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Untangling the Market-Participant Exemption to the Dormant Commerce Clause

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UNTANGLING THE MARKET-PARTICIPANT EXEMPTION TO THE DORMANT COMMERCE CLAUSE

*Dan T. Coenen**

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There is no theme more familiar to constitutional law than the clash between federal power and state autonomy. The history of that struggle reveals, by and large, a long losing battle by the states. Over the years, the Supreme Court has recognized far-reaching congressional powers,¹ rebuffed efforts to rein them in through use of the tenth amendment,² and saddled the states with every significant restraint imposed by the Bill of Rights.³ From time to time, however,

1. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

2. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

3. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2, at 772-73 (2d ed. 1988).

the currents of constitutional doctrine run in favor of local control. In recent years, for example, the Court has stemmed the tide toward constitutionalizing the law of criminal procedure,⁴ and cut down federal judicial authority through development of the abstention doctrine⁵ and state-favoring constructions of the eleventh amendment.⁶ This article focuses on another important vehicle through which the modern Court has moved to protect local prerogatives: the market-participant exemption to the dormant commerce clause.⁷

The core of the Court's dormant commerce clause jurisprudence is well-settled: "The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method"⁸ Over the past two decades, however, the Court has lifted this prohibition when states act as "market participants" rather than as "market regulators."⁹ Invoking this distinction, the Court has shielded from commerce clause attack blatant favoritism of local interests when a state or municipality buys printing services,¹⁰ sells cement,¹¹ purchases goods,¹² or hires workers.¹³

This article explores the market-participant rule. Part I traces the rule's evolution and shows how it has proven less rigid than some initially feared. Part II probes the roots of the rule by challenging justifications for it suggested by other observers. Part III offers an alternative theory of the market-participant doctrine, arguing in particular that it rests on a cluster of rationales that properly have led the Court to uphold marketplace preferences as the "general rule."¹⁴ Part IV builds on Part III to advance a new, four-part framework for evaluating market-participant issues. Part V then uses that framework to

4. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984).

5. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

6. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

7. The term "dormant commerce clause" is widely used as a shorthand description of the principle derived by the Supreme Court from the Constitution — and art. I, § 8 in particular — to protect interstate commerce from impermissible interference by the states. See, e.g., Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

8. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 (1938).

9. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (discussing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)); see, e.g., Note, *The Market Participant Test in Dormant Commerce Clause Analysis — Protecting Protectionism?*, 1985 DUKE L.J. 697, 697-98 ("certain state actions taking the form of market participation will be summarily upheld that would, in a different form, be summarily struck down as invalid per se").

10. *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla. 1972) (three-judge court), *affd. mem.*, 409 U.S. 904 (1973).

11. *Reeves*, 447 U.S. at 446.

12. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

13. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

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

apply the market-participant rule to nine key categories of cases. This article rejects an all-or-nothing approach to these cases, advocating instead a sensitive application of the market-participant rule in light of its underlying justifications.

Many observers have attacked the market-participant rule.¹⁵ This article seeks to show that these challenges are misplaced. The Court's market-participant decisions reflect a sound, if complex, accommodation of competing constitutional values. This article lays bare those values and details the course they suggest courts should follow in deciding future market-participant cases.

I. THE DEVELOPMENT OF THE MARKET-PARTICIPANT RULE

A. *The Dormant Commerce Clause*

The commerce clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ." ¹⁶ The provision, by its terms, grants legislative powers to Congress. For more than a century, however, the Court has recognized that the commerce clause also limits the authority of states.¹⁷ These limits on state power emanate from the "basic pur-

15. See, e.g., Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S. ILL. U. L.J. 73, 76-77; Tarlock, *National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain*, 32 U. KAN. L. REV. 111, 133 (1983) ("state-produced goods immunity is without merit"); Note, *State Purchasing Activity Excluded from Commerce Clause Review — Hughes v. Alexandria Scrap Corp.*, 18 B.C. IND. & COMM. L. REV. 893, 901 (1977) [hereinafter *Boston College Note*] (attacking *Alexandria Scrap*); Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 GEO. WASH. L. REV. 601 (1982) [hereinafter *Geo. Wash. Note*]; Comment, *State Discriminatory Action Against Nonresidents: Using the Original Position Theory as a Framework for Analysis*, 22 HARV. J. ON LEGIS. 583, 587 (1985) [hereinafter *Harv. J. Leg. Comment*]; Comment, *Commerce Clause Immunity for State Proprietary Activities: Reeves, Inc. v. Stake*, 4 HARV. J.L. & PUB. POLY. 365, 365 (1981) [hereinafter *Harv. Pub. Poly. Comment*] (market-participant rule "is ill-founded"); Casenote, 27 WAYNE L. REV. 1575, 1590 (1981) [hereinafter *Wayne Casenote*] (citing "the artificiality of the market participant-market regulation distinction"); see also Gergen, *The Selfish State and the Market*, 66 TEXAS L. REV. 1097, 1138 (1988) (describing market-participant rule as "often criticized"). But see Regan, *supra* note 7, at 1193 (arguing that market-participant principle is not within the proper "definition of protectionism"); Wells & Hellerstein, *The Government-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1134 (1980) (market-participant rule "may produce satisfactory results"); Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1317 (1989) [hereinafter *U. Pa. Comment*] ("market participant exception makes sense"); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 78 (1983) (market-participant decisions "provide a foundation for a recognition of community contribution and empowerment"); but cf. Note, *The Disposition of State-Owned Resources Under the Commerce Clause*, 21 HOUS. L. REV. 533, 558 (1984) [hereinafter *Houston Note*] (viewing market-participant rule as a "mixed blessing"). For a recent judicial critique of the market-participant rule, see *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 262 (3d Cir. 1989) (Gibbons, C.J., dissenting).

16. U.S. CONST. art. I, § 8, cl. 3.

17. E.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317-19 (1851); *The Passenger*

pose” of the commerce clause:¹⁸ the creation of a “federal free trade unit”¹⁹ to foster “material success”²⁰ and “the peace and safety of the Union.”²¹ To protect these commerce clause values, the Court has propounded two main rules.²² First, state laws that effect “simple economic protectionism” are subject to a “virtually *per se* rule of invalidity.”²³ When New Jersey barred all local landfills from accepting out-of-state waste, for example, the Supreme Court struck down the law.²⁴ It reasoned:

Whatever 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. Both on its face and in its plain effect, [the law] violates this principle of nondiscrimination.²⁵

Second, the Court will not abide state measures that impose “an undue burden on interstate commerce.”²⁶ In *Hunt v. Washington*

Cases, 48 U.S. (7 How.) 283, 559 (1849); see *Willson v. The Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). See generally *L. TRIBE*, *supra* note 3, §§ 6-2 to 6-5.

18. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

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

20. 336 U.S. at 538.

21. 336 U.S. at 533 (quoting I J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 259-60 (1833)); see 336 U.S. at 534-35 (clause designed to promote “solidarity and prosperity”); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (Constitution “framed upon the theory that . . . in the long run prosperity and salvation are in union and not division”); Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487, 518 (1981) (collecting citations to *The Federalist* for the proposition that “[d]ecreasing the significance of state residence tends to strengthen interstate attachments and thereby diminish the likelihood of interstate conflicts. At the same time, external threats to the country’s security are more likely to be deterred if the nation is cohesive and not split along state lines.”).

22. *City of Philadelphia*, 437 U.S. at 623-24; accord, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). The Court also has articulated more focused rules to deal with such specialized problems as state taxation of multistate business activity, see, e.g., *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and state regulation of foreign commerce, see, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). These additional rules, however, in large measure constitute refinements of the two rules identified in the text and are of little importance in understanding the emergence of the market-participant rule.

23. *City of Philadelphia*, 437 U.S. at 624; accord, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979).

24. 437 U.S. at 629.

25. 437 U.S. at 626-27.

26. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353 (1951). The leading modern statement of the Court’s dormant commerce clause “balancing” test appears in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). There the Court stated:

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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142 (citation omitted).

State Apple Advertising Commission,²⁷ for example, North Carolina barred all producers selling crates of apples in the state from displaying any reference to quality other than the USDA grade. The statute was "neutral on its face."²⁸ Its impact, however, fell on Washington growers, who had developed a distinctive and costly labeling program to supplement the USDA grading system.²⁹ Undertaking "an accommodation of the competing national and local interests,"³⁰ the Court struck down the North Carolina law. It reasoned that the burdens the statute imposed on interstate apple sales outweighed North Carolina's espoused interest in avoiding buyer confusion.³¹ Upon invalidating the statute, the Court recognized, "some potential for 'confusion' might persist."³² It was, however, "the type of 'confusion' that the national interest in the free flow of goods between the states demands be tolerated."³³

The Supreme Court first applied these restrictions in cases involving government regulation and taxation of *private* market activity.³⁴ The Court's decisions thus left open the question whether dormant commerce clause restraints applied in another context: when states or municipalities prefer local interests in choosing their own trading partners.³⁵ The Supreme Court has grappled with this question in the series of cases recognizing and refining the market-participant rule.

B. *The Supreme Court's Market-Participant Decisions*

The Court first embraced the market-participant rule in *Hughes v. Alexandria Scrap Corp.*³⁶ That case involved a Maryland subsidy program designed to encourage the recycling of abandoned cars known as

27. 432 U.S. 333 (1977).

28. 432 U.S. at 340.

29. 432 U.S. at 336-40.

30. 432 U.S. at 350.

31. 432 U.S. at 351-54.

32. 432 U.S. at 354.

33. 432 U.S. at 354. A later comment by the Court may be read to suggest that the decision in *Hunt* rested on a finding of "discriminatory purpose." See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981). This suggestion, however, contradicts the Court's explicit statement in *Hunt* that "we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case." 432 U.S. at 352; see also G. GUNTHER, *CONSTITUTIONAL LAW* 286 n.2 (11th ed. 1985).

34. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805-07 (1976) (reviewing earlier cases).

35. See *Alexandria Scrap*, 426 U.S. at 808 (stating that "until today" the Court had not confronted any case involving a state "as a purchaser, in effect"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978) (leaving open question whether state could discriminate in affording access to state-owned, rather than private, landfills).

36. 426 U.S. 794 (1976).

“hulks.” The program, as initially implemented, afforded subsidy payments on an equal basis to both in-state and out-of-state scrap processors for each Maryland-titled hulk the processor destroyed.³⁷ The Maryland legislature, however, later imposed stricter requirements for establishing good title on out-of-state firms, thus producing a “precipitate decline” in the number of abandoned cars delivered to out-of-state processors.³⁸ Invoking the commerce clause, the lower court found the law invalid because of the “substantial burdens” it imposed on interstate commerce.³⁹ The Supreme Court reversed. Writing for the majority, Justice Powell explained that “Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.”⁴⁰ Maryland was “a purchaser, in effect,” which had “restrict[ed] its trade to its own citizens.”⁴¹ As stated by the Court: “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.”⁴²

The Court firmed up the market-participant rule in *Reeves, Inc. v. Stake*.⁴³ For fifty years, South Dakota had operated a cement plant and sold its cement to both in-state and out-of-state buyers. In 1974, however, a shortage required the rejection of some cement orders, and South Dakota chose to limit its sales to South Dakotans. A former Wyoming buyer challenged this preference for resident purchasers.⁴⁴ Again, a closely divided Court rejected the commerce clause attack. Justice Blackmun’s majority opinion conceded the possibility “that the exemption for marketplace participation . . . admits of exceptions,”⁴⁵ but rejected the plea to invalidate South Dakota’s discriminatory pol-

37. 426 U.S. at 796-97.

38. 426 U.S. at 801.

39. *Hughes v. Alexandria Scrap Corp.*, 391 F. Supp. 46, 62 (D. Md. 1975), *revd.*, 426 U.S. 794 (1976).

40. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

41. 426 U.S. at 808.

42. 426 U.S. at 810. Justice Stevens joined Justice Powell’s opinion, but wrote a separate concurrence emphasizing that Maryland had “created” the commerce in hulks it supposedly was burdening. 426 U.S. at 814, 815. Justice Brennan, joined by Justices White and Marshall, dissented on the ground that the majority had acted “mechanically,” 426 U.S. at 828, in choosing to “forgo all Commerce Clause analysis merely because the State is acting in a proprietary purchasing capacity,” 426 U.S. at 823.

43. 447 U.S. 429 (1980). *See generally* Case Note, 53 U. CIN. L. REV. 649, 655 (1984) (“the Court in *Reeves* made its first effort to articulate an analytical basis for the market participation exemption”).

44. 447 U.S. at 430-33.

45. 447 U.S. at 440.

icy.⁴⁶ The Court explained that the market-participant rule rested on the role that each state must play “as guardian and trustee for its people”⁴⁷ and on the “long recognized right” of private traders to choose their own trading partners.⁴⁸ In addition, the Court emphasized the “foresight, risk and industry” of South Dakota in undertaking the enterprise,⁴⁹ and the danger that disrupting South Dakota’s program would pose to state “experimentation in things social and economic.”⁵⁰

The market-participant rule surfaced again in *White v. Massachusetts Council of Construction Employers, Inc.*⁵¹ At issue in *White* was an executive order requiring each firm working on public construction projects paid for by the City of Boston to ensure that Boston residents made up at least half of the firm’s work force.⁵² Responding to the predictable dormant commerce clause attack, then-Justice Rehnquist wrote for a seven-Justice majority:

Alexandria Scrap and *Reeves* . . . 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 Commerce Clause. 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.’” . . . We reaffirm that principle now.⁵³

The Court went on to hold that Boston’s hiring rule constituted “market participation,” even though it “impose[d] restrictions that reach beyond the immediate parties with which the government transacts business.”⁵⁴

46. 447 U.S. at 440-47.

47. 447 U.S. at 438 (quoting *Atkins v. Kansas*, 191 U.S. 207, 222-23 (1903)).

48. 447 U.S. at 438-39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

49. 447 U.S. at 446.

50. 447 U.S. at 441 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Joined by Justices Brennan, White, and Stevens, Justice Powell filed a dissent, urging that the principle of *Alexandria Scrap* properly reached no further than to shield “traditional governmental functions.” 447 U.S. at 449. See generally *infra* text accompanying notes 77-89.

51. 460 U.S. 204 (1983).

52. 460 U.S. at 205-06. The Court held that the order was authorized by Congress, and thus constitutionally unassailable, to the extent it applied to city projects funded in whole or part with federal monies. 460 U.S. at 212-13. It also found that the case did not present the issue whether the order was constitutional as applied to projects funded in part with private money. 460 U.S. at 208-09. Thus, the only market-participant issue presented by the case concerned the constitutionality of the order as applied “to projects funded wholly with city funds.” 460 U.S. at 209.

53. 460 U.S. at 208 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 n.7 (1980)).

54. 460 U.S. at 211 n.7. Justice Blackmun’s dissent, joined by Justice White, accepted the validity of the market-participant/market-regulator distinction, but argued that Boston’s “attempt to govern private economic relationships . . . is the essence of regulation.” 460 U.S. at 218-19. See generally *The Supreme Court, 1982 Term, supra* note 15, at 70-71 (*White* “vigorously reaffirmed” the market-participant rule, and the Court “unanimously supported” the doctrine).

In *South-Central Timber Development, Inc. v. Wunnicke*,⁵⁵ the Court for the first time refused to apply the market-participant rule to validate a preference for state residents effectuated through state proprietary action. That case involved Alaska's sale of state-owned timber, which — due to the economics of shipping — was destined mainly for Japanese markets.⁵⁶ As a condition of sale, Alaska required buyers to have the timber processed in Alaska prior to shipment outside the state.⁵⁷ Writing for a four-Justice plurality, Justice White concluded that important “elements that were not present in *Reeves*” rendered this requirement invalid — namely, the presence of “foreign commerce, a natural resource, and restrictions on resale.”⁵⁸ The plurality rejected the argument that, under *White*, the market-participant rule broadly validates state-imposed contractual conditions, noting that “the doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate”⁵⁹

In its most recent market-participant case, the Court again declined to apply the rule. At issue in *New Energy Co. v. Limbach*⁶⁰ was an Ohio statute designed to encourage production and use of gasohol, a motor vehicle fuel made by mixing gasoline and a grain derivative, ethanol.⁶¹ Ohio provided a tax credit for each gallon of ethanol sold against the fuel tax otherwise payable on gasoline and gasohol sales. Ohio, however, refused to give any credit for ethanol produced in states, including Indiana, that did not afford a similar tax credit for Ohio-produced ethanol. As a result, the program favored Ohio producers over producers from Indiana.⁶² In response to an Indiana producer's commerce clause challenge, Ohio invoked the market-participant rule. It argued in particular that Ohio's discriminatory tax credit was functionally identical to the discriminatory state subsidy upheld in *Alexandria Scrap*.⁶³ A unanimous Supreme Court disagreed. It distinguished *Alexandria Scrap* on the ground that taxation

55. 467 U.S. 82 (1984).

56. 467 U.S. at 85 & n.4.

57. 467 U.S. at 84.

58. 467 U.S. at 96.

59. 467 U.S. at 97. Justice Marshall did not participate in *Wunnicke*, and Chief Justice Burger and Justice Powell refused to consider the market-participant issue because the lower court had not addressed it. 467 U.S. at 101. Justice Rehnquist, joined by Justice O'Connor, however, dissented from the majority's commerce clause analysis and, relying on *White*, argued that Alaska's “contractual term” was unobjectionable under the market-participant rule. 467 U.S. at 101-03 (Rehnquist, J., dissenting).

60. 108 S. Ct. 1803 (1988).

61. 108 S. Ct. at 1806.

62. 108 S. Ct. at 1806-07.

63. 108 S. Ct. at 1809.

is “a primeval government activity”⁶⁴ and that the Ohio tax credit — unlike Maryland’s action to “bid up” the price of abandoned cars⁶⁵ — “cannot plausibly be analogized to the activity of a private purchaser.”⁶⁶

C. *The Implications of the Supreme Court’s Decisions*

This series of Supreme Court decisions gives rise to two important points. First, the market-participant rule has proven less inflexible than some initially feared.⁶⁷ Just because the challenged in-state preference is connected with the state’s purchase or sale of goods or services does not mean it will automatically escape dormant commerce clause scrutiny. The plurality opinion in *Wunnicke* reveals that much,⁶⁸ as does the Court’s close examination of possible “exceptions” to the rule in *Reeves*.⁶⁹ Indeed, what has happened in the market-participant field reflects a sort of role reversal from ordinary dormant commerce clause jurisprudence. Just as state laws requiring private interests to discriminate against out-of-staters are subject to a “virtually *per se* rule of invalidity,”⁷⁰ the market-participant cases may be seen as establishing a “virtually *per se* rule” of validity for state discrimination in the marketplace. A *virtually per se* rule, however, need not operate *all* of the time — just as the rule set forth in *City of Philadelphia* has yielded on occasion.⁷¹ It follows that, even if a state looks

64. 108 S. Ct. at 1809.

65. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

66. *Limbach*, 108 S. Ct. at 1809.

67. See Tarlock, *supra* note 15, at 133 (asserting that *Reeves* recognized “few, if any, qualifications” to the market-participant rule); *Boston College Note*, *supra* note 15, at 928 (criticizing the “broad exclusion” created by *Alexandria Scrap*); Casenote, *Constitutional Law — Concrete Development Chips Away at Commerce Clause Analysis*, 14 CREIGHTON L. REV. 629, 629, 638 (1981) [hereinafter *Creighton Casenote*] (“*Reeves* decision has provided the basis” for “far-fetched . . . events to occur”); see also *Geo. Wash. Note*, *supra* note 15, at 617-18 (expressing concern about application of *Reeves* to distribution of state-owned natural resources); *Recent Decision*, 13 GA. L. REV. 1086, 1096 (1979) (challenging “*per se* rule” as “unfounded and unwise”); *Wayne Casenote*, *supra* note 15, at 1597 (citing “broad language in *Alexandria Scrap* and *Reeves*”).

68. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); see *supra* text accompanying notes 55-59.

69. 447 U.S. at 442-46; see also *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983); cf. *Hicklin v. Orbeck*, 437 U.S. 518, 528 (1978) (“We do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the [Privileges and Immunities] Clause.”); Anson & Schenkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEXAS L. REV. 71, 87 (1980) (In *Hicklin*, “very strong dicta indicated that, *Alexandria Scrap* notwithstanding, actual ownership would not automatically validate state embargoes or preferences against commerce clause attack.”).

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

71. See *Maine v. Taylor*, 477 U.S. 131 (1986); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935) (quar-

quite like a buyer or seller choosing trading partners, the Court has left itself room not to treat the state as such. The Court may accomplish this result by recognizing an "exception" to the "general rule"⁷² or by characterizing the state as a "market regulator" notwithstanding its superficial appearance as a "market participant."⁷³ Both roads lead to the same place. The key point is that they remain open.

Second, members of the Court have disagreed, and will continue to disagree, about when these roads should be traveled. Justice Powell, for example, wrote *Alexandria Scrap*, but dissented in *Reeves*. Justice Marshall, on the other hand, provided the decisive vote for applying the market-participant rule in *Reeves* even though he had joined the dissent in *Alexandria Scrap*. Justice Brennan, who dissented in every other case applying the market-participant rule, and Justice Stevens, who refused to sign on with the majority in *Reeves*, joined the majority without qualification in *White*. Justice Blackmun, on the other hand, strongly dissented in *White*, even though he was with the majority in both *Reeves* and *Alexandria Scrap*.

There is nothing inherently inconsistent in this voting pattern. Reasonable persons may disagree about whether *Alexandria Scrap* is a stronger case for judicial intervention than *Reeves* and whether *Reeves* is a stronger case than *White*. Even so, this erratic pattern suggests an *ad hoc* approach to the cases, directed by no overarching theory of the market-participant rule. It behooves the Court — and those who study it — to explore whether such a theory is identifiable.⁷⁴

antine laws constitutional). See generally *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 62 (1978) (emphasizing that Court's recognition of virtually per se rule leaves room for judicial flexibility).

72. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980); *Harv. Pub. Poly. Comment*, *supra* note 15, at 369 (Court in *Reeves* "admitted that there are exceptions"); *Wayne Casenote*, *supra* note 15, at 1595.

73. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93-99 (1984); see, e.g., *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (characterizing state contract debarment scheme as market regulation, rather than participation); *New Orleans S.S. Assoc. v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1021 (5th Cir. 1989) (stating that challenged user fees "wear the colors of both market regulation and market participation"); *Transport Limousine v. Port Auth.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) ("line between 'market participant' and 'market regulator' is not always bright"); *Geo. Wash. Note*, *supra* note 15, at 619 ("By recognizing that the exemption is not universally applicable, the *Reeves* court demonstrated the ultimate need to balance state and national interests . . ."); *Houston Note*, *supra* note 15, at 554 n.157 ("[S]tate ownership of the resource involved may not be dispositive if the court chooses to label the state's activity as regulatory based upon the market affected."); *Wayne Casenote*, *supra* note 15, at 1597 (noting that the Court may "find that the activity in question is not proprietary activity, and therefore not protected by *Alexandria Scrap* and *Reeves*").

74. See, e.g., *Anson & Schenkkan*, *supra* note 69, at 88 ("the doctrine plainly needs development").

II. UNTANGLING THE MARKET-PARTICIPANT RULE — PART ONE: AN EVALUATION AND REJECTION OF OTHERS' APPROACHES

A logical starting point for exploring the roots of the market-participant rule is to consider what justifications do *not* support it. Keen observers have proposed refinements of and rationales for the rule that I find of marginal relevance. This Part considers — and rejects — their suggestions.

A. Justice Powell and the Traditional-Functions Model

The list of critics of the market-participant rule includes some Supreme Court Justices. Justice Brennan has said the rule suffers from an “inherent weakness,” but he has offered no meaningful explanation why.⁷⁵ In contrast, Justice Powell has commented at length on the market-participant doctrine, expressing a vision of it quite unlike the one that has prevailed with a majority of the Court.⁷⁶ In his *Reeves* dissent, Justice Powell in fact *rejected* the “market participant” rule, arguing instead that the Court should exempt from commerce clause scrutiny in-state distributions of resources only when they amount to “integral government operations in an area of traditional governmental functions.”⁷⁷

Justice Powell's effort in *Reeves* to refocus analysis from market participation to “traditional governmental functions” was and is perplexing.⁷⁸ It was Justice Powell, after all, who wrote for the majority in *Alexandria Scrap* and justified that decision by characterizing the state as a “purchaser” that was “participating in the market.”⁷⁹ In

75. 467 U.S. at 101 (Brennan, J. concurring).

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

77. 447 U.S. at 451 (Powell, J., dissenting).

78. See, e.g., Case Note, *supra* note 43, at 656 n.48 (“it is difficult . . . to reconcile [Justice Powell's *Reeves*] approach with the reasoning in *Alexandria Scrap*”); see also Comment, *State Immunity from the Dormant Commerce Clause: Extension of the Market-Participant Doctrine from State Purchase and Sale of Goods and Services to Natural Resources*, 25 NAT. RES. J. 515, 525 & n.120 (1985) [hereinafter *Nat. Res. Comment*].

79. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808, 810 (1976); see also Anson & Schenkkan, *supra* note 69, at 86 n.69 (citing “the broad language of [*Alexandria Scrap*] that carves out an exception from dormant commerce clause review for state actions when the state enters the market as a participant”); Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 S. CT. REV. 51, 76; Varat, *supra* note 21, at 504 (reading *Alexandria Scrap* as promulgating “the view that the commerce clause does not limit state proprietary decisions in the market”); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 59 (1976); Note, *White v. Massachusetts Council of Construction Employers, Inc.: State or Local Governments Acting as Market Participants Are Not Subject to Commerce Clause Restraints*, 10 J. CONTEMP. L. 217, 219-20 (1984) [hereinafter *Contemporary Law Note*]; Note, *Proprietary Powers: A New Policy Tool for the States?*, 31 U. MIAMI L. REV. 729, 733 (1977) [hereinafter *Miami Note*]; Note, *Solving New Jersey's Solid Waste Problem Constitutionally — or*

addition, the Court decided *Alexandria Scrap* on the same day it recognized in *National League of Cities v. Usery*⁸⁰ the “traditional governmental functions” limitation on Congress’ commerce clause power to regulate state activity.⁸¹ If the Court saw the same or a similar principle as central to *Alexandria Scrap*, it surely would have relied significantly on *National League of Cities* and explored whether Maryland’s subsidy program constituted “traditional” state action.⁸² Instead, the Court relied on the starkly contrasting rationale that Maryland’s subsidy program was unassailable because Maryland had “entered into the market itself.”⁸³

The majority in *Reeves*, of course, rejected Justice Powell’s revisionist reading of *Alexandria Scrap*.⁸⁴ Moreover, an entirely different coalition of the Justices later overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,⁸⁵ thus repudiating the doctrinal underpinnings of Justice Powell’s tradition-bound analysis.⁸⁶ There existed from the outset, however, a more basic problem with Justice Powell’s “traditional governmental functions” approach to the market-participant rule. A hypothetical case shows why.

Assume that South Dakota corn farmers recently have endured a rash of trouble from leaf-eating gnats and locusts. South Dakota decides to address this problem by offering these frustrated farmers cash subsidies. Given Justice Powell’s validation of the in-state subsidy program challenged in *Alexandria Scrap*, it seems clear he would agree that South Dakota could confine these cash payments to South Dakota farmers. Suppose, however, that South Dakota chooses not to hand out cash but rather to distribute seed for a strain of bug-resistant corn.

— *Filling the Great Silences with Garbage*, 32 RUTGERS L. REV. 741, 755 (1979) [hereinafter *Rutgers Note*].

80. 426 U.S. 833 (1976).

81. 426 U.S. at 852.

82. *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 452 (1980) (Powell, J., dissenting).

83. *Alexandria Scrap*, 426 U.S. at 806.

84. *See* 447 U.S. at 435-36 nn.7-8.

85. 469 U.S. 528 (1985).

86. The Court’s care in *Reeves* to reject the *National League of Cities* analysis puts to rest any suggestion, *see Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 260-61 (3d Cir. 1989) (Gibbons, C.J., dissenting), that the Court either implicitly or otherwise repudiated the market-participant doctrine when it overruled *National League of Cities* in *Garcia*. *Accord Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 132 (D. Or. 1986), *affid.*, 820 F.2d 1482 (9th Cir. 1987). This conclusion is made especially clear by the Court’s post-*Garcia* reiteration of the rule. *See Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988). Indeed, as shown below, the Court’s decision in *Garcia* lends support to the market-participant rule. *See infra* notes 212-18 and accompanying text.

No principled basis for distinguishing the two cases appears, for if South Dakota may limit a cash subsidy to needy local farmers, surely it should be able to restrict a seed subsidy in the same way.⁸⁷ Now suppose that South Dakota chooses to charge its farmers for the corn seed but still distributes that seed only locally because of limited supplies. No basis for distinguishing the second and third programs seems available, for both schemes flatly favor local farmers over non-local farmers and do so with respect to precisely the same resource. Indeed, the third case appears to present a *less favorable* — and therefore *less discriminatory* — protection to in-state farmers because it is a protection for which they must pay.

The third program, like the first two, therefore seems constitutionally unassailable. Yet if South Dakota may limit paid-for distributions of state-supplied corn seed to South Dakota farmers, then why should it not be able in the same way to limit paid-for distributions of state-supplied cement? No evident principle distinguishes farmers from contractors. And, even if some principle might distinguish the two cases, it surely is not one based on the “traditional” or “integral” nature of the program.⁸⁸ These considerations — together with a salutary reluctance to stifle novel approaches to state problem-solving⁸⁹ — properly led the Court to rebuff Justice Powell’s tradition-based effort to reformulate the market-participant rule.

B. *The Commentators’ Approaches to the Market-Participant Rule*

Observers off the bench also have sought to unearth the roots of the market-participant doctrine. The literature reveals four main attempts: the first by Professor Varat,⁹⁰ the second by Professor Tribe,⁹¹ the third by Professor Regan,⁹² and the fourth by Professor Gergen.⁹³

87. See *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3052 (1989) (“If the State may ‘make a value judgment favoring childbirth over abortion and . . . implement that by the allocation of public funds,’ surely it may do so through the allocation of other public resources, such as hospitals and medical staff” (citation omitted).); Anson & Schenkkan, *supra* note 69, at 72 (“[d]isposition of resources in kind is hard to distinguish from cash expenditures”).

88. Nor is there a basis for distinguishing the cases on the ground that in the cement case, but not the corn case, the state is “burdening” interstate commerce. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 451-53 (1980) (Powell, J., dissenting). Rather, in both cases the “burden” is the same: it is more difficult for out-of-state businesses than in-state businesses to secure a scarce and valuable product. (It is noteworthy in this regard that Justice Powell’s *Reeves* analysis did not purport to rest on South Dakota’s pre-preference servicing of out-of-state buyers. For an argument that this fact should make no difference in any event, see *infra* text accompanying notes 322-26.)

89. See *infra* text accompanying notes 194-217.

90. Varat, *supra* note 21.

91. L. TRIBE, CONSTITUTIONAL CHOICES 144-46 (1985).

92. Regan, *supra* note 7.

93. Gergen, *supra* note 15.

While the approaches of these observers are provocative, in the end each fails to identify fully the values underlying the market-participant rule.

My objection to Professor Varat's analysis is the most straightforward. His article is without question loaded with useful insights.⁹⁴ The core proposition, however, is that there is "a presumptive justification"⁹⁵ for the Court's market-participant decisions — namely, that state residents may as a rule channel state resources to themselves because they constitute "the group responsible for creating the state's benefits."⁹⁶ This consideration in fact does provide a central justification for the market-participant rule.⁹⁷ The difficulty is that Professor Varat suggests that this consideration essentially *stands alone* in justifying the rule.⁹⁸ In my view, this single-pronged explanation of the market-participant doctrine is defective because it is substantially incomplete. In effect, all of Part III of this article seeks to demonstrate why.⁹⁹

My objections to the work of Professors Tribe, Regan, and Gergen

94. Indeed, even a cursory review of the footnotes that follow will reveal the broad influence of Professor Varat's work on this article.

95. Varat, *supra* note 21, at 523. Notably, important works by other commentators also sound this theme. See Anson & Schenkkan, *supra* note 69 at 89-91; Wells & Hellerstein, *supra* note 15, at 1133.

96. Varat, *supra* note 21, at 529.

97. See *infra* notes 170-93 and accompanying text.

98. To be sure, Professor Varat argues that other countervailing considerations — such as an abundance of, or special need for, the state resource — may cut against application of the market-participant rule in particular cases. See Varat, *supra* note 21, at 531-40. He seems, however, to fix pointedly on this "Lockean labor-desert theory" justification for the rule, *id.* at 523, while displaying a marked hostility to supplementary justifications, see, e.g., *id.* at 505-07.

99. Properly mentioned in connection with Professor Varat's work is the similarly pioneering effort of Thomas M. Anson and P.M. Schenkkan. See Anson & Schenkkan, *supra* note 69. These observers offer an explanation for the market-participant rule akin to that offered by Professor Varat, but they part company with him by finding important support for the rule in the representation-reinforcement analysis long championed by Professor John Hart Ely. See generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). In this vein, they write: "Because . . . outsiders have no formal political role in the state, . . . state regulatory action is less subject to the political check of those it affects than is state proprietary activity." Anson & Schenkkan, *supra* note 69, at 90. This analysis is unconvincing. Discriminatory marketplace activity, after all, adversely affects nonvoting nonresidents as surely as does discriminatory state regulation. Just ask the would-be Wyoming buyer turned away by the South Dakota cement plant. See, e.g., *Harv. J. Leg. Comment*, *supra* note 15, at 595 ("it cannot be seriously contended that discriminatory state legislation taking the form of participation does not have an impact on interstate commerce"). Indeed, Anson and Schenkkan recognize as much. As a result, they seek to augment their representation-reinforcement analysis by asserting that state marketplace actions constitute "a return of capital" to state residents, which thus "primarily affect[s]" those able to participate in local political processes. Anson & Schenkkan, *supra* note 69, at 89-90 (emphasis added). This refinement of their thesis, however, reveals that the Anson and Schenkkan representation-reinforcement rationale has no independent significance. Rather, the pivotal point becomes the heightened interest of state residents freely to choose the use of their own property — the same interest focused on by Professor Varat.

go beyond claims of omission. The ensuing discussion suggests that their analyses suffer from errors of commission as well.

1. *Professor Tribe and "Creating Commerce"*

Professor Tribe asserts that the market-participant cases reflect a simple, unifying theme: "The principle that necessarily underlies the market participant-market regulator distinction is that, when the state is *creating* commerce that would not otherwise exist, it has greater freedom to *shape* that commerce than when it is *intruding* into a previously existing private market."¹⁰⁰ This claimed synthesis is problematic because it renders the market-participant rule both too narrow and too broad.

The synthesis is underinclusive because the very Supreme Court cases from which Professor Tribe purports to derive his "creating commerce" principle involved state programs that *did* "intrud[e] into a previously existing market." Most importantly, the record in *Alexandria Scrap* suggested that Maryland's actions altered dramatically an already-existing market by diverting to Maryland hulks that, absent a subsidy program, would have wound up in Virginia.¹⁰¹ At the least, the Court's majority accepted this factual premise in holding that Maryland's program nonetheless was protected by the market-participant rule.¹⁰² In a similar vein, Professor Tribe argues that *Reeves* involved "commerce creation" because "[i]n *Reeves* lack of supply blocked purchases of cement by state residents [and] the state lessened the obstacle by providing additional supply."¹⁰³ That is true, but it is also true that by "lessen[ing] the obstacle," South Dakota *did* "intrud[e] into a previously existing market." Prior to construction of the South Dakota cement plant, after all, "producers outside the State were ' . . . supplying all the cement used in' South Dakota,"¹⁰⁴ and receiving "substantial profits . . . in the prevailing market."¹⁰⁵ Obviously, these sellers were displaced when the South Dakota plant began filling orders. The state thus "created commerce" only in the loose

100. L. TRIBE, *supra* note 91, at 146 (emphasis in original).

101. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 824-26 n.6 (1976) (Brennan, J., dissenting) (noting, for example, the complaint's allegation that the program deprived out-of-state processors of "scrap which normally moved in interstate commerce").

102. As stated by the majority, "the record contains no details," so that the issue posed if Maryland had in fact "created, in whole or substantial part," the commerce in hulks was "not clearly presented." *Alexandria Scrap*, 426 U.S. at 809 n.18; see *Reeves, Inc. v. Stake*, 447 U.S. 429, 446 n.18 (1980) (Powell, J., dissenting).

103. L. TRIBE, *supra* note 91, at 146.

104. *Reeves*, 447 U.S. at 431 n.1.

105. 447 U.S. at 431 n.1.

sense that it satisfied more buyers' needs at lower prices by generating an alternative and additional source of supply. At the least, it is not self-evident why such state conduct involves "creating commerce," but not "intruding into a previously existing market."

The "creating commerce" litmus is also *overinclusive* because it clashes with settled principles of the Court's commerce-clause jurisprudence. In his analysis of *Reeves*, for example, Professor Tribe indicates that a state "creates commerce" — and thus may "shape that commerce" — when it acts to supplement supply.¹⁰⁶ A state, however, could supplement supply in many ways. It might, for example, create additional supplies of milk by requiring that buyers pay a state-specified minimum price, so as to generate desirable price stability and the resulting market entry of more milk producers.¹⁰⁷ Under existing doctrine, however, the resulting "creation" of "commerce" would not permit the state to force milk producers to hold back from interstate markets those additional supplies produced as a consequence of the state's action.¹⁰⁸ Nor could Professor Tribe parry this criticism by responding that his "commerce creation" test applies only to cases in which the state spends its own funds. A state, for example, creates commerce when it spends its money to build a new road facilitating exchanges with an erstwhile remote and unreachable locality. Under settled commerce clause principles, however, the state could not for this reason exclude nonresident traders from the road.¹⁰⁹

There are other problems with Professor Tribe's analysis. Why, for example, does the "creation" of "commerce" necessarily raise a sufficiently powerful equity to justify state discrimination against interstate commerce? We might concede that *Alexandria Scrap*, *Reeves*, and *White* all involved, in a loose sense, state "creation" of commerce. But we might quickly add, "So what?" Does any constitutional authority or norm suggest that, because a state creates commerce, it may do so in a way that violates the "principle of nondiscrimination" underlying the dormant commerce clause?¹¹⁰ Professor Tribe's own analysis hints that he might find authority for his theory in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*.¹¹¹

106. See *supra* text accompanying notes 100 & 103.

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

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

109. See *infra* note 328.

110. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) ("principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

111. 472 U.S. 159 (1985). I say "hints" because Professor Tribe offered his observations on the market-participant rule prior to issuance of the Supreme Court's decision in *Northeast*

In *Northeast Bancorp*, the Court upheld a regionally discriminatory interstate banking statute against commerce clause attack, arguably because the statute facilitated *some* interstate commerce in banking even though Congress otherwise had allowed none at all.¹¹² It is not easy to squeeze this half-a-loaf rationale from the Court's opinion in *Northeast Bancorp*.¹¹³ Even accepting that rationale, however, it does not carry over to the state's "creation" of commerce — like that generated by the programs challenged in *Alexandria Scrap* and *Reeves* — that is entirely or essentially *intrastate*. The drafters of the commerce clause did not seek to stimulate commerce for its own sake. Rather, they sought to safeguard and promote "[c]ommerce . . . among the several States."¹¹⁴ If the choice is between maintenance of existing commerce flowing across state borders and the "creation" of additional commerce purposefully restricted to local residents, the dormant commerce clause's hostility to "a multiplication of preferential trade areas"¹¹⁵ might well favor the nondiscriminatory status quo.

Finally, while it is a fair enterprise to search the Court's market-participant cases for a unifying theme, it is a dubious business to distill a theme that the Court itself has eschewed.¹¹⁶ In *Alexandria Scrap*, Justice Stevens sought to wrap the market-participant rule in the same

Bancorp. Nonetheless, Professor Tribe clearly viewed the market-participant rule and the result he anticipated in *Northeast Bancorp* as properly resting on the same "commerce creation" principle. L. TRIBE, *supra* note 91, at 146; see also L. TRIBE, *supra* note 3, § 6-33, at 527 n.39 (describing earlier work as "an anticipatory defense of the *Northeast Bancorp* decision . . . by analogy to the 'market participant' theory"). It thus seems logical to believe that, given the Court's validation of the laws challenged in *Northeast Bancorp*, Professor Tribe would view that decision as helping to support and explain the market-participant doctrine.

112. Professor Tribe had earlier urged that an analysis emphasizing this fact was proper in meeting the commerce clause challenge to the regional banking plan. See L. TRIBE, *supra* note 91, at 138-48. Although the Court reached the result advocated by Professor Tribe, it did not track his reasoning. Rather, the Court found that the regional discrimination implemented by the plan was authorized by federal statute. 472 U.S. at 168-73. The Court then applied the familiar rule that "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." 472 U.S. at 174. Even so, it is conceivable that the Court was influenced to some extent by the commerce-creation dynamic of the case. See 472 U.S. at 173 (noting that Connecticut "proposed 'an experiment in regional banking' as a first step toward full interstate banking").

113. See *supra* note 112.

114. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

115. *Boston Stock Exch. v. State Tax Commn.*, 429 U.S. 318, 329 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

116. Of course, there is nothing wrong with a legal realist's seeking to prove that the Court is *doing* something different from what it is *saying*. Professor Tribe's analysis, however, does not seem to be offered in this spirit. Rather, he seeks to identify a rationale to be applied by lower courts encountering commerce clause issues in the future, including issues concerning state interstate banking laws. See L. TRIBE, *supra* note 91, at 146. The lower courts, however, may not properly employ a line of reasoning that the Supreme Court has explicitly rejected.

“creating commerce” cloak Professor Tribe would have it wear.¹¹⁷ In his concurring opinion, joined by no other member of the Court, Justice Stevens justified approval of the discriminatory Maryland program on the ground that “the commerce which Maryland has ‘burdened’ is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile scrap-processing business.”¹¹⁸ Stated another way, the case was one in which “Maryland created a market,” which “owe[d] its existence to [the] state subsidy program.”¹¹⁹ The full Court, however, rejected this line of analysis for the telling reason that Maryland *had* disrupted the out-of-state hulk market.¹²⁰ To be sure, Justice Powell did not find Justice Stevens’ “commerce creation” analysis wholly without relevance for future cases.¹²¹ But the Court’s specific refusal to apply a “commerce creation” rationale in *Alexandria Scrap* negates any claim that the rationale qualifies as the key “theme” or “principle” underlying the Court’s market-participant decisions.¹²² Any doubt in this regard was dispelled by *Reeves*, which tersely scuttled the Wyoming buyer’s attempt to argue that commerce-creation was the controlling principle guiding application of the market-participant rule.¹²³ It is simply not open to argue that “commerce creation” explains the Court’s market-participant decisions when the Court itself has said just the opposite.

This is not to say that Professor Tribe’s observations have no value. If his central mission is to recapture in more felicitous terms Professor Varat’s argument that state residents have a special claim to state benefits, his point is sound, though his phraseology is questionable.¹²⁴ One also senses — as did Justice Stevens and the majority in

117. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 814-17 (1976) (Stevens, J., concurring).

118. 426 U.S. at 815 (Stevens, J., concurring).

119. 426 U.S. at 815 (Stevens, J., concurring).

120. See *The Supreme Court, 1975 Term*, *supra* note 79, at 62 n.27 (rejecting Justice Stevens’ factual assumption that Maryland created the burdened commerce in hulks); *Boston College Note*, *supra* note 15, at 927 (noting that Justice Stevens’ claim of commerce creation “has absolutely no support in the record”); Note, *Taxes and Bounties Burdening Interstate Commerce: Distinguishing Boston Stock Exchange from Alexandria Scrap*, 34 WASH. & LEE L. REV. 979, 995 n.100 (1977). See generally *supra* notes 101-02 and accompanying text.

121. 426 U.S. at 809 n.18.

122. *Boston College Note*, *supra* note 15, at 927 (“no support can be found for Justice Stevens’ [commerce creation] position in the broad language employed by the majority, which seemingly excludes *all* state purchasing from commerce clause review”).

123. *Reeves, Inc. v. Stake*, 447 U.S. 429, 446 n.18 (1980); see also *County Commrs. v. Stevens*, 299 Md. 203, 217, 473 A.2d 12, 19 (1984) (rejecting commerce-creation theory in light of *Alexandria Scrap* and *Reeves*).

124. Notably, Professor Tribe echoes Professor Varat’s emphasis of the “fairness in allowing a community to retain the public benefits created by its own public investment.” L. TRIBE, *supra* note 91, at 145. Professor Tribe then proceeds, however, to articulate and defend his own “crea-

*Alexandria Scrap*¹²⁵ — that state activity may tread less on the values of a “national ‘common market’ ”¹²⁶ when that activity does not in any way disrupt already-existing commercial enterprises operating in other states. Finally, Professor Tribe’s emphasis is well-placed to the extent that it reflects concern about safeguarding federalistic experiments to cure market failures.¹²⁷ To say these things, however, is a far cry from explaining all applications of the market-participant rule by asserting that a state “should be able to enjoy largely unfettered freedom in creating the contours” of a “market” it “creates.”¹²⁸ If nothing else, this attempted synthesis would profit from refinement.

2. Professor Regan and “Coercion”

Professor Regan, like Professor Tribe, has sought to distill a unifying principle that explains the Court’s market-participant decisions. In essence, he contends that the market-participant rule is defensible because marketplace programs typically involve state “spending,” and spending programs pose less of a threat than tariffs and discriminatory regulations to the free-market values enshrined in the dormant commerce clause.¹²⁹ In support of this claim, Professor Regan offers several reasons, including that spending programs are “less likely to proliferate” because by definition they are “relatively expensive.”¹³⁰ Professor Regan is on target with these basic points. As shown below, market-participant programs *do* pose less of a threat to commerce clause values than tariffs and regulations, and that fact is attributable largely to the inherent expensiveness of market-participant programs.¹³¹ There is a flaw, however, in *another* reason offered by Professor Regan in urging that spending programs are less disruptive of commerce clause values — a reason on which he seems to lay special emphasis.

Professor Regan asserts: “For the most part, state spending programs are *less coercive* than regulatory programs or taxes with similar purposes. . . . Because spending programs are less coercive, they seem to interfere less, or less objectionably, with the ordinary workings of

tion of commerce” rationale as a “*broader* theme that underlies each case.” *Id.* (emphasis added).

125. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976) (majority opinion); 426 U.S. at 814-17 (Stevens, J., concurring).

126. *Hunt v. Washington State Apple Advertising Commn.*, 432 U.S. 333, 350 (1977).

127. *See also* Gergen, *supra* note 15, at 1141.

128. L. TRIBE, *supra* note 91, at 146.

129. Regan, *supra* note 7, at 1193-94.

130. *Id.* at 1194.

131. *See infra* notes 223-45 and accompanying text.

the market economy.”¹³² It is, however, difficult to see why state spending programs are “less coercive” than discriminatory regulations or tariffs in any meaningful respect. And even if spending programs are in some sense “less coercive,” it is difficult to see why that means they “interfere less” with the free-market values underlying the dormant commerce clause.

The reason why is a practical one: in the real world, discriminatory spending programs will have effects on out-of-state competitors that are just as draconian — and therefore just as exclusionary — as discriminatory tariffs and regulations. The economic effect of a nickel-per-gallon tariff on out-of-state milk, for example, should be little or no different than the effect of a nickel-per-gallon subsidy for in-state milk. In the former case the out-of-state producer will raise prices; in the latter the in-state producer will lower them. The “squeeze” on the out-of-state seller in both cases is the same; because of the state’s law, he will be undersold.¹³³

A case like *White* further illustrates just how “coercive” a state spending program can be. In that case, Boston plainly forced contractors to hire Boston workers through the threat of not opening its pocketbook. It might be said in response that the contractors were not “coerced”; they freely could have chosen not to do business with Boston. The same is true, however, of out-of-state firms subjected to burdensome regulations and tariffs; they too can freely avoid such unpleasantness by not doing business in the state.

For these reasons, Professor Regan’s no-coercion reasoning carries little, if any, persuasive force. This analytic misstep, moreover, may lead Professor Regan to put undue emphasis on the notion that state spending and marketplace programs pose limited dangers to commerce clause values. To be sure, his “reduced danger” line of reasoning carries weight in explaining the market-participant rule.¹³⁴ As demonstrated below, however, it neither stands alone nor serves as the dominant consideration in applying the market-participant principle.

132. Regan, *supra* note 7, at 1194 (emphasis added).

133. See, e.g., Gergen, *supra* note 15, at 1134-35 (“the effects of subsidies are generally the same as those of tariffs” with respect to out-of-state competitors); Varat, *supra* note 21, at 492 (noting that subsidies “may . . . reduce out-of-state competitive advantages to the same degree” as “state tax and regulatory schemes”); *Miami Note*, *supra* note 79, at 734-35; see also *United States v. Butler*, 297 U.S. 1, 71 (1936) (“The power to confer or withhold unlimited benefits is the power to coerce or destroy. . . . This is coercion by economic pressure.”); cf. *New Energy Co. v. Limbach*, 108 S. Ct. 1803 (1988).

134. See *infra* notes 223-45 and accompanying text.

3. Professor Gergen and "Equal Access"

Professors Varat, Tribe, and Regan seek to identify principles that both portend sound future results and jibe in large measure with the existing market-participant decisions. Other commentators, in contrast, have sought to scrap the existing precedents and to reconstruct from scratch dramatically new approaches to market-participant issues. The main effort in this regard has come from Professor Gergen, who argues "for per se rules prohibiting many impure subsidies, such as buy-, hire- and sell-local laws, . . . but allowing pure subsidies, such as cash grants and tax breaks."¹³⁵ Focusing on "efficiency"¹³⁶ and "utility maximization,"¹³⁷ Professor Gergen seeks to erect a dichotomy between programs through which a state "favor[s] its own in the allocation of goods it creates" (which a state may do) and programs through which a state denies "equal access to resources in the market" (which a state may not do).¹³⁸ Although Professor Gergen's analysis is useful in many details, his proposed dichotomy does not provide a suitable alternative to the existing market-participant rule.

Professor Gergen's focus on economic efficiency in construing the commerce clause is itself, to say the least, controversial. Indeed, the Court has emphasized, in the specific context of applying the dormant commerce clause, that the "Constitution does not require the States to subscribe to any particular economic theory."¹³⁹ The difficulties with Professor Gergen's approach do not stop here.¹⁴⁰ Most importantly,

135. Gergen, *supra* note 15, at 1134. This pattern of results (with the probable exception of "cash grants") is the precise opposite of the pattern now marking the Supreme Court's decisions. See *supra* notes 36-66 and *infra* notes 292-485 and accompanying text.

136. Gergen, *supra* note 15, at 1100 & 1107.

137. *Id.* at 1107.

138. *Id.* at 1106.

139. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987); see also Hellerstein, *supra* note 79, at 73 ("The possibility that the regulation may be economically inefficient ordinarily gives rise to no substantial constitutional objection. The Constitution did not enact Adam Smith's *Wealth of Nations*."); Tarlock, *supra* note 15, at 134 ("[T]he Commerce Clause grants Congress the power to regulate trade, but the promotion of competition is only one of the regulatory options that Congress can and does choose. . . . The Constitution does not mandate economic efficiency."); Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 370 (1985) (quoting Hellerstein with approval); cf. Anson & Schenkkan, *supra* note 69, at 78 n.31 ("The assumption that the commerce clause embodies a free-trade value . . . is erroneous. The commerce clause, by granting Congress the power to regulate interstate commerce, can as fairly be said to contemplate a regulated market as a free one."); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 434 (1982) (arguing that "[t]he commerce clause . . . cannot be said to establish and protect free trade or a national marketplace as a fundamental constitutional value").

140. For example, Professor Gergen's willingness to abandon his own economic approach — in particular, by endorsing subsidies even "though they . . . encourage inefficient uses of resources," Gergen, *supra* note 15, at 1134-35 — suggests the inherent limits of his proposed "test." Even more problematically, Professor Gergen supplements his efficiency-based approach by emphasizing "tradition," thus exposing his analysis to the same criticisms that led the Court

the utility-based decisional categories proposed by Professor Gergen themselves seem of limited utility for decisionmakers confronting real cases. Professor Gergen, for example, never satisfactorily explains why a state's preferential treatment of residents in supplying state-produced medical services constitutes "favor[ing] its own citizens in the allocation of goods it creates," while a preference for residents in supplying state-made cement does not.¹⁴¹ He urges that "[n]ot only is cement capable of provision through the market, but historically it has been so produced."¹⁴² In the same breath, however, Professor Gergen concedes that states may limit state-owned housing to state residents — even though housing also has long been "provi[ded] through the market."¹⁴³

One senses in reading Professor Gergen that he is moved in large measure by a desire "to prevent state ownership of commercial enterprises from undermining our common market."¹⁴⁴ As he puts it:

United States scholars, reared in our pervasively private market, too easily discount the possibility that publicly owned enterprises may displace private ones and that allowing a state to favor its citizens in its commercial operations could balkanize the national market. Would we really permit a socialist government in Vermont to defeat free trade by collectivizing its retail establishments, factories, and farms?¹⁴⁵

To this basic concern, four preliminary responses are available.¹⁴⁶

First, Professor Gergen overstates his case. We live in a "perva-

to reject the innovation-stifling approach of Justice Powell. *See supra* note 89 and accompanying text.

141. *See* Gergen, *supra* note 15, at 1142.

142. *Id.*

143. *Id.* *See generally infra* notes 315-26 and accompanying text (further discussing adverse-reliance argument).

144. Gergen, *supra* note 15, at 1142.

145. *Id.* at 1142-43. Others have expressed similar concerns. *See* Blumoff, *supra* note 15, at 111 & n.270 (viewing emergence of "a kind of state socialism" as "not as farfetched as it might appear"); Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10, 60 (1965) (fearing "incentive for states to socialize natural resources"); Creighton Casenote, *supra* note 67, at 638 ("inducements for socialized industry are obvious"); Note, South-Central Timber Development, Inc. v. Wunnicke: *The Commerce Clause and the Market Participant Doctrine*, 15 ENVTL. L. REV. 593, 613 (1985) [hereinafter *Envtl. L. Rev. Note*] ("What would prevent all states from setting up their own state-run industries to protect their own economies, and isolate those industries from the interstate market?"); *Harv. J. Leg. Comment, supra* note 15, at 586 ("if all state actions characterized as market participation are taken out of the strictures of the Commerce Clause, then only time prevents the states from structuring many, if not most, discriminatory actions in the form of market participation"); *Harv. Pub. Poly. Comment, supra* note 15, at 380; *cf.* Note, *The Constitution and State Control of Natural Resources*, 64 HARV. L. REV. 642, 649 (1951) [hereinafter Note, *State Control of Natural Resources*] (asserting that it is "well established that there is virtually no limitation on the state's right to engage in business in competition with, or to the exclusion of, private organizations").

146. I say "preliminary" because much of the discussion below echoes and builds on the points briefly made here.

sively private market” precisely because American sensibilities eschew state-managed economies. To most of us who are looking, the collectivization of Vermont simply does not loom close on the horizon.¹⁴⁷ Second, even if Vermont did collectivize its economy in an isolationist way, it is far from clear that the market-participant rule would shield such dramatic state action from dormant commerce clause attack. The rule to date has operated to protect resident preferences in discrete programs; a massive governmental effort to absorb the private sector, coupled with the widespread exclusion of nonresident traders, would present a very different problem.¹⁴⁸ Third, regardless of the market-participant rule, the commerce clause should prove equal to the challenge of countering extreme isolationism in individual states. This is so because the clause arms Congress with power. Even if the Court declined to invalidate Vermont’s collectivization effort, Congress unquestionably would be alerted to, and equipped to respond to, the task. Indeed, the central justification for *judicial* use of the Commerce Clause is that Congress has too little time and too few resources to give attention to “low visibility” state programs that have protectionist purposes or effects.¹⁴⁹ This “low-visibility” justification for preferring judicial action to congressional action, however, hardly would apply to Vermont’s hypothetical collectivization effort or to similarly sweeping protectionist incursions by states into historically private enterprises.

Finally, the pro-national values of the commerce clause do not stand alone. The Framers’ endorsement of a system of federalism envisioned experimentation — including economic experimentation — in individual states.¹⁵⁰ Even assuming the Framers would not have countenanced the collectivization of Vermont, they surely invited more limited departures from orthodoxy in state choices about distrib-

147. For similar views, see Anson & Schenkkan, *supra* note 69, at 93 (citing “popular antipathy to state experiments with apparent socialism”), and Varat, *supra* note 21, at 530 n.175 (“As for the incentive to socialism that the distinction creates, it seems unlikely in our society that the desire to be protectionist often will outweigh the disincentives.”).

148. See *infra* notes 223-42 and accompanying text (arguing that degree of interference with free commerce values is one proper consideration in applying the market-participant rule); *cf.* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3052 n.8 (1989) (suggesting that a state ban on the use of public facilities to perform abortions would be more suspect “if a particular State had socialized medicine”).

149. Tarlock, *supra* note 15, at 134; see also, e.g., L. TRIBE, *supra* note 3, § 6-1; Varat, *supra* note 21, at 488 n.4; Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 569 (1983) (noting Congress’ inability to deal with “myriad local laws and practices that penetrate state borders”).

150. See Varat, *supra* note 21, at 522 (“[D]iversity [inherent in the federal system] inevitably distorts business location and resource allocation decisions from what they would be in a true free-trade area. The Framers thus compromised to some degree the national free-trade objectives of the commerce clause in the interest of state power.”).

uting state resources. Given this constitutional plan, one cannot lightly infer a design to limit state freedom to experiment with novel distributional programs through judicial pronouncement.¹⁵¹

In fairness to Professor Gergen, he acknowledges the constitutional complexity of these cases¹⁵² and offers many useful insights about market-participant issues.¹⁵³ In the end, however, he does not offer good enough reasons to justify the extreme reworking of doctrine he proposes.¹⁵⁴

4. *A Closing Note on Others' Approaches*

This critique of existing commentaries should not obscure the valuable contributions their creators have made. Indeed, the broad themes — and specific analysis — developed in the next two Parts of this article draw heavily on the insights of these other analysts. Professor Varat, for example, well emphasizes the fairness of letting state residents spend state money on themselves. At least implicit in Professor Tribe's "commerce creation" theory is the thought that the states must have room to experiment with innovative distributional programs. There lies in the work of both Professor Regan and Professor Gergen a salutary sensitivity about safeguarding programs that undercut in only a limited way the core values of the dormant commerce clause. And even Justice Powell's tradition-steeped analysis bears some kinship to the focus on formal considerations advocated below.

In short, when taken cumulatively, the contributions of these observers offer support for the multi-factor analytical framework distilled in Part IV of this article. I turn now, in Part III, to detailing the underpinnings of that framework.

III. UNTANGLING THE MARKET-PARTICIPANT RULE — PART TWO: FINDING AND FORMULATING THE ROOTS OF THE RULE

The market-participant rule does not spring from a single source. Rather, like many rules, it is the product of "a congeries of purposes."¹⁵⁵ Indeed, five key justifications underlie the market-partici-

151. *See id.* at 530 n.175.

152. *See Gergen, supra* note 15, at 1106, 1153 (recognizing that his proposed "goods it created"/"resources in the market" dichotomy is "clouded" and requires "considerable refinement").

153. Indeed, despite differences in basic approach, the frequent citation to Professor Gergen's work in this article reveals that in many particulars I concur in his observations.

154. *See supra* notes 135-38 and accompanying text.

155. Fuller, *American Legal Philosophy at Midcentury*, 6 J. LEGAL ED. 457, 470 (1954).

pant rule. First, as a general matter, it is fair and consistent with broadly shared conceptions of property to let state governments favor state residents when selecting the recipients of the state's own largess.¹⁵⁶ Second, the values of federalism suggest a special need to avoid interference with state autonomy in this area.¹⁵⁷ Third, marketplace preferences for local concerns in general pose less of a danger to commerce clause values than do those discriminatory regulations and taxes that engendered recognition of the dormant commerce clause principle.¹⁵⁸ Fourth, formal considerations — emanating from constitutional text and history — suggest that states should have a freer hand when dealing in the market than when regulating others' efforts at free trade.¹⁵⁹ And fifth, institutional considerations counsel heightened caution in applying the dormant commerce clause to market-participant cases.¹⁶⁰

Before developing these themes, two preliminary points merit mention. First, some of these justifications support judicial nonintervention in evaluating in-state preferences going beyond state selection of trading partners. The fairness of facilitating state control over its own largess, for example, helps justify resident preferences in operating state welfare programs¹⁶¹ and municipal schools.¹⁶² That fact, however, does not mean that the market-participant principle is misconceived and too narrowly drawn, as Professor Varat in particular suggests.¹⁶³ If, as argued below, there are *additional* reasons for judicial restraint in marketplace cases that focus directly on the marketplace character of the state activity, then settled interpretive canons properly led the Court to lay down a "market-participant" rule, rather than some more expansive adjudicative principle. As the Court has noted on numerous occasions, it "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"¹⁶⁴

156. See *infra* notes 170-93 and accompanying text.

157. See *infra* notes 194-217 and accompanying text.

158. See *infra* notes 218-44 and accompanying text.

159. See *infra* notes 245-64 and accompanying text.

160. See *infra* notes 265-77 and accompanying text.

161. See *Califano v. Torres*, 435 U.S. 1 (1978).

162. See *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (noting "substantial state interest in assuring that services provided for its residents are enjoyed only by residents").

163. Varat, *supra* note 21, at 571 (advocating "a theory of state 'citizenship' in the broadest sense" as "the appropriate starting point"); *id.* at 552 (suggesting that the "only unfortunate thing about *Reeves* is that, although the elements of the principle were adverted to in the Court's opinion, they were displaced from their rightful place of honor by the ill-conceived proprietary exception doctrine"); *id.* at 493 (criticizing Supreme Court's "partial doctrines").

164. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commrs.*, 113 U.S. 33, 39 (1885)).

Second, it merits mention that these five rationales do not stand alone in justifying the market-participant doctrine. The Court in *Reeves* suggested a further rationale:

[S]tate proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.¹⁶⁵

This rationale is not free from difficulties,¹⁶⁶ although it draws at least some support from the fairness-based notion that similar burdens should beget similar benefits.¹⁶⁷ Moreover, whatever weight this rationale had when first articulated has been enhanced by the Court's post-*Reeves* holding that state purchases, no less private purchases, are subject to Robinson-Patman Act restrictions so long as the "[s]tate has chosen to compete in the private retail market."¹⁶⁸ Even so, the indisputable differences between firms and states,¹⁶⁹ together with the inherent amorphousness of the evenhandedness justification, renders it of limited significance. More central to explaining the market-participant rule are the five central rationales identified above. I turn now to explaining why.

A. *Sowing and Reaping — The Fairness of Directing State Benefits to State Residents*

There exists a basic distinction between state regulation or taxation

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

166. Professor Varat is unpersuaded by it, see Varat, *supra* note 21, at 506-07, as is Professor Tribe, see L. TRIBE, *supra* note 91, at 145; see also *The Supreme Court, 1982 Term, supra* note 15, at 72-73 n.26.

167. Notably, the court of appeals in *Reeves* relied heavily on this rationale. See *Reeves, Inc. v. Kelley*, 586 F.2d 1230, 1233 (8th Cir. 1978) (state as proprietor "possessed the rights of and is subject to the regulatory restrictions on any private business making marketing decisions"). Particularly unpersuasive is the suggestion that this argument must fail because its acceptance means that states — so long as they trade in the market — may do such things as discriminate against racial minorities. See, e.g., G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 326 (1986); cf. Varat, *supra* note 21, at 495 (noting that such "invidious" discrimination is "certainly" impermissible, including in the marketplace). The easy answer to this argument was stated well by Justice Douglas in another context: "[T]he right of people to be free of state action that discriminates against them because of race 'occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.'" *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 279 (1964) (Douglas J., concurring) (quoting *Edwards v. California*, 314 U.S. 160, 177 (1941)); see also *Takahashi v. Fish & Game Commn.*, 334 U.S. 410, 421 (1948) (invalidating on equal protection grounds state exclusion of resident legal aliens from fishing privileges notwithstanding defense that state discriminated based on its ownership of fish as trustee for its residents; distinguishing *Geer v. Connecticut*, 161 U.S. 519 (1896), as a case "where only the commerce clause was involved").

168. *Jefferson County Pharmacy Assn. v. Abbott Laboratories*, 460 U.S. 150, 154 (1983).

169. See *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 261-62 (3d Cir. 1989) (Gibbons, C.J., dissenting).

and state trading in the marketplace. When a state government regulates or taxes, it turns over nothing that belongs to it; rather, it compels private action through the exercise of raw governmental power.¹⁷⁰ In contrast, when a state government buys or sells, it is controlling and distributing its own resources. This distinction gives rise to the first and most basic rationale for the market-participant rule.

To see why, it is useful to recall that states are people — people who have banded together.¹⁷¹ One collective activity in which a state's citizens may engage is the accumulation of property. The property they accumulate is their own, and the state government handles that property on their behalf.¹⁷² Against this backdrop, it seems sensible that when a state government distributes state resources, it may — on behalf of all its citizens — pick and choose among proper recipients. An essential feature of having property is, after all, the right to exclude others;¹⁷³ and if individuals may exclude others from their property, so too may groups of individuals who own property jointly.¹⁷⁴ There is no apparent reason why this logic should not apply to a group of individuals that calls itself a state.¹⁷⁵ Indeed, the Supreme Court often has recognized governmental claims to limit access to government property, even when access is sought by full-fledged members of the political community.¹⁷⁶

170. See *Maier v. Roe*, 432 U.S. 464, 476 (1977) (“Constitutional concerns are greatest when the State attempts to impose its will by force of law.”); *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 (1989) (quoting *Maier*); cf. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (the use of “raw political power” to benefit favored groups is a recurring constitutional concern).

171. See, e.g., Anson & Schenkkan, *supra* note 69, at 89 (“the state remains nothing more than a set of relationships between individual persons, created by individual persons”); Varat, *supra* note 21, at 520; see also *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[I]nstitutions represent people, not trees or acres”).

172. See, e.g., *Heim v. McCall*, 239 U.S. 175, 191 (1915) (referring to state as a “trustee” of its people); *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903) (same).

173. *Nollan v. California Coastal Commn.*, 483 U.S. 825, 831 (1987); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); see Varat, *supra* note 21, at 494 (noting “traditional assumptions” that property ownership entails “range of choice . . . including choices about whom to admit and whom to exclude”); cf. *Nebbia v. New York*, 291 U.S. 502, 523 (1934) (“Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference.”).

174. See I A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 203 (P. Bradley ed., Vintage Books 1945) (“The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them.”).

175. See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (characterizing state residents as “tenants in common of [public] property”).

176. See, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 (1989) (upholding a state ban on the use of public facilities to perform abortions; citing earlier decisions that “all support the view that the State need not commit any resources to facilitating abortions”); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 108 S. Ct. 1319, 1327 (1988) (rejecting free exercise clause challenge to federal government’s building of road destroying sacred Native American

This property-based right to exclude others carries special force when a state's representatives prefer its own residents over the residents of other jurisdictions. Alexander Hamilton, writing in *The Federalist Number 32*, conceded the "justness" of letting "individual States . . . raise *their own* revenues for the supply of *their own* wants."¹⁷⁷ Professor Varat, more recently, has explained why basic fairness supports this form of self-preference: "Like other groups free to combine their members' efforts to produce collective benefits to be shared among the group, political communities, including states, have a prima facie justification for limiting distribution of their public goods to those who combined to provide them."¹⁷⁸ In short, as a matter of both equity and accepted notions of the nature of property, the citizens of a state may reap where they have sown.¹⁷⁹

site, and noting, "Whatever rights the Indians have to the use of the area, however, those rights do not divest the Government to its right to use what is, after all, *its land*"; *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 223 (1984) (remanding for further consideration of privileges-and-immunities challenge to municipal hiring preference; noting that judicial restraint "is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls"); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) ("[i]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid"); *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (rejecting free-assembly argument for right to gather on jailhouse grounds; asserting that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated"); *Truax v. Raich*, 239 U.S. 33, 39-40 (1915) (noting in invalidating state law requiring private discrimination in employment that "the act does not pertain to the regulation and distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and citizens of other States"); see also *United States Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129-30 (1981) (quoting *Adderley* in rejecting first amendment claim of right to deposit unstamped material in mailboxes reserved for use by Postal Service); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley* in rejecting free-speech challenge to exclusion of political speakers from military compound); *People v. Crane*, 214 N.Y. 154, 164, 108 N.E. 427, 430 (Cardozo, J.) ("[t]he state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens"), *affd.*, 239 U.S. 195 (1915).

177. THE FEDERALIST NO. 32 (Hamilton) (J. Cooke ed. 1961), at 199 (emphasis added).

178. Varat, *supra* note 21, at 523.

179. *Accord*, e.g., L. TRIBE, *supra* note 3, § 6-35, at 539 (There "appear to be some goods and services that a state's citizens, having created or preserved for themselves, are entitled to keep for themselves."); *Anson & Schenkkan*, *supra* note 69, at 89 ("When a state distributes resources owned in its capacity as a political 'trust' or 'corporation,' its disposition of those resources is in effect a return of capital to some of the resources' true individual owners."); *Linde*, *supra* note 145, at 61 ("the most obvious sources" for justifying discrimination against nonresidents include "the taxes that may be contributed to state programs by residents and not by nonresidents"); *Rodgers*, *The Limits on State Activity in the Interstate Water Market*, 21 LAND & WATER L. REV. 357, 364 (1986) (market-participant rule applies if state "expends its revenues"); *Wells & Hellerstein*, *supra* note 15, at 1131 ("the underlying principle may be that the states enjoy considerably more freedom from commerce clause restraints when dealing with their own resources than they do when dealing with the resources of others"); *The Supreme Court, 1982 Term*, *supra* note 15, at 73-74; *Houston Note*, *supra* note 15, at 536 n.22; *U. Pa. Comment*, *supra* note 15, at 1321 (recognizing propriety of state power "to reserve to state residents public goods paid for or created by state residents"); Note, *Municipal Employee Residency Requirements and Equal Protection*, 84 YALE L.J. 1684, 1697 (1975) [hereinafter *Yale Note*] (citing the "idea that the re-

This theme of fairness runs through the Court's market-participant decisions. In *Reeves*, for example, the Court reasoned that the state government should be able to serve "as trustee . . . for its people,"¹⁸⁰ "channel state benefits to residents of the state supplying them,"¹⁸¹ and "limit[] benefits generated by a state program to those who fund the state treasury."¹⁸² Again in *White*, the Court carefully limited its market-participant holding to those projects on which "the city expended its own funds."¹⁸³ The Court also has recognized the propriety of letting state residents control their own resources in restricting the application of the privileges and immunities clause. In such cases, the Court has emphasized, state ownership of the desired resource will be "often the crucial factor . . . considered in evaluating whether the statute's discrimination against noncitizens violates the Clause."¹⁸⁴

sources of a municipality belong to its residents and that residents legitimately are preferred in the distribution of such resources"). *But cf. id.* at 1698 (questioning whether so-called "public coffer" objective is constitutionally legitimate).

180. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915) (itself quoting *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903))).

181. 447 U.S. at 443 n.16.

182. 447 U.S. at 442.

183. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 214 (1983). Earlier in the opinion, the Court noted that its holding turned on the fact that the action in question related to "contracts involving only city funds." 460 U.S. at 211; *see also* *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982) (noting in applying the commerce clause to Nebraska's in-state water preference that state conservation efforts may give water "some indicia of a good publicly produced").

184. *Hicklin v. Orbeck*, 437 U.S. 518, 529 (1978) (emphasis added); *accord* *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220-21 (1984); *see also* *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387 (1929) (justifying preference for residents' access to local courts on ground that "broadly speaking it is they who pay for maintaining the Courts concerned"); *Sturgis v. Washington*, 368 F. Supp. 38, 40-41 (W.D. Wash.) (three-judge court) (nonresident tuition differential proper because of disparate contributions made to the university in other forms by in-state and out-of-state students and parents), *affd. mem.*, 414 U.S. 1057 (1973). Lower courts also have recognized this "sow-and-reap" aspect of the market-participant rule. *E.g.*, *Tenneco, Inc. v. Sutton*, 530 F. Supp. 411, 441 (M.D. La. 1981) (market-participant rule protects "a state program supported by funds from the state treasury"; but this principle is inapplicable to Louisiana natural-gas restrictions because "no state funds or state owned resources are involved"); *County Commrs. v. Stevens*, 299 Md. 203, 221, 473 A.2d 12, 21 (1984) (limiting landfill use to county residents ensures that "service provided there will be reserved for those who have paid to construct and operate the facility"); *see also, e.g.*, *State v. Antioch*, 694 P.2d 60, 63 (Wyo. 1985) (upholding construction hiring preference against privileges and immunities clause challenge; emphasizing "the fact that the Wyoming Preference Act confines its discriminatory effects to projects constructed from public funds"); *Antioch*, 694 P.2d at 65 (Thomas, C.J., concurring) (action unobjectionable where state "provides in essence that to the extent possible public works contracts benefit the citizens of the state whose contributions to the public treasury fund those projects"); *cf.* *Salla v. County of Monroe*, 48 N.Y.2d 514, 399 N.E.2d 909, 914-15, 423 N.Y.S.2d 878 (1979) (finding a "State's interest in allocating its funds to their beneficial owners, its citizens[,] insufficient to overcome privileges and immunities clause attack on in-state contractor preference, in part because "most of the project's funds emanated from Federal sources"), *cert. denied*, 446 U.S. 909 (1980). *But cf.* *Krzewinski v. Kugler*, 338 F. Supp. 492, 498 n.4 (D.N.J. 1972) (disavowing "public coffer" theory offered to justify residency requirement for public servants).

This sow-and-reap rationale is not without difficulties. Most important, nonresidents often pay the state taxes that create the state's property. This is especially true of those nonresidents likely to have an interest in trading with the state: nonresidents who live nearby, are temporarily located in the state, are highly mobile, or are corporations operating in multiple jurisdictions. Because these nonresidents have helped seed the fields producing the state's largess, the real unfairness may lie in excluding them from the harvest. At least five reasons, however, suggest that this challenge to the sow-and-reap rationale is unpersuasive.

First, nonresidents must take the bitter with the sweet. By choosing not to reside in the state, the nonresident receives some — even if not complete — immunity from state taxation.¹⁸⁵ It therefore is reasonable for the nonresident to bear greater burdens when state benefits are doled out.¹⁸⁶ Second, the burdensomeness of excluding nonresidents from state benefits is mitigated by constitutional rules that require states freely to award full resident status to all who seek it.¹⁸⁷ A rule permitting resident preferences is less objectionable when residence itself may readily be obtained. Third, any unfairness of a rule discriminating against nonresidents in disbursing state property is reduced by the rule's symmetrical effect. A person may not enjoy certain trading relationships with a state because she has chosen not to reside there. At the same time, she may benefit because of her own state's ability to exclude nonresidents from exchanges that may be of value to her. Fourth, regardless of who pays state taxes, it is always possible for states to redistribute resulting resources through non-marketplace programs that channel benefits solely to state residents.¹⁸⁸ Fairness may suggest that states should not forfeit this power to favor their own solely because their particular needs require adoption of market-participant programs.

Finally, a line must be drawn somewhere. Surely, the plea for fairness to nonresident taxpayers does not mean a state must treat *all* nonresidents *just* like its own citizens.¹⁸⁹ Most nonresidents pay no state

185. See Varat, *supra* note 21, at 527-28.

186. *E.g.*, Hellerstein, *supra* note 79, at 77 (“[F]orbid[ding] the States from preferring their own in the distribution of their resources would introduce into the federal system an unsettling asymmetry between the respective obligations the resident and nonresident owe to the State and the benefits they enjoy there.”).

187. See, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Edwards v. California*, 314 U.S. 160 (1941); Varat, *supra* note 21, at 519.

188. See Regan, *supra* note 7, at 1193 (“there is no doubt that a state can favor its own citizens in certain contexts,” such as in the dispersal of welfare benefits or in the direct payment of oil royalties).

189. See Varat, *supra* note 21, at 529 (“that some nonresidents may pay taxes is no reason to

taxes, and among even those who do, few will pay as much as the vast majority of state residents.¹⁹⁰ Thus, efforts fairly to include nonresidents in state marketplace programs will pose formidable administrative difficulties.¹⁹¹ In these circumstances, a sound, if imperfect, place for linedrawing is between nonresidents and residents. Such a line not only has the virtue of simplicity,¹⁹² it recognizes that state residents are “those . . . whom the State was created to serve.”¹⁹³

B. *The Values of Federalism and the Market-Participant Rule*

The sow-and-reap rationale suggests that the market-participant rule is proper because it is fair. In addition, the rule finds support in the values of federalism. The Court in *Reeves* relied squarely on “considerations of state sovereignty” in justifying the rule.¹⁹⁴ Commentators have echoed the theme that the market-participant rule responds

require the state to treat *all* nonresidents on a par with residents”) (emphasis in original); *see also* *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948) (“The State is not without power . . . to charge non-residents a differential which would merely compensate the State for . . . any conservation expenditures from taxes which only residents pay.”).

190. *E.g.*, *Sturgis v. Washington*, 368 F. Supp. 38, 41 (W.D. Wash.) (three-judge court) (upholding one-year waiting period for students seeking reduced in-state tuition because of reasonableness of “charging [more to] those who have not theretofore contributed tax dollars to the State”), *affd. mem.*, 414 U.S. 1057 (1973); *Starns v. Malkerson*, 326 F. Supp. 234, 240 (D. Minn. 1970) (three-judge court) (upholding one-year residence requirement for reduced in-state tuition on the ground that it reasonably “achieve[s] partial cost equalization between those who have and those who have not recently contributed to the State’s economy through employment, tax payments and expenditures therein”), *affd. mem.*, 401 U.S. 985 (1971); *see also* *Anson & Schenkkan*, *supra* note 69, at 90 (“Even though the state’s action may have a distributional impact on those outside the state, the primary distributional effects, both benefits and burdens, fall on the individual owners of the resources.”); *Simson, Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 396 (1979) (“[A]lthough most, if not all, nonresident students no doubt pay some taxes to the state during their years at the state school, and many non-resident students’ parents may have occasion to pay some taxes to the state as well, resident students and their parents typically pay more.”).

191. *See, e.g.*, *Varat*, *supra* note 21, at 553 (“recapturing the full cost of educating nonresidents, but no more, would be an administratively difficult task”).

192. *See, e.g.*, *Gergen*, *supra* note 15, at 1115 (noting “[t]he tremendous complexities involved in assessing the reasonableness of state taxes and fees”); *Varat*, *supra* note 21, at 529 (noting that courts “have been unreceptive to this sort of individual accounting”); *see also* *Simson*, *supra* note 190, at 396 (“although the assumption that resident students’ contributions to the state treasury differ dramatically from those of nonresident students obviously is imperfect, the classification that it helps explain is as precise as possible”).

193. *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980); *see also* *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (“It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest”); *Simson*, *supra* note 190, at 387 (“[T]he framers could not have intended to incapacitate states totally from disadvantaging nonresidents because the effect would have been to destroy the integrity of one of the basic units of the federal system that they envisioned — the state.”); *Varat*, *supra* note 21, at 490 (“[F]ulfillment of the fundamental obligation of state government — to care for the state’s own residents — depends, to some ill-defined degree, on the ability to withhold from others what a state chooses to provide its own.”).

194. 447 U.S. at 438.

to concerns about state autonomy.¹⁹⁵

The values of federalism are of keen constitutional importance.¹⁹⁶ As others have observed, the easiest way to nationalize the American people would have been to do away with state governments altogether.¹⁹⁷ However, “[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.”¹⁹⁸ Reasons of function, as well as long-established loyalties, precluded such radical surgery.¹⁹⁹ Meaningful local governance fosters experimentation and responsiveness to distinctive local conditions,²⁰⁰ facilitates choice by fostering diversity,²⁰¹ and may increase both liberty and participatory democracy by keeping government near at hand.²⁰² More subtly, the allowance of substantial local control may promote the healthiest brand of nationalism by fostering pursuit of different traditions in a spirit of shared toleration.²⁰³

To recite the creed of states’ rights, however, is not to explain why judicial interference with state distributional programs is *particularly* offensive to the values of federalism. The question remains: Why should the dormant commerce clause command closer scrutiny of state regulatory programs than of state marketplace programs?

The simplest answer is that state resources are the state’s “own” in a way that the state’s regulatory powers are not. It is, in other words, a greater intrusion on state autonomy to restrict a state’s use of its own tangible resources than to cabin its otherwise limitless power to coerce through government fiat.²⁰⁴ The Supreme Court’s eleventh amend-

195. See, e.g., Hellerstein, *supra* note 79, at 77.

196. E.g., THE FEDERALIST, *supra* note 177, No. 45 (Madison), at 310 (“the States will retain under the proposed Constitution a very extensive portion of active sovereignty”).

197. See Varat, *supra* note 21, at 519-20.

198. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 403 (1819).

199. See, e.g., Varat, *supra* note 21, at 516 (“state loyalties and fear of centralized authority compelled the retention of the states as separate political communities” (citing THE FEDERALIST Nos. 17, 31, 32, 34 (Hamilton), 45, 46 (Madison))).

200. See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (citing “principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures”); *L. TRIBE*, *supra* note 3, § 6-35, at 542-43; Varat, *supra* note 21, at 520 (“ability to experiment in a local setting is a frequently cited advantage of our federal structure”).

201. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 77 (1982) (O’Conner, J., concurring) (“Just as our federal system permits the States to experiment with different social and economic programs, it allows the individual to settle in the State offering those programs best tailored to his or her tastes.”) (citation omitted).

202. See, e.g., G. GUNTHER, *supra* note 33, at 71.

203. Cf. *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways”); Varat, *supra* note 21, at 531 n.176.

204. See, e.g., *Anson & Schenkkan*, *supra* note 69, at 76 (citing “heightened federalism con-

ment jurisprudence lends some support to this rationale. Thus, concerns of state sovereignty do not bar a federal court from directing state officials to alter state *policy* through the issuance of injunctions; they do, however, bar such a court from directly interfering with the state's *resources* through the imposition of money-damage awards.²⁰⁵

Instrumental considerations provide even stronger support for the general entitlement of a state to exclude nonresidents when it distributes state resources. We have already seen that states may act in many ways that restrict state benefits to state residents.²⁰⁶ If states may limit the distribution of state resources to state residents through some channels (such as by building and operating schools)²⁰⁷ but not through others (such as by building and operating cement plants),²⁰⁸ then we should expect states to favor the former type of activity over the latter.²⁰⁹ This result, however, would be undesirable, for it would induce state governments to spend state money on state programs not producing the greatest benefit for those who reside in the state. It thus would, as the Court explained in *Reeves*, "threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse."²¹⁰

A majority of the Court sounded this same theme nearly a decade after adopting the market-participant rule in a case not involving that rule at all. In *Garcia v. San Antonio Metropolitan Transit Authority*,²¹¹ the issue was whether the Court should invalidate under the tenth

cerns" when "a state discriminates in the disposition of state-owned resources," rather than imposes "preferences on privately owned resources"); Hellerstein, *supra* note 79, at 75 (The states' ability to "favor resident individuals and businesses in the distribution of state resources [is] . . . a logical corollary of the basic assumptions underlying our federal system. . . . [I]t is difficult to imagine [commerce clause] limitations extending so far as to bar the States from making any distinctions between in-state and out-of-state interests in distributing state resources without destroying the essential fabric of our constitutional plan."); Varat, *supra* note 21, at 541 & n.193 ("collection of state revenues to serve state residents is at the core of the purposes of state political organization"; noting that "fiscal autonomy interests of the state" justify resident preferences even when "free rider" problems are not present).

205. Compare *Edelman v. Jordan*, 415 U.S. 651 (1974) with *Ex parte Young*, 209 U.S. 123 (1908); see also Blumoff, *supra* note 15, at 83 (noting sovereign immunity rationale "that when funds are paid for private damages, government activities that enhance the general welfare are necessarily diminished"); Wells & Hellerstein, *supra* note 15, at 1098 (noting, in discussing the eleventh amendment, that a "state's autonomy from the federal government depends significantly on its financial independence").

206. See *supra* note 188 and accompanying text.

207. See *supra* note 162 and accompanying text.

208. See *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

209. See Varat, *supra* note 21, at 541 ("monetary resources are finite; making funds available for one purpose, or for one group, makes them unavailable for use by another").

210. 447 U.S. at 441; see also *The Supreme Court, 1982 Term*, *supra* note 15, at 73 (the Court was influenced in *White* by "a belief that the dormant commerce clause should not stifle worthy local initiatives").

211. 469 U.S. 528 (1985).

amendment federal minimum-wage legislation as applied to state workers employed in carrying out traditional governmental functions.²¹² In rejecting a tradition-based tenth amendment approach, the Court cited “the role of federalism,” focusing in particular on the need for states to be “equally free” to undertake orthodox and unorthodox programs.²¹³ As stated by the Court:

Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. . . . States cannot serve as laboratories for social and economic experiment, . . . if they must *pay an added price* when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.²¹⁴

This same federalist reasoning serves to explain and to validate the market-participant rule. If the state must pay the “added price” of including nonresidents when it directs resources into the marketplace, the state will be encouraged to adopt non-marketplace programs not producing the greatest benefit for state residents.²¹⁵ Indeed, a state may prefer suboptimal residents-only programs even when the inclusion of out-of-staters in the proposed program does not “bump” state residents or cost the state additional money.²¹⁶ Such a result, as the Court reasoned in *Garcia*, is incompatible with two key goals of our

212. 469 U.S. at 530-31.

213. 469 U.S. at 546.

214. 469 U.S. at 546 (emphasis added). In *Shapiro v. Thompson*, 394 U.S. 618 (1969), Justice Harlan sounded the same tocsin in dissenting from the Court’s invalidation of a one-year residency requirement for eligibility for state welfare benefits. The Court’s holding, he observed, would create “the unfortunate consequence of discouraging . . . generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments.” 394 U.S. at 675 (Harlan, J., dissenting). In other words, even if state legislators saw increased public assistance as the optimal way to help state residents, they would eschew such “fresh solutions” out of fear of having to share such benefits with erstwhile outsiders. 394 U.S. at 674-75 (Harlan, J., dissenting). (Notably, the majority in *Shapiro* did not question this observation. Rather, it accepted this risk in the particular context of invalidating the challenged durational residency requirement because the claimed entitlement to welfare benefits involved “the very means to subsist,” 394 U.S. at 627, and “the fundamental right of interstate movement” of individuals, 394 U.S. at 638. These factors, of course, are not present in market-participant cases.) See also Gergen, *supra* note 15, at 1112 (“[f]orced sharing of state-created goods may prevent the people of a state from maximizing their value”); cf. *Jefferson v. Hackney*, 406 U.S. 535, 551 (1972) (refusing, in response to equal protection challenge to welfare program producing discriminatory effects, “to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients”); quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

215. See, e.g., *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 251 (3d Cir. 1989) (local residents are “unlikely to pay for local government services if they must bear the cost but the entire nation may receive the benefit”).

216. See *Varat*, *supra* note 21, at 553-54 (“If a state must choose between no public schools or serving all nonresidents who demand admission, are able to pay, and are otherwise equal to the residents the state wishes to educate, it may hesitate before choosing the second option. A

constitutional federalism: the encouragement of novel state experiments and the fostering of governmental responsiveness to distinctive local needs.²¹⁷

C. *The Reduced Risk of Interference with Commerce Clause Values*

We have seen that permitting resident preferences in the distribution of state resources comports with both fairness and effective federalism. These considerations serve to counterbalance in state-as-trader cases the commerce clause's pro-national policy, a policy that has been vindicated repeatedly in cases involving discriminatory state regulations and taxes.²¹⁸ Wholly apart from these countervailing considerations, however, state programs preferring state residents in the distribution of state resources may threaten the underlying commerce clause goal of free trade in a unified nation to a lesser extent than do preferential regulatory or taxing programs. For reasons detailed below, state spending and marketplace preferences in fact do threaten commerce clause values to a reduced degree. Moreover, this line of reasoning explains in large measure the Court's partial grounding of the market-participant rule in "the long recognized right of [the] trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."²¹⁹

Critics have faulted the Court for embracing this "free trader" rationale.²²⁰ Professor Tribe, for example, has written:

[T]here are obvious tensions between the image of the state as just another economic actor, responding to the same pressures as private enterprises, and the image of the state intervening in the market, propelled by the power to tax, in order to promote the interests of its citizens. These

state might not wish to create a vast public educational establishment despite the ability to charge nonresidents more.").

217. See generally L. TRIBE, *supra* note 3, § 6-35, at 539-40 ("If a state . . . were forced to act evenhandedly in distributing its state-created 'goodies,' perhaps it would simply give up the effort to conserve or create them.").

218. See *supra* notes 17-33 and accompanying text.

219. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Notably, some observers have suggested that this line of reasoning should *limit* the market-participant rule to the narrow band of cases in which the state acts just like a typical private business. In *New Orleans S.S. Assoc. v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1021 (5th Cir. 1989), for example, the court suggested that "the assumption of the market participant exception" is "that the [state] will charge what the market would allow." Nothing could be further from the truth. In *Reeves*, for example, South Dakota clearly forewent the higher prices that increased demand for its cement from other states would have brought. The very point of the market-participant rule is to let states exclude out-of-state buyers and sellers from its dealings, even though such exclusions will produce prices other than "what the market would allow."

220. See, e.g., Varat, *supra* note 21, at 506.

are in fact inconsistent alternative defenses.²²¹

This criticism is not sound. The “free trader” rationale involves more than visualizing “the state as just another economic actor,” and if properly understood, is fully consistent with the fairness and federalism rationales also underlying the market-participant rule.

How, then, is the free-trader rationale properly understood? The rationale has two aspects, which we may label the “functional” and the “formal.” The remainder of this section examines the “functional” side of this rationale, which focuses on the reduced risk to commerce clause values in market-participant cases. Section III.D then explores the rationale’s “formal” dimension, which focuses on the impact of the language and legislative history of the commerce clause.

The creation of a national free market is widely accepted as a major purpose of the commerce clause.²²² The economic justifications for free markets are well-known. Free markets channel work to those who produce most efficiently, and they encourage further efficiency by increasing the number of actual and potential competitors of all producers.²²³ Free markets induce specialization and innovation by expanding the range of available buyers.²²⁴ Free markets allow resources to move into the hands where they are most valued, thus maximizing the overall wealth of the trading unit.²²⁵ If the free choice of trading partners creates efficiencies and maximizes the national wealth, then why should not states — like anybody else — be permitted to deal with whomever they wish?

Critics of the market-participant rule have answered this question

221. L. TRIBE, *supra* note 3, at 432; *accord* Note, *supra* note 9, at 712 (citing the “paradox” of the Court’s market-participant justifications because “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”); *Harv. Pub. Poly. Comment*, *supra* note 15, at 369 n.26; *Houston Note*, *supra* note 15, at 555 (citing “inconsistency” in the Court’s rationale); *Wayne Casenote*, *supra* note 15, at 1586 (arguing that the Court in *Reeves* “relied on two conflicting notions”); *see also* Recent Case, 80 HARV. L. REV. 1357, 1360 (1967) (viewing the analogy of the state to private trader as “strained”); *cf.* Hellerstein, *supra* note 79, at 76 (noting that the right of a state to control its own funds and its right to deal in the marketplace as it wishes are “related but analytically distinct principles”).

222. *See supra* notes 19-21 and accompanying text. This view is not universally held, however. *See, e.g.,* Eule, *supra* note 139.

223. *See* Gergen, *supra* note 15, at 1108, 1109 n.65 (noting, among other things, “economies of scale made possible by the enlargement of markets” and “the stimulus of increased competition . . .”); *see also* Bane, *Interstate Trade Barriers*, 16 IND. L.J. 121, 126 (1940); Blumoff, *supra* note 15, at 100; Melder, *The Economics of Trade Barriers*, 16 IND. L.J. 127, 142-43 (1940).

224. *See, e.g.,* Comment, *In-State Preferences in Public Contracting: States’ Rights Versus Economic Sectionalism*, 49 U. COLO. L. REV. 205, 210 (1978) (asserting that free national trade has the effect of increasing “specialization”).

225. *See, e.g.,* A. KRONMAN & R. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-2 (1979).

by observing that states do not act like the ordinary Joe.²²⁶ It is the ordinary Joe's "self-love" that leads to efficient production through unregulated trading.²²⁷ A state, however, "frequently will respond to market conditions on the basis of political rather than economic concerns."²²⁸ This motivation, it is said, means that when states adopt resident preference programs, free-market goals may be frustrated. When a state adopts an in-state buying program, for example, the most efficient producers often will go unrewarded.

For the state-as-trader rationale to carry persuasive force, however, we need not conclude that states act just like private traders. Rather, it is necessary to show only that discriminatory actions by states in the marketplace pose *less* of a risk than discriminatory regulations and taxes to the values underlying the dormant commerce clause. For at least three reasons, the free-trader rationale has a meaningful functional content when measured against this standard.

First, when state regulations or tariffs effectively prohibit interstate trade, the state's disruption of the "national common market" is plain and powerful. Private traders who wish to maximize gains through trades cannot do so.²²⁹ On the other hand, when South Dakota elects to sell its cement to in-state Buyer *A* over out-of-state Buyer *B*, it is not at all clear that the goal of "gains through trades" has been subverted. Rather, the citizens of South Dakota have elected to sell their cement to in-state Buyer *A* precisely because in their self-interested view they will get more in return than if they sell to out-of-state Buyer *B*. They will not get the higher price that Buyer *B* offers, but they will "buy" other benefits they value more highly: contributions to the public till through otherwise jeopardized future tax payments, helpful ripple effects through the local economy, and perhaps even intangible gains like a preserved sense of local vitality.²³⁰ Such a trading choice by the

226. See, e.g., Anson & Schenkkan, *supra* note 69, at 89 ("the state responds to incentives and maximizes values that no private economic actor would respond to or value"); Varat, *supra* note 21, at 506; Wells & Hellerstein, *supra* note 15, at 1129; Note, *supra* note 9, at 713 n.95 (state's "political decision [to favor state residents in procuring services] transforms whatever 'private entity' features it has"); Note, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 IOWA L. REV. 576, 585 (1973) [hereinafter *Iowa Note*] (states that exercise preferences for residents in purchasing act on "irrational economic considerations of local politics"); *Harv. Pub. Poly. Comment*, *supra* note 15, at 378 (characterizing *Alexandria Scrap* and *Reeves* as involving "economically irrational decisions" not based on "minimum cost/maximum profit" goals); *Wayne Casenote*, *supra* note 15, at 1591.

227. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 21-22 (8th ed. 1796)

228. *Reeves, Inc. v. Stake*, 447 U.S. 429, 450 (1980) (Powell, J., dissenting).

229. See *supra* note 225 and accompanying text.

230. See Gergen, *supra* note 15, at 1107 n.51 ("efficiency might best be defined as the maximization of not only material wealth but all human satisfactions").

state is not unlike choices made by private concerns operating in the free market. It might well be, for example, that a local bank lending money in a time of shortage would prefer a local firm to a nonlocal borrower willing to pay more interest. Why? Because a refusal to deal with the local firm might cause it to fail, thus costing the bank a major customer for years into the future. Turning away the local firm might also put local people out of work, thereby threatening the bank's ability to collect loans it has made to other customers. The bank's decision to make the lower-interest loan in these circumstances is rational because the bank's funds, according to the bank's own self-interested judgment, have found "their highest valued, most productive uses."²³¹ So it is, one can argue, with South Dakota's cement. The cement moves to its optimal use in the eyes of its joint owners, the citizens of South Dakota. To them, when the cement is transferred to South Dakota residents, the greatest gain through trade has been achieved.²³²

This brief discussion surely is not an authoritative treatment of the economics of state-made trades. It suffices, however, to make the salient point: something different — and less threatening to social wealth-building — may well be happening when a state favors residents in trading its resources, as opposed to when a state simply bans or slaps a tariff on private consensual exchanges. One might argue the opposite position, but at least it is "open to question how well equipped courts are to make this kind of determination about the workings of economic markets."²³³ It follows for this *functional* reason that courts should hesitate to condemn resident preferences in state-made trades.

Second, the Framers' central goal in forging the commerce clause was not to maximize economic efficiency.²³⁴ Rather, the core goal of the commerce clause was and is to engender national solidarity.²³⁵

231. A. FARNSWORTH, *CONTRACTS* § 1.2, at 7 (1982).

232. There is another way of phrasing this point. One might say that free trade creates wealth in two separate ways. First, even assuming a fixed number of goods and services, their voluntary exchange creates wealth simply by moving them into the hands of those persons who value them most. Second, unrestricted voluntary exchange maximizes the creation of wealth by inducing the most efficient production of *additional* goods and services. Even assuming that in-state preferences in state-made trades tend to undermine the latter tendency of free markets, such preferences may be compatible with the former.

233. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985).

234. *E.g.*, Regan, *supra* note 7, at 1124 ("[t]he people who wrote our Constitution were by no means thoroughgoing free traders"); *see also supra* note 139 and accompanying text.

235. Regan, *supra* note 7, at 1114 (the Framers "feared not merely for the economic health, but also and even more for the political viability of the infant United States"); *see also* THE ARTICLES OF CONFEDERATION art. IV (1781) (recognizing principle of like treatment for residents and nonresidents "to secure and perpetuate mutual friendships and intercourse among the people"); THE FEDERALIST, *supra* note 177, No. 22 (Hamilton), at 137 (citing "serious sources of animosity and discord"); THE FEDERALIST, *supra* note 177, No. 42 (Madison), at 283 (citing risk of "unceasing animosities"); Bane, *supra* note 223, at 122 (quoting letter by Madison urging

Professor Regan has argued that "it just seems obvious that when states distribute benefits they can prefer their own citizens."²³⁶ It follows, he says, that such actions "seem less hostile to other states and less inconsistent with the concept of union than discriminatory regulation or taxation."²³⁷ The point may be made more forcefully. If it is "obvious" that a state may prefer its own residents in distributing its resources, then few nonresidents will take umbrage when a state does so; and if few nonresidents take umbrage, then their home states are unlikely to pursue the retaliations and reprisals the dormant commerce clause was meant to neutralize.²³⁸ To this thought, another may be added: when a state passes out benefits in the specific context of making contracts to buy or sell, its presumed right to distribute benefits to its own citizens becomes aligned with the "long recognized right" of the trader to determine with whom it will deal.²³⁹ In this specialized context, so marked by a tradition of free choice, the risk posed to interstate cohesion by in-state preferences seems at its lowest ebb.

Third, the built-in "expensiveness" of in-state marketplace preferences may brake the danger to commerce clause concerns that discriminatory state marketplace actions pose. As Professor Regan has written: "The very fact that spending programs involve spending and are therefore relatively expensive as a way of securing local benefit makes them less likely to proliferate than measures like tariffs. They therefore are less likely to damage the economy seriously in the aggregate, if they damage it at all."²⁴⁰ This "expensiveness" rationale is debatable. The linchpin of the theory is that states will limit in the aggregate expenditures favoring local commercial interests; such expenditures, however, seem very much with us.²⁴¹ Moreover, discriminatory state regulatory and tax programs, which *do* violate the commerce clause, also may be said to be "expensive" to the state, for they always entail at least those costs involved in their administration.

Even so, this expensiveness rationale packs at least some persuasive punch. Although discriminatory regulations and tariffs may in-

a constitutional convention because trade barriers "are destructive of the general harmony"); Varat, *supra* note 21, at 511 (commerce clause "designed to promote political and social cohesion . . . as well as to establish a favorable framework for economic growth").

236. Regan, *supra* note 7, at 1194.

237. *Id.*

238. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935).

239. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

240. Regan, *supra* note 7, at 1194.

241. *See generally infra* notes 295-97.

volve expense to the state, the costs they generate are less direct, less visible, and less likely to be significant than the costs that flow from conscious decisions to pay more or get less by choosing to deal with only resident trading partners.²⁴² These dynamics indicate that ordinary political processes contain safeguards against the spread of marketplace preferences that are not applicable to discriminatory taxes and regulations.²⁴³ If that is so, ample Supreme Court precedent suggests that judges should relax dormant commerce clause scrutiny in the marketplace setting.²⁴⁴

D. *Formal Considerations Underlying the Market-Participant Rule*

Some observers disagree with the proposition that there is a “functional” justification for the market-participant rule based on the state’s status as a trader.²⁴⁵ Even accepting (as I do not) that these critics are correct, they err nonetheless in approaching the constitutional question from only one direction.

Judicial reasoning is never entirely “functional.” It also, and al-

242. Professor Gergen questions this “expensiveness rationale” by noting that tariffs also impose “internal costs” in the form of “the increased price of goods.” Gergen, *supra* note 15, at 1135-36 n.201. It follows, according to Professor Gergen, that Professor Regan’s argument must rest solely “on the assumption that the cost of a subsidy is more obvious and so more likely to be taken into account.” *Id.* Professor Gergen is correct in emphasizing the visibility of the costs of marketplace programs, but may be too cavalier in otherwise dispatching the “expensiveness” rationale. The key point is that tariffs and spending programs have qualitatively different effects than subsidy and marketplace programs on the *state treasury* operated by *state legislators*. Measured against the status quo, spending programs entail a direct *outflow* or *reduction* of state treasury funds. Tariffs, on the other hand, constitute new revenue-raising taxes, which accordingly (at least in the short term) may *increase* the level of state funds. Thus, the two forms of legislative action have greatly different effects on the distinctly legislative mission of balancing the state’s budget. In this sense, marketplace preferences and other distributional programs are “expensive” in a way that tariffs and discriminatory regulations are not.

243. *See, e.g.*, Gergen, *supra* note 15, at 1111.

244. *See, e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981) (plurality opinion) (validity of laws under commerce clause hinges in part on whether “a State’s own political processes will serve as a check against unduly burdensome regulations”); *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 447 (1978) (focusing on whether a “State’s own political processes will act as a check on local regulations that unduly burden interstate commerce”).

Notably, Professor Regan suggests that this “spending” rationale is inapplicable to a substantial range of market-participant discrimination, including the type at issue in *Reeves*. *See* Regan, *supra* note 7, at 1195. It is difficult to understand why. A state, after all, has only so much money and only so much cement. Trading cement for fewer dollars is not functionally different from trading state money for fewer desks, chairs, or schoolbooks. In both instances the exchange is “expensive” in the relevant sense that the state fails to get the “biggest bang” it can, be it for its buck or its bags of cement. Both forms of marketplace activity impose equally upon the state’s ability to balance its budget and reduce equally the number of benefits the state may turn over to the people as a whole. *See supra* note 242. In these key senses, buying and selling discriminations are equally “expensive” to the state; it follows that they should be similarly unlikely to proliferate in a world of scarce resources.

245. *See supra* note 226.

ways, has a formal dimension.²⁴⁶ When a court interprets a statute it must pay heed to the text's language and legislative history even if to do so produces results deemed unfair, unwise, or dysfunctional.²⁴⁷ Similarly, in constitutional adjudication, courts must — and do — pay attention to formal considerations raised by textual language and constitutional history.²⁴⁸ As Professor Ely puts it, "positive law has its claims, even when it doesn't fit some grander theory."²⁴⁹ These considerations have been at work in the market-participant cases. In particular, they underlie at least in part the Court's founding of the rule on the "long recognized right of [the] trader or manufacturer" to choose its own trading partners.²⁵⁰

The text of the commerce clause grants Congress the power to "regulate" interstate commerce,²⁵¹ thus to the extent the clause embodies a "negative implication,"²⁵² that implication is that the states may not "regulate" commerce in certain respects.²⁵³ The term "regulate," of course, is not self-defining. It seems fair to say, however, that when a state buys books or sells corn seed the ordinary person is less likely to see a "regulation" than when a state, for example, excludes out-of-state wares²⁵⁴ or promulgates minimum price laws governing private transactions.²⁵⁵ This textual justification for the market-par-

246. See P. ATIYAH & R. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 2-3 (1987).

247. See, e.g., *Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987); *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984).

248. See, e.g., *Coy v. Iowa*, 108 S. Ct. 2798 (1988).

249. J. ELY, *supra* note 99, at 76.

250. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); see also *Transport Limousine, Inc. v. Port Auth.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (emphasizing that actions of a state agency in granting permits to airport concessionaires "resembles the activities of a merchant in the private sector").

251. U.S. CONST. art. I, § 8, cl. 3.

252. E.g., *Wood Marine Serv. Inc. v. City of Harahan*, 858 F.2d 1061, 1064 (5th Cir. 1988); see *Hellerstein, supra* note 79, at 65 n.79.

253. As the Court bluntly stated in *United Bldg. & Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 220 (1984) (emphasis added): "The Commerce Clause acts as an *implied* restraint upon state *regulatory* powers." See also *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2284 (1989) ("the Commerce Clause withholds power from the States at the same time it confers it on Congress"); *New Energy Co. v. Limbach*, 108 S. Ct. 1803 (1988) (quoted *infra* at text accompanying note 483); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (finding "great force" in the argument that "as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation"); L. TRIBE, *supra* note 3, § 6-2, at 403 ("the constitutional limitations upon state interference with interstate commerce . . . [originated] as negative judicial inferences from the constitutional grant of power to Congress"); Gergen, *supra* note 15, at 1117 ("in [the] grant to Congress of authority to regulate interstate commerce lies an implied denial of that power to the states").

254. See *Welton v. Missouri*, 91 U.S. 275 (1875).

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

participant rule is more than an arguable abstraction. The Court itself has endorsed it in observing that “[w]hen the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise.”²⁵⁶

The textual argument for excluding marketplace choices from the dormant commerce clause draws additional support from the historic perception that traders in the market — whether individuals or aggregations of individuals — ordinarily are free to deal with whom they wish.²⁵⁷ Such a shared assumption justifies giving special treatment to the government as a market participant simply because it *is* a market participant. Common assumptions provide an important part of law because they make up the background against which law is made.²⁵⁸ Such assumptions are not easily overcome by vague constitutional language or unfocused expressions of the drafters’ intent.²⁵⁹

Finally, in both *Alexandria Scrap* and *Reeves* the Court invoked constitutional history to bolster its conclusion that the dormant commerce clause does not reach state marketplace decisions. As stated by the Court in *Reeves*: “[T]he commerce clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.”²⁶⁰ Commentators have criticized this reasoning.²⁶¹ Professor Varat, for example, has written:

The Framers’ principal concern in fashioning the commerce clause may well have been state interference with interstate private trade. There is, however, no indication that they thought about state proprietary policy at all. If state resident preference restrictions in proprietary policy

256. *United Bldg. & Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 220 (1984) (emphasis in original).

257. See *supra* text accompanying note 219.

258. See, e.g., *Public Citizen v. United States Dept. of Justice*, 109 S. Ct. 2558, 2566 n.9 (1989) (noting, among other things, in interpreting federal statute, that “[t]he idea that Members of Congress would vote for a bill subjecting their own political parties to bureaucratic intrusion and public oversight . . . is outlandish”); *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2305 (1989) (courts should consult “common usage” in interpreting the language of statutes).

259. See *Walz v. Tax Commn.*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring) (long-standing practice “is a fact of considerable import in the interpretation of abstract constitutional language”); Hellerstein, *supra* note 79, at 78 (“it would take more than a ‘great silence’ to sever the special relationship between a State and its in-state residents and businesses”); cf. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 242, 129 N.E. 889, 891 (1921) (Cardozo, J.) (“Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication.”).

260. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980) (citation omitted); *accord, e.g., Gergen, supra* note 15, at 1137 (“[t]he commerce clause always has focused on state interference in commerce through taxes and regulations”).

261. E.g., Blumoff, *supra* note 15, at 108; *U. Pa. Comment, supra* note 15, at 1326; see also *Wayne Casenote, supra* note 15, at 1589-90

threaten the interstate unification or free-trade goals of the commerce clause, it is difficult to see why commerce clause limits would not be appropriate.²⁶²

In fact, it is not so difficult at all. If the Framers envisioned the protection of *private* trade to achieve national unity, but had no "thought about state propriety policy at all," then why should we not conclude that their relevant constitutional purpose was to protect private trade? To carry the argument one step further, the Framers surely intended to protect private trade to foster interstate unification to achieve the greater good. That conclusion, however, hardly provides a judicial license to invalidate under the commerce clause all laws that do not achieve the greater good.²⁶³ When, as here, constitutional language is at best obscure, the absence of a specific design to reach state discrimination in trading its own property cannot be dismissed as irrelevant.²⁶⁴

E. Institutional Considerations

Institutional considerations provide a final justification for the market-participant rule. First, because the dormant commerce clause is the *dormant* commerce clause, Congress remains capable of protecting national interests in this area even if the Court holds back.²⁶⁵ This

262. Varat, *supra* note 21, at 505.

263. As Professor Gergen puts it: "To say that those who passed on the Constitution desired national unity does not explain *how* they intended that dream to be realized without unduly compromising state sovereignty." Gergen, *supra* note 15, at 1119 (emphasis added).

264. To put the point more generally, as one moves from a more clear and focused indication of legislative purpose, to a more debatable and amorphous indication of purpose, that purpose becomes less informative in judicially defining the enactment's effect. The Supreme Court's holding that the eighth amendment's excessive-fines clause does not reach punitive damage awards in cases between private parties, *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), provides a recent illustration of this recurring principle. In that case, the majority reasoned that the purpose of the excessive-fines clause was to limit "those fines directly imposed by, and payable to, the government," 109 S. Ct. at 2916, so that punitive-damage awards "in private civil cases . . . are too far afield from the concerns that animate the Eighth Amendment," 109 S. Ct. at 2920, to trigger scrutiny under the excessive-fines clause.

Justice O'Connor viewed the majority's reasoning as resting on the "historical accident that, prior to the mid-18th century, monetary sanctions filled the coffers of the King and his barons," 109 S. Ct. at 2929 (O'Connor, J., concurring in part and dissenting in part), and thus relied on a more broadly formulated constitutional purpose — namely, preventing "the evil of exorbitant monetary penalties," 109 S. Ct. at 2926. In short, the result in the case turned in large part on the majority's decision to focus on "the text of the Amendment" and "the context where the Framers *clearly* intended it to apply . . ." 109 S. Ct. at 2920 (emphasis added). That Justice O'Connor condemned this analysis as "formalistic," 109 S. Ct. at 2932, is precisely the point: formal considerations based on the specificity with which the enactors' purposes are discernible count for something in constitutional interpretation.

265. *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286-91 (1986) (market-participant rulings are always reversible by Congress); *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) (recognizing that Congress may legislate to limit state marketplace preferences); *Wayne Casenote*, *supra* note 15, at 1595 (the Court in *Reeves* "invited Congress to promulgate legislation").

consideration, however, might equally well justify judicial noninterference with state regulatory and tax programs that discriminate against interstate commerce. It thus provides at best a "background" justification for judicial restraint if other factors counsel a cautious approach. Prior discussion suggests that such factors do exist in evaluating discriminatory state marketplace programs. Additional institutional considerations point in the same direction as well.

A fair generalization of the Court's dormant commerce clause decisions is that the Court has struck down two types of state laws: (1) laws in which the state has discriminated overtly in favor of in-state interests in the flow of commerce;²⁶⁶ and (2) laws in which the state has acted in a facially neutral way to favor in-state interests on the basis of a flimsy justification.²⁶⁷ In these sets of cases the Court has intervened to protect the national-market values of the commerce clause. The reason why is understandable: the state's interference with free interstate commerce is great in each such case, while the state's justification for the interference is of minimal legitimacy at best.²⁶⁸ Precisely by limiting its incursions into these most-troubling classes of cases, the Court has by and large avoided being accused of acting as a "super legislature."²⁶⁹ Beyond this range of cases, however, the Court has refused to tread.²⁷⁰

At first blush, laws preferring local residents in state marketplace exchanges fall easily into the proscribed zone marked off by the Supreme Court. They involve, after all, blatant discrimination against out-of-staters.²⁷¹ The considerations marshalled above, however, suggest that these cases at least require a more subtle analysis than appli-

266. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (discussed *supra* at text accompanying notes 23-25).

267. See, e.g., *Hunt v. Washington State Apple Advertising Commn.*, 432 U.S. 333 (1977) (discussed *supra* at text accompanying notes 26-33).

268. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (quoted *supra* at note 26); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945) (inquiring whether safety advantages of Arizona's train-length law were "so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it"); see also Gergen, *supra* note 15, at 1102 (the Court's "focus, in practice, prohibits laws motivated by protectionist sentiments or a desire to enrich citizens at the expense of outsiders"); Sunstein, *supra* note 170, at 1707 (viewing dormant commerce clause "balancing" as essentially "a check against the possibility of covert protectionism"). For an elaborate treatment of the Court's dormant commerce clause decisions, contending that "[i]n the central area of dormant commerce clause jurisprudence . . . the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism," see Regan, *supra* note 7, at 1092, 1206-87.

269. See *Southern Pacific*, 325 U.S. at 788 (Black, J., dissenting).

270. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

271. See, e.g., Varat, *supra* note 21, at 509 n.87 (noting that, but for the market-participant rule, a *per se* rule against state protective legislation would seem operative).

cation of a *per se* rule of invalidity.²⁷² Yet application of the traditional balancing approach — with its focus on “the unavailability of non-discriminatory alternatives adequate to preserve the local interests”²⁷³ — also presents profound problems in market-participant cases. The main reason why is that the sow-and-reap and good-government “interests” justifying marketplace preferences have such a fundamental quality.²⁷⁴ It is not hard to search for less restrictive alternatives to achieve a focused local purpose, like securing a sanitary supply of milk.²⁷⁵ But it borders on the incoherent to seek “alternatives” to marketplace preferences that serve to vindicate the state’s interests in funneling state benefits to state residents and in directing state resources to their optimum use.²⁷⁶ It follows — as the Court said in *Reeves* — that “the competing considerations in cases involving state proprietary action [are] difficult to assess under traditional Commerce Clause analysis.”²⁷⁷

The logical outgrowth of these institutional difficulties may be not so much a strict, hands-off approach to market participant cases as the adoption of a specialized dormant commerce clause framework for testing market-participant issues. The trick is to find and map out that

272. See, e.g., Trelease, *supra* note 139, at 374 (developing constitutional complexity of state controls over state water even though “economic protectionism is exactly what they seek”); Note, *supra* note 9, at 723 (“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*, 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.”); *Iowa Note*, *supra* note 226, at 591 (criticizing purchasing preferences, but “assuming” they may not be “invalid *per se*”). But cf. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 223 (1983) (Blackmun, J., dissenting) (finding a *per se* rule applicable in absence of market-participant principle); *Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston*, 384 Mass. 466, 425 N.E.2d 346, 354 (1981) (state Supreme Court ruling in *White*, also applying *per se* rule of invalidity); *Wayne Casenote*, *supra* note 15, at 1590 (arguing that preference in *Reeves* should have “patently” and “inescapabl[y]” fallen under a *per se* rule).

273. See *Hunt v. Washington State Apple Advertising Commn.*, 432 U.S. 333, 353 (1977).

274. See *Simson*, *supra* note 190, at 398 (describing sow-and-reap objective as “open-ended”).

275. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951).

276. Cf. *Simpson*, *supra* note 190, at 392 (failing to identify sow-and-reap and effective-federalism considerations as pertinent in itemizing “goals” underlying in-state hiring preferences).

277. *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980); see also *Anson & Schenkkan*, *supra* note 69, at 91 (citing the “Court’s comparative institutional inability to analyze the economic and political questions” involved); *Tarlock*, *supra* note 15, at 133 (balance is “complex”); *Varat*, *supra* note 21, at 491 (“developing criteria to separate allowable from forbidden distinctions between residents and nonresidents is a formidable task”); *id.* at 492 (noting “impressive obstacles” posed by distinguishing between permissible and impermissible state programs reserving state benefits for state residents); cf. *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 188 (1950) (refusing to intervene, because “in a field of this complexity with such diverse interests involved, we cannot say that there is a clear national interest so harmed” that the Court should act). But see *Eule*, *supra* note 139, at 484 n.318 (questioning *Reeves*’ institutional argument for the market-participant rule); *Varat*, *supra* note 21, at 507 (same).

framework. The preceding study of the roots of the rule should help point the way.

IV. A FRAMEWORK FOR MARKET-PARTICIPANT ANALYSIS

The foregoing discussion, although detailed, points to a simple conclusion: As a rule, when a state makes trades, it should be able to prefer residents to nonresidents as its trading partners. To say this much, however, is not to say that the Court should *always* apply the market-participant rule to protect state proprietary activity. Indeed, as we saw in Part I, the Court has not chosen the path of blind abdication in these cases.²⁷⁸ With the market-participant rule, as with other legal principles, "the rule follows where its reason leads; where the reason stops, there stops the rule."²⁷⁹

To decide market-participant cases, then, courts must consider whether the challenged program does or does not bring into play the policies underlying the market-participant rule. In particular, they must consider:

- (1) whether the program reflects an effort of local citizens to reap where they have sown;
- (2) whether invalidation of the program is consonant with the underlying values of federalism, including in particular the values of local experimentation and optimal responsiveness to local concerns;
- (3) to what extent the program threatens the underlying commerce clause values of a free market and unified nation; and
- (4) whether the state bears the appearance of "participating in," rather than "regulating," the market.²⁸⁰

Application of such "soft" factors promises to be no easy task. More discrete sub-inquiries, however, may make the undertaking more manageable. In applying the third factor concerning the degree of interference with commerce clause values, for example, a number of familiar legal concepts should help guide the analysis. Thus, as in other commerce clause cases, it will cut against judicial intervention if in-state political processes naturally will discourage excessive use of the challenged form of in-state preference.²⁸¹ As in other constitu-

278. See *supra* notes 67-73 and accompanying text.

279. K. LLEWELYN, *THE BRAMBLE BUSH* 157-58 (1951) (emphasis omitted).

280. It is not through oversight that I include no fifth factor based on institutional difficulties of judicial manageability and administration. That consideration, while justifying the market-participant rule in general, seems to offer limited help in distinguishing appropriate cases for applying the rule from inappropriate ones.

281. See *supra* note 244; see also L. TRIBE, *supra* note 3, § 6-35, at 541 n.72 (noting that "surrogate representation analysis" is "central to commerce clause jurisprudence").

tional settings,²⁸² the importance of the sought benefit also will have significance.²⁸³ Exclusion from necessities, for example, surely will engender greater interstate hostility and resentment among nonresidents than exclusion from state benefits of more marginal importance.²⁸⁴ Similarly, the Court has recognized in other contexts that the degree of the state's monopolization of a desired resource will bear upon the strength of the excluded party's claim to access.²⁸⁵ The degree of market power may count in market-participant cases as well, particularly because an absence of alternative sources of supply will heighten the risk of bad feeling and retaliation when a state channels its resources exclusively to its own citizens.²⁸⁶ Finally, the *degree* of exclusion of nonresidents from state programs may be a relevant factor.²⁸⁷ It is, for example, less disruptive of commerce clause values to impose a surcharge on nonresidents than to exclude them altogether from obtaining a state resource.²⁸⁸ Common sense suggests that this type of factual difference may count in assessing the constitutionality of market-participant programs.

This listing of informative "sub-considerations" is not exhaustive; rather it is offered to show that the basic four-factor analysis proposed here is both broadly inclusive of intuitively relevant considerations and more manageable in application than first might appear. As with other legal "tests," however, the proof is in the pudding. The next

282. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

283. See Varat, *supra* note 21, at 533-40.

284. See, e.g., *id.* at 534 (a "nonresident's claim to emergency medical . . . services within the state surely stands on a different plane than a claim of access to public golf and tennis facilities"); see also *id.* at 540 n.192 (noting the "greater importance of access to even nonemergency medical care than of access to alcoholic beverages").

285. Compare *Boddie v. Connecticut*, 401 U.S. 371 (1971) with *United States v. Kras*, 409 U.S. 434 (1973); see also *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989) (upholding state ban on the use of public facilities to perform abortions, but noting that a "different analysis might apply if a particular state had socialized medicine").

286. See, e.g., Varat, *supra* note 21, at 533, 558 & n.243 (favoring equal access to state beaches and parks because they are "unique and not reproducible," even though the state may deny access to its golf courses and tennis courts); see also Hardman, *The Right of a State to Restrain the Exportation of Its Natural Resources*, 26 W. VA. L.Q. 1, 13-14 (1919) (arguing against ability to exclude in "excess capacity" natural resource cases). Notably, when monopoly power is present, formal considerations may conjoin with functional concerns in bolstering the case for not applying the market-participant distinction. See *supra* notes 245-64 and accompanying text. This is so because, despite the law's general toleration of free choice in selecting trading partners, there exists a "traditional public policy *against* discriminatory distribution of *monopolized* benefits." Varat, *supra* note 21, at 537 (emphasis added).

287. See *Fidelity Guar. Mortgage Corp. v. Connecticut Hous. Fin. Auth.*, 532 F. Supp. 81, 85 (D. Conn. 1982) (exploring the degree of the state's interference with interstate commerce in deciding whether market-participant rule applies).

288. See, e.g., *Toomer v. Witsell*, 334 U.S. 385 (1948) (quoted *supra* at note 189); Varat, *supra* note 21, at 553.

Part of this article examines both how workable the test is, and the results it produces, in nine key categories of market-participant cases.

V. APPLYING THE MARKET-PARTICIPANT RULE

The Supreme Court's own decisions illustrate how varied market-participant cases can be.²⁸⁹ Cases arising in the lower courts also reveal a rich factual diversity.²⁹⁰ This Part explores nine categories of cases raising market-participant issues. The cases involve governmental favoritism of local interests in (1) state or municipal purchases and sales; (2) authorization of access to the means of interstate commerce; (3) state disposition of natural resources; (4) government operation of landfills; (5) downstream conditions on trading partners imposed in government contracts; (6) state subsidies; (7) state tax breaks; (8) state rules requiring municipalities to deal only with state residents; and (9) state programs disfavoring nonresidents who have substantial contacts with the state.

A. State Purchasing and Selling

There exists no starker form of discrimination against out-of-state commerce than when a state buys goods or services only from in-state suppliers.²⁹¹ This blatant brand of favoritism, however, has stirred little controversy among members of the Supreme Court²⁹² or lower-court judges.²⁹³ It is not clear why.

Preferential state purchasing policies seem, after all, to cause inefficiencies by directly insulating local producers from out-of-state competition.²⁹⁴ In addition, government procurement now is big

289. See *supra* notes 36-66 and accompanying text.

290. See, e.g., *infra* notes 293, 332, 335, 375, 382, and accompanying text.

291. See generally Comment, *supra* note 224, at 205-08 (detailing different forms of purchasing preferences — namely, percentage preferences, tie-bid preferences, general preferences, absolute preferences, and reciprocal preferences); *Yale Note*, *supra* note 179, at 1686-88 (describing nature of municipal hiring preferences and places where they exist).

292. Indeed, even the dissenting opinion in *Reeves* flatly stated that “[i]n procuring goods and services for the operation of government, a State may act without regard to the private marketplace and remove itself from the reach of the Commerce Clause.” 447 U.S. at 450 (Powell, J., dissenting). *But see* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 819-23 (1976) (Brennan, J., dissenting) (challenging constitutionality of government purchasing preferences).

293. See *Iowa Note*, *supra* note 226, at 578 (citing a “long and remarkably consistent line of both state and federal cases” supporting state purchasing preferences); see also *Delta Chem. Corp. v. Ocean County Utils. Auth.*, 231 N.J. Super. 180, 554 A.2d 1381 (1988) (upholding Buy-American law as protected by market-participant rule).

294. See Gergen, *supra* note 15, at 1101 (urging general invalidity of “buy-, hire-, and sell-local laws”); Linde, *supra* note 145, at 53-55 (attacking flat preferences in purchasing); Melder, *supra* note 223; *Iowa Note*, *supra* note 226, at 582; Comment, *supra* note 224, at 213-16 (arguing that in-state purchasing preferences are economically inefficient); see also Recent Case, *supra* note 221, at 1361; cf. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 820-21 (1976) (Brennan,

business,²⁹⁵ and resident preferences in state and municipal purchasing are commonplace.²⁹⁶ For these reasons, resident preferences in governmental purchases probably represent a greater threat to a borderless national market than, for example, resident preferences in state sales. Justice Powell sought to sidestep these difficulties by characterizing and defending in-state purchasing preferences as a “traditional governmental function[.]”²⁹⁷ Even that focused line of justification, however, is today unavailable, since a majority of the Court rejected it in both *Garcia* and *Reeves*.²⁹⁸

Nonetheless, the in-state purchasing preference does, and should, represent the classic form of state action protected by the market-participant rule. This conclusion follows from the justifications for the rule distilled in Parts III and IV. First, the state as purchaser spends its citizens’ own money; thus, the sow-and-reap rationale pointedly comes into play.²⁹⁹ Second, in some situations the pursuit of valuable state projects may depend on the availability of in-state purchasing preferences; thus, concerns about effective federalism provide at least some support for discriminatory purchasing policies.³⁰⁰ Third, for

J., dissenting) (noting that purchasing preferences require “the relocation of labor” and tend “to neutralize advantages belonging to’ other States”). *But see, e.g., Boston College Note, supra* note 15, at 907 (statutes requiring purchase of goods produced in state have only a “marginal” effect on interstate commerce).

295. *Iowa Note, supra* note 226, at 577 (citing “vast amounts of money expended by state and local governments” and providing data showing such expenditures in 1971 accounted for nearly 13% of the Gross National Product); *Boston College Note, supra* note 15, at 923-24 (citing “dramatic increase in state and local spending in the last several decades”); *Wayne Casenote, supra* note 15, at 1584 (noting the “tremendous size of state budgets and the broad scope of state spending power today”).

296. *See Blumoff, supra* note 15, at 101 (stating that state and local purchasing expenditures total almost \$300 billion annually and that the cost of these preferences is “prodigious”); *Leymore, supra* note 149, at 578; *Linde, supra* note 145, at 53 (“In 1960 all states but one had official purchasing preference rules.”); *Melder, supra* note 223, at 140 (noting that “forty-seven states have adopted at least one type of citizen preference laws”; that “[m]unicipal preference ordinances are even more common”; and that “[p]robably hundreds of municipalities informally practice such protection”); *Iowa Note, supra* note 226, at 576-77 (citing 1970 survey showing that “a substantial majority of the states exercise at least some form of local preference”; concluding based on empirical data that “it is certain that billions of dollars each year are spent by state and local governmental units under contracts negotiated pursuant to . . . policies openly calculated to discriminate in favor of home-state products and labor”); *Comment, supra* note 224, at 206-09 & nn.2-30 (collecting numerous state statutes providing for in-state purchasing or contracting preferences); *Wayne Casenote, supra* note 15, at 1582.

297. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 449-50 (1980) (Powell, J., dissenting).

298. *See supra* notes 84-86 and accompanying text.

299. *See Varat, supra* note 21, at 546 (“opportunities to sell to the state exist only because they were created by the state and its residents”).

300. *See, e.g., Regan, supra* note 7, at 1194 (suggesting that the “unquestioned benefit” produced by the construction projects at issue in *White* “probably would not have existed if the local preference aspect had been forbidden”). *But cf. Varat, supra* note 21, at 546 (arguing that “state purchases of equipment and services will be made whether or not a rule of nonresident equality is imposed”).

reasons already detailed, state purchasing preferences threaten to only a limited extent the pro-national values underlying the commerce clause.³⁰¹ In particular, the inherent expensiveness of state purchasing holds down the risk of effectuating rampant protectionism through in-state purchasing programs.³⁰² Finally, formal considerations strongly favor validation of purchasing preferences, for in few other settings does the state look more the part of the market trader. Given these considerations, it is not surprising that resident preferences in government purchasing have met with little judicial resistance.³⁰³

As a rule, these same considerations apply in cases involving the

301. See *supra* notes 229-44 and accompanying text.

302. See *supra* notes 240-44 and accompanying text.

303. Of course, purchasing rules subject to challenge under the dormant commerce clause may take many forms. For example, a number of localities have enacted divestiture ordinances. These ordinances require city agents — most significantly those agents operating city pension funds — to eschew contracts with, or investments in, companies that have holdings or dealings in South Africa. At least one court has upheld such an ordinance against dormant commerce clause attack. *Board of Trustees v. Mayor of Baltimore*, 317 Md. 721, 562 A.2d 720, 756 (1989).

This result seems correct under the analysis proposed here. See also *L. TRIBE*, *supra* note 3, § 6-21. In particular:

(1) It may be an oversimplification to say flatly that city residents, through such ordinances, are controlling the fate of their own property; after all, at least pension funds may be viewed as belonging more to the discrete subgroups of city pensioners (e.g., police officers, firefighters, and other city employees) than to city residents in general. Cf. *infra* notes 494-95 and accompanying text. Even so, city residents at large did and do make the tax payments that are turned over to pensioners, and the pensioners let the city so greatly control the funds that they may be said to “belong” to the City . . . as a trustee.” 562 A.2d at 753. For these reasons, the sow and reap rationale cuts against judicial intervention under the dormant commerce clause.

(2) Considerations of federalism also counsel judicial restraint. The vigor of feeling about spending city money to support apartheid underscores the importance of local responsiveness on this issue, especially given “our society’s deep commitment to the eradication of discrimination based on a person’s race or the color of his or her skin.” *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2371 (1989). Moreover, to the extent that value maximization is a goal of free trade, it seems proper to consider the moral and psychic costs inducing cities to eschew South African-connected trading partners. See *supra* note 230.

(3) Perhaps most importantly, divestiture ordinances pose little risk at all to salient commerce clause values. Such laws — restricting the channeling of only municipal funds to only one country for only a nonprotectionist purpose — impede in the most modest way, if at all, any free-trade goals underlying the foreign commerce clause. Indeed, “because the Divestiture Ordinances do not favor local residents at the expense of nonresidents, they pose a *smaller threat* to the national common market than do the overtly discriminatory measures . . . the market-participant doctrine sanctions.” 562 A.2d at 750 (emphasis added). To be sure, additional commerce clause concern may arise when states or cities interfere with private international transactions having no connection with city money or trammel foreign policy concerns implicitly or explicitly recognized by Congress. These considerations, however, do not seem relevant here. See 562 A.2d at 744-49, 756-57.

(4) Finally, cities that adopt divestiture policies look the part of traders in the market. In fact, many private firms have adopted identical policies. For this reason in particular, it seems reasonable to say that “just as a private merchant may elect not to deal with companies doing business in South Africa, the City too may make the same choice.” 562 A.2d at 750.

Notably, divestiture ordinances raise a “downstream restraint” issue, concerning a city’s or state’s ability to limit the trading partners of private citizens. This issue is discussed below with other downstream restraint issues, at *infra* note 428 and accompanying text.

sale of state-made services and goods.³⁰⁴ Indeed, state-seller cases may present even stronger equities for judicial restraint than cases involving state purchases. In *Reeves*, for example, the up-front risk incurred by South Dakota in building a cement plant heightened its claim to reap where it had sown.³⁰⁵ In addition, state selling often will involve — as it did in *Reeves* — the sort of innovative problem-solving that our federalism invites and envisions.³⁰⁶ As for the endangerment of commerce clause values, a general skepticism about state entry into the commercial supply business may reinforce the built-in constraint that costliness places on rampant use of preferential state sales programs.³⁰⁷ Finally, formal considerations again strongly favor judicial restraint; South Dakota, for example, “manifestly fit” the market-participant description when it took to selling cement.³⁰⁸

Even so, cases involving states as sellers may present special difficulties. Two particularly thorny problems — the gratuitous exclusion of nonresidents from state sales programs and the “turncoat” state seller’s switch to serving only residents after earlier welcoming all comers — merit special attention.

1. *The Problem of Gratuitous Exclusion*

Professor Varat has noted the special problem posed by state actions that gratuitously exclude nonresidents from the purchase of state-made resources.³⁰⁹ For example, in *Doe v. Bolton*³¹⁰ the Court struck down Georgia’s denial to nonresidents of medical services performed in state hospitals where there was “no intimation . . . that Georgia facilities [were] utilized to capacity in caring for Georgia residents.”³¹¹ In such a case, Professor Varat says, there is good reason

304. See Varat *supra* note 21, at 548-49 (“When the state converts its fiscal resources into goods or services that it makes available on a resident-discriminatory basis, the same justification that supports state expenditures favoring residents should apply.” Thus “the state should be able to reserve in-kind resources created with state funds for its residents.”) *But see Geo. Wash. Note, supra* note 15, at 616 (objecting to *Reeves*’ extension of the *Alexandria Scrap* rule to sellers).

305. *Accord Houston Note, supra* note 15, at 555 n.162.

306. See generally Varat, *supra* note 21, at 548-59 (“Different rules for state-created goods and services and state payments to residents would unnecessarily narrow the ability of state government to create new ways of serving its people.”).

307. See *supra* note 147. In addition to widespread antipathy to government displacement of private enterprise, the existence of numerous private producers in our essentially private economy provides a potent political check on aggressive state entry into the commercial service and supply industry. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) (noting that the “existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse”).

308. *Creighton Casenote, supra* note 67, at 635.

309. Varat, *supra* note 21, at 531-33.

310. 410 U.S. 179 (1973).

311. 410 U.S. at 200.

for requiring access for nonresidents if the state can recoup its added costs through service charges.³¹² The merit of this argument is readily discerned from the four-factor analysis suggested above.

First, the sow-and-reap rationale carries little weight in such a case. The presence of excess capacity, together with the nonresident's payment of all added costs, ensures that state residents will realize without interference the full value of their investment.

Second, concerns of federalism provide little justification for the exclusion of nonresidents when all costs are readily recaptured. Rather, because affording benefits to nonresidents is a "no-lose proposition" in these circumstances, forced inclusion of nonresidents in the program should create no disincentive for undertaking the program in the first instance.

Third, concerns about safeguarding *functional* commerce clause values also cut against exclusion of nonresidents in these circumstances. Indeed, precisely because the discrimination against nonresidents is gratuitous, it threatens to place a particularly severe strain on interstate goodwill.

It follows that only the *formal* appearance of the state as a market participant provides a reason to apply the market-participant principle. The Court already has signaled, however, that this factor, standing alone, will not suffice to trigger application of the market-participant rule.³¹³

This condemnation of gratuitous exclusions holds true, of course, only to the extent that the state in fact can recoup its costs from the nonresident buyer or user. Moreover, as Professor Varat explains, such cases may well be rare because of the recurring "nonfinancial costs of extending state services to nonresidents."³¹⁴ In cases of claimed gratuitous exclusion, the key inquiry is whether the denial of access is in fact fairly characterized as gratuitous. If it is, controlling market-participant considerations require the state to deal with the would-be nonresident purchaser.

2. *The Problem of the Turncoat Seller*

Special problems also arise when a state deals with nonresidents at the outset of a sales program, but later changes course and services only resident buyers. In *Reeves*, for example, South Dakota sold ce-

312. Varat, *supra* note 21, at 532-33.

313. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (discussed *supra* at notes 55-59 and accompanying text).

314. Varat, *supra* note 21, at 532; see *supra* note 216 and accompanying text (discussing arguable propriety of a total exclusion of nonresidents from a state university system).

ment to out-of-staters for approximately fifty years before turning off the spigot.³¹⁵ This chronology triggered a claim that South Dakota's "hoarding" was distinctly unfair and disruptive of the national marketplace. This charge rested on two separate grounds. First, the would-be Wyoming buyer suggested that out-of-staters reasonably had relied on the continuing availability of South Dakota cement in building up their operations. Second, it was argued, "free market forces would have generated an appropriate level of supply" for out-of-state purchasers had South Dakota not long undertaken to satisfy their needs.³¹⁶ These arguments surely strengthened the hand of the plaintiff in *Reeves*.³¹⁷ The Court, however, correctly found each of them, on balance, unpersuasive.

a. Reasonable reliance. The reasonable-reliance argument is at bottom question-begging, for the reliance of nonresidents on South Dakota cement was reasonable only if there was good cause to believe South Dakota would continue to supply their needs in the event of a shortage. The law, however, had provided no basis for such a belief for it was not until the *Reeves* case arose that the courts were asked to pass upon the claim of a continuing duty to supply cement. Moreover, to the extent lower courts had hit around the issue, their decisions pointed toward an ability to withhold.³¹⁸ "Real-world" considerations also signaled the riskiness of relying on an uninterrupted cement flow from the South Dakota plant. Out-of-staters were at least on notice of the general freedom suppliers customarily enjoy to deal with whomever they wish.³¹⁹ And it took no delphic prescience to foresee that a cement plant owned by South Dakota might well prefer South Dakota customers in a time of shortage.

Notably, state purchasing programs, as surely as state selling programs, may cause reliance by out-of-state businesses in developing or expanding operations. An out-of-state supplier — a seller of school desks, for example — might well expand operations or hire additional personnel in light of a pattern of earlier buying by a state or municipality. Yet even the dissenters in *Reeves* seemed to agree that a shift to an in-state purchasing program that excluded such a seller would be constitutionally permissible.³²⁰ Indeed, in *Alexandria Scrap* the Court had found it insignificant that, before Maryland effectively confined its

315. *Reeves, Inc. v. Stake*, 447 U.S. 429, 431-32 (1980).

316. 447 U.S. at 445.

317. See e.g., *Regan*, *supra* note 7, at 1195-96; *Wayne Casenote*, *supra* note 15, at 1592-93.

318. See 447 U.S. at 437 n.9 (collecting cases).

319. See, e.g., *supra* text accompanying note 219.

320. See *supra* note 292.

hulk “purchases” to Maryland operators, it had afforded equal benefits to out-of-staters for five years.³²¹ In short, potent prior authority — as well as the dubious reasonableness of the claimed reliance — weakened any fairness-based attack on South Dakota’s withholding of its cement.

b. Displacement of private producers. Apart from focusing on past reasonable reliance, Professor Regan has argued that South Dakota should have had to replicate how the free market would have operated because its actions “quite possibly prevented the emergence of private suppliers for the foreign demand it was supplying.”³²² The *Reeves* majority cannot be faulted for failing to consider this contention; in fact, the Court responded to it directly:

This argument appears to us to be simplistic and speculative. The very reason South Dakota built its plant was because the free market had failed adequately to supply the region with cement. . . . There is no indication, and no way to know, that private industry would have moved into petitioner’s market area, and would have ensured a supply of cement to petitioner either prior to or during the 1978 construction season. Indeed, it is quite possible that petitioner would never have existed — far less operated successfully for 20 years — had it not been for South Dakota cement.³²³

Professor Regan’s argument falters for another reason as well. He concedes — as he must for purposes of his *turncoat*-seller argument — that South Dakota could have limited cement sales to South Dakotans if it had done so from the start.³²⁴ If that were the constitutional rule, however, it is predictable that South Dakota would have sold only to South Dakotans from the inception of its cement production. South Dakota’s purpose in building its cement plant was, after all, to protect *South Dakotans* from present and future cement shortages.³²⁵

Would Wyoming — whose residents had suffered from the same cement shortages that induced South Dakota to construct its plant — preferred to have risked that result? More generally, is a rule that encourages full-scale hoarding more consonant with the open-market values of the commerce clause than a rule that countenances periodic preferences for local buyers? As stated by the Court in *Reeves*, the argument raised by Professor Regan “proves too much, for it would tolerate even a greater measure of protectionism and stifling of inter-

321. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976).

322. Regan, *supra* note 7, at 1195.

323. *Reeves, Inc. v. Stake*, 447 U.S. 429, 445-46 (1980).

324. Regan, *supra* note 7, at 1195.

325. See *Eakins v. South Dakota State Cement Commn.*, 44 S.D. 268, 272, 183 N.W. 651, 652 (1921); see also *Wayne Casenote*, *supra* note 15, at 1575.

state commerce than the challenged system allow[ed].”³²⁶ In short, the turncoat-seller argument supplies insufficient cause in cases like *Reeves* to depart from the general principle that states as sellers should be sheltered from dormant commerce clause restraints.

B. *State Control of the Means of Commerce*

All that precedes broadly supports the proposition that a “state should be able to reserve in-kind resources created with state funds for its residents.”³²⁷ The market-participant rule, however, does not permit a state to deny *all forms* of state-made benefits to outsiders. Consider roads. States pay for and own state highways. Nonetheless, the ordinary strictures of the commerce clause apply to state laws that limit access to state thoroughfares.³²⁸

A powerful explanation for this “exception” to the market-participant rule is that the ready movement of goods is indispensable to the operation of the national market. Roads are the arteries of the national market. If they may be clogged or blocked, then the free marketplace cannot operate, or at least not operate well. Each state’s interest in channeling state benefits to its own citizenry gives rise to a countervailing claim that the state should be able to limit the use of its roads as it wishes.³²⁹ However, the national interest in a vibrant national market — especially given the states’ practical monopolization of local roadways — trumps this equity.³³⁰ The message of the cases is that states, as a rule, may not ignore the dormant commerce clause in deciding who gains access to the infrastructure of interstate trade.³³¹

326. 447 U.S. at 445.

327. Varat, *supra* note 21, at 549.

328. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925); see also *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 262 (1911) (holding unconstitutional state’s denial of pipeline easements below state highway to nonresidents).

329. Indeed, in one of its early road-use decisions, the Supreme Court evidenced sympathy for this position, noting in upholding a challenged state road-access rule that “[u]nlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions.” *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 187 (1938); accord *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783 (1945).

330. Moreover, concern about this particularly potent interference with the national market does not stand alone. Thus, formal considerations support a more aggressive judicial role because a road “provider” looks little like a typical private seller. In addition, the effective-federalism touchstone provides little basis for excluding nonresidents from state roads, because free road access probably poses only modest disincentives to adopting otherwise needed local road-building programs.

331. Accord *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 254 (3d Cir. 1989) (“right-of-way or transportation cases raise a discrete set of concerns”); Gergen, *supra* note 15, at 1132-33 (noting that “a general liberty of navigation and commerce has a long tradition in this country”); Hellerstein, *supra* note 79, at 77 n.150 (citing the “Court’s unwillingness to brook

This line of reasoning best explains the result in a controversial market-participant case decided by the United States Court of Appeals for the Fifth Circuit. In *Smith v. Department of Agriculture*,³³² the issue was whether the state could prefer in-state growers in renting out prime spaces in a state-owned fruit and vegetable market. A divided court invalidated this preference, asserting without meaningful explanation that the state had acted as a “market regulator” and not as a “market participant.”³³³ This conclusory reasoning is unsatisfactory, particularly because the state in fact was leasing for money commercial property that it owned.³³⁴ A more satisfying explanation for the court’s decision is that the farmers’ market resembled state roads. The market was more than an ordinary commercial building. It was an artery of commerce, developed by the state for the very purpose of facilitating private purchases and sales and through which — due to its very existence — such trading had been channeled. To limit access to this infrastructure, particularly for nearby out-of-state farmers, thus was akin to limiting access to state roads.³³⁵

State discrimination against instrumentalities of interstate commerce”); Varat, *supra* note 21, at 535 (condemning “severe collateral effects” on free private exchanges flowing from, for example, exclusion from state roads). Of course, this line of analysis is not meant to imply that a state may exclude from its roads nonresidents who are not transporting goods. The Supreme Court, after all, has recognized a generalized right to travel. *See, e.g., supra* note 214. The point is that the value of unimpeded commerce provides a special — if not the central — justification for a claimed right to free movement when the planned interstate travel has a commercial purpose.

332. 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981).

333. 630 F.2d at 1083.

334. 630 F.2d at 1082; *see also* Anson & Schenkkan, *supra* note 69, at 95 n.121 (arguing that *Smith* was wrongly decided because the “initial disposition in this case is of rental space and as such should be permissible”); Varat, *supra* note 21, at 496, 552 (“a state should be able to lease state-owned commercial property to residents first”); *Nat. Res. Comment, supra* note 78, at 524; *cf. McCready v. Virginia*, 94 U.S. 391, 395-96 (1876) (observing that state, in leasing state-owned agricultural land to farmers, may rent only to residents).

335. Professor Gergen seems to agree. *See* Gergen, *supra* note 15, at 1133 n.191; *see also Smith*, 630 F.2d at 1086 (Gee, J., concurring). Special solicitude for open access to the channels of commerce helps explain two other market-participant cases: *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), and *Western Oil & Gas Assn. v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984), *affd. per curiam by an equally divided court*, 471 U.S. 81 (1985). *Cory* involved a challenge to the amount of “rent” charged by California for the movement of oil pumped by offshore rigs across state-owned tidal and submerged lands. The court refused to apply the market-participant rule to “[t]his control over the channels of interstate commerce,” especially because the state “has a complete monopoly over the sites used by the oil companies.” 726 F.2d at 1343. In *Shell Oil*, the court again declined to apply the market-participant rule. Here, upon expiration of a lease of a city’s substreet land for operation of the plaintiff’s oil pipeline, the city offered to renew the lease only if paid such dramatically higher payments that the plaintiff alleged an “undue burden” on interstate commerce. In finding the market-participant rule inapplicable, the court once again emphasized that “this case involves lands . . . that are recognized transportation corridors for commerce.” 830 F.2d at 1057. The reasoning of these cases seems persuasive, although the court might have bolstered its analysis in each by noting that both cases also concerned access to natural resources, giving rise to only a limited claim of right to reap where state residents had sown. *See Cory*, 726 F.2d at 1341 (noting that tidelands had been conveyed to California by Congress); Varat, *supra* note 21, at 557 (“tidelands are a

This is not to say that the proper result in *Smith* is clear,³³⁶ as application of the four-factor analysis reveals. Thus:

(1) The state in leasing farmers' market spaces clearly was making available a tangible benefit its citizens had created with their own funds.

(2) The development of a farmers' market reflected an innovative attempt by Georgians both to help Georgia farmers market their crops and to provide Georgia consumers with ready access to farm-fresh produce. It is, moreover, at least a possibility that Georgia would not have built its farmers' markets had decisionmakers known that equal access for nonresidents was required.

(3) The risk posed to commerce clause values by excluding nonresidents arguably was limited; this is so because, unlike in the case of state roads, ready alternative methods for marketing crops in Georgia remained available to out-of-state growers.³³⁷ Indeed, Georgia did not exclude nonresidents from its farmers' markets altogether; it simply offered them less attractive sales locations.³³⁸

(4) Finally, despite the majority's suggestion otherwise, the state as lessor clearly looked the part of a trader in the market.³³⁹

Smith thus highlights the need for value judgments in market-participant cases. While the proper resolution of the case is debatable, it seems indisputable that the *channels* of trade — whether in the form of a national stock exchange, a regional commodities house, or a local farmers' market — are of special importance to the free flow of commerce. Moreover, concerns about predictability, equal treatment, and efficiency require the formulation of legal standards at some workable

unique natural resource, not reproducible by the private sector and not established by a state program"; it is therefore especially unfair to deny access because of the state's "monopoly power" over such lands). See generally *infra* text accompanying notes 341-64.

In addition, formal considerations for characterizing the government as a "landowner" market participant were weak in these cases, especially in *Cory*. See *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) (denigrating states' claim of "ownership" of sub-ocean land). *But cf.* Hellerstein, *supra* note 79, at 88-89 (arguing that state ownership of tidal lands is less "fiction[al]" than state ownership of game). On the other side of the coin, these cases presented problems for the plaintiffs not present in other market-participant cases, insofar as the state frustrated access by both residents and nonresidents for environmental reasons. See Note, *State Control of Natural Resources*, *supra* note 145, at 643 ("the Court has been less sympathetic toward statutes, . . . the effect of which has been to hoard rather than to conserve natural resources"); see also *infra* notes 424-25 and accompanying text (discussing reduced commerce clause concern where state's objective is environmental, rather than commercial).

336. See Varat, *supra* note 21, at 552 n.224 (criticizing result in *Smith*); Levmore, *supra* note 149, at 618 n.220; see also *supra* note 334.

337. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 444 n.17 (1980) (noting, in applying market-participant rule, that alternate channels for securing cement remained available to out-of-state purchasers); *Nat. Res. Comment*, *supra* note 78, at 543.

338. See *supra* notes 287-88 and accompanying text.

339. See *supra* note 334 and accompanying text.

level of generality. In short, *Smith* may reflect a sensible rule of thumb: a state may not divert substantial marketplace activity to a state-owned "exchange" and then greatly disfavor nonresidents' ability to trade there.³⁴⁰

C. Natural Resources

In *Reeves*, the Court suggested an important limitation on the "general rule"³⁴¹ sheltering state market participation from dormant commerce clause attack. As stated by the Court:

Cement is not a natural resource, like coal, timber, wild game, or minerals. Cf. *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (minnows); *Philadelphia v. New Jersey*, *supra* (landfill sites); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (natural gas) It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. . . . Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.³⁴²

This passage opened the door for recognition of a "natural resources exception" to the market-participant rule.³⁴³ Moreover, in *Wunnicke*, the Court moved further in that direction, by relying in part on *Reeves*' natural-resources discussion in refusing to validate Alaska's in-state timber-processing requirement.³⁴⁴ The significance

340. In *Airline Car Rental, Inc. v. Shreveport Airport Auth.*, 667 F. Supp. 303 (W.D. La. 1987), the court did a better job than the *Smith* majority in identifying this salient consideration. There a rental car business — which had leased no airport counter, but which met passengers arriving at the airport — challenged a gross-receipts tax as unduly burdening interstate commerce. The Airport Authority sought dismissal of the suit on the ground that it was a market participant, merely charging a fee for use of the airport grounds it owned. Relying on *Smith*, the District Court rejected this argument by emphasizing that "the Authority has simply created a suitable marketplace for the buying and selling of [rental car] services by private individuals." 667 F. Supp. at 306. (The court reserved judgment on whether the burden on interstate commerce imposed by the challenged tax was, in fact, undue.)

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

342. 447 U.S. at 443-44 (additional citations omitted); see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (citing "decisions holding that a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders").

343. See *Geo. Wash. Note, supra* note 15, at 610 ("*Reeves* opinion concedes the possibility of a natural resource exception"); *Houston Note, supra* note 15, at 544 (*Reeves* suggests a natural resources exception, but not whether "*Pike* balancing test" or "some modification of it" will apply in such cases); *Nat. Res. Comment, supra* note 78, at 544 (the "Court . . . has suggested a distinction between natural resources and state-manufactured goods").

344. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984).

of this “element”³⁴⁵ nonetheless remains clouded, both because the Court has said so little about it and because nature’s riches come in such myriad forms.³⁴⁶ Two basic questions require investigation. First, is a natural resources exception a good idea? Second, if it is, in what circumstances should it apply?

1. *The Propriety of a Natural Resource Exception*

As a working proposition, a natural resource exception to the market-participant rule is sound.³⁴⁷ Considerations of form and federalism help explain this conclusion. As to the former, in many natural-resource cases the state’s claim of “ownership” will be so tenuous that it will bear little resemblance to a private trader.³⁴⁸ As to the latter, giving states freedom to prefer their own residents cannot even possibly cause the creation of those nonreproducible assets — such as minerals and fossil fuels — that are central to any natural resources exception.³⁴⁹ Even more important to explaining the exception, how-

345. 467 U.S. at 96.

346. See, e.g., Trelease, *supra* note 139, at 351, 363-64 (distinguishing between “unappropriated” and “appropriated” resources); Varat, *supra* note 21, at 554-60 (distinguishing between reproducible and nonreproducible resources).

347. The term “natural resource exception” has not been used by the Court itself, but it has been used by others and seems fairly to encapsulate the view of the Court embodied in *Reeves*. Of course, the term “natural resources” is not self-defining, and controversies may arise regarding whether particular assets are “natural” or not. Professor Varat has said that “the common characteristic of natural resources is that they are not the products of human creation.” Varat, *supra* note 21, at 555. Any such definition inevitably will pose difficulties, for “human creation” may be said to “produce” things often thought of as natural resources (e.g., fresh water distilled from salt water), and in other cases the resource at issue will involve both “created” and “uncreated” elements (e.g., trees, crops, a landfill, an apartment building, or a cement plant located on state land). Perhaps the best approach is to recognize that various assets fall along a continuum from “very natural” to “very unnatural.”

348. See, e.g., *Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 950-51 (1982) (finding view that state “owns” subterranean water a “legal fiction”); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982) (rebuffing New Hampshire’s claim of “ownership” of the Connecticut River); *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979) (view that state owns wild game is a “pure fantasy”; quoting *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977)); *Toomer v. Witsell*, 334 U.S. 385, 401-02 (1948) (viewing state claim of “ownership” of migratory shrimp in the marginal sea as tenuous); Hardman, *supra* note 286, at 11-12 (developing weakness of state’s claim of “ownership” of certain natural resources); Hellerstein, *supra* note 79, at 74 (distinguishing between “conventional” state ownership — e.g., trees on state land — and “nonconventional” ownership — e.g., water in streams); Varat, *supra* note 21, at 498 (noting that, under existing Supreme Court precedent, a state has “somewhat greater power” to discriminate against nonresidents “when a state’s claim of ownership conforms more closely to traditional forms of private ownership”); *Nat. Res. Comment, supra* note 78, at 545 (citing “the difficulty in determining when the state ‘owns’ natural resources”).

349. See Varat, *supra* note 21, at 556 (“State experimentation and innovation are not curtailed, because the resources exist without state action.”); cf. Gergen, *supra* note 15, at 1113 (suggesting that pro-conservation arguments for natural-resource preferences “are weak and rarely withstand scrutiny”).

ever, are the other two components of the applicable four-part analysis.

The fairness-based sow-and-reap rationale packs limited force in these cases because of the nature of natural resources. It is one thing for a state to keep for state residents those benefits actively produced through their own investment and industry. It is another for the state to hoard resources fortuitously located within its borders.³⁵⁰ To be sure, in some cases a state will expend its funds to acquire, extract, or treat natural resources to ready them for the market.³⁵¹ Even in these cases, however, the fairness-based sow-and-reap rationale is mitigated by the state's *natural access* to the natural resources it controls.³⁵² "Indeed, to the extent that these natural blessings provide the states in

350. See *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 n.6 (1982) (emphasizing that *Reeves* involved restricted "sale of products it produces") (emphasis in original); Gergen, *supra* note 15, at 1112 n.79 (urging that sow-and-reap rationale "is not persuasive when natural resources, goods not created by the community, are at issue"); Varat, *supra* note 21, at 555 (noting that at least nonreproducible natural resources "exist without the need for communal cooperation"); see also *Hicklin v. Orbeck*, 437 U.S. 518, 532-33 (1978) ("the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State's residents"); cf. Anson & Schenkkan, *supra* note 69, at 71-72 (distinguishing state ownership by "original endowment" from ownership by "purchase out of state funds"). But cf. *U. Pa. Comment*, *supra* note 15, at 1330-31 (noting that in the post-frontier era, "natural resources . . . increasingly owe their existence to some form of human investment," at least by way of "conservation" or "thrift"). This "happenstance" factor explains at least in part the modern Court's unwillingness to permit states to impose restrictions on the interstate disposition of privately taken game. See *supra* note 348; see also *Takahashi v. Fish & Game Commn.*, 334 U.S. 410, 421 (1948) (finding "ownership" claim to peripatetic fish "inadequate" to justify discrimination against aliens). It also helps to explain the Court's recent shift away from its early hands-off view of state water laws disfavoring nonresidents. Compare *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356-57 (1908) (upholding water-hoarding law in part because when a state "finds itself in possession of . . . a great public good, . . . what it has it may keep and give no one a reason for its will") with *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (similar Nebraska statute held unconstitutional under the commerce clause). As Professor Trelease observed: "*Sporhase* does not explicitly overrule *Hudson County*, but it is difficult to find much left of its holding or doctrine." Trelease, *supra* note 139, at 347 n.2.

351. See, e.g., Hellerstein, *supra* note 79, at 89 ("If the States had expended large sums of money to develop, manage, and cultivate oyster beds located in state waters, one might regard the entire enterprise as a 'statewide oyster farm' subsidized by the State, to which access might reasonably be limited to in-state residents . . ."); Rodgers, *supra* note 179, at 380 (arguing for state's market-participant status with respect to water because of "equity interest in water resources that it has carefully created through water regulation and investment of its taxpayers' capital"); Varat, *supra* note 21, at 558 (noting weaker case of nonresidents for access to reproducible natural resources because the "state may well have invested public funds in increasing the originally available resource"); see also *Sporhase*, 458 U.S. at 957 ("given [Nebraska's] conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced . . ."); *Toomer v. Witsell*, 334 U.S. 385, 398 (1948) (noting, in invalidating discrimination against nonresidents seeking to undertake in-state shrimp fishing, that "[n]othing in the record indicates . . . that any substantial amount of the State's general funds is devoted to shrimp conservation").

352. See Varat, *supra* note 21, at 519 (emphasizing importance of "leav[ing] people free to make their home in one state without sacrificing the opportunity to share in the bounty found in others"); Anson & Schenkkan, *supra* note 69, at 96-97.

which they are found with a sounder tax base and greater economic potential, residents already enjoy a relative advantage over nonresidents. A further advantage is not deserved"³⁵³

A natural resources exception also is defensible because state hoarding of natural resources is distinctively disruptive of the goal of national unification.³⁵⁴ Our conception of nationhood entails viewing states as equals — not in natural abundance but in the *opportunity* to be productive.³⁵⁵ Precisely because natural resources are the irreducible — and thus critical — components of production,³⁵⁶ permitting states to hoard them through state control severely diminishes this equality of opportunity.³⁵⁷ It thus raises to the greatest degree the threat of interstate disharmony and retaliation.³⁵⁸

Others have suggested that this point of view has it backwards.³⁵⁹ Professor Trelease, in particular, argued that states have a *heightened* claim to favor residents in the disposition of “unappropriated” mineral resources because such resources are quintessentially part of the territory over which the state is sovereign.³⁶⁰ This argument, however, has a hollow ring; state cement physically created with the sweat of state

353. Varat, *supra* note 21, at 556; see *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 251-52 (3d Cir. 1989) (it “would seem less fair” to permit hoarding of natural resources than, for example, cement).

354. See, e.g., Varat, *supra* note 21, at 554 (citing “Canada’s recent experience” as showing that “recognition of the power of constituent political units to reserve the natural resources found within their jurisdiction for the use of their own inhabitants carries a serious potential for division of the nation”); see also Levmore, *supra* note 149, at 565-66 (suggesting the particular appeal to states of hoarding natural resources despite resulting threat to interstate trade).

355. See L. TRIBE, *supra* note 3, § 6-8, at 423 (citing “major concern of the commerce clause” as “avoiding any state’s exploitation of its geographical or resource position ‘to the disadvantage and displeasure of [its] less strategically situated neighbors’ ”); Varat, *supra* note 21, at 519 (emphasizing importance of “leav[ing] people free to make their home in one state without sacrificing the opportunity to share in the bounty found in others”); *Harv. J. Leg. Comment*, *supra* note 15, at 606 (“In forming the union, the states agreed to share one another’s fate and recognized that natural resources accrue to the benefit of all states.”).

356. See *Hicklin v. Orbeck*, 437 U.S. 518, 533-34 (1978) (“oil and gas . . . are of profound national importance”); see also Melder, *supra* note 223, at 127-28 (noting importance to nation of access to minerals not domestically available).

357. See *Swin Resource Sys., Inc.*, 883 F.2d at 251 (noting that “state does not have the ability to develop a natural resource if it has not had the fortuity to be favored with such a resource”).

358. See *City of El Paso v. Reynolds*, 563 F. Supp. 379, 389 (D.N.M. 1983) (“[c]onstitutional restrictions on the ability of the states to burden the flow of interstate commerce in natural resources lie at the heart of our national solidarity and prosperity”), *later proceeding*, 597 F. Supp. 694 (D.N.M. 1984).

359. See *Nat. Res. Comment*, *supra* note 78, at 545 (urging that each “state should have the greatest autonomy” when “furthering the state’s interest in initial distribution” of state-owned natural resources); Hellerstein, *supra* note 79, at 77 (“To preclude the States from preferring in-state interests in the distribution of state natural resources would deprive the States of an important attribute of their separate existence as independent political units in the federal system.”).

360. See *Trelease*, *supra* note 139, at 352, 361.

workers, for example, may well be viewed as no less a “part” of the state than subsurface minerals resting in the vicinity through the whimsy of natural history. More potent is Professor Trelease’s contention that the power to discriminate in the disposition of natural resources naturally follows from the state’s unquestioned authority to define local real-property rights.³⁶¹ Professor Trelease urged, for example, that the Court in *McCready v. Virginia*³⁶² was right to uphold Virginia’s exclusion of nonresidents from state-owned submerged lands uniquely suited to the farming of oysters.³⁶³ The essence of Professor Trelease’s argument seems to be that Virginia could have favored residents’ access to this resource simply by structuring its property law to vest ownership of these lands in Virginia residents (for example, those persons owning adjacent unsubmerged lands). It should make no difference, the argument continues, that the state chose to retain title for a time and then favor residents in the initial disposition of the resource through sale, lease, or grant.³⁶⁴

This argument is unpersuasive. It is one thing to recognize title to shoreline property in the holder of the adjacent parcel (or, as more commonly occurs, to vest title to subterranean minerals in an overlying landowner). Such a title-refining rule comports with conventional notions of property law, does not advantage in-state businesses lacking a natural connection with the parcel, and for these reasons is unlikely to generate reciprocal hoarding. It is quite another thing for the state to declare that it will sell or lease mineral-rich lands it owns to any and all — but only — state residents. The challenged action in *McCready*, for example, resulted in the acquisition of Virginia’s oyster beds by in-state watermen to the exclusion of out-of-state watermen. An outright transfer to adjacent shoreline landowners, in contrast, would likely have resulted in self-interested retransfers to the highest paying oyster farmers without regard to state of residence.

Indeed, a requirement that the state include nonresidents among its offerees in disposing of valuable state lands or mineral rights serves to provide a sort of commerce-clause “equalizer” for letting the state initially vest title to such critical resources in itself. The very fact of state ownership, after all, may be seen as frustrating commerce clause values by restricting the free movement of naturally existing resources into the hands of nonresidents in response to private needs and incentives. It thus may be especially appropriate to require the state to wel-

361. *See id.* at 361-62.

362. 94 U.S. 391 (1876).

363. *See Trelease, supra* note 139, at 365-67.

364. *See id.* at 362, 366.

come nonresidents to the sales counter as soon as the state chooses to part with ownership.

2. *Applying the Natural Resource Exception*

To recognize the general validity of a natural resource exception is not to say how it will apply in practice. In *Wunnicke*, for example, the Court cited the principle that natural resources might warrant special treatment;³⁶⁵ in other cases, however, courts have found the involvement of natural resources unpersuasive or inconsequential.³⁶⁶ Three main factors — extractable from the more general policies underlying the market-participant rule — seem particularly important to these decisions. First, it matters whether the state has special access to the natural resource not enjoyed by other states.³⁶⁷ Good luck provides little justification for shunting nonresidents, and scarcity heightens the need for open access to ensure equal opportunity. Second, it matters whether the state has invested heavily in the development of the state-owned resource.³⁶⁸ If it has not, then the state would essentially be asserting a right to reap where it has not sown and can advance only a weak claim that its program reflects the sort of meaningful innovation envisioned by our federal system. Third, it may matter whether the state exerts control over all or most of the natural resource that is present within its borders. Even if the state lacks a monopoly or oligopoly position vis-à-vis the national market, the greater the foreclosure of purchasing options within a state the more likely is the possibility of unhealthy resentment and retaliation.³⁶⁹

365. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984).

366. *See, e.g., infra* text accompanying note 380.

367. *See Western Oil & Gas Assn. v. Cory*, 726 F.2d 1340, 1343 (9th Cir. 1984) (citing monopolization of the resource in upholding commerce clause attack), *affd. per curiam by equally divided court*, 471 U.S. 81 (1985); *Nat. Res. Comment, supra* note 78, at 515. In this regard, one author reports:

Six states — Montana, Wyoming, Illinois, West Virginia, Kentucky, and Pennsylvania — contain 76% of the country's coal. U.S. DEPARTMENT OF ENERGY, DEMONSTRATED RESERVE BASE OF COAL IN THE UNITED STATES ON JANUARY 1, 1979 6 (1981). Montana and Wyoming alone contain 40%. *Id.* Louisiana and Texas hold approximately 51% of the nation's proved natural gas reserves. *See* U.S. DEPARTMENT OF ENERGY, U.S. CRUDE OIL, NATURAL GAS AND NATURAL GAS LIQUIDS RESERVES, 1979 ANNUAL REPORT 18, Table 9 (1981). Those two states plus Alaska account for approximately 67% of proved natural gas reserves. *See id.* Approximately 87% of total estimated proved crude oil reserves lie beneath Alaska, Texas, Louisiana, and California. *See id.* at 14, Table 6.

Geo. Wash. Note, supra note 15, at 620 n.132.

368. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 448 n.2 (1980) (quoted *infra* at text accompanying notes 370-72).

369. *See also Varat, supra* note 21, at 538 (noting distinction between statewide and national monopoly). *But see U. Pa. Comment, supra* note 15, at 1338 (in-state monopoly counts little if the "blockading state has no monopoly on the inputs necessary to create disposal capacity elsewhere"). The listing of these three factors is not meant to suggest that other factors are inconsequential. Most importantly, the extent to which the state imposes resident-favoring contractual

The Court's analysis shows that each of these three factors played a role in *Reeves*. To use the Court's own words:

(1) "[P]etitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement";³⁷⁰

(2) "[Cement] is the end product of a complex process whereby a costly physical plant and human labor act on raw materials";³⁷¹ and

(3) "South Dakota has not sought to limit access to the State's limestone or other materials used to make cement."³⁷²

Toward the other end of the continuum may lie a case like *Wunnicke*. In striking down Alaska's requirement that buyers of state-owned timber process that timber in Alaska, the Court relied in part on the natural resources "element" and probably did so with good reason. Thus:

(1) Although Alaska does not have unique access to timber, it does have rich stores of timber in comparison to most other states.³⁷³

(2) The development of Alaskan timber had not been a costly enterprise requiring ingenuity and sacrifice by local residents. Indeed, timber grown on Alaskan land was simply handed over to Alaskans by the national government when Alaska was made a state.³⁷⁴

(3) It may well be — although *Wunnicke* does not answer this question — that a large percentage of salable timber in Alaska sits on state-owned land. To the extent this is true, the lack of alternative Alaskan suppliers cut against application of the market-participant rule.³⁷⁵

conditions on the use of the natural resource is a critical consideration. This subject of "downstream restraints," however, is taken up more systematically in section V.E below. Moreover, other factors — such as the general importance of the hoarded resource — may be significant in particular cases. See generally *supra* notes 281-88 and accompanying text.

370. 447 U.S. at 444.

371. 447 U.S. at 444.

372. 447 U.S. at 444.

373. See *Env't. L. Rev. Note, supra* note 145, at 598 ("timber is not available in marketable quantities in all states"). But cf. *Houston Note, supra* note 15, at 547 (suggesting that Alaskan timber is not an important part of the national timber market).

374. *Hicklin v. Orbeck*, 437 U.S. 518, 528 n.11 (1978); see *Geo. Wash. Note, supra* note 15, at 620 n.140 ("[c]ertainly the existence of timber on state lands was not due to Alaska's 'foresight, risk and industry'"); *Houston Note, supra* note 15, at 555 ("[Alaska's] ownership of the timber was not the result of its own industry or foresight, but rather the federal government's action in granting the state ownership of federal land."); *U. Pa. Comment, supra* note 15, at 1325 n.91 ("Nor had [Alaska] tended the trees; they had simply grown on its land.").

375. A focus on these factors would certainly have been more meaningful than the analysis actually offered by the court in *Tangier Sound Watermen's Assn. v. Douglas*, 541 F. Supp. 1287 (E.D. Va. 1982). That case involved an attack on Virginia laws prohibiting all nonresidents from harvesting blue crabs from Virginia waters. In responding to the plaintiffs' commerce clause challenge, Virginia invoked the market-participant rule. The court dismissed this defense in a short footnote, asserting that Virginia "operates more as a market regulator than a market participant," thus making the case "analogous" to *Smith v. Department of Agric.*, 630 F.2d 1081

Of course, many cases lie between *Reeves* and *Wunnicke*.³⁷⁶ In his *Reeves* dissent, for example, Justice Powell noted that “[t]he extraction of natural gas . . . could hardly occur except through a ‘complex process whereby a costly physical plant and human labor act on raw materials.’”³⁷⁷ Having made this point, Justice Powell sought to use it to attack the *Reeves* majority’s attempted distinction between natural and nonnatural resources.³⁷⁸ There is a basic difficulty with this criticism: it fails to take account of *all* the considerations relevant to proper commerce clause treatment of state hoarding of state-owned natural resources. Most importantly, natural gas is the archetype of a natural resource located by happenstance in only a few states.³⁷⁹ The hoarding of natural gas thus differs fundamentally from South Dakota’s “hoarding” of a finished product made with raw materials widely available both inside and outside the state.

D. Landfills

In *City of Philadelphia v. New Jersey*,³⁸⁰ the Supreme Court invalidated a New Jersey law prohibiting nonresidents from dumping trash in privately owned New Jersey landfills. The Court, however, left open the question whether it would invalidate a similar discrimination in the operation of landfills owned by the state.³⁸¹ A series of lower-court cases decided in the wake of *Alexandria Scrap* have addressed this issue.

In five separate reported decisions, courts have upheld resident-preference restrictions on public landfill use.³⁸² These lower-court de-

(5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981). *Tangier Sound*, 541 F. Supp. at 1303 n.18. As shown above, *Smith* was readily distinguishable because it involved exclusion from the infrastructure of trade. *See supra* text accompanying notes 332-40. A sensitive focus in *Tangier Sound* on the presence of state-specific and state-monopolized natural resources in their “undeveloped” state — together with attention to the state’s evanescent claim of state “ownership” of the controlled resource, *see supra* note 348 — would have substituted well for the court’s conclusory “market regulator” reasoning.

376. Indeed, placing *Wunnicke* at the far end of this suggested continuum might be inappropriate. Alaska, after all, did not limit the end use of the natural resource, but only limited the buyer’s freedom to *process* the natural resource. Professor Varat argues, however, that this distinction should make no difference. *See Varat, supra* note 21, at 561.

377. *Reeves, Inc. v. Stake*, 447 U.S. 429, 448 n.2 (1980) (Powell, J., dissenting).

378. *See* 447 U.S. at 448 n.2 (Powell, J., dissenting); *Creighton Casenote, supra* note 67, at 636 n.70 (endorsing Justice Powell’s argument); *Geo. Wash. Note, supra* note 15, at 610 n.63 (same); *Wayne Casenote, supra* note 15, at 1596 (same); *cf.* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 167, at 327 (questioning whether majority’s “complex process” distinction is persuasive).

379. *See supra* note 367.

380. 437 U.S. 617 (1978).

381. 437 U.S. at 627 n.6.

382. *Swin Resources Sys., Inc. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), *affg.* 678 F. Supp. 1116 (M.D. Pa. 1988); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987);

cisions are debatable, for landfill sites may well be characterized as natural resources.³⁸³ At least on the records developed in the cases, however, the lower-court landfill decisions seem correct. The three salient “natural resources factors” identified above help show why.

First, the cases give no suggestion that the development of general landfill sites requires any peculiar type of land to which only a few states have special access. Land is land, and — unlike most, if not all, other valuable natural resources — all states have it.³⁸⁴

Second, the development and operation of landfills entail substantial absolute and opportunity costs.³⁸⁵ As observed by one court:

The District also argues that landfills are much more than just a raw resource. Rather, they are highly regulated, costly waste disposal facilities. The District contends that it spends millions of dollars annually to meet state and federal law and to provide leachate control, temporary and final cover, roads, and drainage.

• • • •

I agree with the District that a complex metropolitan landfill operation is not a natural resource to which commerce clause scrutiny should apply. Like the cement plant in *Reeves, Inc.*, the District has developed a complex plant. The District is not hoarding raw land, it is providing a public service to its residents.³⁸⁶

Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 643 F. Supp. 127 (D. Or. 1986), *affd.*, 820 F.2d 1482 (9th Cir. 1987); *Shayne Bros. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Commrs. v. Stevens*, 299 Md. 203, 473 A.2d 12 (1984).

383. See *Reeves*, 447 U.S. at 443 (distinguishing cement case from one involving a natural resource like landfill sites); *Geo. Wash. Note, supra* note 15, at 617 (reading *Reeves* as sheltering state-run landfill preferences). Some courts have sought to escape the “natural resources” exception by reasoning that states operating landfills are restricting access not to a natural resource, but instead to “landfill services” provided by the government. See, e.g., *Lefrancois*, 669 F. Supp. at 1211 (urging that state in operating landfill “has entered the market for landfill services and therefore is not a participant in a natural resource market”); *Creighton Casenote, supra* note 67, at 1123 n.331 (characterizing landfill operation as a service). This reasoning seems of limited usefulness since the key “service” the state sells is access to scarce — and indubitably “natural” — land. See *supra* note 347. Indeed, the “service” characterization highlights a particular problem in the landfill cases: the buyers of landfill “services,” unlike more typical natural resources, may not resell them outside the state. In this respect, the landfill cases provide a special justification for judicial intervention not present in a case like *Reeves*, in which interstate commerce was only *partially* obstructed because South Dakota cement buyers *could* resell to nonresidents. See *Reeves*, 447 U.S. at 444.

384. To this point may be added the further observation that the scarcity of undeveloped land in any state may be attributed not solely to “happenstance,” see *Reeves*, 447 U.S. at 444, but to the state’s own decisions concerning land-use control.

385. The costs are incurred, moreover, in “an area in which experimentation by the states is devoutly to be wished.” *U. Pa. Comment, supra* note 15, at 1334. See *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 252-53 (3d Cir. 1989).

386. *Evergreen Waste Systems*, 643 F. Supp. at 132; see also *U. Pa. Comment, supra* note 15, at 1332-33 (noting subtle in-state costs of landfill operation, including increased “health risks and environmental degradation”; emphasizing also expensiveness of landfill operation, especially through “compliance with increasingly stringent environmental regulations”).

Notably, in *McCready v. Virginia*,³⁸⁷ the Court observed that a state leasing arable land it owned could prefer resident corn farmers over their nonresident counterparts.³⁸⁸ To the extent this pronouncement remains good law, it provides a powerful *a fortiori* argument in the landfill cases. This is so because, if a state may limit access to raw land provided with no accompanying service or expense, it surely should have the option of restricting access to costly landfills developed and operated with government funds in an effort to help solve a pressing local problem.

Third, the landfill cases involved local-government operators that had not monopolized available in-state sites. In upholding a Maryland county's landfill preference, for example, the court in *County Commissioners of Charles County v. Stevens*³⁸⁹ reasoned: "The County has not closed its borders to anyone who wishes to construct landfills within the County Nor has it been shown that the County possesses unique access to potential landfill sites."³⁹⁰

A key teaching of the landfill cases is that the involvement of natural resources does not operate as a talisman to render the market-participant rule inapplicable. *Reeves* and *Wunnicke* render suspect preferential distributions of state-owned natural resources. In such cases, however, courts still must balance the values underlying the market-participant rule against the national-unification goal of the commerce clause. The lower courts seem to have struck this balance properly in the landfill cases they have encountered so far. However, modest factual differences — such as the proven preferability of state-specific geological conditions for disposing of certain types of waste or the established inability of private entrepreneurs to develop competing landfill sites in the state — may justify different conclusions in future landfill cases.³⁹¹

387. 94 U.S. 391 (1876).

388. 94 U.S. at 396.

389. 299 Md. 203, 473 A.2d 12 (1984).

390. 299 Md. at 220, 473 A.2d at 21. *Accord Evergreen Waste Systems*, 643 F. Supp. at 132 ("Here, nothing prevents private operators from purchasing land in the District and developing it for landfill. Nor has Evergreen argued that the District owns all the potential landfill sites"); see Varat, *supra* note 21, at 558 (justifying *McCready* cornland rule in part on ground that "[a]rable land is rarely unique; the private sector generally will control other land suitable for planting").

391. See, e.g., *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 253-54 (3d Cir. 1989) (emphasizing that "[t]his is not a case in which a state has hoarded a resource like coal or oil that is geologically peculiar to that state"); *Rutgers Note, supra* note 79, at 758 (arguing that state could not couple access restrictions to public landfills with forced closing of private landfills).

E. Downstream Restraints

In *White*, there was no dissent from the conclusion that the commerce clause permits states to restrict state jobs to state residents.³⁹² The logic of the market-participant rule supports this view as surely as it justifies in-state purchasing preferences generally. State jobs, after all, are benefits afforded through a marketplace exchange of state money for valuable services.³⁹³ *White*, however, involved an added wrinkle, for Boston did more than limit its own hiring to Bostonians. Boston required the private construction firms it contracted with — and even the subcontractors those private firms engaged — to ensure that at least half their workforce was made up of Boston residents.³⁹⁴ The preference in *White* thus created a “downstream restraint” requiring private traders to prefer state residents in making otherwise private hiring decisions.³⁹⁵

1. The Difficulties of Downstream Restraints

Downstream restraints raise two major problems with the rationales underlying the market-participant rule. First, a state or municipality imposing such a contractual condition seems to act at least as

392. See *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983) (upholding Boston rule because construction workers were, in effect, “working for the city”); 460 U.S. at 217 n.2 (Blackmun, J., dissenting) (preference in hiring city’s own workers “would almost certainly have been permissible”); *International Org. of Masters v. Andrews*, 626 F. Supp. 1271, 1277-78 (D. Alaska 1986) (state can favor state residents in employment), *affd. in part and vacated in part*, 831 F.2d 843 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1228 (1988). *But cf. Simson*, *supra* note 190, at 394 (arguing that under privileges and immunities clause “the state may not validly make state residence a qualification to run for local dogcatcher or to be hired for the custodial staff in a state office building”).

393. See *Varat*, *supra* note 21, at 546-48 (concluding that “the general principle supporting state authority to prefer residents in the distribution of state-created resources applies fully to state employment”; “state spends money to obtain labor, just as it might spend money to buy goods or the services of independent contractors”); see also *McCarthy v. Philadelphia Civil Serv. Commn.*, 424 U.S. 645, 646-47 (1976) (*per curiam*) (upholding resident hiring preference against challenge that it burdened right of interstate travel). See generally *supra* notes 291-303 and accompanying text.

394. See 460 U.S. at 205 n.1.

395. See *The Supreme Court, 1982 Term*, *supra* note 15, at 75 (“*White* permits the government to . . . impose conditions on the way its partners operate”); *cf. Note*, *South-Central Timber Dev., Inc. v. Wunnicke: The Dormant Commerce Clause Fells Alaska’s Primary Manufacture Requirement for the Sale of State-Owned Timber*, 5 N. ILL. L. REV. 155, 176 (1984) (viewing *White*’s validation of downstream hiring restraint as “arguably an undue extension” of prior doctrine).

As with the term “natural resources,” see *supra* note 347, the proper scope of the term “downstream restraint” is not entirely clear. One might characterize the landfill cases, for example, see *supra* notes 380-91 and accompanying text, as involving governmental sales of rights to dispose of trash. If the state effectively bars the retransfer of those rights to nonresidents through a rule flatly limiting dumping to in-state trash, has it burdened the sale of the right with a “downstream restraint”? Fortunately, in most cases the presence or absence of downstream restraints will be clear. The cases discussed below involve state programs involving readily identifiable downstream restraints.

much as a market regulator as a market participant.³⁹⁶ It so acts, moreover, in a manner particularly at odds with the commerce clause values the Court emphasized in embracing the market-participant rule. This is so because the governmental entity that imposes such restraints effectively limits the selection of private trading partners, thus “impeding free private trade”³⁹⁷ and *subverting* “the long recognized right of [the] trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”³⁹⁸

Second, the sheltering of such “downstream restraints” magnifies dramatically the potential for widespread discrimination against out-of-state commercial interests through the medium of government contracts. This is so because the availability of downstream restrictions greatly expands the “pool” of resident preferences achievable by states. It is one thing to permit the state to prefer state residents in direct exchanges; such exchanges reflect only a small percentage of all trades in the national economy. It is quite another thing, however, to let the state dictate all the private economic relationships that all of its trading partners may have. To adopt such a rule is to authorize the state to “reach through” its own purchases and sales to dictate the terms of large numbers of private transactions.³⁹⁹

396. See, e.g., Case Note, *supra* note 43, at 663 (“*White* stretches the market participation exemption to encompass activities that are analogized more aptly to state regulation than to transactions engaged in by private traders”).

397. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) (emphasis added).

398. 447 U.S. at 438-39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Professor Gergen seems sensitive to this distinction, especially insofar as it rests on *formal* considerations. Thus, he condemns downstream restraints, even while seeming to defend “subsidies of like effect.” Gergen, *supra* note 15, at 1144. In doing so, he reasons that “[w]hen states require firms with whom they deal to favor citizens in other dealings, they appear to be interfering with the ability of out-of-staters to engage in entirely private transactions, something historically prohibited” *Id.*

399. See Varat, *supra* note 21, at 561, 564 (decrying the “leverage” states might exercise through downstream restraints and noting that such conditions permit the state “to accomplish indirectly — and too effectively — what it is forbidden to compel directly”); *Harv. J. Leg. Comment*, *supra* note 15, at 603 (“Allowing the state to make use of its resources before it allows them to pass out of its possession is a far less intrusive means of providing for its citizens than a requirement that state resources, once reduced to private possession, must be used in certain ways.”); Rodgers, *supra* note 179, at 364 & n.35 (state should not have the ability to use market participation as a “subterfuge to regulate the activities of other markets”). A poignant illustration of this danger is presented by *Hicklin v. Orbeck*, 437 U.S. 518 (1978), in which “Alaska had attempted to pyramid its ownership of oil and gas into control of the private sector on such a wide basis that the program of conditional distribution was barely distinguishable from regulation.” Varat, *supra* note 21, at 562. Notably, the Court has shown concern about “reaching through” government spending decisions broadly to interfere with otherwise private decisions in other constitutional contexts as well. See, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989) (upholding Missouri ban on the use of public facilities for abortions, but noting that the “case might . . . be different if the state barred doctors who performed abortions in private facilities for the use of public facilities for any purpose”); 109 S. Ct. at 3059 (O’Connor, J., concurring) (rejecting facial attack on the Missouri ban, but noting that certain

It may be said in response that downstream restraints are in functional terms no different than permissible subsidies that favor in-state traders. This is so, the argument goes, because the state simply pays more money to the contractor with which it directly deals so that that contractor can pass along higher rates to the favored in-state workers or firms with which it is forced to deal.⁴⁰⁰

This “they’re-just-like-subsidies” defense of downstream restraints, however, ignores the real world. A contract that requires a state contractor to hire a fixed percentage of state workers will operate directly and effectively to get jobs for a targeted number of state residents. Direct state payments to residents working on state projects (who in theory will be more employable because they can “charge” less for their services) simply will not be so readily achievable in practice. The proper amount of the per-worker subsidy, for example, may prove impossible to calculate,⁴⁰¹ and the difficulties of administering such programs may make them uninviting to pursue. In addition, there invariably will arise more pointed problems of political salability when the state considers favoring specific state citizens with direct cash payments, rather than indirect support through a mandated downstream hiring or purchasing preference.⁴⁰² These considerations suggest that there exist significant practical differences between direct subsidies and downstream restraints that render the latter constitutionally more problematic. As a result, all members of the Court in *White* properly agreed that “there are *some* limits on a state or local government’s ability to impose restrictions that reach beyond the immediate parties

applications of the statute — for example, a “ban against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land” — “may be . . . unconstitutional”); 109 S. Ct. at 3068 n.1 (Blackmun, J., dissenting) (attacking the Missouri law on the ground that states “may not affirmatively constrict the availability of abortions by defining as ‘public’ that which in all meaningful respects is private”).

400. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 103 (1984) (Rehnquist, J., dissenting); Gergen, *supra* note 15, at 1111 n.76 (In *Wunnicke*, “[t]he law simply shifted state revenues to the processing industry through the intermediary of private purchasers of timber. The state charged considerably less than it otherwise would for timber sold subject to the restriction, presumably to compensate purchasers for the increased cost of Alaskan processing.”) (citation omitted); *id.* at 1138-39 (*Wunnicke*, in effect, concerned a subsidy); *Envtl. L. Rev. Note*, *supra* note 145, at 609-11 (arguing that Alaska could accomplish the same economic result by paying rebates equal to difference between in-state and out-of-state processing costs to buyers who process their timber in Alaska; reasoning that such payments would parallel bounties upheld in *Alexandria Scrap*).

401. See Regan, *supra* note 7, at 1196.

402. See Gergen, *supra* note 15, at 1144:

If downstream restraints are different from subsidies in any real respect, it is because their costs are hidden. The cost of supporting local lumber mills is signaled more clearly if the state grants the mills a subsidy, for example, instead of reducing the price of timber sold to firms compelled to process it at the local mills. The state is less likely to take these hidden costs into account.

See also *supra* note 244 and accompanying text.

with which the government transacts business.”⁴⁰³

In *Wunnicke*, four members of the Court made even more explicit their discomfort with broad validation of downstream restraints. Writing for the plurality, Justice White reasoned that “the market-participant doctrine . . . allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.”⁴⁰⁴ He added that in applying this principle, “[u]nless the ‘market’ 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.”⁴⁰⁵ The plurality thus agreed that Alaska could not condition the sale of its timber on the buyer’s agreement to process that timber in Alaska.⁴⁰⁶

The plurality in *Wunnicke* noted that its aversion to downstream restraints had a doctrinal basis reaching back many years.⁴⁰⁷ Thus, as far back as 1928, the Court in *Foster-Fountain Packing Co. v. Haydel*⁴⁰⁸ confronted a Louisiana statute that required fishermen who caught shrimp in local waters to process their catch within the state. The Court decided the case at a time when it was well understood that Louisiana owned the shrimp.⁴⁰⁹ As a result, the Louisiana statute, in effect, told shrimpers: “We will transfer our state-owned shrimp to you, but only on the condition that you process the shrimp in Louisiana.” That condition, the *Foster-Fountain* Court concluded, was impermissible under the dormant commerce clause.⁴¹⁰

2. *The Logic and Limits of White*

Notwithstanding *Foster-Fountain* and the Court’s expression of concern about downstream restraints in *White*, the majority in that case readily upheld the challenged downstream hiring restriction. Then-Justice Rehnquist — joined by such unlikely compatriots as Jus-

403. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983) (emphasis added).

404. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

405. 467 U.S. at 97-98.

406. 467 U.S. at 98.

407. 467 U.S. at 96 n.9.

408. 278 U.S. 1 (1928).

409. 278 U.S. at 11.

410. *See also* *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982) (market-participant rule does not permit restrictions on the sale of electricity by a private utility because the utility uses state waters to produce the power sold); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (invalidating resale restrictions on captured minnows allegedly “owned” by the state); *cf.* *Trelease, supra* note 139, at 364 (characterizing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), as a case invalidating a “downstream restraint”).

tices Brennan and Stevens — brushed aside the attack on the Boston rule by asserting in effect that the case did not involve a downstream restraint at all. Rather, it was the majority's view that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'"⁴¹¹ This analysis is puzzling. Construction workers, after all, work for construction companies. They are hired, paid, and supervised by those companies. Company profits depend on labor costs and labor efficiency. To say that construction workers "work for the city" thus seems to blink at reality.⁴¹²

Seeking to flesh out its notion of "working for the city," the Court in *White* reasoned that "the Mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant."⁴¹³ Yet a "discrete, identifiable class of economic activity" may still be very broad, and provide a medium for sweeping ripple effects across the national economy. Under a commodious reading of *White* itself, for example, the "class" of economic activity exempted from commerce-clause scrutiny might embrace all purchases (as well as all hirings) by all suppliers (as well as all contractors and subcontractors) on all state and municipal construction projects.⁴¹⁴ The difficult question left in the wake of *White* is how far its validation of downstream restraints will reach.

The plurality in *Wunnicke* distinguished the Boston hiring preference from the Alaska processing preference by noting: "In contrast to the situation in *White*, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract."⁴¹⁵ In addition, as Justice Blackmun pointed out in his dissent to *White*, there is a "unique aspect of employment in the construction industry."⁴¹⁶ Why? "Because many construction contractors hire a substantially different work crew for each project they undertake"⁴¹⁷ Thus, a resident-hiring require-

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

412. See 460 U.S. at 223 (Blackmun, J., dissenting); *The Supreme Court, 1982 Term, supra* note 15, at 75 (viewing working-for-the-city rationale as "amorphous," "ad hoc," and "conclusory"); *Contemporary Law Note, supra* note 79, at 222-23 (characterizing the majority's opinion in *White* as "cursory" and "superficially dismiss[ive of] the issue of market participation"); *Note, supra* note 395, at 177 (viewing the working-for-the-city rationale as a "thin thread").

413. 460 U.S. at 211 n.7.

414. *But see infra* text accompanying notes 416-18.

415. *Wunnicke*, 467 U.S. at 99.

416. *White*, 460 U.S. at 223 (Blackmun, J., dissenting).

417. 460 U.S. at 222 & n.6 (Blackmun, J., dissenting).

ment incorporated into a construction contract (unlike, for example, a resident-employee requirement attached to a furniture-purchase contract) is not likely to have sweeping effects altering the pattern of who is employed to work on other, purely private projects. Taken together, the “working-for-the-city” and “limited-effects-on-other-projects” rationales could serve to limit *White* essentially to cases involving hiring by construction contractors.⁴¹⁸

White itself gives reason to believe that substantial limits exist on localities’ power to mandate hiring preferences by project *suppliers*. This is so because the majority in *White* distinguished *Hicklin v. Orbeck*⁴¹⁹ by observing that Boston did not “‘attempt to force virtually all businesses that benefit in some way from the ripple effect’ of the city’s decision to enter into contracts for construction projects ‘to bias their employment practices in favor of the [city’s] residents.’”⁴²⁰ Moreover, the Court in *Hicklin* condemned a downstream restraint precisely because its “ripple effect” reached employment by *suppliers* for state projects.⁴²¹ In short, a combined reading of *White* and *Hicklin* suggests that, under the commerce clause, contractors — or at least subcontractors — may not be forced to deal only with suppliers who employ a specified number of state residents.

3. *The Many Faces of Downstream Restraints*

White and *Wunnicke* leave much in doubt about resident-favoring conditions placed in government contracts. This uncertainty is heightened because these contractual conditions come in so many shapes and sizes.

As in other settings, the easiest cases are identifiable. Is an ordinance requiring that all print work done under city contract be assigned to local firms unenforceable if a city contracts not directly with the print shop but with a sales intermediary who then must engage a

418. See Case Note, *supra* note 43, at 664 (“the fact that the Boston mayoral order was directed at an employment market in which hiring took place largely on a temporary, ad hoc basis must be considered as an essential limitation of the scope of *White*”); Gergen, *supra* note 15, at 1143-44 (“Consider a state law requiring firms doing business with the state to hire only its citizens. The implication of *United Building* and *Hicklin* is that such a restraint on unrelated hiring by firms that do business with the state is prohibited.”).

419. 437 U.S. 518 (1978).

420. *White*, 460 U.S. at 211 (quoting *Hicklin*, 437 U.S. at 531).

421. The Court in *Hicklin*, relying on article IV’s privileges and immunities clause, invalidated an Alaska law requiring all companies providing supplies or support services to extractors of Alaskan fossil fuels to prefer Alaskans in hiring. In taking this view, the Court specifically observed: “The Act goes so far as to reach *suppliers* who provide goods or services to subcontractors who, in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State’s oil and gas or ever set foot on state land.” 437 U.S. at 530 (emphasis added).

local printer?⁴²² Almost surely not. As in *White*, the “condition” imposed on the salesperson raises little risk of distorting later private transactions, and the printer (even more so than the laborers in Boston) seems actually to be the one who is “working for the city.”⁴²³ On the other hand, almost any downstream restraint on the retransfer of raw natural resources disposed of by the state should be impermissible.⁴²⁴ Indeed, the most strident critic of a “natural resource exception” to the market-participant rule seems to concede that much.⁴²⁵

Even these principles, however, may be difficult to apply in practice,⁴²⁶ and other cases may present still greater complexities. In actuality, most downstream-restraint cases have concerned laws requiring state contractors to use in-state products in discharging contractual duties. A sampling of these cases reveals the subtle problems downstream restraints can present.

a. *Alexandria Scrap and in-state hulks.* A “downstream restraint” issue lurked quietly in *Alexandria Scrap*, since the program challenged in that case afforded cash payments to hulk processors *only if* they disposed of *Maryland-titled* cars.⁴²⁷ Was this requirement an impermissible “downstream restraint” because it conditioned state payments to processors on their exclusive “use” of Maryland products? One senses that the answer is no, although the reason why is not self-evident. Probably the best explanation is that Maryland’s decision to exterminate hulks (unlike, for example, its decision to favor Maryland processors) was not in any meaningful sense protectionist, or even commercial.⁴²⁸ Because Maryland’s ridding itself of hulks re-

422. See *American Yearbook Co. v. Askew*, 339 F. Supp. 719, 723 (M.D. Fla. 1972) (upholding printing preference statute requiring contracts with residents or nonresidents with local plants), *affd. mem.*, 409 U.S. 904 (1973); *In re Gemmill*, 20 Idaho 732, 119 P. 298 (1911) (same); cf. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917).

423. See *Recent Case*, 80 HARV. L. REV. 1347, 1360 (1967) (implying that state “locally produced goods” requirement is unobjectionable if it creates downstream restraints only for “middlemen”).

424. See *Altus v. Carr*, 255 F. Supp. 828, 839 (W.D. Tex.) (invalidating statute barring withdrawal of water with intent to transport it in interstate commerce), *affd. mem.*, 385 U.S. 35 (1986).

425. See *Trelease*, *supra* note 139, at 351-52 (suggesting impropriety of state restraints on dispositions of “appropriated” waters and minerals); see also *Anson & Schenkkan*, *supra* note 69, at 92 (emphasizing importance of applying downstream-restraint limitations to distributions of natural resources).

426. See, e.g., *infra* note 428 (suggesting “upstream restraint” inherent in local landfill’s in-state trash requirement is constitutional although it involves natural resource).

427. See *Rutgers Note*, *supra* note 79, at 757.

428. As explained in greater detail below, see *infra* notes 460-61 and accompanying text, this same analysis probably best explains the validity of a downstream restraint (or more accurately an “upstream restraint”) requiring users of municipal landfills to secure for such disposal only in-state trash. There seems, after all, to be little functional difference between automotive junk and

flected a choice about aesthetics, rather than about commerce, it seems logical that the *commerce* clause would have little to say about it.⁴²⁹ To find no objectionable downstream restraint in *Alexandria Scrap*, however, sheds little light on the validity of more ordinary in-state product requirements.

b. Allen, Treat, and in-state stone. A more typical problem concerning in-state product requirements is illustrated by two early cases, *Allen v. Labsap*⁴³⁰ and *People ex rel. Treat v. Coler*.⁴³¹ Each case concerned a state law requiring government contractors to use only stone that had been finished within the state. In *Treat*, but not in *Allen*, the court found the statute unconstitutional. The cases thus starkly invite an inquiry into which holding is correct under modern market-participant analysis.⁴³²

Treat and *Allen* clearly involved downstream restraints; just as in *White*, the contractor could get the government job only if the con-

regular junk. See *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir. 1989) (arguing that the Maryland-hulks-only rule of *Alexandria Scrap* is indistinguishable from local-trash-only rules adopted by states and municipalities). Similar reasoning (coupled with a far more limited exclusionary sweep, see *supra* note 303) also serves to justify downstream restraints incorporated in recently enacted divestiture laws — *i.e.*, state or municipal provisions that ban persons having a contractual relationship with the local government from retaining holdings in South Africa. To carry forward the analogy, a state or municipality should have broad authority free of the *commerce* clause, to rid itself of a moral, no less than a visual, blight. See *Board of Trustees v. Mayor of Baltimore*, 317 Md. 72, 562 A.2d 720, 751 (1989) (emphasizing that Baltimore ordinances have the primary purpose of removing a perceived moral taint from the city's investments).

429. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982) (distinguishing restraints on water exports based on protecting local economic interests from restraints designed to protect local health interests). *But cf.* *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding, in a case not involving public benefits, that discrimination against out-of-state articles of commerce may violate the dormant commerce clause even if undertaken for a broader goal of environmental protection). Other explanations are also available. First, in keeping with the formal aspect of the four-factor analysis, it might be said that Maryland *looked* like a "purchaser" of hulks. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976) (characterizing Maryland as a "purchaser, in effect"). This circumstance may suggest, to track the reasoning of the *Wunnicke* plurality, that Maryland in *Alexandria Scrap* discriminated only in the market it had entered — namely, the market for the *purchase of hulks*. One might argue in response that Maryland did not really purchase hulks at all, but rather subsidized the services that hulk processors provided. The per-vehicle nature of Maryland's payments, however, give at least some support to the "purchaser" characterization, which would not have applied had Maryland simply afforded a flat payment or some other form of subsidy to hulk processors. Second, in keeping with the sound-federalism line of analysis, it may be significant that *Alexandria Scrap* involved a government's dealing with an "externality" not remediable by free market forces. See, *e.g.*, P. SAMUELSON & W. NORDHAUS, *ECONOMICS* 47-48 (12th ed. 1985). In such circumstances, it may be argued, government should have the freest hand, so as to facilitate government intervention in the field where government intervention is most required.

430. 188 Mo. 692, 87 S.W. 926 (1905).

431. 166 N.Y. 144, 59 N.E. 776 (1901).

432. When such statutes are challenged it is an insufficient answer to respond that the statute permits both residents and nonresidents to finish stone, so long as they operate in the state. "[T]he dormant commerce clause is aimed not at discrimination against out-of-staters, but against interstate commerce." Sunstein, *supra* note 170, at 1706.

tractor favored in-state commercial concerns. *White's* "work-for-the-city" rationale, however, seems inapplicable to *Allen* and *Treat* because stone-finishers, unlike construction workers, often are both physically and temporally removed from the construction project. This is so because finished stone frequently is not a job-specific building product; as a result, its preparation often will not occur either *on* the construction site or even *during* the pendency of the construction project. For these reasons, such work will not be subject to monitoring and supervision by the city or its architect in the same day-to-day fashion as the labor of construction workers. In such circumstances, it is hard to say that stone finishers are "working for the city."⁴³³

On the other hand, the result in *White* rests in part on the notion that resident preferences on discrete government construction contracts will not significantly "spill over" to distort contractor-worker employment relationships for purposes of private projects.⁴³⁴ Because stone suppliers typically bid and work on a project-by-project basis, this limited spillover reasoning of *White* should apply with equal force to cases like *Allen* and *Treat*; just because contractors use in-state stone for public works projects does not mean they will do so in constructing privately owned buildings.⁴³⁵ *Allen* and *Treat* thus raise the subtle question whether *White's* implicit "spillover" reasoning should be dispositive even if its more explicit and more formal "work-for-the-city" rationale is inapplicable. For reasons already given, a formal focus is not necessarily ill-conceived;⁴³⁶ indeed, the plurality in *Wunnicke* distinguished *White* largely on formal grounds, even though the Alaska program probably had no influence on timber owners' choices of timber processors for trees felled on private lands.⁴³⁷

Like *Allen* and *Treat*, modern decisions may well break different ways in passing upon these statutes. Moreover, factual nuances — such as whether stone finishing occurs before or after commencement of the project, or on or off the construction site — might well prove decisive in these cases. In general, however, the dubious legitimacy of downstream restraints⁴³⁸ suggests that courts should hesitate to uphold this form of in-state product restriction.

433. Cf. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98-99 (1984) (emphasizing that required in-state work performed on timber was to occur after the state surrendered control of the timber).

434. See *supra* notes 416-18 and accompanying text.

435. See Case Note, *supra* note 43, at 664-65.

436. See *supra* notes 245-64 and accompanying text.

437. See *Wunnicke*, 467 U.S. at 95 (the "fact that the employees were 'working for the city' was 'crucial' to the market-participant analysis in *White*").

438. See *supra* notes 396-410 and accompanying text.

c. *Garden State Dairies and in-state milk.* Even if *White's* reasoning does protect statutes like those considered in *Allen* and *Treat*, not all downstream purchasing restraints should meet with judicial approval. Consider *Garden State Dairies, Inc. v. Sills*.⁴³⁹ In that case, the New Jersey Supreme Court faced a statute requiring milk distributors seeking state-supply contracts to certify (1) that they would purchase in the contract year at least as much New Jersey milk as they were to sell to the state under the contract, and (2) that they had purchased at least as much New Jersey milk as they contracted to sell to the state in the previous year as well. The New Jersey Supreme Court refused to uphold the statute *ipso facto* because of the state's "proprietor" status, but also declined to invalidate the statute summarily.⁴⁴⁰ For three reasons, however, the spillover effects of the milk statute were so plain and substantial that the court should have struck down the statute on its face.

First, the statute permitted New Jersey, in effect, to "double its money" by forcing an equivalent purchase of New Jersey milk in *both* the contract year *and* the year preceding the award of the contract. The sow-and-reap rationale suggests that New Jersey fairly could insist at most on a flow-through of its *own* money to New Jersey milk producers; the statute, however, conditioned state contracts on the diversion of "matching" amounts of purely private money to New Jersey producers as well.⁴⁴¹

Second, because of the statute's "preceding year" requirement, prospective sellers had to buy substantial volumes of New Jersey milk simply to *be in a position* to compete for a state contract. The consequence of such a requirement is to cause purchases from in-state producers even by private suppliers who will wind up getting *no* state contract, and thus no state money whatsoever.⁴⁴² Finally, regardless of the "previous year" stipulation, the "same year" requirement might as a practical matter induce more than equivalent in-state purchases. In particular, it is predictable that the hired supplier will exercise care not to under-order in-state milk so as to jeopardize her entitlement to payments and continued eligibility under the program. For all these reasons, the condition at issue in *Garden State Dairies* — and other conditions resembling it — should not survive dormant commerce clause attack.

439. 46 N.J. 349, 217 A.2d 126 (1966), *remanded*, 98 N.J. Super. 109, 236 A.2d 176 (Ch. Div. 1967), *revd.*, 53 N.J. 71, 248 A.2d 427 (1968).

440. *See* 46 N.J. at 358-59.

441. *See* Recent Case, *supra* note 423, at 1360 n.24.

442. *Id.* at 1360.

d. *A final word on downstream restraints.* These varied examples signal the danger of generalizing about downstream restraints. The four-factor analysis developed here, however, suggests that at least with respect to commercially motivated contractual conditions, courts should pause long before extending *White's* validation of downstream restraints significantly beyond the specialized setting of construction-worker hiring requirements.⁴⁴³ Such wariness should not impinge unduly on the ability of states to channel state benefits to state residents, for states may still favor state residents in direct dealings with them. Nor should intolerance of downstream restraints interfere too much with a state's ability in a federalist system to help certain of its industries, since other approaches — such as direct subsidies — will remain available. A general rejection of downstream restraints will keep states from end-running the dormant commerce clause by vastly expanding private in-state commercial preferences, and a restrictive approach to downstream restraints will confine the market-participant rule to cases in which the state most looks and acts like a market trader. All these considerations point to the same conclusion: the safer, sounder, and more judicially manageable course is to invalidate preferential downstream restraints as the general rule.

F. *Monetary Subsidies*

The Court in *Alexandria Scrap* upheld a Maryland subsidy program that starkly discriminated in favor of in-state businesses. The Court also recognized that the state's central motivation in adopting the subsidy was no more complex than "to channel state benefits to the residents of the State . . ."⁴⁴⁴ Notwithstanding its endorsement of the discriminatory subsidy at issue in *Alexandria Scrap*, the Court in *Reeves* pointed out that "subsidy programs unlike that involved in *Alexandria Scrap*" may not enjoy the protection afforded by the market-participant rule.⁴⁴⁵ The Court echoed this same point in *Limbach*.⁴⁴⁶

The Court's reservation about sheltering all monetary subsidies from commerce clause attack seems to flow from the *formal* justifications for the market-participant doctrine. As the Court explained in *Reeves*: "South Dakota, as a seller of cement, unquestionably fits the

443. See Anson & Schenkkan, *supra* note 69, at 92-95; Case Note, *supra* note 43, at 664 n.105 (noting the potential for "substantially alter[ing] employment patterns" if the *White* holding were extended beyond construction contracts).

444. *Reeves, Inc. v. Stake*, 447 U.S. 429, 443 n.16 (1980) (discussing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)).

445. 447 U.S. at 440 n.14.

446. *New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1809 (1988).

'market participant' label more comfortably than a State acting to subsidize local scrap processors."⁴⁴⁷ If, as previously suggested, a relevant inquiry in applying the market-participant rule is whether the State *looks* like a trader in the market, there is at least some basis for scrutinizing monetary subsidies more closely than state purchases and sales.⁴⁴⁸

What subsidies, then, remain insulated by the market-participant doctrine? We know that the subsidy attacked in *Alexandria Scrap* passes muster. There, however, the government's per-hulk payment made Maryland indeed look like a traditional "purchaser" — either of individual hulks or of the services performed in destroying automotive eyesores.⁴⁴⁹ Other subsidy programs look less like "purchasing." Into this category fall, for example, flat payments to favored manufacturers or payments to producers reflecting some percentage of losses or income. Are such subsidies, when limited to in-state businesses, sustainable against dormant commerce clause attack?

The Court's decision in *Limbach* suggests they are. In *Limbach*, the Court struck down an Ohio tax credit given only to Ohio ethanol producers. In doing so, however, the Court specifically distinguished Indiana's own program, which afforded monetary *subsidies* to only Indiana producers. The Court flatly stated: "Direct subsidization of domestic industry does not ordinarily run afoul of . . . [the commerce clause] prohibition"⁴⁵⁰

This conclusion seems sensible in light of the policies underlying the market-participant rule. In-state subsidies — no less than in-state buying, selling, and hiring — reflect the collective decision of state residents to expend their own resources to further their own interests.⁴⁵¹ In-state subsidies — no less than in-state buying, selling, and

447. *Reeves*, 447 U.S. at 440 (emphasis added).

448. See generally *supra* notes 245-64 and accompanying text.

449. Cf. Note, *supra* note 9, at 709 (noting that "in form[,] Maryland's entry into the marketplace to buy abandoned cars resembled the actions of a private market force").

450. *Limbach*, 108 S. Ct. at 1810. Support for resident-preferring subsidies also comes from *Wunnicke*, in which even the plurality did not question Alaska's ability directly to subsidize in-state timber processors. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95 (1984); *Nat. Res. Comment, supra* note 78, at 537-38 (reading *Wunnicke* as endorsing "subsidies distributed solely to local businesses"); see also *Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) ("State may make residence within its boundaries more attractive by offering . . . direct distribution of its munificence"). Commentators also have defended resident preferences in affording in-state subsidies. See Gergen, *supra* note 15, at 1134-38; Regan, *supra* note 7, at 1193-95; see also Linde, *supra* note 145, at 49-67 (generally criticizing preferential distribution of state-made goods, but noting that "in the selective use of direct subsidy . . . the states perhaps retain some means immune from constitutional attack to let charity, and economic self-help, begin and end at home").

451. See *supra* notes 170-93 and accompanying text.

hiring — embody governmental experiments designed to improve the lives of the local citizenry.⁴⁵² And in-state subsidies, for the most part at least, seem no more intrusive on commerce clause values than preferential trading or in-state hiring; indeed, the built-in “costliness” check on the proliferation of discriminatory programs⁴⁵³ may reach its apex with direct subsidies because *unrequited* payments usually will be more expensive than outlays for which state governments receive some value in return.⁴⁵⁴

Finally, typical production subsidies resemble governmental actions that few would find constitutionally objectionable. States, for example, often battle to attract firms about to build new plants. They do so by offering those firms state benefits, such as flat monetary support, expanded government services, or free land. If states constitutionally may use state resources to woo new businesses,⁴⁵⁵ then why should states not be able to use their resources to keep old businesses where they are?⁴⁵⁶

452. See *supra* notes 194-217 and accompanying text.

453. See *supra* notes 240-44 and accompanying text.

454. See Gergen, *supra* note 15, at 1135 (“because subsidies entail a conscious expenditure of public funds, the state is likely to weigh the costs and benefits of its actions”); Levmore, *supra* note 149, at 585 (“[w]here the funds for a subsidy or preference benefitting some state residents come out of the state treasury, reviewing courts might assume that the state legislature has considered the burdens and benefits . . .”). Subsidies may be less objectionable than tariffs — and less antithetical to the values of national union — for other reasons as well. See, e.g., Gergen, *supra* note 15, at 1135, 1137 (noting that persons may “perceive subsidies as fair interstate competition and not as a point of special offense” in part because subsidies “encourage . . . reduced commodity prices” and “unlike tariffs, benefit foreign buyers”); *The Supreme Court, 1975 Term*, *supra* note 79, at 61 (noting that effect of subsidies, “at least in the short-run, is imposed not on consumers”; thus while tariffs and regulations burden both out-of-state competitors and consumers, subsidies burden only out-of-state competitors); cf. Recent Case, *supra* note 423, at 1360 n.21 (suggesting that subsidies are more defensible than purchasing preferences because subsidies “do not preclude the possibility of interstate competition”).

455. See *Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) (“A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live.”); *Boston Stock Exch. v. State Tax Commn.*, 429 U.S. 318, 335-37 (1977) (holding that “a State may [not] tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests,” but emphasizing its refusal “[to] hold that a State may not compete with other States for a share of interstate commerce”).

456. Varat, *supra* note 21, at 545 (citing as functionally akin efforts “to attract industry, . . . or to keep it in . . . the subsidizing state”). It merits mention that the preceding discussion considers subsidies generally. Professor Varat takes a different approach, dividing the world of subsidies into two categories. *Id.* at 540. The essence of Professor Varat’s distinction is that the nonresident who pays state taxes should not be denied equal access to state subsidies, for such a denial is functionally indistinguishable from affording the resident taxpayer an impermissible tax advantage. See *infra* notes 472-76 and accompanying text.

Professor Varat’s analysis is problematic, however, for a number of reasons. First, Professor Varat himself generally is willing to accept nonresidence as a proxy for noncontribution to public benefits sought by the nonresident without inquiring into the details of the particular nonresident’s tax bill. Varat, *supra* note 21, at 527-30. For reasons already given, this approach is sound, see *supra* notes 185-93 and accompanying text, and it is not apparent why Professor Varat chooses to depart from it in this particular setting. Second, Professor Varat’s proposed distinc-

All subsidies, however, are not created equal. Thus, while subsidies may be generally safe from dormant commerce clause challenge, at least two types of subsidies raise special problems.

1. *Subsidies and Downstream Restraints*

In *W.C.M. Window Co. v. Bernardi*,⁴⁵⁷ Judge Posner wrote: “[I]f . . . the State of Illinois subsidized the electrical generating plants in Illinois that buy coal, it could . . . forbid them to buy coal produced out of state.”⁴⁵⁸ The accuracy of this assertion is not as clear as its categorical rendition suggests. It is one thing directly to subsidize coal-burning utilities or in-state coal producers, but quite another to pay money to in-state electrical plants only if they buy coal exclusively in state. In Judge Posner’s hypothetical case, Illinois in substance is saying: “We will pay you money in return for burning coal, but on the strict condition that you buy coal only from in-state suppliers.” Such a condition resembles the “downstream restraint” deemed invalid by a plurality of the Court in *Wunnicke*: in both cases, the recipient of the government benefit is required to deal only with in-state private parties as a price for getting a government benefit.⁴⁵⁹

The key policy consideration casting doubt on downstream restraints also applies in this context: if the state may condition any tangible benefit it grants to residents in any way it likes, the risk of widespread and proliferating discrimination in otherwise private transactions is increased enormously. It seems to follow that downstream restraints attached to subsidies should be scrutinized with no less vigor than downstream restraints attached to state purchases and sales. Indeed, since formal considerations suggest that discriminatory subsidies

tion invites confusion and difficulties of administration. For example, it is not clear whether Professor Varat would apply his parallel-subsidy rule narrowly to only those cases in which the nonresident and resident businesses are “equally taxed,” Varat, *supra* note 21, at 542, more broadly to cover all cases in which the nonresident has paid some tax, *see id.* at 542, or adopt some intermediate position based on “the comparative tax obligations of resident and nonresident taxpayers,” *id.* at 541. Each of these alternatives, however, seems either unduly wooden or practicably complex. Third, as explained below, there are sound reasons to reject Professor Varat’s equation of denying subsidies to taxpaying nonresidents with granting tax breaks to taxpaying residents. Simply stated, there exist important formal and functional differences between tax breaks and subsidies, and this is so whether or not the nonresident can show that she has paid taxes to the state. *See infra* notes 478-85 and accompanying text. Finally, requiring that monetary subsidies be extended to taxpaying nonresidents raises significant problems under existing case law. The Court, after all, did not ask in *Alexandria Scrap* or *Reeves* whether the out-of-state scrap processor or ready-mix plant had paid any state taxes.

457. 730 F.2d 486 (7th Cir. 1984).

458. 730 F.2d at 494.

459. *See supra* notes 55-59, 404-06, and accompanying text (discussing *Wunnicke* and downstream restraints).

are more questionable than discriminatory purchases and sales,⁴⁶⁰ perhaps downstream restraints attached to subsidies should receive *more* careful scrutiny.

Professor Varat's work casts doubt on this analysis by suggesting that *Alexandria Scrap* validated monetary subsidies conditioned on dealing with resident businesses.⁴⁶¹ *Alexandria Scrap*, however, did no such thing. Although Maryland's differentiated documentation rules had the effect of causing unlicensed suppliers to favor Maryland scrap processors, Maryland's subsidy payments went solely to scrap processors, and those payments were *not* conditioned on processors' dealing with Maryland, rather than non-Maryland, hulk suppliers.⁴⁶²

It is true that the program challenged in *Alexandria Scrap* involved a form of downstream restriction because it afforded subsidy payments only to processors that destroyed Maryland-titled cars. This aspect of *Alexandria Scrap* suggests that *some forms* of downstream restraints attached to subsidies are constitutionally permissible.⁴⁶³ It would be difficult to distinguish from *Alexandria Scrap*, for example, a case challenging per-ton payments made to landfill operators for burying trash generated in Maryland, but not elsewhere.⁴⁶⁴ Approval of that subsidy, however, hardly requires approval of the coal-restrictive utility subsidy described by Judge Posner. The reason why has already been suggested: Maryland's noncommercial *aesthetic* goals in destroying automotive eyesores reduced commerce clause concern about its "in-state hulk" requirement.⁴⁶⁵ This rationale might well cover ordinary, as well as vehicular, junk. It can supply no justification, however, for a conditional subsidy designed to enhance the competitive position of in-state coal producers or their workers.

There is another important reason why Judge Posner's hypotheti-

460. See *supra* notes 447-48 and accompanying text.

461. See Varat, *supra* note 21, at 562.

462. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 n.22 (1976) (suggesting that only licensed suppliers — as to which no challenge was raised — had to be from Maryland); 426 U.S. at 803 (noting concession that prior to change of documentation requirement, program was constitutional, thus revealing absence of any attack on requirement to use unlicensed Maryland processors even if such a requirement existed).

463. See *supra* notes 427-29 and accompanying text.

464. See *Rutgers Note, supra* note 79, at 757 (suggesting that *Alexandria Scrap* would permit a state to pay subsidies to private landfills "for each ton of solid waste originating within the state which is deposited at one of [its] landfills"). Notably, although such a subsidy resembles the Maryland subsidy attacked in *Alexandria Scrap*, the two subsidies may be distinguishable. This would be especially true if the central purpose of the trash-disposal subsidy were to advantage resident trash-producing businesses, see *supra* notes 427-29 and accompanying text, or if the subsidized landfills had such limited capacity they could not as a practical matter simultaneously serve nonresidents, see *infra* note 466 and accompanying text.

465. See *supra* note 429 and accompanying text.

cal utility subsidy is not properly analogized to either the Maryland-hulk subsidy or the posited in-state trash-disposal subsidy. These latter subsidies encourage the handling of in-state materials, but do not preclude the subsidy recipient from simultaneously handling like materials from other states.⁴⁶⁶ These “non-exclusive” per-unit subsidies thus are far less sweeping in their discriminatory effect (and less unlike typical state “purchasing”) than subsidies subject to such “blunderbuss” conditions as one flatly prohibiting a utility’s use of *any* out-of-state coal. For reasons already developed,⁴⁶⁷ such a rigid and restrictive “downstream restraint” on subsidy payments should receive the most exacting scrutiny.

2. *Tariff-like Subsidies*

In many respects, subsidies resemble tariffs. Indeed, the key effect on interstate commerce of subsidies and tariffs are the same: both forms of state intervention steer business to local producers at the expense of more efficient out-of-state competitors.⁴⁶⁸ Even so, tariffs are unconstitutional, while in-state subsidies generally are not. This result rests on the core purposes underlying the market-participant rule: subsidies reflect a state citizenry’s entitlement to enjoy and experiment with its own resources and carry a reduced risk to interstate harmony.⁴⁶⁹ These policies, however, apply with reduced force when a subsidy alters the market to favor local producers at minimal cost to the state. As Professor Regan has observed:

A carefully calibrated subsidy that was passed on to consumers in a relatively competitive market could achieve a substantial redirection of business to local producers at very little cost. The state might get so much market distortion for its subsidy dollar that the expense of providing this benefit to locals would not be an effective constraint. In principle, I think such direct subsidies should probably be forbidden.⁴⁷⁰

Stated another way, some subsidies “act” just like tariffs.⁴⁷¹

Should the Court recognize a rule invalidating such subsidies? Probably it should not. First, for at least formal reasons, subsidies are

466. See *Rutgers Note, supra* note 79, at 757-58 (arguing that a state could not “enact a subsidy conditioned upon a private operator’s agreement to take only garbage originating in New Jersey”; such a program would “go beyond . . . *Alexandria Scrap*” because “[i]n *Alexandria Scrap*, the state’s offer to subsidize scrap processors for each Maryland-registered hulk they took was not conditioned on a requirement that they were to take only cars registered in Maryland”).

467. See *supra* notes 396-410, 443, and accompanying text.

468. See *supra* note 133 and accompanying text.

469. See *supra* notes 251-64 and accompanying text.

470. Regan, *supra* note 7, at 1196.

471. See Varat, *supra* note 21, at 544 (“The result of an effective local subsidy program will be the same as that of a tax or minimum pricing scheme . . .”).

always different from tariffs.⁴⁷² Second, subsidies differ from tariffs for an important functional reason as well: even low-cost subsidies present visible preferences of one in-state constituency over another; thus, they are more likely than tariffs to engender resistance in the local legislative process.⁴⁷³ Finally, there will be great difficulties both in creating and in sorting out the type of “carefully calibrated” subsidies Professor Regan identifies.⁴⁷⁴ Lack of necessity and problems of judicial manageability thus converge to favor restraint in invalidating “tariff-like” subsidy programs.⁴⁷⁵ On balance, these considerations suggest that, in at least all but the rarest case, state subsidies unadorned by downstream restraints should survive dormant commerce clause attack.

G. Tax Breaks

Recognition that discriminatory commercial subsidies normally survive commerce clause scrutiny raises a related problem: What about tax breaks for in-state producers? Consider *Bacchus Imports v. Dias*.⁴⁷⁶ That case concerned a Hawaii law exempting local wine and brandy producers from Hawaii’s liquor tax.⁴⁷⁷ The economic effect of the tax exemption, which was clearly designed to support these local producers, surely paralleled the effect of a direct cash subsidy. The tax exemption, no less than a subsidy, provided the producer with a calculable state-awarded monetary benefit permitting the producer to cut prices and undersell more efficient out-of-state competitors.⁴⁷⁸ Nonetheless, the Court struck down the tax exemption in *Bacchus Imports*.⁴⁷⁹ Thereafter, in *Limbach*, the Court specifically held that such

472. See *supra* notes 251-64 and accompanying text.

473. See *supra* notes 453-54 and accompanying text.

474. Cf. Gergen, *supra* note 15, at 1137 (“formulating a simple rule that can distinguish wealth-creating subsidies from those that are inefficient is virtually impossible”).

475. Professor Regan seems to agree, at least with respect to the difficulty of *framing* such subsidies. See Regan, *supra* note 7, at 1196 (“the informational demands for designing the dangerously cost-effective subsidy are just too great”).

476. 468 U.S. 263 (1984).

477. 468 U.S. at 265.

478. See *South Carolina v. Baker*, 108 S. Ct. 1355, 1360 n.5 (1988) (“one could argue that any law exempting state bond interest from the tax applicable to interest on other bonds is, in effect, a subsidy”); *Walz v. Tax Commn.*, 397 U.S. 664, 674 (1970) (noting that “[g]ranteeing tax exemptions . . . necessarily operates to afford an indirect economic benefit”); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 910 (1989) (Scalia, J., dissenting) (stating that the Court in *Walz* “noted that . . . tax exemptions may have the same economic effect as state subsidies”); Recent Case, *supra* note 423, at 1360 n.21 (characterizing tax exemption as a form of subsidy).

479. 468 U.S. at 273. Notably, the particular law at issue in *Bacchus Imports* may have failed even if viewed as a subsidy. This is so because the tax preference afforded by Hawaii applied to “fruit wine manufactured in the state from products grown in the state.” The Hawaii law accordingly not only favored local wineries, it effectively coerced local wineries to buy local fruit.

tax breaks were *not* sheltered from dormant commerce clause challenge by the market-participant rule.⁴⁸⁰ Why should a subsidy, but not a tax break, be permissible? Is the distinction simply one of form rather than substance?⁴⁸¹

The first answer to these questions is that form matters. The commerce clause took focused aim at state tariffs.⁴⁸² The Hawaii tax program resembles a tariff because it operates to impose on all wine and brandy importers a tax burden not borne by local producers. Thus, as a matter of constitutional history and intent, the Hawaii tax-preference law is suspect in a way a discriminatory subsidy is not. To be sure, the tax break at issue in *Bacchus Imports* was not identical to a tariff. In particular, it gave local fruit wineries a tax break vis-à-vis both in-state and out-of-state producers of competing products. Even so, the operation of the discriminatory tax on out-of-state producers puts it in a different class, as a formal matter, from a traditional subsidy or state "purchase" transaction. As Justice Scalia explained in *Limbach*:

The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the state's regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacture does.⁴⁸³

Other distinctions between subsidies and tax exemptions transcend form. Most importantly, discriminatory tax exemptions may be more politically palatable to state legislators than monetary subsidies and, therefore, more likely to take hold and engender retaliation. This is so because: "A subsidy involves the *direct* transfer of public monies to the subsidized enterprise and uses resources *exacted* from taxpayers as a whole. An exemption, on the other hand, . . . assists the exempted enterprise only passively"⁴⁸⁴ In addition, tax laws, which are

Such a "downstream restraint" is, as already shown, constitutionally questionable even if attached to a subsidy. See *supra* notes 457-67 and accompanying text.

480. *New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1809 (1988); *accord, e.g.*, *Russell Stewart Oil Co. v. State*, 124 Ill. 2d 116, 529 N.E.2d 484 (1988) (invalidating tax exemption for sale of gasohol containing ethanol distilled in Illinois); *Archer Daniels Midland Co. v. State ex rel. Allen*, 315 N.W.2d 597, 599-60 (Minn. 1982).

481. *Cf. Levmore, supra* note 149, at 566 (criticizing the court for treating taxes and subsidies differently "even though they may have the same effects on interstate commerce").

482. *E.g.*, *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

483. 108 S. Ct. at 1810 (emphasis in original).

484. *Walz v. Tax Commn.*, 397 U.S. 664, 690 (1970) (Brennan, J., concurring) (emphasis added); *accord Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 910 (1989) (Scalia, J., dissenting). In addition, tax exemptions might be more attractive because "a direct money subsidy . . . could encompass sustained and detailed administrative relationships." 397 U.S. at 675.

effective until repealed, differ from subsidies as a legislative matter because subsidies require appropriations typically made on an annual basis. It follows that subsidies have a heightened "political visibility" that puts a check on their perpetuation not applicable to tax exemptions.⁴⁸⁵ At a minimum, the annual revisitation of legislated subsidies should assure that the state interest supporting the program remains a keen one.⁴⁸⁶

Finally, this context may be one of those in which "a page of history is worth a volume of logic."⁴⁸⁷ It runs deep in the American marrow that tax laws are susceptible to abuse when they disfavor those with no say in the political process.⁴⁸⁸ Indeed, it was "taxation without representation" that in large measure accounted for the birth of the nation that the commerce clause seeks to hold together. Against this historical and psychological backdrop, even when discriminatory subsidy and tax programs have functionally identical economic effects, discriminatory taxes may in a very real sense present a greater threat than subsidies to the healthy spirit of nationalism envisioned by the commerce clause.

H. *State-Mandated Preferences by Local Governments*

There is a longstanding and widespread brand of state discrimination that raises a substantial market-participant issue. Some state legislatures have passed laws requiring local governments to deal in the

485. *See Spending by Not Taxing*, THE ECONOMIST, Jan. 23, 1988, at 51 (tax breaks are "preferred because they are less obvious than budgeted spending, and so harder for opponents to attack — and for governments to cut"); *Miami Note*, *supra* note 79, at 735 ("there are built in political limits on the use of subsidies" because "bounty-subsidy money comes out of the state budget"; noting that these "countervailing forces . . . do not confront discriminatory regulations or taxes"). *See generally supra* notes 453-54, 473, and accompanying text.

486. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 167, at 276 ("visibility in the political process of an annual direct appropriation may be greater than that of a one-time 'permanent' exemption"); Varat, *supra* note 21, at 549-50 ("state representatives probably will consider the extent to which state residents will benefit from a proposed investment of state funds"). The point made here harkens all the way back to the famous footnote four of the *Carolene Products* case, since it hinges on holding suspect "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938):

487. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

488. *See, e.g.*, J. BLUM, W. MCFEELY, E. MORGAN, A. SCHLESINGER, K. STAMPP & C. WOODWARD, THE NATIONAL EXPERIENCE 90-98 (6th ed. 1985) (detailing colonists' opposition to parliamentary taxes, including those imposed by the Sugar, Stamp, and Townshend Acts; noting in particular that "Parliament, they believed, had some right to legislate for them; but it had no right to tax them" and that "colonists in 1764 and 1765 were remarkably unanimous in adopting this distinction between taxation and legislation"). The special dangers of taxation have long been recognized by the Supreme Court. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819) ("[T]he power to tax involves the power to destroy . . ."); *Levmore*, *supra* note 149, at 592 ("Historically, the Court has treated taxes affecting interstate commerce less deferentially than subsidies . . .").

marketplace only with state workers or firms.⁴⁸⁹ Should these statutes survive dormant commerce clause attack?

The answer is not apparent. On the one hand, local governments are creatures of the state, exercising delegated state power and persevering solely as a result of state authorization;⁴⁹⁰ from this perspective, it should make little difference that the state that chooses a preferential trading policy chooses also to extend that policy to the state's component parts. On the other hand, local governments possess substantial autonomy and distinctiveness from the state;⁴⁹¹ viewed from this angle, the market-participant rule perhaps should not validate these laws because they do not concern a state's trading on its *own* account.

The Seventh Circuit is the only court to have confronted this conundrum.⁴⁹² In an opinion by Judge Posner, that court held that the market-participant rule did *not* insulate such state laws from commerce clause challenge.⁴⁹³ The four-factor market-participant analysis developed in this article suggests that the Seventh Circuit was correct.

Consider first the sow-and-reap rationale. The money raised by a locality is not the money of a state — at least in the same sense as funds in the state's own treasury. Different localities impose different taxes, issue different types and numbers of bonds, and save or spend the resources they gather depending on local preferences. Thus, when *all* the citizens of a state tell *only* the residents of a *particular* locality that they may not distribute resources as they wish, the sow-and-reap rationale does not come fully into play. This is so because the state is not redistributing its own largess.⁴⁹⁴ Instead, one group of citizens is telling a subgroup how *it* must spend *its* money.⁴⁹⁵ This is not to say that states may not exert broad control over local spending decisions. As a rule, they surely may. It is to say, however, that a powerful

489. See Comment, *supra* note 224, at 209 ("Many preference statutes . . . apply to all public contracts entered into by all levels of government.").

490. See, e.g., 56 AM. JUR. 2d *Municipal Corporations, Counties, and Other Political Subdivisions* §§ 23, 28 (1971).

491. See, e.g., *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) (recognizing that cities are subject to liability under 42 U.S.C. § 1983, even though states are not).

492. Notably, this issue also has escaped altogether the notice of commentators addressing the market-participant rule. For example, the most thorough studies of purchasing preferences nowhere suggest that there may be a special argument for invalidating state laws requiring in-state preferences by local political subdivisions. See, e.g., *Iowa Note*, *supra* note 226; Comment, *supra* note 224.

493. *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984).

494. See 730 F.2d at 495 (noting that the municipal project at issue was in no part funded by the state, and suggesting that a different rule would apply to state-funded projects).

495. Cf. 730 F.2d at 496 ("When the project on which the state impresses a home-state preference is undertaken by a unit of local government without any state financial support or supervision, the state is not a participant in the project but a regulator.").

equity for mitigating the general constitutional limitation on state discrimination against interstate commerce diminishes when a governmental unit is not distributing resources fairly attributable to all residents of the state.⁴⁹⁶

Concerns about fostering federalist experimentation and local responsiveness also diminish when a state dictates with whom local governments must deal. The reason is simple: a rule requiring all localities to hire or buy in-state imposes uniformity and cramps the ability of local governments to respond to the local will.⁴⁹⁷

The third prong of market-participant analysis — focusing on the degree of interference with unfettered interstate commerce — also cuts against upholding state-imposed municipal hiring and purchasing preferences. When a state government forces municipalities to deal exclusively with their own residents, it tampers with exchanges other traders wish to make and undermines any possible free-trade justification for the market-participant rule.⁴⁹⁸ More importantly, mandated municipal preferences heighten dramatically the dangers to national-market values posed by the rule. If local governments are left to their own devices, some will and some will not adopt resident-preference rules. State legislatures, however, may pass laws compelling broad municipal resident-preferences in one fell swoop.⁴⁹⁹ The danger that such laws pose to the national common market is especially acute because a state law requiring that localities favor residents extracts no funds from the state treasury. Any built-in “expensiveness” restraint on the proliferation of such programs is therefore minimal, if present at all.⁵⁰⁰

Finally, a state that forces municipalities to make marketplace decisions they otherwise would eschew looks far less like a market participant trading on its own account and much more like a regulator of

496. Cf. Blumoff, *supra* note 15, at 92 (under state-imposed local purchasing preference, “counties [are] not as free as their citizens”).

497. Of course, it may be observed in response that the Constitution envisioned quasi-sovereign status for states, and not for municipalities. Thus, the Constitution anticipated experimentation and responsiveness primarily on the statewide level or at least that a state’s choices properly would trump those of its constituent parts. Accepting these premises, the argument made here may seem dubious, since it would be odd to jettison a duly enacted statewide choice of policy (here, a policy favoring statewide purchasing preferences) on the basis of safeguarding “federalism.” Nonetheless, municipalities in reality are key governmental actors, and the population of many cities today far exceeds that of whole states at the time of the Constitution’s adoption. In this context, the tradition and policy underlying our constitutional plan provide at least some support for favoring flexibility in municipal choice to ensure local responsiveness and meaningful innovation.

498. See *supra* notes 229-33 and accompanying text.

499. See generally *supra* note 489 and accompanying text.

500. See *supra* notes 240-44 and accompanying text.

others' conduct.⁵⁰¹ Formal considerations thus confirm the view that the market-participant rule should not protect state laws mandating municipal preferences for state residents in the market.⁵⁰²

I. PROGRAMS PLACING SPECIAL BURDENS ON LOCAL NONRESIDENTS

A final market-participant problem cuts across each category of cases discussed above. All that precedes quietly assumes that the market-participant rule operates in an all-or-nothing fashion. Either the commerce clause lets the state favor its residents or it does not, and if it does the state may exclude nonresidents without exception. In other words, all nonresidents stand together, for better or worse. This conception of the market-participant rule is sound as a general proposition. Under our Constitution, persons are "citizens . . . of *the* State wherein they reside."⁵⁰³ A person can no more be "partly resident" than she can be "partly pregnant"; rather, it seems that for constitutional purposes we are residents of one — and only one — state.⁵⁰⁴ A rigid resident/nonresident distinction also reflects a central purpose of the market-participant rule. That rule, after all, flows from the propriety of a state's serving those persons it was "created to serve"⁵⁰⁵ — namely, the state's own residents. Finally, an uncomplicated dichotomy between residents and nonresidents provides a steady tool for forging clear and workable constitutional rules.⁵⁰⁶

Notwithstanding these considerations, there may be good reason to stray from a rigid resident/nonresident distinction in particular types of market-participant cases. The most attractive candidates for applying a flexible approach are those cases involving an important, state-monopolized product withheld from a nonresident who has a continu-

501. See generally *supra* notes 245-64 and accompanying text.

502. Constitutional history also suggests an argument for the view that states should have no more ability to force protectionism on municipalities than on private corporations. This is so because, when the Constitution was framed, "municipal corporations were analogized to private corporations," and not viewed as a "legal form exercising government powers delegated by the state." P. LOW & J. JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 804 (1987). See generally Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *STAN L. REV.* 1033, 1100-01 (1983). This argument, however, probably proves too much, since it suggests that municipalities — like private corporations — are not properly subject to the dormant commerce clause *at all*. Under settled Supreme Court authority, however, they unquestionably are. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

503. U.S. CONST. amend. XIV, § 1 (emphasis added).

504. See, e.g., *Zobel v. Williams*, 457 U.S. 55 (1982).

505. *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980).

506. See generally *supra* notes 189-93 and accompanying text.

ing physical presence in the state.⁵⁰⁷ Consider the case of the state-run utility. Can that utility constitutionally cut off the power it supplies to a manufacturing plant situated in the state — say a chair factory — because that plant is owned by a nonresident proprietor, partnership, or corporation? If the state may not, then must it also continue to provide power to another manufacturing plant — say a table factory — located just across the state border?

There is little authority addressing such questions.⁵⁰⁸ In fact, however, there is good reason to say that the “present,” but not the “absent,” nonresident has a constitutional right of access to the power. Formal considerations do not support this conclusion, for in each case the state is selling (or not selling) electricity. The three other considerations properly guiding market-participant analysis, however, do support this distinction.

First, as previously shown, the fact of local *residence* generally provides the sole proper proxy for saying that a person who claims a state benefit is in fairness entitled to it.⁵⁰⁹ Even so, it is apparent that the “present” chair factory operator has a far stronger fairness-based claim than the “absent” table factory operator to reap the benefits of state-made power. This is so because, even though the “present” operator may enjoy some tax and other immunities not shared by full-fledged state residents,⁵¹⁰ she also is subject to in-state taxation in a way the “absent” operator is not. The “present” chair factory operator most likely pays local income tax, local real estate tax, local *ad valorem* tax, and local withholding tax by reason of her physical nexus with the state.⁵¹¹ Moreover, the “present” chair factory owner contributes indirectly to the public fisc, including by employing individual state residents who in turn pay state taxes. In short, the continuing physical presence of the chair factory in the state renders its operator

507. An illustrative case is suggested by the bug-resistant cornseed hypothetical discussed earlier in this article. See *supra* notes 87-89 and accompanying text. What if, in connection with its hypothetical local-distribution program, South Dakota refused to sell its bug-resistant seed to foreign corporations conducting farming operations on South Dakota land? One senses that such a refusal would, at least, be more constitutionally problematic than a refusal to sell seed for use in distant California or South Carolina.

508. See *Fidelity Guar. Mortgage Corp. v. Connecticut Hous. Fin. Auth.*, 532 F. Supp. 81, 85 (D. Conn. 1982) (upholding statute requiring mortgage lenders seeking to use state funds to have three years' experience in state; court emphasizes that law does not discriminate against nonresident corporations with continuing presence in the state); Varat, *supra* note 21, at 550 n.219 (noting that the reference in *Reeves* to state ability to confine benefits of police, firefighting, and electrical service probably concerned a “claim that . . . services be provided beyond the state's borders”).

509. See *supra* notes 185-93 and accompanying text.

510. See *supra* note 185 and accompanying text.

511. See, e.g., *Shaffer v. Carter*, 252 U.S. 37 (1920) (physical presence creates sufficient nexus to justify state taxation of nonresident).

much like local residents, and much unlike the “absent” table factory operator. Physical presence will have caused the nonresident chair factory operator to contribute to the creation of the benefit she now seeks to enjoy.⁵¹²

Second, considerations of federalism also weigh in on the side of favoring the “present,” but not the “absent,” factory operator. It is farfetched to believe that states considering the construction of utilities will be deterred by the prospect of having to supply power to nonresidents physically located in the state. This is especially true of nonresident businesses, which employ local workers and which the state has every interest in supporting.⁵¹³ On the other hand, a state may well balk at developing even much-needed utilities if it must afford full access to homes and businesses located outside the state. Of no less importance, a rule requiring the provision of service beyond the state’s borders would trench on the state’s territorial integrity. In our federal system, states are fixed by geographic boundaries that define in a central way the scope of state sovereignty.⁵¹⁴ Forced enlistment of a state to supply benefits beyond its borders thus represents an intrusion on core notions of state self-definition.

Third and finally, the concerns of national unification underlying the commerce clause operate to distinguish the “present” and “absent” nonresident factory operators. The Framers gave little attention to creating the most efficient market as envisioned by today’s advocates of free trade.⁵¹⁵ They clearly did desire, however, to break down state-made obstructions that impeded easy movement across state borders.⁵¹⁶ This central constitutional principle of interstate mobility suggests a special need to afford vital and monopolized state services

512. See *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973) (noting, in invalidating New York’s restriction on public employment of legal aliens, that a “resident alien . . . must pay taxes” and “may reside lawfully in New York for a long period of time”); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (denying states the power to exclude aliens physically living in a state from state welfare benefits; the Court reasoned: “. . . Aliens like citizens pay taxes [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state.’ . . . There can be no ‘special public interest’ in tax revenues to which aliens have contributed on an equal basis with the residents of the State.”).

513. It is thus not surprising that many in-state preferences in reality require only in-state presence rather than in-state residence. See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 800-01 (1976); *Ex parte Gemmill*, 20 Idaho 732, 736, 119 P. 298, 299 (1911) (upholding law requiring that printing work be done in the state); *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 260, 76 So. 258, 260 (1917) (upholding state printing preference including nonresidents with local plants).

514. Trelease, *supra* note 139, at 361-68.

515. See generally *supra* notes 139, 234, and accompanying text.

516. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 68 (1982) (Brennan, J., concurring) (citing need to protect “the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order”).

to nonresidents when they choose to enter the state to conduct business. Otherwise, such nonresidents cannot as a practical matter exercise their right to enter the state at all.⁵¹⁷ This norm of interstate mobility obviously supports the claim of the chair factory operator, since she in fact chose to expand across the state's border in establishing additional operations. The same norm, however, affords no help to the "absent" table factory operator, for the simple reason that he chose *not* to enter the state.

These considerations show that physical presence may justify commerce clause protection of *some* nonresidents under *some* circumstances notwithstanding the market-participant rule. Not every form of presence, however, will mandate entitlement to every form of state benefit. The continuing physical presence of the nonresident chair factory operator, for example, makes her case far stronger than that of the Wyoming concrete firm in *Reeves*, which briefly sent its trucks into South Dakota for the sole purpose of expropriating South Dakota cement for use in out-of-state operations.⁵¹⁸ Similarly, the vital importance of electricity and the state's natural monopoly over it make the hypothetical chair factory operator's claim to state-made power more compelling than, for example, a claim to tap into a state chair-producer subsidy program. The key point is that in some cases a distinction between "present" nonresidents and "absent" nonresidents will be proper, while in other cases it will not. As in other market-participant cases, the four-factor analysis suggested here should help point the way to an "appropriate accommodation."⁵¹⁹

CONCLUSION

The market-participant rule reflects a conscious choice by the Court to limit the reach of the dormant commerce clause in order to

517. See, e.g., *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) ("promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose"); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870) (reading article IV's privileges and immunities clause as "unmistakably secur[ing] and protect[ing] the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation"); see also *Hicklin v. Orbeck*, 437 U.S. 518, 532 (1978) (citing common origin and "shared vision" of privileges and immunities clause and commerce clause); *Baldwin v. Fish & Game Commn. of Mont.*, 436 U.S. 371, 379-80 (1978) (same). As Professor Varat has put it: "[I]f state-owned public utilities could limit in-state customer service to state residents, then nonresident freedom to . . . live in one state and operate a business in another . . . would be drastically curtailed." Varat, *supra* note 21, at 535; see also Linde, *supra* note 145, at 67 (expressing concern that right "against absolute exclusion . . . will remain hollow" if state can deny important benefits to outsiders).

518. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 433 (1980) (noting that Wyoming buyer did physically send trucks into South Dakota in effort to buy cement).

519. *Wells & Hellerstein*, *supra* note 15, at 1134.

protect important state interests. The rule reflects a mix of justifications: the sensed rightness that citizens comprising political units may dispense their own property as they see fit; the values in a federalist system of facilitating local experimentation and differentiated responses to different local needs; the reduced risk that marketplace preferences pose to the dormant commerce clause's goal of economic nationalism; and formal and institutional considerations counseling judicial restraint in this distinctive setting.

This article has undertaken to show why these forces justify the market-participant doctrine as a general rule. It also has undertaken to show that the Court's existing market-participant decisions are reconcilable and defensible in light of these considerations. Application of the market-participant rule — like application of other constitutional rules — calls for a balancing of competing constitutional values. This article has suggested a proper accommodation of those values by offering a more systematic framework for analyzing market-participant cases and a sampling of the results that approach will produce.

New market-participant issues will continue to crop up. My hope is that the analytical framework proposed here will aid courts in resolving those issues. At the least, that framework should help to illumine the subtlety of the judicial task in untangling the market-participant rule.