Vanderbilt Law Review

Volume 31
Issue 3 *Issue 3 - April 1978*

Article 1

4-1978

Some Intersections of the Negative Commerce Clause and the New Federalism

James F. Blumstein

VANDERBILT LAW REVIEW

VOLUME 31 APRIL 1978 NUMBER 3

Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*

*James F. Blumstein***

TABLE OF CONTENTS

I. INTRODUCTION 474
II. NEGATIVE COMMERCE CLAUSE CASES: THE ROLE OF THE COURT 490
III. NEGATIVE COMMERCE CLAUSE CASES: AN ANALYTICAL FRAMEWORK 497
A. Legislative Purpose 497
B. The Extent of the Burden on Commerce 498
C. The Nature of the Subject Matter Regulated (Herein of the Need for Uniformity) 500

* I would like to acknowledge the contribution of Ms. Susan E. Dominick, a member of the Bar of the State of Alabama. Initially, she and I were planning to write this Article jointly, but the press of her practice precluded that. Portions of the Article, however, reflect her direct input, for which I express my appreciation. I would also like to express my gratitude to Messrs. James S. Hutchinson, David L. Jordan, George C. Lamb III, and Joel R. Tew of the Vanderbilt Law School class of 1979 for their able and diligent assistance in the assiduous task of preparing the footnotes for this Article. Finally, I would like to thank Kevin J. Wolff, Editor in Chief of the *Law Review*, for his constructive blend of patience and persistence during the preparation of this Article and his acumen in the editorial process.

Work on portions of this article was supported by the Vanderbilt Institute for Public Policy Studies.

**Professor of Law, Vanderbilt Law School; Senior Research Associate, Vanderbilt Institute for Public Policy Studies. B.A., Yale College, 1966; M.A., Yale University, 1970; LL.B., Yale Law School, 1970.

D. The Nature of the Effect on Commerce (Herein of Discrimination) 501
(1) Regulation Cases 503
(2) Taxation Cases 508
IV. JUDICIAL INTERVENTIONISM IN DIFFERING CONTEXTS: COMPARING THE COURT'S APPROACH IN NEGATIVE COMMERCE CLAUSE AND EQUAL PROTECTION CASES .. 518
V. THE NEW FEDERALISM 524
A. The Usery *Case* 525
B. The Hughes *Case* 533
VI. DISCRIMINATORY STATE INCOME TAXATION OF OUT-OF-STATE TAX-EXEMPT BONDS 542
A. The Problem 542
B. Prior Non-Commerce Clause Case Law 547
C. The Commerce Clause Analysis 559
D. The Impact of the New Federalism 565
VII. CONCLUSION 572

I. INTRODUCTION

Much has been written about the change in the Supreme Court's judicial philosophy[1] as a new, ascendant majority[2] has been able successfully to implement its emerging notions of judicial reticence and self-abnegation.[3] This fundamental turnabout in judicial perspective is hardly coincidental, since it reflects the fulfillment of an oft-repeated campaign pledge of Richard Nixon, who in 1968 promised, if elected, to appoint so-called strict constructionists to

1. *See, e.g.*, Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Gunther, *Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Swindler, *The Court, the Constitution, and Chief Justice Burger*, 27 VAND. L. REV. 443 (1974); Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

2. With regard to the ideological composition of the Court, Chief Justice Burger and Justice Rehnquist seem to represent one wing of the Court while Justices Brennan and Marshall represent another. The remaining Justices stand somewhere in between. The voting patterns of the Justices evidence this composition. During the 1976-77 term, for example, while Chief Justice Burger and Justice Rehnquist agreed in 78.4% of the decisions in which both took part, Chief Justice Burger agreed with Justices Brennan and Marshall only 36.9% and 37.4% of the time respectively. Similar differences occurred between Justice Rehnquist and Justices Brennan and Marshall. *See The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 296 (1977). On many specific issues, however, it seems that the Burger-Rehnquist position has prevailed. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976); Paul v. Davis, 424 U.S. 693 (1976); Miller v. California, 413 U.S. 15 (1973).

3. *See, e.g.*, Yarbrough, *Litigant Access Doctrine and the Burger Court*, 31 VAND. L. REV. 33 (1978).

the Court.[4] In a basic way his appointees have succeeded in modifying the activist stance that prevailed on the Court during much of the tenure of Earl Warren as Chief Justice. With notable exceptions in some areas,[5] the new majority has a much more modest view of the judicial function within our democratic society.[6] Elements of

4. In October 1968 Mr. Nixon expressed the opinion that Supreme Court Justices had "gone too far" by injecting "social and economic ideas" into their opinions, and he promised to appoint Justices who would "interpret the Constitution strictly and fairly" instead of writing the law. N.Y. Times, Oct. 4, 1968, at 50, col. 2.

5. The primary exceptions are the abortion cases. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (striking down numerous state restrictions on the sales, the advertising of, and the right to purchase contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (striking down a state statute requiring parent's or husband's consent before an abortion may be performed); Doe v. Bolton, 410 U.S. 179 (1973) (striking down a state statute prohibiting abortion except in narrowly defined medical circumstances and requiring procedural conditions beyond the mere approval of the attending physician); Roe v. Wade, 410 U.S. 113, 160 (1973) (although admitting there was a "wide divergence of thinking on this most sensitive and difficult question," the Court struck down a state statute prohibiting nontherapeutic abortions). *But see* Poelker v. Doe, 432 U.S. 519 (1977) (per curiam); Maher v. Roe, 432 U.S. 464 (1977) (equal protection clause allows a state participating in the medicaid program to pay for childbirth expenses of indigent women and not for nontherapeutic abortions). Furthermore, in the environmental area Justice Blackmun has been willing to adopt a more interventionist approach. *See* Sierra Club v. Morton, 405 U.S. 727, 757 (1972) (Blackmun, J., dissenting) ("I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as [plaintiff] possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues."). *Compare* United States v. SCRAP, 412 U.S. 669 (1973) (association has standing to challenge the ICC's failure to suspend a temporary surcharge on railroad freight rates; plaintiffs alleged the surcharge would indirectly damage the natural environment they enjoyed) *with* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (barring standing to a group challenging Treasury regulations that grant favorable tax treatment to nonprofit hospitals, even though they do not provide significant nonemergency medical care to indigents). *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S. Ct. 2620 (1978).

6. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); *see also* Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971). This view has been articulated well in recent decisions that contract the concept of standing. *See* notes 298 & 324 *infra*. Pursuing Justice Harlan's suggestion in dissent in Flast v. Cohen, 392 U.S. 83, 116 (1968), Justice Powell's concurrence in United States v. Richardson, 418 U.S. 166, 188 (1974), sets a tone of judicial modesty:

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either . . . . We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.

The Powell view expressed in *Richardson*—urging a distinction between constitutional (article III) and prudential standing rules—was adopted by the majority in Warth v. Seldin, 422 U.S. 490 (1975). *See also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). In

this philosophy have emerged and been acted upon in such fields as individual rights (especially equal protection),[7] access to the federal courts (for example, standing),[8] and federal-state relations (for example, revivification of the eleventh amendment[9] and resurrec-

specific response to the argument that narrowed standing rules may permit governmental abuse of power to go unreviewed, Chief Justice Burger has argued that "the absence of any particular individual or class to litigate . . . gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." United States v. Richardson, 418 U.S. at 179.

7. In a series of cases, the Court has declined to extend more rigorous review to interests in education, welfare, and housing. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 43 (1973), in which parents challenged on equal protection grounds a state scheme of financing public education through a property tax in each school district. The Court refused to label education as a fundamental interest or to apply the strict scrutiny equal protection test, in part because when complex and unsettled questions of educational finance are involved, "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints;" Jefferson v. Hackney, 406 U.S. 535 (1972) (upholding larger state reductions in a welfare program than in an old-age program despite the fact that blacks and Mexican-Americans were the primary recipients under the welfare program); Lindsey v. Normet, 405 U.S. 56 (1972) (upholding a state statute which, in eviction proceedings for nonpayment of rent, required a trial to be held almost immediately after service of the complaint and severely limited litigable issues; the Court declined to accord special status to, or to review stringently, interests in housing); Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.").

8. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (indigents have no standing to sue the Treasury Department for granting favorable tax treatment to nonprofit hospitals that limit indigent aid to emergency care; plaintiffs did not establish that their asserted injury was the consequence of the Treasury's actions, or that victory in the suit would remove the harm); Warth v. Seldin, 422 U.S. 490 (1975) (holding, *inter alia*, that a plaintiff challenging exclusionary zoning practices must allege facts showing that the practices actually are causing harm to him, and that he will benefit from the court's action in a direct and tangible way); United States v. Richardson, 418 U.S. 166 (1974) (taxpayer has no standing to sue to obtain information on how the CIA spends its funds; taxpayer did not allege he was "in danger of suffering any particular concrete injury" as a result of nondisclosure of the information). *See* note 6 *supra*.

Access also has been limited in other ways. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), a federal class action suit, the Court required individual notice to be mailed to over two million class members and required plaintiff to bear the entire cost of this notice. *See also* Stone v. Powell, 428 U.S. 465 (1976) (holding that when a state has provided an "opportunity for full and fair litigation" of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that illegally obtained evidence was introduced at trial); City of Kenosha v. Bruno, 412 U.S. 507 (1973) (adopting a narrow definition of the term "person" for purposes of 42 U.S.C. § 1983, and holding that municipalities are not "persons"). *But see* Monell v. Department of Social Servs., 98 S. Ct. 2018 (1978) (overruling *City of Kenosha*).

9. *See* Edelman v. Jordan, 415 U.S. 651 (1974) (Douglas, Brennan, Marshall, Blackmun, JJ., dissenting), holding that while *Ex Parte* Young, 209 U.S. 123 (1908), authorized prospective injunctive relief against unlawful actions by state officials, the eleventh amendment prohibits a federal court from ordering state officials to make retroactive payments of funds wrongfully withheld by the state under a federal-state program. The Court found that retroactive payments were indistinguishable from an impermissible "award of damages against the State." 415 U.S. at 668. *But see* Milliken v. Bradley, 433 U.S. 267 (1977) (in a

tion of the doctrine of comity[10] as limitations on federal judicial activity).[11] The overriding themes appear to include judicial self-restraint,[12] reliance on and faith in the democratic process,[13] skepti-

school desegregation case, a requirement that the state pay one-half of the additional cost of a remedial education plan is not prohibited by the eleventh amendment because, unlike *Edelman*, the funds would operate prospectively to unify the school system); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (the eleventh amendment does not bar a back-pay award when Congress, pursuant to § 5 of the fourteenth amendment, authorizes money damages against a state government that had discriminated against its employees).

10. Comity has been defined as "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 334 (rev. 4th ed. 1968).

In Younger v. Harris, 401 U.S. 37 (1971), the Court, relying on the comity doctrine, substantially narrowed Dombrowski v. Pfister, 380 U.S. 479 (1965), in which the Court had upheld a federal injunction against threatened bad-faith state prosecutions under an overly broad subversive activities statute. In *Younger* the Court refused to uphold a federal injunction against a pending state criminal suit even though the defendant in that suit challenged the statute under which he was indicted as violative of the first amendment. Justice Black wrote that the defendant could raise his constitutional claim in the state criminal proceeding and that the federal district court should not interfere in an ongoing state criminal proceeding absent evidence of harassment or a showing that the state forum would not fully and fairly adjudicate the federal constitutional claim. 401 U.S. at 49. The companion cases to *Younger* and subsequent decisions have further strengthened the *Younger* encroachment on *Dombrowski*. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977) (*Younger* counsels against federal court intervention in state court civil proceedings in which the state seeks return of welfare payments that were allegedly wrongly received); Juidice v. Vail, 430 U.S. 327 (1977) (*Younger* applies to cases involving the state's contempt process); Hicks v. Miranda, 422 U.S. 332 (1975) (*Younger* applies when state criminal proceedings are instituted after the filing of the federal complaint but before any substantial proceedings on the merits in the federal court); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (*Younger* principles held applicable to some state civil actions); Samuels v. Mackell, 401 U.S. 66 (1971) (declaratory relief denied in a situation similar to *Younger*).

11. In United States v. Darby, 312 U.S. 100, 124 (1941), the Court indicated that the tenth amendment is only a "truism." In Fry v. United States, 421 U.S. 542, 547 n.7 (1975), however, the Court indicated that the tenth amendment might have more vitality. Justice Marshall stated that the amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Gerald Gunther described the *Fry* footnote as a "straw in the wind." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 125 n.1 (9th ed. 1975). In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court invoked the tenth amendment as a rationale for limiting federal power under the commerce clause, the first such decision in almost forty years.

12. *See generally* Maher v. Roe, 432 U.S. 464, 479 (1977) ("when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature"); Rizzo v. Goode, 423 U.S. 362 (1976) (holding that the federal district court exceeded its authority in ordering the city of Philadelphia to establish a program to deal with complaints of unconstitutional police mistreatment of citizens; the Court found that the lower court decree too sharply limited the city government's discretion to deal with its internal affairs); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); 18 ST. LOUIS U.L.J. 75 (1973).

13. A recent example of the Court's faith in the democratic process is shown by Morris v. Gressette, 432 U.S. 491 (1977). In *Morris* the Court forbade judicial review of the U.S.

cism about the wisdom and effectiveness of active judicial intervention in the resolution of basic societal disagreements,[14] and a certain nervousness about continual confrontations between the Court—an institution perceived by many as undemocratic and countermajoritarian[15]—and popularly elected, and therefore politically accountable, legislative and executive officials.[16]

Attorney General's failure to object within the statutory period to a state reapportionment plan. Although Justice Marshall in dissent, joined by Justice Brennan, objected strongly that the Court's holding would make unreviewable an Attorney General's blatant abuse of authority—such as his acquiescence in an apportionment plan in exchange for electoral votes—the majority lightly dismissed this possibility in a footnote, stating "we place no weight on the prospect that an Attorney General someday will trade electoral votes for preclearance [of an apportionment plan]." *Id.* at 506 n.23. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) (without the limitations of standing, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions"); United States v. Richardson, 418 U.S. 166, 179 (1974) ("Slow, cumbersome and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."); Whitcomb v. Chavis, 403 U.S. 124 (1971) (holding that a state legislative apportionment scheme calling for at-large election of legislators in a certain county does not illegally cancel the voting power of a racial minority in the county ghetto; the Court concluded that the minority simply had been outvoted and had not been denied accesss to the political system); Dandridge v. Williams, 397 U.S. 471, 487 (1970) ("the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.").

14. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977) (upholding, in the face of an equal protection clause challenge, a decision by the Connecticut legislature to subsidize medical expenses incident to pregnancy and childbirth, but not to subsidize expenses incident to nontherapeutic abortions). *See also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (overruling the district court's denial of a motion to modify an injunction requiring that there not be a majority of students of any minority group in Pasadena schools; the Court concluded that the school board was not answerable for demographic shifts that resulted in some resegregation of Pasadena's schools after a court order had achieved a desegregated, unitary system—even if for only a single school year).

15. *E.g.*, Wright, *supra* note 6. In Southern Pac. Co. v. Arizona, 325 U.S. 761, 794 (1944), dissenting from the majority's invalidation of a state law limiting the length of interstate passenger trains, Justice Black argued that "[r]epresentatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which govern the people." In Board of Educ. v. Barnette, 319 U.S. 624, 650 (1943), Justice Frankfurter in dissent wrote:

> The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

16. In Warth v. Seldin, 422 U.S. 490 (1975), Justice Powell, writing for the Court, viewed standing issues as being "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Id.* at 498. Without the standing limitation, Justice Powell feared that "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 500.

This general retrenchment from judicial interventionism has not been reflected, however, in the new majority's decisions in the commerce clause area.[17] The commerce clause gives Congress the power to "regulate commerce with foreign Nations and among the several States . . . ."[18] At least since 1851,[19] the Court has construed the commerce clause not only as a conferral of authority on Congress, but also as a significant, independent limitation on state power. The Supreme Court has applied the commerce clause, by its negative implication, to strike down state taxation[20] and regulatory[21]

17. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (striking down a North Carolina statute, which required that all apples shipped into North Carolina in closed containers bear no grade other than the applicable federal grade, on the grounds that the statute stripped the Washington apple industry of the competitive advantage it had earned through the use of a state grading system more stringent than the federal system); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) (striking down a New York statute that taxed securities transactions involving out-of-state sales more heavily than those involving sales within the state); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (striking down a Mississippi regulation providing that out-of-state milk could be sold in Mississippi only if the producing state would accept Mississippi milk on a reciprocal basis); Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974) (holding unconstitutional as a violation of the commerce clause a state's refusal to enforce a contract for the purchase of cotton entered into by a foreign corporation that had not qualified to do business in the state, on the grounds that cotton, although delivered to a local warehouse, is part of a stream of interstate commerce); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (striking down an Arizona regulation that, in effect, required an Arizona cantaloupe grower to build packing facilities within Arizona instead of utilizing out-of-state packing facilities).

18. U.S. CONST. art. I, § 8, cl. 3.

19. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). *See also* Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 244 (1829).

20. Welton v. Missouri, 91 U.S. 275 (1876) (license tax imposed only upon itinerant salesmen who sold goods produced outside the state). *See also* Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887) (state tax on all salesmen soliciting orders for the purchase of goods to be shipped interstate); Walling v. Michigan, 116 U.S. 446 (1886) (tax on nonresidents selling liquor produced out-of-state); Webber v. Virginia, 103 U.S. 344 (1880) (license tax on sellers of out-of-state merchandise); Guy v. Baltimore, 100 U.S. 434 (1880) (tax for use of public wharves imposed upon vessels laden with goods produced outside Maryland).

21. Shafer v. Farmers Grain Co., 268 U.S. 189 (1925) (North Dakota statute providing for grading and inspection of grain, together with profit and dockage regulation, constitutes a direct interference with and a direct burden upon interstate commerce); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922) (North Dakota statute requiring purchasers of grain to obtain a license, pay a license fee, submit to a system of grading, inspection and weighing, and to adhere to price and profit regulation, held invalid as a direct burden on interstate commerce); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) (Kentucky statute requiring foreign corporations that conduct business in the state to qualify to do business is invalid as applied to corporations engaged in interstate commerce). For a more recent treatment of the state regulation problem, see Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), in which the Court struck down an Arizona cantaloupe-packaging statute, concluding that the state's minimal interest in identifying the origin of cantaloupes to enhance the goodwill of local growers did not justify the substantial capital expenditures necessary to build and operate a packing plant.

legislation that unduly interferes with commerce.[22] In some commerce clause cases, however, the Court has permitted incidental regulation of interstate commerce by states seeking to promote legitimate police power objectives[23] and has even permitted states to tax interstate commerce directly,[24] recognizing that interstate transactions can reasonably be required to pay their fair share of the cost of running government.[25] The Court's problem has been to determine in individual cases whether a given regulation or tax is acceptable or excessively burdensome on commerce;[26] that is, recognition that states can regulate and tax interstate commerce to some extent necessarily involves the Court in a balancing process[27] to determine the permissible scope of state authority.

---

22. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

23. *E.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). The *Huron* Court quickly dispensed with appellant's contention that the municipal air pollution code imposed an undue burden on interstate commerce:

> State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.
>
> . . . .
>
> It has not been suggested that the local ordinance, applicable alike to "any person, firm, or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application, designed to better the health and welfare of the community. And while the appellant argues that other local governments might impose differing requirements as to air pollution, it has pointed to none. The record contains nothing to suggest the existence of any such competing or conflicting local regulations (citations omitted). We conclude that no impermissible burden on commerce has been shown.

Id. at 448.

24. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (net income from exclusively interstate operations of foreign corporations may be subjected to state taxation provided that the tax is nondiscriminatory and is properly apportioned to local activities within the taxing state). *Cf.* Shaffer v. Carter, 252 U.S. 37, 57 (1920) (state tax held not an impermissible burden on interstate commerce because it was imposed not upon gross receipts but only upon net proceeds). *See also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

25. The basic principle upon which these decisions are based was expressed by the Court in Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938): "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Id.* at 254.

This concern has reappeared in recent cases. *See, e.g.*, United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972).

26. *See generally* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

27. In recent cases the Court has weighed the state's interest in promoting the health, safety, and welfare of its citizens against the federal interest in uniform regulation of interstate commerce. *See generally* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). *See also* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

It is self-evident that judicial evaluation of the impact on commerce of state activity (to determine whether it unduly interferes with the flow of commerce) involves the Court actively in the review of state legislative actions.[28] Indeed, over the years a significant controversy has arisen among members of the Court about the appropriate judicial role in this kind of commerce clause litigation.[29] One view, represented most forcefully by Justice Black,[30] found an activist stance inappropriate because it was incompatible with inherent limitations in the judicial role. For Justice Black, the determination of when state interference with commerce becomes too extensive involves an essentially political and economic choice;[31] an unelected and unaccountable branch of government, the Supreme Court, should not thrust itself into such a decision with only the bare language of the commerce clause, which establishes no specific criteria, as guidance.

The other view, which with exceptions[32] seems to have prevailed

---

28. *See generally* Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129 (1968); *see also* Southern Pac. Co. v. Arizona, 325 U.S. 761, 784-95 (1945) (Black, J., dissenting).

29. It is interesting to note Justice Frankfurter's position in regard to judicial activism. Generally, Justice Frankfurter favored judicial restraint. In commerce clause cases, however, he felt that the parochial pull toward balkanization required the Court to vindicate national interests. For a discussion of Justice Frankfurter's role in commerce clause cases, see Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957).

30. See Justice Black's dissent in Southern Pac. Co. v. Arizona, 325 U.S. 761, 784 (1945), and his unanimous opinion for the Court in Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129 (1968).

31. In *Southern Pacific*, for example, the Court struck down an Arizona statute regulating the length of trains for safety reasons. Justice Black accused the Court of acting as a "super-legislature" and argued that:

> [T]he determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. Someone must fix that policy—either the Congress, or the state, or the courts. A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government.

Id. at 789.

32. Among the exceptions are Breard v. City of Alexandria, 341 U.S. 622 (1951), and South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938). In *Breard* the Court considered the constitutionality of a local ordinance prohibiting door-to-door solicitation by salesmen. The majority refused to apply a less burdensome alternatives test, declaring that "[w]hen there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise" of local control. 341 U.S. at 640. In *Barnwell*, which involved regulation of the weight and width of trucks, the Court applied a simple rational basis test stating that the regulation's "constitutionality [was] not to be determined by weighing in the judicial scales the merits of the legislative choice." 303 U.S. at 191. *See also* Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129 (1968), in which Justice

over time,[33] sees the Court as the representative of federal as opposed to state authority, acting to thwart the natural tendency toward economic balkanization among the states.[34] This approach emphasizes the need for assertion of federal authority to safeguard a national marketplace—a free trade area among the states—which has been a source of national economic strength.[35] The Court's concern for preservation of federal interests in commerce is warranted, according to this view, because state political institutions are di-

---

Black reproved the lower court for applying a balancing test, remarking that it was "difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers." *Id.* at 140.

For an example of a state court's explicit refusal to use a balancing analysis in an environmental protection context, see American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 517 P.2d 691 (1973). *See also* Note, *State Environmental Protection Legislation and the Commerce Clause,* 87 HARV. L. REV. 1762 (1974).

33. *See, e.g.,* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). In *Pike* the Court reviewed an Arizona regulation which required that locally grown cantaloupes be packed in-state. The regulation's purpose was to insure that the high quality fruit be identified as Arizona-grown in marketing. Balancing the state interest against the burden imposed on interstate commerce, the Court found the regulation invalid. Writing for a unanimous Court, Justice Stewart stated the general rule: "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." 397 U.S. at 142. *See also* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976).

34. For an example of judicial hostility to state laws that foster economic balkanization, see H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). In *Hood* the Court struck down a New York law under which an interstate milk distributor was denied a license to establish an interstate receiving depot. Operation of the depot would have had the effect of diverting milk from local markets, which would have prejudiced the interests of local distributors. *See also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Minnesota v. Barber, 136 U.S. 313 (1890). In *Baldwin* the Court held invalid a New York statute under which a license was denied to a milk dealer who had purchased out-of-state milk at a price lower than the New York minimum. In *Barber* the Court invalidated a Minnesota statute that banned the sale of meat not inspected by a local official within one day of slaughter.

35. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-39 (1949):

> [O]ur economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy . . . .
>
> . . . .
>
> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

See also Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974). In *Allenberg* a Tennessee buyer who had not qualified to do business in Mississippi sued to enforce a Mississippi contract for the purchase of Mississippi cotton. The cotton was destined for resale in interstate and foreign markets. The Court held Mississippi's refusal to enforce the contracts repugnant to the commerce clause. The Court in *Allenberg* quoted approvingly the expansive commerce clause language of *Hood.* 419 U.S. at 31-32.

rectly responsive to parochial influences[36] rather than to a national constituency. Moreover, while ultimate deference to the political judgment of Congress in these matters is underscored,[37] the Court, it is argued, must be in a position to protect federal free trade interests when they arise in litigation because the political process is not sufficiently fine-tuned to cope with isolated or incipient breaches of the free-market concept.[38] The Court's role in deciding negative commerce clause cases is therefore informational (for Congress) and also helpful in inhibiting isolationist and fragmentationist political currents in the states.[39] The relative political disadvantages of out-of-state business and commercial interests is further justification for this judicial solicitude.[40]

Since 1970, the members of the Court have achieved remarkable agreement in many commerce clause taxation and regulatory cases. Indeed, in three of the most significant regulatory[41] and two of the most important taxation cases,[42] the Court has been unani-

36. *See generally* McAllister, *Court, Congress and Trade Barriers*, 16 IND. L.J. 144 (1940). For a discussion of the role of the Court and Congress as umpires over the growth of the national economy "amidst an 'immense mass' of state and municipal legislation," see *id.* at 146.

37. Congress has overruled Supreme Court decisions in numerous tax cases. After the decision in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), Congress passed a restrictive law. *See* Hartman, *"Solicitation" and "Delivery" Under Public Law 86 -272: An Uncharted Course*, 29 VAND. L. REV. 353 (1976). Congress also overrode the state enplaning taxes authorized in Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972), by passing the Airport Development Acceleration Act of 1973, 49 U.S.C. §§ 1711, 1714, 1716, 1717 (Supp. V 1975). *See also* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), which held that a South Carolina tax on foreign insurance companies did not violate the commerce clause in light of congressional legislation specifically authorizing such state taxation. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 401-04 (1978).

38. *See generally* Brown, *supra* note 29, for a discussion of the evolution of Justice Frankfurter's views on the role of the Court in negative commerce clause cases. *See also* McAllister, *supra* note 36.

39. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538-39 (1949).

40. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945): "[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." See also United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), in which Justice Stone's famous footnote intimated an exacting degree of judicial scrutiny to protect politically disadvantaged "discrete and insular minorities." *See* Gordon v. Lance, 403 U.S. 1 (1971). In *Gordon* the Court found that West Virginia's referendum statute requiring 60% of the vote for approval of a bond issue did not unconstitutionally discriminate against the majority by giving disproportionate power to the minority. No identifiable group was disadvantaged, and no special judicial scrutiny was therefore deemed necessary or desirable. *Id.* at 7.

41. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

42. In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), Justice Blackmun

mous, while in other cases there has been only a lone dissent.[43] In both the taxation and the regulatory cases, the Court has been extremely searching in its review of state regulatory[44] and tax[45] legislation that adversely affects interstate commerce. Discrimination against interstate commerce has been dealt with especially harshly.[46]

---

writing for a unanimous court overruled the doctrine of Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951), which held that state taxation of the "privilege" of doing business within that state violated the commerce clause. *Complete Auto Transit* involved a challenge, brought by a motor carrier delivering cars to be sold in Mississippi, to a Mississippi "privilege" tax based on gross income from sales. The Court upheld the tax, noting that the *Spector* doctrine had "no relationship to economic realities" and that the plaintiff had not alleged the tax to be discriminatory or unfairly apportioned.

In the same year a unanimous Court in Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977), struck down a New York transfer tax on securities transactions, which placed a heavier burden on out-of-state than in-state sales. Holding by implication that investment funds are an object of commerce, Justice White writing for the Court concluded that the greater tax liability on out-of-state sales violated the negative implications of the commerce clause because the tax was a discriminatory burden on out-of-state exchanges; the Court also held that this diversion of commerce was inconsistent with the "free trade purpose" of the commerce clause. *Id.* at 335.

43. In Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974), a regulatory case, Justice Rehnquist was the sole dissenter. The Court there held that a state could not, consistent with the Constitution, refuse to enforce a contract made in interstate commerce, even if the foreign corporation had not qualified to do business in the state. Justice Stewart filed a lone dissent in Colonial Pipe Line Co. v. Traigle, 421 U.S. 100 (1975). He argued that the case was indistinguishable from prior precedent—Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951), and Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954)—and that a contrary result was dictated unless the Court straightforwardly would overrule the prior cases. Justice Stewart, however, in Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975), joined a unanimous Court in upholding Washington's business and occupation tax on the unapportioned gross receipts of sales from appellant to its principal Washington customer. Although appellant's only Washington employee was an engineer who was consulted regarding the sales but who did not take sales orders, the Court held that there was no multiple taxation because all the activities taxed were intrastate. Finally, in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), a unanimous Court overruled *Spector*. *See generally* J. Hellerstein, *State Taxation under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335 (1976); W. Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term:* Standard Pressed Steel *and* Colonial Pipeline, 62 VA. L. REV. 149 (1976).

44. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

45. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); United Airlines, Inc. v. Mahin, 410 U.S. 623 (1973); Best & Co. v. Maxwell, 311 U.S. 454 (1940).

46. *See generally* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) ("State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand"); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 (1938) ("The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method . . . .").

Examples of strict scrutiny of discriminatory legislation include Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (striking down a city ordinance outlawing the sale of milk not

Despite this apparent agreement on the propriety of an activist role in protecting commerce against excessively burdensome or discriminatory state intrusions, the Court's solicitude for federalism values[47] and especially its respect for and deference to the quasi-sovereign nature of state government[48] are distinct counterthemes.[49]

---

processed at an approved plant within five miles of the city; despite the city's "unquestioned power" to protect its citizens' health, the ordinance failed because "reasonable, nondiscriminatory alternatives" were available to effectuate the state's purpose), and Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977), in which the Court struck down a North Carolina statute that required apples sold in North Carolina to bear a federal grade or be marked "not graded," and prohibited display of more stringent Washington State grades; the Court held that discrimination against the Washington apple industry outweighed local benefits and that nondiscriminatory alternatives were available.

In the taxation area, the Court has invalidated revenue measures that applied only to out-of-state businesses, Welton v. Missouri, 91 U.S. 275 (1876) (license tax imposed only on itinerant salesmen who sold goods produced out-of-state), and statutes that provide a competitive advantage to local business while nominally treating all businesses alike, Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887) (license tax on "drummers"—salesmen soliciting orders for the purchase of goods to be shipped interstate—where only out-of-state manufacturers depended on drummers' services) (principle affirmed in Nippert v. City of Richmond, 327 U.S. 416 (1946)). *See* Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) (Louisiana sales-use tax system struck down because the tax favored local equipment construction and sales without adequate justification). More recently the Court struck down a discriminatory tax scheme in Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

47. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Fiss, *supra* note 1. *See generally* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977).

48. See the Court's 1976 decision in National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Court invalidated the application of the federal Fair Labor Standards Act to state and local employees performing essential or integral governmental functions. On the same day, the Court decided Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), in which the Court concluded that the negative force in the commerce clause did not apply to a state when acting as a purchaser. In *Hughes*, a Virginia scrap processor challenged a Maryland statute that, in providing bounties for the destruction of junked automobiles formerly titled in Maryland, required much stricter proof of title from non-Maryland processors. The Court concluded that the commerce clause does not forbid a state from entering the market as a purchaser and favoring its own citizens.

In these cases the Court relied upon principles of state sovereignty, which limited the reach of the federal power over state authority. Note, *Municipal Bankruptcy, the Tenth Amendment, and the New Federalism*, 89 HARV. L. REV. 1871 (1976). In *Usery*, however, the basis of the Court's decision is unclear. Much of the opinion relied on the idea, suggested in a footnote from Fry v. United States, 421 U.S. 542, 547 n. 7 (1975), that the tenth amendment prohibits Congress from acting so as to impair the role of states in the federal system. In casting the tenth amendment as an affirmative limitation on federal power, the *Usery* Court seemingly rejects the "truism" characterization of the amendment in United States v. Darby, 312 U.S. 100, 124 (1941). The holding in *Usery*, however, is not that precise. Despite the suggestion that the tenth amendment serves as an affirmative limitation, the Court's conclusion seems to be that application of the Fair Labor Standards Act to state and local employees is beyond congressional power under the commerce clause. The Court in footnotes, 426 U.S. at 852 n.17, 854 n.18, explicitly reserves decision on federal power under the spending clause, the war power, and the enabling clause of the fourteenth amendment; a ruling on tenth amendment grounds potentially could have been much broader because of its impact on these

The opinion in *National League of Cities v. Usery*[50] has gained considerable notoriety,[51] since it was the first Supreme Court decision in forty years to invalidate congressional legislation passed under the authority of the commerce clause.[52] The *Usery* decision reflects the Court's willingness to disinter early commerce clause doctrines in an effort to identify some limitations on federal commerce clause intervention in what a majority of the Court perceives to be essential political decisions of state government.[53] Whether *Usery* relies upon

other areas. A conclusion that there is no authority under the commerce clause, out of respect for tenth amendment values, might be a narrower holding, leaving open the possibility that a different form of analysis might apply with respect to war power and spending power cases.

It also should be noted that the decision in *Usery* is a throwback to the analytical framework of such earlier cases as Carter v. Carter Coal Co., 298 U.S. 238 (1936), in which the Court relied on both grounds discussed here: that federal regulation exceeded federal power under the commerce clause, and that it intruded upon state police power prerogatives protected by the tenth amendment. *Usery* seems neither to choose one theory nor to embrace both. The *Usery* line of analysis also, by relying upon concepts of essential function, appears to resurrect the doctrine of logical nexus or logical connection that was discarded in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and has not been used since. *See* note 53 *infra*.

49. The counterthemes also were reflected in the Burger Court's early decisions in the preemption area. *E.g.*, DeCanas v. Bica, 424 U.S. 351 (1976) (Federal Immigration and Nationality Act not intended to displace consistent state authority to regulate employment of aliens); Goldstein v. California, 412 U.S. 546 (1973) (copyright clause does not require inference that power to grant copyrights is exclusively federal); 74 COLUM. L. REV. 960 (1974).

In the economics sphere, however, the Court may very well be playing a different tune. Ray v. Atlantic Richfield Co., 98 S. Ct. 988 (1978); Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) (federal laws preempt Virginia statute prohibiting nonresidents from catching menhaden in Virginia waters); Jones v. Rath Packing Co., 430 U.S. 519 (1977) (federal statute preempts state regulating disclosure of average weight of a lot of goods). *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Perez v. Campbell, 402 U.S. 637 (1971).

50. 426 U.S. 833 (1976).

51. *See* Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Friendly, *supra* note 47; Michelman, *supra* note 1; Tribe, *supra* note 1; Note, *supra* note 48.

52. The last case in which the Court invalidated a federal law under the commerce clause was Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See* L. TRIBE, *supra* note 37, at 308 n.1.

53. Early commerce clause decisions evolved two lines of analysis. In United States v. E.C. Knight Co., 156 U.S. 1 (1895), the Court indicated that Congress could invoke the commerce power to reach local economic activities only if the activity had a "direct" rather than an "indirect" effect on interstate commerce. By distinguishing between "manufacturing" and "commerce," the former having only an indirect effect on interstate commerce, this analysis served to invalidate certain federal social legislation directed at manufacturing. In contrast, in the *Shreveport Rate* case, 234 U.S. 342 (1914), the Court utilized a "practical effects" test, stating that congressional authority extended to "all matters having such a close and substantial relation" to interstate commerce. *Id.* at 351. The *Shreveport* analysis eventually superseded the "direct-indirect" test in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

Language in Carter v. Carter Coal Co., 298 U.S. 238 (1936), reflected the height of the Court's disinclination to examine practical economic consequences in its analysis of federal power under the commerce clause. The Court drew logical distinctions between commerce,

a notion of inherent limitations on congressional commerce clause authority or upon a form of qualified state immunity—either theory

which was subject to federal regulation, and production or manufacturing, which occurred prior to commerce. *Id.* at 307-08. *See* note 332 *infra.* The analysis used by Justice Rehnquist in *Usery* in many respects was similar to the "logical nexus" approach of *Carter Coal,* a point made by Justice Brennan in his dissent. 426 U.S. at 867-68. Most significantly, citing Fry v. United States, 421 U.S. 542, 547 n.7 (1975), Justice Rehnquist emphasizes that the ability of states to function effectively in the federal system is an aspect of sovereignty. 426 U.S. at 852. The *Usery* approach, therefore, examines whether the functions at issue are attributes of sovereignty and whether they are essential functions integral to governmental operation. *See* Blumstein & Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context:* Parker v. Brown *in Constitutional Perspective,* 1978 DUKE L.J. (forthcoming). Although, as Justice Brennan notes, the majority in *Usery* is not specific about what constitutes an attribute of sovereignty or an essential governmental function, it seems clear that logical reasoning rather than economic analysis is the proper means of identifying such attributes and functions, since the Court "disclaim[ed] any reliance on the costs of compliance." 426 U.S. at 874. For Justice Rehnquist, federal displacement of state decisionmaking was critical irrespective of the dispute about the actual cost impact of the federal law. Thus, it seems clear that the *nature* of the activity and not its actual *effect* controls. *Id.* at 846, 851. This analysis parallels the logical relationship standard of cases such as *Carter Coal. See* note 48 *supra.*

The throwback to the logical nexus analysis in *Usery* drew a stinging rebuke from Justice Brennan, who argued that abandonment of such doctrines "preserved the integrity" of the Court. *Id.* at 868. Yet, in a subsequent footnote Justice Brennan accurately pinpointed the difficulty a court would have in playing a power-allocation role in commerce clause cases in which the constitutional standard was economic effects. Thus, he noted that the decision not "to rely on the cost of compliance to invalidate this legislation is advisable." *Id.* at 874 n.12. The reason, he observed, is that "[s]uch matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for Congress, not the courts." *Id.* (quoting Oklahoma v. Atkinson Co., 313 U.S. 508, 527 (1941)).

Justice Brennan's insight is important for an understanding of the doctrinal thrust of *Usery.* If the Court is to reestablish a role for itself in limiting federal power under the commerce clause—not a universally shared aspiration, see Choper, *supra* note 51—it necessarily must develop doctrines that do not require a direct confrontation with Congress on empirical questions of degree. Abandonment of *Carter Coal*'s logical nexus approach for the modern "practical effects" or "affecting commerce" standard virtually assured a permissive judicial stance toward expanding federal power. It is extremely difficult for the Court explicitly to second guess a legislative judgment when the standard of review relies upon a judicial reassessment of the very same evidence used by the legislative branch to make its decision. Consequently, a formula that emphasizes practical economic effects is destined to serve as no serious restraint on legislative decisionmaking, since the legislative body will have advantages of legitimacy, because of its political accountability and competency, and because of its ability to gather and assess empirical data.

A standard that turns on the *nature* of the governmental activity allows a potentially broader role for the Court, as in the cases prior to NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The use of a nature or logical relationship standard in *Usery,* therefore, appears to reflect the desire, by at least a bare majority of the Justices, to formulate a standard that would allow the Court a more active, participatory role in defining the breadth of federal power under the commerce clause. In the view of Justice Brennan, this is precisely the wrong direction for the Court, and Professor Choper, *supra* note 51, supports Justice Brennan's stance, arguing that the Court should leave these power-allocation questions entirely to Congress. Professor Choper goes so far as to declare that such questions are improper for adjudication—*i.e.,* that they are committed to the legislative branch.

being premised upon immunities that emanate from the tenth amendment—is unclear.[54] Nevertheless, *Usery* evidences both an abiding concern for the maintenance of an effective state role in the federal system and a willingness by the Court's majority to use its authority to nurture and sustain that role. The opinion by Justice Rehnquist in *Usery* reflects the majority's attempt to breathe new life into commerce clause doctrines of an earlier era in order to restore the Court's role as a check on federal congressional intrusion on certain of the state's undefined essential functions.[55]

On the same day that the Court handed down *Usery,* it decided a much less publicized case involving, not congressional power under the commerce clause, but rather the negative force of the commerce clause on state activity. In *Hughes v. Alexandria Scrap Corp.,*[56] the Court reversed a three-judge district court decision that had held a discriminatory state program unconstitutional.[57] Maryland had adopted a system of paying bounties for abandoned old cars in order to encourage wreckers and processors to clear the highways of junked automobiles. The program made it easier for processors located in the state of Maryland to prove ownership of the vehicles and thereby become eligible to collect the bounty. Out-of-state processors had a much heavier burden of proving ownership, although they were permitted to receive bounties if they furnished extra documentation. The effect of this discrimination was that out-of-state processors lost about one-third of the business they had developed prior to the amendment of the Maryland law.[58]

Following the analysis of the Supreme Court's negative commerce clause cases,[59] the lower court held that this form of economic discrimination warranted strict judicial scrutiny. In reversing, the Supreme Court concluded that the state bounty program was not the kind of activity that the commerce clause was concerned with at all.[60] The Court reasoned that a state purchase program, which

54. *See generally* note 48 *supra.*

55. *See* note 53 *supra.*

56. 426 U.S. 794 (1976).

57. 391 F. Supp. 46 (D. Md. 1975).

58. 426 U.S. at 801 n.11.

59. 391 F. Supp. at 58-63.

60. The Court stated: "We do not believe the Commerce Clause was intended to require independent justification for such action." 426 U.S. at 809.

This definitional approach is consistent with the modes of analysis used by the new majority in considering other constitutional problems. *See* text accompanying notes 389-403 *infra.* First, in the procedural due process area, in decisions commencing with Board of Regents v. Roth, 408 U.S. 564 (1972), the applicability of procedural due process turns on the *nature* of the interest involved rather than on its importance or the degree of harm to it. In *Roth* the Court stated that the procedural due process analysis looks "not to the 'weight'

it analogized to a form of government largesse or subsidy,[61] need not be dispensed beyond the borders of the state any more than welfare payments need be disbursed to nonresidents. The Court claimed that this distinguished the state's bounty program from the taxation

---

but to the *nature* of the interest at stake." *Id.* at 571. Thus if a "liberty" or "property" interest is not within the fourteenth amendment's protection of liberty and property, there is no due process protection at all. This is essentially a threshold analysis in which the Court ignores the potential extent or effect of the deprivation and focuses only on the nature of the interest affected. If the threshold is not met, then due process does not apply.

The new majority has used a similar approach in the area of eighth amendment cruel and unusual punishment. In Ingraham v. Wright, 430 U.S. 651 (1977), the Court concluded that the eighth amendment's bar to cruel and unusual punishment did not apply outside of the criminal process, stating that "an examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." *Id.* at 664. In *Ingraham* the Court refused to apply a cruel and unusual punishment analysis to school disciplinary action where plaintiff claimed that an excessively severe paddling was cruel and unusual punishment in violation of the eighth amendment. The Supreme Court refused to apply any eighth amendment analysis at all, basing its conclusion on the premise that the eighth amendment was inapplicable, in that context, to any form of punishment. This raised an outcry from the four dissenters, speaking through Justice White, who noted that the majority's opinion would leave open the possibility that a teacher could "cut off a child's ear for being late to class" and not violate the eighth amendment, while someone who did the same to a convicted murderer would violate the eighth amendment. *Id.* at 684. The majority rejected this hypothetical as "rhetoric" which "bears no relation to reality or to the issues presented in this case," stating that "[t]he laws of virtually every State forbid the excessive physical punishment of schoolchildren." *Id.* at 670 n.39. The majority's faith in the system leads it to conclude that Justice White's hypothetical is a horrible that is not realistic, but even in the case of such a breach of normalcy, the majority's definitional approach would not allow the Court to act.

The new majority has applied the same definitional approach in at least two other areas. With respect to immigration, in Kleindienst v. Mandell, 408 U.S. 753 (1972), the Court recognized that first amendment interests were at stake in the Justice Department's refusal to grant a visa to a well-known European Marxist academician. Nevertheless, the Court concluded that since the area of immigration was committed to the executive branch, first amendment interests would not be considered at all.

With regard to interpretation of the Voting Rights Act, in Morris v. Gressette, 432 U.S. 491 (1977), the Court held judicial review inapplicable to certain decisions, which thereby were committed to the unreviewable discretion of the attorney general. The potential for abuse of discretion was dismissed in much the same manner as in *Ingraham. See* note 13 *supra.*

Finally, the Court's decision in Imbler v. Pachtman, 424 U.S. 409 (1976), is consistent with this definitional approach. In that case, the Court held that the Civil Rights Act, 42 U.S.C. § 1983, provision that "every person" who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages, was not applicable to a prosecutor acting within the scope of his employment. The Court declined to allow redress out of concern that "if the prosecutor could be made to answer in court each time a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U.S. at 425. *See also* Stump v. Sparkman, 98 S. Ct. 1099 (1978).

The decision in *Hughes,* therefore, conforms to a mode of analysis that has appealed frequently to the ascendant majority.

61. 426 U.S. at 809.

and regulatory cases[62] and declined to apply a commerce clause analysis.[63]

Hughes and *Usery*, in tandem, reflect the Court's solicitude for state prerogatives and are responsive to the overall federalism concerns of the new majority. This Article will examine more thoroughly the recent doctrinal developments in the negative commerce clause area, focusing on both regulatory and taxation cases. It will then contrast the developments in that area, which has been characterized by moderately active judicial intervention in vindicating federal free trade interests, with doctrinal developments in other areas, which reflect deference to state police power regulations and judicial reluctance to intrude on state prerogatives. The Article will next analyze the two trends and discuss their confluence in the Supreme Court's decision in the *Hughes* case. Finally, in the last section, the Article will attempt to determine how these conflicting doctrinal strands can be accommodated in a single specific context. In this regard, the Article will consider the problem posed when a state taxes income derived from municipal bonds issued by out-of-state municipalities while at the same time exempting from income taxation revenues derived from municipal bonds issued by in-state municipalities.

II. NEGATIVE COMMERCE CLAUSE CASES: THE ROLE OF THE COURT

The inclination of state political units to enact laws that favor local economic interests at the expense of interstate commerce has been difficult to suppress.[64] Accordingly, the Supreme Court has been called upon to review numerous forms of state legislation that adversely affect commerce.[65] The Court is asked to apply the commerce clause, in its dormant state, to invalidate parochial economic taxation and regulatory legislation and, simultaneously, to vindicate national interests in the free flow of commerce.[66]

62. *Id.* at 809-10.

63. The Court indicated that when a state acts in its proprietary capacity, entering the market as a purchaser, it acts more like a private party than a governmental unit. When it exercises its regulatory or taxation authority, a state exercises instead its coercive power. Presumably this is the exercise of governmental power at which the commerce clause is aimed. *See* note 60 *supra*. For a potentially interesting antitrust implication when the governmental unit is not the state itself but a local unit of government, see City of Lafayette v. Louisiana Power & Light Co., 98 S. Ct. 1123 (1978). *See generally* Blumstein & Calvani, *supra* note 53.

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

65. For a recent example, see Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. 787 (1978).

66. For early cases applying the commerce clause in its dormant state to state and local legislation, see Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) and Willson v.

At one time, the Court sought to fulfill its responsibility in negative commerce clause cases by determining whether a state's legislation involved a subject proper for state regulation. The answer to that question was often sought in precedent that either upheld or rejected federal power under the commerce clause.[67] Consequently, the problem of accommodating state and federal power arose only in the context of determining which governmental entity had exclusive authority to legislate in an area.[68] The notion that the commerce clause contemplated mutually exclusive jurisdictions had the effect of limiting judicial willingness to permit expansive congressional power because every such expansion of federal authority was achieved at the direct expense of state regulatory authority. Moreover, the issues addressed in the context of congressional power are analytically quite distinct from those that arise in negative commerce clause cases, which involve limitations on state power.[69]

Over time, the Court firmly and finally discarded the exclusive jurisdiction view and adopted a model of concurrent federal and state authority[70]—an idea that had been in existence in an earlier

Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 244 (1829).

67. *See, e.g.*, Shafer v. Farmers Grain Co., 268 U.S. 189 (1925); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Kidd v. Pearson, 128 U.S. 1 (1888).

68. This is the so-called doctrine of dual federalism, which holds that federal and state power exist in separate spheres. A finding of federal power under the commerce clause would automatically prohibit state regulatory activity. Conversely, when state police power action is permitted, federal authority would be nonexistent. For examples of this concern in commerce clause cases, see Carter v. Carter Coal Co., 298 U.S. 238 (1936) and Hammer v. Dagenhart, 247 U.S. 251 (1918) in which the Court stated:

> "When the commerce begins is determined, . . . by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control *to the practical exclusion of the authority of the States*, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States.

247 U.S. at 272-73 (citations omitted) (emphasis supplied).

69. Justice Marshall recently made this point in Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977). Although the case was decided on preemption grounds, Justice Marshall did note that pronouncements made concerning the validity of state laws under the dormant commerce clause are not used interchangeably as statements of law where the issue is the power of Congress to regulate under the commerce clause. *Id.* at 282 n.17.

70. In United States v. Darby, 312 U.S. 100 (1941), the Court indicated that separate sovereign status for states would no longer be a limit on federal power. The Court stated that the tenth amendment "states but a truism" and "has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power . . . ." *Id.* at 124.

In contrast to *Darby*, note the modest rejuvenation of the tenth amendment in National League of Cities v. Usery, 426 U.S. 833 (1976). For a good statement of the current situation in negative commerce clause cases, see Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) and Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

era.[71] Under the concurrent authority approach, the Court has "recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."[72] When state legislation that promotes legitimate local interests "comes into conflict with the Commerce Clause's overriding requirement of a national 'common market,'" the Court must accommodate "the competing national and local interests."[73]

This process of accommodation, in which the Court "[o]ccasionally . . . has candidly undertaken a balancing approach,"[74] implicates the Court in an activist reviewing posture. This role has hardly been uncontroversial. For example, in *Southern Pacific Co. v. Arizona*[75] the Court held unconstitutional a state law that limited the length of trains because of its excessive burden on interstate commerce. In his dissent, Justice Black argued that the danger to railroad employees was a function of train length[76] and that the question whether train length should be regulated in the interest of employee safety required a public policy judgment that balances safety and economic interests.[77] For Justice Black, such balancing of competing values was not "a matter for judicial determination, but one which calls for legislative consideration."[78]

As recently as 1968, Justice Black was able to author an opinion for a unanimous Court, sustaining an Arkansas full-crew law that "specified a minimum number of employees who must serve as part of a train crew . . . ."[79] Justice Black scolded the district court for evaluating the evidence to make an independent determination of the competing state interest in safety and national interests in free trade. Whereas the district court had concluded that "the financial burden of compliance . . . is out of all proportion to the benefit," Justice Black found that the lower court had "indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the commerce clause."[80] To Justice Black, the

71. *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).
72. Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945).
73. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977).
74. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
75. 325 U.S. 761 (1945).
76. *Id.* at 784-85.
77. *Id.* at 789.
78. *Id.* at 794.
79. Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129, 130 (1968).
80. *Id.* at 136.

safety issue was one for resolution by the state legislature.[81]

Despite such decisions as *Firemen*,[82] the Court, at least since 1970,[83] seems to have concluded that an interventionist reviewing posture is mandated in appropriate negative commerce clause cases. Thus, in *Raymond Motor Transportation, Inc. v. Rice*,[84] the Court held invalid under the negative commerce clause a Wisconsin provision that barred double trailers from state highways. The state argued that, under *South Carolina State Highway Department v. Barnwell Bros.*,[85] which upheld state truck width and weight restrictions, the appropriate standard for testing the statute's constitutionality was the rationality of the state's decision, not a weighing of state safety interests against national commerce interests. Acknowledging that language in *Barnwell Bros.* had suggested that "no showing of burden on interstate commerce is sufficient to invalidate local safety regulations in the absence of some element of discrimination against interstate commerce,"[86] Justice Powell nevertheless rejected Wisconsin's position "that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce."[87]

The balancing approach, which is less deferential to state legislative judgments than the rational relation standard, is based upon sound historical precedents that have specifically determined that the Court's role in commerce clause cases can legitimately be more activist than when the Court reviews state police regulation of intrastate activities.[88] Thus, the Court once barred Pennsylvania from prohibiting the transportation of oleomargarine into the state[89] even though it had permitted Pennsylvania to ban the manufacture and distribution of oleomargarine within the state.[90] Similarly, the Court has required preferred treatment for interstate commerce in other situations. For example, in *H.P. Hood & Sons, Inc. v. Du Mond*,[91]

81. *Id.* at 137.

82. 393 U.S. 129 (1968). *See also* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938), in which the Court applied a rational relation test rather than a balancing test. *Id.* at 190-92.

83. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

84. 98 S. Ct. 787 (1978).

85. 303 U.S. 177 (1938).

86. 98 S. Ct. at 795 (quoting Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 528-29 (1959)).

87. 98 S. Ct. at 795.

88. *See* Brown, *supra* note 29.

89. Schollenberger v. Pennsylvania, 171 U.S. 1 (1898).

90. Powell v. Pennsylvania, 127 U.S. 678 (1888).

91. 336 U.S. 525 (1949).

the Court held that New York must permit an interstate milk distributor to open a new receiving depot, despite a refusal by New York officials to issue a license because of the fear of destructive competition. The Court implicitly acknowledged that New York had adequate grounds to regulate the entry of new plants, so if the firm had sold its milk intrastate, the state's authority to refuse the license apparently would have been sustained.[92] The interstate character of the business invoked an extra measure of judicial protection, in effect overriding the state's otherwise legitimate police power regulation.

The *Hood* approach recently was reaffirmed in *Allenberg Cotton Co. v. Pittman*,[93] in which the Court held that Mississippi could not require a Tennessee cotton merchant, who had contracted in advance with Mississippi farmers for the delivery of cotton at harvest time, to qualify to do business in Mississippi.[94] Qualification of foreign corporations presumably provides information to local purchasers about the corporation's financial position and facilitates collection of taxes owed to the state. Such regulation of corporations who do intrastate business[95] or who have localized their operations within a state[96] is concededly permissible, but the Court held that interstate transactions could not be so burdened by state regulation.[97]

92. *Id.* at 529-30.

93. 419 U.S. 20 (1974).

94. *Id.* at 33-34.

95. *See, e.g.*, Eli Lilly & Co. v. Sav-on-Drugs, Inc., 366 U.S. 276 (1961).

96. *See* Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944).

97. The examples of regulatory immunity for interstate businesses are, admittedly, relatively few in number. They are discussed in the text because this form of special treatment is usually overlooked.

On the other hand, there has developed a long line of cases in the taxation area that purported to establish immunity from state taxation. "The doctrine developed . . . that . . . the commerce clause created a tax haven for foreign corporations that conducted an exclusively interstate business, by freeing those corporations of some of the state franchise, license, gross receipts, and sales taxes imposed on intrastate businesses." J. Hellerstein, *supra* note 43, at 335-36. Professor Jerome R. Hellerstein traces the repudiation of the "tax-free haven approach" to the opinion of Justice Stone in Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). This trend "reached a new milestone in 1959 when . . . the Court held for the first time, at least explicitly, that the commerce clause does not debar a state from levying a fairly apportioned net income tax on a foreign corporation that carries on exclusively interstate business in the state." J. Hellerstein, *supra* note 43, at 337-38. The landmark 1959 decision about which Professor Hellerstein writes is Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). Despite the decision in *Northwestern States Portland Cement Co.*, the Court did not eliminate the formalistic approach in certain areas of state taxation. Thus, in Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951), the Court "reaffirmed the highly conceptual distinction between a franchise tax, measured by apportioned net income, as applied to an exclusively interstate business, . . . and an apportioned direct net income tax, which it [had] upheld . . . ." J. Hellerstein, *supra* note 43, at 338.

Recognition of the Court's more interventionist role in commerce clause litigation[98] has also led to the formulation of a doctrine that necessitates stricter judicial scrutiny of state regulatory legislation. One cornerstone of active review is judicial examination of alternatives available to a state that are less intrusive on important constitutionally protected interests.[99] In *Hannibal & St. Joseph Railroad Co. v. Husen*,[100] Missouri forbade all Texas, Mexican, or Indian cattle from entering the state for eight entire months. Although acknowledging the state's legitimate interest in preventing

---

The so-called *Spector* rule drew considerable criticism in the literature. *See, e.g.*, P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 201 (1953) (criticizing Freeman v. Hewit, 329 U.S. 249 (1946)). In 1975, the Court decided two cases that might have provided clarification had they not been decided on narrow grounds. *See generally* W. Hellerstein, *supra* note 43, at 188-92. In 1977, in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), the Court overruled the *Spector* decision, rejecting the previously asserted formalistic distinctions that had had the effect of focusing analysis on "the language or labeling of the statute" rather than "on the real effects . . . upon interstate commerce." L. TRIBE, *supra* note 37, at 345. *See generally* W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426 (1977).

Despite the decision in *Complete Auto Transit*, the Court has not overruled such decisions as Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887), which prohibited a tax on so-called drummers, who entered the state for the purpose of drumming up business for an out-of-state seller. This would still appear to be a formalistic limitation on a state's ability to tax interstate business. Nevertheless, the clear thrust of the *Complete Auto Transit* decision is to reject the view that the commerce clause establishes an "irreducible zone of tax immunity unrelated to its purposes." W. Hellerstein, *supra*, at 1445. The clear implication of *Complete Auto Transit* is that the Court will be looking at economic pragmatism and reducing its emphasis on formalism that "merely obscures the question whether the tax produces a forbidden effect." 430 U.S. at 288. *See generally* L. TRIBE, *supra* note 37, at 344-69. *See also* Department of Revenue v. Association of Wash. Stevedoring Cos., 98 S. Ct. 1388 (1978), in which the Court followed *Complete Auto Transit* and overruled Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937), and Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).

98. Walter Hellerstein suggests that the economic pragmatism approach of *Complete Auto Transit*, 430 U.S. 274 (1977), reflects a less interventionist approach in state taxation matters. W. Hellerstein, *supra* note 97, at 1448. Because of the Court's past active role in invalidating state taxation of interstate commerce, that characterization might be correct. Nevertheless, by adopting a pragmatic approach, the Court inevitably involves itself in a balancing process that necessarily requires some subtle judgmental decisionmaking. In the regulatory area, this balancing approach has resulted in a more interventionist stance on the part of the Court. If the Court does invalidate state taxation under a balancing framework, then the second-guessing of state legislatures will be readily apparent. A sympathetic view of the formalism in the taxation area is that the Court was seeking a vehicle for reducing direct confrontations with legislative judgments, while at the same time establishing parameters for constraining state taxation of interstate business. As Professor Tribe has pointed out, however, "[t]he rule usually meant . . . that the language of a tax statute rather than its effect was determinative; by changing an improper label, a state could often avoid invalidation." L. TRIBE, *supra* note 37, at 345 n.3.

99. *See generally* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

100. 95 U.S. 465 (1877).

diseased cattle from entering, the Court noted that Missouri sought to achieve its objective by an outright prohibition rather than by a more precise form of regulation. Consequently, although health and sanitation laws were deemed permissible, the Court concluded that a state "may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection."[101]

The thread present in *Husen* became a centerpiece in *Dean Milk Co. v. Madison.*[102] The city of Madison had regulated the sale of milk within its jurisdiction in a manner that insulated an important local industry from out-of-state competition. The Court acknowledged the legitimacy of the city's regulatory objectives in promoting sanitary milk production, but invalidated the ordinance on the ground that "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."[103]

Almost twenty years after *Dean Milk,* the Court in 1970 unanimously held that examination of alternatives was an integral part of commerce clause analysis. In *Pike v. Bruce Church, Inc.*,[104] Justice Stewart noted that the extent of the burden of state regulation on commerce that will be tolerated will depend in part on whether the state interest "could be promoted as well with a lesser impact on interstate activities."[105] In *Great Atlantic & Pacific Tea Co. v. Cottrell,*[106] Justice Brennan, writing for a unanimous Court, reemphasized the alternatives language of *Dean Milk* and *Pike* in invalidating a Mississippi reciprocity regulation. He articulated the rationale for examining alternatives as follows:

> Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of "accommodation" of conflicting local and national interests, since any " 'realistic' judgment" whether a given state action "unreasonably" trespasses upon national interests must, of course, consider the "consequences to the state if its action were disallowed."[107]

Accordingly, the Mississippi reciprocity regulation was struck down, in part because "there are means adequate to serve [the state's] interest that are substantially less burdensome on commerce." Given the other "available methods of protecting" the

101. *Id.* at 472.

102. 340 U.S. 349 (1951).

103. *Id.* at 354.

104. 397 U.S. 137 (1970). *But see* Breard v. City of Alexandria, 341 U.S. 622 (1951). *Breard* upheld a so-called Green River ordinance prohibiting door-to-door solicitation of orders to sell goods unless the solicitors were invited by the occupants. The Court in *Breard* refused to apply the alternatives standard of *Dean Milk,* 341 U.S. at 640. *See* note 32 *supra.*

105. 397 U.S. at 142.

106. 424 U.S. 366 (1976).

107. *Id.* at 373.

state's interest, the burden on commerce therefore was unjustifiable.[108] Most recently, in *Hunt v. Washington State Apple Advertising Commission,*[109] Chief Justice Burger for a unanimous Court reaffirmed the relevance of considering alternatives in commerce clause adjudication and went so far as to suggest some[110] as the Court had done in *Dean Milk.*

These cases demonstrate that the Court had adopted a rigorous reviewing posture in appropriate commerce clause cases. In a variety of contexts, it has required states to show that their interests are important, and cannot be otherwise served—an analysis traditionally associated with strict scrutiny. The question then arises in what commerce clause cases will the Court apply this strict reviewing standard?

III. NEGATIVE COMMERCE CLAUSE CASES: AN ANALYTICAL FRAMEWORK

A. Legislative Purpose

Analysis of negative commerce clause issues generally addresses the question of purpose first—that is, whether there is a "legitimate local public interest."[111] The Court has indicated that traditional police power objectives such as promotion of public health and safety are permissible state goals.[112] On the other hand, economic protectionism[113] and the reduction of competition from interstate commerce[114] have been found impermissible state objec-

108. *Id.* at 376-77.

109. 432 U.S. 333 (1977).

110. *Id.* at 354. In *Hunt* the Court considered the constitutionality of a North Carolina statute requiring that all apples sold or shipped into the state in closed containers be marked with no grade designation other than United States Department of Agriculture (U.S.D.A.) gradings or an indication that the apples were not graded. In striking down the statute, Chief Justice Burger suggested that as an alternative method of regulation the state might have required out-of-state growers to indicate the U.S.D.A. grade in addition to any local grading. If that alternative were deemed insufficient, Burger suggested that North Carolina might have banned the use of local grades inferior to corresponding U.S.D.A. categories.

111. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

112. *See* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).

113. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 335-36 (1977); Toomer v. Witsell, 334 U.S. 385, 403-04 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928). In City of Philadelphia v. New Jersey, 98 S. Ct. 2531 (1978), the Court noted that a benign purpose will not shield a facially discriminatory law since "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 2537. Thus, "whatever [the state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently." *Id.*

114. *Compare* Buck v. Kuykendall, 267 U.S. 307 (1925) *with* Bradley v. Public Util.

tives in commerce clause litigation. These impermissible purposes might be manifest on the face of the statute, but such facial bias is now unusual because of the Court's unstinting invalidation of it as violative of commerce clause principles.[115] Despite a statute's "facial neutrality,"[116] however, a plaintiff may still attempt to prove an illegitimate intent to discriminate.[117] A law that appears to promote a legitimate police power purpose may, in fact, be a disguised form of economic protectionism. This point was raised recently when apple growers from the state of Washington alleged that a North Carolina labeling requirement was sponsored by North Carolina's apple producers as an anticompetitive device, and not as a consumer protection measure.[118] Although the Court ultimately did not rely on the impermissibly discriminatory-motivation rationale,[119] it appeared to acknowledge that economic protectionism as a motivating factor would warrant a finding of discrimination.[120]

"[H]owever, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry."[121] When a state regulation or tax promotes legitimate state interests "even-handedly,"[122] the Court, in reaching a balance between state and national interests, will focus on the incidental effects of the regulation or tax. In this regard, the Court will examine both the extent and the nature of the burden on commerce.

B. The Extent of the Burden on Commerce

Focusing on the extent of the burden that will be tolerated, the Court has said that it will consider the "nature of the local interest

Comm'n, 289 U.S. 92 (1933). *See also* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).

115. Voight v. Wright, 141 U.S. 62 (1891); Brimmer v. Rebman, 138 U.S. 78 (1891). *See also* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). *But cf.* Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) (There the Court struck down a Louisiana use tax as applied to labor and overhead costs of assembling goods brought into Louisiana from out of state. Such costs would not have been subject to the tax if they had been incurred within Louisiana; thus an unequal tax burden resulted on in-state and out-of-state manufacturers.).

116. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352 (1977).

117. *Id.* at 350.

118. *Id.* at 352.

119. *Id.* at 352-53.

120. *See* Toomer v. Witsell, 334 U.S. 385 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928). *But see* Breard v. City of Alexandria, 341 U.S. 622 (1951). *See also* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

121. 432 U.S. at 350.

122. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

involved" and the availability of other ways for the state to promote its legitimate policies,[123] but that it will uphold the state law unless the burden on commerce "is clearly excessive in relation to the putative local benefits."[124]

The standard enunciated in such recent cases as *Pike*,[125] *A&P*,[126] and *Hunt*[127] crystallizes and clarifies a forty-year trend in the Supreme Court's prevailing practice. For example, in *South Carolina State Highway Department v. Barnwell Bros.*,[128] the Court sustained South Carolina's width and weight restrictions on trucks despite the effect on commerce, because highway regulation was at the time "so peculiarly of local concern."[129] Dicta in *Barnwell* indicated that the Court would not even enter a balancing process, but this hands-off approach has not withstood the test of time.[130] Rather, the Court has given great weight to state regulatory interests in highway safety, but even in this situation, it has found some burdens on commerce excessive.

Thus in *Bibb v. Navajo Freight Lines, Inc.*,[131] the Court held invalid an Illinois mudguard requirement for trucks that used the state's highways. Although a unanimous Court recognized that the state's authority to regulate the use of its highways was "broad and pervasive"[132] in light of its "peculiarly local nature,"[133] it nevertheless held that the impact on commerce—especially on "interlining"[134]—was significant and that the safety benefit to the state was "too inconclusive,"[135] given the demonstrated burden on commerce. The Court in *Bibb* specifically rejected the language in *Barnwell* that had suggested that "no showing of burden on inter-

123. *Id.*
124. *Id.*
125. *Id.*
126. 424 U.S. at 371-72.
127. 432 U.S. at 350, 354.
128. 303 U.S. 177 (1938).
129. *Id.* at 187.
130. *See* text accompanying note 84 *supra*. *But see* Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129 (1968); American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 517 P.2d 691 (1973).
131. 359 U.S. 520 (1959).
132. *Id.* at 523.
133. *Id.*
134. "Interlining" is a shipping operation that involves the physical transfer of a trailer from one carrier to another without unloading the cargo. It is an especially important process in the trucking of perishables or other cargo that would be spoiled if unloaded before reaching the final destination. The statute in *Bibb* would have substantially interfered with interlining as it would have required the transfer of cargo to a trailer meeting the Illinois standards or the alteration of the trailer. 359 U.S. at 527-28.
135. *Id.* at 530.

state commerce is sufficient to invalidate local safety regulations in absence of some element of discrimination against interstate commerce."[136] *Bibb* was therefore a case in which a nondiscriminatory safety regulation imposed an excessive burden on commerce in violation of the dormant power of the commerce clause.[137] Because of the strong state police power interest in highway safety, due deference was given to local interests but in the end, the national interest in facilitating interstate commerce prevailed. The balancing approach of *Bibb,* which focuses on the extent of the state's benefit and the scope of the burden on commerce, has become the prevailing mode of analysis in negative commerce clause cases.[138]

C. *The Nature of the Subject Matter Regulated (Herein of the Need for Uniformity)*

In addition to examining the *extent* of the burden on commerce posed by a state regulation, the Court will scrutinize the *nature* of subject matter regulated. Since the decision in *Cooley v. Board of Wardens,*[139] the Court has held invalid state regulatory laws that deal with subjects that by their nature require national uniformity of regulation. The Court in *Cooley* noted that some subjects "imperatively" call for a "single uniform rule, operating equally on the commerce of the United States"[140] while others permit diversity in regulation. "Whatever subjects . . . are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."[141]

---

136. *Id.* at 528-29.

137. *See also* the concurring opinion of Justice Blackmun in Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. 787 (1978):

> Nineteen years after *Bibb,* then, the Court has been presented with another of those cases—"few in numher"—in which highway safety regulations unconstitutionally burden interstate commerce. The contour mudflaps law burdened the flow of commerce through Illinois in 1959 just as the length and configuration regulations burden the flow through Wisconsin today. It was shown that neither the mudflaps nor the regulations contributed to highway safety. Giving the same legislative leeway to Wisconsin that the Court gave to Illinois, *Bibb v. Navajo Freight Lines* requires reversal of the judgment of the District Court.

Id. at 799.

138. *See* Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. 787 (1978); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 142 (1970). *But see* Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129 (1968); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

139. 53 U.S. (12 How.) 299 (1851).

140. *Id.* at 319.

141. *Id.*

In *Southern Pacific Co. v. Arizona,*[142] the Court noted that states cannot excessively burden commerce, nor can they "regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority."[143] *Southern Pacific* involved an Arizona statute that as a safety measure limited passenger trains to fourteen cars and freight trains to seventy cars. Although the Court acknowledged the great burden on commerce for trains to uncouple and recouple cars at Arizona's border[144] and noted the slight safety benefit from the law,[145] the decision stressed the "confusion" that would arise "under the varied system of state regulations" and the "unsatisfied need for uniformity in such regulation."[146] A similar concern surfaced in *Bibb*, the mudguard case, in which Justice Douglas observed that conflicting state requirements as to mudguard specifications militated against permitting diversity of treatment,[147] at least absent overriding interests not present in that case.

Although the *Cooley* line of cases is susceptible of a reading that would focus conclusive attention on whether the nature of a particular regulated subject matter is local or national, it seems more likely in the modern context that the need for uniformity criterion will be seen as an important factor weighing in the scales of an overall balancing process.[148]

D. The Nature of the Effect on Commerce (Herein of Discrimination)

A major theme of the Court's negative commerce clause cases has been that discrimination against interstate commerce is extraordinarily disfavored. The problem, however, is to ascertain in a variety of contexts what the scope of the discrimination label is. Professor Ernest Brown once concluded that the term "discrimination" was an abstraction and shibboleth and that "[s]uch symbols and slogans . . . offer not a great deal in either understanding or guidance."[149] Professor Laurence Tribe agrees,

142. 325 U.S. 761 (1945).
143. *Id.* at 767.
144. *Id.* at 775.
145. *Id.* at 779.
146. *Id.* at 774.
147. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529-30 (1959).
148. "The validity of state action affecting interstate commerce must be judged in light of the desirability of permitting diverse responses to local needs and the undesirability of permitting local interference with such uniformity as the unimpeded flow of interstate commerce may require." L. TRIBE, *supra* note 37, at 325 (emphasis omitted).
149. Brown, *supra* note 29, at 228.

arguing that "political unrepresentativeness"[150] is the critical factor that explains the Court's interventionism to protect the national economy—that is, regulations that discriminate against commerce often "result from the inherently limited constituency to which each state or local legislature is accountable . . . ."[151] Discrimination is seen, then, as a "surrogate" criterion, and not "a wholly satisfactory alternative" at that.[152]

Nevertheless, the Court has used the discrimination concept as a means of expressing disapproval of particular kinds of state taxation and regulatory legislation that warrant searching judicial scrutiny. Thus, discriminatory state regulatory[153] and taxation legislation[154] has uniformly received the strictest form of judicial protection in commerce clause cases, in large part because such discrimination is deemed antithetical to the fundamental needs of a national marketplace and because, once permitted, such discrimination is contagious and difficult to cabin. Even in cases such as *South Carolina State Highway Department v. Barnwell Bros.*[155] in which the Court adopted an extremely restrained reviewing posture in determining the validity of a state highway regulation, the Court indicated that discrimination against commerce is extremely disfavored: "The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method."[156]

This prohibition applies to both state regulatory and taxation legislation: "A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a state under the taxing power rather than under manifestations of the police power in the conventional sense."[157] Thus, the Court has endorsed the "fundamental principle" that "no state may, consistent with the

150. L. TRIBE, *supra* note 37, at 327 n.7.

151. *Id.* at 326.

152. *Id.* at 327 n.7. *See also id.* at 326 n.2.

153. *See, e.g.*, City of Philadelphia v. New Jersey, 98 S. Ct. 2531, 2535-36 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); Minnesota v. Barber, 136 U.S. 313 (1890).

154. *See, e.g.*, Walling v. Michigan, 116 U.S. 446 (1886) (tax on nonresidents selling liquor produced out-of-state held invalid); Webber v. Virginia, 103 U.S. 344 (1880) (license tax on sellers of out-of-state merchandise held invalid); Guy v. Baltimore, 100 U.S. 434 (1879) (tax for use of public wharves on vessels laden with goods produced outside Maryland held invalid); Welton v. Missouri, 91 U.S. 275 (1876) (license tax imposed only upon itinerant salesmen who sold goods produced outside the state held invalid). More recently see Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

155. 303 U.S. 177 (1938).

156. *Id.* at 185; *accord*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

157. Freeman v. Hewit, 329 U.S. 249, 252-53 (1946).

Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . .' "[158] Indeed, it seems that in the state taxation situation, the Court has indicated that discrimination against interstate commerce will continue to be prohibited outright, without consideration of competing state interests or the existence of adequate, nondiscriminatory alternatives. In the regulatory context, on the other hand, the Court, though regarding some forms of discrimination as inherently suspect, appears willing nevertheless to consider at least to some extent alleged state regulatory justifications "both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."[159] Presumably, tax measures, which generally are aimed at revenue raising, are not supported by the same type of independent justifications that might support regulatory, police power laws. Consequently, once discrimination is found in a tax case, the matter ends without the need for further weighing of state and national interests. Adequate, nondiscriminatory alternatives always exist in the taxation situation through other forms of revenue raising,[160] and when taxes are designed not only to generate revenue but also to provide economic incentives, other types of direct economic subsidies serve as ready substitutes.[161]

That the Court will carefully scrutinize discriminatory legislation does not answer the threshold question of determining when a tax or regulation is indeed discriminatory, the problem next to be considered. It is analytically convenient at this point to consider separately the regulation and taxation cases, examining the several types of effects on commerce that have been labeled discriminatory.

(1) Regulation Cases

Of the several effects on commerce that can result in the application of a label of discrimination for a regulation, the first and most obvious[162] is purposeful, differential treatment of in-state and out-of-state business. The absence of facial discrimination and an in-

158. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977).

159. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977). *See also* Breard v. City of Alexandria, 341 U.S. 622, 638 (1951) ("Taxation that threatens interstate commerce is . . . bad, . . . hut regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason.")

160. *See generally* Powell, *State Income Taxes and the Commerce Clause*, 31 YALE L.J. 799, 802 (1922).

161. *E.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

162. *See* Section III (A) *supra.*

ability to prove purposeful discrimination, however, are not fatal to a claim of discrimination under the commerce clause. Even if a statute is intended to promote a legitimate police power purpose, the Court can find that it has "the practical effect of not only burdening . . . but also discriminating against"[163] interstate commerce.

Discriminatory effects have taken numerous forms. Preferential treatment for local consumers in the use of natural resources has been held discriminatory and therefore invalid.[164] Similarly, state laws that restrict the export of natural resources have been held impermissible when the practical effect is to harm an out-of-state industry that is dependent on those resources.[165] Thus, the commerce clause places limits on the ability of the states to reserve, for their own use, resources that exist or are produced within their borders.[166]

Discrimination has also been found in the converse situation, in which a state seeks to protect its own industry from external competition.[167] This type of discrimination keeps foreign commerce out of state markets by depriving it of its ability to compete with local business. A classic illustration of this was a Minnesota meat inspection statute, which prohibited the sale of meat without a certificate of inspection from a local health official indicating that the animal was healthy within one day prior to slaughter. The statute effectively barred from the state all sale of meat slaughtered out-of-state. The Court rejected Minnesota's argument that the inspection system was not discriminatory because it was applicable to all meat sellers alike—in-state and out-of-state.[168] Rather, the Court concluded that the effect of the law was to create "discrimination against products and business of other States"[169] in violation of the commerce clause's protection of the rights of nonresidents in reaching the Minnesota market.[170]

163. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977). *See also* City of Philadelphia v. New Jersey, 98 S. Ct. 2531, 2536-37 (1978).

164. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

165. *E.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

166. *See* notes 199 & 478 *infra*. *See, e.g.*, Shafer v. Farmers Grain Co., 268 U.S. 189 (1925); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921). *See* Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976), *aff'd sub nom.* Baldwin v. Fish & Game Comm'n, 98 S. Ct. 1852 (1978). *See also* Bison, *Economic Protection Powers of States Under the Commerce Clause*, 38 GEO. L.J. 590, 613 (1950) (discussing decisions following Geer v. Connecticut, 161 U.S. 519 (1896)).

167. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

168. Minnesota v. Barber, 136 U.S. 313, 326 (1890).

169. *Id.* at 323.

170. *Id.* at 328-29.

Similarly, the Court found the city of Madison's milk inspection ordinances discriminatory in that they "in practical effect exclude[d] from distribution in Madison wholesome milk produced and pasteurized in Illinois."[171] Among other things, the city of Madison prohibited the sale of milk within its jurisdiction unless it came from a source of supply that had been issued a permit after inspection by city officials. The city refused to inspect farms located more than twenty-five miles from the center of Madison, thereby making it impossible for out-of-state processors to sell milk on the Madison market. Although there was no objection to the purpose of the legislation—assuring sanitary operation of milk processing—the Court found the exclusionary effect to be inherently discriminatory.[172] Finding that adequate, nondiscriminatory alternatives existed,[173] the Court concluded that the city could not constitutionally "adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce."[174]

There need not be, however, a total exclusion of out-of-state business in order to support a finding of discrimination against interstate commerce. A competitive disadvantage imposed on an external industry may be enough to warrant a conclusion that discrimination exists. In the case of *Baldwin v. G.A.F. Seelig, Inc.*,[175] for example, an out-of-state producer challenged the New York Milk Control Act, which set minimum prices for all wholesale purchases of milk in New York and which also prohibited the New York sale of any milk bought for less than the price established by law. Although the regulation arguably applied evenhandedly to local and foreign industry, the Court held that the Act worked a discrimination against interstate commerce since the practical result of the pricing arrangement was the mitigation of lower cost competition from out-of-state milk.[176] The minimum wholesale price when added to transportation charges incurred by out-of-state milk, tended "to suppress or to mitigate the consequences of competition between the states," and to "neutralize advantages belonging to the place of origin."[177] The *Baldwin* rationale was later applied by a unanimous

171. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).
172. *Id.* at 354.
173. *Id.* at 354-55.
174. *Id.* at 356.
175. 294 U.S. 511 (1935).
176. *Id.* at 527.
177. *Id.* at 522, 577. *Cf.* Henneford v. Silas Mason Co., 300 U.S. 577 (1937) (A Washington statute placed a 2% tax on retail sales within Washington and imposed a compensating use tax on goods purchased out-of-state and brought into Washington. The Court upheld the

Court to invalidate a state regulatory scheme that in effect reserved to local producers a substantial share of the local milk market by requiring state wholesale milk purchasers to buy a certain proportion of their supply from in-state producers at a fixed price.[178]

Most recently, the Court found an impermissibly discriminatory effect from a North Carolina apple-labeling statute that required all closed containers of apples sold in the state to bear "no grade other than the applicable U.S. grade or standard."[179] The effect was to disadvantage apples grown in the state of Washington, which had developed its own classification system and whose apples were graded in accordance with that scheme. "In all cases, the Washington State grades . . . [were] the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture."[180] The unanimous Court, per Chief Justice Burger, found three forms of discrimination. First, the North Carolina statute raised "the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected."[181] This exacerbated a competitive disadvantage that already existed because of high transportation costs. Second, the North Carolina statute eliminated the advantages to Washington producers of that state's superior inspection and grading system. This effect only harmed the Washington producers, not those in North Carolina.[182] Third, the statute had a "leveling effect which insidiously operate[d] to the advantage of local apple producers."[183] Without the North Carolina restrictions, Washington producers would have had a market advantage when the Washington grade was superior, but the North Carolina statute required a "down grading" that provided the local apple industry "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit."[184]

The Court's unanimous conclusion in *Hunt* is recent evidence that the effects of state regulatory legislation will be carefully examined to determine whether a competitive disadvantage is imposed on foreign competitors. In this regard, it reflects reaffirmation of the

tax despite its practical effect of equalizing competitive advantages among dealers in different states.).

178. Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 377 (1964).
179. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 339 (1977).
180. *Id.* at 336.
181. *Id.* at 351.
182. *Id.* at 352.
183. *Id.* at 351.
184. *Id.* at 352.

Court's commitment to examine the practical economic consequences of state regulatory legislation and to act sternly and decisively against such measures when they advantage local interests at the expense of out-of-state interests.

Another economic effect the Court has viewed "with particular suspicion" results from "statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere."[185] In *Pike v. Bruce Church, Inc.*,[186] the state of Arizona prohibited a cantaloupe grower from transporting uncrated cantaloupes from its Arizona farm to a packing and processing plant located in California. The state claimed that it sought to "promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging,"[187] but the Court struck down the regulation, finding it an unjustifiable burden on commerce. The practical effect of the regulation was to require that the company relocate its packing operation from California to Arizona and construct a new $200,000 packing plant in Arizona. The Court strictly scrutinized this type of effect, noting: "The nature of that burden is, constitutionally, more significant than its extent."[188] For the unanimous Court, Justice Stewart indicated that the nature of the Arizona law's effect made it "virtually *per se* illegal,"[189] justifiable only when "a more compelling state interest" can be shown.[190]

Similarly, in *Toomer v. Witsell*,[191] cited approvingly in *Pike*,[192] the Court held unconstitutional, as a violation of the commerce clause, a South Carolina statute that required owners of shrimp boats licensed to fish in state waters to unload and pack their catch in-state before "shipping or transporting it to another state."[193] The Court noted that, apart from the extensive burden on commerce caused by the statute, there resulted a diversion into South Carolina of "employment and business which might otherwise go to Georgia."[194] The consequence was imposition of an "artificial rigidity"[195] on commerce, advantageous to the regulating state and harmful to competitors. The Court therefore held the statute invalid,[196] despite

185. Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).
186. *Id.*
187. *Id.* at 143.
188. *Id.* at 145.
189. *Id.*
190. *Id.* at 146.
191. 334 U.S. 385 (1948).
192. 397 U.S. at 142, 145.
193. 334 U.S. at 403.
194. *Id.*
195. *Id.* at 404.
196. *Accord*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

the acknowledged interest of the state in collecting a tax[197] and in conserving its shrimp, which earlier cases[198] had held were the property of the state.[199]

In summary, then, discrimination under a traditional negative commerce clause analysis can be found by reason of a number of effects of state regulation on commerce. Clear-cut facial lack of evenhandedness or a finding of discriminatory purpose will support such a finding, but absent these factors, discrimination may be found when the state unduly interferes with the natural function of the market to the disadvantage of politically underrepresented, out-of-state commercial interests. This interference occurs when state regulation gives preferential treatment to local consumers in the use or exploitation of natural resources, when a state seeks to protect its own industry from out-of-state competition by barring or impeding access to the state market, and when a state's regulation has the purpose or effect of pressuring or requiring businesses to relocate within the regulatory state.[200] This concept of discrimination will now be considered in the context of taxation, rather than regulation, cases.

(2) Taxation Cases

In the state taxation area, as in the regulatory field, the Court initially prohibited "direct" taxation on interstate commerce, effectively insulating interstate transactions from state taxation. Over time, this "tax-free haven"[201] approach gave way to the notion that interstate commerce could legitimately be expected to bear its fair share of the costs of running government. This philosophy was articulated in *Western Live Stock v. Bureau of Revenue*[202] as follows: "It was not the purpose of the Commerce Clause to relieve those en-

197. 334 U.S. at 406.

198. *See, e.g.*, Geer v. Connecticut, 161 U.S. 519 (1896).

199. For a recent decision on the problem of discriminating against out-of-state residents with respect to hunting of wildlife, see Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976). The Supreme Court noted probable jurisdiction in that case, *sub nom.* Baldwin v. Fish & Game Comm'n, 429 U.S. 1089 (1977), and has recently affirmed the district court decision, 98 S. Ct. 1852 (1978). *See* note 478 *infra.*

200. *See generally* L. TRIBE, *supra* note 37, at 334. Professor Tribe describes two forms of this relocation phenomenon: "(a) regulations which induce business relocations by *prohibiting exports* of local resources unless certain processes have occurred locally; or (b) regulations which induce business relocations by *prohibiting imports* of out-of-state products unless certain processes have occurred locally."

201. *See* J. Hellerstein, *supra* note 43, at 337.

202. 303 U.S. 250 (1938).

gaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."[203]

By 1959, in the well-known case of *Northwestern States Portland Cement Co. v. Minnesota*,[204] the Court (over Justice Frankfurter's strong dissent) permitted states to tax directly the net income from interstate business. Reflecting the emerging consensus, Justice Clark concluded that "it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within a state."[205] The Court's attention thus turned away from an examination of whether the incidence of a tax fell on interstate commerce directly or incidentally; rather, the Court was concerned with considerations of proper apportionment, the risk of multiple taxation by different states, sufficient relationship between the taxable event and the taxing jurisdiction, and nondiscrimination against interstate commerce. The Court did not expressly overrule *Spector Motor Service v. O'Connor*,[206] which held that states could not tax the privilege of transacting interstate business, but on the same day that it decided *Northwestern States Portland Cement*, the Court clearly began the process of eroding the *Spector* rule by holding that a state could legitimately tax the going-concern value of a business as measured by gross receipts.[207]

The *Spector* standard was premised on "a blanket prohibition against any state taxation imposed directly on an interstate transaction,"[208] and in this regard was fundamentally inconsistent with the underlying theory of *Northwestern States Portland Cement*.[209] In

203. *Id.* at 254 (upholding a state statute taxing gross receipts received from the sale of advertising by a magazine publisher and carrying on business within the state, even though some of the advertisements were obtained from other states and the magazine was circulated to subscribers outside the state). *See* Brown, *supra* note 29. *See also* Colonial Pipeline v. Traigle, 421 U.S. 100, 108 (1975); W. Hellerstein, *supra* note 97.

204. 358 U.S. 450 (1959).

205. *Id.* at 461-62.

206. 340 U.S. 602 (1951).

207. Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959) (*REA* II). There the Court upheld a Virginia tax, levied on an express agency, which was based on a percentage of gross receipts. The Court distinguished its decision in Railway Express Agency v. Virginia, 347 U.S. 359 (1954) (*REA* I) (holding a state tax on gross receipts invalid as a "privilege" tax) on the grounds that the latter Virginia tax was imposed in lieu of other *property* taxes and the use of gross receipts was only part of the formula to reach this end.

208. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 280 (1977).

209. One commentator has stated that "[c]ontinued adherence to *Spector* . . . after *Northwestern States Portland Cement*, cannot be justified." 70 Nw. U. L. Rev. 835, 854 (1975).

Nevertheless, the Court appears to have been willing in the state taxation field to allow doctrines to survive even though in parallel cases their conceptual underpinnings may have

two 1975 decisions, the Court further distinguished *Spector*[210] and finally in 1977 overruled it forthrightly in *Complete Auto Transit, Inc. v. Brady.*[211]

In *Complete Auto Transit,* Mississippi levied what it called a privilege tax on doing business within the state. Complete Auto Transit was a Michigan corporation that transported motor vehicles by motor carrier for General Motors, which assembled the vehicles outside of Mississippi and shipped them by rail into the state. These vehicles then were loaded onto Complete Auto Transit's trucks for transportation from the railhead in Jackson, Mississippi, to the dealers elsewhere in the state.

The Mississippi tax was equal to five percent of the gross income for this transportation and operated much like a sales tax in that Complete Auto Transit was required to add the tax to the gross sales price and to collect it at the time the sales price was collected. For purposes of its analysis, the Court assumed that the transportation was in interstate commerce,[212] but nevertheless upheld the tax, overruling *Spector* explicitly. For a unanimous Court, Justice Blackmun indicated that, with the demise of the philosophical underpinning of *Spector*—that "interstate commerce should enjoy a

been eroded. Thus, the *Spector* rule arose despite the Court's earlier decision in Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948), which appeared to reject the idea that interstate commerce is immune from state taxation and in that sense presaged the Court's subsequent decision in *Northwestern States Portland Cement* about a decade later.

In Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948), the Court rejected a commerce clause challenge to a Mississippi tax imposed on capital used, invested, or employed within Mississippi at the rate of $1.50 per $1,000.00 of the value of the capital used. The tax had been imposed with regard to a national gas pipeline running 135 miles through Mississippi. The corporation owning the pipeline did no intrastate business and had no offices or employees in Mississippi except to the extent necessary to maintain the pipeline. The Court recognized that a state tax may be invalid because levied "upon the *privilege* of doing interstate business within the state," an approach similar to that utilized in *Spector,* but concluded that the Mississippi tax was not a tax on privilege and was valid. *Id.* at 88.

Consequently, even when *Spector* was decided there were cases that seemed to raise questions about the premise on which *Spector* turned. It now seems, however, that the Court has reached a consensus on the vitality of a principle of state taxation and is overruling cases inconsistent with that premise. *See, e.g.,* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (overruling *Spector*); Department of Revenue v. Association of Wash. Stevedoring Cos., 98 S. Ct. 1388 (1978) (overruling Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937) and Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947)).

210. Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975); Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975). For a discussion of these cases, see W. Hellerstein, *supra* note 43, at 149.

211. 430 U.S. 274 (1977).

212. *Id.* at 276 n.4. The Court stated "[t]he Mississippi courts, in upholding the tax, assumed that the transportation is in interstate commerce. For present purposes, we make the same assumption."

sort of 'free trade' immunity from state taxation"[213]—the *Spector* rule had "no relationship to economic realities" and stood "only as a trap for the unwary draftsman."[214] Justice Blackmun therefore concluded that the formalistic *Spector* rule "served only to distract" from the basic inquiry whether the results from a particular tax were "forbidden by the Commerce Clause."[215] "Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned."[216]

In rejecting the *Spector* approach, the Court sought to articulate guidelines that would direct attention to impermissible effects of state taxation and "not the formal language of the tax statute."[217] At three separate places in the *Complete Auto Transit* opinion,[218] Justice Blackmun set forth four factors that were not present in the case. Presumably, had any of these elements been alleged and proved, a prohibited effect would have been demonstrated. The four factors are: (1) a substantial nexus between the taxed activity and the taxing state;[219] (2) fair apportionment of the tax;[220] (3) a fair relation between the amount of the tax and the benefits provided the taxpayer;[221] (4) an absence of discrimination against interstate

213. *Id.* at 278.
214. *Id.* at 279.
215. *Id.* at 285.
216. *Id.* at 288.
217. *Id.* at 279.
218. First, Justice Blackmun indicates

> appellant in its complaint in Chancery Court, did *not* allege that its activity which Mississippi taxes does not have a sufficient nexus with the state; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the state.

Id. at 277-78.

Later, Justice Blackmun indicates, after canvassing some earlier decisions, that those decisions have

> considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against the interstate commerce, and is fairly related to the services provided by the state.

Id. at 279.

Finally, Justice Blackmun notes again that "no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Id.* at 287.

219. *See* note 218 *supra;* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977).

220. *See* note 218 *supra;* L. TRIBE, *supra* note 37, at 367-69. *See generally* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 n.6 (1977), and cases cited therein.

221. *See* note 218 *supra;* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977). *See generally* L. TRIBE, *supra* note 37, at 354-59.

commerce.[222] The Court's emphasis on these factors appears designed to supply guidance for ruling on future commerce clause challenges to state tax legislation. The standards reflect the Court's determination to concentrate on the practical economic consequences of state taxation in reaching an accommodation between state and national interests.

The articulation of the first three criteria, which have much in common with due process notions of fairness and jurisdiction,[223] is very likely to result in a restrained reviewing posture in many state tax cases.[224] This, of course, has been the trend, as state taxing power has gradually increased in the forty years since the *Western Live Stock* decision.[225] The Court has been increasingly sympathetic to the revenue needs of states, provided that adequate jurisdictional and fairness safeguards are maintained.

What remains, however, as a firm judicial commitment, is a willingness to invalidate state tax legislation that discriminates against interstate commerce, the fourth criterion mentioned in *Complete Auto Transit.*[226] Every decision expanding states' taxing power, up to and including *Complete Auto Transit,* has made the bar against discriminatory taxation explicit. Just as the Court reached a unanimous consensus on a set of comprehensive criteria in *Complete Auto Transit,* it was also unanimous during the same 1976-77 term in reaffirming the nondiscrimination principle by invalidating a discriminatory tax.[227]

While the antidiscrimination principle emerges as one of the few certain precepts in the constitutional review of state taxation legislation,[228] the determination of what constitutes discrimination

222. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 335-36 (1977).

223. *See* Shaffer v. Heitner, 433 U.S. 186 (1977), in which a shareholder brought an action against nonresident corporate officers and directors for breach of fiduciary duties and sequestered defendants' property in the state. The statutory situs of the property in the state, it was argued, provided a basis for the *quasi in rem* jurisdiction of the state court. The Supreme Court held that (1) property unrelated to plaintiff's cause of action cannot alone support state court jurisdiction; the "minimum contacts" rule of International Shoe Co. v. Washington, 326 U.S. 310 (1945), must be met, and (2) the state's assertion of jurisdiction based solely on the statutory presence of defendant's property in the state violated the due process clause of the fourteenth amendment.

224. This view conforms with the view expressed by Walter Hellerstein in his discussion of *Standard Pressed Steel* and *Colonial Pipeline. See* W. Hellerstein, *supra* note 43, at 190-92.

225. *See generally* J. Hellerstein, *supra* note 43.

226. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

227. *Id.*

228. *See generally* Bison, *supra* note 166, at 593; Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business,* 75 HARV. L. REV. 953, 962 n.44 (1962).

has involved a continuing process of definition and has engendered debate and confusion. As in the regulatory area, there is uniform agreement that a tax levied only upon foreign commerce is patently discriminatory and thus invalid. The first cases challenging state taxes on the ground of discrimination, therefore, were instituted against revenue measures that applied only to out-of-state businesses. For example, in the seminal case of *Welton v. Missouri*[229] the Court invalidated a license tax imposed only upon itinerant salesmen who sold goods produced outside the state. The Court in *Welton* found that taxation scheme impermissibly discriminatory, and the *Welton* rule has been uniformly adopted in subsequent decisions.

Since the Court has so consistently set aside taxes laid solely on foreign commerce because of its out-of-state source,[230] few current statutes explicitly single out interstate commerce for taxation while leaving intrastate business tax free.[231] Facial discrimination, however, is not necessary to support a finding of discriminatory effect. A taxing statute that nominally treats all trade alike might discriminate in practical operation against interstate commerce by providing local business with a competitive advantage.[232] Thus, beginning with the decision in *Robbins v. Shelby County Taxing District,*[233] the Court invalidated a series of state "drummer statutes" that laid license taxes on all salesmen soliciting orders for the purchase of goods to be shipped interstate. Although the statutes arguably applied to all solicitors no matter what the source of their merchandise,[234] the Court was sensitive to the need, peculiar to out-of-state manufacturers, for drummers' services.[235] Finding that the statute in fact put salesmen doing business interstate at a disadvantage

229. 91 U.S. 275 (1876).

230. *See generally* L. TRIBE, *supra* note 37, at 355. *See also* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963); Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939).

231. *But see* Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963).

232. *E.g.,* Best & Co. v. Maxwell, 311 U.S. 454 (1940).

233. 120 U.S. 489 (1887).

234. The Tennessee tax set aside in *Robbins* was imposed on "[a]ll drummers, and all persons not having a regular licensed house of business . . . offering for sale or selling goods . . . by sample." *Id.* at 490-91. The Court rejected the argument that the statute applied equally to local and foreign solicitors and thus did not discriminate, noting that in practice, only out-of-state merchants and manufacturers depended upon these agents to sell their wares. *Accord,* Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940).

235. In addition, the statute's apparent purpose—the protection of local merchants from foreign competition—facilitated a finding of discrimination. *See* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 56 n.11 (1940).

when competing with local retail merchants making untaxed sales, the Court made it clear that such discrimination would not be tolerated.[236]

Fifty years later, in *Nippert v. City of Richmond,*[237] the Court reaffirmed its drummer holdings in a case involving a variation on the tax theme in those cases.[238] The city of Richmond had imposed license and earnings taxes on all itinerant solicitors of orders for the sale of goods. Although noting that the tax was applied equally to sellers of in-state and out-of-state goods,[239] the Court recognized that foreign distributors of necessity employed solicitors to sell their products, whereas local manufacturers could rely on sales by untaxed retail merchants. The "varied differences between interstate and local trade"[240] thus made foreign commerce bear an unequal share of the tax burden and rendered the tax unconstitutional.

---

236. *See, e.g.,* Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325 (1925); Davis v. Virginia, 236 U.S. 697 (1915); Stewart v. Michigan, 232 U.S. 665 (1914); Rogers v. Arkansas, 227 U.S. 401 (1913); Crenshaw v. Arkansas, 227 U.S. 389 (1913); Caldwell v. North Carolina, 187 U.S. 622 (1903); Stockard v. Morgan, 185 U.S. 27 (1902); Brennan v. City of Titusville, 153 U.S. 289 (1894); Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Asher v. Texas, 128 U.S. 129 (1888); Corson v. Maryland, 120 U.S. 502 (1887). *See generally* Lockhart, *The Sales Tax in Interstate Commerce,* 52 HARV. L. REV. 617, 621 n.21 (1939).

237. 327 U.S. 416 (1946).

238. In *Nippert,* the city of Richmond contended that the Court's decisions upholding taxing on interstate sales (*e.g.,* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940)) had overruled the drummer cases. The Court, however, held that since the tax could be used to discriminate against commerce, it was invalid despite the expansion of the stato's power to tax interstate sales. *See* West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390 (1957).

It is noteworthy, however, that the rationale of the drummer cases has not been applied to taxes on peddlers, *i.e.,* sellers who travel "from place to place within the state, selling goods that are carried about with the seller for the purpose." Wagner v. City of Covington, 251 U.S. 95, 101 (1919). In his treatise, Professor Tribe notes that so-called "peddler" taxes "are usually upheld unless they are facially discriminatory." L. TRIBE, *supra* note 37, at 357. *But see* Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 395 (1952) ("The 'peddler' cases . . . support state taxation only where no discrimination against interstate commerce appears either upon the face of the tax laws or in their practical operation."). Professor Tribe describes the differing treatment given the peddler and drummer cases by the interaction of two factors:

> (a) the Court has found peddling to be a local activity distinct from any interstate movement which preceded it, and a nondiscriminatory license tax on peddlers is therefore 'a valid exercise of the power of the State over persons and business within its borders;' [Emert v. Missouri, 156 U.S. 296, 322 (1895)]; and
>
> (b) while drummers have been assumed to compete with local retail merchants operating from fixed locations [citation omitted], the Court has concluded [citation omitted] that peddlers ordinarily compete with other peddlers, so that a tax structure not discriminating among peddlers may be assumed not to discriminate at all.

L. TRIBE, *supra* note 37, at 357-58.

239. In this regard, *Nippert* is distinguishable from the drummer cases since in those cases the tax levied applied only to sellers whose merchandise came from outside the state.

240. 327 U.S. at 432.

In determining whether a discriminatory impact exists, the Court has compared the effect of a tax on out-of-state salesmen with the existing tax on their competition, local retail merchants. Thus, in *Best & Company v. Maxwell,*[241] the Court examined a North Carolina statute that imposed a 250 dollar tax upon "persons soliciting sales by display of samples in a hotel room."[242] In practical operation this tax applied only to sellers of foreign goods, and since local retailers were charged only one dollar each year for the privilege of doing business, the Court held the solicitation tax unconstitutional under the commerce clause.[243] On the other hand, the use tax now commonly imposed on interstate sales to state residents has been upheld only because such taxes are designed to achieve parity between local and out-of-state sellers.[244] Although the use tax is directed specifically at interstate sales, the Court has concluded that it does not discriminate against interstate commerce, but merely balances the sales tax burden on local transactions with an equal burden on out-of-state acquisitions.[245] Since "equality is the theme of the statutes,"[246] the use tax system has withstood constitutional attack.[247]

---

241. 311 U.S. 454 (1940).

242. *Id.* at 455.

243. *See* Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952). In that case, a privilege tax imposed upon each person soliciting business for an out-of-state laundry was held to violate the commerce clause because laundries not licensed in-state paid a tax of $50 per truck. Seen as a tax on the solicitation of interstate business, the tax fell under the drummer cases. Seen as a peddler case, however, see note 238 *supra,* the tax was held invalid as discriminatory since the $50 fee on out-of-state laundry trucks exceeded the $8 per truck fee paid by in-state laundries. *Id.* at 394-95. *See also* West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390 (1957).

244. General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

245. 300 U.S. at 583-84. *See also* Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969); Alaska v. Arctic Maid, 366 U.S. 199 (1961) (Court upheld state tax statutes that on their faces discriminated against interstate commerce on the ground that local commerce was subjected to an equivalent tax). In *Dunbar-Stanley,* the Court upheld a $5 per week tax on itinerant photegraphers. Since Alabama photographers operating at a fixed location paid an annual privilege tax of from $5 to $25, a North Carolina photographic firm that sent agents into Alabama periodically failed to show that any transient photographers paid more than the in-state license fee.

In *Arctic Maid,* the Court upheld a 4% tax on out-of-state salmon freezer ships that took salmon from Alaska to other states for canning. Since the freezer ships were competitive with Alaska canneries, which paid a 6% tax on all salmon they processed, the tax was held to be nondiscriminatory.

246. Henneford v. Silas Mason Co., 300 U.S. 577, 583 (1937).

247. In National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977), the Supreme Court recently restated the reasons for upholding sales-use tax schemes. The Court noted:

> All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the

While an evenhanded tax may inadvertently place a heavier burden on out-of-state than on in-state concerns and still not violate the commerce clause,[248] it is nevertheless axiomatic that the Constitution will not tolerate discrimination against interstate commerce. Thus the sales-use-tax system in *Halliburton Oil Well Co. v. Reily*[249] was declared unconstitutional, not because the system itself was objectionable, but because the tax as drafted was discriminatory. The Louisiana use tax was applied to the full value of a manufacturer-user's equipment that was produced in another state and subsequently used in Louisiana. Had the manufacturer constructed his equipment in Louisiana, its labor and shop overhead costs would have been excluded from the use tax base, so that the manufacturer would have paid tax only on the materials used to assemble the equipment. Recognizing that the provision favored the local manufacturer-user over his out-of-state counterpart, the Court found no adequate justification for the discrepancy and thus set the tax aside.[250] The Court also found that the sales-use pattern contained a more blatant form of discrimination against interstate commerce, because as Louisiana "baldy admitted,"[251] the use tax applied to products purchased in "isolated sales"[252] that were exempted from the sales tax.[253] The Court held that the discriminatory exemption made local isolated sales more attractive to Louisiana purchasers than the same sales accomplished out-of-state. Finding no justification[254] for this discrimination, the Court refused to allow

sales tax on a competitive parity with out-of-state retailers exempt from the sales tax [citation omitted]. The constitutionality of such state schemes is settled.

Id. at 555.

248. For example, the Court intimated in *Silas Mason* that a state need not provide a credit for sales tax paid to other states in order to preserve the constitutionality of its system. 300 U.S. at 587 (1937). *See* Note, *Problems Arising from Henneford v. Silas Mason Co.*, 51 HARV. L. REV. 130, 132 (1937).

249. 373 U.S. 64 (1963).

250. The Court rejected the contention that, because the foreign manufacturer-user was treated the same as the local retail purchaser of the oil well servicing equipment, the tax was not discriminatory. Since the in-state manufacturer-user, the local entity most similarly situated to the plaintiff, enjoyed a tax advantage (the exclusion of labor and shop overhead costs) not provided the plaintiff, the tax was unconstitutional.

251. 373 U.S. at 73.

252. *Id.*

253. The sales tax was levied only on retail sales and exempted purchases from those persons not in the regular business of selling the item in question. The use tax applied to all items purchased in other states and imported to Louisiana and thus did not distinguish between out-of-state isolated and retail sales. *Cf.* State v. Bay Towing & Dredging Co., 265 Ala. 282, 90 So. 2d 743 (1956) (holding that an Alabama exemption for in-state isolated sales was unconstitutional under the commerce clause unless the same exemption was provided for out-of-state sales).

254. Louisiana argued that it granted a sales tax exemption because any item sold in

the mitigation of interstate competition achieved by the isolated sales exemption.

The discrimination issue has most recently been raised in a case involving state taxation of funds moving in the capital market. In *Boston Stock Exchange v. State Tax Commission*,[255] six regional stock exchanges challenged an amendment to New York's transfer tax on the sale of securities.[256] As originally enacted, the statute applied one tax rate to any transaction, a part of which occurred in New York.[257] Thus a deal involving an in-state transfer and an in-state sale was taxed in the same manner as was a transaction in which an in-state transfer followed an out-of-state sale. In response to a complaint from the New York Stock Exchange about competition from regional Exchanges that operated free from transfer taxes, New York amended the statute. Under the amendments the transfer tax was reduced if the taxpayer made his sale within the state.[258] Since most stock is transferred in New York and thus is subject to the transfer tax,[259] the tax reduction for transactions involving New York sales operated to give the investor a financial incentive to sell on the New York Stock Exchange. A unanimous Court struck down the transfer tax as amended, adhering to the fundamental principle that no state may discriminate against interstate commerce. In so doing, the Court articulated a new test for determining whether a

---

an isolated sale already had been subjected to a sales and use tax, and further contended that the use tax on an out-of-state isolated sale likewise could be abated by the amount of any tax previously paid. The state, however, failed to produce any regulation allowing for such reduction of the use tax. 373 U.S. at 74 n.8.

Although the state failed to advance the argument, the Court noted that administrative difficulties in enforcing the taxing measure on out-of-state transactions could not justify a discriminatory exemption since an extension of total exemption would eliminate the collection problems as well as the discrimination against interstate commerce. *Id.* at n.9.

255. 429 U.S. 318 (1977).

256. N.Y. TAX LAW (Consol.) §§ 270 to 270-a (1976). The tax rate imposed depends upon the selling price and the total number of shares sold.

Securities have been recognized as interstate commerce at least since 1946. In the case of Freeman v. Hewit, 329 U.S. 249 (1946), the Court found that an Indiana tax on the proceeds from a sale of securities transacted on the New York Stock Exchange was an impermissible burden on commerce and held: "Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper . . . rather than machines." *Id.* at 259.

257. The tax attached to a transfer transaction if one of the following five elements took place in New York: (1) a sale; (2) an agreement to sell; (3) a memorandum of sale; (4) a delivery; or (5) a transfer. The entire transaction was subject to the tax regardless of how many of the elements occurred in New York. 429 U.S. at 321-22.

258. The amendment placed a $350 ceiling on the tax on any sale made in New York by a resident or nonresident. In addition, residents got a 50% reduction of the tax if they made their sales in-state.

259. 1968 Public Papers of Governor Nelson A. Rockefeller 553, *quoted in* 429 U.S. at 327 n.10.

tax is discriminatory. Under the new standard, if an individual faced with a choice between an in-state and an out-of-state transaction would make his decision without being influenced by the state tax consequences, the tax is nondiscriminatory. Since the New York transfer tax "foreclosed tax-neutral decisions"[260] by offering a tax incentive for keeping business in or bringing business into New York,[261] the Court held the tax wholly inconsistent with the free-trade purpose of the commerce clause. The *Boston Stock Exchange* Court thus established that funds in the capital market, like goods moving in commerce, are resources the state cannot hoard or divert for its own use to the detriment of interstate commerce.

Thus in the area of taxation, as in the field of state regulation, the Court vigilantly has protected interstate commerce against discrimination, be it in the form of a burden imposed only on foreign commerce, or in the form of a disguised competitive advantage for local business. Moreover, in the *Boston Stock Exchange* case, the Court's finding of discrimination was enough. It did not then proceed to evaluate the state's independent interests as it had done in the regulatory context in *Hunt.*[262] In a tax case, discrimination, by itself, appears sufficient to justify invalidation because other, nondiscriminatory means of raising revenue or of providing economic incentives are readily available.

IV. Judicial Interventionism in Differing Contexts: Comparing the Court's Approach in Negative Commerce Clause and Equal Protection Cases

The Court's firm stand in protecting national free-trade interests against excessively burdensome and discriminatory state legislation stands out even more dramatically when juxtaposed with the Court's evolving *weltanschauung* in other areas. Perhaps most striking is the Court's differential standards for proving discrimination in commerce clause and other cases.

Application of the "discrimination" label is important in a commerce clause case because it appears to overcome the presumption of validity that attaches to otherwise legitimate state legislation.[263] Thus, when a state regulates "even-handedly," the statute "will be upheld unless the burden imposed on . . . commerce is

260. 429 U.S. at 331.

261. *Cf.* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Toomer v. Witsell, 334 U.S. 385 (1948).

262. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

263. *See generally id.* at 353.

clearly excessive in relation to the putative local benefits."[264] That is, in balancing state police power interests against national free-trade needs, the Court requires plaintiffs to show either that the national interests are overriding[265] or that the incremental benefits to the state are insufficiently consequential to prevail.[266] Otherwise, a plaintiff cannot show that the burden on commerce is "clearly excessive,"[267] given the local benefits. When, however, discrimination is found in a regulatory measure, the Court reverses the burden so that it "falls on the [s]tate to justify [the discrimination against commerce] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[268] If the state cannot sustain this burden, then its discriminatory statute falls.

In the state taxation situation, the siguificance of a finding of discrimination against commerce is even more consequential. Of the four criteria the Court articulated in *Complete Auto Transit*,[269] only the discrimination factor will involve the Court in active judicial scrutiny of state taxation legislation,[270] and under the analytical framework of the unanimous *Boston Stock Exchange* case,[271] a finding of discrimination is, of itself, fatal in a state taxation case. Unlike the Court's treatment of discrimination in the regulatory context of *Hunt*, the *Boston Stock Exchange* opinion declined to balance state and national interests at all. The only mitigating argument the Court would seriously consider was that no discrimination existed, either because the New York tax was compensatory in nature, and therefore analogous to a "use" tax,[272] or because the effect on commerce would be insignificant.[273] Thus, a finding of

264. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

265. *E.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

266. Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. 787 (1978); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). *Cf.* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (requiring state interests of substantial importance to justify a reciprocity regulation when balanced against the devastating effect on interstate commerce).

267. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

268. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).

269. *See* note 218 *supra*.

270. *See* text accompanying note 224 *supra*.

271. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977). The opinion of the Court was written by Justice White.

272. *Id.* at 331-32.

273. *Id.* at 333-34. The Court rejected the view that geographical rather than economic factors would be the major determinants of where transactions would occur. The Court, however, indicated that its decision would be the same even if geographical factors were important in choosing an exchange on which to transact business:

> Whatever the current inclinations of New York investors, the Clause protects out-of-state businesses from any discriminatory burden on their interstate commercial activi-

discrimination in a commerce clause challenge to a state tax measure is tantamount to a holding of unconstitutionality.

In an analogous area, the Court has been faced with the problem of determining when state legislation, neutral on its face, is racially discriminatory. The "race discrimination" label is important in equal protection cases for much the same reason as the "discrimination against commerce" label is in commerce clause cases—namely, it overcomes the presumption of validity normally associated with state-made classifications.[274] Under modern equal protection doctrine, state-imposed classifications that rely on race —at least to the disadvantage of minorities[275]—are inherently "suspect."[276] This imposes what has been, since the Japanese relocation cases in 1944,[277] an insurmountable burden of justification on states[278] to show that race classifications are necessary to promote compelling state interests.[279]

In the early school desegregation cases,[280] the problem of identifying racial classifications did not arise because Southern Jim Crow

---

ties. Even if the tax is not now the sole cause of New York residents' refusal to trade on out-of-state exchanges, at the very least it reinforces their choice of an in-state exchange and is an inhibiting force to selling out of state; that inhibition is an unconstitutional barrier to the free flow of commerce.

Id. at 334 n.13.

The Court also held that discrimination "between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses . . . is constitutionally impermissible." *Id.* at 335.

274. *See generally Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

275. The argument in so-called affirmative action cases, where race-based classifications are explicit, is that these do not suffer from the same defects as do racial classifications that disadvantage minorities. *See* United Jewish Orgs. v. Carey, 430 U.S. 144, 161-62, 165-68 (1977). *Compare* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976) *with* Regents of Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *aff'd in part, rev'd in part*, 98 S. Ct. 2733 (1978).

276. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

277. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

278. The Court also has developed another strand of the strict scrutiny doctrine. When a state law deprives a person of an interest labeled fundamental, the more searching review also is triggered. At one time, it seemed that this standard, too, would be insurmountable, as Chief Justice Burger once remarked. Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). Subsequent decisions, however, seem to acknowledge that the compelling governmental interest necessary to override the individual interest at stake has been demonstrated. *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974). *Cf.* Roe v. Wade, 410 U.S. 113 (1973) (demonstrating that the state's interest in prohibiting abortions becomes more compelling as the pregnancy progresses).

279. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

280. *See* note 279 *supra*. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

laws were explicitly segregatory on their face.[281] The difficulty came when the Court confronted challenges to statutes that were not explicitly segregatory, but that had a racially disproportionate impact. The discrimination label was important because of the stricter reviewing standard applied to racial classifications. In the seminal decision of *Washington v. Davis,*[282] the Court made clear that before a finding of race discrimination can be sustained, more must be shown than a disproportionate racial impact.[283] Rather, the Court required that a racially discriminatory purpose or intent be proven in order to warrant strict judicial scrutiny:[284] "Disproportionate impact . . . [s]tanding alone . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[285]

In part, the Court's apprehension of an impact or effect test stemmed from the potentially sweeping consequences of such a rule. The Court recited a long laundry list of statutes that might fall under an impact analysis, indicating its dissatisfaction with the implications for greater judicial oversight of legislative and administrative activity.[286] Explicitly, then, and partially for reasons of reticence relating to institutional role, the Court declined to adopt an

281. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 257 (1973) (Rehnquist, J., dissenting). Justice Rehnquist points out the difficulty of proving segregatory intent when a public body performs an official act. The difficulty is increased when the official acts are spread over a number of years and hence a number of different boards. *Id.* at 261-65. He also found fault with the presumption of intent established by the majority, calling it "the product of judicial fiat" and akin to a "principle of 'taint,' found in some primitive legal systems . . . ." *Id.* at 257. *See generally* Blumstein, *Constitutional Perspectives on Governmental Decisions Affecting Human Life and Health,* 40 LAW & CONTEMP. PROB. 231, 289-93 (1976).

282. 426 U.S. 229 (1976).

283. In a rather lengthy footnote in *Davis,* Justice White took the relatively unusual step of disapproving a series of cases that had relied on a theory of disproportionate impact in order to sustain a showing of race discrimination. *Id.* at 244 n.12.

284. The decision in *Washington v. Davis* was presaged in large measure by the Court's earlier decision in *Keyes v. School Dist. No. 1,* in which the Court held that in a northern school desegregation case, intent was the critical factor that had to be shown in order to prove racial discrimination. The school desegregation cases, however, can lend confusion because, where racial discrimination has been proven, the standard applied during the remedies portion of the case is effectiveness rather than purpose. Thus, there is language in cases such as Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and Green v. County School Bd., 391 U.S. 430 (1968), that indicates that if a remedy is not effective then it will be inadequate, even absent the showing of intentional discrimination. The desegregation cases, however, show a clear distinction between the establishment of a substantive violation, where a showing of intent is necessary, and the remedies phase, where effect is the test. *See* Blumstein, *supra* note 281, at 291 n.380.

285. 426 U.S. at 242.

286. 426 U.S. at 248 & n.14.

effect or impact formula for determining the existence of racial discrimination.[287]

This approach is in considerable contrast to the very justification for focusing on effect or impact in determining discrimination in the commerce clause context. While recognizing that facial discrimination and impermissible purpose are disfavored in commerce clause cases, the Court has noted that the absence of such factors "does not end the inquiry." Rather, the Court will examine the practical effects of state legislation even when a state does not "artlessly" disclose "an avowed purpose to discriminate against interstate goods."[288] The very reason for focusing on effect or impact

287. The rule for establishing sex discrimination is analogous to that for proving racial discrimination. *See* Blumstein, *supra* note 281, at 293-97. The key cases are Geduldig v. Aiello, 417 U.S. 484 (1974), and General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (which followed the approach set out in *Geduldig*). In *Geduldig*, the Court sustained California's decision not to include normal pregnancies as covered disabilities within the state-run disability insurance program. The Court rejected the argnment tbat California's exclusion of pregnancy reflected a sex-based classification. Writing for the majority, Justice Stewart concluded that the program drew distinctions between "pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." 417 U.S. at 496 n.20. The Court explained:

> Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Id.

Most recently in City of Los Angeles v. Manhart, 98 S. Ct. 1370 (1978), the Court found impermissible sex discrimination in a pension plan that required female employees to contribute large sums to receive equal pension benefits. The plan was primarily based on mortality tables showing that female employees had greater longevity than male employees and that the total cost of a pension for the average female retiree was greater than for the average male retiree because more montbly payments had to be made to the female. The Court concluded that the antidiscrimination statute, 42 U.S.C. § 2000e-2(a)(1), required that "the existence or nonexistence of 'discrimination' . . . be determined by comparison of . . . individual characteristics." 98 S. Ct. at 1375. Justice Stevens for the majority held that the statutory policy required a "focus on fairness to individuals rather than fairness to classes." *Id.* at 1376.

Despite Justice Blackmun's conclusion that *Manhart* was an erosion of *Geduldig* and *Gilbert*, *id.* at 1384, it seems more plausible to accept the decision in *Manhart* as a vigorous assertion that sex-based classifications cannot easily be justified rather than a retreat from the principles established in *Geduldig* for determining when a classification is in fact sex-based. As Justice Stevens asserted, "the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress bas decided that classifications based on sex, like those based on national origin or race, are unlawful." *Id.* at 1376. Even the dissenters (Chief Justice Burger and Justice Rehnquist) did not seriously challenge the sex-based nature of the classification. Instead, they argued that the classification was justifiable (given the different longevity of men and women) and not explicitly barred by the Act. *Id.* at 1384.

288. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) (quoting Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)).

is that otherwise states would be permitted too much leeway to act in furtherance of parochial interests at the expense of national free trade. Indeed, the Court's doctrinal emphasis assures it of an active role in vindicating federal interests when discrimination against commerce is identified.

The Court's distaste for equal protection interventionism is also reflected in its unwillingness to expand the select list of interests deemed fundamental.[289] Paralleling the development of the suspect classification doctrine, the fundamental interest analysis serves as another vehicle for triggering a more activist judicial role. In *San Antonio Independent School District v. Rodriguez*,[290] a closely divided Court established a restrictive framework for determining what interests would fall within the "inner circle."[291] For a five to four majority, Justice Powell rejected a system whereby the Court would decide on an ad hoc basis which interests were entitled to special treatment. Justice Powell reasoned that decisions concerning the "social or economic importance"[292] of specific interests are legislative judgments, "not the province" of the Supreme Court,[293] and that the balancing of "relative societal significance"[294] would involve the Court in a "legislative role . . . for which the Court lacks both authority and competence."[295] Thus, the "key" to "discovering" whether an interest is fundamental "lies in assessing" whether that interest is "explicitly or implicitly guaranteed by the Constitution."[296] The majority resolutely declined Justice Marshall's invitation to adopt a sliding scale of review, which would have depended in part on the importance of the particular interest at stake.[297]

The type of interest balancing the Court has eschewed in the equal protection area is precisely the kind of function it has performed in negative commerce clause cases. The retrenchment from activism and the circumscription of the inner core of preferred inter-

289. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972) (welfare); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare).

290. 411 U.S. 1 (1973).

291. Coons, Clune, and Sugarman employed the term "inner circle" to refer to those "cases singled out upon substantive grounds for special scrutiny." Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 346 (1969).

292. 411 U.S. at 32.

293. *Id.* at 33.

294. *Id.*

295. *Id.* at 31.

296. *Id.* at 33.

297. *Id.* at 102-03 (Marshall, J., dissenting). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting).

ests in recent equal protection analysis reflect a trend toward deference to state legislative and administrative judgments that does not characterize the commerce clause decisions, especially the recent ones. It seems apparent that, for the majority of Justices, the different institutional role of the Court in protecting national commerce interests sufficiently distinguishes the situations, since the Court has evinced its willingness to intervene aggressively to foreclose economic balkanization.[298]

V. THE NEW FEDERALISM

To this point, I have shown a distinct disinclination on the part of the new, ascendant Supreme Court majority to intrude on what it perceives to be state prerogatives. The Court, in the comity cases, has demonstrated an abiding respect for state court processes and their integrity.[299] These cases also show an unwillingness to permit expansive use of federal equitable powers to remedy perceived invasions of individual rights[300] when implementation would require detailed oversight or restructuring of state government by federal courts.[301] The Court's standing decisions[302] reflect the Court's atti-

298. In addition to the equal protection line of cases, at least two other contrasting examples highlight the relatively activist role the Court has adopted in commerce cases. With respect to comity, the Court has grown increasingly unwilling to intervene when rights can be vindicated through state courts. The seminal case here was Younger v. Harris, 401 U.S. 37 (1971). For examples of later decisions in this line, see Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). *See* L. TRIBE, *supra* note 37, at 152-56; Fiss, *supra* note 1.

Standing is another striking area in which the Court has expressed reservations about an interventionist stance. *See* notes 6 *supra*, & 324 *infra*. Justice Powell has been the most articulate spokesman for the restrictive view. For example, in his concurrence in *United States v. Richardson*, Justice Powell noted that restricting standing reflected a decision to allocate power to a democratic forum of government and away from judicial authority. 418 U.S. 166, 188 (1974). For the majority in *Richardson*, Chief Justice Burger concluded that there was a close relationship between the absence of standing and a finding of political question. He noted that "the absence of any particular individual or class to litigate . . . claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." 418 U.S. at 179.

In Warth v. Seldin, 422 U.S. 490 (1975), the retrenchment from broad standing decisions such as Baker v. Carr, 369 U.S. 186 (1962), Flast v. Cohen, 392 U.S. 83 (1968), and even the more recent decision in United States v. SCRAP, 412 U.S. 669 (1973), is apparent. Professor Tribe has expressed strong objection to the Court's decision in *Warth:* "Nothing in article III, in the canons of sound judicial administration or in the judicial precedents required so harsh and bizarre a result." L. TRIBE, *supra* note 37, at 97. *See also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

299. *See* note 298 *supra*.

300. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976).

301. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977); Milliken v. Bradley, 418 U.S. 717 (1974).

302. *See* note 298 *supra*.

tude that many issues raised by public-interest-type lawsuits are best left resolved by the political process. This theme is found in Chief Justice Burger's opinion for the Court in *United States v. Richardson,* in which he indicated that if, as a result of a narrow standing ruling, nobody could challenge the secret funding of the Central Intelligence Agency, then the matter likely had many characteristics of a political question.[303] Similarly, in *Warth v. Seldin,*[304] Justice Powell noted for the Court the close interrelationship between one's view of standing and one's view of the Court's appropriate institutional role in resolving constitutional disputes.[305] Notions of standing, Justice Powell seemed to argue, were bottomed ultimately in the expansiveness with which one read *Marbury v. Madison.*[306] Without self-imposed limits on access to the courts—not required by the article III case or controversy requirement, but dictated as a matter of prudence or "judicial self-governance"[307]—courts would become excessively involved in deciding "abstract questions of wide public significance" better left to the politically accountable branches of government.[308] The decisions in *Warth* and subsequently in *Simon v. Eastern Kentucky Welfare Rights Organization*[309] give clear evidence of the Court's determination increasingly to remit litigants to the political process for channeling basic value conflict issues.[310]

A. *The* Usery *Case*

The Court's decision in *National League of Cities v. Usery*[311] represents another facet of the recent trend toward defining a new framework for federalism. Unlike the equal protection, comity, and standing cases, in which the Court invoked notions of judicial restraint to support its basic thrust toward federal disengagement, the *Usery* case represents a more dramatic and activistic judicial blow for states' prerogatives within the federal system. In *Usery* the Court held invalid application of the federal Fair Labor Standards Act

303. 418 U.S. 166, 175 (1974).
304. 422 U.S. 490 (1975).
305. *Id.* at 498.
306. 5 U.S. (1 Cranch) 137 (1803).
307. 422 U.S. at 500.
308. *Id.*
309. 426 U.S. 26 (1976).
310. *See, e.g.,* Maher v. Roe, 432 U.S. 464, 479 (1977) ("Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."). *See generally* Note, *supra* note 48, at 1874-78.
311. 426 U.S. 833 (1976).

(FLSA) to almost all public employees. Originally the FLSA had required only that private sector employers pay their employees a minimum hourly wage and one and one-half times their normal rate of pay for work beyond forty hours per week. States and political subdivisions were expressly excluded from coverage until, commencing in 1961, Congress gradually eliminated these exemptions for public sector employers. FLSA coverage for employees of state hospitals, institutions, and schools was upheld in *Maryland v. Wirtz*,[312] and in 1974 Congress broadened FLSA coverage so that public agencies generally were considered employers subject to the provisions of the Act. The *Usery* decision held invalid these amendments and overruled the *Wirtz* decision.

The Supreme Court in *United States v. Darby*[313] had constitutionally endorsed the FLSA in its application to private employers. In *Usery* Justice Rehnquist apparently did not seek to undercut the general authority of Congress, under the commerce clause, to legislate when the means it chooses are "reasonably adapted to the end permitted by the Constitution."[314] The Court found, however, that congressional authority under the commerce clause differs when the federal government deals with private individuals rather than with states as states. Justice Rehnquist said that it would take a "startling restructuring of our federal system" to allow Congress "under its commerce power [to] deal with States as States just as they might deal with private individuals."[315] He noted further that states have "attributes of sovereignty,"[316] which Congress cannot impair.[317] Without any elaboration, Justice Rehnquist concluded

312. 392 U.S. 183 (1968).

313. 312 U.S. 100 (1941).

314. 426 U.S. at 840 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964)).

315. 426 U.S. at 855 n.19. The Court also commented:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not he impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845.

316. *Id.*

317. The *Usery* decision terms the tenth amendment an "affirmative limitation" on the federal commerce power; the holding, however, seems to indicate that there is an absence of federal *authority* under the commerce clause. It is interesting to speculate what the theory of the decision actually is, since the opinion is sufficiently ambiguous to be capable of either interpretation. *See* note 48 *supra;* Note, *supra* note 48, at 1879 n.66. If the holding rests on

that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided when these employees may be called upon to work overtime."[318] The Court went on to determine that these employment decisions are "essential" to the "separate and independent existence"[319] of states within the federal system and that congressional displacement of state decisionmaking authority therefore "would impair the States' 'ability to function effectively in a federal system.' "[320] Accordingly, *Usery* held unconstitutional the FLSA to the extent that it directly displaced the freedom of states "to structure integral operations in areas of traditional governmental functions."[321] In short, under *Usery* "Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[322]

The decision in *Usery* is striking for a number of reasons. It represents the first time in almost forty years that the Court has intervened to protect state sovereignty interests against perceived federal legislative encroachment. By invalidating the FLSA as applied to essential governmental functions, the Court actively asserted its views of federalism in opposition to a contrary congressional determination.[323] In the court-access decisions, especially the standing cases, the Court had invited Congress to change the balance the Court itself had struck when denying access in public-interest litigation.[324] *Usery* constitutes a head-on confrontation with

---

the tenth amendment as an affirmative limitation, then there are broad implications for the war power and spending power—areas of federal authority expressly not reached by the decision. 426 U.S. at 852 n.17. The tenth amendment rationale would imply a broader limitation on federal power in these other areas. *See* Note, *supra* note 48, at 1884 & n.11.

318. 426 U.S. at 845.

319. *Id.* (quoting from Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869), as quoted in Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

320. 426 U.S. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

321. 426 U.S. at 852.

322. *Id.* at 855.

323. Justice Brennan in dissent was particularly critical of this aspect of the majority's decision, since he urged that the states were represented adequately in the political forum of the Congress to protect their own interests in autonomy. *Id.* at 876. *See also* Choper, *supra* note 51, at 1557-60.

324. Justice Powell has become the spokesman for the majority in the standing area. *See* notes 6 & 298 *supra*. His concurrence in United States v. Richardson, 418 U.S. 166, 180 (1974), marked the initial broad formulation of his position on standing. In Warth v. Seldin, 422 U.S. 490 (1975), and in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), Justice Powell spoke for the majority in standing cases. The Powell position, as developed in

a coordinate branch in vindication of aspects of state sovereignty[325]—interposition of a form of state immunity against federal legislative action.[326] *Usery*'s analytical style also appears to reflect

Warth, stresses the distinction between article III standing, which is the constitutional minimum, and prudential standing, which is based on principles of judicial self-restraint. The article III minimum is the "injury in fact" that is articulated in such cases as Baker v. Carr, 369 U.S. 186, 204 (1962). *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970). This is the irreducible minimum; if no injury in fact is found, then Congress cannot impose upon the Court an obligation to entertain the litigation. A failure to meet this article III standard means that there is no "case or controversy" under the terms of article III, and presumably a constitutional amendment would be necessary for adjudication of the case or issues to take place in federal court.

In contrast, the principle of prudential standing contemplates that the litigant could seek redress through Congress. When the Court declines to hear a case for prudential reasons, it essentially invites Congress to augment its authority up to the maximum permitted under article III. The Court's rationale, as articulated by Justice Powell (and earlier by Justice Harlan), is that the judicial branch should be reticent to adjudicate constitutional issues on important subjects by itself because of the risk of a head-on confrontation with the politically accountable branches. Consequently, by inviting Congress to augment the authority of the judiciary, the Court is acting in a more humble role. If it is to be the branch that ultimately decides an important constitutional issue, at least it will have the explicit blessing of the politically accountable branch.

Therefore, the Court's decisions in the standing cases are rather explicitly deferential to the competence and legitimacy of Congress. In essence, the Court enters a dialogue with the legislative branch, inviting it to grant the Court more power as the Congress sees fit—up to the maximum limits imposed by article III. Although the Court in the standing cases has declined to adjudicate issues raised by litigants who seek resolution of a fundamental constitutional question, the Court has not totally foreclosed litigants from a hearing—it has, however, required that the adjudication be blessed by the legislative branch. The *Usery* decision is at quite some odds with the approach in the standing area, since it establishes a judicially-imposed restriction on substantive decisions explicitly made by the Congress itself.

325. In this regard, since the confrontation is between the Court and Congress, the Court's intervention in *Usery* is even more dramatic in some ways than its decision to adjudicate issues of legislative apportionment in Baker v. Carr, 369 U.S. 186 (1962). Indeed, in *Baker*, one of the Court's major arguments was that the intervention was not as dramatic as might appear because there was no direct confrontation between two coordinate branches of the federal government.

326. There is a distinct tone in Justice Rehnquist's opinion that suggests the development of a states' rights counterpart to the individual right of privacy that has flourished in the contraception/abortion line of cases. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The analysis suggests that state decisions concerning the expenditure of tax-raised funds might be designated as a preferred power, subject to special judicial safeguarding. Although not labeled as such, this notion is advanced in modified form in Note, *supra* note 48, at 1888-91. That commentator suggests, in part, that when interests in state autonomy are at stake, a court should require a "clear statement" from Congress that it seeks to impinge on the protected interest. *Id.* at 1889. Moreover, where federal commerce interests and state autonomy interests collide, the proposal is advanced that an accommodation give the "maximum scope to the autonomy interest which is consistent with the national policy or purpose underlying the legislation. When an autonomy interest is implicated, Congress is required to choose the least intrusive means for accomplishing its goals." *Id.* *See* text accompanying notes 416-20 *infra*.

For a very different perspective on the appropriate role of the judiciary in federalism cases, see Choper, *supra* note 51.

a groping on the part of the Court, or at least on the part of Justice Rehnquist, the Court's spokesman on this occasion, in an attempt to rediscover a formula by which the Court can become once again a participant with the Congress in shaping the contours of federal-state relationships. Because the activism of the *Usery* decision (for the protection of state autonomy) has much in common with the Court's relative activism in the negative commerce clause cases (for the protection of national economic interests) further discussion of the analytical style in *Usery* is warranted.

Prior to the New Deal, the Supreme Court had taken an active role in reviewing congressional legislation enacted under the commerce power.[327] Indeed, it was the Court's invalidation of major New Deal initiatives that precipitated the Court-packing controversy during President Roosevelt's second term.[328] Although this direct assault on the Court's integrity failed, the Court itself retreated from its interventionist role, at first perhaps out of an instinct for institutional self-preservation by an individual Justice or two, but later by a transformation from within effectuated by new Roosevelt appointees to the Court. Within a period of only four years, the doctrinal retreat had been dramatic.[329]

Prior to this transformation, one major technique of interventionism was the Court's insistence that federal legislation under the commerce power concern activities having a "logical relationship" or "logical nexus" with interstate commerce.[330] Although earlier cases had sometimes applied a "practical effects" test,[331] which allowed federal regulation of state activities that in the aggregate affected interstate commerce, the Court buttressed its interventionism on the logical nexus standard. Under that theory, practical economic consequences were irrelevant to commerce clause analysis of federal power. Rather, federal authority could only be founded on an asserted logical relationship between the regulated activity and commerce itself.[332] The logical nexus approach allowed the Court a

327. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight Co., 156 U.S. 1 (1895).

328. For a succinct discussion of the Roosevelt administration's Court reorganization plan of 1937, see P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, CONSTITUTIONAL LAW (CASES AND OTHER PROBLEMS) 260-62 (4th ed. 1977).

329. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

330. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936).

331. *E.g.*, Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914).

332. A classic statement of this approach is found in the *Carter Coal* case, in which Justice Sutherland wrote:

> Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or

much greater opportunity for active review because it could reason as well as Congress on logical relationships. When the practical effects test superseded the logical relationship formula,[333] there was considerably less room for judicial intervention since Congress as a fact-finder presumably deserves deference, and the Court as an institution is at a comparative disadvantage in second-guessing Congress on that type of practical economic judgment.[334]

Interestingly, in *Usery* the Court concluded that both the minimum wage and maximum hour components of the FLSA "will im-

---

blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?

298 U.S. at 307-08 (emphasis added). *See* note 53 *supra*.

333. *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

334. The multiplicity of variables that enter into a political or economic judgment call for discretion of a type not easily reviewable by a court. This predictably has led the Court to defer to the judgment of Congress. In this regard, it is no accident that subsequent to the erosion of the logical nexus standard and its replacement by the practical effects test, the Court did not disapprove of federal legislation enacted under the commerce clause for nearly 40 years.

Recognizing that "[j]udicial validation of federal power as against states' rights has often placed the Court at the center of a storm of controversy . . . ." Choper, *supra* note 51, at 1579. Professor Choper argues that the "federal judiciary should not decide constitutional questions respecting the ultimato power of the national government vis-à-vis the states; the constitutional issue whether federal action is beyond the authority of the central government . . . should be treated as nonjusticiable, with final resolution left to the political branches." *Id.* at 1557. Choper is concerned that the Court will use its political capital even when it legitimates "the already-exercised authority of the *Congress* and *President*." *Id.* at 1581. This, for Choper, is the "crowning injustice." *Id.* Professor Choper's suggestion that the Court disengage from such validating decisions stems from his view that judicial intervention to preserve federalism values "is unnecessary to effect the preservation of the constitutional scheme." *Id.* at 1582. The *Usery* decision reflects an attempt on the part of the Court, it seems to me, to develop a doctrine that will permit it to reinvolve itself in federalism issues of federal-state power allocation. In essence, it recognizes the unworkability of the previous standards of review in the commerce clause area for a Court that wishes to play a role in these federalism, power-allocation issues. It has therefore sought a modest return to prior doctrines that permitted a more interventionist judicial posture. Not surprisingly, given his interpretation of the Court's appropriate role in federalism matters, and the Court's track record in that area, Professor Choper recommends that *Usery* be overruled. *Id.* at 1552.

permissibly interfere with the integral governmental functions"[335] of state and local governments. The Supreme Court reviewed *Usery* on appeal from a lower court's sustaining of a motion to dismiss for failure to state a claim upon which relief might be granted.[336] The Court acknowledged that the "actual effects"[337] of the FLSA as applied to state and local governments were a "matter of some dispute among the parties"[338] since the law had not yet gone into effect. Nevertheless, even accepting the federal government's prediction of practical effect, Justice Rehnquist concluded that "particularized assessments of actual impact" were not "crucial to resolution of the issue presented."[339] Rather, the character or nature of the decisions at stake was found determinative. This emphasis on logical relationships—in this case what functions are integral or essential to traditional state and local operations—represents a return to the pre-New Deal approach in commerce clause litigation, an attempt to develop doctrine that would allow greater judicial participation in defining state and federal power relationships.[340] The Court's rejection of the need for "particularized assessments of actual impact" and its reliance instead on the nature of the state authority Congress sought to supersede are reminiscent of the analytical style of earlier interventionist decisions[341]—a doctrinal groping for an appropriate participatory role for the Court in these commerce clause matters.[342]

One other important technique used by the pre-New Deal Court in invalidating federal commerce power legislation tacitly reappears in the *Usery* decision. Since Chief Justice Marshall's early dictum in *McCulloch v. Maryland,*[343] the Court has wavered in determining the permissible use of the commerce power to

335. 426 U.S. at 851.

336. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974).

337. 426 U.S. at 849.

338. *Id.* at 850.

339. *Id.* at 851.

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

341. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936).

342. It is precisely this search for a participatory judicial role that is criticized by Professor Choper, who urges that these federalism issues be declared nonjusticiable. *See* note 334 *supra.*

Justice Brennan's dissent in *Usery* claims that the majority's standard was based on a "manufactured . . . abstraction without substance," 426 U.S. at 860, an "ill-conceived abstraction" at that. *Id.* at 867. He identifies the intellectual roots of Justice Rehnquist's majority opinion in cases such as Carter v. Carter Coal Co., 298 U.S. 238 (1936), and ominously warns that the "eventual abandonment" of those "overly restrictive" cases "spelled defeat for the Court-packing plan, and preserved the integrity of this institution." 426 U.S. at 868. *See* notes 53 & 332 *supra.*

343. 17 U.S. (4 Wheat.) 316, 423 (1819).

achieve general police power objectives. Chief Justice Marshall had asserted that the federal government could not use an enumerated power merely as a pretext for the accomplishment of other, unenumerated general welfare goals. This view stood at the heart of the Court's short-lived decision in *Hammer v. Dagenhart*,[344] in which the Court struck down a federal statute that prohibited the interstate transportation of manufactured goods that had been produced in factories employing child labor. Arguing that Congress could not properly legislate to protect children under any enumerated power, Justice Day found the predicate for federal action lacking since the legislation sought not to regulate commerce, but to "standardize the ages at which children may be employed in mining and manufacturing within the States."[345] That the pretext language of *McCulloch* governed in *Hammer v. Dagenhart* is clear from the dissent of Justice Holmes, who asserted that Congress could promote its own view of public policy "by all the means at its command."[346] By prohibiting interstate transportation, Holmes argued, Congress was acting on the flow of commerce, and its motive or "real" objective should be constitutionally irrelevant.

Some points made in *Usery* implicitly reflect a revival of interest in the pretext notion, widely thought interred by *United States v. Darby*,[347] which overruled *Hammer v. Dagenhart*.[348] This revival is especially apparent in the *Usery* Court's distinction of *Fry v. United States*,[349] which upheld the Economic Stabilization Act of 1970[350] as applied to freeze temporarily the wages and salaries of state and local government employees. The Court found the federal interest in *Fry* more substantial because of the risk of severe inflation.[351] Admittedly, Justice Rehnquist also saw the impact on state functioning as less intrusive,[352] but one must conclude from his opinion that he saw the federal program in *Fry* as embodying weightier federal interests than the police power or general welfare goals promoted by minimum wage and maximum hour legislation.[353] After

344. 247 U.S. 251 (1918).

345. *Id.* at 271-72.

346. *Id.* at 281.

347. 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.").

348. 247 U.S. 251 (1918).

349. 421 U.S. 542 (1975).

350. 12 U.S.C. § 1904 (1976).

351. 426 U.S. at 853.

352. *Id.* ("The means selected were carefully drafted so as not to interfere with the State's freedom beyond a very limited, specific period of time.")

353. Indeed, the Court in *Usery* concluded that *Fry* was "quite consistent" with the

all, nationwide inflation involved macroeconomic considerations that "only collective action by the National Government" might counteract.[354] Implicitly, the Court's distinction of *Fry,* in which Justice Rehnquist dissented,[355] represents a statement about the relative propriety of federal action in the pursuit of national economic policy and in the pursuit of federal notions of fairness in employment relationships. This theme is even more pronounced in the concurring opinion of Justice Blackmun, who would rule differently in such areas as "environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[356]

Thus, the decision in *Usery* is consistent in some ways with the activist trend in negative commerce clause cases because it restores a judicial role in reviewing federal commerce power legislation.[357] It revives an interest in doctrines that in an earlier era allowed for greater judicial participation in defining boundaries of federal and state power. On the other hand, *Usery* conforms to the growing *weltanschauung* of the Court that states need breathing space in which to operate, an area in which their judicial, legislative, and administrative decisions have integrity, prevailing over even federal interests in certain situations.

B. The Hughes *Case*

While *Usery* reflects the Court's renewed interest in establishing bounds on federal authority under the commerce clause, the contemporaneous decision in *Hughes v. Alexandria Scrap Corp.*[358] represents a narrowing of the Court's role in reviewing state actions that arguably discriminate against interstate commerce. *Hughes* is particularly noteworthy because it deals both with the negative commerce clause, an area in which the Court's reviewing posture has been relatively interventionist, and with an innovative state highway beautification program that relied on governmental incentive payments to achieve environmental objectives and that can be

Court's holding. *Id.* On the other hand, the Court explicitly overruled Maryland v. Wirtz, 392 U.S. 183 (1968), which had upheld application of the FLSA to schools and hospitals. Despite the "obvious differences between schools and hospitals involved in *Wirtz,* and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled." 426 U.S. at 855.

354. *Id.* at 853.

355. 421 U.S. at 549.

356. 426 U.S. at 856.

357. *But see* Choper, *supra* note 51, at 1583-87.

358. 426 U.S. 794 (1976).

analogized to a social welfare program. Faced with a potential conflict between the doctrine of its negative commerce clause cases, which raised an almost insuperable presumption against state regulations that discriminated against out-of-state business,[359] and the doctrine of its equal protection cases, which dictated judicial self-restraint in the area of economics and social welfare programs,[360] the Court held that the negative commerce clause analysis was inapplicable because the state's program was not "the kind of action with which the Commerce Clause is concerned."[361]

Hughes involved an attempt by the state of Maryland "to deal with the growing aesthetic problem of abandoned automobiles."[362] A legislatively commissioned study had concluded that "the root of the problem was the existence of bottlenecks in the 'scrap cycle,' the course that a vehicle follows from abandonment to processing into scrap metal for ultimate re-use for steel mills."[363] Apparently, wrecking companies would retain and accumulate vehicles in junkyards because the resale value of their spare parts was greater than the profits that could be attained by delivery of the vehicles to scrap processors.[364] The Maryland statute sought to intervene in this market by altering the economic incentives of wreckers so as to encourage them to deliver the vehicles for reprocessing. The mechanism adopted was a system of bounty payments for the destruction by a licensed processor of any qualified vehicle formerly titled in Maryland.[365] Because of the processors' fears that they would be sued for conversion by vehicle owners who could claim that they had not abandoned their vehicles, the statute provided for appropriate documentation by which a processor could prove clear title and that the processor had to present in order to receive the state bounty.[366] However, these documentation requirements themselves imposed such a significant impediment to the transferability of vehicles that the legislature recognized a separate category of "hulks," vehicles over eight years old and inoperable, for which no documentation was required.[367] Given the features of the market, virtually all bounty-eligible vehicles actually processed were "hulks."[368]

359. *See* Section III(D) *supra.*
360. *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970). *See* Section IV *supra.*
361. 426 U.S. at 805.
362. *Id.* at 796.
363. *Id.*
364. *Id.*
365. *Id.* at 797.
366. *Id.* at 798.
367. *Id.* at 798-99.
368. *Id.* at 800.

As originally enacted, the Maryland program allowed out-of-state processors to be licensed, and seven of the sixteen participating processors were located in Pennsylvania or Virginia.[369] The legislature, however, amended the statute to require title documentation for processors to receive a bounty even for a hulk. This disadvantaged out-of-state processors because in-state processors could claim their bounty by submitting a "simple document in which the person who delivered the hulk certified his own right to it and agreed to indemnify the processor for any third-party claims arising from its destruction."[370] Out-of-state processors, on the other hand, could not rely on such an indemnity agreement; they had to provide the same documentation as was required generally for abandoned vehicles.[371] This differential treatment of out-of-state processors resulted in a "precipitate decline in the number of bounty eligible hulks" supplied to out-of-state processors, primarily because of their inability to compete with in-state processors for hulks from unlicensed wreckers.[372]

The district court granted summary judgment to the processors, finding a violation of the commerce clause.[373] Although recognizing that the effect of the discriminatory amendment was to reduce interstate commerce and to encourage wreckers to deliver hulks to in-state processors, the Supreme Court reversed, rejecting the familiar analytical mode of commerce clause cases and finding that analysis inappropriate under the facts presented.[374]

Writing for the majority, Justice Powell admitted that the district court's commerce clause analysis was "not without force if its basic premise is accepted . . . . [*i.e.*] that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden."[375] Citing a number of its commerce clause cases, however, the Court held them inapplicable because their

> common thread . . . is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. There has been an impact upon

369. *Id.* at 799.
370. *Id.* at 801.
371. *Id.*
372. *Id.* at 801-02.
373. *Id.* at 802. The district court also found the Maryland program to violate the equal protection clause. *Id.* at 810.
374. *Id.* at 805, 807-10.
375. *Id.* at 805.

> the interstate flow of hulks only because, since the 1974 Amendment, Maryland effectively has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland rather than take them outside the State.[376]

For the *Hughes* majority, the entry by the state into the market was not the kind of coercive state action that threatened the unity of the national marketplace. Justice Powell in four separate footnotes[377] emphasized the noncoercive nature of the discriminatory state action. He also acknowledged that "any attempt by a State to restrict or regulate the flow of commerce out of the State" is "suspect," and that "[t]he same principle . . . makes equally suspect a State's similar effort to block or to regulate the flow of commerce into the State."[378] Nevertheless, the Court declined to apply commerce clause doctrine at all because it could not accept the characterization of "Maryland's action as a burden which the Commerce Clause was intended to make suspect."[379]

As a result, the traditional balancing analysis of negative commerce clause cases[380] was not even entered into; the commerce clause did not require "independent justification" for a state's decision to enter the private market for environmental protection reasons.[381] The reason, apparently, was that a state's entry into the private market "as a purchaser, in effect, of a potential article of commerce" does not create a burden on commerce "if the State restricts its trade to its own citizens or businesses within the State."[382] Despite the shift in economic activity into the state—normally considered impermissible when brought about by a state taxation or regulatory provision[383]—Justice Powell found that this was not a "trade barrier of the type forbidden by the Commerce Clause."[384] Hulks for reprocessing remained in-state "in response to market forces, including that exerted by money from the State. Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[385]

---

376. *Id.* at 806.
377. *Id.* at 803 n.13, 806 n.15, 810 n.20, 814 n.24.
378. *Id.* at 808 n.17.
379. *Id.* at 807.
380. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. 787 (1978).
381. 426 U.S. at 809.
382. *Id.* at 808.
383. *See* Boston Stock Exch. v. State Tax. Comm'n, 429 U.S. 318 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).
384. 426 U.S. at 810.
385. *Id.*

Justice Brennan, in dissent, argued persuasively that the majority adopted a "categorical approach . . . which simply carves out an area of state action to which . . . the Commerce Clause has no application."[386] As Justice Brennan noted, the Court did not examine the state interest asserted, "the availability of reasonable and nondiscriminatory methods for achieving the state interest," and then conclude "with a reasoned and considered judgment under all the circumstances of the permissibility of the action."[387] Rather, it "recognized an area of state action absolutely immune from the implied restraints of the Commerce Clause."[388]

This categorizational approach has surfaced in a number of other areas of the Court's jurisprudence as a technique for avoiding a sensitive balancing of interests that established doctrine would require. For example, in *Kleindienst v. Mandel*,[389] the Court rejected a first amendment challenge to a decision by the Attorney General to deny a European Marxist academician a visa to lecture in the United States. Despite acknowledging the existence of a first amendment right to receive information,[390] Justice Blackmun for the majority held that when the executive exercises its statutory authority to deny entry to a foreigner on "facially legitimate" grounds, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[391] The Court's refusal to apply first amendment principles in *Kleindienst* stemmed directly from its concern that courts "would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant . . . . The dangers and undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious."[392] Consequently, the Court concluded that, in the context of immigration, executive decisions which are "facially legitimate and bona fide" are immune from first amendment scrutiny.[393]

The definitional or categorizational approach of *Kleindienst*,

386. *Id.* at 822 n.4.
387. *Id.*
388. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 60 (1976) [hereinafter *1975 Term*].
389. 408 U.S. 753 (1972). *See* note 60 *supra*.
390. *Id.* at 762-64.
391. *Id.* at 770.
392. *Id.* at 769.
393. *Id.* at 770.

which has been used in the areas of procedural due process,[394] prosecutorial immunity,[395] obscenity,[396] defamation,[397] corporal punishment,[398] and possibly others,[399] is precisely the technique used in *Hughes*. The Court found that the interests the state sought to promote, environmental values, were legitimate; however, application of a commerce clause analysis would have required examination of nondiscriminatory alternatives.[400] The *Hughes* Court, of course, never balanced state against national interests, just as the *Kleindienst* Court declined to weigh the governmental interest against that of the audience. Similarly, in the *Kleindienst* context, traditional first amendment doctrine would have necessitated a consideration of whether the governmental interest was of overriding or compelling importance and whether less restrictive alternatives were available to promote it.[401]

The parallels between *Hughes* and such definitional cases as *Kleindienst* are, therefore, clear. The question is what in the context of *Hughes* led the Court to find that the state's action was beyond commerce clause scrutiny, especially when it subsequently held unanimously in *Boston Stock Exchange*[402] that "a tax advantage given to protect local industry is invalid."[403]

The Court's decision in *Hughes* noted that the ultimate state objective was highway beautification, a legitimate environmental goal, and that the discrimination had the reasonable consequence of increasing the chance that payments made under the program would be for cars actually abandoned in Maryland. Under an equal protection analysis, this type of assumption might survive the minimal scrutiny the Court has given claimed inequalities under the fourteenth amendment. Indeed, the Court rejected an equal protection allegation in *Hughes* on the ground that Maryland "reasonably could assume that a hulk destroyed by a non-Maryland processor is more likely to have been abandoned outside Maryland than is a

394. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972) (both cases were decided on the same day as *Kleindienst*).

395. Imbler v. Pachtman, 424 U.S. 409 (1976). *See also* Stump v. Sparkman, 98 S. Ct. 1099 (1978) (judicial immunity).

396. Miller v. California, 413 U.S. 15 (1973).

397. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

398. Ingraham v. Wright, 430 U.S. 651 (1977).

399. *E.g.*, Stone v. Powell, 428 U.S. 465 (1976). *See* note 60 *supra*.

400. 426 U.S. at 805. *See also id.* at 821, 827 (Brennan, J., dissenting).

401. 408 U.S. at 777 (Marshall, J., dissenting).

402. 429 U.S. 318 (1977).

403. Note, *Taxes and Bounties Burdening Interstate Commerce: Distinguishing* Boston Stock Exchange *from* Alexandria Scrap, 34 WASH. & LEE L. REV. 979, 992 (1977).

hulk destroyed by a Maryland processor, and vice versa."[404] The district court had found not a "scintilla of factual support"[405] for this assumption, but in reversing that finding, Justice Powell concluded that "[t]he District Court demanded too much . . . . The State is not compelled to verify logical assumptions with statistical evidence."[406]

While that extraordinarily deferential standard of review may well conform to the equal protection line of cases, it is discordant with the discrimination against commerce cases, which require a more searching scrutiny of reasonably available nondiscriminatory alternatives.[407] The legitimate purpose of the bounty program in *Hughes* is insufficient to distinguish it from cases in which a rigorous commerce clause analysis was applied.[408] Moreover, there is some question in *Hughes* whether the purpose of the challenged amendment was in fact protectionist or environmentalist in character.[409]

Another explanation advanced has relied on the differential market effects that stem from subsidies on the one hand and prohibition or regulation on the other. The emphasis of this argument is on "the nature of the impact on interstate commerce resulting from state subsidies," which is "different from that caused by either prohibitory or regulatory forms of legislation."[410] According to this view,

> [w]here a state acts effectively to foreclose out-of-state firms from competing in its markets through regulations and prohibitions, consumers are denied the opportunity to enjoy the lower prices or better quality which the competitor could otherwise offer. Where a state favors local firms through subsidies or purchasing power, on the other hand, the out-of-state competitor remains free to offer his goods and the resident consumer remains free to prefer the out-of-state firm in his own purchases. . . . Thus, while state interference with interstate commerce through probibitions or regulations actually burdens both consumers and competitors, the only direct burden imposed by a subsidy or purchasing program is the out-of-state company's loss of a relative advantage in competing for the resident market.[411]

From that perspective, one would inquire whether the commerce clause was designed to protect out-of-state competitors even when

404. 426 U.S. at 812.
405. *Id.*
406. *Id.*
407. *Id.* at 805.
408. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).
409. *See generally* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).
410. *1975 Term, supra* note 388, at 60.
411. *Id.* at 61.

the in-state consequences might not be excessive,[412] or whether it is only aimed at providing consumers with the benefits of an unrestrained national market.[413] The outcome of *Hughes* "makes sense only if the narrower, consumer-oriented purpose of the Commerce Clause is adopted,"[414] but this view does not seem consistent with subsequent commerce clause decisions.[415]

Probably the most plausible explanation of the *Hughes* decision can be found in its emphasis on the state's role as purchaser. Justice Brennan objected to reliance on a prior *per curiam*[416] Supreme Court opinion, because in that case the state was purchasing as an ultimate consumer. The Maryland program involved in *Hughes*, however, was a subsidy to achieve environmental goals. Concededly, it was not a direct purchase, as would occur when a state agency decides to buy textbooks from in-state companies, but it did represent a governmental payment to achieve a legitimate police power objective. In this way, the Court was able to draw a parallel between payment of the bounty and other forms of governmental "largesse,"[417] which is paid to promote specified police power goals. Seen this way, the government was pursuing a social and not an economic policy, and surely a state can confine to state residents the class of beneficiaries of its social services system. In *Hughes* the state permitted out-of-state processors to benefit, although at a comparative disadvantage in terms of the documentation requirement. The Court's frequent recitation that the state's action was noncoercive would fit into this analysis, because it would stress the role of the state as provider of funds to promote social policies, not the role of the state as economic regulator through techniques such as taxation, prohibition, and regulation, that are only available to governments.

From this discussion, the question arises, as was suggested by Justice Brennan,[418] whether the federal government would be able to legislate against the type of action taken by Maryland. Justice

412. The validity of the assumption that in-state consumers will not be prejudiced by discrimination against out-of-state competitors is questionable because, presumably, out-of-state competitors stimulate price and quality consciousness among the favored in-state businesses.

413. *1975 Term*, *supra* note 388, at 61.

414. *Id.* at 62.

415. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

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

417. 426 U.S. at 809. *See* note 326 *supra*.

418. *Id.* at 822 n.4.

Powell expressly declined to deal with that issue,[419] but posing it helps place *Hughes* in the context of *Usery*. Since *Hughes* involved expenditure of state funds in pursuit of an important governmental function, it is plausible to conclude that *Usery* could restrict federal authority, especially given the language in *Hughes* that the matter was beyond the purview of the commerce clause. This would suggest a rationale, consistent with *Usery*, that emphasizes the autonomy of states in the expenditure of state monies, at least when state discretion over spending priorities might be jeopardized by a searching application of negative commerce clause principles.[420]

Nevertheless, there is a troublesome disjunction between *Hughes* and *Usery*. The Court's opinion in *Usery* relied heavily on the deferential treatment to which states are entitled under the commerce clause, in part presumably because of their constitutionally mandated roles. Fundamental to this special function, however, is a state's ability to tax and regulate—to use coercive powers—that justifies the kind of solicitude decreed in *Usery*.[421] Yet, the *Hughes* opinion strongly suggests that the commerce clause immunity there conferred was dependent on the use of noncoercive techniques of governmental intervention that pit the state in a role much more like a private party.[422]

In sum, as others have recognized,[423] *Hughes* is a complex case whose significance will be felt only over time.[424] The final section of this Article will attempt to apply the overall commerce clause framework developed in Sections I, II, and III to a specific case of discriminatory taxation—exempting from taxation, income derived from bonds issued by the state itself and in-state municipalities while fully taxing, income derived from bonds issued by comparable governmental units that are located out-of-state. The commerce clause analysis arguably establishes a prima facie case of unconstitutionality for discrimination against out-of-state investments, but the effect of *Hughes* and *Usery* must be considered to determine whether the commerce clause analysis is applicable and, if so, whether the discrimination can be adequately justified.

---

419. *Id.* at 810 n.19.

420. *See* notes 315-17, 326 *supra*.

421. *See generally* Blumstein & Calvani, *supra* note 53.

422. Of course, it is not unreasonable for the Court to emphasize different factors in negative commerce clause cases than in commerce clause cases dealing with the scope of federal power. *See* note 69 *supra* and accompanying text. It is the link suggested by Justice Powell's footnote, 426 U.S. at 810 n.19, however, that raises the troublesome issue.

423. *See, e.g.*, Note, *supra* note 403; *1975 Term*, *supra* note 388, at 56.

424. *See* Friendly, *supra* note 47, at 1033 n.119.

VI. Discriminatory State Income Taxation of Out-of-State Tax-Exempt Bonds

A. *The Problem*

The federal government exempts from federal income taxation income derived from bonds issued by states, municipalities, and certain specified state or local agencies. Although at one time, perhaps, this immunity could have been justified by a sense that exemption of income from state or local governmental entities was a constitutional imperative,[425] the exemption has continued largely out of a federal commitment to help state and local governments borrow funds at subsidized rates.

The tax exemption, as a means of subsidy, has been much criticized because of its distributive effect, advantaging relatively well-to-do, high-tax-bracket taxpayers for whom the tax exemption is an especially attractive investment inducement. In addition to the distributive consequences, critics of the tax exemption argue that this form of subsidy is inefficient since federal revenue foregone through the exemption exceeds in amount the subsidy conferred on state and local governmental units.[426] Despite these policy criticisms,[427] the exemptions have survived, supported politically not only by wealthy loophole-seeking beneficiaries but by state and local governments as well. The principal reason for supporting the tax exemption as a means of subsidizing state and local bond financing, it would seem, is that the major alternative—direct federal subsidy—would entail at least two significant political risks to state and local governments. First, a direct subsidy would be visible, and the funds would flow through the budget and appropriations process in Congress. The magnitude of the subsidy thus would secure additional scrutiny, and those funds would likely be seen more clearly as competitive with other federal expenditures. Second, the tax ex-

425. *See* Collector v. Day, 78 U.S. (11 Wall.) 113, 127 (1870), *overruled in* Graves v. New York, 306 U.S. 466 (1939).

426. *See* Surrey, *Federal Taxation of State and Local Government Obligations*, Tax Pol'y, May-June, 1969, at 3, 11. In 1969 the Treasury estimated that the federal government suffered an annual revenue loss of 2.63 billion dollars, while savings on interest costs to local government amounted to only 1.86 billion. The remaining .77 billion dollars was "leaked" to high bracket taxpayers. In 1971 economists estimated that the exemption lost the Treasury 3.3 billion dollars and the states saved 2.5 billion in interest, thus leaving .8 billion dollars in leakage. *Housing & Urban Development Legislation—1971: Hearings on H.R. 9688 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 92d Cong., 1st Sess. pt. 2, at 852 (1972).

427. *See generally* L. Fitch, Taxing Municipal Bond Income (1950); Note, *The Continuing Debate over the Municipal Bond Exemption: Time for a New Approach by Reformists*, 25 Syracuse L. Rev. 953 (1974).

emption provides for autonomy that a direct subsidy might not. Control over the subsidy rests with the state and local issuers, who determine the amounts to be borrowed, and the interest rates are set by competitive market forces without federal administrative oversight. This system results in minimal federal intrusion, actual or potential, on state decisionmaking with respect to bond expenditures. Moreover, the threat of funds being cut off, the uncertainty and anxiety of annual appropriation, and the risk of substantive review of state expenditure priorities all inhere in the direct subsidy alternative.

In 1976, despite the efficiency and equity criticisms, Congress expanded the tax exemption[428] by providing that a mutual fund may pass through to its shareholders the tax exempt status of the qualified bonds in its portfolio.[429] In response to this incentive, a number of special funds, whose entire portfolios consist of tax-exempt bonds, have been established to take advantage of the provisions of the Tax Reform Act of 1976.[430] The expanded scope of the exemption allows lower-income taxpayers to participate in the tax-exempt market because of the lower initial investment required by such mutual funds and because of their greater risk spreading through diversification.[431]

By spawning the growth of specialized, tax-exempt bond funds, the 1976 revisions of the tax law have highlighted a long-existing problem in the area of state taxation that has received virtually no commentary. For many taxpayers, the tax-exempt feature of certain bonds results not only in immunity from federal income taxation for qualified income, but also in exemption from state income taxation as well. For purposes of personal income taxation, states typically exempt income derived from federally tax-exempt bonds, provided they are issued by the state itself or by some other tax-exempt in-state issuer. States typically do not extend this exemption, however, to income derived from comparable tax-exempt issuers located out of state.[432] This disparity in tax treatment between income derived from in-state sources and that derived out-of-state has always been

428. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1930 (amending I.R.C. § 852(b)(5)(B)).

429. The pass-through of the tax exemption is allowed to any regulated investment company as defined under I.R.C. § 852(a).

430. *See* Wall St. J., Feb. 15, 1977, at 38, col. 1.

431. Some analysts suggest that the attempt to attract small investors has been less than successful. *See, e.g.*, Madrick, *The Municipal Funds Are No Sure Thing*, BUS. WEEK, Nov. 29, 1976, at 60; Lamb, *A Wary Look at Those Tax-Exempt Mutuals*, FORTUNE, Dec. 1976, at 59.

432. *See* 2 CORP. L. GUIDE (CCH) ¶¶ 11,230-31 (1977).

a problem for individual and corporate taxpayers. With the growth of tax-exempt bond funds, however, the disparity of treatment takes on even greater importance because federal law now contemplates the existence of and the participation of financial institutions in the tax-exempt market. Yet, the disparity in treatment between in-state and out-of-state tax-exempt issues poses a real competitive disadvantage to those funds whose portfolios include issues from many states. Income derived through such a fund is likely to be fully or partially taxed by the state of residence of a shareholder, whereas income derived from the purchase of in-state tax-exempt bonds or from the purchase of bond funds which hold exclusively bonds of a single state will be exempt.[433]

Institutionally, however, the problem of establishing even-handed treatment of in-state and out-of-state tax-exempt issues is difficult to resolve. No state, on its own, could act in a nondiscriminatory manner without disadvantanging its tax-exempt issuers because of the current widespread disparity in tax treatment. In this regard, the situation is much like the durational residency requirements for voting that were invalidated by federal statute for federal elections and eventually by the Supreme Court for all elections. In commenting on the need for some federal oversight, Justice Stewart noted that

> [f]ederal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. No State could undertake to guarantee this privilege to its citizens. At most a single State could take steps to resolve that its own laws would not reasonably discriminate against the newly arrived resident. Even this resolve might not remain firm in the face of discriminations perceived as unfair against those of its citizens who moved to other States. Thus, the problem could not be wholly solved by a single State, or even by several States, since every State of new residence and every State of prior residence would have a necessary role to play.[434]

Federal action against durational residency requirements for voting came from both legislative and judicial sources.[435] Realistically, "[i]n the absence of a unanimous interstate compact,"[436] only federal action can terminate the disparity in tax treatment,

433. Some states are adopting the new federal approach of allowing a pass-through of tax exemptions by mutual funds. The in-state/out-of-state disparity is likely to be retained. In Pennsylvania, for example, the state will give a tax exemption to only that portion of a mutual fund dividend representing interest paid the fund on in-state bonds. Letter from Milt Lopus, Pennsylvania Secretary of Revenue, to James F. Blumstein (Mar. 24, 1977) (copy on file with the *Vanderbilt Law Review*).

434. Oregon v. Mitchell, 400 U.S. 112, 286-87 (1970) (Stewart, J., concurring).

435. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Blumstein, *The Supreme Court and Voter Eligibility*, in ISSUES OF ELECTORAL REFORM 33 (R. Carlson ed. 1974).

436. 400 U.S. at 287.

and it is precisely this function that has fallen to the courts in the application of the commerce clause in its dormant state. Indeed, the Court recently has intervened to break down trade barriers that were imposed in order to effectuate a reciprocity agreement between states. The Court concluded that a state cannot bar products from another state even when imposed as a means of promoting greater mutual cooperation and thereby "advancing the identical national interest that is served by the Commerce Clause."[437] Since mutual access is constitutionally compelled and would be judicially enforced, the restriction on entry was an impermissible trade barrier.[438] Thus, the Court has recognized the propriety of and necessity for intervening when national interests are threatened by parochial state concerns, and the case for such intervention is even stronger when only through federal oversight can economic balkanization be thwarted.

While judicial intervention would therefore be appropriate in this setting, the question of the effect of judicially mandated even-handedness must be addressed. States could respond in one of two ways to a constitutional rule of nondiscrimination in taxation of out-of-state bonds that would be tax-exempt if issued by a comparable in-state governmental borrower: they could extend the exemption equally to all out-of-state issuers, or alternatively, they could withdraw the exemption entirely. From the perspective of the tax-exempt bond fund, either solution would be preferable to the current discrimination against out-of-state issues. Naturally, from the perspective of individual and corporate bondholders, the entire elimination of the tax-exempt status for bonds for purposes of state taxation would be a net detriment. On the other hand, if states responded by extending the exemption to out-of-state issuers, these bondholders would be free to search out the best returns in an open market unimpeded by considerations of state tax policy. Only the incentives specifically authorized by federal law—the distinction between taxed and tax-exempt securities—would influence investment choices. Finally, from the perspective of tax-exempt issuers, a state's decision to eliminate the tax exemption potentially could

437. Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 378 (1976).

438. The Court held that "Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement." *Id.* at 379. Moreover, if Mississippi were concerned that Louisiana might unduly burden commerce "by erecting and enforcing economic trade barriers to protect its own producers from competition . . . , the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by . . . challenging Louisiana's actions as violative of the Commerce Clause." *Id.* at 379-80.

reduce the level of subsidy flowing to that governmental borrower. Although this is politically uncertain, states wishing to continue to subsidize borrowing presumably could allocate funds directly to appropriate governmental borrowers to compensate for the higher interest rates they would, of necessity, be forced to pay without the state tax exemption.

It is interesting, also, to speculate about the impact of a nondiscrimination rule on the allocation of funds in the tax-exempt bond market. Under the existing system, a discriminatory state tax exemption is a powerful incentive for investors in high marginal tax brackets—those likely to seek out tax-exempt securities as a source of tax relief—to keep their funds invested in the in-state tax-exempt market. This incentive has the interesting consequence of, in effect, creating a "captive audience" phenomenon for major in-state investors, especially where state marginal tax rates are the highest. Simultaneously, because of the similar discriminatory tax treatment by other states, a strong disincentive develops for out-of-state investors to enter out-of-state tax-exempt markets. One can hypothesize, therefore, that the beneficiaries of the existing system are those states that are capital-rich and that also have high marginal tax rates. The effect of the present arrangement could well be that states with large concentrations of capital are better able to retain those funds for in-state investment. At the same time, states that seek to borrow for public purposes but that do not have a well-developed commercial banking industry must overcome the tax disincentive of the discriminatory taxation of out-of-state tax-exempt securities if they are successfully to attract out-of-state financing for public borrowing. Absent discrimination, relatively capital-scarce states, whose bonds might be more attractive when viewed from a "tax-neutral"[439] perspective, could more easily compete for capital funds concentrated in large commercial states.

Under the present tax regime, states seeking to attract both in-state and out-of-state capital for public projects must sell their securities in two distinct markets—a market enjoying only a federal tax exemption and a market enjoying both federal and state tax exemptions. To the extent that governments seek to attract a significant proportion of out-of-state lenders and to the extent that those lenders face stiff taxation on income derived from such out-of-state lending, the issuers must offer a high enough return to compensate out-of-state investors for the tax disadvantages. Moreover, in offering this higher rate, governmental issuers are required to pay an

439. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977).

inefficient premium to investors from their own state who, presumably, would be willing to lend at a lower rate because of the combined federal and state tax exemption. Therefore, only governmental issuers that feel confident that in-state lenders will comprise the vast bulk of their market will accrue the full measure of benefit from the subsidy built into the existing system. Indeed, assuming the existence of either a nondiscriminatory tax exemption or a system of compensatory subsidization in the face of the elimination of state tax-exempt status across the board, many governmental issuers might well be able to market their securities at a lower interest cost than they now do.[440]

Of course, the effect of imposing a constitutional rule of nondiscrimination is not the only issue to be considered in a constitutional analysis, but it provides an important overview of the problem presented and a background against which to think through the constitutional analysis. The following portions of this section will discuss related case law that arose under other constitutional theories. The prima facie commerce clause case against the discriminatory tax treatment of out-of-state tax-exempt bonds will then be discussed, and in the final subsection, the impact of New Federalism principles, as articulated in *Usery* and particularly in *Hughes*, will be considered.

B. Prior Non-Commerce Clause Case Law

In considering application of the commerce clause to the discriminatory treatment of out-of-state tax-exempt securities, one is immediately struck with the gnawing feeling that the problem—so apparent on its face, albeit exacerbated by the recent tax reform legislation—must have been addressed before. Although courts have dealt with related issues, apparently they have not faced this issue squarely.

In 1881, the Supreme Court faced a related problem in *Bonaparte v. Tax Court*.[441] In *Bonaparte* the Court addressed the question "whether the registered public debt of one State, exempt from taxation by the debtor State, or actually taxed there, is taxable

440. This possibility, of course, would make this a far different situation than *Usery*, in which federally imposed minimum wage and maximum hour requirements would add significantly to government's financial burden. Indeed, this was an important distinction between *Usery* and Fry v. United States, 421 U.S. 542 (1975), which was distinguished but not overruled by *Usery*. *See* National League of Cities v. Usery, 426 U.S. 833, 853 (1976) ("[T]he Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them.").

441. 104 U.S. 592 (1881).

by another State when owned by a resident of the latter State."[442] The taxpayer, a resident of Maryland, held debt obligations of other states and out-of-state municipalities. As part of her agreement with the borrowing states, they had agreed not to tax the debt they created. She argued that Maryland had a duty under the full faith and credit provisions of article IV, section 1, to grant immunity from taxation in recognition of the immunity conferred by the issuing states. The Court rejected that claim, holding that the states are independent and that the issuing state cannot impose a binding obligation on sister states to grant a tax immunity. The Court focused on the relationship between the taxpayer and her state of residence, Maryland:

> All the obligations which rest on the holder of the debt as a resident of the State in which he dwells still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself.[443]

The Court recognized the advantages that a state could accrue from a rule of universal exemption, but it could not find anything in the full faith and credit provision that commanded such a result.

The *Bonaparte* challenge merits consideration only because it involves taxation by one state of a debt instrument of another state. The implications of the commerce clause were never raised or adjudicated in that case, however, and nothing in the opinion reflects an element of discriminatory treatment of out-of-state debt issues. At most, one could extrapolate from the *Bonaparte* case the inference that a state would be entitled to tax income derived from debt issued by other states. The case could reasonably be used as a building block in drawing a conclusion that states need not confer a special, preferential immunity on income derived from debt issued by other states. Although such an immunity might once have been a serious possibility, it is now beyond serious question that, without running afoul of the commerce clause, a state can legitimately tax income derived from debt issued by another state, provided it does so evenhandedly. Beyond that, *Bonaparte* cannot be reasonably pushed.

The question then, more broadly, is whether under the commerce clause disproportionate tax burdens can be levied on residents who invest funds out-of-state. In the contrary situation, the Court apparently will permit some discrimination when the state's actions advantage out-of-state business at the expense of local inter-

442. *Id.* at 594.
443. *Id.* at 595.

ests. Thus, in *Allied Stores of Ohio, Inc. v. Bowers,*[444] the Court sustained an Ohio *ad valorem* tax exemption for the merchandise or agricultural products of nonresidents if held for storage only in a warehouse. The plaintiff, an Ohio corporation, kept a private warehouse where it held stocks of merchandise to be sold in its department stores. When Ohio levied a tax on its warehoused merchandise, plaintiff claimed that the nonresident tax exemption was a violation of equal protection.[445] Not surprisingly, the Court showed great deference to the state's formulation of its tax system.[446] In an equal protection context, the Court could not say that the promotion of commerce within a state was impermissible or arbitrary, and it therefore declined to invalidate the distinction.[447]

Justices Brennan and Harlan noted in their concurrence that cases such as *Wheeling Steel Corp. v. Glander*[448] were distinguishable because in those cases Ohio taxed the property of non-Ohio corporations differently than identical property of Ohio corporations.[449] When, as in *Wheeling,* the legislature is favoring in-state interests, active judicial intervention may be appropriate, but when, as in *Allied Stores,* the aggrieved commercial interest is within the state and can seek legislative redress through the political process, federalism values are not threatened.[450] Of course, the equal protection claim was a natural one to advance in the context in which *Allied Stores* was raised, but the Court's rather chilly response to the argument is not particularly surprising either, especially given subsequent equal protection taxation decisions,[451] which have been characterized by extraordinarily deferential judicial review.

While *Allied Stores* rejected a claim by an in-state corporation of favoritism toward nonresident corporations, the decision in *Madden v. Kentucky*[452] is much closer to the issue under consideration here. In *Madden* a Kentucky resident challenged a Kentucky

444. 358 U.S. 522 (1959).

445. *Id.* at 522-24.

446. "[T]he States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests," provided that they do not impinge "upon the prerogatives of the National Government or violat[e] the guaranties of the Federal Constitution, ..." *Id.* at 526.

447. *See generally* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

448. 337 U.S. 562 (1949).

449. 358 U.S. at 531-33 (Brennan, J. and Harlan, J., concurring).

450. *Id.* at 532-33; *accord,* Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945).

451. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

452. 309 U.S. 83 (1940).

statute that taxed deposits in banks located outside the state at a rate five times greater than comparable taxes on deposits in banks located within the state. Clearly, in-state banks were accorded a form of preferential treatment, but the challenge was not based on commerce clause grounds. Rather, the issues raised were based upon the due process, equal protection, and privileges and immunities clauses of the fourteenth amendment.

With respect to the classification, the Court noted the state's "broad discretion as to classification . . . in the field of taxation"[453] and concluded that the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."[454] In order to overcome this "presumption of constitutionality," a taxpayer was required to demonstrate explicitly "that a classification is a hostile and oppressive discrimination against particular persons and classes."[455] Thus, as in *Allied Stores* and other subsequent cases,[456] the Court in *Madden* refused to interfere under the aegis of due process or equal protection in a state taxation scheme.[457]

The other claim in *Madden*—based on the privileges and immunities clause of the fourteenth amendment—was perfectly plausible when considered in light of the then-recent precedent, *Colgate v. Harvey*.[458] *Colgate* involved a challenge to a Vermont income tax statute that taxed Vermont residents on dividends and interest earned from out-of-state sources, but exempted similar income earned from in-state sources. While rejecting an equal protection claim, the *Colgate* majority held the Vermont taxes invalid as a violation of the privileges and immunities clause of the fourteenth amendment. For the Court, Justice Sutherland held that it was a privilege of national citizenship for a "citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides . . . ."[459] Therefore, "[a] state law prohibiting the

453. *Id.* at 87.

454. *Id.* at 88.

455. *Id.*

456. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

457. It must be remembered that in 1940, when *Madden* was decided, the Court was just repudiating almost fifty years of activist judicial intervention in support of sundry economic interests under the substantive due process doctrine. Its special reluctance to interfere in state legislative judgments in the taxation field was a direct response to the expansive reading of the privileges and immunities clause, considered in the 1935 decision Colgate v. Harvey, 296 U.S. 404 (1935). *See generally* L. TRIBE, *supra* note 37, at 424-25.

458. 296 U.S. 404 (1935).

459. *Id.* at 430.

exercise of any of these rights in another state would . . . be invalid under the Fourteenth Amendment."[460]

The majority opinion in *Colgate* drew a blistering rebuttal from Justice Stone, who was joined in dissent by Justices Brandeis and Cardozo. He labeled as "[f]eeble indeed"[461] an argument based on the fourteenth amendment's "almost forgotten"[462] privileges and immunities provision. Justice Stone argued that the privileges and immunities clause conferred no new rights on citizens and that there were strong reasons not to expand the scope of protection under the clause:

> If its restraint upon state action were extended more than is needful to protect relationships between the citizen and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House* cases [16 Wall. 36], with the decision against enlargement.[463]

As Professor Tribe has observed, Justice Stone "feared that the privileges or immunities clause, as interpreted by the majority, would permit similar treatment of other laws controlling the power of wealth, perhaps even after the substantive due process doctrine itself had passed."[464] In this way, the *Colgate* decision reflected a considerable threat for "providing an additional means [other than substantive due process] for the federal judiciary to review state laws governing property rights."[465] This concern stemmed from Justice Stone's misgiving about the Court's use of substantive due process, an interventionism he saw potentially exacerbated by the fact that *Colgate* was the first (and only) case to hold a state law invalid under the privileges and immunities language of the fourteenth amendment.[466]

The Stone position in *Colgate* focused almost entirely on the risk of judicial limitation on the freedom of states to exercise reasonable taxing discretion as a matter of state or local policy. Although Justice Stone did not appear to question the vitality of the privileges and immunities provision of article IV, section 2, "guaranteeing to the citizens of each state the privileges and immunities of citizens

460. *Id.* at 430-31.
461. *Id.* at 443.
462. *Id.*
463. *Id.* at 445.
464. L. TRIBE, *supra* note 37, at 425.
465. *Id.* at 424.
466. 296 U.S. at 445-46, 445 n.2; L. TRIBE, *supra* note 37, at 425.

in the several states,"[467] he wished to limit the implications of the privileges and immunities of *national* as opposed to *state* citizenship. With respect to the latter, as later expressed in *Toomer v. Witsell,*[468] the article IV, section 2 provision was "designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[469] The situation in *Colgate* was quite different. The Vermont resident was not venturing outside the state, but rather was being taxed by his own state. What Stone objected to was the creation of an immunity from taxation based upon a constitutional privilege. The clear focus was on state power to raise revenue and its ability to ask residents to make a fair contribution to the support of the state's services.

The Stone objection to the creation of a constitutionally based immunity must also be viewed in the context of the state of commerce clause doctrine at the time. *Colgate* arose before the Court's decison in *Western Live Stock,* which adopted the position that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden . . . . 'Even interstate business must pay its way.' "[470] Prior to the evolution in commerce clause thinking and the demise of the dual federalism concept,[471] one could reasonably fear that an expansion of federally protected principles of national citizenship could withdraw power from state taxation or regulation and vest it exclusively in the federal sphere.

The doctrinal concern of the *Colgate* dissent resulted in a rapid overruling of that decision five years later in *Madden v. Kentucky.*[472] For the majority, Justice Reed rejected the argument that the deposit of money in out-of-state banks is a privilege of national citizenship. He emphasized the need for courts to respect the "power of states to manage their own fiscal affairs"[473] and concluded that within constitutional limits "the power of the state over taxation is plenary."[474]

In overruling *Colgate, Madden* focused on the relationships between the state and its own citizens. As noted in earlier sections of this Article, the Court has been reluctant to interfere in these eco-

467. 296 U.S. at 445.
468. 334 U.S. 385 (1948).
469. *Id.* at 395.
470. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).
471. *See* note 68 *supra.*
472. 309 U.S. 83 (1940).
473. *Id.* at 93.
474. *Id.*

nomic relationships when there is a rationale for the state's exercise of discretion, and in *Madden* the differential taxation at least arguably was justified because in-state and out-of-state bank deposits may well have generated different problems and expenses in tax collection.[475] None of the cases, however, focused on the problem of the potential distortion of investment in an interstate securities market that can result from differential tax treatment.[476] The recent decision in the *Boston Stock Exchange* case, its emphasis on the interstate commerce features of the national securities markets, and its holding that discriminatory state taxation that "forecloses tax-neutral [investment] decisions"[477] violates the commerce clause would seem to leave open the commerce clause issue, which would focus upon the economic effect of tax discrimination on the national tax-exempt securities market, not upon the relationships between a state and its own resident taxpayers under a fourteenth amendment framework. For the sake of the ensuing discussion, it is assumed that *Madden* would effectively foreclose a fourteenth amendment challenge. The analysis here will intentionally be restricted to consideration of commerce clause issues as tempered by the New Federalism.[478]

---

475. *Id.* at 89-90.

476. Indeed, the only significant commerce clause point in either *Madden* or *Colgate* is a footnote in *Colgate* that summarily dismisses the commerce clause argument. 296 U.S. at 419 n.2.

477. 429 U.S. at 331.

478. Two other related lines of cases are worthy of mention. They do not seem to bear directly on the commerce clause analysis, but the factual situations are sufficiently parallel to warrant brief consideration. Moreover, the Supreme Court has recently demonstrated renewed interest in cases that touch on these issues, so some discussion is appropriate.

The first line of cases concerns the states' imposition of limitations on employee qualifications and on terms and conditions of employment. For example, in Atkin v. Kansas, 191 U.S. 207 (1903), state law established maximum hours for employees of state and local government and for contractors performing services for state or local government. In upholding the Kansas statute, the Court took pains to emphasize that the issues presented were quite different from those involved when government imposes a maximum hours rule on private sector employees. *Id.* at 218-19. In the public sector context, the Court concluded that no contractual liberty interest was unduly compromised. The Court's perspective was similar to the framework later adopted in *Hughes*—that is, it focused on the state's role as employer and permitted the state as employer to effectuate its public policy. As an employer, the state could prescribe the conditions under which the work would go forward. *Id.* at 224.

The distinction drawn in *Atkin* between public and private sector employees became important in the famous decision two years later of Lochner v. New York, 198 U.S. 45 (1905), in which the Court held invalid a ten-hour daily maximum and a sixty-hour weekly maximum for employment by bakers. Clearly, the public sector versus private sector distinction with regard to employment relationships that later surfaced in *Usery* was important in the economic substantive due process era as well.

Relying on *Atkin* for the proposition that a state can prescribe conditions of employment, the Court held in Heim v. McCall, 239 U.S. 175, 191-93 (1915), that New York could, in public

works projects, limit employment to United States citizens and give preference to citizens of New York State. The Court found *Atkin* controlling and found the distinction between a maximum hours rule and an employee qualifications standard inconsequential, since both situations involved state regulation of employment on state projects.

The public versus private distinction important in *Atkin* (as reflected in *Lochner*) again was paramount in *Heim*. Truax v. Raich, 239 U.S. 33 (1915), was decided just prior to *Heim*. In *Truax* the Court struck down an Arizona law that required private employers with more than five employees to hire eighty percent "qualified electors or native-horn citizens of the United States . . . ." *Id.* at 35. The foreclosure of opportunity to aliens was apparent, and, unlike the situation in *Heim*, there was no special public interest to justify the restriction. *Id.* at 39-40, 43. *See* Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973). *Cf.* Foley v. Connelie, 98 S. Ct. 1067 (1978) (upholding against an equal protection challenge a New York statute requiring state police officers to be United States citizens); McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (upholding a city rule that municipal employees must be residents of the city in which they work).

The state's special interest in employment led in *Atkin* and *Heim* to results that would have been different had the restrictive regulations been applied more generally to the private sector. Of course, both cases raise issues of fair or evenhanded treatment by a state of its residents. In this regard, they are much more closely parallel to *Madden* and serve only to confirm that a fourteenth amendment challenge would be much more difficult to maintain.

The other line of analogous cases involves challenges to state restrictions on the access of out-of-state residents to certain of the state's natural resources. For example, in McCready v. Virginia, 94 U.S. 391 (1876), Virginia prohibited citizens of other states from planting oysters in a stream when its own citizens had that privilege. *Id.* at 394. The Court upheld the statute, basing its decision on the ground that "each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. . . . In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running." *Id.* This notion of ownership led the Court to reject both a privileges and immunities clause (article IV, section 2) and a commerce clause argument. With respect to the privileges and immunities clause, the Court said that citizens of one state "are not invested . . . with any interest in the common property of the citizens of another State." *Id.* at 395. With respect to the commerce clause, the Court held that the "cultivation and production" of oysters did not involve "transportation or exchange of commodities" and was therefore not interstate commerce. *Id.* at 396. *See also* Geer v. Connecticut, 161 U.S. 519 (1896) (upholding a statute prohibiting hunting of certain birds for the purpose of transportation out of state on the theory of common ownership of game).

The decisions in *Geer* and *McCready* were somewhat undermined in cases such as Toomer v. Witsell, 334 U.S. 385 (1948), and Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). In *Toomer*, South Carolina required a license fee of $25 for each shrimp boat owned by a resident and $2500 for each one owned by a nonresident. 334 U.S. at 389. The Court found the discrimination against out-of-state fishermen to be a prima facie violation of the privileges and immunities clause, *id.* at 395-99, and expressly rejected the claim that the "ownership" analogy for shrimp was an exception to coverage of the clause under the facts of that case. Chief Justice Vinson expressed great skepticism about the vitality of the "ownership" or "common property" theory as articulated in *McCready*, indicating that it "is now generally regarded as but a fiction." *Id.* at 402. Although the Court carefully refrained from overruling *McCready*, pointing to distinctions between the cases, it nevertheless concluded that "the *McCready* exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case." *Id.*

In *Takahashi* a California statute that barred the issuance of a commercial fishing license to anyone not eligible for citizenship under federal law was challenged. In a suit brought by a Japanese alien, California claimed it had a special public interest in banning noncitizens from engaging in commercial fishing because its citizens were "the collective owners of fish swimming in the three-mile belt." 334 U.S. at 420. Justice Black acknowledged that *McCready* had been followed in *Geer*, but he also noted that it had been limited in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), which has been cited approvingly in Pike

v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). *See also* Johnson v. Haydel, 278 U.S. 16 (1928). In *Takahashi,* Justice Black concluded that "[t]o put the claim of the State upon title is to lean upon a slender reed." 334 U.S. at 421 (quoting Missouri v. Holland, 252 U.S. 416, 434 (1920)). Skeptical of the ownership concept, the Court held that, assuming the theory was still viable, it was "inadequate" justification for California's discriminatory treatment of aliens. 334 U.S. at 421.

Interestingly, in his concurring opinion in *Toomer v. Witsell,* Justice Frankfurter took issue only with the privileges and immunities analysis of the majority. He preferred to rely exclusively on the commerce clause because of his concern that the majority's approach—regarding any limitation on the privileges and immunities clause as "some unexpressed exception," 334 U.S. at 399, 407—did not treat the privileges and immunities clause in its proper perspective. That is, Justice Frankfurter argued that the privileges and immunities clause must be "read in conjunction with the Tenth Amendment," *id.* at 407, which "presupposes the continued retention by the States of powers that historically belonged to the States, and were not explicitly given to the central government or withdrawn from the States." *Id.* at 407-08. Therefore, while Justice Frankfurter could accept a privileges and immunities doctrine that barred discrimination against nonresidents who seek to compete with a state's residents, he thought it inconceivable that all special relationships between a state and its citizens should be invalidated by the privileges and immunities clause.

Justice Frankfurter, consequently, looked much more favorably on the *McCready* case, which he argued was "not an isolated decision to be looked at askance." *Id.* at 408. For him, it was appropriate for a state to "care for its own in utilizing the bounties of nature within her borders" because it either owns the resources or exercises control for the common good. *Id.* Where the state failed in *Toomer,* however, was in its violation of the commerce clause. *See, e.g.,* Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). *But see* Geer v. Connecticut, 161 U.S. 519 (1896):

> It is one thing to say that a food supply that may be reduced to control by a State for feeding its own people should be only locally consumed. The State has that power and the Privileges-and-Immunities Clause is no restriction upon its exercise. It is a wholly different thing for the State to provide that only its citizens shall be engaged in commerce among the States, even though based on a locally available food supply. That is not the exercise of the basic right of a State to feed and maintain and give enjoyment to its own people. When a State regulates the sending of products across State lines we have commerce among the States as to which State intervention is subordinate to the Commerce Clause.

Toomer v. Witsell, 334 U.S. 385, 409 (1948) (Frankfurter, J., concurring).

The Frankfurter position makes the commerce clause position somewhat distinct from the privileges and immunities argument and suggests that the commerce clause challenge to the discriminatory tax treatment of out-of-state tax-exempt bonds is not prejudiced even by those who would advocate retention of *McCready*'s vitality. Of course, it is true that Justice Frankfurter did not mention *Geer,* which in following *McCready* rejected a commerce clause challenge. And one must concede that *Hughes* seems to draw its intellectual roots (without attribution) at least in part from Justice Frankfurter's opinion in *Toomer,* but transferred to a commerce clause context. The scope of *Hughes* and the impact of the New Federalism in a negative commerce clause context are considered in Section VI (D) *infra.* For purposes of this footnote, however, it should seem clear that the prima facie commerce clause analysis of Section VI (C) *infra,* is unaffected by the common ownership doctrine of *McCready,* as left by the somewhat critical but ambiguous opinion in *Toomer.*

There was some hopo that before the end of its October 1977 Term the Court would clarify the present state of both lines of cases discussed in this note. In Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976), *aff'd sub nom.* Baldwin v. Fish & Game Comm'n, 98 S. Ct. 1852 (1978), the Court had before it a Montana statute that requires nonresident hunters to pay twenty-eight times as much to hunt elk as in-state elk hunters are charged. There was no commerce clause challenge, however, since the plaintiffs relied on the privileges and immunities, due process, and equal protection clauses.

Recognizing the unsettled state of cases such as *McCready* and *Geer*, the district court declined to choose a theory upon which to rest state regulatory authority. Given the constitutional claims advanced, however, it focused on the permissibility of the discrimination between resident and nonresident hunters, examining the nature of the claimed right asserted, the state's legislative purpose, and its justification for the discrimination. Beginning with the premise that some form of hunting restriction was necessary, the Court concluded that the nonresident hunters' interest was "recreational in character," therefore not fundamental, and thus not a protected privilege and immunity. 417 F. Supp. at 1009. Similarly, with respect to equal protection, the nonfundamental nature of the interest allowed the state to choose any rational means of allocating its scarce hunting days, and the discriminatory fee was reasonable because of the fear that the state's voters would not keep up the elk management program if the benefits were enjoyed equally by residents and nonresidents through a lottery. *Id.* at 1010. Circuit Judge Browning dissented, finding an equal protection violation. *Id.* at 1010-12.

On appeal, the Supreme Court affirmed. 98 S. Ct. 1852 (1978). For the 6-3 majority, Justice Blackmun emphasized the principle that evenhanded treatment of nonresidents was the touchstone of a privileges and immunities analysis. However, not all distinctions based on residence were impermissible. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Id.* at 1860.

In determining whether Montana's distinction between resident and nonresident hunters "threaten[ed] a basic right in a way that offends the Privileges and Immunities Clause," *id.* at 1862, the Court acknowledged that the ownership theory of *McCready* and *Geer* had been modified by subsequent decisions: "[T]he States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute." *Id.* at 1861. Justice Blackmun expressly recognized that "[s]tates may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce." *Id.* This would seem clearly to confirm that where interstate commerce is involved, the privileges and immunities analysis of *McCready* and *Geer* will not control.

In *Baldwin*, however, the Court was unwilling to sap *McCready* and *Geer* of all existing vitality: "The fact that the State's control over wildlife is not exclusive and absolute in the face of . . . certain federally protected interests does not compel the conclusion that it is meaningless in their absence." *Id.* But in *Baldwin* the Court found that the nonresidents' interest in sharing equally with resident hunters Montana's elk supply for purely recreational purposes was not "within the purview of the Privileges and Immunities Clause" because "not basic to the maintenance or well-being of the Union." *Id.* at 1862.

Justice Brennan in his dissent objected to the analytical approach of the majority. Unlike Justice Blackmun, he would not focus on whether the interest involved was basic or fundamental. The important component of a privileges and immunities analysis, according to the dissent, is the discriminatory classification based solely "on the status of nonresidency." *Id.* at 1869. For Justice Brennan,

> an inquiry into whether a given right is "fundamental" has no place in our analysis of whether a State's discrimination against nonresidents . . . violates the Clause. Rather, our primary concern is the State's justification for its discrimination . . . [A] State's discrimination against nonresidents is permissible where (1) the presence or activity of the nonresidents is the source or cause of the problem or effect with which the State seeks to deal, and (2) the discrimination practiced against nonresidents bears a substantial relation to the problem they present. . . . This requirement that a State's unequal treatment of nonresidents be reasoned and suitably tailored furthers the federal interest in ensuring that a "norm of comity" . . . prevails throughout the Nation while simultaneously guaranteeing to the States the needed leeway to draw viable distinctions between their citizens and those of other states.

Id. at 1869-70.

The Brennan approach to the privileges and immunities clause would build upon an analogy from the suspect classification branch of equal protection analysis. A finding of a

discriminatory classification solely on the basis of nonresidency would obligate the state to justify the distinction by a stiffer standard than the relaxed equal protection rationality test. *Id.* at 1868-69.

> Instead, even though an important state objective . . . was at stake, . . . a classification based on the fact of noncitizenship [would be] constitutionally infirm "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." Moreover, even where the problem the State is attempting to remedy is linked to the presence or activity of nonresidents in the State, the Clause requires that there be "a reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them."

Id. at 1869. The majority, on the other hand, seems to rely on an analogy to the fundamental interest branch of equal protection analysis, which requires finding an infringement of a basic interest in order to trigger a more searching degree of judicial scrutiny. In a privileges and immunities context, however, Justice Blackmun seems willing to include within the "fundamental" category such things as commercial enterprise ("a means to the nonresidents' livelihood," *id.* at 1862) that would not be deemed fundamental in an equal protection setting.

The Court's decision in *Baldwin*, therefore, reinforces the position in the text that a privileges and immunities claim, based either on the fourteenth amendment or article IV, section 2, is analytically distinct from a commerce clause claim. Furthermore, the Court's emphasis in *Baldwin* on the noncommercial, recreational components of that case makes the commerce clause discussion of the discriminatory income tax treatment of out-of-state tax-exempt bonds especially relevant.

The second case before the Supreme Court during its October 1977 Term, Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977), *rev'd* 98 S. Ct. 2482 (1978), also reinforced the text's distinction between a privileges and immunities and a commerce clause analysis, concluding that it is "establish[ed] that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce." 98 S. Ct. at 2492. Justice Brennan's opinion for a unanimous Court also seemed to downplay the significance of Heim v. McCall, 239 U.S. 175 (1915), questioning whether it had "any remaining vitality" and suggesting that the Court in *Heim* was "concerned almost exclusively with the statute's discrimination against resident aliens" and thus did not consider seriously the privileges and immunities issue of discrimination against out-of-state residents because "no out-of-state United States citizen challenged the law." *Id.* at 2491 n.15.

Hicklin involved a challenge to the "Alaska Hire" law which, for petroleum and pipeline jobs, gave preference to residents of Alaska. As amended, the statute required that:

> all oil and gas leases, easements, or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiation of any of these to which the state is a party, contain a requirement that qualified Alaska residents be hired in preference to nonresidents. The statute does not apply to other private employment, nor to public employment.

565 P.2d at 161. The challenge was based on alleged violations of the privileges and immunities and equal protection clauses. No commerce clause argument was raised. *Id.* at 169.

With respect to the equal protection claim, the closely divided Alaska Supreme Court declined to apply strict scrutiny. It rejected the claim that the right to travel was penalized by a residency requirement, McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646-47 (1976); the court held that the "right to work" was not fundamental in the equal protection context; and it refused to declare the classification based on residency suspect. 565 P.2d at 166-67. Accordingly, the court applied the more lenient rationality standard and concluded that the preference for Alaskans was reasonably related to the goal of "providing economic benefit to residents." *Id.* at 167. The issue for the majority, therefore, was the legitimacy of this purpose under the privileges and immunities clause.

The majority of the Alaska Supreme Court rejected the privileges and immunities argument, relying essentially on what it described as the "*McCready* 'natural resources exception' to the privileges and immunities clause." *Id.* at 169. Justice Connor noted that *McCready* had been distinguished but never overruled and "it states the principle applicable to the

decision of this case." *Id.* at 168. He argued that Alaska's natural resources "belong" to the state and its citizens in a way that "Alaska's society and economy in general do not." *Id.* at 169. In short, the Court considered the Alaska hire law to be "an economic measure justified by the 'natural resources exception,' the principle that a state may prefer its residents in dealing with natural resources it owns." *Id.*

The court did not mention the *Heim-Atkin* line of cases in further support of its decision, see *id.* at 172 n.4, despite that suggestion in a 1972 consultant's report to the Joint Pipeline Impact Committee of the Alaska State Legislature. *See* Alleyne, *Constitutional Restraints on the Preferential Hiring of Alaskan Residents for Oil Pipeline Construction*, 2 UCLA-ALAS. L. REV. 1, 8-10 (1972). Since the preferential hiring law was limited to jobs in which the state is a party, *Hicklin* could have served well as a vehicle for determining not only the status of the *McCready-Geer* but also the *Heim-Atkin* line of cases. *Compare* Foley v. Connelie, 98 S. Ct. 1067 (1978) *with* Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973). Although no commerce clause claim was raised, the case also helped shed some light on the scope of *Hughes* because:

> The kind of competitive leasing arrangements under which the pipeline will be constructed will not require a cash outlay of public funds, as in the usual public works context. Some state land will be leased. The difference is merely the nature of the asset distributed by the State: cash in return for construction services in one case; land in exchange for the royalty benefits accruing to the State as lessor in the other.

Alleyne, *supra*, at 9. The Court's treatment of this issue could have provided a further insight into the importance to *Hughes* of the budgetary outlay factor discussed in Section V (B) *supra*.

The dissenters in *Hicklin* argued that the majority relied "on an antiquated line of authority . . . ." 565 P.2d at 171. They contended that *Toomer* "severely limited" the *McCready-Geer* line of cases, *id.* at 172, and, additionally, that Alaskan oil will not be restricted to in-state use but will be shipped to other states by means of the pipeline constructed to Valdez. *Id.* Moreover, the dissenters saw the Alaska statute as considerably more restrictive than the limitation in *McCready* and distinguishable on that basis, if *McCready* retained its vitality. *Id.* at 172-73.

The majority in *Hicklin*, like Justice Frankfurter in *Toomer*, explicitly distinguished between commerce clause cases and claims such as privileges and immunities or equal protection that focus on a state's duty to provide evenhanded treatment to certain classes of people. The *Hicklin* majority did not deal successfully with such nondiscrimination cases as Pennsylvania v. West Virginia, 262 U.S. 553 (1923), and West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), except to note that they "were decided under the commerce clause, not the privileges and immunities clause," and that "[o]ne of the principal reasons the United States Constitution was written, to replace the old Articles of Confederation, was to make the United States a single economic unit, without barriers to interstate trade." 565 P.2d at 169.

In reversing the Alaska Supreme Court, the United States Supreme Court rejected the view that *McCready* created an exception to the privileges and immunities clause. 98 S. Ct. at 2489. Quoting its recent decision in *Baldwin*, the Court noted that it "has recognized that the States' interest in regulating those things they claim to 'own' . . . is by no means absolute." *Id.* at 2489-90. State ownership is not necessarily determinative but it is a factor "to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause." *Id.* at 2490. In the "Alaska Hire" situation, the state's proprietary interest was too attenuated to justify the preference, especially given the relatively broad sweep of the statute's coverage.

Interestingly, Justice Brennan bolstered the privileges and immunities analysis by drawing a parallel to commerce clause cases that restricted a state's ability to prefer its own citizens when the "state owned resource is destined for interstate commerce." *Id.* at 2492. He made the point that discrimination against nonresidents did not, "of itself, disable the State from preferring its own citizens in the utilization of that resource," even if interstate commerce was involved. The privileges and immunities clause apparently continues to allow some forms of preference for a state's residents; but the commerce clause standard, which

C. *The Commerce Clause Analysis*

In *Boston Stock Exchange v. State Tax Commission,*[479] a unanimous Supreme Court reaffirmed that "[t]he prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the [Commerce] Clause."[480] The Court found that New York's stock transfer tax was discriminatory, favoring the New York Stock Exchange, because "the choice of exchange by all nonresidents and by residents engaging in large transactions is not made solely on the basis of nontax criteria."[481] By foreclosing

---

seems stiffer, in some way "does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource." *Id.*

The Brennan opinion does mention the *Heim* line of argument, if only in a footnote. *Id.* at 2491 n.15. With respect to a state's ability to discriminate against aliens, Justice Brennan questions the value of the *Heim* precedent in light of Sugarman v. Dougall, 413 U.S. 623, 643-45 (1973). *But see* Foley v. Connelie, 98 S. Ct. 1067 (1978). Of course, that form of discrimination was not involved in *Hicklin.* With respect to the facet of *Heim* that involved the public works employment preference for citizens of New York, Justice Brennan facilely notes that the Court expressed no view on the privileges and immunities issue because "no out-of-state United States citizen challenged the law." 98 S. Ct. at 2491 n.15.

From this footnote in *Hicklin,* one might conclude that the public-private distinction made in *Heim* and *Atkin* has been relegated to a subtle nonexistence. While that inference would strengthen the position developed in Part VI(C) and lend strong support to the ultimate conclusion reached in Part VI(D), it seems unlikely that by a single footnote the Court would be signaling its retreat from the initiative it took in *Hughes. See, e.g.,* City of Philadelphia v. New Jersey, 98 S. Ct. 2531, 2537 n.6 (1978); Foley v. Connelie, 98 S. Ct. 1067 (1978). More realistically, the formulation of the footnote in Hicklin is probably reflective of the position of Justice Brennan, the author of the *Hicklin* opinion. The entire *Hicklin* opinion seems to be a negotiated compromise with currents and countercurrents that seem to coexist in an uneasy truce. It may be that the Court has reached a consensus on dropping entirely the *Heim-Atkin,* if not the *McCready,* line of analysis. It would be imprudent, however, to rely on the *Hicklin* footnote as the final word on the matter.

With respect to the *McCready-Geer* line of cases, the *Baldwin* decision indicates that *McCready* and *Geer* survive, but *Hicklin* shows that their application has been narrowly circumscribed. *See* Toomer v. Witsell, 334 U.S. 385 (1948). The *Hicklin* opinion and the almost contemporaneous footnote in *City of Philadelphia,* 98 S. Ct. at 2537 n.6, show that the Court has not yet reached a consensus on how much weight to accord to the ownership theory, and *Baldwin* demonstrates a striking disagreement on how issues under the privileges and immunities clause should be approached analytically. The assignment of the *Hicklin* opinion to Justice Brennan, a dissenter in *Baldwin,* is puzzling in that regard.

Finally, the problems raised in the lines of cases discussed in this footnote are only parallel to the commerce clause issue discussed in the text, and even those Justices who advocate retention of the earlier doctrines expressly distinguish the commerce clause analysis from the privileges and immunities or fourteenth amendment analysis. Since this Article focuses on the commerce clause, and the text explicitly eschews consideration of privileges and immunities or equal protection issues, these cases, as those discussed in text, cannot be reasonably viewed as controlling.

479. 429 U.S. 318 (1977). *See* notes 255-62 *supra* and accompanying text.

480. *Id.* at 329.

481. *Id.* at 331.

"tax-neutral"[482] investment decisions, the New York law advantaged the exchange in New York and imposed a "discriminatory burden on commerce to its sister states."[483] The Court rejected the argument that New York's tax affected only "a local event at the end of interstate commerce,"[484] concluding that the commerce clause protects income derived from an interstate transaction from burdens imposed "by reason of its foreign origin."[485] Thus, "absent an undue burden on interstate commerce,"[486] a state can evenhandedly tax income of its citizens derived from out-of-state sources, but "the tax may not discriminate between transactions on the basis of some interstate element."[487]

The bar on discriminatory taxation in *Boston Stock Exchange* focuses on the distortion imposed on the securities market by New York's policy and on the harm to the non-New York Exchanges themselves. As in that case, the disparity of treatment of out-of-state tax-exempt securities is apparent on its face. There is no need to rely on a finding that the effect is discriminatory because the discordant treatment is evident on the face of these state taxing statutes. The question, thus, is whether the facial discrimination can be justified under traditional commerce clause principles or, if not, whether the New Federalism would be expanded in scope to withdraw this discriminatory taxation from the purview of the commerce clause.

One argument, raised in *Boston Stock Exchange,* would be that, although the tax disparity appears discriminatory on its face, it is not so in practice. The source of this argument is the Court's upholding of use taxes, applied exclusively to out-of-state transactions, as compensatory.[488] As Justice White noted in *Boston Stock Exchange,* the "common theme" of state use tax cases is "[e]qual treatment of interstate commerce."[489] The rationale of the use tax is that it places in-state merchants on an equal footing with out-of-state competitors who might attract customers solely because the sales tax in their state was lower than in a competitive state. The objective of the use tax is to bring about "nondiscriminatory treat-

482. *Id.*
483. *Id.*
484. *Id.* at 332 n.12.
485. *Id.* (quoting Welton v. Missouri, 91 U.S. 275, 282 (1876)).
486. 429 U.S. at 332 n.12.
487. *Id.*
488. Henneford v. Silas Mason Co., 300 U.S. 577 (1937).
489. 429 U.S. at 331.

ment of in-state and out-of-state purchases."[490] In the use-tax situation

> an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax of the same amount. The taxes treated both transactions in the same manner.[491]

It is difficult to see how the analogy of the use tax cases—with their emphasis on the compensatory nature of the tax and the lack of discrimination when the total scheme of taxation is considered—could reasonably be applied to the case of disparate treatment of out-of-state tax-exempt bonds. The most plausible argument is that, for any state, discrimination against out-of-state tax-exempt issuers is necessary to keep it on an even footing because virtually all states discriminate in this way. As a practical matter this is true, provided that such discrimination is permissible at all. As was discussed in Section VI(A) of this Article, however, the Court in the *A&P* case rejected a similar claim advanced to justify a Mississippi milk reciprocity provision.[492] The Court noted in *A&P* that a state cannot fight discrimination with compensatory discrimination. Rather, the Court's function is to step into just such disputes to put an end to the original discrimination itself. Lowering trade barriers, not the erection of compensatory (*i.e.* retaliatory) restrictions is the path mandated by the commerce clause.[493] This is the clear teaching of the Court's commerce clause cases, especially *A&P* and *Boston Stock Exchange.*

Another argument in support of the facial discrimination in tax treatment might be that all persons who purchase bonds from tax-exempt issuers of a state are exempt from taxation by that state. Thus, all purchasers of New York's tax-exempt bonds are exempt from taxation by New York, and therefore all similarly situated persons are treated alike. This argument is too facile for several reasons. The perspective is limited to equal treatment for taxpayers rather than equal treatment for interstate commerce. The focus of a commerce clause analysis must be the impact of state tax legislation on investment decisions—whether they can be made "solely on the basis of nontax criteria."[494] Of course, the decision to invest in the tax-exempt market is itself influenced by tax incentives de-

490. *Id.*
491. *Id.* at 332.
492. 424 U.S. 366 (1976).
493. *Id.* at 378-81.
494. 429 U.S. at 331.

signed to encourage certain kinds of investments, but this is done as a matter of national policy and is therefore unrelated to the commerce clause concern that investment decisions in a securities market be made on a "tax-neutral"[495] basis without the distorting influence of discriminatory state taxation.

The argument of equal treatment could be more persuasive if the source of the constitutional analysis were the equal protection or privileges and immunities clause, because the leeway granted for classification is considerable in those contexts.[496] The critical shortcoming of the discriminatory exemptions, however, is the disproportionate impact they have on interstate transactions in the tax-exempt bond market—that they "discriminate between transactions on the basis of some interstate element."[497] The impact on commerce and the competitive disadvantage confronted by funds which market shares in a multi-state, tax-exempt bond portfolio are the focal points of a commerce clause analysis. The superficial even-handed treatment by a state of all purchasers of its tax-exempt securities does not, therefore, respond to the commerce clause concern. Furthermore, there is an element of unreality or even disingenuousness to the claim, since a state has no jurisdiction to tax the income of nonresidents; instead, the problem is that by its tax system a state is acting to keep investment funds in-state that might otherwise flow in interstate commerce. This is a form of economic protectionism, which is designed to and has the effect of disadvantaging out-of-state tax-exempt issuers and, simultaneously, of keeping investment capital of state residents within the state. Precisely this kind of curtailment of natural competitive markets has characterized the discriminatory taxation and regulatory legislation held invalid in negative commerce clause cases.[498]

A fair reading of the *Boston Stock Exchange* case would end the commerce clause analysis once discrimination against interstate commerce were found.[499] During the same term as *Boston Stock Exchange,* however, the Court indicated that in a regulatory context, once discrimination is shown, "the burden falls on the State to justify it both in terms of the local benefits flowing from the

495. *Id.*

496. *See* Madden v. Kentucky, 309 U.S. 83 (1940). *See also* note 478 *supra.*

497. 429 U.S. at 332 n.12.

498. *See, e.g.,* McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45 n.2 (1940). *See also* City of Philadelphia v. New Jersey, 98 S. Ct. 2531, 2535-38 (1978).

499. *But see* 429 U.S. at 330 n.11 (suggesting that New York eliminate the "competitive edge enjoyed by the regional exchanges . . . by simply declaring that sales would not be a taxable event.").

statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."[500] A reasonable conclusion is that in the taxation context, where revenue raising is the rationale for taxation, adequate and reasonable nondiscriminatory alternatives are readily available. This distinction between taxation and regulatory cases was recognized by Justice Frankfurter in *Freeman v. Hewit:*

> A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding local interests. . . . State taxation . . ., on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny a State a particular source of income does not impose a crippling limitation of a State's ability to carry on its local function.[501]

Placing the insight of *Hewit* in the modern context, one could conclude that a finding of discrimination against commerce by a taxing measure is sufficient to support a holding of unconstitutionality because of the inherent existence of alternative sources of revenue.

While the taxation of income derived from investing in out-of-state tax-exempt bonds and the simultaneous exemption of similar income from in-state sources cannot be justified as a revenue collection measure, the special characteristics of the beneficiary—the state and its political sub-units—might be deemed sufficient by the Court to warrant consideration of other legitimate state interests.

One rationale for the exemptions is that they subsidize governmental entities that can, in turn, provide desired governmental services. Under a commerce clause analysis, however, this policy must be subjected to the nondiscriminatory alternative requirement of *Hunt* and *Dean Milk.*[502] One readily available alternative, discussed in Section VI(A) of this Article, is direct subsidy by the state to currently tax-exempt issuers. Objections to replacement of the federal tax exemption with direct subsidies would undoubtedly be raised in the state context as well, but for a number of reasons they are less forceful. The major concern has been the risk of the loss of autonomy if tax exemption is eliminated.[503] While that argument

500. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977). *But cf.* City of Philadelphia v. New Jersey, 98 S. Ct. 2531, 2535 (1978) ("Where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.").

501. 329 U.S. 249, 253 (1946).

502. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

503. *See, e.g.*, Morris, *Tax Exemptions for State and Local Bonds*, 42 GEO. WASH. L. REV. 526, 530 (1974); *Panel Discussions on General Tax Reform Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess., pt. 8 at 1172 (1973).

may have considerable force with respect to federal-state relationships, it is constitutionally less significant in the state context. First, the states themselves float a considerable amount of tax-exempt issues. In this context, the loss of autonomy argument is irrelevant since, assuming full taxation, the state would pay higher interest rates, but would compensate by direct appropriations. With respect to bonds issued by sub-units, a risk of increased state interference exists, but the relationships between the states and their political subdivisions are of little constitutional significance.[504] Typically, local power stems from an explicit state statutory or constitutional source,[505] so limits on state interference could be negotiated between state and local officials through state administrative, legislative, or constitutional processes. The fear of diminished local autonomy vis-à-vis the states, therefore, is not a constitutionally substantial factor.

Furthermore, instead of imposing a uniform tax on hitherto tax-exempt in-state issues, a state could reasonably respond by extending the existing exemption to all federally tax-exempt issues. This would allow many state and local political units to benefit from lower interest costs by competing effectively for out-of-state investors. In this way, the same or even an additional subsidy could be provided, as is done under the existing system, without the need for direct subsidy. Since other states likewise would be required to terminate their discriminatory tax treatment of out-of-state tax-exempt securities, many states could comfortably rely on competitive pressures from a broader range of potential lenders to keep interest charges down.

In sum, under a conventional commerce clause analysis, the present tax exemptions discriminate against interstate commerce and, in view of the availability of reasonable, nondiscriminatory alternatives, the discrimination cannot be justified on the ground that the statutes further a legitimate state purpose.[506] Remaining for

504. City of Trenton v. New Jersey, 262 U.S. 182 (1923); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 425 n.47 (1978).

505. *E.g.*, D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 148-51 (1977).

506. The states might attempt to justify the discrimination inherent in the tax exemption statutes on the ground that, apart from any economic protection of municipalities, they have an interest in having their own residents hold state bonds. According to this view, a state or local government legitimately could prefer having creditors with a stake in the wellbeing of their debtor. Also, state citizens would gain a sense of solidarity by sharing in government enterprises financed by their bonds.

This justification, however, is also questionable. First, the means chosen by the state to accomplish its purpose are not entirely rational or sufficiently narrowly drawn. Since the tax

consideration is whether the New Federalism, as developed in *Usery* and *Hughes,* is broad enough or could reasonably be expanded to require a contrary conclusion.

D. The Impact of the New Federalism

In his foreword to a recent symposium on federalism, Judge Friendly cautioned that "[i]t would be dangerous . . . to regard the *Hughes* case as having much doctrinal significance. The Court did not even mention it in *Boston Stock Exchange v. State Tax Commission* . . ., when it unanimously struck down, under the Commerce Clause, an amendment to the New York stock transfer tax which gave advantage to sales made within New York."[507] Nevertheless, if the traditional commerce clause analysis, which culminates in the *Boston Stock Exchange* decision, is to be held irrelevant in the context of discriminatory tax treatment of out-of-state tax-exempt securities, the distinction must be found in some principle that would withdraw the discrimination at issue from "[t]he rule which prohibits states from enforcing their laws in a way which . . . discriminates against interstate commerce . . . ."[508]

Of course, what makes the matter interesting at the outset is that the disparity in tax treatment of out-of-state tax-exempt securities results from differential treatment when the ostensible beneficiary is the state itself or a sub-unit of local government. The other tax cases, in which the Court "has seldom hesitated to strike down statutes discriminatory on their face,"[509] involved tax disadvantages for out-of-state businesses that were competing with local enter-

---

exemption is offered to all state citizens who buy bonds of any state subdivision, a municipality is by no means assured of attracting bondholders from its own locale. Indeed, out-of-state investors may have a greater interest in a given municipality than do in-state purchasers. For example, it certainly is arguable that New Jersey or Connecticut residents who work in New York City have a far greater interest in its economic welfare than do citizens of up-state New York. Accordingly, they should be the preferred holders of Big Mac bonds and attracted by a subsidy. Second, it is open to question whether municipalities in fact benefit from friendly creditors. Again taking New York City as an example, arguments certainly could be made that arms-length creditors would have preserved the city's fiscal stability better than union creditors who could bargain with the threat of bond foreclosure to achieve their own economic objectives. The securing of friendly bondholders becomes an even less valid state goal when it implicates federal interests as when, for example, the federal government is called upon to bail out a city whose local creditors have allowed it to overextend itself. *See, e.g.,* the New York City "bailout" legislation, 31 U.S.C. §§ 1501-1510 (Supp. V 1975). Moreover, the less discriminatory alternatives part of the analysis poses insuperable obstacles to this line of argument.

507. Friendly, *supra* note 47, at 1033 n.119.

508. Bison, *supra* note 166, at 593. *See* City of Philadelphia v. New Jersey, 98 S. Ct. 2531, 2537 n.6 (1978).

509. Note, *supra* note 228, at 962 n.44.

prise. Given *Hughes,* and to a lesser extent *Usery,* one must at least stop to inquire whether this distinction does or should make a difference analytically.

In the *Boston Stock Exchange* case, a clear purpose of the unconstitutional New York tax was to provide additional tax revenue to New York. The state was concerned with external competition and also with the threat of the Exchange to leave New York. The competitive disadvantage of the New York Exchange meant "a loss of stock transfer tax revenue to New York City,"[510] and the continued presence of the New York Exchange was seen as important for New York's future economic strength and prosperity.[511] Moreover, the nondiscriminatory alternative suggested by the Court—elimination of stock sales as a taxable event[512]—was unacceptable to New York because "taxation revenue would no longer be forthcoming from the situation where the securities sale occurs in New York but the transfer occurs out-of-state."[513]

Thus, it is clear that New York's compromise with the New York Stock Exchange was governed by a desire to maintain or increase tax revenues, and this goal was explicitly held outweighed by the national interests in commerce. Moreover, the less restrictive alternative the Court suggested for assuring competitive equity among various stock exchanges was a device that would have had significant revenue effects on the state and city governments. For this reason, the purported distinction of the tax-exempt bonds case on the ground that the beneficiaries are governments and not businesses is not persuasive. The critical issue is the effect on commerce, not the beneficiary of the discriminatory tax. Moreover, a distinct and identifiable industry that is fostered by federal tax policy—tax-exempt bond funds—suffers competitive disadvantage by the uneven tax treatment of out-of-state tax-exempt issues. Thus, the effect on competitors, as well as the impact on the allocation of resources within the bond market, is clear.

In *Hughes,* the Court and Justice Stevens in his concurrence argued that the commerce involved was generated by the state as a subsidy. Arguably, the borrowing of funds by state and local governments is also generated by governments and should be exempt from commerce clause strictures. The discriminatory treatment at issue,

510. Statement of Robert W. Haack, March 4, 1968, *quoted in* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 324 n.7 (1977).

511. Public Papers of Governor Nelson A. Rockefeller 553 (1968), *quoted in* 429 U.S. at 327 n.10.

512. *See* 429 U.S. at 331 n.11.

513. Note, *supra* note 403, at 986 n.34.

however, is not related directly to the borrowing transaction itself. Rather, it is the tax consequence of income derived from the investment that is made to depend on the in-state or out-of-state character of the investment. At one time it might have been plausible to argue that a state's sovereignty interests were involved when taxation was imposed (or, by implication, disallowed) on incomes derived from loans to governmental entities,[514] but that concept has long been interred.[515] It is no longer reasonable to contend that the state's sovereignty interests as borrower extend to the taxation of income derived from governmental loans.

Hughes would have to be extended considerably to include loan transactions, since the subsidy involved in that case was a direct expenditure of tax-raised funds. In a loan transaction, a state or local governmental unit enters a preexisting capital market to compete with other potential borrowers for funds held by potential lenders. The federal tax code has created a special market for tax-exempt securities in which state and local governments compete with each other and with the nonexempt market. Thus, the state would be acting in a capacity that much more clearly affects commercial intercourse when it enters the money market than when it acts to subsidize directly businesses that act in the public interest. Furthermore, this market is created by the private sector or by the federal government's tax decisions, not by the state, and it is unclear whether the imposition of tax evenhandedness for all governmental issues would actually result in any increase in costs for many governmental borrowers—the reverse possibly could result for most.[516]

More important, though, the difference between *Hughes* and the taxation of out-of-state tax-exempt bonds turns on the mechanism employed by government to serve its ends. In *Hughes,* Justice Powell repeatedly emphasized the noncoercive aspects of a subsidy program favorable to in-state business. He expressly noted that other commerce clause cases had involved state interference "with the natural functioning of the interstate market either through prohibition or through burdensome regulation."[517] The state's decision in the transaction itself—the decision "to favor its own citizens over

514. *See* Collector v. Day, 78 U.S. (11 Wall.) 113 (1870).

515. *See* Graves v. New York, 306 U.S. 466 (1939) (overruling *Collector v. Day*); Helvering v. Gerhardt, 304 U.S. 405 (1938).

516. This was the ground upon which *Fry* was distinguished in National League of Cities v. Usery, 426 U.S. 833, 852-53 (1976).

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

others"[518]—distinguished the transaction in *Hughes*. The noncoercive purchase, and the concomitant element of subsidy, placed the state in a different role than when it operates through more traditional coercive means, such as prohibition, regulation, or taxation.[519]

In the bonds situation, there is no state purchase and there is no state policy to prefer its own citizens over others. Similarly situated state residents are taxed differently based solely on the locus of their investments. *Hughes* probably would permit state and local governments to prefer in-state lenders, for example, by giving them preference in underwriting, even paying a noncompetitively higher fee. Other such advantages might come within *Hughes*, justified as the exercise of state social policy in a market environment. Even the state's use of a direct subsidy approach rather than a tax exemption would seem permissible under *Hughes*. It is the use of the tax system, with its exercise of traditional governmental coercive authority, that runs afoul of the commerce clause and distinguishes *Hughes* from traditional regulatory and taxation cases, such as *Hunt* and *Boston Stock Exchange*.

In sum, the state and local governments are not declining to borrow from out-of-state sources or even giving local investors a competitive advantage in the market; indeed the loan transaction itself is uninvolved. Rather, the state is exercising its taxing power on income derived from comparable tax-exempt issues solely because of the out-of-state character of the issuing body. This use of the taxing power places the transaction beyond the *Hughes* exemption and within the *Boston Stock Exchange* rationale, and since there is no preference to state citizens, which would permit an attendant welfare analogy, the bonds situation falls outside the largesse approach that probably best explains *Hughes*.

If the decision in *Hughes* is distinguishable from the disparity in tax treatment of out-of-state tax-exempt bonds, the question must be faced whether *Hughes* should be broadened to engraft another exemption from the traditional commerce clause cases. The argument would be that, although the largesse conferred in *Hughes* was consummated through a state as purchaser, the critical feature was the subsidy itself, not the mode of subsidization. Thus, the state

518. *Id.* at 810.

519. *Id.* at 810 n.20. This view is supported by a footnote to the very recent decision in City of Philadelphia v. New Jersey, 98 S. Ct. 2531, 2537 n.6 (1978). In that case, the Court held invalid a New Jersey law that prohibited the "importation of most 'solid or liquid waste which originated or was collected outside . . . the state . . . .'" *Id.* at 2532. In the footnote, Justice Stewart noted that the Court expressed no opinion on a state's "power to spend state funds solely on behalf of state residents and businesses. . . ." *Id.* at 2537 n.6.

would argue that it has chosen to exempt one source of income—that from tax-exempt in-state bonds—and this subsidy for in-state investment should be treated as if it were achieved by a direct grant or other such noncoercive method. The analogy to a tax expenditure[520] might be used to further the argument; that is, whether a subsidy represents a direct appropriation or an exemption from income taxation should be deemed irrelevant since they are functional equivalents.

On this reasoning, the beneficiary and purpose of the subsidy would be determinative, not its nature. In *Hughes* the beneficiaries of the subsidy were the in-state processors; in theory, the goal was to benefit the state's environment, an independent police power objective. In the bonds situation, the beneficiary is the lender of funds to in-state governmental borrowers; the purpose of diverting capital market funds to in-state investment as a form of subsidy, however, is not so clearly unrelated to the interests prohibited by the commerce clause.[521] Moreover, it is not so clear that the state or local governments actually derive any benefit, except when the bulk of the bonds are bought by in-state lenders. If a substantial out-of-state sale occurs, then the interest coupon that governments must pay will be sufficiently high to attract out-of-state investors, who must pay state taxes on the interest. Because of this, the overall yield to in-state investors will be an above-market premium (*i.e.*, a windfall) when the tax exemption is added. In these situations any governmental benefit is questionable.[522]

The recognition in *Boston Stock Exchange* of the important national commercial features of the securities market also strengthens the argument against extension of *Hughes* to the tax-exempt bonds situation. An important, federally fostered tax-exempt bond industry faces a competitive disadvantage because of the discriminatory state taxation rules. These rules cannot be dealt with effec-

520. A "tax expenditure" is a form of subsidy generated by incentives or preferences built into the taxation system. *See* S. SURREY, PATHWAYS TO TAX REFORM (1973). For a criticism of the tax expenditure concept, see Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244 (1969). *See also* the reply to Professor Bittker by Professors Surrey and Hellmuth, *id.* at 528, and a rebuttal by Professor Bittker, *id.* at 538.

521. *See* text accompanying notes 185-200 *supra*.

522. If a state could separate the market, it theoretically could establish different rates of interest for in-state and out-of-state lenders. Given the existence of an interstate tax-exempt honds market, it is unrealistic to expect this separation to work. Of course a local unit could float issues at different yields, hoping to attract in-state lenders for the lower interest coupon, but if a higher yield were to appear in a float aimed for out-of-state investors, it is difficult to see why in-state lenders would not subscribe to the higher-yield issue, thus forcing a uniform rate by competitive pressures.

tively on a state-by-state basis through the political process,[523] but rather require a national solution—by the courts if the context is a negative commerce clause case. At present, states may well be discriminatory against out-of-state tax-exempt issues for defensive purposes, on the theory that at least for smaller floats the tax advantage creates an in-state market that will allow borrowing at lower cost. This may be especially true for capital-rich states that expect in-state funds to be adequate to cover the float, but the discrimination obviously disadvantages other governmental issuers. Whereas a state might be permitted leeway in favoring its own citizens over nonresidents in the dispensation of largesse, it is not clear why the dictates of the federal commerce clause should be held in abeyance to allow states and their sub-units to disadvantage the securities of sister states and municipalities. Principles of comity would caution against the kind of retaliatory tax practices that have become an imperative if a capital-poor state is to assure a fair market for its own securities. Moreover, the free flow of private sector investment funds is an important policy goal of the commerce clause. Elimination of parochial barriers to the interstate flow of investment capital is precisely the role the Court has adopted in negative commerce clause cases and is consistent with the principles of comity embodied in the full faith and credit provisions.[524]

Finally, for important reasons of policy and principle the kind of subsidy accepted in *Hughes* should be preferred to the discriminatory tax exemption under discussion. Most fundamentally, there is a safeguard to interstate commercial interests when the state chooses to favor its own citizens through a purchase decision that requires a visible political choice and an actual appropriation of funds. In that situation, at least, there are some substantial political checks on the process of subsidization, with in-state taxpayers being asked to contribute directly, by tax-raised and appropriated funds, to the state's subsidy program. On the other hand, a tax exemption tends to blur the political issues involved, and the absence of explicit expenditure of funds circumvents an annual political review. The subsidy is hidden and, since it need not be voted on annually, would tend to be continued without intensive scrutiny.[525] Thus, there are likely to be more restraints on the state's

523. *See* text accompanying notes 433-38 *supra*.

524. U.S. CONST., art. IV, § 1.

525. The same phenomenon also exists with respect to many state regulatory programs in which internal subsidies exist but are hidden from public political scrutiny and accountability. *See, e.g.*, Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 22 (1971).

ability to subsidize when actual appropriations must be made in competition with other claims on the state's funding resources. As long as the state is acting in ways closely analogous to its welfare function (as a provider of either social services or other forms of largesse) or to its proprietary function (as a participant in the economic marketplace), it may well be appropriate to impose fewer constraints under the negative commerce clause.[526]

The discriminatory treatment of out-of-state tax-exempt securities, however, does not seem reasonably to fall within even an expanded *Hughes*. The taxation element and the use of coercive governmental authority to channel investment funds, especially in the presence of such a significant private interstate securities market, make the more traditional commerce clause cases closer on point. Moreover, the basis of taxation is so clearly the interstate character of the investment—such a clear breach of the "tax-neutral" rule of *Boston Stock Exchange*—that application of the traditional commerce clause analysis seems more reasonable. In *Hughes*, at least, the largesse analogy could be made, justifying the drawing of a legitimate distinction between in-state and out-of-state residents, but in the bonds case, the tax disparity does not affect taxpayers based on their residence, but only on the "basis of some interstate element"[527] in the investment decision. This weakens the largesse analogy and strengthens the case for treatment under commerce clause principles, particularly in light of the likely positive consequences of universal abolition of such discrimination and the availability of reasonable, nondiscriminatory alternatives if states do choose to respond by eliminating state tax exemptions entirely.

Ultimately, remembering that *Hughes* left open the question of federal power to "prohibit the type of selective participation in the market undertaken by Maryland,"[528] one must be very wary of extending *Hughes* if federal power simultaneously would be curtailed.

One interesting observation that supports the point made in text is that a prudent investor might decide to leave well enough alone and not challenge the discriminatory taxation of out-of-state tax-exempt issues. Fearing that a state might respond to a rule of tax neutrality by eliminating the existing immunity, an investor might be satisfied to accept the status quo as a prudent compromise against the possibility of losing all opportunity to shelter bond income from state income taxation. It is this very perverse political incentive not to rock the boat that distinguishes the tax discrimination under discussion here from the direct appropriation involved in *Hughes*. Since the creation of the tax-exempt bond funds under the 1976 tax law amendments, however, there is an actor that has a commercial stake in bringing suit, although the political check of *Hughes* still is not present in the tax expenditure context.

526. *See* Parker v. Brown, 317 U.S. 341 (1943).

527. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332 n.12 (1977).

528. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 n.19 (1976).

In *Usery* the governmental decision held beyond federal power involved the disbursement of funds and was distinguished from traditional constraints on taxation and regulation of private parties. *Hughes* also involved governmental disbursements,[529] and the possibility of foreclosing federal action may be understandable in that context. However, while it may seem plausible that Congress should not be able to require a state to deal with scrap processors evenhandedly when the state establishes a bounty program for abandoned vehicles, it seems entirely unrealistic to conclude that Congress would be constitutionally unable to prevent the kind of tax discrimination under discussion in this Article—the very kind of authority it has traditionally exercised to dismantle state-imposed barriers to interstate commercial enterprise. Perhaps looking at the bonds situation from a different perspective—from the *Usery* side of *Hughes*—is the most persuasive argument against extending *Hughes* to that context.

VII. CONCLUSION

The problem of the disparity in the state tax treatment of income derived from in-state and out-of-state tax-exempt bonds has been used in this Article as a vehicle for discussing the intersection of two important trends in recent Supreme Court decisions. In the negative commerce clause area, the Court has acted boldly to protect the national interests in commerce against restrictive or discriminatory state legislation. In the so-called New Federalism area, the Court has been deferential to state interests, even when they come into conflict with federal legislation (as in *Usery*) or with generally applicable negative commerce clause principles (as in *Hughes*). The discussion has shown that the Court's vigorous action in negative commerce clause cases has been in distinct contrast with its more reticent approach in areas such as equal protection and standing.

This differential tax treatment of income derived from in-state and out-of-state tax-exempt bonds brings into focus a problem at the frontier, where these two somewhat conflicting approaches meet. It provides a useful vehicle for analyzing the negative commerce clause cases in the areas of regulation and taxation, and for discussing them in the context of the New Federalism. The ultimate conclusion, however, is that in this context the traditional negative

529. The importance of the budgetary outlay feature of *Hughes* was highlighted in *City of Philadelphia v. New Jersey*. *See* note 519 *supra*.

commerce clause style of review is more appropriate, especially in light of the unanimous *Boston Stock Exchange* decision, and that the ruling in *Hughes*, exempting certain discriminatory state purchasing decisions from commerce clause scrutiny, should not be extended to cover this situation.