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Natural Resources - Commerce Clause - State Market Participation Exempt from Commerce Clause Review - Reeves, Inc. v. Stake

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NATURAL RESOURCES—COMMERCE CLAUSE—State Market Participation Exempt from Commerce Clause Review. Reeves, Inc. v. Stake, ____ U.S. ____, 100 S.Ct. 2271 (1980).

In 1919, critical shortages of cement[1] in South Dakota moved its legislature to establish the South Dakota Cement Commission. By the early 1920's the Commission had established and was operating the South Dakota Cement Plant. The state-owned plant soon produced enough cement to alleviate the shortages, so the Commission began selling cement to purchasers from other states. It continued to sell to purchasers from nine other states for more than fifty years. Between 1970 and 1977 the South Dakota Cement Plant sold approximately forty percent of its output to non-resident purchasers, including the petitioner, Reeves, Inc., a Wyoming ready-mix concrete distributor.

In the summer of 1978, heavy demand created a cement shortage and prevented the plant from filling all of its orders. The Cement Commission therefore reaffirmed a policy of first supplying all South Dakota customers and honoring all contract commitments, selling any remaining volume on a first come, first served basis. Reeves had no contract with the plant, but had purchased niney-five percent of its cement from the plant for 20 years. The plant consequently refused to sell cement to Reeves. Since it could find no other suppliers, Reeves was forced to cut production by seventy-six percent.[2]

Reeves challenged the resident preference policy in federal district court. On commerce clause grounds, the court enjoined the Cement Commission from applying the policy to Reeves.[3] The United States Court of Appeals for the Eighth Circuit, relying on *Hughes v. Alexandria Scrap Corp.*,[4] reversed, holding that the commerce clause does not limit a state's "power to choose whether, to whom, and on what conditions to sell its goods."[5] The Supreme Court

1. Cement is a finely ground and baked powder, commonly made from limestone and clay or shale. Cement is mixed with a sand or stone aggregate and water to make concrete. 3 ENCYCLOPEDIA BRITTANICA 1075-76 (1974).
2. Reeves, Inc. v. Stake, ____ U.S. ____, 100 S. Ct. 2271, 2274-2275 (1980).
3. Reeves, Inc. v. Kelley, No. 78-5060 (D.S.D. July 21, 1978).
4. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) [hereinafter cited in text as *Alexandria Scrap*].
5. Reeves, Inc. v. Kelley, 586 F.2d 1230, 1233 (8th Cir. 1978).

granted Reeves' petition for certiorari, vacated the judgment of the Eighth Circuit, and remanded the case for further consideration due to the Court's recent decision in *Hughes v. Oklahoma*.[6] On remand, the court of appeals distinguished *Hughes v. Oklahoma* and again upheld the South Dakota policy.[7] The Supreme Court again granted Reeves' petition for certiorari.[8]

The issue before the Supreme Court was whether South Dakota, acting in a proprietary capacity as a free market participant, in time of shortage could confine the sale of its cement to its residents free from the strictures of the commerce clause. In a 5-4 decision written by Justice Blackmun, the Court held that it could, relying on the general rule of *Alexandria Scrap*: "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[9]

COMMERCE CLAUSE BACKGROUND

The commerce clause grants to Congress the power "[to] regulate Commerce . . . among the several States."[10] The Supreme Court has long interpreted this grant of power to act concomitantly as a limit on the power of the states to obstruct interstate trade, whether or not Congress has acted within the area.[11] Nevertheless, when there is no conflicting federal legislation, states do retain some authority under their police powers to regulate matters of "legitimate local concern," even though interstate commerce may be bur-

6. Reeves, Inc. v. Kelley, 441 U.S. 939 (1979). In Hughes v. Oklahoma, 441 U.S. 322 (1979), the Court invoked the commerce clause to strike down an Oklahoma statute that prevented shipping or selling outside of Oklahoma, minnows that were caught within the state. The Court denounced the fiction of state ownership of wild game. *Id.*, at 338-339. In Reeves, Inc. v. Stake, *supra* note 2, at 2275 n. 4, the Court recognized that South Dakota owned the cement in fact, so Hughes v. Oklahoma was not controlling.
7. Reeves, Inc. v. Kelley, 603 F.2d 736 (8th Cir. 1979).
8. Reeves, Inc. v. Kelley, ____ U.S. ____, 100 S. Ct. 700 (1980).
9. Reeves, Inc. v. Stake, *supra* note 2, at 2277, *quoting* Hughes v. Alexandria Scrap Corp., *supra* note 4, at 810. Joining with Justice Blackmun in the majority opinion were Chief Justice Burger, and Justices Stewart, Marshall, and Rehnquist. Justice Powell filed a dissenting opinion, in which Justices Brennan, White, and Stevens joined.
10. U.S. CONST. art. I, § 8, clause 3.
11. Lewis v. BT Investment Managers, Inc., ____ U.S. ____, 100 S. Ct. 2009, 2015 (1980); H.P. Hood and Sons v. Dumond, 336 U.S. 525, 534-538 (1949).

dened.[12] The conservation of natural resources has been held to be a legitimate local concern where regulation to that effect applied equally to intrastate and interstate consumers.[13] Whatever the local purpose, though, the Court has repeatedly warned against a state placing itself in a "position of economic isolation."[14]

In commerce clause cases, the Court traditionally has distinguished between state regulation that creates a barrier to interstate commerce and that which creates a burden but does not discriminate.[15] A regulatory barrier erected for the purpose of economic protectionism is "virtually *per se* [invalid],"[16] while state action that places burdens evenhandedly generally is scrutinized under guidelines such as those enumerated in *Pike v. Bruce Church, Inc.*: (1) is the regulation evenhanded, with only incidental effects on interstate commerce, or discriminatory; (2) does the regulation serve a legitimate local purpose; and (3) could that purpose be served as well without discriminating against interstate commerce?[17]

THE PRINCIPAL PRECEDENT FOR REEVES, INC. V. STAKE

Although cement is manufactured, it is basically a combination of limestone and clay that could be considered a natural resource.[18] Under the *Pike* "balancing test", and earlier formulations, the Court held that a state could not conserve its natural resources by reserving them for their residents at the expense of interstate commerce.[19] The feature distinguishing *Reeves, Inc. v. Stake* from those cases, however, was that South Dakota had not enacted any discrim-

12. Raymond Motor Transportation, Inc. v Rice, 434 U.S. 429, 440 (1978).
13. Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 186-188 (1950).
14. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935).
15. Lewis v. BT Investment Managers, Inc., *supra* note 11, at 2015; Philadelphia v. New Jersey, 437 U.S. 617, 623-624 (1978).
16. Philadelphia v. New Jersey, *supra* note 15, at 624.
17. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) [hereinafter cited in text as *Pike*]. This test has been applied repeatedly throughout the last decade. *See, e.g.*, Raymond Motor Transportation, Inc. v. Rice, *supra* note 12, at 441-442; Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 353 (1977).
18. *See* note 1, *supra*.
19. Hughes v. Oklahoma, *supra* note 6, at 338; Pennsylvania v. West Virginia, 262 U.S. 553, 598-99 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911).

inatory legislation; rather, while acting in a proprietary capacity, it made a market decision to prefer South Dakota purchasers.[20] The Court, therefore, squarely based its decision on the singular case of *Hughes v. Alexandria Scrap Corp.*[21]

In an opinion by Justice Powell, the Court in *Alexandria Scrap* refused to apply traditional commerce clause analysis to the Maryland legislation because the state had entered the market itself and influenced it through subsidies which supplemented natural market forces.[22] The Court dealt with the case as one of first impression and concluded that a state's entry into the market, even if the state then chose to favor its own citizens, was not even within the purview of the commerce clause.[23] According to the Court, there was therefore no need to examine state market participation with traditional commerce clause scrutiny.[24]

In his dissent, Justice Brennan criticized the conclusion that state purchasing activities were not within the contemplation of the commerce clause.

> In the absence of some limiting principal this is a disturbing conclusion, for little imagination is required to foresee future state actions "set[ting] barrier[s] to traffic between one state and another"

20. Reeves, Inc. v. Stake, *supra* note 2, at 2275 [hereinafter cited in text as *Reeves*].
21. Reeves, Inc. v. Stake, *supra* note 2, at 2279, 2282. Hughes v. Alexandria Scrap Corp., *supra* note 4, at 796-802, involved a subsidy that Maryland paid to scrap automobile processors as an incentive to clear abandoned automobiles from the countryside. In order to limit the subsidies spent on scrap autos abandoned in surrounding states and in order to encourage processing within Maryland, the state made documentation requirements stricter for processors outside of Maryland. The effect of that action was to reduce the flow of scrap autos out of the state.
22. Hughes v. Alexandria Scrap Corp., *supra* note 4, at 806-810. Joining with Justice Powell were Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist. Justice Stevens filed a concurring opinion. Justice Brennan filed a dissenting opinion, in which Justices White and Marshall joined.
23. *Id.* at 807-810.
24. *Id.* at 809. The Court had previously summarily affirmed a lower court decision allowing a state to favor its own citizens when purchasing services for its own end use. American Yearbook Co. v. Askew, 409 U.S. 904 (1972). The lower court held that statutes specifying the conditions of state purchases dealt with proprietary activities that are not subject to commerce clause restrictions. American Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (N.D. Fla. 1972). The majority in Alexandria Scrap gave no notice to that case, but the dissent did distinguish it. Hughes v. Alexandria Scrap Corp., *supra* note 4, at 821 (dissenting opinion).

> . . . . This can surely occur if all state action is to be immunized from further analysis merely . . . by the State's becoming in some sense a "purchaser".[25]

In 1980, *Reeves*, with the modification of the state acting as a seller, presented the Court with just such a foreseeable problem.

THE COURT'S ANALYSIS

In *Reeves*, the principal drafters of *Alexandria Scrap's* "market participant" analysis, Justice Powell for the majority and Justice Stevens in concurrence, dissented.[26] Despite that significant voting shift, Justice Blackmun's opinion for the majority reaffirmed the distinction *Alexandria Scrap* made between states as market participants and states as market regulators.[27] Since South Dakota qualified as a market participant, its action was free from commerce clause restraints.[28] Furthermore, the Court noted that considerations of state sovereignty and fairness required providing South Dakota with the benefits, as well as the burdens, of free market participation.[29] In the main, however, the Court simply applied the "general rule" of *Alexandria Scrap*: in the absence of congressional action, the commerce clause does not prohibit a state from participating in the market and favoring its own citizens over non-residents.[30]

ANALYSIS OF THE COURT'S OPINION

The Court in *Reeves* failed to refine the rule set forth in *Alexandria Scrap* beyond clearly expanding it to include sales by the state, as well as purchases or subsidies. Once it determined that the rule in *Alexandria Scrap* applied, the Court rather summarily responded to Reeves' arguments.[31] Certainly no limiting principles were imposed on the broad "market participant" exemption from commerce clause

25. Hughes v. Alexandria Scrap, Corp., *supra* note 4, at 828-29 (dissenting opinion), *citing* Baldwin v. G.A.F. Seelig, Inc., *supra* note 14, at 521.
26. Reeves, Inc. v. Stake, *supra* note 2, at 2282.
27. *Id.* at 2277.
28. *Id.* at 2279.
29. *Id.* at 2278-2279.
30. *Id.* at 2277, 2279.
31. *Id.* at 2279-2282.

scrutiny. The majority's perfunctory treatment of *Reeves* belies the confusion that apparently exists on the Court as to the effect, if any, of the commerce clause on state market participation. The close decisions in *Alexandria Scrap* and *Reeves*, combined with the major shifts in voting between the two, indicate that the question is far from resolved and that the states do not have clear guidance as to what extent their participation in the private market will be immune from commerce clause prohibitions.

Reeves clearly raised the issue of state control of natural resources through proprietary means. Unfortunately, the Court chose not to examine that issue.[32] Surely the states have not been given a blueprint for avoiding the commerce clause proscriptions against hoarding natural resources, but neither have they been given any meaningful limits to the realm within which they can operate free from such proscriptions.

Why the Court abandoned traditional commerce clause analysis is not entirely clear. That analysis would allow the Court to balance considerations of state innovation and sovereignty against the national concern for free trade among the states.[33] It is likely that the Court was reluctant to apply the rule of *per se* invalidity to South Dakota's clearly discriminatory action since state tax dollars initially funded the cement plant.[34] That consideration diminishes in importance, however, in view of the fact that the cement plant had been self-supporting for many years.[35]

The consideration of tax support could have received its due without excepting all state market participation from commerce clause review. The Court conceivably could have used *Alexandria Scrap* as a justification for removing discriminatory state market activity from the *per se* invalidity rule,[36] and then scrutinized the activity under the traditional

32. *Id.* at 2281.
33. Pike v. Bruce Church, Inc., *supra* note 17, at 142.
34. Philadelphia v. New Jersey, *supra* note 15, at 624.
35. Reeves, Inc. v. Stake, *supra* note 2, at 2285 n. 3 (dissenting opinion).
36. Philadelphia v. New Jersey, *supra* note 15, at 624.

Pike balancing test.[37] That type of limited exception, with proper deference to the states in the balancing process, could protect the states' legitimate interest in their natural resources, innovations, and expenditures, but would prevent purely protectionist activity from escaping review. In *Reeves*, however, the Court chose instead merely to follow without limitation a precedent whose own author felt was not controlling.[38]

RECONSIDERATION OF REEVES' ARGUMENTS

Reeves' Detrimental Reliance

In support of its commerce clause challenge, Reeves argued that in time of shortage South Dakota could not withdraw from the interstate market that it had plied for many years.[39] The Court rejected that argument as implying that South Dakota could not have favored its residents from the day the plant opened, even though such action would clearly be permissible. That situation, argued the Court, was indistinguishable from the change in policy that actually occurred in *Reeves*.[40]

Initially, it must be emphasized that the South Dakota Cement Plant was the only one in that state and sold some forty percent of its production out of state.[41] Whether private enterprise would have provided the difference had South Dakota maintained a "residents only" policy from the outset is impossible to determine;[42] nevertheless, it is evident that South Dakota profited greatly from its position as the only supplier in the region. In good times, the state sold its cement to non-residents, insuring that the plant was self-supporting and not a burden on South Dakota taxpayers;[43]

37. Pike v. Bruce Church, Inc., *supra* note 17, at 142. *See* text accompanying note 17, *supra*. Even though the South Dakota policy discriminates, the Court could simply inquire whether the regulation serves a legitimate local purpose, and whether the purpose could be served as well with less discriminatory means.
38. Reeves, Inc. v. Stake, *supra* note 2, at 2283 (dissenting opinion).
39. Brief for Petitioner at 25, Reeves, Inc. v. Stake, *supra* note 2, at 2279.
40. Reeves, Inc. v. Stake, *supra* note 2, at 2279.
41. Brief for Petitioner, *supra* note 39, at 7.
42. Reeves, Inc. v. Stake, *supra* note 2, at 2282.
43. *Id.* at 2285 n. 3 (dissenting opinion).

while in times of shortage, it erected a barrier to interstate trade, insuring that South Dakota taxpayers received maximum benefits from the plant.

Furthermore, the Court paid no heed to the explicit reservation that Justice Powell made in *Alexandria Scrap*.

> We also note that appellee undertook to build no new plant nor add additional machinery in reliance upon . . . the Maryland bounty scheme. . . . We intimate no view as to the consequences, if any, in a Commerce Clause case of a different state of facts in this respect.[44]

The Court in disputing another of Reeves' arguments emphasized that Reeves' very existence and continued operation for twenty years depended upon the South Dakota Cement Plant.[45] In reliance on the expectation of purchasing cement from the South Dakota Cement Plant, Reeves had invested about $3,000,000 in "plant equipment, supplies, facilities and material sources" since 1958.[46] In that same period, Reeves purchased about ninety-five percent of its cement from the plant and provided over fifty percent of the ready mix concrete for three Wyoming counties.[47] When South Dakota refused to sell cement to it as a non-resident, Reeves was forced to cut his production by seventy-six percent. In view of the degree of reliance, Justice Powell's admonition in *Alexandria Scrap*, and his subsequent dissent in *Reeves*, the Court should not have summarily dismissed Reeves' reliance argument as "self serving."[48]

Finally, if the Court "balanced" interests, with reliance as one of the factors to consider, a state policy that preferred residents from the outset would not necessarily be void. The Court could use *Alexandria Scrap* to avoid the rule of *per se* invalidity, and then use the *Pike* test to balance the degree of burden against the legitimate local purpose. If the state sold only to residents from the outset, the balance would

44. Hughes v. Alexandria Scrap Corp., *supra* note 4, at 809 n. 18.
45. Reeves, Inc. v. Stake, *supra* note 2, at 2282.
46. Brief for Petitioner at 5, Reeves, Inc. v. Kelley, No. 78-5060 (D.S.D. July 21, 1978).
47. Reeves, Inc. v. Stake, *supra* note 2, at 2275.
48. *Id.* at 2279.

most likely be struck in favor of the state. With no prior reliance, the degree of burden on interstate commerce would actually be slight despite the discrimination; the local purpose would be legitimate and could not be achieved as well without discrimination. Once the state exploits the interstate market, however, the legitimacy of the local purpose becomes attenuated, the degree of burden increases, and the state can promote its purpose with less discrimination; for example, it could first supply projects of the State of South Dakota before selling to any private interests.[49]

If the Court exempted state market participation from the *per se* invalidity rule, a state would still be free to try social and economic experiments in solving local problems; by subjecting the actions to a balancing test, the Court could insure that such experiments were indeed "without risk to the rest of the country."[50] By failing to limit *Reeves* and *Alexandria Scrap*, the Court instead has encouraged states to engage in experiments in economic protectionism and resource hoarding free from commerce clause scrutiny.

Hoarding of Natural Resources

Reeves also argued that if South Dakota's action were approved, other states would be encouraged to follow its plan and isolate themselves from national energy and other natural resource shortages.[51] The Court responded that cement is not a natural resource, but "the end-product of a complex process whereby a costly physical plant and human labor act on raw materials."[52] The Court reasoned that the limestone used to make cement was the essential natural resource and South Dakota had not limited access to it.[53] The Court intimated that limits to the *Reeves* and *Alexandria Scrap* exemption might exist to prevent a state from invoking them to hoard natural resources, but it proposed no limits and simply stated that none would apply to the *Reeves* situation.[54]

49. *Id.* at 2286 (dissenting opinion).
50. *Id.* at 2280, *quoting* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion).
51. Brief for Petitioner, *supra* note 39, at 29.
52. Reeves, Inc. v. Stake, *supra* note 2, at 2281.
53. *Id.* at 2281.
54. *Id.*

As Justice Powell's dissent pointed out, the Court's description of cement production describes the exploitation of most natural resources,[55] especially those such as crude oil, gasified coal, shale oil, uranium, the metallic minerals, and other natural resources that are not usable immediately upon extraction from the earth. It is understandable that the Court would seek to avoid giving an advisory opinion, but by distinguishing cement from other resources that a state might actually own, the Court avoided a very important issue and offered little guidance to the states as to permissible activity. The Court itself characterized cement as "a finely ground manufactured mineral product."[56] It is therefore hard to see how the Court would have issued an advisory opinion had it discussed cement in the context of natural resources.

The Court's distinction between access to limestone and access to cement is no more helpful to the states. Cutting off the supply of cement in times of shortage is equivalent to cutting off the supply of any natural resource.[57] The Court's artificial distinction leaves open numerous scenarios of a state hoarding natural resources that it developed and owned. Those scenarios are logically indistinguishable from the situation in *Reeves*. For example, the development of oil shale is a complex process that is highly capital intensive and currently heavily dependent on government funds. Access to oil shale and shale oil are distinct, but could a state justifiably cut off a supply of state-produced shale oil during a shortage on the grounds that access to oil shale is unhindered? If limits to the *Alexandria Scrap* and *Reeves* exemption do exist, the Court was shortsighted in failing to enunciate any.

Economic Protectionism

The Court also rejected Reeves' argument that the South Dakota policy was invalid since it gave South Dakota purchasers an unfair advantage in the interstate market.[58] The

55. *Id.* at 2283-84 n. 2 (dissenting opinion).
56. *Id.* at 2275 n. 2.
57. *Id.* at 2284 n. 2 (dissenting opinion).
58. *Id.* at 2281.

Court reasoned that Reeves' argument necessarily implied that a policy barring the sale of cement by South Dakota purchasers to out-of-state purchasers would have been valid, even though that would constitute an even greater burden on interstate commerce.[59] That reasoning obscured Reeves' real argument.

Reeves argued that the policy of unconditional preference for South Dakota made the purpose of the policy suspect.[60] There was no guarantee that the cement would go to projects of importance to the people of South Dakota; the only guarantee was that only South Dakota businesses could purchase cement. Under those circumstances, the policy's main concern seemed to be economic protection for South Dakota businesses.[61] The logical implication of Reeves' argument was not that the state should bar all interstate resales, but that there were less discriminatory means to effect the legitimate goal of protecting the people of South Dakota, if that were indeed the goal.[62]

As the dissent noted, South Dakota could have reserved enough cement to supply public projects before allowing all private interests to compete for the remainder. That action would probably be deemed an acceptable means of achieving a legitimate local purpose under the *Pike* balancing test.[63] A policy preventing resale out of state would probably fail that test for being an illegitimate purpose and unnecessarily discriminatory. For the same reasons, the policy of selling only to residents would probably fail a balancing test.[64] It is disturbing, therefore, that such a policy was not given any commerce clause scrutiny.

RECONSIDERATION OF THE DISSENT

The fact that Justices Powell and Stevens both dissented in *Reeves*, after writing the opinions sustaining the state discrimination in *Alexandria Scrap*,[65] might indicate incon-

59. *Id.*
60. Brief for Petitioner, *supra* note 39, at 27.
61. *Id.*
62. *Id.* at 27-30.
63. *See* text accompanying note 17, *supra.*
64. Brief for Petitioner, *supra* note 39, at 26-32.
65. *See* notes 9 and 22, *supra.*

sistency on their part; but, it also might indicate that *Reeves* extended the principle of *Alexandria Scrap* much beyond what its authors envisioned. There is language in *Alexandria Scrap* to substantiate both the majority opinion in *Reeves* and Justice Powell's more limited interpretation in the dissent.[66] It can not be gainsaid, though, that the broad exemption from commerce clause scrutiny the Court granted to state market participation in *Alexandria Scrap* appeared in a more unpalatable form in *Reeves*. That it would was foreseeable; that the Court still did not limit the exemption is surprising.

Application of the General Rule of Alexandria Scrap

In order to reach its decision in *Reeves*, the majority operated under several assumptions that, in light of Justice Powell's dissent, at least require greater justification than the Court supplied. The first assumption was that the general rule of *Alexandria Scrap* clearly applied to *Reeves*.[67] Even though South Dakota was a market participant, Justice Powell wrote that rather than being exempt from the commerce clause, the South Dakota "residents only" policy represented "precisely the kind of economic protectionism that the commerce clause was intended to prevent."[68] He carefully emphasized, however, that "protectionism" did not refer to state policies relating to traditional governmental functions, such as the subsidy program n *Alexandria Scrap*.[69] Then, the author of *Alexandria Scrap* declared that *Reeves* presented a "novel constitutional question."[70]

According to Justice Powell, the question of whether or not the commerce clause should apply to the state activity in *Reeves* hinged not on whether South Dakota was a market participant, but on whether its market participation was an "integral operatio[n] in areas of traditional governmental functions."[71] In Justice Powell's analysis, a state could enter

66. *Compare, e.g.*, Hughes v. Alexandria Scrap Corp., *supra* note 4, at 809-10 *with* 806.
67. Reeves, Inc. v. Stake, *supra* note 2, at 2279.
68. *Id.* at 2282 (dissenting opinion).
69. *Id.* at 2282-83 n. 1.
70. *Id.* at 2283.
71. *Id.* at 2284, *quoting* National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

the market to supply its own needs for operation of the government free from commerce clause scrutiny. When a state enters the "private market and operates a commercial enterprise for the advantage of its private citizens," however, the commerce clause prevents actions that unduly burden interstate commerce.[72] Whether *Alexandria Scrap* was misconstrued in *Reeves*, or whether Justice Powell simply was troubled by its broad implications when applied to *Reeves*, his dissent adds even more to the confusion surrounding *Reeves*.

Reconciliation of Justice Powell's Opinions in Alexandria Scrap and Reeves

Although Justice Powell definitely used broad language to describe the *Alexandria Scrap* exemption, the distinctions he made in *Reeves* merit attention as possible limits that the Court may later impose. The "traditional governmental function" distinction may be useful because in *Alexandria Scrap*, Justice Powell did give some weight to Maryland's purpose for entering the market, that of environmental protection.[73] Another distinction is that *Alexandria Scrap* involved subsidies funded by taxation, while the South Dakota Cement Plant was a self-supporting proprietary entity.[74] Perhaps the most significant difference, though, was the method of discrimination.

In *Alexandria Scrap*, Justice Powell emphasized that Maryland merely entered the market to bid up the price of scrap autos and did not regulate or prohibit their flow out of state. Nor did it require scrap autos to be processed in state. Maryland simply made the decision to process in state more lucrative.[75] Maryland erected no barrier to trade, rather, the autos remained "within Maryland in response to market forces, including that exerted by money from the state."[76]

72. *Id.*
73. Hughes v. Alexandria Scrap Corp., *supra* note 4, at 809.
74. Reeves, Inc. v. Stake, *supra* note 2, at 2285 n. 3 (dissenting opinion).
75. Hughes v. Alexandria Scrap Corp., *supra* note 4, at 806.
76. *Id.* at 809-810.

Reeves, in contrast, dealt with an absolute state-imposed barrier to interstate commerce. South Dakota was indeed a market participant, but rather than making certain market options more attractive, it manifestly eliminated a market option by barring sales to non-resident purchasers.[77]

Perhaps Justice Powell's limitations were not clearly made in *Alexandria Scrap;* or, perhaps he changed his position between the two cases. In either event, it seems that the unqualified assertion that *Reeves* fell within the general rule of *Alexandria Scrap* needed some further support.[78]

The State as Market Participant and Market Regulator

The Court also assumed that fairness required that the state as a market participant should be as free from commerce clause restraint as a private individual.[79] As Justice Powell recognized, equating a state with any other market participant does not account for different factors that motivate the two. A private individual's market decisions will generally reflect a desire to maximize profits. A state's goals, however, will often be political; so its market decisions often will be politically, not economically, motivated.[80] Those decisions, when backed by the power of the state, have the potential to regulate the market and should not go unscrutinized.[81]

The tools available to the states as market participants are much more powerful and diverse than those of a private entity. For example, the South Dakota Constitution authorizes the legislature to "empower the state to acquire, by purchase or appropriation, all lands, easements, rights of way, tracts, structures, equipment . . . and material necessary" to manufacture, distribute, and sell cement.[82] A private entity generally will not have the ability to acquire the

77. Reeves, Inc. v. Stake, *supra* note 2, at 2285-2286 (dissenting opinion).
78. *Id.* at 2279.
79. *Id.*
80. *Id.* at 2284 (dissenting opinion).
81. *Id.*
82. S.D. CONST. art. XIII, § 10.

elements of an enterprise through appropriation.[83] In fact, a state has a full range of police powers to aid their entry into the free market, and if necessary, a full range of taxing powers to keep themselves there.

With its political motivations and powers, a state is not a mere market participant. It occupies the enviable position of both market participant and market regulator.[84] Those two functions merged particularly well in *Reeves* since South Dakota operated the only cement plant in the state.[85] The majority attributed little significance to the state's ability to regulate through participation. In fact, the Court's commerce clause inquiry halted once it found market participation.[86] That degree of deference to the state was unwarranted because "[s]tate action burdening interstate commerce is no less state action because it is accomplished by a public agency authorized to participate in the private market."[87] Although the Court considered market participation sufficient to remove the action from commerce clause review, an early principle of commerce clause review was "a state may not, in any form or under any guise, directly burden the prosecution of interstate business."[88]

CONCLUSION

The Court in *Reeves* allowed South Dakota to discriminate against out-of-state cement purchasers without submitting the state's action to traditional commerce clause scrutiny. Even the fact that an entire region was facing severe cement shortages was insufficient to trigger commerce clause scrutiny. The Court justified its decision by denominating South Dakota's action "market participation" rather than "market regulation." That ethereal distinction does not comport with the settled principle that the "Constitution was framed . . . upon the theory that the peoples of the

83. There are some limited private rights of eminent domain for certain public uses, mainly to provide access to water and mines. WYO. STAT. §§ 1-26-303 and 1-26-401 (1977).
84. Reeves, Inc. v. Stake, *supra* note 2, at 2284 (dissenting opinion).
85. Brief for Petitioner, *supra* note 39, at 7.
86. *Id.* at 2279.
87. *Id.* at 2284 (dissenting opinion).
88. Baldwin v. G.A.F. Seelig, Inc., *supra* note 14, at 522, *quoting* International Textbook Co. v. Pigg, 217 U.S. 91, 112 (1910).

several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[89]

States should have freedom to experiment and provide for their citizens, but there is an elusive boundary beyond which state activity is too protectionistic to be allowed in a unified nation. The states have just as much power to cross that boundary as "market participants" as they do as "market regulators." The commerce clause should not interfere with legitimate state experimentation, but it should prevent protectionism. By failing to balance interests or limit the *Reeves* exemption from commerce clause scrutiny, the Court has given the states no standards by which to make their own decision on the legitimacy of an experiment.

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89. Baldwin v. G.A.F. Seelig, Inc., *supra* note 14, at 523.