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The Foreign Commerce Clause and the Market Participant Exemption

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NOTES

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ABSTRACT

In this Note, the author argues that, despite the strictures of the Foreign Commerce Clause, under an expansive conception of the market participant exemption, states should be able to place restrictions on the export of state-owned or state-nurtured natural resources. In light of the current trade imbalance between Japan and the United States and by way of example, the author discusses Japan's importation of United States natural resources and the competing interests that argue for and against its continuance. Japan's economic growth, appetite for natural resources, and lack of adequate regard for environmental consequences is well documented. Economists and political scientists have posited that the inherent structural imcompatabilities between the United States and Japanese approaches to international trade strongly suggest that Japan's trade surplus with the United States will not decrease. This trade imbalance has created economic and political pressures to export United States natural resources to Japan. At the state level, however, a combination of economic and environmental motives have driven some states to consider legislation that would prohibit the export of natural resources.

The author examines the foreign prong of the Commerce Clause, which prohibits state legislation restricting the export of natural resources. Recent Commerce Clause decisions have indicated that a theoretical basis exists for validating state legislation which restricts the export of state-owned or state-nurtured natural resources. The author discusses Maine v. Taylor, *which signals a growing judicial solicitude for state regulation of interstate commerce that promotes environmental considerations. Applied to the Foreign Commerce Clause,* Maine v. Taylor *and the line of market participant exemption cases suggest that*

states validly could enact environmentally motivated restrictions on the initial distribution of state-owned natural resources. The author argues, in the case of state-owned natural resources, that for reasons of public policy the market participant exemption should be expansively interpreted to include not only state-owned natural resources, but also those natural resources that pervasive state regulation and management facilitate or nurture.

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I. INTRODUCTION

In recent years, Japan has assumed a growing predominance in world trade. Much of Japan's international trade has been aimed at acquiring the natural resources that are not indigenous to, or are becoming prohibitively more scarce in, resource-poor Japan.[1] Unfortunately, Japan's international environmental impact has been the subject of widespread condemnation.[2] The Japanese economy's ravenous appetite for natural resources has deprived much of the Third World of indigenous raw materials and has created long-term environmental damage with little corresponding long-term benefit.[3]

The seemingly perpetual growth of its trade surplus with the United

1. *See* JAPAN (Time-Life Books ed., 1985), 14, 117 (Japan imports oil, iron ore, lead and copper ore, bauxite, wool, cotton, and lumber); *see also* EDWIN O. REISCHAUER, THE JAPANESE TODAY: CHANGE AND CONTINUITY 23-24 (1988); T. MORRIS-SUZUKI ET AL., JAPANESE CAPITALISM SINCE 1945, at 167-69 (T. Morris-Suzuki & T. Seiyama eds., 1989).

2. *See infra* text accompanying notes 19-43.

3. *See infra* notes 42-43 and accompanying text.

States is further evidence of Japan's increasing strength in international trade. Aided by informal, but nonetheless protectionist, trade barriers entrenched in Japanese custom, Japan only sparingly imports finished goods from the United States.[4] As the world supply of raw materials diminishes, Japan increasingly covets the United States relatively abundant natural resources. The chronic trade deficit creates market forces that will increase the pressure on the United States to sell its remaining natural resources. The United States federal government's rigid adherence to a free-trade stance toward Japan, despite Japan's covert, but structurally inherent, protectionism exacerbates the situation.[5] Using the strict scrutiny standard of the foreign branch of the United States Constitution's Commerce Clause, courts universally have invalidated state attempts to protect natural resources, or at least to ensure that their disposition benefits state citizens.[6] The market participant exemption, however, provides a possible loophole whereby states could enact legislation to prevent foreign acquisition of state-owned natural resources. Currently, courts would invalidate this state legislation as protectionist, absent an explicit endorsement by Congress.[7] Nevertheless, the theoretical underpinnings of the Foreign Commerce Clause are sufficiently diverse that contemporary legal interpretation can adjust to environmental necessity.

Following a brief introduction, Section II discusses the economic, political, and environmental background of the Note. Section II-A focuses on Japan's economic success in world trade. Section II-B sets forth the global environmental impact of Japan's trade policies and practices. Section II-C illustrates the United States persistent and chronic trade deficit with Japan. Section II-D examines state efforts to limit the acquisition of state-owned natural resources by foreign entities for environmental and economic reasons. Section III addresses the question whether such state efforts can survive Commerce Clause scrutiny. Section III-A examines the values underlying the Commerce Clause and posits that they are sufficiently diverse as not to absolutely prohibit all state restrictions on foreign acquisition of state-owned natural resources. Section III-B discusses the Commerce Clause as it relates to the regulation of natural resources. Section III-C examines relevant Foreign Commerce Clause

4. Karl G. van Wolferen, *The Japan Problem*, FOREIGN AFFAIRS, Winter 1986/87, at 288, 297.

5. Fujiwara Sadao, *Foreign Trade, Investment and Industrial Imperialism in Postwar Japan, in* MORRIS-SUZUKI ET AL., *supra* note 1, at 196-98.

6. *See infra* text accompanying notes 164-93.

7. *See, e.g.*, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984).

cases. Section IV proposes that the market participant exemption to the Commerce Clause also should apply to the foreign branch of the Commerce Clause. Section V concludes that Commerce Clause jurisprudence could accommodate environmentally motivated state legislation that restricts the international export of state-owned natural resources under the market participation exemption.

II. HISTORICAL BACKGROUND

A. *The Japanese Economy in World Trade*

Japan's post-war ascendancy in international trade is a remarkable economic success story. Japan has become one of the world's leading economic powers, second only to the United States.[8]

Statistics reflect the phenomenal growth of Japan's export economy. Every year since 1964, with only two exceptions, Japan has maintained a trade surplus with the United States.[9] Since 1980, the United States cumulative net deficit in trade with Japan is 460 billion dollars.[10] Japan's economic growth is attributable largely to the exportation of finished goods.[11] Conversely, Japan is reluctant to import finished goods.[12] Japan, however, must import one commodity—natural resources.[13]

Japan is a small, densely-populated island-state, severely lacking in natural resources.[14] Its production-centered economy requires large quantities of natural resources. Evidence of this need lies in Japan's consumption of raw materials purchased from other states.[15] For example,

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8. *See* Alan S. Miller, *Three Reports on Japan and the Global Environment*, ENV'T, July/Aug. 1989, at 25, 25 (reviewing ENVIRONMENTAL AGENCY, GOVERNMENT OF JAPAN, WHITE PAPER ON THE ENVIRONMENT IN JAPAN 1988: JAPAN'S CONTRIBUTION TOWARD THE CONSERVATION OF THE GLOBAL ENVIRONMENT; AD HOC GROUP ON GLOBAL ENVIRONMENTAL PROBLEMS, JAPAN'S ACTIVITIES TO COPE WITH GLOBAL ENVIRONMENTAL PROBLEMS: JAPAN'S CONTRIBUTION TOWARD A BETTER GLOBAL ENVIRONMENT; ENVIRONMENT AGENCY EXPERT PANEL ON GLOBAL WARMING, INTERIM REPORT ON GLOBAL WARMING).

9. Michael W. Punke, Comment, *Structural Impediments to United States-Japanese Trade: The Collision of Culture and Law*, 23 CORNELL INT'L L.J. 55, 56-57 (1990).

10. *State of the U.S. Economy, with Emphasis on the U.S. Trade Deficit with Japan: Hearing of the Senate Banking Committee*, Federal News Service, Jan. 15, 1992, *available in* LEXIS, Legis Library, Allleg File (statement of Sen. Riegle).

11. *See* Sadao, *supra* note 5, at 167, 176-78, 186-88, 193-94.

12. *See* van Wolferen, *supra* note 4, at 297; James Fallows, *Japan: Playing by Different Rules*, THE ATLANTIC, Sept. 1987, at 22, 26, 28.

13. Fallows, *supra* note 12, at 26.

14. *See supra* note 1 and accompanying text.

15. *Id.*; *see also* Miller, *supra* note 8, at 26.

Japan imports more than fifty percent of the world's supply of broad-leaved logs.[16] Additionally, Japan receives more than one-quarter of the world's imports of roundwood and coal.[17] Japan also consumes more than one-third of the worldwide shrimp harvest.[18]

B. *Japan's International Environmental Impact*

Given Japan's economic strength and voracious appetite for the world's natural resources, Japan's international environmental behavior is of paramount importance.[19] Unfortunately, Japan's impact on the world ecology has been perceived largely as negative. According to Edwin Reischauer, the former United States ambassador to Japan: "the Japanese, for all their love of nature, have done as much as any people to defile it."[20] Worldwide, Japan has attained the reputation of being virtual "eco-outlaws."[21] Many environmental organizations believe that Japan's economic expansion is responsible, in large part, for the worldwide degradation of the marine environment, the destruction of tropical forests, the decrease in biological diversity, and the squandering of stocks of natural resources.[22] For example, despite international efforts to curb the ivory trade, the precipitous decline in the world's elephant population has been partially attributed to Japan's demand for ivory *hankos*, or name seals.[23] Japan also has resisted international efforts to prevent the extinction of endangered species.[24] Additionally, Japan refused to adopt

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16. Miller, *supra* note 8, at 26.
17. *Id.*
18. *Id.*
19. *See id.* at 25.
20. *Id.* (citation omitted).
21. *See* Sharon Begley et al., *The World's Eco-Outlaw?*, NEWSWEEK, May 1, 1989, at 68; *see also* Miller, *supra* note 8, at 25.
22. *See* Miller, *supra* note 8, at 25; *see also* Begley, *supra* note 21, at 68; Neil Gross, *Charging Japan with Crimes Against the Earth*, BUS. WK., Oct. 9, 1989, at 108. *But see* Jim Impoco, *Japan's Late Greening*, U.S. NEWS & WORLD REP., Mar. 16, 1992, at 61 (describing Japan's recent change in attitude toward environmental issues).
23. Bill Dietrich, *Our Troubled Earth—Japan*, SEATTLE TIMES, Nov. 13, 1990, at F2. In Asia, approximately two-thirds of imported ivory tusks are made into name seals. *Id.* at F5. Name seals are "ivory stamps used to endorse checks or access bank accounts. The name seals have legal recognition in Japan, China and Korea that written signatures lack." *Id.; see also* Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 3 (1990).
24. Japan ratified the Convention on the International Trade Endangered Species of Wild Fauna and Flora (CITES) in 1980. *See Japan Jeopardizing Int'l Wildlife Treaty, Says LaPointe*, Japan Economic Newswire, Apr. 26, 1988, *available in* LEXIS, Nexis Library, Omni File. Initially, Japan requested reservations to 36 species. *Id.* As of 1989,

laws regulating domestic trade in international endangered species until 1987.[25] Despite international recognition of the necessity to curb whaling to preserve the remaining whale populations, Japan is one of only two states that continues to conduct large-scale whaling operations.[26] Moreover, Japan is one of the most vociferous and outspoken defenders of whaling.[27]

Japan's effect upon the world's tropical rain forests has been particularly disastrous. More than forty percent of Japan's wood imports origi-

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Japan had reduced this number to 12 reservations. *See* Begley, *supra* note 21, at 68. "Reservations allow a signatory to the convention to disregard the endangered status accepted by other governments." Miller, *supra* note 8, at 26. Thus, Japan continues to trade in endangered species of whales, lizards, and musk deer.

Japan has been criticized frequently as "one of the world's leading illicit traffickers in endangered wildlife." *See* Impoco, *supra* note 22, at 61; *see also* Rudy Abramson, *Wild Debate Expected on Rare Animals*, L.A. TIMES, Feb. 25, 1992, at 5 ("Japan's past whaling policies, drift-net fishing and massive imports of endangered sea turtles have made it an object of environmentalists' scorn."). According to Traffic, a group that monitors international trade in endangered species, in 1990 Japan had more reservations to CITES for commercial purposes than any other state. *See* Jonathan Thatcher, *Asia's Endangered Species Head for Cage, Table or Fashion*, Reuter Library Report, Apr. 19, 1990, *available in* LEXIS, Nexis Library, Omni File. More recently, however, this trafficking is shifting from Japan toward other states in Asia, including Taiwan, South Korea, China, and Thailand. *See* Colin Nickerson, *The Asian Nightmare: A Hotbed for Illegal Trade in Endangered Species*, GAZETTE (Montreal), Mar. 21, 1992, at L6.

25. Miller, *supra* note 8, at 26.

26. Virginia A. Curry, Comment, Japan Whaling Association v. American Cetacean Society: *The Great Whales Become Casualties of the Trade Wars*, 4 PACE ENVTL. L. REV. 277, 279 (1986). A moratorium on commercial whaling went into effect in 1985. The moratorium was passed by the International Whaling Committee (IWC), set up in 1946 by whaling nations to manage whaling. The IWC currently allows Japan to kill 330 minke whales a year for scientific purposes. *See* Makiko Shinohara, *Scientists Clash Over Whaling*, CHRISTIAN SCI. MONITOR, Feb. 27, 1992, at 10. Japan asserts that "it has stopped commercial hunts and conducts only scientific whaling." Begley, *supra* note 21, at 68. Some scientists and environmental organizations, however, have questioned whether scientific research is being conducted during these Japanese whaling expeditions. *See* Shinohara, *supra*, at 10; *see also Greenpeace Condemns Japanese 'Scientific Charade' on Whales*, Agence France Presse, Feb. 9, 1992, *available in* LEXIS, Nexis Library, Omni File. *See generally* Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 32-48 (describing the formation and development of the IWC and the moratorium on whaling), 54-56 (description of Japan's "scientific research activities" related to whaling). The moratorium on whaling was renewed by the IWS in 1990. *Id.* at 48.

27. *Id.* at 277. "Whaling in Japan is perceived as a matter of national pride and not an ecological issue, even among many environmentalists." Miller, *supra* note 8, at 27. "For the Japanese people, the whale is not only a food source, but also a basis of culture." D'Amato & Chopra, *supra* note 26, at 57 (citation omitted).

nate from those nations that contain the planet's rapidly disappearing tropical rain forests.[28] The World Wildlife Fund (WWF) has released a report severely criticizing Japan for its role in the global destruction of the rain forests.[29] The WWF Report claims that over the past thirty years, Japan's corporations have systematically devastated the tropical forests of Southeast Asia.[30] In Malaysia, for example, tropical forest logging projects have prompted protests against Japanese timber corporations.[31]

In 1989, Japan imported 6.7 billion board feet of unfinished logs.[32] Japan requires a high volume of timber imports to feed an insatiable hunger for wood products.[33] This wood consumption seems to be culturally endemic. Japan often describes itself as a "culture of wood" in which a market exists for any conceivable wooden product.[34] Notably, Japanese chopstick production alone annually consumes the equivalent of ten million two-by-four lumber pieces eight feet in length.[35] Japan consumes large amounts of disposable paper products in the form of elaborate packaging, newspapers, and adult comic books.[36] Consequently, Japan's per capita paper consumption is twice as large as the European average.[37]

Japan's negative ecological impact merely reflects the primacy of eco-

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28. Miller, *supra* note 8, at 26.

29. *See* David Swinbanks, *Japan No Help to Rain Forests*, 338 NATURE 606, 606 (1989).

30. *See id.* Attributing this destruction to "a combination of Japan's trade and foreign aid policy, a booming economy and wasteful consumption of wood," the WWF Report recommends that Japan establish binding environmental impact assessments, set up a committee to guide Japan's rain forest conservation efforts, and reduce its excessive consumption of tropical timber. *Id.* As of March 1992, Japan still has not required environmental impact statements. *See* Gross, *supra* note 22, at 108.

31. Miller, *supra* note 8, at 27. In the Malaysian state of Sarawak, "more than 100 members of the Penan Tribe have been arrested in protests against the logging." Gross, *supra* note 22, at 109.

32. *See* Terry McDermott, *At Loggerheads: The "Marriage" of Japan and the Northwest Pits Environmental Issues Against Tough Economics*, SEATTLE TIMES, Aug. 19, 1990, at J1 (Magazine).

33. *See id* at J5 ("if a wooden product exists there is a market for it in Japan"); *see also* Dietrich, *supra* note 23, at F3 (describing how Japanese imports of wood have increased approximately 30% from 1965, while Japanese production of domestic wood has decreased almost 50% during the same period, in part because it is cheaper to buy wood from the Pacific Northwest and import it).

34. McDermott, *supra* note 32, at J5; *see also* Dietrich, *supra* note 23, at F3.

35. Dietrich, *supra* note 23, at F3.

36. *Id.*

37. *Id.*

nomic development over long-term environmental health in the Japanese government's hierarchy of values.[38] The Japanese Environmental Agency is weak compared to the Ministry of International Trade and Industry (MITI) and other government agencies.[39] The MITI and the Ministry of Agriculture, Forestry and Fisheries largely control Japan's Overseas Development Assistance Program.[40] Japan's foreign aid policy is instrumental in advancing its economic interests, regardless of the environmental consequences.[41] Typically, Japan grants foreign aid in order to fund infrastructure development in Third World nations that benefits Japanese corporations by facilitating resource extraction.[42] These

38. *See generally* Miller, *supra* note 8, at 26 (describing as "unusual" a Japanese government report which expresses concern regarding the adverse effect of economic growth on the global ecosystem, because "economic growth is virtually a Japanese religion"); Swinbanks, *supra* note 29, at 606 (noting that Japan's Overseas Development Assistance Program has funded environmentally destructive projects). In Japan, private environmental organizations have only a slight influence upon public policy. Their access to information and the judiciary is severely limited. Miller, *supra* note 8, at 28.

Environmental awareness among the Japanese people is extraordinarily low. Japan was ranked lowest in overall environmental concern and awareness in a 1989 survey conducted by the United Nations Environment Program. *See* Impoco, *supra* note 22, at 61; Jonathan Porritt, *Open Space: No Campaigning For the Environment Please—We're Japanese*, DAILY TELEGRAPH, Oct. 26, 1991, at 103. This is reflected in the low membership levels in Japanese environmental organizations. For example, it has been estimated that the total number of people involved in environmental organizations in Japan is 250,000 maximum, whereas the total number in the United Kingdom is 4 million. *Id.* at 103. Greenpeace Japan, Friends of the Earth, and World Wild Fund for Nature all encounter difficulty in Japan due to apathy, lack of money, and low membership. *See* Veldin Kattoula, *Apathy, Ignorance Frustrates Activists*, NIKKEI WKLY., Oct. 12, 1991, at 19. Some have attributed low involvement to "the social stigma attached to membership of such environmental groups," resulting in alienation or even harming employment prospects. *Id.*; *see also* Porritt, *supra*, at 103 ("Japanese environmentalists are still considered by the establishment to be 'subversive forces.' ").

39. Miller, *supra* note 8, at 28. "The Environment Agency has little power to enforce the few environmental laws that exist and in essence is no more than an unsuccessful mediator between environmentalists and the powerful larger ministries," according to one environmentalist. Kattoula, *supra* note 38, at 19.

40. Swinbanks, *supra* note 29, at 606. Japan's overseas development assistance budget is the world's largest at 11,000 million dollars. *Id.* at 26.

41. *See* Miller, *supra* note 8, at 26. Japan reportedly intends to disburse $50 billion in grants and loans by 1992. *See* Gross, *supra* note 22, at 108.

42. *See* Miller, *supra* note 8, at 26 (describing Japan's approach to financial aid as "commercially oriented," and citing a report which notes that "much of Japan's aid goes to infrastructure projects such as power plants and mines, which have major environmental impacts"). Critics are concerned about Japan's "potential to wreak havoc with the ecologies of recipient countries," because Japan's aid projects focus on short-term gains, and fail to consider the impact on the environment. *See* Gross, *supra* note 22, at 108.

projects have impacted negatively on the ecology of such nations.[43]

C. *The Chronic United States Trade Deficit*

While Japan's economic star has waxed, the United States economic star has waned. The United States trade deficit with Japan stood at 43.44 billion dollars in 1991.[44] The United States global trade deficit ballooned from 31 billion dollars in 1980 to 170 billion in 1987.[45] In 1980, the United States had a 27 billion dollar surplus in the international trade of manufactured goods.[46] By 1987, this surplus dropped to 138 billion dollars.[47] United States efforts to reduce its burgeoning trade deficit have been uniformly unsuccessful. Economists and other observers of United States-Japan relations posit that a trade imbalance between Japan and the United States is inevitable given certain structural aspects of the respective economies and societies.[48]

Japan espouses free trade, but practices protectionism. Imports accounted for only ten percent of Japan's gross national product (GNP) in 1987, and most imports were raw materials, which Japan must import.[49] Japan does not generally employ formal trade tariffs.[50] Instead, Japan implements informal barriers known as nontariff barriers, which are equally restrictive.[51] Despite the complete absence of formal trade barriers, a 1987 World Bank study found that the industrialized world's most

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Funds are often used to "strip natural resources" from the recipient states. Critics also claim that Japanese foreign aid programs "fail to consider environmental impacts and emphasize the short term exploitation of resources rather than the creation of sustainable economic growth." *Id.*

43. *See* Swinbanks, *supra* note 29, at 606 (Japanese development efforts "have destroyed rain forests and damaged the health and economic welfare of local populations in several South-East Asian states). In the Amazon, Japan has been criticized for its willingness to finance a major highway in order to spur resource exploitation in a previously undeveloped area. *See* Miller, *supra* note 8, at 27; Begley, *supra* note 21, at 68.

44. Keith Bradsher, *December Trade Gap Widened*, N.Y. TIMES, Feb. 21, 1992, at D1.

45. Punke, *supra* note 9, at 56.

46. *Id.*

47. *Id.*

48. Fallows, *supra* note 12, at 24.

49. *Id.* at 28.

50. *See* Punke, *supra* note 9, at 57-58. Many cultural nontariff barriers are unaffected by the GATT, which leaves Contracting Parties free to develop nontariff barriers as a response to domestic economic interests. *Id.* at 65.

51. See Fallows, *supra* note 12, at 26 for examples of Japanese barriers to trade; *see also* Punke, *supra* note 9, at 58 (describing nontariff barriers to trade as "the primary impediment to imported goods").

heavily protected market is Japan.[52] The Structural Impediments Initiative revealed "informal structural arrangements that help shield the Japanese market against foreign participation."[53] The deep entrenchment of these informal trade barriers in Japanese cultural patterns[54] may enhance their effectiveness.

United States trade policy with Japan exacerbates this situation. Despite systematic behavior indicating that Japan will not voluntarily market reciprocally,[55] the federal government continues to insist that free trade is always in the best interest of the United States. In his 1990 Economic Report to Congress, President George Bush reiterated his belief in restriction-free foreign investment in the United States.[56] The President's Council of Economic Advisers has expressed the belief that limiting foreign investment "would weaken the [United States] economy."[57] From 1980 to 1988, Japanese investment in the United States increased by 1,036 percent.[58] Despite United States insistence on free trade, throughout the 1980s, Japan "openly restricted imports, subsidized exports, and became the world's richest per capita industrial nation."[59]

Recently, a number of economists and analysts, including James Fallows, Karl van Wolferen, and Pat Choate, have examined the nature of the chronic trade disparity between the United States and Japan.[60]

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52. Punke, *supra* note 9, at 57.

53. Karl van Wolferen, *The Japan Problem Revisited*, 69 FOREIGN AFF. 42, 44 (1990).

54. *See* Punke, *supra* note 9, at 55.

55. Fallows, *supra* note 12, at 29 (commenting that "[t]hreats not backed up by action annoy the Japanese, make America look weak and nervous, and leave the bothersome trade patterns unchanged."). *See also* T. Morris-Suzuki and t. Seiyama eds., *supra* note 1, at 172. In the post-war period, Japan did not attempt to liberalize trade until, in 1959, Ambassador MacArthur "pressed strong demands for the liberalization of trade and foreign exchanges, . . ." *Id.* at 172. ". . . the highly vertical nature of Japan's trade structure is a major source of friction." "As far as Japan is concerned, it is unlikely that trade problems could be resolved without some rather fundamental structural changes." *Id.* at 197. "History has demonstrated that Japan will not open its market unless the United States demands that trade barriers be eliminated." *U.S.-Japan Structural Impediments Talks: Hearing of the International Trade Subcommittee of the Senate Finance Committee*, ____ Cong., ____ Sess. ____ (1992) (statement of Senator Max Baucus (D-Mont.)), *available in* LEXIS, Nexis Library, Omni File.

56. John S. McClenahen, *The Buying of America: What's Left?*, INDUSTRY WK., June 4, 1990, at 62, 66.

57. *Id.* at 66.

58. *Id.* at 62-63.

59. PAT CHOATE, AGENTS OF INFLUENCE 24 (1990).

60. *See, e.g.*, Fallows, *supra* note 12, at 22-32; van Wolferen, *supra* note 53, at 42-

These commentators share the belief that, barring the unlikely change in the status quo, the functional imperatives of the two economies will ensure that the economic interaction between Japan and the United States will result in a United States trade deficit and Japanese economic dominance.[61]

Fallows argues that the Japanese and United States economies are grounded in different and contradictory philosophies.[62] The United States economy focuses on the consumer. The goal, therefore, is to produce more of everything at the lowest possible price.[63] Consequently, the United States encourages lower priced imports. In contrast, Japan's economy is concerned primarily with producers and with increasing their market share.[64] Consumers are of secondary importance.[65] Hence, Japan resists the importation of finished products, even when they are less expensive, but, of necessity, encourages importation of raw materials.[66]

Because Japan's primary motivation is "the non-capitalist desire to preserve every Japanese person's place in the Japanese productive system,"[67] Japan promotes exports regardless of market forces that would recommend contrary action.[68] Given Japan's desire to expand the international market share of its producers, it views protectionist cartels and monopolies favorably because "they strengthen Japanese producers against foreign competition."[69] When seeking to expand market share, Japanese economic interests may refuse to act primarily on consideration of price,[70] contrary to what United States corporations do. Even when the yen increases in value, the Japanese may refuse to import finished goods.[71] United States trade policy toward Japan is based on an ideal-

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55; CHOATE, *supra* note 59, at 3-27.

61. *See* Fallows, *supra* note 12, at 24; van Wolferen, *supra* note 53, at 50; Choate, *supra* note 59, at 3; *infra* notes 66-88 and accompanying text.

62. Fallows, *supra* note 12, at 24, 26.

63. *Id.* at 24.

64. *Id.* at 26, 28.

65. *See id.* at 24.

66. *See id.* at 26. "Japan, of all the great industrial nations, is buying far less manufactured goods than any other, . . ." *U.S.-Japan Structural Impediments Talks: Hearing of the International Trade Subcommittee of the Senate Finance Committee*, ___ Cong., ___ Sess. ___ (1992) (statement of Senate William V. Roth, Jr. (R-De)), *available in* LEXIS, Nexis Library, Omni File.

67. *Id.* at 24.

68. *See id.* at 26. The Japanese public subsidizes exports by paying the "world's highest prices for consumer goods." van Wolferen, *supra* note 53, at 45.

69. Fallows, *supra* note 12, at 26.

70. *Id.*

71. *See id.* at 28 ("[i]f the yen rises high enough, Japan will finally be priced out of

ized free trade model in which the participants always act on price and the market provides equilibrium.[72] In Japan, by contrast, the market is viewed as an "instrument[] to influence desired outcomes", but the market is "not allowed to determine the course of economic processes."[73]

Like Fallows, van Wolferen notes Japan's unwillingness to allow market forces to dictate its economic fortunes.[74] Unlike the United States, Japanese society binds government bureaucracies and personal networks together in noncompetitive relationships to promote the national economy.[75] The economic and political integration of Japanese society is a component of Japan's economic success relative to that of the United States.[76] Mr. van Wolferen argues, therefore, that the trade deficit will continue to exist even if United States competitiveness improves.[77] Japanese economic actors hold an inherently advantageous position because of their political protection that renders them immune to bankruptcy.[78] "[T]he international free trade system is undermined by the very methods Japanese business interests use to help preserve the advantages of their controlled domestic economy."[79]

The political economist Pat Choate maintains that the nature of Japanese investment presents a threat to United States economic and political independence.[80] The Japanese consciously seek to intertwine their economy with that of the United States to render the two nations' economic interests indistinguishable, and to limit the independence of United States economic action. Choate has noted:

> Japan now wields so much political power in [the United States] that it can, in effect, veto much legislation that it dislikes. It can ignore almost any U.S. law or policy that it finds inconvenient. . . .
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> Today, Japan plays a major role in shaping American public policy on

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its export surplus. But if it were a society of economic men, it would have begun buying its way out of the surplus long before now.").

72. Fallows, *supra* note 12, at 23-24.

73. van Wolferen, *supra* note 53, at 47.

74. *See id.* at 47.

75. *See id.* at 46-49.

76. *See id.* at 48.

77. *See id.* at 50.

78. *See id.* at 49-50.

79. *Id.* at 46.

80. *See* CHOATE, *supra* note 59, at xv. "By knowing about [political] decisions ahead of its U.S. competitors, by using its network of well-connected insiders and lobbyists in Washington, D.C., by unleashing its grass-roots political network, by shaping the coverage of economic issues by journalists, and by mobilizing its opinion leaders in universities and think tanks, the Japanese are able to use their purchased political influence in America as a critical element of their corporate and national strategies." *Id.* at xi.

> everything from tariff rates to federal support for . . . critical technologies.[81]

According to Choate, Japan spends 400 million dollars annually to influence United States policies.[82] Much of this influence is exerted through former United States officials who, upon their departure from federal government positions, became highly paid lobbyists for Japanese interests.[83] Choate also believes that Japan consciously finances the growing United States deficit in order to gain leverage over United States policy.[84]

Choate argues that the Japanese manipulate their economic power in a given area of trade through "government-sanctioned cartels" to gain political power and further their overarching national trade goals.[85] Typically, the Japanese will dominate a specific technology to gain control of that market.[86] They then pursue a strategy of coordinated "predatory pricing" to effectively create a cartel of their activities.[87] The cartel then exerts its market power attempting to "to take over other industries and to exert ever-greater political control."[88]

D. *Individual State Efforts to Protect Natural Resources*

In recent years, the United States relative abundance of natural resources increasingly has attracted Japanese attention.[89] This trend is not solely the result of the growing global scarcity of raw materials; it is a market driven phenomenon as well. That is to say, in the acquisition of natural resources the Japanese do act on price.[90] Natural resources con-

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81. *Id.* at xx.

82. *Id.* at 39.

83. *Id.* at 38-39, 69, 71-72. The Japanese refer to this sort of money-tainted politics as "structural corruption." In other words, so many advocates of Japan's position are involved in decision-making that the ultimate outcome is structurally bound to be in Japan's favor. *Id.* at xx.

84. *Id.* at 22-23. Choate also argues that the federal government has elevated the importance of the United States-Japanese relationship to such a degree that it seemingly has taken precedence over United States self-interest. *See id.* at 43.

85. *Id.* at 13. For an example of the impact of a Japanese cartel on the United States television industry, see generally *id.* at 77-105.

86. *See* McClenahen, *supra* note 56, at 63.

87. *Id. See also* James D. Harman, Jr., *Rico Meets* Keiretsu: *A Response to Predatory Transfer Pricing,* 25 VAND. J. TRAN'L L. 3 (1992).

88. *Id.*

89. *See* Sadao, *supra* note 5, at 191; McDermott, *supra* note 32, at J1 (noting that "in wood products, [Japan's] trade deficit is as lopsided as are its surpluses in . . . consumer electronics").

90. *See, e.g.*, Dietrich, *supra* note 23, at F2 (noting that Japan imports two-thirds of

stitute a large portion of Japanese imports.[91] In response to the growing United States merchandise trade deficit with Japan, the Reagan Administration devalued the dollar in 1985.[92] Overall, the effect on trade of the dollar's decline was negligible. Japanese producers refused to pass along increased costs to United States consumers.[93] And Japanese consumers expressed little interest in United States products regardless of the price.[94] The devaluation of the dollar, however, did have one unexpected effect. For Japanese buyers, the cost of United States timber decreased dramatically, which allowed the Japanese to begin buying even more timber from the United States Northwest.[95]

In response to increasing importation of the United States diminishing supplies of natural resources, some states within the United States have enacted or considered various forms of quasi-protectionist legislation.[96] Since the federal government dogmatically maintains a free trade stance toward international trade, state action is a possible alternative vehicle for such legislation. For example, under the past six Presidents, official United States policy has encouraged timber sales and wood use.[97] Environmental organizations have expressed the fear that, in foreign trade negotiations, the federal government will sacrifice the states' inherent police power to protect the environment within their borders.[98] State laws restricting the export of natural resources are permissible under GATT if enacted to protect the environment.[99] Other motivations, such as the preservation of jobs, would be impermissible.[100]

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its wood supply, in part because it is more economically efficient than using Japanese wood).

91. *See* Sadao, *supra* note 5, at 188; Fallows, *supra* note 12, at 28.

92. McDermott, *supra* note 32, at J4.

93. *Id.*

94. *Id.*

95. *See id.* at J5. The net effect of this devaluation strategy was to double the price of timber. *Id.* The Reagan Administration drove down the value of the dollar by selling dollars and buying yen on international exchanges. In theory, devaluing the dollar should prompt the Japanese to buy more United States goods. Devaluing the dollar makes each dollar worth less yen. Therefore, Japanese products should become more expensive and United States products become less expensive. *Id.* at J4.

96. For example, in late 1991, an organization known as Forests Forever Inc. proposed a ballot initiative for November 1992 to restrict exports of California logs. Virginia Ellis, *New Tree Protection Initiative Planned,* L.A. TIMES, Oct. 20, 1991, at A22.

97. McDermott, *supra* note 32, at J1, J4.

98. *See* Bruce Stokes, *State Rules and World Business*, 22 NAT'L J. 2630, 2630 (1990).

99. *Id.*

100. *Id.*

Timber is not the only natural resource of the United States subject to foreign consumption, and Japan is not the only foreign consumer. In early 1990, Maine banned the sale of nonbiodegradable plastic beverage containers to conserve decreasing landfill space.[101] The European producers of these containers protested.[102] The European Community, representing the container producers, charged Maine with implementing nontariff, protectionist measures.[103] As the United States becomes further integrated in the global community, these clashes between individual states within the United States and foreign interests will increase.

These protectionist-type statutes are grounded primarily in two motives. First, environmental concerns exist regarding the lasting ecological damage caused by the market-driven extraction or processing of natural resources.[104] California's failed Big Green 1989 ballot measure exemplified legislation primarily inspired by environmental concerns.[105] A number of Big Green's provisions would have clashed with foreign interests. For example, the proposed California exposure standards for certain toxic substances were stricter than international standards.[106] The "Forests Forever" ballot measure, which failed in the same election as the "Big Green" ballot measure, would have restricted the export of California logs.[107] Although Big Green failed, it underscored the United States growing environmental awareness and presaged future similar initiatives.

The economic concern that local governments and residents will not reap adequate benefits in exchange for the long-term depletion of their resources is the other motivating factor behind these protectionist stat-

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101. *Id. See* ME. REV. STAT. ANN. tit. 32, § 1868 (West Supp. 1991).

102. Stokes, *supra* note 98, at 2630 (referring specifically to "European firms that sell vaccum-sealed beverages and license the packaging technology").

103. *Id.*

104. *See, e.g.*, Ellis, *supra* note 96, at A22; *see also* McDermott, *supra* note 32, at J1.

105. *See A Primer on the Propositions,* L.A. TIMES, Nov. 4, 1990, at M4 (briefly describing Proposition 128, also known as "Big Green"); Stokes, *supra* note 98, at 2630. Big Green was eventually defeated by a margin of 63% to 37%, following an intense media campaign by oil and chemical companies. *See State and Local Ballot Questions,* Facts on File World News Digest, Nov. 9, 1990, *available in* LEXIS, Nexis Library, Omni File.

106. Stokes, *supra* note 98, at 2630.

107. A *Primer on the Propositions, supra* note 105, at M4 (briefly describing Proposition 130, also known as "Forests Forever"). Although Proposition 130 was defeated in 1990, the Forests Forever alliance is preparing a new initiative entitled "The River, Oak and Wildlife Protection Act," to ban timber clear-cutting and preserve wildlife along waterways. *See* Chris Chrystal, *Forests Forever Proposes New Timber Initiative,* UPI, Jan. 8, 1992, *available in* LEXIS, Nexis Library, Omni File.

utes.[108] The social customs underlying the Japanese economy ensure that Japanese raw material importers will patronize Japanese processors, regardless of price, over those processors located in the state where the raw materials were extracted.[109] When Japan imports raw natural resources, therefore, the local economies from which the natural resources are taken lose corresponding profits and jobs in the applicable processing industry.

Much of the debate over protectionist state legislation has focused specifically on the export of logs from the Pacific Northwest. While Japan imports a wide array of natural resources, the quantity of its log importation is particularly astonishing. For example, Japan imported 6.7 billion board feet of logs in 1989.[110] Most of this timber came from the United States, with most of the unworked logs coming from the state of Washington.[111] The majority of Japanese timber imports currently originates in the Pacific Northwest.[112] Demand for wood leads Japan to import logs from all over the world.[113] In one Japanese port that handles only logs, one United States reporter observed Douglas fir from Washington, Sitka Spruce from Alaska, Western Hemlock from the Olympic Peninsula, Port Orford Cedar from Oregon, Kapok from Papua New Guinea, Plantation Pine from Chile and New Zealand, Larch from Siberia, and Mahogany from Burma and Malaysian Lauan.[114] Of all the world's forests, however, Japan prefers old-growth timber from the Pacific Northwest because it so closely resembles native Japanese wood and because it is relatively free from imperfections.[115] Ironically, logs from the Pacific Northwest are so underpriced that it is less expensive for the Japanese to import them than to harvest their own trees.[116]

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108. *See* McDermott, *supra* note 32, at J6 for an example of Washington state mill owners who complain that the Japanese will not buy finished timber from Washington mills.

109. *See, e.g.,* McDermott, *supra* note 32, at J6, J7 (noting that Japan purchases logs, but not the same volume of lumber, in order to preserve Japanese lumber mills—"extraordinary measures to protect a relative handful of jobs").

110. *Id.* at J1.

111. *Id.* at J7; Dietrich, *supra* note 23, at F3.

112. *See* McDermott, *supra* note 32, at J1, J4, J7; Dietrich, *supra* note 23, at F3.

113. *See* Dietrich, *supra* note 23, at F3. Partially because of Japanese wood demands, every state in Southeast Asia, except Malaysia, has restricted log exports. *Id.* Due to United States log export restrictions, Japanese buyers are beginning to look to Chile and Russia "to ensure a continuous supply of raw material for their mills." *Mini-Trade Bill Provision Prompts Reduction in Private Log Exports*, Bureau of National Affairs International Trade Reporter, Dec. 5, 1990, at Vol. 7, No. 48, 1828.

114. McDermott, *supra* note 32, at J1.

115. *Id.* at J5.

116. *See* Dietrich, *supra* note 23, at F3; McDermott, *supra* note 32, at J5-J6. De-

For the foregoing reasons, Japan prefers to import unworked logs for processing in Japanese mills rather than to process the logs in United States mills, a method which would be less expensive and more practical.[117] This policy receives support in the form of unofficial Japanese government policy against the importation of finished logs.[118] The impenetrable social bonds between Japanese timber importers and mill owners reinforces this prohibition.[119] The ultimate goal is the preservation of Japan's 17,000 domestic timber mills and the attendant mill jobs.[120] Motivated partially by the anticipated loss of United States jobs, mill owners in the Pacific Northwest, along with the Department of Commerce in the Pacific Northwest, have accused the Japanese of restricting imports of finished logs.[121]

In this atmosphere, mill owners and environmentalists have forged a tenuous alliance.[122] Environmental groups resist the manipulation of their agendas for economic goals. They do not want to prevent, however, state legislatures from using trade legislation benefiting mill owners in order to achieve environmental ends.[123] This fragile alliance set the stage for the emergence of proposals to ban exports of timber from state-owned forests.[124] Most old-growth forests are located on land owned by

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spite this volume of imported logs, 45% of usable trees felled in Japanese forests are left to rot on the ground hauling them to Japanese mills is more expensive than importing logs from the United States. Dietrich, *supra* note 23, at F3. Japan also is motivated environmentally to preserve their forests. While United States lumber corporations clear-cut vast forest tracts to satisfy the Japanese demand for wood, the Japanese restrict clear-cutting in their own forests to plots of 25 acres or less. *Id.* at F2.

117. *See* McDermott, *supra* note 32, at J6.

118. *See id.*

119. *Id.* at J6-J7.

120. *Id.* at J6. This situation is not the first instance of Japanese refusal to act on price in order to preserve Japanese jobs. The Japanese government has pursued a similar protectionist policy in favor of Japanese rice farmers, despite the enormously lower cost of rice grown in the United States. *Id.*

121. *See id.* at J6.

122. *Id.* at J8.

123. *See* Stokes, *supra* note 98, at 2630 (National Wildlife Federation representative commenting "we also do not want to weaken a state's right to use trade measures for environmental purposes.").

124. *See* McDermott, *supra* note 32, at J8. In June 1989, Oregon voters approved a state constitutional amendment to ban log exports from state lands, by a margin of 90.4%. The amendment, however, would not take effect until it was approved by Congress. Peter Gillins, *Voters Approve Ban on Log Exports by Big Margin*, UPI, June 28, 1989, *available in* LEXIS, Nexis Library, Omni File. Similarly, in April 1989, Idaho passed a law restricting the export of logs from state land. *See* Peter Tormey, *Andrus Signs Log Export Bill*, UPI, Apr. 10, 1989, *available in* LEXIS, Nexis Library, Omni

states or by the federal government. Federal law already prohibits the export of unfinished logs from national forests.[125] The amount of timber affected by these state export ban proposals is staggering. The Washington Department of Natural Resources alone manages 2.1 million acres of forest land.[126] In 1989, approximately seventy percent of the logs harvested from state forests was exported.[127]

Oregon, Montana, Idaho, and California each had log export bans[128] until 1985, when the holding in *South-Central Timber Development, Inc. v. Wunnicke*[129] rendered unenforceable such bans as violative of the Commerce Clause.[130] The call for export bans, however, recently has been renewed.

In 1990, Congress passed the Mini-Trade Bill, which allowed states to prohibit the export of state timber.[131] Nonetheless, the issue of foreign depletion of United States natural resources remains unresolved because the congressional legislation applies only to lumber; it does not address other natural resources such as minerals, fisheries, gas, and oil. State legislation protecting these natural resources may arise in the future if market forces militate for their export. Therefore, the question remains unanswered whether, under the foreign branch of the Commerce Clause, a state can ban the international export of state-owned natural resources.

III. THE COMMERCE CLAUSE

A. *Underlying Values*

The Commerce Clause provides, "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several

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125. *See* Act of Nov. 27, 1979, Pub. L. 96-126, Tit. III, § 301, 93 Stat. 954, 979; Customs and Trade Act of 1990, Pub. L. No. 101-382, tit. IV, § 489, 104 Stat. 629, 715 (1990); *see also* McDermott, *supra* note 32, at J8.

126. McDermott, *supra* note 32, at J2

127. *Id.* at J5

128. Jim Simon, *Gardner, Boyle Take New Stands on Timber*, The Seattle Times, May 1, 1990, at E1.

129. 467 U.S. 82 (1984).

130. *See* 467 U.S. at 100; *see also* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 284-86 (1986) (discussing *South Central Timber*, and concluding "[i]f the local measure . . . attempts to afford residents an economic advantage at the expense of a free-flowing national market, the countervailing national interest will override.").

131. Customs and Trade Act of 1990, Pub. L. No. 101-382, tit. IV, § 491, 104 Stat. 629, 719 (1990); *see also Mini-Trade Bill Provision Prompts Reduction in Private Log Exports*, 7 Int'l Trade Rep. (BNA) 1828 (Dec. 5, 1990).

States, and with the Indian Tribes."[132] This amorphous grant of power has given birth to a sprawling jurisprudence. Given this express grant of power to regulate commerce, Congress possesses authority to enact legislation affecting interstate commerce.[133] This authority includes the power to approve state legislation affecting interstate commerce.[134] When federal and state legislation conflict, the federal law controls.[135] Beyond this power, however, the boundaries of congressional power, and the extent to which state regulation may exist, when Congress is silent, or when there is no "articulated congressional judgment," are not directly inferable from the text of the clause.[136] The inquiry of this Note implicates this so-called dormant commerce clause.[137] The dormant, or negative, Commerce Clause refers to state regulation of interstate commerce in the face of congressional silence.[138] Therefore, the question of how much power to regulate interstate commerce the states retained under the Constitution, and in the absence of controlling congressional legislation, remains unanswered.

Some scholars have argued that the framers' intent in drafting the Commerce Clause was the creation of a common national market.[139] The Supreme Court initially responded by striking down laws that create trade barriers between the states.[140] From this action, scholars have in-

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132. U.S. CONST. art. I, § 8, cl. 3.

133. *See* White v. Mass. Council of Constr. Employers, 460 U.S. 204, 213. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 403 (2d ed. 1988) ("Article 1, section 8, is phrased as an affirmative grant of power to Congress.").

134. NOWAK ET AL., *supra* note 130, at 260.

135. *Id.*

136. *See id.* at 260-261.

137. *Id.* at 261. "When the Court seeks to decide the extent of permissible state regulation in light of a 'dormant' commerce clause power, it is in effect attempting to interpret the meaning of congressional silence when the Court intervenes in an area where the primary power is that of Congress." *Id.*

138. *See id.* at 261 ("the text of the commerce clause provides no overt restraint of state impingement of interstate commerce in the absence of congressional legislation."); *see also* TRIBE, *supra* note 133, at 468-69 (1988).

Under the dormant Commerce Clause, the Supreme Court has extended the plenary power of the clause to situations in which Congress has not yet enacted legislation, but has the power to do so. *See* Stephanie Landry, 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. RESOURCES J. 515, 517 (1985).

139. *See, e.g.*, Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U.L. REV. 43, 45 (1988); *see also* NOWAK, *supra note* 130, at 262.

140. *See* NOWAK ET AL., *supra* note 130, at 262 (discussing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

ferred that free trade is the implicit value driving the Commerce Clause.[141] Some constitutional scholars, however, argue that the values undergirding the Commerce Clause are not so clear. Julian Eule, for example, questions the concept that the Commerce Clause implicitly advocates reliance on the private market as the most efficient means of allocating natural resources.[142] Eule posits that current Commerce Clause jurisprudence unnecessarily incorporates *laissez-faire* economics as a substantive constitutional value.[143] Another constitutional scholar, Dan T. Coenen, also has reinterpreted the economic intent of the framers regarding the Commerce Clause.[144] He argues that the framers, as demonstrated by their adoption of a federalist system, meant to provide for the possibility of "economic experimentation" by the states.[145] The framers anticipated "limited departures from orthodoxy in state choices about distributing state resources."[146]

Commerce Clause jurisprudence reflects the development of constitutional law as a see-saw battle between federal power and state autonomy.[147] Only occasionally do the "currents of constitutional doctrine" run in the states' favor.[148] In contemporary Commerce Clause analysis, the courts employ a balancing test that accords heavier weight to the national interest in unimpeded interstate commerce than the state interest in local autonomy.[149] In the past, however, courts have accorded states more autonomy in the regulation of commerce.[150] Historically, a

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141. RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 603-09 (3d ed. 1986).

142. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429 (1982). Eule argues that "[t]he Framers did not explicitly protect free trade." *Id.* at 429. "Our Constitution . . . did not attempt to solve economic parochialism by an express prohibition against interference with free trade. . . . The commerce clause does not expressly prohibit the states from enacting protectionist economic legislation. It merely gives Congress the power to rectify such excesses by superseding enactments." *Id.* at 430.

143. *Id.* at 435.

144. Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 418-19 (1989).

145. *Id.* at 418.

146. *Id.* at 418-19.

147. *See id.* at 396.

148. *Id.* at 396-97

149. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626-28 (1978). According to Coenen, "the court has propounded two main rules. First, state laws that effect 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity." Coenen, *supra* note 144, at 399 (citing *City of Philadelphia*, 437 U.S. at 624).

150. *See, e.g.* Arlene Warden, Comment, *The Disposition of State-Owned Resources Under the Commerce Clause*, 2 HOUS. L. REV. 533, 534 (1984).

number of distinctions were used to validate state statutes that affected interstate commerce.[151] Courts have approved state statutes characterized as the exercise of state police power rather than as state economic regulation.[152] In *Cooley v. Board of Wardens*,[153] the Court distinguished state statutes affecting national trade that were local in scope from those that affected an interest requiring federal uniformity.[154] *Cooley* also articulated the precept that concurrent state and federal legislation of the same subject is permissible.[155] The Court later developed a distinction based on whether the state at issue had a "direct" or "indirect" effect on interstate commerce distinction.[156] The extent of permissible concurrent state regulation of interstate commerce traditionally within the ambit of federal legislation has also fluctuated. The Court's early "origin-of-power" theory created separate areas exclusively subject to either state or federal regulation.[157] Later, in *Cooley* states became free to regulate "as-

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151. *Id.*

152. *Id.* at 534.

153. 53 U.S. (12 How.) 299 (1851). *See New York v. Miln*, 36 U.S. (11 Pet.) 102, 9 L. Ed. 648 (1837), wherein the Court upheld a New York statute that required every shipmaster arriving in New York from any foreign nation or state of the United States to submit passenger identification information. *Id.* at 130-32. The Court applied a "regulation of commerce/state power" test and found that the statute at issue was a permissible exercise of state police power. *Id.* at 132. To support its potentially broad definition of state police power, the Court cited THE FEDERALIST, No. 45 (Madison): " 'The powers reserved to the several states, will extend to al the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state'." *Id.* at 133. *See also* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 13 L.Ed. 966 (1851), wherein the Court upheld a Pennsylvania law against Commerce Clause attack. The law required ships entering or leaving Philadelphia to engage a local pilot. *Id.* at 321. The Court applied a distinction between subjects of commerce which required a nationally uniform rule and subjects of commerce for which differential treatment is necessary to fulfill the needs of individual states. *Id.* at 319. Despite existent congressional legislation by which "the power to regulate pilots was conferred on Congress by the Constitution," and recognition that "the regulation of pilots . . . has an intimate connection with, and an important relation to the general subject of commerce with foreign nations and among the several [s]tates, . . ." *Id.* at 317, the Court found that "the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants." *Id.* at 320.

154. *Id.* at 319.

155. *Id.* at 319-20.

156. Warden, *supra* note 150, at 534-5 ("the Court labelled 'direct' those state actions whose burden on interstate commerce it considered invalid, and 'indirect' those it found allowable.").

157. *See* NOWAK ET AL., *supra* note 130, at 264-5 (discussing Willson v. Black-Bird

pects of interstate and foreign commerce which were so local in character as to demand diverse treatment."[158] In the contemporary *Pike v. Bruce Church, Inc.*[159] balancing test, courts invalidate state regulations affecting interstate or foreign commerce if they are facially discriminatory or overly burdensome to interstate commerce.[160]

B. *The Commerce Clause and Natural Resources*

Much Commerce Clause jurisprudence has developed around state attempts to regulate state-owned or privately owned natural resources. Although most of these cases have concerned regulation of interstate commerce,[161] their principles may be applicable to state regulation of natural resources in foreign commerce as well. Currently, the Commerce Clause case law provides no exception for state regulation of natural resources.[162] In the past, however, under state autonomy theories, states possessed more authority to regulate interstate and foreign commerce in order to conserve raw materials found within their borders.[163]

Within the realm of state regulation of natural resources, the appropriate Commerce Clause analysis is a multi-factor balancing test to reconcile opposing federal and state interests.[164] Also notable is the truism that "[j]udicial responses often lag behind emergence of new economic and political pressures involving natural resources."[165] Despite the monolithic and inflexible appearance of current Commerce Clause jurisprudence, the Court previously has vacillated regarding the degree of permissible state regulation or protectionism. For example, when large, resource-dependent industries became relatively common, courts viewed

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Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829)).

158. Warden, *supra* note 150, at 534.

159. 397 U.S. 137 (1970).

160. *See infra* note 174 and accompanying text.

161. *See, e.g.,* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (the interstate commerce clause applied to an Alaskan law restricting the foreign export of unworked logs).

162. *See* Maine v. Taylor, 477 U.S. 131, 139-40 (1986); *see also* D. Lee Shields, Note, Maine v. Taylor: *Natural Resource Statutes Against the Commerce Clause, or When is a Hughes Not a Hughes But a Pike?*, 29 NAT. RESOURCES J. 291, 293 (1989).

163. Nowak et al., *supra* note 130, at 282-283. *See also* Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), wherein the Court upheld a state prohibition against transporting water out of state.

164. *See* Note, Hughes v. Oklahoma *and* Baldwin v. Fish and Game Commission: *The Commerce Clause and State Control of Natural Resources*, 66 VA. L. REV. 1145, 1160-61 (1980) (suggesting the typical commerce clause analysis may have to be adapted when applied in cases involving natural resource regulation).

165. *Id.* at 1161.

protectionist state regulations as "conservation efforts involving proprietary actions and regulation of wholly intrastate activities."[166] Later, the Court expanded the Commerce Clause to reduce the scope of state control over natural resources.[167]

Geer v. Connecticut represents the early, definitive case involving state control of natural resources.[168] In *Geer*, the Court upheld Connecticut's regulation restricting the export of wild gamebirds.[169] In *Geer*, the Court distinguished between internal and external commerce, and interstate commerce, and concluded that the power of the state to regulate the killing and ownership of game birds in this case was internal commerce not subject to the Commerce Clause of the Constitution.[170] The *Geer* holding remained intact until 1979, when *Hughes v. Oklahoma*[171] overruled it.[172] In *Hughes*, the Court struck down an Oklahoma statute that prohibited the export of free-swimming minnows taken from waters in Oklahoma.[173] The *Hughes* majority adopted the rationale similar to Justice Field's dissent in *Geer*,[174] which reasoned that when wild game is reduced to a state of possession, it becomes an article of commerce indis-

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166. *Id.* at 1161-62; *see, e.g.*, McCready v. Virginia, 94 U.S. 391, 394-95 (1876) (Court upheld a statute which discriminated against nonresidents in the distribution of natural resources, when the resources had not yet entered the stream of interstate commerce and no fundamental rights had been implicated).

167. Note, *supra* note 164, at 1162.

168. 161 U.S. 519 (1896).

169. *Id.* at 530; *see also* Carol A. Fortine, Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 GEO. WASH. L. REV. 601, 607-08 (1982).

170. 161 U.S. at 530-32.

171. 441 U.S. 322 (1979). *Hughes* sets forth the test for statutes which directly impinge on interstate commerce, whereas *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), sets forth the test for state statutes that incidentally affect interstate commerce. The *Pike* balancing test is as follows:

> 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.

172. 441 U.S. at 326, 335.

173. *Id.* at 323-25. The Oklahoma statute did not prohibit the export of hatchery raised minnows. *Id.* at 325.

174. 161 U.S. at 528 ("[w]hen any animal . . . is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.").

tinguishable from any other article of commerce.[175] The Court characterized the statute as a clear-cut case of discrimination against out-of-state minnow wholesalers and retailers.[176] The Court found conservation to be a legitimate state interest similar to the state's interest in protecting in public health and safety.[177] In the Court's current Commerce Clause balancing test, public health and safety is considered to be a legitimate state interest which may justify state interference with interstate commerce.[178] The Court struck down the Oklahoma statute, however, because the majority felt that equally effective, nondiscriminatory means were available.[179] Justice Rehnquist's dissent, on the other hand, argued that no discrimination was present because the statute prohibited both out-of-state and in-state minnow retailers from exporting minnows from Oklahoma.[180] Rehnquist also reasoned that the statute was a legitimate exercise of state power for the legitimate purpose of conservation.[181]

City of Philadelphia v. New Jersey[182] is another pivotal Commerce Clause case that involved state protectionism used to shield privately owned in-state resources. In *City of Philadelphia*, the Court struck down a New Jersey statute prohibiting the importation of out-of-state waste for disposal in New Jersey landfills.[183] The majority found the New Jersey statute to be facially discriminatory and, therefore, clearly violative of the Commerce Clause.[184] In a dissent similar to the one in *Hughes*, Rehnquist advocated a more flexible and functional Commerce Clause analysis that would allow a state to respond to pressing environmental concerns without running afoul of the Commerce Clause merely because the state legislation also incidentally benefitted the state's citizens.[185]

Rehnquist's dissenting opinions in *Hughes* and *Philadelphia* laid the

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175. 441 U.S. at 335-36.

176. *Id.* at 336-37.

177. *Id.* at 337.

178. *See* Warden, *supra* note 150, at 537 & n.26 (citing, for example, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Huron Portland Cement v. City of Detroit, 362 U.S. 440 (1960); and South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938)).

179. *Hughes*, 441 U.S. at 337-38.

180. *Id.* at 344.

181. *Id.* at 342-44.

182. 437 U.S. 617 (1978).

183. *Id.* at 618-19, 629.

184. *Id.* at 627-28. At least one constitutional scholar has argued that *City of Philadelphia v. New Jersey* was wrongly decided because the costs of regulation were not exported by the state, but remained within the state. *See* Collins, *supra* note 139, at 113.

185. *City of Philadelphia*, 437 U.S. at 631-33.

groundwork for the majority opinion in *Maine v. Taylor*.[186] *Maine* signals a potential withdrawal, based upon environmental considerations, from the Court's previous strict Commerce Clause holdings.[187] In *Maine*, the Court upheld a state statute which prohibited the importation of out-of-state baitfish.[188] Stating that the limitation on state regulation of interstate commerce "is by no means absolute,"[189] the Court reaffirmed that the states retain some authority under their police powers to regulate matters of legitimate local concern, such as conservation.[190]

C. *The Foreign Commerce Clause*

In issues involving state regulation of foreign commerce, a higher degree of Commerce Clause scrutiny applies.[191] Traditionally, the judiciary has accorded Congress broad plenary authority over matters involving foreign commerce, in part because foreign commerce issues implicate a number of other issues concerning the division of the foreign affairs power within the federal system.[192] Congress' broad grant of authority over foreign commerce is grounded in the text of the Constitution and the intent of the Framers. The Commerce Clause itself grants Congress the power to "lay and collect . . . Imposts and Excises,"[193] and "To regulate Commerce with foreign Nations."[194] The Commerce Clause also mandates that "Imports and Excises shall be uniform throughout the United States."[195] Article I, section 10 reflects the framer's general intent that states not have an independent voice in foreign affairs.[196]

Congressional primacy with respect to foreign commerce is also based on functional imperatives, such as the necessity for a national, unified

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186. 477 U.S. 131 (1986).

187. *See* Shields, *supra* note 162, at 292-93, 298-301.

188. 477 U.S. at 132-33, 151-52.

189. *Id.* at 138 (quoting Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980)).

190. *Id.* at 151. The Court agreed with the district court's conclusion that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks," and rejected evidence that Maine's regulation was motivated by protectionism. *Id.* at 148-51.

191. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100; *see also* Warden, *supra* note 150, at 556.

192. *See* NOWAK ET AL., *supra* note 130, at 125-26.

193. U.S. CONST. art. I, § 8, cl. 1.

194. *Id.* § 8, cl. 3.

195. *Id.* § 8, cl. 1.

196. *Id.* § 10; *see also* NOWAK ET AL., *supra* note 130, at 125 ("no constitutional recognition of any 'reserved powers' of the states to act in [foreign trade or foreign relations]").

policy in international trade matters.[197] In 1979, the Court articulated the "one voice" standard in *Japan Line, Ltd. v. County of Los Angeles*.[198] Yet, the precedent for federal uniformity in foreign commerce stretches back to the 1824 case of *Gibbons v. Ogden*.[199]

The framers were intent on promoting the formation of a strong economic union.[200] Although interstate rivalry was the dominant concern, the framers also perceived state protectionism aimed at foreign powers as an evil to avoid.[201] Modern Commerce Clause jurisprudence reflects this fear. The antidiscrimination rule of courts' Commerce Clause analyses is an anticipatory response to potential protectionism,[202] which holds that state laws are presumptively invalid if they categorically discriminate against foreign commerce by directly favoring local interests over their immediate foreign competitors.[203]

A court also must inquire whether the state statute unconstitutionally interferes with the foreign affairs power of the federal government. States enjoy substantial leeway from the courts in the absence of a specific congressional mandate against state action in a particular area.[204] *Zschernig v. Miller*,[205] however, may bar state statutes which trespass on Congress' foreign affairs power, even when the federal government has not specifically preempted state action.[206] To be prohibited under

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197. Grace A. Jubinsky, Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 558-59 (1985).

198. 441 U.S. 434 (1979). When the *Japan Line* "one voice" criteria is not impaired, however, the heightened scrutiny inherent in the Foreign Commerce Clause drops out and is replaced by the regular interstate commerce clause analysis. *See* Jubinsky, *supra* note 197, at 559.

199. 22 U.S. (9 Wheat.) 1, 11-14 (1824). The Court in *Gibbons* noted that "the higher branches of commercial regulation must be exclusively committed to a single hand." *Id.* at 14; *see also* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984) (the United States must "speak with one voice when regulating commercial relations with foreign governments.") (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976).

200. *See* NOWAK ET AL., *supra* note 130, at 262; Collins, *supra* note 139, at 45.

201. *See* Collins, *supra* note 139, at 53.

202. *See id.* at 75.

203. *Id.* at 75 (the antidiscrimination rule "presumes the invalidity of state laws that categorically discriminate against interstate or foreign commerce.").

204. Jubinsky, *supra* note 197, at 567.

205. 389 U.S. 429 (1968).

206. In *Zschernig*, the Court invalidated an Oregon probate statute that conditioned the right of foreigners to inherit property from Oregon citizens upon the existence of reciprocal rights in the foreign state. *Id.* at 430-31, 440-41. Thus, from *Zschernig*, courts have derived a preemption doctrine which states that "even when the federal government

Zschernig, the state statute either must have more than an incidental or indirect effect within the foreign state, or it must create a great potential for disruption or embarrassment.[207]

Notably, however, very few state statutes have been invalidated under the *Zschernig* doctrine.[208] In *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*,[209] the New Jersey Supreme Court rejected a Foreign Commerce Clause challenge to a New Jersey "Buy American" statute[210] that required the state government to purchase materials from United States manufacturers whenever possible.[211] The majority opinion relied on a market participant exemption to the Foreign Commerce Clause.[212]

IV. THE MARKET PARTICIPANT EXEMPTION

"The Court has dealt firmly with state attempts to control commerce involving privately owned natural resources."[213] The question remains, however, whether in the absence of a congressional edict to the contrary, a state, acting as a market participant, may regulate foreign commerce involving state-owned natural resources.[214] The Court has not yet addressed the application of the market participant exemption to state restrictions directed against foreign interests.[215]

Two primary, but somewhat contradictory, rationales underlie the market participant exemption.[216] The "private actor" rationale, based upon notions of equity and evenhandedness, posits that a state which enters the market and assumes the risks of a private actor should be permitted to reap any benefits which may accrue.[217] One of the perceived

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has not acted," state legislation may be preempted if it "has a direct impact upon foreign relations and impairs the federal government's ability to act in that area." *Id.* at 440-41; *see also Jubinsky*, *supra* note 197, at 569-71.

207. *See Zschernig*, 389 U.S. at 434-35; *see also Jubinsky, supra* note 197, at 570.

208. *See Jubinsky, supra* note 197, at 571.

209. 381 A.2d 774 (N.J. 1977), *appeal dismissed*, 435 U.S. 982 (1978).

210. 381 A.2d at 784, 789.

211. *Id.* at 776; *see also Jubinsky, supra* note 197, at 571.

212. *See* 381 A.2d at 787-88.

213. Fortine, *supra* note 169, at 606.

214. *See* Landry, *supra* note 138, at 516. The market participant rule has been described as meaning "[a]s a rule, when a state makes trades, it should be able to prefer residents to nonresidents as its trading partners." Coenen, *supra* note 147, at 441.

215. *See* Jubinsky, *supra* note 197, at 556.

216. Landry, *supra* 138, at 522-23.

217. *See id.* at 523-26. "[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

benefits of private action is the discretion to choose with whom to deal.[218] The second rationale posits that allocation of state-owned resources is an activity derived from a state's inherent sovereignty.[219] This sovereignty rationale may overlap somewhat with the private actor rationale, in that sovereignty includes power to decide with whom, how, and for whose benefit to deal.[220] One scholar has described "five key justifications" underlying the market participant rule.[221] He suggests that it is fair to allow a state to favor its citizens in the allocation of state-owned resources.[222] Additionally, the values implicit in federalism suggest the necessity "to avoid interference with state autonomy" in the distribution of state-owned natural resources.[223] Furthermore, preferences for local interests are less threatening to the values underlying the Commerce Clause than "those discriminatory regulations and taxes that engendered recognition of the dormant commerce clause principle."[224]

The market participant exemption, however, is not without its limits. The relevant cases suggest that states may only impose restrictions on the initial distribution of state-owned resources.[225] According to one scholar, "almost any downstream restraint on the retransfer of raw natural resources disposed of by the state should be impermissible."[226] In *Foster-Fountain Packing Co. v. Haydel*,[227] the Court held that a state could not regulate the sale of shrimp taken from state waters after the shrimp were sold in interstate commerce.[228] In dicta, the Court suggested that it might have been permissible for the state to have restricted the shrimp

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from federal constraints, including the inherent limits of the Commerce Clause." Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980) (citation omitted).

218. *See* Coenen, *supra* note 144, at 437.

219. *See* Landry, *supra* note 138, at 522, 526-31.

220. *See id.* at 526.

221. Coenen, *supra* note 144, at 419-20.

222. *Id.* at 420.

223. *Id.*

224. *Id.* The fourth justification was that states should have more leeway "when dealing in the market than when regulating others' efforts at free trade." *Id.* The final justification was that the dormant commerce clause should be applied cautiously to market-participation cases. *Id.*

225. *See* Landry, *supra* note 138, at 531; *see, e.g.*, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 98-99 (1984).

226. Coenen, *supra* note 144, at 469. Coenen concedes, however, that "these principles . . . may be difficult to apply in practice." *Id.*

227. 278 U.S. 1 (1928).

228. *Id.* at 13 ("by permitting its shrimp . . . to be shipped and sold in interstate commerce, the State . . . definitely terminates its control"); *see also* Landry, *supra* note 138, at 543-44 (noting that the *South-Central Timber* court alluded to this quote from the *Foster-Fountain* case).

for intrastate consumption prior to its entrance into the stream of interstate commerce.[229]

The market participant exemption fits into the *Pike* balancing test[230] as an independent justification for state regulation.[231] In other words, once a court determines that a state is acting as a market participant, the examination of the burden on interstate commerce becomes unnecessary.[232] The focus is no longer on legitimate local benefits, such as public health and safety, but on states' rights as either a state sovereign or private actor.[233]

In *Reeves, Inc. v. Stake*, the Court considered a Commerce Clause challenge to a state's burden on interstate commerce through its direct market participation.[234] South Dakota had built a cement plant and, during a period of regional cement shortages, began to accord preferential treatment under its contracts with South Dakota citizens.[235] A Wyoming citizen who held a long-term contract with the South Dakota cement plant challenged South Dakota's in-state preference under the Commerce Clause.[236] The *Reeves* majority held that, despite the appearance of protectionism, penalizing South Dakota for its foresight and enterprise in constructing a cement plant would be improper.[237] The *Reeves* holding implies that some form of loose, indirect state protectionism is permissible.[238] Significantly, however, the Court did not interpret South Dakota's preferences as protectionism.[239] Instead, the Court characterized South Dakota's in-state preference as the permissible channelling of state resources to the citizens whose taxes made the benefits possible.[240] The holding may be understood as suggesting that a state's rational, long-term planning decision which favors residents in state-owned or state-nurtured resource distribution does not threaten the goals

229. *Foster-Fountain*, 278 U.S. at 13; *see also* Landry, *supra* note 138, at 544.

230. *See supra* note 174.

231. *See* Landry, *supra* note 138, at 524-25. ". . . in *White*, the Court indicated that it would not look to the burden on commerce once the state had successfully established itself as a market participant." *Id.*

232. *Id.* at 525.

233. *Id.* at 525-26.

234. 447 U.S. 429 (1980).

235. *Id.* at 430-33.

236. *Id.* at 433.

237. *See id.* at 445-47.

238. *See* Fortine, *supra* note 169, at 610-11.

239. *Reeves*, 447 U.S. at 442.

240. *Id.*; *see also* Warden, *supra* note 150, at 543-44. South Dakota's action was not characterized as protectionism, but as an "improvement of the quality of life" for its citizens. *Reeves*, 447 U.S. at 443 n.16.

of the Commerce Clause.[241]

The *Reeves* opinion "concedes the possibility of a natural resources exception to the market participant rule,"[242] but does not conclusively address the issue because it concluded that cement is not a natural resource.[243] Unlike coal, timber, fisheries, or wild game, the Court characterized cement as the "end product of a complex process whereby a costly physical plant and human labor act on raw materials."[244]

In *South-Central Timber Dev., Inc. v. Wunnicke*, Alaska imposed an in-state processing requirement on logs harvested from state forests.[245] The affected logs were being exported to Japan almost exclusively.[246] The Court rejected Alaska's argument that as a participant in the timber market, the state was permitted to sell timber on its own terms and thereby promote the local log-processing industry.[247] The Court also rejected Alaska's market participant exemption argument and, instead, characterized the requirement as an impermissible "downstream regulation."[248] The Court held that Alaska could not employ the market participant exemption beyond the stage at which the logs were sold.[249] Alaska could not impose an in-state processing requirement after the initial distribution of state-owned resources.[250] The Court also held that there was no implicit congressional approval of state policy to overcome the invalidity of Alaska's in-state manufacturing requirement.[251] Despite this holding, some commentators have posited that *South-Central Tim-*

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241. *See* Reeves, 447 U.S. at 429-47.

242. Fortine, *supra* note 169, at 610.

243. *Reeves*, 447 U.S. at 443.

244. *Id.* at 444. The Court also considered the fact that South Dakota did not have unique access to the materials necessary to make cement. Unique access in a similar scenario could be construed as hoarding. *Id.* at 444.

245. 467 U.S. 82, 84-85 (1984).

246. *Id.* at 85.

247. *Id.* at 95-96, 98-99; *see also* Warden, *supra* note 154, at 551-52. Despite Alaska's ownership of the logs, Alaska's primary manufacturing requirement was protectionist in "purpose and [] practical consequence." *Id.* at 557.

248. *South-Central Timber*, 467 U.S. at 99.

249. *Id.* at 82, 97-99.

250. *Id.* at 95-99. The Court suggested, however, that state subsidies extending only to in-state businesses would be constitutional, "because the purchaser would retain the option of taking advantage of the subsidy by processing timber in the State, or forgoing the benefits of the subsidy and exporting unprocessed timber." *Id.* at 95; *see also* Landry, *supra* note 138, at 538.

251. *South-Central Timber*, 467 U.S. at 91-92. "The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goal we believe Congress had in mind—is an insufficient indicium of congressional intent." *Id.* at 92.

ber suggests that the Court will apply the market participant exemption in a similar scenario involving foreign commerce, as long as downstream restrictions are absent.[252]

The Court distinguished *South-Central Timber* from *Reeves* on the basis of three elements present in *South Central* but not present in *Reeves*: natural resources, downstream restrictions on resale, and foreign commerce.[253] Implicating all three of these elements, the Court found that in *Reeves*, South Dakota acted as a private market participant,[254] whereas in *South-Central Timber*, Alaska imposed "downstream" restrictions for the "purpose of fostering local industry."[255] Despite South Dakota's superficial similarity to a private actor (it manufactured a product, maintained employees, and assumed market risks, for example), the question arises whether South Dakota's allocation decisions were determined solely by market forces? Would a private economic actor rationally decide to sell to state residents rather than to the highest bidder?

Regarding the natural resources distinction, the Court contrasted South Dakota's cement, the end product of a complex manufacturing process, with Alaska's vast timber holdings, which the Court characterized as a "windfall."[256] Windfall may have been a proper characterization in Alaska's case, but is it applicable to other timber-producing states that invest heavily in tree farms and the reseeding of state forests and have well-staffed and well-equipped forestry management services? Are these trees not more similar to South Dakota's cement, the end result of a complex manufacturing process? Is not the only difference that one process is industrial and the other silvacultural? The same reasoning could be applied to other natural resources that traditionally are perceived as windfalls, such as extensive state expenditures for fish hatcheries, for other aspects of aquaculture, and for game management? Protecting these resources should not be characterized as hoarding.[257] Current

252. *See* Warden, *supra* note 150, at 553-55.

253. *South-Central Timber*, 467 U.S. at 96.

254. *Id.* at 95-96.

255. *Id.* at 98.

256. *Id.* at 96.

257. The Court recognizes, under the article IV Privileges and Immunities Clause, that state residents may have a greater claim than out-of-state residents to natural resources developed and maintained by the state. *See* Tribe, *supra* note 133, at 434, n.33. *See also* Baldwin v. Fish & Game Commission of Montana, 435 U.S. 371 (1978). "The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved. Appellants' interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privilege and Immunities Clause." *Id.* at 388.

Commerce Clause jurisprudence seems mired in a period of United States history during which windfall raw materials were abundant, as they still are in Alaska.

The holding in *White v. Mass. Council of Constr. Employers*[258] may implicitly contradict the Court's invalidation of Alaska's downstream restrictions in *South-Central Timber*. In *White*, the Court approved an arguably "downstream restraint" under the market participant exemption.[259] The *White* Court held that the executive order in this case, which influences a "discrete, identifiable class of economic activity in which the city is a major participant,"[260] fell within the market participant exemption. More generally expressed, "the Commerce Clause does not require the city to stop at the boundary of formal privity of contract."[261]

Apparently, the only remaining valid distinction between *Reeves* and *South-Central Timber* is the foreign commerce issue. But assuming that the primary rationale behind the "one voice" standard is the fear of retaliation,[262] is this distinction still valid? Japan's market is already largely closed to United States manufacturers.[263] The fear of counter-embargoes, therefore, is rendered virtually void. Thus, the Court should question whether to invalidate automatically state legislation that protects state-owned and investment-heavy natural resources against foreign acquisition.

Examination of an alternative analysis may be fruitful. In *South-Central*, the Court suggested that the use of subsidies for downstream in-state processors might be constitutional, but struck down downstream requirements on foreign purchasers.[264] Yet, under this alternative in-state subsidy scheme, the possibility of retaliation still exists.[265] This may indicate that protectionist results should not invalidate per se state legislation. Daniel Coenen has suggested that the erratic voting pattern in market participant cases suggests the absence of a consistent, all-

258. 460 U.S. 204 (1983).

259. Coenen, *supra* note 144, at 463 & n.395 (the downstream restraint of "requiring private traders to prefer state residents in making otherwise private hiring decisions.").

260. *White*, 460 U.S. at 211 n.7.

261. *Id.*

262. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453 & n.18 ("[t]he risk of retaliation . . . under these circumstances is acute, and such retaliation of necessity would be felt by the Nation as a whole.").

263. *See supra* text accompanying notes 62-88.

264. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 95, 99 (1984).

265. *See, e.g.*, Fortine, *supra* note 169, at 617.

encompassing theory underlying the application of the exemption.[266] Coenen offers a number of reasons why the Court should relax its Commerce Clause scrutiny. First, benefits subsist from meaningful and responsive local government, including increased participatory democracy and greater sensitivity to local concerns.[267] Second, ordinary political and marketplace pressures are sufficiently efficient barriers to the excessive promulgation of in-state preferences.[268] Third, in contrast to present Commerce Clause analysis, the significance of the state legislation's goal should be accorded greater consideration.[269] Finally, "states have a *heightened* claim to favor residents in the disposition of . . . resources because such resources are quintessentially part of the territory over which the state is sovereign."[270]

Other commentators have argued that in the absence of a clear federal prohibition, states should have the flexibility to allocate their resources freely.[271] Unlike *Japan Line*,[272] in which the state sought to regulate all private and public trade through its state taxation scheme, the *South-Central Timber* scenario involves the limited reach of state proprietary activities.[273] Additionally, strict scrutiny of Foreign Commerce Clause issues becomes less important because Congress has the constitutional power to negate any state legislation of which it disapproves.[274]

V. CONCLUSION

Invalidating environmentally motivated state legislation that implicitly corresponds with federal policy merely because the state legislation is seemingly protectionist seems counterproductive.[275] Laurence Tribe's

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266. Coenen, *supra* note 144, at 405.

267. *Id.* at 427. Additionally, the uniquely local nature of state management of state-owned resources is an inappropriate federal uniformity concern. Jubinsky, *supra* note 202, at 561.

268. Coenen, *supra* note 144, at 434-35.

269. *Id.* at 442.

270. *Id.* at 456.

271. Jubinsky, *supra* note 197, at 566.

272. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

273. *See* Jubinsky, *supra* note 197, at 559 ("State legislation governing the state's proprietary decisions are confined to operate only upon the marketplace activities of the state itself.").

274. *See generally id.* at 550. ". . . the 'subtle, complex [and] politically charged' nature of most market participation questions rendered then more suitable for congressional, rather than judicial, resolution." *Id.*

275. In Reeves v. Stake, 447 U.S. 429, 442 (1979), the Court characterized South Dakota's refusal to sell cement produced in a state-owned factory to non-South Dakota buyers as protectionist "only in the sense that it limits benefits generated by a state

analysis of *Hughes v. Alexandria Scrap Corp.*[276] reflects a recognition of this counterproductivity. Tribe contends that *Alexandria Scrap* "suggests growing judicial solicitude for efforts by states to protect the environmental and other needs of their residents."[277] The argument has been made that, if no significant federal interest is impaired, the Court should apply the rational basis test to state legislation[278] implementing in-state preferences in the distribution of resources. Others believe that protectionist intent, not protectionist effect, should be the focus of foreign Commerce Clause inquiry.[279] As the Court recently stated in *Maine v. Taylor*, "[the Commerce Clause] does not elevate free trade above all other values."[280] The *Maine* Court also expressed the view that as long as a state does not isolate itself economically, "it retains broad regulatory authority to protect . . . the integrity of its natural resources."[281]

Powerful state sovereignty arguments also lend legitimacy to state attempts to conserve natural resources which impinge on foreign commerce: "a state's response to a foreign government's foray into its own territory is not per se a veto or hindrance of national policy."[282] Within the scheme of federalism, states exist for more than mere historical reasons.[283] *Reeves* and the Rehnquist dissent in *Hughes* both suggest that state residents should be able to benefit from the natural advantages contained within a state's borders.[284] "It is questionable whether the com-

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program to those who fund the state treasury and whom the state was created to serve." *Id.*

276. 426 U.S. 794 (1976).

277. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 337-38 (1978).

278. *See* Note, *supra* note 164, at 1164-65 ("The court should not focus on whether the statute discriminates against interstate commerce or whether the benefits to the state outweigh the federal interest. Such balancing provides little guidance . . .").

279. *See* Collins, *supra* note 139, at 117-124.

280. Maine v. Taylor, 477 U.S. 131, 151 (1986). State rules can be more responsive to local environmental conditions and preferences. Note, *supra* note 164, at 1164.

281. *Maine*, 477 U.S. at 151.

282. Jubinsky, *supra* note 197, at 574 (quoting Reisman, *Foreign Affairs and the Several States: Outline of a Theory for Decision*, 71 AM. SOCY' INT'L L. PROCS. 182, 198-99 (1977)).

283. *See* James Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863, 871 (1982). One scholar has argued that state laws that burden interstate commerce can be legitimized as fair charges for services provided by state government. *See* Collins, *supra* note 142, at 69.

284. Hughes v. Oklahoma, 441 U.S. 322 (1978). Rehnquist objected to the majority's overruling of *Geer* by defending it as "a shorthand way of describing of state's substantial interest in preserving and regulating the exploitation of the fish and game and other natural resources within its boundaries for the benefit of its citizens." *Id.*, at 342. *Reeves, Inc. v. Stake*, 442 U.S. 429 (1979). The Court rejected the plaintiff's argument

merce clause was intended to preserve the integrity of interstate commerce at the cost of denying individuals the benefits of living in a certain geographical area."[285]

Maine v. Taylor creates the possibility of a special Commerce Clause dispensation for state environmental regulations.[286] *Maine* implies that when the legitimate local purpose is environmental, a lighter burden of proof is required. That is, the mere possibility of environmental harm is sufficient to satisfy the burden of proof.[287] This relaxed burden of proof is a response to the unique threat presented by environmental degradation. "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such consequences."[288] Given the overriding significance of long-term, irreversible environmental damage, the *Maine* analysis should be applicable in the case of the Foreign Commerce Clause as well.

In the present era, which is characterized by a growing worldwide shortage of raw materials, natural resources assume special significance. In the forum of Commerce Clause litigation, the federal interests in a national market and free trade periodically clash with the states' interest in the conservation of natural resources.[289] Although the federal interest almost always prevails, the distinction between impermissible protectionism and the legitimate exercise of state power is ill-defined.[290] Perhaps the time is ripe for the emergence of a new paradigm. The seemingly

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that South Dakota's refusal to sell cement produced in a state-owned factory to non-South Dakota buyers was protectionist. The Court characterized South Dakota's actions as protectionist "only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve." *Id.* at 442. *See also* Tribe, *supra* note 136. "Moreover, *White*, *Reeves* and *Alexandria Scrap* all involved government expenditures of public revenues to create commerce which generated benefits that those governments wished to keep within their communities." *Id.* at 433. "The market participation exemption . . . encourages states and cities to improve the lives of their citizens by allowing the benefits they generate to be contained within their borders." *Id.* at 434.

285. Note, *supra* note 164, at 1166.

286. *See* Shields, *supra* note 162, at 299-302.

287. *See id.* at 300. "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." Maine v. Taylor, 477 U.S. 131, 148 (1986).

288. *Maine*, 477 U.S. at 148 (quoting the district court opinion, United States v. Taylor, 585 F. Supp. 393, 397 (1984)).

289. *See* Shields, *supra* note 162, at 292-93.

290. *See* Collins, *supra* note 139, at 74.

limitless supply of natural resources of the 1700s that shaped the framers' world view has given way to worldwide scarcity. Ever since *Cooley* ushered in the balancing test in Commerce Clause jurisprudence,[291] states have advocated the advantages of increased state control over natural resources to promote the health and safety of state citizens.[292] Perhaps the seriousness of natural resource depletion and the growing awareness of the complexity of the world's ecosystems suggest that states should be free to test creative solutions to environmental degradation, even if it results in some state interference with foreign commerce.

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291. *See* Huffman, *supra* note 283, at 872-73.
292. *Id.*