,*[225] Massachusetts would have to show that preferring bona fide city residents in hiring created, for the state, an economic benefit in excess of that obtainable either by hiring without preference or by preferring the unemployed.

2. *The Per Se Rule of Invalidity.* Cases like *South-Central Timber* and *Alexandria Scrap* would not fall within the proposed market participant test. Alaska's restriction on resale of state-owned timber does not qualify as market participation because it was not a resident preference.[226] Even if it were, the test would not apply, since it covers only goods created by the state, not state-owned natural resources.[227] Although Maryland's repurchase of abandoned cars took the *form* of market participation,[228] it was not carried out with the intent of an economically rational private trader. Maryland bought the cars not to use them but to remove them from the highway, a goal of a state acting in its

222. *Cf. supra* note 124 and accompanying text (discussing Justice Blackmun's contention, in his *White* dissent, that interference by the state with private economic relationships constitutes market regulation, not market participation).

223. *Cf. supra* notes 104-06 and accompanying text (discussion in *Reeves* of whether channeling benefits generated by state revenues for traditional state services back to the taxpayers is really "protectionist").

224. *See supra* notes 78-79 and accompanying text.

225. *See supra* notes 110-12 and accompanying text.

226. Alaska would sell to both residents and non-residents as long as they agreed to process the timber in state. *See supra* notes 134-49 and accompanying text.

227. *Cf.* South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237, 2245 (1984) (distinguishing *Reeves* as involving state restriction on a manufactured product, not a natural resource); *supra* note 131 and accompanying text (discussing Court's traditional suspicion of state restrictions on natural resources).

228. *See supra* notes 51-61 and accompanying text.

role as a guardian of the people.[229]

Nonetheless, programs like Maryland's represent creative programs with laudable purposes and little impact on interstate commerce. As discussed, the very appeal of such programs may have prompted elaboration of the market participant test in the first place.[230] Rather than summarily invalidating state activity that discriminates against out-of-state commerce, the Court should modify the per se rule of *City of Philadelphia v. New Jersey*.[231]

This modification subjects to heightened scrutiny those state actions that, either in intent or in effect,[232] discriminate against interstate commerce or out-of-state businesses. Rather than automatically invalidating such statutes, the modification requires that the state establish three elements: first, that its action is a valid exercise of its tenth amendment right to promote the health, safety, or welfare of its citizens rather than a purely protectionist measure;[233] second, that its goal could be achieved in no less discriminatory way; and, finally, that the local benefits of its action outweigh the corresponding burden on interstate commerce.[234]

Applied to *Alexandria Scrap*,[235] the modified per se rule probably would not invalidate the Maryland program. First, the Court recognized

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229. *See supra* note 73 and accompanying text.

230. *See supra* notes 62-67 and accompanying text.

231. *See supra* notes 24-40 and accompanying text.

232. *Cf. supra* notes 90-91 and accompanying text (discussing argument of *Reeves* dissent that only those state actions which constitute an integral operation in the provision of traditional governmental services be exempt from dormant commerce clause analysis).

233. Compare Justice Powell's dissent in *Reeves*, in which he argued that only those state actions that constitute an "integral operation in areas of traditional governmental functions" should be exempt from commerce clause scrutiny. *See Reeves*, 447 U.S. at 449 (1978) (Powell, J., dissenting) (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled*, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985)).

234. The modification of the per se rule is the same as the approach taken in Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), which struck down a Madison regulation requiring that milk sold as pasteurized be pasteurized and bottled within five miles of the city. The Court found that the measure operated to erect "an economic barrier protecting a major local industry against competition from without the State, . . . plainly discriminat[ing] against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonably nondiscriminatory alternatives . . . are available." *Id.* at 354 (footnote omitted).

As recently as 1977, the Court adopted the approach of *Dean Milk* in Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977), in which it struck down a North Carolina statute preventing the sale of apples with any grade other than that of the USDA. "When discrimination against commerce of the type we have found is demonstrated [either by the statute's intent or effect], the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 353; *see also The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 62-66 (1978) (advocating a return to the *Dean Milk* approach).

235. *See supra* notes 50-73 and accompanying text.

protection of the environment as a traditional state service.[236] Second, Maryland probably can show that no less discriminatory means could be formulated to ensure that it was buying only autos abandoned on Maryland highways.[237]

The New Jersey statute struck down in *City of Philadelphia v. New Jersey,* prohibiting the importation of wastes originating outside the state,[238] would still fail under this modified per se rule. The Court in *City of Philadelphia* expressly found that New Jersey could achieve protection of its environment in a less discriminatory way: by limiting the amount of waste, regardless of its origin, accepted by New Jersey landfills.[239]

In summary, the proposed revisions allow the state to be exempt from commerce clause scrutiny by demonstrating that its actions are like those of a private market actor in intent and effect as well as in form. Alternatively, when the state regulates the market instead of participating in it, it may discriminate against interstate commerce only in that small area traditionally protected by the tenth amendment, and then only when necessary.[240]

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236. *See supra* notes 72-73 and accompanying text.

237. *Cf. Alexandria Scrap,* 426 U.S. at 812 ("[I]n terms of likelihood, the Maryland Legislature reasonably could assume that a hulk destroyed by a non-Maryland processor is more likely to have been abandoned outside Maryland than is a hulk destroyed by a Maryland processor, and vice versa.") *Alexandria Scrap* might then argue that Maryland could have achieved its goal through an evenhanded approach, by seeking the more complete documentation required of non-Maryland processors from all processors. It is doubtful, however, that such an evenhanded approach would have provided an alternative; very few of the wreckers supplying non-Maryland processors could meet the stricter requirements. Application of the stricter documentation requirement to all processors would nearly halt the supply of autos to the state. *See id.* at 801 n.11 (citing the dramatic decline in interstate movement of autos once the stricter documentation requirements were implemented).

238. *See supra* notes 28-31 and accompanying text.

239. *City of Philadelphia,* 437 U.S. at 626.

240. The proposed modifications attempt not only to resolve the anomaly that currently exists in dormant commerce clause analysis, but also to harmonize dormant commerce clause doctrine as a whole with the Court's most recent decisions addressing Congress's affirmative commerce clause power, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

By equating market participation with state *proprietary* action—and, implicitly, market regulation with *governmental* action—the current market participant test relies upon a distinction that the Court last term expressly disapproved for purposes of constitutional analysis. *See id.* at 1014-16. Although *Garcia* analyzed the commerce clause as an affirmative grant of power to Congress, and not as an implicit check on the power of states, its reasons for rejecting the governmental/proprietary distinction clearly apply to dormant commerce clause analysis.

In *Garcia* the Court determined that San Antonio's transit authority was subject to the minimum wage and overtime requirements of the Fair Labor Standards Act, *id.* at 1020 (interpreting scope of the Fair Labor Standards Act, § 6(a)(1),(6), (29 U.S.C. § 203(d), (x) (1982)), regardless of whether mass transportation was a "traditional" or "nontraditional" state function. *Garcia,* 105 S. Ct. at 1016. In so ruling, the Court expressly overruled its earlier holding in National League of Cities v. Usery, 426 U.S. 833 (1976). *National League of Cities* had held that Congress could not use its commerce clause power to impose wage and overtime requirements on states "in areas of tradi-

B. Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations.

In *South-Central Timber,* the plurality recognized that, unless limited, the market participant test enables states to circumvent judicial restraints imposed pursuant to the commerce clause.[241] Next term the Court confronts a state's attempt to use the test to avoid congressional statutory constraints enacted pursuant to the commerce clause.[242] In *Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc.,* the Court will address whether federal legislation under commerce clause authority reaches market participation by states.[243] Faced with a choice between applying the market participant test to reduce Congress's commerce clause power over states and limiting the test to manageable

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tional governmental functions." *Id.* at 852. In a complete reversal, the *Garcia* Court concluded that the traditional/nontraditional distinction was unworkable and fundamentally inconsistent with established principles of federalism. *Garcia,* 105 S. Ct. at 1016.

The *Garcia* Court drew a direct parallel between its decision to abandon the traditional/nontraditional distinction in commerce clause analysis and its earlier decision in New York v. United States, 326 U.S. 572, 583 (1946), to reject the governmental/proprietary distinction that underlay state immunity from taxation. The two sets of distinctions are essentially synonymous, the *Garcia* Court reasoned. *See Garcia,* 105 S. Ct. at 1012-13. Courts had been unable to give "principled content" to either. *Id.* Their inability was due in part to the vagueness of the terms. *See id.* at 1014. There was, however,

> a more fundamental problem at work here, a problem that explains why the Court was never able to provide a basis for the governmental/proprietary distinction in the intergovernmental tax immunity cases and why an attempt to draw similar distinctions with respect to federal regulatory authority under *National League of Cities* is unlikely to succeed regardless of how the distinctions are phrased. The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. . . . [Both sets of distinctions] inevitably invite[ ] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

Id. at 1015.

By equating the governmental/proprietary and traditional/nontraditional distinctions, and by basing its holding upon principles of federalism, *Garcia* clearly implies that the current definition of market participation as "proprietary" state activity is invalid as a matter of constitutional law. The proposed revision of the term responds to this problem by supplying a narrower, more objective definition.

241. *See* South-Central Timber Development, Inc. v. Wunnicke, 104 S. Ct. 2237, 2246 (1984) ("Unless the 'market' [for purposes of the market participant test] is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.").

242. *See* Gould, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations, 750 F.2d 608, 612-13 (7th Cir. 1984) (defendants arguing that preemption analysis is inapposite where state is acting like market participant), *prob. juris. noted,* 53 U.S.L.W. 3824 (U.S. May 20, 1985).

243. Before both the district court and the court of appeals, Wisconsin argued that as a market participant its activity was free from preemption by commerce clause enactments. *See id.*; *Gould,* 576 F. Supp. 1290, 1296 n.7 (W.D. Wis. 1983), *aff'd in relevant part,* 750 F.2d 608 (7th Cir. 1984). Therefore, the Supreme Court must address this argument before it considers whether the National Labor Relations Act preempts the state actions.

bounds, the Court should use this opportunity to resolve the unsettled state of dormant commerce clause doctrine.

The issue arises from Gould's challenge to Wisconsin statutes that blacklisted recidivist violators of labor laws.[244] Under the scheme, Wisconsin's labor agency compiled a list of persons and firms that had violated the National Labor Relations Act three or more times within the past five years.[245] Each name was to remain on the list for three years.[246] During that time, the state "[would] not purchase any product known to be manufactured or sold by any person or firm included on the list."[247] As one of the firms blacklisted, Gould sought to have the district court declare Wisconsin's program unconstitutional, arguing that by virtue of the supremacy clause, the National Labor Relations Act preempted the state laws.[248] Both the district court[249] and the Seventh Circuit[250] agreed with Gould and held the statutes unconstitutional on these grounds.

In characterizing its refusal to deal with labor law violators as market participation, Wisconsin seeks to broaden the test in two ways. First, it argues that market participation should be exempt from congressional enactments under commerce clause authority.[251] Previously the test has only limited courts' exercise of the dormant commerce clause.[252] Second, Wisconsin contends that as a market participant, it may not only choose to favor state residents over nonresidents, it may also choose its

244. WIS. STAT. ANN. § 101.245 (Supp. 1985) (requiring Department of Industry, Labor and Human Relations to compile a list of labor law violators); *id.* § 16.75(8) (1985) (providing that the state would not purchase from those on list).

245. *Id.* § 101.245(1).

246. *Id.* § 101.245(4).

247. *Id.* § 16.75(8).

248. *See Gould,* 576 F. Supp. at 1292; *Gould,* 750 F.2d at 610.

249. *Gould,* 576 F. Supp. at 1298-99. In concluding that the Court in *Alexandria Scrap* expressly limited the market participant test to dormant commerce clause analysis, *id.* at 1296 n.7, the district court appears to misread *Alexandria Scrap.* The Court in *Alexandria Scrap* expressly declined to express its view "on whether Congress could prohibit the type of selective participation in the market undertaken by Maryland." *Alexandria Scrap,* 426 U.S. at 810 n.19.

250. *Gould,* 750 F.2d at 615. The Seventh Circuit, like the district court, concluded that the market participant test only applies in dormant commerce clause analysis, and not where Congress has legislated. *Id.* at 612-13.

251. *See Gould,* 576 F. Supp. at 1296 n.7; *see also* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 822 n.4 (1976) (Brennan, J., dissenting) (foreshadowing this argument by admitting "logical difficulty" understanding why, if Maryland's program was not the kind of action with which the commerce clause is concerned, "there can be any congressional power to legislate in this area").

252. In the earliest market participant test case, the Court expressly reserved the issue whether the test applied in areas in which Congress had legislated. Hughes v. Alexandria Scrap Corp., 426 U.S. 749, 810 n.19 (1976). In the latest market participant case, the plurality's statement of the test seemed to limit it to dormant commerce clause analysis. South Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237, 2243 (1984) ("Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the *dormant* Commerce Clause places no limitation on its activities.") (emphasis added).

trading partners based on other criteria, in this case, compliance with the National Labor Relations Act.[253]

Both arguments find support in the broad terms with which the Court first fashioned the market participant test. Because the Court described the test as a limitation on the scope of the commerce clause itself, and not merely on the courts' authority under the dormant commerce clause,[254] Wisconsin may logically argue that Congress's authority under the clause reaches no farther than the courts'. Futhermore, because the test focuses solely on the *form* of state action rather than its intent,[255] it follows that the basis on which the state chooses its trading partners is irrelevant.[256]

Although the broad terms of the Court's decisions support Wisconsin's argument, it is unlikely to succeed. Accepting Wisconsin's argument would fence off a limitless area of state action that could not be reached by Congress through the exercise of its most potent authority.[257] Moreover, it would leave courts to determine the permissible bounds of

253. *See* Appellants' Jurisdictional Statement at 10 ("Wisconsin chooses not to do business with recidivist labor law violators."), Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc., 750 F.2d 608 (7th Cir. 1984), *prob. juris. noted,* 53 U.S.L.W. 3824 (U.S. May 20, 1985). Wisconsin asserts that the purpose of blacklisting is to promote compliance with the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982). *Gould,* 750 F.2d at 611. Nonetheless, it has attempted to characterize its objective as a desire to "influence," not "regulate," relationships between recidivists and their employees. *Id.* at 613.

254. *See, e.g.* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 208 (1983) ("*Alexandria Scrap* and *Reeves,* therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commeree Clause."); Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980) ("[T]he Commerce Clause responds principally to state taxes and regulatory measures. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-09 (commerce clause not intended to prohibit state's entry into the market to trade with its own citizens). *But cf.* South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237, 2243 (1984) ("Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the *dormant* Commerce Clause places no limitation on its activities.") (emphasis added); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 n.19 (1976) (expressly reserving issue whether market participant test applied in areas in which Congress had legislated).

255. *See supra* notes 61, 76, 113-25 and accompanying text.

256. *See* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 208 (1984) ("[I]n this kind of ease there is a single inquiry: whether the challenged program constituted direct state participation in the market.") (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 436 n.7 (1980)).

257. *See* Wickard v. Filburn, 317 U.S. 111, 120 (1942) (referring to the "embracing and penetrating nature" of the commerce clause power); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 138 (interpretation of the commerce clause "has played a significant role in shaping concepts of federalism and the permissible uses of national power"); for examples of the breadth of Congress's commerce clause authority, see Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1020 (1985) (holding federal wage and hour provisions applicable to city's mass transit operations); Hodel v. Indiana, 452 U.S. 314, 323-29 (1981) (Congress's commerce clause authority extends to protection of farmland from effects of surface mining); Perez v. United States, 402 U.S. 146, 154-57 (1971) (Congress's commerce clause authority extends to proscription of loan-sharking); Heart of

Congress's commerce clause authority on the basis of the distinction between market participation and market regulation, a result clearly inconsistent with the Court's latest commerce clause decision.[258]

Nonetheless, it is unclear how the Court can use the market participant test in its present form to prevent Wisconsin from succeeding.[259] In

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Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) (upholding Congress's exercise of commerce clause power to prohibit discrimination in public accomodations).

258. In Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1007 (1985), the Court rejected the use of the distinction between "traditional" and "nontraditional" state functions to limit Congress's commerce clause authority. As argued *supra* note 240, the distinction between market participation and regulation is as untenable and inconsistent with federalism as that between traditional and nontraditional state functions.

259. If the Court does not revise the market participant test, it will probably find that Wisconsin's refusal to deal with recidivist labor law violators does not fall within the restrictive definition of market participation announced in South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237 (1984), the most recent Supreme Court case addressing the test. *See generally supra* notes 129-62. In that case the plurality said: "The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *South-Central Timber,* 104 S. Ct. at 2245-46. The purpose of Wisconsin's statute was precisely to affect economic relationships between private businesses and their employees. *See Gould,* 750 F.2d at 611 (purpose to encourage employers to comply with NLRA). The effect was clearly regulatory because Wisconsin's statutes expressly incorporated federal regulation and encouraged compliance with that regulation. *Id.* Since, like Alaska, Wisconsin has attempted "to govern the private, separate economic relationships of its trading partners," *South-Central Timber,* 104 S. Ct. at 2246, its actions, like those of Alaska, do not constitute market participation and are subject to commerce clause constraints. *Cf.* Appellee's Brief at 35-37, *Gould,* No. 84-1484 (U.S. prob. juris. noted May 20, 1985) (distinguishing *South-Central Timber* on this basis); Brief for the National Labor Relations Board as Amicus Curiae in Support of Appelle at 25-26, *Gould,* No. 84-1484 (U.S. prob. juris. noted May 20, 1985) (same).

Wisconsin's attempt to characterize blacklisting as market participation may fail even under the broader view of the test taken by the majority in White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983), discussed *supra* notes 110-28. That decision, like *South-Central Timber,* recognized that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." *White,* 460 U.S. at 211 n.7 (1983). Although *White* did not further define these limits, and although members of the Court disagree on their bounds, *see South-Central Timber,* 104 S. Ct. at 2246, n.10; *id.* at 2248 (Rehnquist, J., dissenting); *White,* 460 U.S. at 211 n.7; *id.* at 217 (Blackmun, J., dissenting in part), *White* clearly implies that state actions affecting only a "discrete, identifiable class of economic activity in which the city is a major participant" do not transgress these limits. *White,* 460 U.S. at 211 n.7. Wisconsin's statutory program leaps beyond these limits. It affects all of the employees of all of the employers who are subject to the NLRA and who supply the types of goods or services for which Wisconsin enters the market. The facts of *Gould* highlight the potentially far-reaching impact of Wisconsin's program. At the time its name was placed on the blacklist, the Gould Corporation no longer owned the divisions whose violations earned it a place there. *Gould,* 750 F.2d at 610. Wisconsin then canceled contracts made with two divisions of Gould that had not repeatedly violated the NLRA and were not located in Wisconsin. *Id.* As the Seventh Circuit noted, one may further appreciate the impact of allowing blacklisting practices by imagining different blacklisting criteria adopted by each of the fifty states. *See id.* at 612. In fact, at least four other states have enacted similar legislation barring the awarding of state contracts to employers found by a federal court of appeals to have violated the NLRA. *See* CONN. GEN. STAT. ANN. § 31-57a (West Supp. 1985) (three-time violators); MD. STATE FIN. & PROCUREMENT CODE ANN. § 13-404 (1985) (persons held in contempt for violations); MICH. COMP. LAWS ANN. §§ 423.322-.324 (West Supp. 1985)

contrast, under the proposed modification to the test, Wisconsin's program clearly fails. First, the test as revised clearly applies only in dormant commerce clause analysis and does not act as a restraint on congressional authority.[260] This revision recognizes that the Court created the test to curtail *judicial,* not *federal,* interference with state economic activity.[261] Furthermore, under the proposed test, a state participating in the market may only choose with whom it will deal on the basis of residency; it may not choose its trading partners on any other basis. This revision accommodates the state's conflicting duties to further the welfare of its own citizens and to honor the framers' intent to ensure a nationwide marketplace.[262]

IV. CONCLUSION

Present constitutional doctrine does not ensure that states further legitimate local objectives only in ways that do not impermissibly discriminate against interstate commerce. Recent developments in the dormant commerce clause doctrine have at once constricted and rigidified application of the clause. As a result, clearly protectionist state measures bypass commerce clause scrutiny. They are not held in check by the

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(three-time violators); OHIO REV. CODE ANN. § 121.23 (Page 1984) (held in contempt more than once); *cf.* ME. REV. STAT. ANN. tit. 26, § 1402 (Supp. 1984) (willful or repeated OSHA violators).

260. *See supra* text at note 220. In contrast, it is not clear at present whether the market participant test only applies in dormant commerce clause analysis or, instead, also limits Congress's exercise of commerce clause authority. *See supra* note 252.

261. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980) ("[T]he competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that . . . the adjustment of interests . . . is a task better suited for Congress than this Court.").

The proposal to restrict the market participant test to dormant commerce clause analysis also recognizes that dormant commerce clause doctrine as a whole is essentially a judicial creation. *See supra* notes 15-18 and accompanying text. By defining the test as a limit on judicial power under the commerce clause, it at once recognizes that state legislatures should have more leeway to address local concerns, and at the same time places on Congress more responsibility to inform its silences. Using the test to restrain Congress's exercise of commerce authority, as Wisconsin seeks to do, leads to the opposite result. It encourages courts alternatively to favor state or federal legislative policies by labeling state statutes "participation" or "regulation." The Court abandoned such superlegislative control over state and federal economic legislation long ago. *See, e.g.,* Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (state legislation). As for federal legislation, see, e.g., Wickard v. Filburn, 317 U.S. 111, 120 (1942) ("At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. . . . He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.") (citations omitted); *see also id.* at 129 (economic conflicts "rarely lend themselves to judicial determination").

262. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 442 (1980) (quoted *supra* text accompanying note 106); *see also supra* note 10 (defining protectionism).

equal protection clause, nor, despite its recent extension, by the privileges and immunities clause.

Accordingly, this note has argued that the commerce clause should allow the states to prefer state residents only when they behave both in form and intent like a private market actor. Alternatively, when states do not act like market participants, discrimination against interstate commerce should be tolerated only when it is necessary to achieve a legitimate local objective.

Richard H. Seamon