Integrating Public Choice and Public Law: A Reply to DeBow and Lee

Daniel A. Farber
Berkeley Law

Philip P. Frickey
Berkeley Law

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The Selfish State and the Market

Mark P. Gergen*

Courts and scholars have struggled to define the extent to which a state may constitutionally favor its citizens in the disposition of resources from within the state. The uneasy tension between the rule of interstate equality, which would brook no differential treatment, and the concept of state sovereignty, which would allow unrestricted preferences, fails to resolve the issue. Professor Gergen proposes two principles for differentiating between permissible and impermissible preferences. First, a state may not prefer its citizens by interfering in the movement of resources in the market. Second, a state may reserve for its citizens goods that it creates if a redistributinal or other interest justifies its action. Although administrability and respect for tradition may influence what preferences are tolerated, Professor Gergen argues that the effect of these principles is to maximize utility by discouraging inefficient market interferences while encouraging wealth-creating state action. He next asserts that the privileges and immunities clause of article IV provides ample support for the principles and bolsters this argument with an in-depth examination of the history and original understanding of the clause. Finally, Professor Gergen illustrates how one might apply the principles to two particularly ambiguous preferences—state subsidies of local commerce and restrictions on the export of groundwater.

I. Introduction

It is a maxim of constitutional law that states may not discriminate against citizens of other states to enrich their own citizens. But, like many supposed truths, this maxim is subject to exception. States may seek advantage for their citizens in a variety of ways, some of which entail discrimination. States may impose quarantines on imports to protect the health of citizens,¹ for example, and they may enact reciprocal laws to encourage better treatment of citizens abroad.² This Article explores the most significant exception to the rule of interstate equality, the power of a state to favor its citizens in the disposition of certain resources. It

* Assistant Professor of Law, The University of Texas School of Law. I would like to thank Barbara Aldave, Hans Baade, Jack Getman, Lino Graglia, Corwin Johnson, Douglas Laycock, Sanford Levinson, Dick Markovits, and Scot Powe for advice on earlier drafts.

will explain when these resource preferences should be tolerated and when they should not.

Resource preferences come in many forms. The following is a partial list:

1. State $X$ allows only residents to enroll in public schools.
2. State $X$ sells cement produced by a state-owned plant only to residents.
3. State $X$ requires firms doing business with it to hire only residents.
4. State $X$ forbids the export of groundwater.
5. State $X$ forbids the disposal of foreign wastes on privately owned land.

The United States Constitution always has prohibited state measures of the last sort, which interfere with the flow of goods in interstate commerce. In recent years, however, the Supreme Court has prohibited other measures that favor a state's own citizens in the allocation of resources, including restrictions on access to such resources as groundwater and fisheries (item four). It also has forbidden a state from requiring firms that exploit oil and timber from state lands to prefer citi-

3. See Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978). Philadelphia v. New Jersey followed a series of earlier decisions which had held that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demand or because they are needed by the people of the State." Id. at 627 (quoting Foster Fountain-Packing Co. v. Haydel, 278 U.S. 1, 10 (1929)).

4. From the middle of the nineteenth century until the 1940s, most state resources were thought to be the property of the state, which the state could dispose of as it wished. See, e.g., Hudson County Water Co. v. McCarter, 209 U.S. 349, 356-58 (1908) (upholding state law prohibiting export of surface water); Geer v. Connecticut, 161 U.S. 519, 534-35 (1896) (refusing to strike down state law prohibiting taking of game birds from the state), overruled, Hughes v. Oklahoma, 441 U.S. 322 (1979); McCready v. Virginia, 94 U.S. 391, 396-97 (1876) (upholding state law prohibiting nonresidents from taking or planting oysters in state waters). Thus, states restricted public employment to citizens, required a preference for local products in government purchasing, allowed exploitation of state-owned natural resources only by citizens, and forbade the export of state-owned resources. See, e.g., Melder, The Economics of Trade Barriers, 16 IND. L.J. 127, 139 (1940) (arguing that a state generally may exercise both preferences for its own citizens and discriminations penalizing noncitizens because of its spending power and its powers as owner and conservator of public property).

5. In the landmark decision of Toomer v. Witsell, 334 U.S. 385 (1948), the Court struck down a South Carolina law imposing a prohibitive tax on nonresidents taking shrimp in state waters. The Court reasoned that the privileges and immunities clause of article IV barred "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." Id. at 396. The Court cast aside the ownership theory as "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Id. at 402.

Other cases have attacked substantially similar measures under the commerce clause. In Hughes v. Oklahoma, 441 U.S. 322 (1979), the Court struck down an Oklahoma law prohibiting the export of minnows caught in the state. The Court rejected Oklahoma's claim to ownership of the minnows and then invalidated the law because it facially discriminated against interstate commerce. Id. at 336-38. Three years later, the Court struck down a Nebraska law prohibiting the export of groundwater. See Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957-58, 960 (1982). This decision was foreshadowed by the Court's summary affirmance of a decision invalidating a Texas
zens or local firms in other dealings (item three). The Court has insisted that a state may not discriminate against outsiders to aid its citizens—a principle of interstate equality embodied in the commerce clause, the privileges and immunities clause of article IV, and the equal protection clause. At the same time, the Court has ruled that a state may limit social services to citizens (item one) and may favor them in direct sales.


In Hicklin v. Orbeck, 437 U.S. 518 (1978), the Court ruled that the privileges and immunities clause prohibited Alaska from requiring private companies to give its citizens preference in employment related to the development of the state's oil and gas resources. The Court based its decision on the narrow ground that Alaska had failed to show that outsiders coming to the state were a significant cause of unemployment. Id. at 526-28. The Court conceded that Alaska's claim to ownership of the oil and gas could be "often the crucial" factor in the analysis, but struck down the law because it extended "to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State." Id. at 529-30.

Nonresidents also have challenged similar measures under the commerce clause. The Supreme Court recently used the commerce clause to invalidate an Alaska law requiring that purchasers of timber from state land process it within the state before export. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 84 (1984). Although its reasoning is less than clear, the plurality opinion suggests that the state was impermissibly "using its leverage in [the timber] market to exert a regulatory effect in the processing market" and that it reached too far in "attempting to govern the private, separate economic relationships of its trading partners." Id. at 98-99.

In Metropolitan Life Insurance Company v. Ward, 470 U.S. 869 (1985), the Court suggested a rule so sweeping as to call into question virtually any citizen preference. At issue was an Alabama law taxing out-of-state insurance companies at a higher rate than domestic companies. Such a law plainly would violate the commerce and privileges and immunities clauses, but states are relieved from the strictures of the former in regulating the insurance business by the McCarran-Ferguson Act, 15 U.S.C. § 1012(a) (1982), and the latter does not protect corporations, e.g., Hemphill v. Orloff, 277 U.S. 537, 548-50 (1928). Nevertheless, the Court struck down the preferential tax under the equal protection clause, reasoning that "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose." 470 U.S. at 882. As Justice O'Connor observed in dissent, if this rule were taken literally, it would invalidate any sort of subsidy designed to promote local industry. Id. at 893-94 (O'Connor, J., dissenting). Even if the constitutional prohibition is limited to preferential taxes used to promote local industry, this rule may sweep too broadly, for it calls into question cases holding that a state may encourage location of industries within it by selective tax exemptions, e.g., Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528 (1959). Perhaps the best explanation of this perplexing decision is Professor Cohen's suggestion that the Court has grown uncomfortable with the broad exception from the commerce clause the states enjoy in their regulation of insurance under the McCarran-Ferguson Act. See Cohen, Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward, 38 STAN. L. REV. 1, 3-4 (1985).

In Martinez v. Bynum, 461 U.S. 321 (1983), the Court ruled that Texas could deny children admission to Texas public schools if they were United States citizens residing with their parents in Mexico. The Court accepted Texas's interest "in assuring that services provided for residents are enjoyed only by its residents" as sufficient for purposes of equal protection. Id. at 328. In a per curiam opinion in McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646-47 (1976) (per curiam), the Court indicated that a state could discriminate against nonresidents by providing residents a preference in public employment without violating the rule of Shapiro v. Thompson, 394 U.S. 618, 627 (1968), which forbids a state from raising unreasonable residency requirements to deny services to immigrants.
of resources from state lands or state-owned factories (item two).\textsuperscript{11} It also has indicated that a state or municipality may require firms doing business with it on publicly funded projects to hire residents (item three).\textsuperscript{12} In these cases, the Court scarcely mentions the rule of interstate equality and instead rests its decisions on the principle that a state as sovereign may use its resources to aid its citizens.

Part II argues that the principles of equality and state sovereignty cannot explain these cases satisfactorily. Equality would forbid all preferences; state sovereignty would permit all. Part III proposes two related principles to distinguish permissible from impermissible preferences. First, a state may not interfere in the market to deny resources to outsiders. Second, a state may favor its own in the allocation of state-provided goods for which some redistributional or other interest justifies allocation by communal affiliation rather than through market transactions. These principles serve a common utilitarian end. They discourage inefficient interferences in the market while encouraging utility-maximizing activities by states when the market cannot accomplish them. Part III also explains how concerns for administrability and respect for tradition, as well as concerns of efficiency, influence the result in particular cases.

\textsuperscript{11} Such preferences are largely immune from challenge under the commerce clause because they involve proprietary activities by the state. \textit{See}, e.g., Reeves, Inc. \textit{v.} Stake, 447 U.S. 429, 446-47 (1980) (upholding a South Dakota program limiting the sale of cement from a state-owned plant to residents); Hughes \textit{v.} Alexandria Scrap Corp., 426 U.S. 794, 812-14 (1976) (upholding a Maryland law allowing Maryland processors to obtain a bounty for scrapping junked automobiles more easily than processors from outside the state). The proprietary activities exception to the commerce clause is based partly on the notion that a state entering the market should have the same freedom as a private actor to do business with whomever it chooses. \textit{See Reeves,} 447 U.S. at 438-39. The exception also reflects "considerations of state sovereignty" and particularly "the role of each State as guardian and trustee for its people." \textit{Id.} at 438. But the persistent justification for the proprietary activity exception is that the rule of the commerce clause is negative: it prohibits only tax or regulatory barriers to interstate commerce and not domestic preferences in the form of subsidies. \textit{See id.} at 436-37; Hughes, 426 U.S. at 807-09.

\textsuperscript{12} \textit{See} United Bldg. \& Constr. Trades Council \textit{v.} Mayor of Camden, 465 U.S. 208 (1984); \textit{see also} White \textit{v.} Massachusetts Council of Constr. Employers, 460 U.S. 204, 214-15 (1983) (upholding a Boston ordinance requiring that firms working on municipal construction projects give preference to city residents in hiring). \textit{In United Bldg.,} a Camden ordinance required firms working on municipal construction projects to employ residents of the city. The Court remanded the case to the state court with instructions that the preference would violate the privileges and immunities clause unless the city could show that the preference was necessary to arrest middle-class flight and increase the number of employed persons living within its environs. 465 U.S. at 221. Although the Court extended the rule of nondiscrimination from the disposition of a natural resource to the expenditure of public funds, it distinguished \textit{Hicklin v. Orbeck}, 437 U.S. 35 (1978), observing that "[t]he fact that Camden is expending its own funds ... is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause." 465 U.S. at 221. The Court also avoided conflict with \textit{Hicklin} by casting the end served as arresting "middle-class flight" from the city rather than simply alleviating unemployment; it also noted the narrower scope and effect of the statute. \textit{Id.} at 222-23. Thus, the Court clearly indicated that hiring preferences for citizens sometimes are permissible.

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Finally, it demonstrates that these principles may be grounded on the privileges and immunities clause of article IV.

Part IV examines two cases in which it is not clear if a resource preference interferes in the market: state subsidies of local commercial interests and restrictions on the export of groundwater, a natural resource for which there may be no market. This Article concludes that direct commercial subsidies should be tolerated because they are not as troubling as tariffs and embargoes from the perspective of efficiency, because the law traditionally has tolerated them, and because enforcement of a rule prohibiting them would not be feasible. But most indirect subsidies, particularly buy-, hire-, and sell-local laws for state commercial enterprises and downstream restraints, should be prohibited. In the case of restrictions on the export of groundwater, concerns of efficiency clearly point to freeing interstate movement and thus support the straightforward rule that once a state creates internal markets for groundwater, it must provide outsiders with equal access. If a state should choose to allocate water administratively, rather than through the market, it still must allocate it to outsiders on equal terms.

II. Interstate Equality and State Sovereignty

The modern rule of interstate equality provides that a state may not discriminate against outsiders with selfish intent. This modern rule of equality emerged in privileges and immunities clause analysis as courts gradually expanded the class of rights protected from certain fundamental rights to virtually all things, or at least all nontrivial things. The idea that state legislation discriminating against interstate commerce is particularly suspect first appeared as a principle in commerce clause doctrine in the Reconstruction Era, but in the modern era the rule of non-discrimination has become a separate branch of commerce clause analysis. Courts applied the equal protection clause to problems of interstate discrimination largely by default when they invoked it early in this century to protect corporations, which are not considered citizens.

16. See, e.g., Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186-87 (1950) ("The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions.")

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protected by the privileges and immunities clause,\textsuperscript{17} from discriminatory state taxes.\textsuperscript{18} Recently, the equal protection clause has been a provision of last recourse for insurance corporations,\textsuperscript{19} which are denied appeal to the commerce clause by the McCarran-Ferguson Act.\textsuperscript{20}

The ascendance of the rule of interstate equality has brought an emphasis on the motives of state discrimination against outsiders. Under privileges and immunities, commerce, and equal protection clause doctrines, state discrimination against outsiders must serve a legitimate interest.\textsuperscript{21} This focus, in practice, prohibits laws motivated by protectionist sentiments or a desire to enrich citizens at the expense of outsiders.\textsuperscript{22} Thus, the Court has ruled that state action designed only to favor domestic industry, no matter what the cost to foreign corporations, "constitutes the very sort of parochial discrimination that the Equal Protection Clause was designed to prevent."\textsuperscript{23} It has also said that the privileges

\textsuperscript{17} E.g., Hemphill v. Orloff, 277 U.S. 537, 548-50 (1928).
\textsuperscript{18} The Court at first ruled that the equal protection clause did not impair the right of a state to bar or condition the entry of corporations to do business within it, in part because a corporation not yet admitted to do business was not considered a person "within the jurisdiction" of a state and thus was not protected by the provision. See Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 117 (1886). Protection under the provision first was accorded to corporations already established in a state faced with new and confiscatory taxes. See Southern Ry. v. Greene, 216 U.S. 400, 416-18 (1910). The Court soon became entangled in determining whether taxes selectively imposed on foreign corporations were a permissible condition of entry or an impermissible measure to penalize corporations already there, and in this struggle the Court gradually expanded the scope of protection accorded to corporations until it ruled that although a state might charge a special admission fee, it generally could not discriminate with respect to anything else. Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 510-11 (1926). The doctrine that a state may impose whatever exactions it chooses on foreign corporations seeking to do business in its jurisdiction is now termed an "anachronism." See Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 667-68 (1981). For an analysis of the various turns of doctrine on this issue, see Sholley, Corporate Taxpayers and the Equal Protection Clause, 31 ILL. L. REV. 463 (1936).


\textsuperscript{21} The privileges and immunities clause "does not preclude discrimination against citizens of other States where there is a 'substantial reason' for the difference in treatment." United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984) (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)). The commerce clause requires a court to inquire whether the discriminatory statute "serves a legitimate local purpose." Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). A tax discriminating against foreign insurance companies will be sustained against an equal protection clause challenge if its classification is "rationally related to achievement of a legitimate state purpose." Western & S. Life Ins. Co., 451 U.S. at 657. The required relation between means and end varies. Under the privileges and immunities clause, the relation must be substantial, Toomer, 334 U.S. at 396; under the commerce clause, no nondiscriminatory means to achieve the same end may exist, Hughes, 441 U.S. at 337; under the equal protection clause, the relation need only be rational, Metropolitan Life, 470 U.S. at 875 (citing Western & S. Life Ins. Co., 451 U.S. at 667-68), unless a fundamental right is implicated, and then the action must closely serve a compelling interest, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

\textsuperscript{22} See Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091, 1094-95 (1986).

\textsuperscript{23} Metropolitan Life, 470 U.S. at 878.
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and immunities clause demands that states support discrimination against outsiders by "valid independent reasons" apart from "the mere fact that they are citizens of other States."24

The rule of interstate equality alone, however, cannot explain the cases.25 That a state with selfish intent discriminates against outsiders is neither necessary nor sufficient to make its action unconstitutional.26 The Court often permits the state to violate the rule of equality in allocating its own resources because of concerns of state sovereignty.27 The Court has said that a state may prefer its own in the allocation of resources because the state is "guardian and trustee for its people."28 In Martinez the Court ruled that Texas could deny public schooling to nonresidents because of the "substantial state interest in assuring that serv-

24. Toomer, 334 U.S. at 396.

25. Professor John Ely has cited the rule of interstate equality as an ideal type of process-based or nonsubstantive norm in constitutional analysis. J. ELY, DEMOCRACY AND DISTRUST 90-91 (1980). The two themes prominent in Professor Ely's work, suspicion of judicially asserted rights and advocacy of an approach that seeks to cure defects in the democratic process, are emphasized by several critics of current commerce clause doctrine who argue that the Court should abjure balancing and prohibit measures bearing on interstate commerce only when such measures discriminate against outsiders. See, e.g., Eule, Laying the Dormant Commerce Clause To Rest, 91 YALE L.J. 425, 457 (1982); Sedler, The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure, 31 WAYNE L. REV. 885, 998 (1985); Tushnet, Rethinking the Dormant Commerce Clause, 1979 WIS. L. REV. 125, 141-42. Others have tried to explain privileges and immunities clause doctrine in similar terms. See, e.g., Simson, Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV, 128 U. PA. L. REV. 379, 385 (1979); Comment, The Interstate Privileges and Immunities: Fundamental Rights or Federalism?, 15 CAP. U.L. REV. 493, 513 (1986). Professor Cass Sunstein has suggested that several provisions of the Constitution are drawn to prevent naked majoritarian preferences, including the rules prohibiting a state's preferences for its own citizens over out-of-staters. Sunstein, supra note 13, at 1706.

26. Proof of bad intent is not necessary to challenge a discriminatory state law. Tariffs are prohibited, for example, even if their motive is pure (e.g., to raise revenues). Regan, supra note 22, at 1119. A harder question is whether nondiscriminatory laws that bear inordinately on out-of-staters may be challenged if bad motive cannot be shown. An example might be a Maryland law forbidding refiners from owning service stations. See Exxon Corp. v. Maryland, 437 U.S. 117, 119-20 (1978). While the Court upheld the Maryland law, the decision is often criticized. See id. at 137 (Blackmun, J., concurring in part and dissenting in part); Eule, supra note 25, at 444-46; Sunstein, supra note 13, at 1708 n.88. Perhaps we should tolerate measures that neither discriminate nor are of provable bad intent out of a concern that courts not be given too free a rein in reviewing states' laws. But the thesis here—the rule of equality is only a means for checking state laws of disutility—might permit courts to strike down such laws if their foreign costs greatly exceed their benefits.


ices provided for its residents are enjoyed only by residents.”29 It has ruled that a state may grant tax incentives to encourage industry to locate in the state.30 The Court in United Building implicitly conceded that discrimination against outsiders for parochial reasons is not evil per se by ruling that the municipality of Camden could prefer its residents in public employment to alleviate local unemployment and related ills.31 It is unlikely that the city of Camden could demonstrate that such an ordinance inflicts injury upon outsiders for a reason independent of “the mere fact that they are citizens of another state.”32 The burden of unemployment must be borne by either residents or outsiders, and Camden chose to spare its own from suffering first. In all these cases, a state (or local body) discriminates, and in some it undoubtedly does so for selfish reasons. Nevertheless, its actions are permitted.33

The Court sometimes seems to manipulate the rule of equality, working backward from the conclusion that a discriminatory act is inappropriate to the premise that its motive is illegitimate. Recently, for example, the majority in Metropolitan Life Insurance Co. v. Ward34 reasoned that the state’s professed desire to promote the local insurance industry was illegitimate because acceptance of such an interest “would eviscerate the Equal Protection Clause in this context.”35 It was clearly the means used by the state, not the end sought, that troubled the Court. The majority conceded the “broad authority of a State to promote and regulate its own economy” and limited its ruling to “such regulation . . . accomplished by imposing discriminatory higher taxes on nonresident

33. No meaningful line can be drawn between parochialism and self-promotion, as this attempt to do so by Professor Simson suggests:

The difference between a state’s interest in promoting its residents’ well-being and its interest in advantaging its residents over nonresidents should be kept in mind. The former interest is a perfectly valid one [but] the latter interest is unconstitutional because it in effect is nothing more than an interest in frustrating the enjoyment of one’s core right under the privileges and immunities clause to be free from discrimination based solely upon the fact of one’s nonresidence. . . . In some instances, then, a state legitimately may disadvantage nonresidents relative to residents as a means to promote its residents’ well-being, but it may never disadvantage nonresidents relative to residents as an end in and of itself. Simson, supra note 25, at 389 n.45 (citations omitted). The two interests are indistinguishable. A state rarely injures nonresidents out of spite, or as an end in and of itself; instead it disadvantages them to promote its residents’ well-being. Alaska imposed a hiring preference for citizens in its oil fields not to punish persons from the other 49 states, but to enhance the employment opportunities of its own citizens. Saying the two interests are different does not make them so.
35. Id. at 882.
corporations solely because they are nonresidents." A subsidy adopted for the same reason presumably would stand.

To rehabilitate the rule of equality, we might distinguish two ways in which a state can discriminate against outsiders or interstate commerce to aid its citizens. One is by redistributing wealth or satisfaction from outsiders to citizens. Such interstate theft is probably what the Court and scholars condemn when they say that a measure "designed only to favor domestic industry . . . no matter what costs to foreign corporations" is forbidden, or that "a state may not prefer its own citizens over out-of-staters simply because it values their welfare more highly." The other way in which a state can aid its citizens is by measures that produce wealth or increase the sum of human happiness. Social gain is a proper end for a state even though discriminatory means are sometimes used to achieve that end. The difference between the two sorts of gain is easy to illustrate. For example, a state may not bar the import of foreign goods. The benefit to citizens of such measures is largely redistributive because the rise in state income by making foreign goods less attractive represents a loss to foreign manufacturers and their communities. A state, however, could exclude goods carrying infectious diseases. Then the internal gain is not purely redistributive but also includes the social gain of preventing the spread of a disease to a new population.

A rule prohibiting redistributive measures, however, could not turn solely on the motive or interests served by an action. If redistributive

36. Id. at 882 n.10.
37. See id. at 880. As Justice O'Connor noted in dissent, an interest in promoting local industry has sufficed in countless commerce clause decisions and presumably underlies many state programs subsidizing local industry. Id. at 893-96 (O'Connor, J., dissenting).
38. Id. at 878.
39. Sunstein, supra note 13, at 1706.
42. The Court and most commentators have focused on the injury inflicted upon outsiders and looked for some reason for that injury other than "the mere fact that they are citizens of other states." Toomer v. Witsell, 334 U.S. 385, 396 (1948). Another formulation, suggested by Professor Regan, is that the courts should prohibit purposefully protectionist measures: action that seeks to improve the competitive position of citizens vis-à-vis their foreign competitors. Regan, supra note 22, at 1094-95. Merely redefining the impermissible motive as protectionism, however, cannot rehabilitate ends-oriented analysis. Regan fails to distinguish two sorts of internal gain from protectionist measures: social gain from positive measures and takings from redistributive measures. At times he seems to condemn taking, id. at 1118, 1120, 1129-30, 1167, but he repeatedly states the rule as prohibiting any measure designed to improve the competitive position of locals vis-à-vis their foreign competition, id. at 1094-95, 1126. The latter formulation is too broad because it condemns a host of measures ranging from product quality regulations to subsidies, many of which Regan simply excepts from the rule by directing it only to tariff-like measures. Id. at 1095. A rule that forbids takings, however, cannot always turn on purpose. In some cases a state's purpose will be the gain from a measure and not the taking from outsiders.
measures are the evil to be checked, the focus should be on whether the benefit sought by the state represents social gain made possible by its action. A rule keyed to redistribution thus turns as much on the substantive merit of a measure as it does on its motive. Only by weighing the costs and benefits of a challenged action and locating them geographically or by communal affiliation can one determine whether the state action merely takes from outsiders to give to citizens.

If the principle of interstate equality does not explain the cases involving resource allocations, neither does the counterprinciple of state sovereignty. If a state as sovereign may use its resources selfishly to benefit its people, then why may it not prefer them in granting access to water or fish or require firms buying state timber to process it at plants in the state? To understand the roles of the competing principles of interstate equality and sovereignty, we must explore the underlying values that the principles may serve.

III. Toward a New Paradigm: The State and the Market

The results in the cases set forth at the beginning of this Article may be explained, at least at the extremes, by two principles. First, a state must allow outsiders equal access to resources in the market. Second, a state may favor its own in the allocation of goods it creates. Thus, an embargo on the import of wastes for disposal on private lands denies outsiders a resource in the market, but allowing only citizens to enroll in public schools preferentially allocates a good created by the state. This Part argues that these principles, with some considerable refinement, are desirable, for they encourage the efficient exploitation of resources. Moreover, one may find constitutional authority for them in the history of the privileges and immunities clause.

This Article’s emphasis on market interference is not a radical departure from existing doctrine. In carving out an exception to the commerce clause for state proprietary activities, the Court reasoned that the clause’s focus is state interference “with the natural functioning of the interstate market either through prohibition or through burdensome reg-

45. The principle is formulated in terms of access to resources because this Article deals only with resource preferences. More broadly, the principle might require a state to afford outsiders the same opportunities in the market as citizens. This Article suggests below several modifications of the principle, including an exception for measures such as quarantines that interfere in the movement of resources in the market, if their benefits clearly outweigh their costs. See infra text accompanying notes 71-72. Facially nondiscriminatory regulations of the movement of resources may be prohibited if they actually are directed against outsiders. See infra text accompanying note 276.
Likewise, preferences in the allocation of natural resources first were assailed on the grounds that once the resources were in private hands a state could not interfere in the market to prevent their export. Several scholars have explicitly taken an economic perspective on these issues and objected to the inefficiency of state interferences in the market through preferential allocations of resources. Those who cite the principle of state sovereignty as authority for some preferences usually assume that preferences in the allocation of goods in the public sector are of a different quality than discriminatory interferences in the private sector. Even those who decry the emphasis in current commerce clause doctrine on protecting commerce and urge the Court to bar any discrimination against outsiders usually consider only taxes, regulations, and other interferences in the market as the subjects of their supposedly commerce-blind rule. This Article takes this often hidden assumption that state interference in the market is very different from discriminatory distribution of state-created goods, states it as a formal principle, and traces its practical and legal ramifications.

A. The Cause of Efficiency

The principles that states may not deny outsiders resources in the market but may favor citizens in the allocation of state-created goods serve the cause of efficiency or utility maximization. Often the goal of

47. See Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928); Pennsylvania v. West Virginia, 262 U.S. 553, 598 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229, 260 (1911). These rulings limited the rights that a state may claim after relinquishing its undoubted dominion over resources within its borders to private actors, and ultimately they freed resources for exchange in the market. At the time, however, these decisions were criticized as inconsistent with the theory of state ownership of resources. See Hardman, The Right of a State To Restrain the Exportation of its Natural Resources, 26 W. VA. L.Q. 1, 4 (1919).
48. The issues discussed here are explored from a similar perspective in Levmore, Interstate Exploitation and Judicial Intervention, 69 VA. L. Rev. 563 (1983). Levmore chose, however, not to relate his analysis to constitutional tradition. A concern with interference in the market and the economic effects of preferences is also evidenced in Anson & Schenkan, Federalism, the Dormant Commerce Clause, and State-Owned Resources, 59 Texas L. Rev. 71 (1980).
49. See, e.g., Varat, supra note 27, at 522.
50. E.g., Eule, supra note 25, at 455-85.
51. That we should care about the efficiency of preferences seems an unremarkable proposition, although it is not free of criticism. Efficiency may be defined as maximizing material wealth. See Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103, 119-35 (1979). For a criticism of Posner's argument that wealth is a value, see Dworkin, Is Wealth a Value?, 9 J. LEGAL STUD. 191, 205-15 (1980); Krosman, Wealth Maximization as a Normative Principle, 9 J. LEGAL STUD. 227 (1980). Maximizing material wealth may be a dubious value because people often find nonmaterial satisfactions important. Thus, efficiency might best be defined as the maximization of not only material wealth but all human satisfactions. This Article primarily analyzes state regulations affecting the production of material wealth, and thus the success of those regulations may be tested by their maximization of material wealth. Introducing nonmaterial satisfactions to the analysis does not really change its course so much as add to the balance of costs and benefits the nonquan-
efficiency will be compromised out of concerns that a rule be adminis-
trable or that it not depart too far, too fast from tradition. While the rule
may be compromised, we should not lose sight of its objective to facilitate
the individual and communal quest for happiness.

The costs of preferences that restrict the movement of resources in
the market are well known. These costs can include diminished gains
from economic integration, which normally leads to gains such as the
organization of production at its most efficient locations, economies of
scale made possible by the enlargement of markets, the stimulus of in-
creased competition between firms in a widened market, and the expa-
sion of the hinterland from which developing urban areas may draw
resources. Examples of the inefficiency of resource preferences abound.
A New Jersey law prohibiting the dumping of foreign wastes in the
state fragmented the market for waste disposal facilities and prevented
the consolidation of wastes at the best sites for the least costly disposal.
A New Hampshire law giving citizens a preference in the distribution of
cheap hydroelectric power impeded power pooling and ultimately en-
couraged inefficient use of under-priced electricity by New Hampshire
consumers. South Dakota’s law requiring that cement from a state
plant be sold first to citizens inflicted a direct cost on foreign contrac-
tors, which virtually had to shut down because cement was unavailable,
and entailed a loss for consumers, who were compelled to employ South
Dakota contractors with higher marginal costs and prices. Restrictions
on the export of water keep water from those who would use it most
productively. A requirement that timber from state lands be processed
within the state raises the cost of lumber and may entail a significant
tifiable element of happiness gained by citizens and lost to outsiders from preferences in the
allocation of natural wonders, historic monuments, or other goods with intensely subjective returns.

52. The classic work on economic integration is J. Viner, THE CUSTOMS UNION ISSUE (1950).
56. The term “power pooling” refers to the pooling of generation and consumption to average
loads and thus reduce the need for additional generators to meet local peak-load demands. See id. at
334.
59. The plaintiff in Reeves, a Wyoming contractor, was forced to cut production by 76% when
denied South Dakota cement. Id. at 433. Among its customers were three Wyoming counties that
employed it for over half of their construction. Id. at 432.
61. See Gisser & Johnson, Institutional Restrictions on the Transfer of Water Rights and the
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loss for out-of-state processors.\textsuperscript{63} Finally, if a state keeps artistic or historic wonders for its citizens, it denies those wonders to many outsiders who prize them more highly than the citizens do.\textsuperscript{64}

To the extent these costs are borne outside the state, as they often are,\textsuperscript{65} they probably will not be accounted for when the state chooses to act.\textsuperscript{66} The rule against preferences denying outsiders resources thus responds to the familiar problem of externalities.\textsuperscript{67} A state is likely to consider only the internal costs and benefits of its actions and disregard its external costs. If an action has significant external costs, they may outweigh the internal benefits. Such an action is one of disutility. Even if internal benefits equal external costs, the action merely redistributes wealth from outsiders to citizens, something we should not tolerate.\textsuperscript{68}

\textsuperscript{63} For an empirical demonstration of these negative effects in an analysis of a proposed Washington law forbidding the export of timber from state-owned lands, see Parks & Cox, \textit{The Economic Implications of Log Export Restrictions: Analysis of Existing and Proposed Legislation}, in \textit{FORESTLANDS} 247, 255-71 (1985).

\textsuperscript{64} See Merryman, \textit{Thinking About the Elgin Marbles}, 83 \textit{MICH. L. REV.} 1881, 1919-21 (1985). Cultural artifacts may pose harder problems than natural resources because of the identification of the state or its people with the object. Merryman concludes, however, "that the argument from cultural nationalism fails ... because it expresses values not clearly entitled to respect (political nationalism), [and] because it is founded on sentiment and mysticism rather than reason . . . ." \textit{Id.} at 1916.

\textsuperscript{65} If the preference channels scarce resources to citizen-producers, then it forces foreign competitors to purchase more expensive substitutes or cease production. Consumers also lose because the preference channels critical resources to in-state producers with higher marginal costs and it increases costs to out-of-state producers forced to turn to more expensive sources of supply. Undoubtedly, some of the cost of the preference is borne within the state both by consumers and by the state when it foregoes profits from selling resources to outsiders. Local support for the preference, however, suggests that in many cases these costs are small.

\textsuperscript{66} If the cost of a preference is borne inside the state, the preference is generally unobjectionable, at least from a perspective of federalism or constitutional restraints, because the community is best left to account for its own welfare. This principle honors the internal autonomy of a state and sets up federal courts as the protectors of outsiders. It also is consistent with the provisions of the Constitution, which generally speak to the relationship of states to citizens of other states or to interstate commerce.


\textsuperscript{68} This prohibition of purely redistributive measures may be justified on grounds other than efficiency. Theft weakens the bonds of union, see Regan, \textit{supra} note 22, at 1113-15, and, because theft constitutes political haves taking from have-nots, it may violate fundamental democratic
A blanket prohibition of preferences that deny outsiders resources in the market may be overbroad, if its purpose is to check actions that entail disproportionate foreign costs and are likely to be inefficient. Sometimes the costs of a preference will be borne almost entirely in a state. Further, some tariffs and occasionally even embargoes may be efficient. Despite this risk, the rule is stated in absolute terms so that it will be administrable. It is neither feasible nor desirable for federal courts to pass on the substantive merits of every tariff, embargo, or other restriction on the movement of resources. This task would strain their capacity and vest in them undue discretion to decide close questions of value. In essence, all such measures are prohibited because it is too costly to identify the few that are efficient.

There is at least one exception to this general rule: a state may ban the import of infected goods. Although state embargoes typically are not tolerated, quarantines may deserve different treatment, as observed earlier, because they provide a net social benefit by preventing the spread of disease to a new population. This exception advances the cause of efficiency, and because quarantines may readily be distinguished from other embargoes, it does not significantly harm the administrability of the rule.

Certain aspects of current doctrine are consistent with the goal of internalizing to states the costs of their actions. One example is the rule prohibiting states from using discriminatory means to achieve their objectives, when evenhanded means are available. Under this rule, for
example, a state cannot ban the disposal of foreign wastes within its jurisdiction to preserve its environment because it may attain the same end through evenhanded regulation of all waste disposal. Keying the analysis to the existence of less discriminatory alternatives sometimes is justified as a device to smoke out improperly motivated actions, but it might rest more appropriately on concerns of efficiency. The difficulty with using this analysis to flush out improper motive is that it presumes the polity consciously chose the more discriminatory means to injure outsiders, rather than merely to attain some benefit at the least cost to insiders. We may justify analysis of less discriminatory alternatives, without regard to actual motive, as a way to force a state to internalize the costs of its actions. The rule forces states to treat insiders and outsiders the same, ensuring that some of the costs of their actions will be borne by insiders. This provides a form of virtual representation to outsiders. A state compelled to consider both in-state and out-of-state wastes as the subject of dumping regulation is more likely to assess the costs to waste-generators as well as the environmental benefit.

Another consideration that relates to efficiency (but is of questionable constitutional dimension) also is useful to explain why some preferences in the allocation of resources are tolerated while others are not. Often, the clarity with which the internal costs of a preference are signaled to a state seems important. Only the extent to which internal costs are hidden can explain, for example, why courts might tolerate a uniform severance tax on a resource coupled with a subsidy from general revenues to in-state producers, but not the granting of preferential access to the resource. Although the effect of the two measures is the same, they differ in that the internal cost of the subsidy (the cash grant) is more clearly signaled than the cost of the preference (the lesser price received by the state for the resource). This difference is of some economic import because the hope that a state will correct inefficient measures when

74. See, e.g., Eule, supra note 25, at 472-73 (arguing that "[i]f the same end could have been achieved with less disproportional means, reason exists to believe that the legislative goal was the imposition of an out-of-state burden rather than the attainment of an in-state benefit"); Sunstein, supra note 13, at 1699 (suggesting that courts might "search for less restrictive alternatives" because their presence "suggests that the public value justification is a facade").
75. See J. ELY, supra note 25, at 83 (noting that by tying the fate of outsiders to that of citizens, "the framers insured that their interests would be well looked after").
76. In Wunnicke Justice Rehnquist observed in dissent that Alaska could replicate the effect of the law requiring that timber purchased from the state be processed in the state by directly subsidizing in-state timber processors. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 103 (1984) (Rehnquist, J., dissenting). The law simply shifted state revenues to the processing industry through the intermediary of private purchasers of timber. The state charged considerably less than it otherwise would for timber sold subject to the restriction, id. at 85, presumably to compensate purchasers for the increased cost of Alaskan processing.

the cost is borne internally wanes when that cost is hidden. Whether it is
of constitutional dimension is less clear because in acting on this differ-
ence, courts in effect protect the citizens of the state whose actions are
being challenged, rather than outsiders.

The second principle proposed here allows a state to favor its own in
allocating goods it creates. Like the first principle, it is concerned with
efficiency and internalizing to states the consequences of their actions,
but now the focus is on promoting utility maximization by internalizing
to states the benefits of their actions. The principle's objective is to en-
courage states to create goods and services. State or local provision of
public services often is favored over national provision because a local
government's closer proximity to the individual produces greater respon-
siveness to individual preferences. The immediacy and diversity of
state and local governments make them better instruments than national
institutions through which people may combine to seek satisfaction.
Forced sharing of state-created goods may prevent the people of a state
from maximizing their value. If a community must share the benefits of
public expenditures, it can either expend greater amounts for the same
good or produce less of the good than its citizens optimally desire. A
state is thus accorded a property-like interest in public goods—the power
to exclude outsiders from the good—for much the same reason that indi-
viduals are accorded private property rights: to encourage and to reward
them in their quest for happiness or satisfaction.

The efficiency-based argument for allowing preferences in the allo-
cation of publicly funded goods, however, certainly does not extend as
far as many of its proponents have attempted to take it. Some would
allow a state to prefer its citizens in the allocation of natural resources as

78. State and local governments have a number of advantages over national institutions. State
governments often are claimed to be more democratic. E.g., Choper, The Scope of National Judicial
Power Vis-a-Vis the States, 86 YALE L.J. 1552, 1614 (1977); Kaden, Politics, Money, and State Sovere-
eignty: The Judicial Role, 79 COLUM. L. REV. 847, 854 (1979). Additionally, the diversity of state
governments, Choper, supra, at 1614-15; Kaden, supra, at 854, and competition between states, D.
MUELLER, PUBLIC CHOICES 126-34 (1979); H. ROSEN, supra note 77, at 519-23; Tiebout, A Pure
Theory of Local Expenditures, 64 J. POL. ECON. 416, 420 (1956), increase the responsiveness of state
and local governments in the provision of services.
79. Cf. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of
"Just Compensation" Law, 80 HARV. L. REV. 1165, 1208-13 (1967) (noting that respect for individual
entitlements begets security and human activity to maximize output of satisfactions).
Others conceive of the states' interests as property-like. Some have claimed that "like other
groups free to combine their members' efforts to produce collective benefits to be shared among the
group," states "have a prima facie justification for limiting distribution of their public goods to those
who combined to provide them." Varat, supra note 27, at 523. That argument is not persuasive
when natural resources, goods not created by the community, are at issue, but even then a state may
defend its actions by reference to concepts of sovereignty and ownership. See Hellerstein, supra note
27, at 74-75.
a reward for the state's conservation efforts. These arguments are weak and rarely withstand scrutiny. Efforts to regulate or slow a resource's exploitation should not sustain a preference, because sharing the resource with noncitizens does not increase the cost of these conservation efforts and thus should not discourage them. On the contrary, sharing should encourage a state to step up its regulatory effort in the face of widened demand. A state is less likely to permit low yield internal uses of water if by so doing it opens the spigot to similar foreign uses.

When a state expends resources either in conserving or exploiting a natural resource, allowing preferences is a perverse way of rewarding and encouraging those efforts. If the resource is sold by the state, the preference will reduce the state's return because it keeps the resource from those who prize it most highly and are willing to pay the most for it. Likewise, eliminating communal preferences is likely to encourage conservation because users who value a resource most highly will expend the greatest effort to preserve it.

Preferences in the allocation of publicly funded goods are justified only if forced sharing of the goods would imperil some objective of the state in providing the goods. A reason for preferences emphasized here

80. Some have said timber and elk take on the character of publicly created goods that a state may harbor for its own by force of its conservation efforts. See Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 388 (1978); see also Lemore, supra note 48, at 616-17 (suggesting that state conservation efforts may justify export prohibition); Varat, supra note 27, at 558-60 (arguing that so long as a state does not monopolize a reproducible natural resource, it should be able to keep it for its citizens). Commentators have even argued that by settling in a place rich with resources and entering into the union on favorable terms, Texans "exerted foresight, risk, and industry of the highest political order" sufficient to justify the state's claim to mineral resources. Anson & Schenkkan, supra note 48, at 92 n.102.

81. A commission in New Mexico has claimed a special state interest in groundwater because of "the expenditure of state resources to regulate water...to conserve its water supply and...to insure a supply for future economies." New Mexico Water Resources Inst. & Univ. of N.M. School of Law, State Appropriation of Unappropriated Groundwater: A Strategy for Insuring New Mexico a Water Future 145 (1986) [hereinafter New Mexico Report].

82. The converse would be true only if future foreign demand is expected and the state drains its pools in anticipation of that later sharing.

83. See J. Laitos, Natural Resources Law 60-62 (1985). John Merryman has observed that preservation of the Kyriotos is encouraged by placing them where the most people have access to them because many non-Greeks value the works more highly than Greeks do and so will make greater efforts to preserve them. Merryman, supra note 64, at 1916-21.

84. Demonstrating that a good is a public or collective good is generally not sufficient to sustain a preference. The characteristics that make a good "public" weigh against allocating such goods on the basis of communal affiliation. Two of these characteristics are nonexcludability (a state cannot deny access to the good) and nonrivalness (one person's use does not deprive another of the good). See R. Musgrave & P. Musgrave, supra note 67, at 51-52; H. Rosen, supra note 77, at 99; Davis & Whinston, On the Distinction Between Public and Private Goods, 57 Am. Econ. Rev. 360, 361-63 (1967). These goods must be funded publicly because the quality of nonexcludability precludes forcing those who avail themselves of the good to pay, and the quality of nonrivalness requires public choice in funding to attain the optimal public benefit. Cf. D. Mueller, supra note 78, at 13 (stating that nonrivalness is necessary when there are "indivisibilities in production or jointness of supply"). The quality of nonexcludability, however, also makes a preference impossible because a state cannot
is that the state has a redistributorial interest in publicly funded goods. This redistributorial interest may justify restricting public schools, hospitals, or housing to citizens. Redistributorial programs are particularly sensitive to forced sharing because the instincts of altruism and insurance prompting them weaken as the contributor's relationship to the class of beneficiaries becomes more attenuated.

Nevertheless, the toleration of preferences even in these matters rests, ultimately, on arguments of convenience or tradition. In theory, redistributorial goals usually can be better achieved through direct transfers of cash (or a voucher if the purchase of a particular good is contemplated). At a certain point, however, we must take the world as we find it and cannot deny the state the right to achieve redistributorial goals through in-kind programs simply because economists can conceive of more efficient means to the same end. Such revolutionary proposals are not for the courts. Clearly, there is intrinsic merit in judicial respect for tradition, but such respect also may be justified because it ensures that any change is incremental. By its modesty, incrementalism guards against the risk that too significant a change will entail unacceptable, unintended consequences.

One commentator has proposed that a state might protect the integrity of redistributorial programs by pricing preferences—charging outsiders the full cost of a good while providing it free or below cost to citizens. Some precedent supports this solution. For example, under current law a state must open its courts to citizens and outsiders alike, though some authority suggests that states may charge outsiders a higher fee to make up for their lack of contribution to the state's fisc. The Supreme Court also has suggested that such preferential pricing for natural resources is legitimate.

From a perspective of efficiency, preferential pricing for state re-

exclude outsiders from the good. The quality of nonrivalness makes a preference unnecessary because the sharing of the good with outsiders does not diminish the welfare of the community. For example, the citizens of a state should not avoid funding the public radio station they desire simply because outsiders also may enjoy the programming. The outsiders' enjoyment represents no loss to them. Cf. R. Musgrave & P. Musgrave, supra note 67, at 56-57 (stating that sharing of nonrival goods funded by an individual does not preclude his maximization of welfare). Positive externalities with nonrival goods are troubling, but only because the state will not seek to maximize the benefit flowing to outsiders in providing the good. For example, a state may not locate a highway to the best advantage of out-of-staters.

85. See Simson, supra note 25, at 395-97 (discussing tuition preferences at state colleges).
86. See id. at 398-99.
87. See Toomer v. Witsell, 334 U.S. 385, 398-99 (1948) ("The State is not without power . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose for any conservation expenditures from taxes which only residents pay.").
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sources is a fine solution because it protects the integrity of the state program and ensures outsiders access to goods they desire and can afford. When the state can recoup its expense in providing the good through sales or user fees, such transactions are desirable because they both protect the fiscal interest of the state and enable outsiders to acquire the good. Consider public colleges. If we assume the price charged to peripatetic scholars will reflect the cost to the state of their schooling—both in direct costs and in the lost opportunity of citizens to consume the good—then the state should be neutral to their enrollment because it will not affect the internal calculus of the costs and benefits of educating citizens. Scholars will migrate only if the benefits they receive outweigh the costs of their choice, which they pay. Indeed, we would expect such a regime to encourage a state to provide the optimal amount of public colleges (or other goods), because allocating the good by citizenship and without regard to price generally diminishes the return to the state. Economists generally favor user fees because imposing on the beneficiaries of a good the cost of its provision ensures a better fit between demand and supply.88

As a practical matter, however, the proposal founders on pricing difficulties. If a state cannot accurately calculate the cost of an outsider’s use of a good, the price charged for it may not compensate the state adequately;89 or, even more likely, the price may be set unreasonably high by the state so that it effectively excludes outsiders. Of course, federal courts might step in to assess the reasonableness of the charge. In Toomer v. Witsell,90 the Supreme Court held that although South Carolina could charge outsiders a slightly higher shrimping license fee than it charges citizens in order to recover its expense in managing the fishery, a fee one hundred times greater was unconstitutional.91 The tremendous complexities involved in assessing the reasonableness of state taxes and fees, however, suggest that the federal courts may lack the ability and the inclination to undertake such a difficult task in all but the most egregious cases. There is little point and some cost to maintaining a rule forbidding preferences in the allocation of a good but permitting preferential pricing.92

88. See, e.g., McClure, Tax Competition: Is What’s Good for the Private Goose Also Good for the Public Gander?, 39 NAT’L TAX J. 341, 342 (1986) (noting that basic microeconomic analysis suggests that user fees cause “an optimal quantity” of goods to be provided).
89. Varat, supra note 27, at 553-54.
90. 334 U.S. 385 (1948).
91. Id. at 399.
92. If outsiders have a compelling interest in access to a good, but the state also has a redistributitional interest in its funding, and if a court competently can assess the reasonableness of the price charged outsiders, then preferential pricing may be desirable. A state’s courts may be an exam-
Thus, the economic perspective must be modified by practical concerns involving the administration of justice and respect for tradition. That an economic perspective is not sufficient to understand all the cases does not prove it invalid. For all their difficulties, the two principles espoused here do perform an important economic function: they enable individuals to combine to seek satisfaction while protecting others, particularly outsiders, from their combined power. Market allocations of resources—private decisions about consumption, production, and investment—assume a privileged position, and a state may not interfere with them in certain easily identified ways that tend to impose significant costs on outsiders. Preferences in the allocation of resources are tolerated to enable the state or community to provide the level of publicly funded services it finds optimal. The next question is whether these principles are of constitutional stature.

B. A Constitutional Source: The Privileges and Immunities Clause of Article IV

If the last subpart had the flavor of philosophizing in an unwayerly fashion, this subpart attempts to show that the principles advocated by this Article have at least as much basis in our legal tradition as does the doctrine of interstate equality. This subpart also seeks to impart a sense of the fluidity of the principles that have governed resource preferences and of the effect of changing perceptions about the relation of the state, the market, and the individual on the law. It will be shown that the period from 1787 to 1900 witnessed a dramatic shift in the understanding of the privileges and immunities clause. At first the rights protected were thought to be those of trade and commerce granted by the sovereign, but by the end of this period the rights protected were thought to be the fundamental rights of man held independent of or prior to the state. This history belies the simplistic notion that we can recapture an original understanding of the clause;93 the Framers’ world and consciousness is far from our own. We must refashion the principles to suit modern times and minds. In particular, eighteenth and nineteenth century doctrines of such a good: outsiders need access to a state’s courts if they are to compete in its markets; the state has good reason to fund courts out of general revenues in order to provide legal services to the poor; and judges should be competent to assess the reasonableness of court fees, if anything. Preferential pricing is, however, an exceptional remedy, and one we should not utilize automatically for other goods such as schools or public housing.

require reformulation to account for the growth of the public sector and the growing affirmative role of the state in commerce.

The most natural place to look for constitutional authority for a rule that a state may not interfere in the market is the commerce clause. Only the commerce clause speaks explicitly of commerce, and in its grant to Congress of authority to regulate interstate commerce lies an implied denial of that power to the states. Furthermore, commerce clause doctrine prohibits parochial interference in the market but allows preferences in allocating public or proprietary wealth. Nevertheless, the commerce clause offers little guidance for distinguishing between permissible and impermissible state regulation of commerce. Commentators have criticized harshly the proprietary activity exception, which has never commanded universal support on the Court and is poorly suited to fulfill what may be its proper purposes. This Article finds more direct and persuasive authority for constitutional principles to temper the selfish state in the privileges and immunities clause.

Others have urged that the Court should look to the privileges and immunities clause rather than the commerce clause to forbid state discrimination against interstate commerce. The impediments to shifting the analysis to the privileges and immunities clause are few. One problem is that corporations have been held outside the ambit of the clause, but most scholars agree that this rule is a relic of an earlier era, and the approach advocated here is consistent with bringing corporations within the clause's protections. Although states once may have guarded

94. U.S. CONST. art. I, § 8, cl. 3.
96. The proprietary activity exception to the commerce clause follows from the particular concern of that provision with state interference "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976).
98. See infra subsection IV(A)(2)(a).
99. See, e.g., Eule, supra note 25, at 446-55. Eule is simply wrong, however, when he claims that "[t]here is no sound reason . . . for the litigation to be played out on a commercial stage, rather than an equality-oriented one." Id. at 448. Ironically, this commerce-blind perspective works only when state interference in interstate commerce is by tax or regulation. In cases involving a state's use of its resources to better its citizens, the implicit focus on encouraging the natural flow of interstate commerce must be made explicit to sensibly distinguish permissible preferences from impermissible ones.
100. E.g., Hemphill v. Orloff, 277 U.S. 537, 548-50 (1928).
101. See, e.g., Eule, supra note 25, at 451 (arguing that the "legal underpinnings" of the rule are "no longer sound"); Redish & Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 610-11 ("From a policy perspective, there can be little doubt that corporations should receive the protections of the privileges and immunities clause.").

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jealously the privilege of incorporation, today incorporation seems more a common right of trade and commerce that a state must share with outsiders.

A more significant problem is that the privileges and immunities clause may not extend as far as the commerce clause. For example, the privileges and immunities clause may not reach international commerce. The clause arguably does not apply to state discrimination against goods from other states, but only applies to discrimination against people. Some might suggest, for example, that the clause does not address embargoes on the disposal of foreign wastes if the discrimination is not against citizens of other states but only against their wastes: citizens and noncitizens alike are forbidden from dumping foreign wastes. This defect is not fatal, though, because outsiders could challenge the embargo on the basis that it ultimately denies them the ability to dispose of their wastes in the state. More troubling is the clause's apparent inability to correct evenhanded measures that pose an intolerable burden on interstate commerce. These problems might best be dealt with under the commerce clause or other constitutional doctrines. Nevertheless, this Article finds in the text and history of the privileges and immunities clause ample authority and inspiration for dealing with preferences in the allocation of resources.

1. The Original Understanding: Equal Rights of Trade and Commerce.—Surprisingly little serious study has been done of the original understanding of the privileges and immunities clause, the one express constitutional prohibition of interstate discrimination. Its purpose,

103. See generally Damrosch, Foreign States and the Constitution, 73 Va. L. Rev. 483 (1987) (discussing the constitutional protections applicable to foreigners).
104. Cf. Kimmish v. Ball, 129 U.S. 217, 222 (1889) (holding that a statute forbidding import of infected cattle did not violate the privileges and immunities clause because Iowans and non-Iowans alike were denied the right). Regan makes the same point from the clause's text, which requires equality of all the privileges and immunities of citizens "in the several states." Regan suggests that the shipper standing outside the state is without the protection of the clause because of this preposition. Regan, supra note 22, at 1203-05.
105. Donald Regan offers as examples cases involving burdensome state regulation of interstate transportation or unfairly apportioned taxes. Regan, supra note 22, at 1205. He also observes that the handling of these cases suggests a concern with something other than protectionism. Id. at 1182-88. These cases are only tangentially relevant, and this Article makes no claim that, because the privileges and immunities clause best deals with the state preferences discussed here and with most sorts of protectionism, other abuses not reachable under the clause must go unchecked. That is an issue for another day.
106. The clause "is not among the more definitively glossed provisions of the Constitution." Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L.J. 1323, 1335-36 (1960). For an excellent study on the origins of the privileges and immunities clause, published after this Article was written, see Bogen, The Privileges and Immunities Clause of Article IV, 37 Case W. Res. L. Rev. 794 (1987).
typically stated in an obvious but uninteresting way, is to ensure inter-
state comity by checking the "centrifugal" tendency of state parochial-
ism.107 To say that those who passed on the Constitution desired
national unity does not explain how they intended that dream to be real-
ized without unduly compromising state sovereignty. To get at the origi-
nal understanding of the privileges and immunities clause, we must look
beyond the constitutional debates, in which the provision hardly was
mentioned,108 and examine its textual antecedents and the context in
which it was adopted. So viewed, the clause serves a reasonably definite
purpose aptly stated by the Supreme Court three-quarters of a century
after the adoption of the Constitution:

[T]he clause plainly and unmistakably secures and protects the
right of a citizen of one State to pass into any other State of the
Union for the purpose of engaging in lawful commerce, trade, or
business without molestation; to acquire personal property; to take
and hold real estate; to maintain actions in the courts of the State;
and to be exempt from any higher taxes or excises than are im-
posed by the State upon its own citizens.109

Legal scholars have recognized from the start that the privileges and
immunities clause protects at least these rights.110 This rule, which re-
quires a state to open its markets to outsiders and allow them to compete
on equal terms with citizens, suggests a concern reflective of the first
principle espoused by this Article: a state may not deny outsiders access
to resources in the market. Conversely, by the end of the nineteenth
century it was settled that the clause did not forbid preferences in the
public realm, as opposed to the private. That development carries an

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108. The references to the privileges and immunities clause in the debates are collected in Currie
& Schreter, *supra* note 106, at 1336 n.35. The debates centered around two issues that are unimpor-
tant now: first, the removal from a state of the ability to confer upon aliens citizenship rights in all
states; and second, a provision to ensure the right of removal of property from a state (a point largely
of interest to slaveholders who hoped to protect their right to take slaves from free states). *Id.* If we
look back to the debates in the Continental Congress leading to the Constitutional Convention, we
find a tantalizing statement by a Committee appointed to prepare an "Exposition of the Confedera-
tion." This Committee stated that the Articles required execution "[b]y describing the privileges and
immunities to which the citizens of one State are entitled in another." 21 *JOURNALS OF THE CON-
TINENTAL CONGRESS* 1774-1789, at 893-94 (G. Hunt ed. 1912 & photo. reprint 1968) (journal
of Aug. 22, 1781). Unfortunately, nothing seems to have come of this report.

109. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870). This language may have been taken
from T. COOLEY, CONSTITUTIONAL LIMITATIONS *397.

110. These were the "fundamental rights" described by Justice Washington in *Corfield v. Coryell*
but with the unfortunate addition of the right to vote. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823)
(No. 3230). Chief Justice Burger observed that the protected privileges and immunities included
"all the privileges of trade and commerce' which were protected in the fourth Article of the Articles
*Austin*, 420 U.S. at 660). Others have noted the commercial focus of the clause. *See, e.g.*, Eule,
*supra* note 25, at 446-48.
inking of the second principle espoused by this Article, though the doctrine employed a far less restrictive definition of public goods.

The privileges and immunities clause was adapted from the fourth Article of Confederation, which stated:

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

The lineage of this article may in turn be traced to the draft of the Articles of Confederation presented by John Dickinson to the Continental Congress on July 12, 1776. Articles VI and VII of that draft provided:

Art. VI. The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities, and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.

Art. VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony enjoy.

111. Austin, 420 U.S. at 660-61; Simson, supra note 25, at 383. Following the close of the convention, Charles Pinckney observed that “[t]he 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation . . . .” 3 The Records of the Federal Convention of 1787, at 112 (M. Farrand rev. ed. 1937) [hereinafter M. Farrand]. Pinckney later claimed authorship of the clause in a congressional debate touching on the rights of free blacks as citizens. 37 Annals of Cong. 1129 (1821). The authenticity of Pinckney’s draft of the Constitution as a whole has been questioned by no less a constitutional scholar than Max Farrand. See 3 M. Farrand, supra, at 601-09. Some therefore have speculated that Pinckney’s claim of authorship of the privileges and immunities clause also must be suspect. See Howell, The Privileges and Immunities of State Citizenship, in 36 Johns Hopkins University Studies in Historical and Political Science 291, 302-03 (1918). The records of the convention, however, trace the provision to the draft proposed by the Committee of Detail on August 6, 1787, 2 M. Farrand, supra, at 187, and from there to working papers that, according to Farrand, may imply authorship by Pinckney, id. at 134-35, 173-74. Interestingly, the first of these papers noted a provision concerning “Mutual Intercourse—Community of Privileges—Surrender of Criminals—Faith to Proceedings &c.” Id. at 135. This reference also suggests the connection of the clause with interstate commerce.

112. Articles of Confederation art. IV.

113. Articles of Confederation arts. VI-VII (Proposed Draft July 12, 1776), reprinted in 1 The Documentary History of the Ratification of the Constitution 79, 80 (M. Jensen ed. 1976) [hereinafter Documentary History]. Article VII of the version of the Dickinson draft reported in the Journals of the Continental Congress differs in the last clause. That draft spoke of the rights “Natives of such Colony or any Commercial Society, established by its authority shall enjoy.” 5 Journals of the Continental Congress 1774-1789, at 547 (W. Ford ed. 1906 &
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No clear colonial antecedent of the privileges and immunities clause pre-dates this draft. Early confederations or proposals for confederation of the English colonies, such as the Articles of Confederation of 1643 forming the United Colonies of New England,114 William Penn's Plan of Union of 1697,115 and the Albany Plan of Union of 1754,116 made no such provision.

A possible model for the fourth Article of Confederation is the British Union with Scotland Act of 1706.117 The Union with Scotland Act was a likely inspiration to the framers of the Articles of Confederation because colonial lawyers were educated in the English tradition.118 In a manner similar to that of the Articles of Confederation, this Act endowed all subjects of the United Kingdom with "full freedom and intercourse of trade and navigation . . . [and] all other rights, privileges, and advantages which do or may belong to the subjects of either kingdom."119 The Act also provided that "all parts of the united kingdom . . . shall have the same allowances, encouragements, and drawbacks, and be under the same prohibitions, restrictions, and regulations of trade, and liable to the same customs and duties on import and export . . . ."120 These two provisions of the Act, like the provisions of the fourth Article

114. New England Articles of Confederation (1643), reprinted in 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, SECOND SERIES 107 (W. Swindler ed. 1982) [hereinafter 1 W. SWINDLER, SECOND SERIES]. The Treaty of Hartford of 1650 between the United English Colonies and New Netherland incorporated the provisions of these Articles by reference. Treaty of Hartford, Sept. 19, 1650, United English Colonies-New Netherlands, reprinted in 1 W. SWINDLER, SECOND SERIES, supra, at 114. A free trade provision was included, however, in the Treaty of Acadia, between Massachusetts and the French colony of Acadia in 1644. Treaty of Acadia, Sept. 2, 1645, Massachusetts-Colony of Arcadia, reprinted in 1 W. SWINDLER, SECOND SERIES, supra, at 112. Perhaps the need for such a treaty provision between the English colonies was obviated because trading rights were guaranteed to the colonists as common subjects of the King. See infra notes 132-42 and accompanying text.

115. William Penn's Plan of Union (1697), reprinted in 1 W. SWINDLER, SECOND SERIES, supra note 114, at 138. Penn's Plan of Union did provide for a council to "adjust all matters of Complaint or difference between Province and Province," in part "to prevent or cure injuries in point of commerce . . . ." Id.

116. The Albany Plan of Union (1754), reprinted in 1 W. SWINDLER, SECOND SERIES, supra note 114, at 155.

117. An Act for an Union of the Two Kingdoms of England and Scotland (The Union with Scotland Act), 1706, 6 Anne, ch. 11. The author thanks Professor Hans Baade for suggesting this source.

118. See C. WARREN, A HISTORY OF THE AMERICAN BAR 157, 164, 188 (1966). Indeed, Blackstone's Commentaries, which were of preeminent influence in the colonies, emphasized the Act's "communication of all rights and privileges between the subjects of both kingdoms" as one of the "fundamental and essential conditions of the union." 1 W. BLACKSTONE, COMMENTARIES *96-97.

119. An Act for an Union of the Two Kingdoms of England and Scotland (The Union with Scotland Act), 1706, 6 Anne, ch. 11, art. IV.

120. Id. art. VI.

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of Confederation, established a tripartite guarantee of equality of general privileges, of specific privileges of trade and commerce, and in duties, impositions, and regulations.\(^\text{121}\) Thus, the one rule central to the fourth Article of Confederation and its antecedents, the Dickinson draft and the Union with Scotland Act, is that an outsider must be given a right equal to that of citizens to engage in trade and commerce free from discriminatory taxation and regulation.\(^\text{122}\)

The connection of the terms "privileges" and "immunities" with rights of trade and commerce is also evident in various commercial treaties entered into by the United States during the eighteenth century. The Treaty of 1778 with France provided that subjects of the French king and United States citizens "shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce" granted to citizens of the most favored nation under the other's laws.\(^\text{123}\) Treaties of trade and commerce between the United States and the Netherlands (1782),\(^\text{124}\) Sweden (1783),\(^\text{125}\) and Prussia (1785)\(^\text{126}\) contain similar language. The terms "privileges" and "immunities" also appear in several state constitutional provisions requiring that "[t]he legislature shall not pass a private or local bill . . . [g]ranting to any private corpora-

\(^{121}\) This guarantee was perhaps the major benefit sought and won by the Scots in the union with Britain. As Professor Braudel observes, "It was probably in the hope of seeing English and American markets open to Scotland that political union with England was voted . . . . The calculation, if that is what it was, was not a bad one, since . . . Scotland was now able to benefit from all the commercial advantages enjoyed by Britons abroad . . . ." F. BRAUDEL, THE PERSPECTIVE OF THE WORLD 371 (1984).

\(^{122}\) The Framers omitted specific mention of the privileges and immunities of trade and commerce in the Constitution, perhaps because it was thought superfluous. This possibility is suggested by Madison's observation in the Federalist Papers "that what was meant by superadding to 'all privileges and immunities of free citizens,' 'all the privileges of trade and commerce,' cannot easily be determined." THE FEDERALIST No. 42, at 291 (J. Madison) (E. Bourne ed. 1937). Madison did not complain that the commercial focus of the fourth Article of Confederation was misdirected, though he did criticize other aspects of it. Madison objected to the power apparently enjoyed by a state under the Articles to confer citizenship, and thus rights in other states, upon aliens; he also criticized the confusing combination of "free inhabitants," "free citizens," and "people" in the original article. Id. at 291-92. Hamilton argued that a national judiciary was necessary to provide for federal enforcement of the rights protected by the privileges and immunities clause. THE FEDERALIST No. 80, at 114, 117-18 (A. Hamilton) (E. Bourne ed. 1937). A similar concern is reflected in James Madison's commentary on William Paterson's plan: "Will it prevent trespasses of the States on each other? Of these enough has been seen already. He instanced Acts of Virga. & Maryland which gave a preference to their own citizens in cases where the Citizens are entitled to equality of privileges by the Articles of Confederation." 1 M. FARRAND, supra note 111, at 317.

\(^{123}\) Treaty of Amity and Commerce, Feb. 6, 1778, United States-France, arts. 3-4, 8 Stat. 12, 14, T.S. No. 83, at 763, 764-65.

\(^{124}\) Treaty of Amity and Commerce, Oct. 8, 1782, United States-Netherlands, arts. 2-3, 8 Stat. 32, 32-34, T.S. No. 249, at 6, 7-8.

\(^{125}\) Treaty of Amity and Commerce, Apr. 3, 1783, United States-Sweden, arts. 3-4, 8 Stat. 60, 62, T.S. No. 346, at 710, 711-12.

\(^{126}\) Treaty of Amity and Commerce, Sept. 10, 1785, United States-Germany-Prussia, arts. 2-3, 8 Stat. 84, 84-86, T.S. No. 292, at 78, 79.
tion, association or individual any exclusive privilege, immunity or franchise whatever." These provisions were intended to strike at commercial monopolies. Although the description of the right to do business as a privilege or immunity granted by the state may seem strange to modern ears, these provisions reflect an earlier tradition in which access to the market was not free but required a special grant of royal privilege.

Prerevolutionary practice also aids in determining what rights the Framers thought the privileges and immunities clause would protect. The privileges and immunities clause, it was thought by contemporaries, "conferred no new right, but legalized and preserved such as were then fully enjoyed." The Articles of Confederation expressly provided for the right of "free ingress and regress to and from any other state," which reflected the traditional rule that subjects of the Crown could travel, if not settle, anywhere within its dominion. An inhabitant of

127. N.Y. CONST. art. III, § 17 (1894, amended 1938, 1964). Other state constitutions adopted during the revolutionary period had similar provisions. See, e.g., MASS. CONST. pt. 1, art. VI ("No man nor corporation or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community . . . ."); N.J. CONST. art. IV, § 7, ¶ 9(8) ("The legislature shall not pass any private, special or local laws . . . granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever."); VA. CONST. art. IV, § 14(18) ("The General Assembly shall not enact any local, special, or private law . . . granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.").

128. See In re Union Ferry Co., 98 N.Y. 139, 146-50 (1885). In his 1868 treatise Thomas Cooley found these provisions, in conjunction with the privileges and immunities clause of article IV, to forbid special legislation or grants of commercial monopolies. See T. COOLEY, supra note 109, at *389-97.


130. Douglass v. Stephens, 1 Del. Ch. 465, 469, rev'd, 2 Del. Cas. 489 (1821). This interpretation is consistent with the Dickinson draft of the Articles of Confederation, which guaranteed "[t]he Inhabitants of each Colony . . . the Same Rights, Liberties, Privileges, Immunities and Advantages in the other Colonies, which the said Inhabitants now have . . . ." ARTICLES OF CONFEDERATION art. VI (Proposed Draft July 12, 1776), reprinted in 1 DOCUMENTARY HISTORY, supra note 113, at 80. This understanding of the privileges and immunities clause may explain the lack of debate over the provision. See supra note 108 and accompanying text.

131. ARTICLES OF CONFEDERATION art. IV.

132. This principle remained the law in the United Kingdom until the latter half of this century. See J. EVANS, IMMIGRATION LAW 63 (1983); see also W. BEAWES, LEX MERCATORIA REDIVIA 369 (1795) (noting that persons residing in the colonies who pledge allegiance to the King are to be treated as "being a natural-born subject of Great Britain, to all intents and purposes, in every court within the king's dominion"). Migration and settlement also seem to have been free for those with means. See Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 176-81 (1956) (collecting charters and laws contemplating free migration). Several colonies, however, raised barriers to migration and settlement against the poor through "poor laws" that prohibited their immigration and provided for the removal of persons without means of support. See An Act for Defraying of the Publick and Necessary Charge Throughout This Province, and for Maintaining the Poor, and Preventing Vagabonds (1691), reprinted in THE EARLIEST PRINTED LAWS OF NEW YORK 1665-1693, at 12 (J. Cushing ed. 1978); An Act Providing for the Relief, Support, Employment and Removal of the Poor (1727), reprinted in 2 FIRST LAWS OF THE STATE OF RHODE ISLAND 348 (J. Cushing ed. 1983).
one colony could look to several sources for protection of his right to do business in other colonies. As a subject of the Crown, the charters of several colonies guaranteed him the right to fish in colonial waters. Later commentary suggests that among the other rights an inhabitant of one colony enjoyed in another colony were those of an alien friend at common law, including the rights to "acquire a property in goods, money, and other personal estate, or . . . hire a house for his habitation"; to "trade as freely as other people;" and to "bring an action concerning personal property, and . . . make a will, and dispose of his personal estate." An alien friend, however, had no right to own or inherit real property and no immunity from discriminatory taxation. The privileges and immunities clause also may reflect the broader class of rights defined in Calvin's Case, which established that all persons born within the Crown's dominion had the right to own and inherit property in England. One of the earliest decisions interpreting the privileges

133. The Charter of Massachusetts Bay of 1629 provided the model. It required the colony to permit all the King's "loving subjects whatsoever, to use and exercise the Trade of Fishing upon that Coast of New England." Charter of Massachusetts Bay (1629), reprinted in 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 32, 41-42 (W. Swindler ed. 1975) [hereinafter 5 W. SWINDLER]. A similar provision appears in the Charter of the Colony of New Plymouth (1629), reprinted in 5 W. SWINDLER, supra, at 26, 29; the Charter of Massachusetts Bay (1691), reprinted in 5 W. SWINDLER, supra, at 75, 87; and the Charter of Connecticut (1662), reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 131, 135 (W. Swindler ed. 1973) [hereinafter 2 W. SWINDLER]. The Charter to Lord Baltimore (1632) required that the fisheries be opened "to all the Subjects of our Kingdouns of England and Ireland." Charter of June 20, 1632, reprinted in 4 W. SWINDLER, supra, at 16, 23. The 1620 provision may reflect the early conception of the charter companies as trading monopolies, see 5 W. SWINDLER, supra, at 11, though such a provision does not appear in later charters for the other colonies. The charter to Lord Baltimore did empower him to designate and limit ports and landing sites in his grant, but the charter seems drawn to facilitate enforcement of duties and imposts. Charter of June 20, 1632, reprinted in 4 W. SWINDLER, supra, at 350, 364.


135. 1 W. BLACKSTONE, supra note 118, at *360.

136. Id.


and immunities clause suggests that both the perpetuation of the rule in *Calvin's Case* and the elimination of the disabilities of alienage were objectives of the Framers in drafting the clause.139

The Framers also may have considered the protection accorded to intercolonial commerce by the English Board of Trade, which occasionally intervened to invalidate the acts of colonial assemblies.140 Prominent among its concerns were efforts by one colony to impose discriminatory taxes upon the trade of another. Apparently, the practice of the Board of Trade in these cases was to permit excise taxes reasonably drawn to raise revenue, but to disallow taxes thought excessive or drawn to impair intercolonial trade.141 The Board of Trade also struck down, at the behest of South Carolinians, a Georgia statute imposing requirements of cultivation and settlement upon the owners of land in that colony.142 In sum, evidence of prerevolutionary practice suggests that a colonist could claim the right to go to another colony; to buy, sell, or own property there; to claim the protection of its courts; and to engage in trade free from arbitrary imposts or exactions. These rights are precisely the privileges and immunities of trade and commerce that the Supreme Court described in *Ward v. Maryland*143 one century after the adoption of the Articles.

Some support does exist for the much maligned interpretation of the privileges and immunities clause as a guarantee of certain fundamental or natural rights.144 One may find textual support for such a guarantee in the Articles of Confederation, the Dickinson draft, and the Union with Scotland Act; each protects unspecified privileges and immunities in addition to the specific rights of trade and commerce.145 Drafters fre-

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140. See, e.g., B. RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 49-81 (1976) (discussing the Board of Trade's review procedures, the influences on the Board, and the frequency with which it invalidated colonial legislation). This review was perhaps the inspiration for the constitutional mechanism of federal judicial review of state legislation. See J. HUGHES, supra note 129, at 157.
141. See B. RUSSELL, supra note 140, at 111-12, 115, 200-01. The Board, however, primarily directed its attention to acts by a colony against Britain, and not acts against other colonies, as indicated by a 1772 order directing Massachusetts to exempt British goods from a tax laying a double impost on imported goods, but not on goods produced in and imported from other colonies. *Id.* at 112.
142. *Id.* at 199-200.
143. 79 U.S. (12 Wall.) 418, 430 (1870); see supra text accompanying note 109.
144. Modern commentators usually ridicule this view of the clause. See, e.g., Eule, supra note 25, at 449 n.128; Simson, supra note 25, at 385-86; Varat, supra note 27, at 509-16.
145. The fourth Article of Confederation guaranteed "all privileges and immunities of the free citizens in the several States," ARTICLES OF CONFEDERATION art. IV; the Dickinson draft promised "the same Rights, Liberties, Privileges, Immunities and Advantages in the other Colonies, which the said inhabitants now have," ARTICLES OF CONFEDERATION art. VI (Proposed Draft July 12, 1776), reprinted in DOCUMENTARY HISTORY, supra note 113, at 78, 80; and the Union with Scotland Act.
quently used the terms "privileges" and "immunities" to describe the rights traditionally enjoyed by an Englishman. In several resolves the rebellious colonists claimed that "his Majesty's subjects in America... are entitled to the same rights, privileges, and immunities with their fellow-subjects in Great Britain."146 Several colonial charters use similar terms guaranteeing settlers the rights, privileges, and immunities of the Crown's subjects,147 and similar language is found in the charters of various colonial townships.143 A resolution of Congress in 1776 also used the terms in this way to encourage the defection of British troops by promising them land and protection "in the free exercise of their respective religions, and... the rights, privileges and immunities of natives as established by the laws of these States."149 Similarly, the treaty by which the United States obtained the Louisiana territory from France in 1803 guaranteed Louisiana inhabitants citizenship and "all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."150

protected "all other rights privileges and advantages which do or may belong to the subjects of either kingdom," An Act for an Union of the Two Kingdoms of England and Scotland (The Union with Scotland Act), 1706, 6 Anne, ch. 11.


147. The charter of the Virginia colony promised inhabitants of that colony "all Liberties, Franchises and Immunities, within any of another Dominions to all intents and purposes, as if they had been abiding and born, within this our Realm or England, or any other of our said Dominions." The First Charter of Virginia (1609), reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1888, 1891-92 (B. Poore ed. 1878); cf. Charter to Sir Walter Raleigh (1584), reprinted in 1 W. SWINDLER, SECOND SERIES, supra note 114, at 63, 65 (stating that the inhabitants of the colony "shall and may have all the privileges of free Denizens, and persons native of England, and within our allegiance in such like ample measure and form, as if they were born and personally resident within our said Realme of England, and law, custom, or usage to the contrary notwithstanding"). Some have suggested that the promise of the privileges of an Englishman originally included in the colonial charters was intended only to extend the common law to the colonies. See 1 W. SWINDLER, SECOND SERIES, supra note 114, at 67; see also 1 W. BLACKSTONE, supra note 118, at *107 (stating that "if an uninhabited country be discovered and planted by English subjects, all the English laws... are immediately there in force").

148. For example, the charter of Charlottesville, Virginia provided that "the freeholders and inhabitants of the said town... shall then be entitled to, and have and enjoy, all the rights, privileges and inimmunities, granted to or enjoyed by the freeholders and inhabitants of other towns erected by act of assembly in this colony." Charlottesville Charter (1762), ch. 20, ¶ 2, reprinted in 7 HENINGS STATUTES AT LARGE (VIRGINIA) 597-98 (Richmond 1820) [hereinafter HENINGS]. Other examples abound. See, e.g., Romney Charter, ch. 21, ¶ 2, reprinted in 7 HENINGS, supra, at 598; Mechenburg Charter, ch. 22, ¶ 2, reprinted in 7 HENINGS, supra, at 600; Hanover Charter, ch. 23, ¶ 2, reprinted in 7 HENINGS, supra, at 601.


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This fundamental rights aspect of the clause, however, proved to be unimportant. Only slaveholders challenging laws that denied them the right to take their human property through free states claimed the violation of fundamental rights, and the courts rejected their arguments. Most privileges and immunities cases today involve rights that are not easily cast as fundamental, such as hunting privileges. Furthermore, to proceed by asking whether an outsider should enjoy a right because it is fundamental, rather than because a state must accord outsiders the same rights of trade and commerce as citizens, could entitle outsiders to greater rights than a state's citizens. Courts always have refused to credit fundamental rights arguments when refusal was necessary to avoid this incongruous result.

Some evidence that the purpose of the privileges and immunities clause was to promote interstate commerce also may be found in cognate provisions drawn expressly to promote that end. Belaboring this point is unnecessary, however, because promoting trade and commerce long

151. The privileges and immunities clause is unlikely in any event to have guaranteed the rights we now hold dear, as Chester Antieau has suggested it did. Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 WM. & MARY L. REV. 1 (1967). Blackstone wrote that the rights and liberties—or "private immunities" and "civil privileges"—of an Englishman were "the right of personal security, the right of personal liberty, and the right of private property." 1 W. BLACKSTONE, supra note 118, at *129. Most colonists probably thought the terms included these rights (apart from those of trade and commerce already described).

152. Lemmon v. People, 20 N.Y. 562, 601-02 (1860), is the leading antebellum decision holding that the right to carry a slave through a free state is unprotected. The contemporary prominence of the Lemmon case, which wound through the New York courts for almost a decade, is noted in H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW 195-96 (1982), and D. FEHRENBACKER, THE DRED SCOTT CASE 60-61, 444-45 (1978). See also Allen v. Sarah, 2 Del. (2 Harr.) 434, 440 (1838) (upholding law freeing slaves taken from state); Commonwealth v. Griffin, 42 Ky. (3 B. Mon.) 208, 212-15 (1842) (upholding prohibition on importation of slaves); Opinion of the Justices, 41 N.H. 553, 556-67 (1861) (observing that a law freeing slaves taken through the state is constitutional). For a discussion of the significance of the clause in the debate over state laws prohibiting immigration of free blacks, see W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1670-1848, at 163-67 (1977).


155. Several scholars have observed that an effective way to interpret open-ended constitutional provisions is to look to the rest of the Constitution to determine those values that inform the entire instrument. See, e.g., J. ELY, supra note 25, at 87; Laycock, Taking Constitutions Seriously: A Theory of Judicial Review (Book Review), 59 TEXAS L. REV. 343, 354 (1981). The provision most closely related to the privileges and immunities clause is the impost or duty clause of article I. U.S. CONST. art. I, § 10, cl. 2. Numerous provisions empower Congress to take useful measures to promote interstate commerce, including the specific grants of authority to establish uniform rules of bankruptcy, id. art. I, § 8, cl. 4; to regulate the currency, id. art. I, § 8, cl. 5-6; to establish roads and a postal system, id. art. I, § 8, cl. 7; and of course the general grant of power "[t]o regulate Commerce with foreign Nations, and among the several States,” id. art. I, § 8, cl. 3. The same end is served by provisions prohibiting Congress from either taxing exports from a state, id. art. I, § 9, cl. 5, or from imposing duties on vessels bound from one state to another, id. art. I, § 9, cl. 6.
has been recognized as an important purpose of the Constitution. Of course, one can carry this analysis to ever greater levels of generality and describe the values served by the privileges and immunities clause in such sweeping terms as national unification or protection of the unrepresented from legislative abuse. But at this level of generality, the analysis loses sight of the nature of the Constitution as an instrument of compromise.

The background of the privileges and immunities clause, its relation to other provisions, and its interpretation in the early years of the republic all suggest that the Framers sought by the privileges and immunities clause only to ensure outsiders the right to engage in trade and commerce free from discriminatory tax or regulatory burdens. This purpose served to unify the nation and protect people from hostile state legislatures, but these were only two ends among many served by a measure certainly more modest than an absolute rule of interstate equality.

2. Toward a Theory of Private Rights.—A detailed review of cases concerning the privileges and immunities clause during the nineteenth century would reveal authority for virtually any interpretation of the clause, including an early exposition of the modern rule of absolute equality, Justice Bushrod Washington's oft-noted natural rights the-

156. State tax and regulatory barriers to interstate commerce were among the particular evils at which the Framers directed the Constitution. See 1 M. FARRAND, supra note 111, at 316-17.

157. See Laycock, supra note 155, at 362-63; see also Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (noting in dictum that without a provision like the privileges and immunities clause, which gives "the citizens of each State . . . equality of privilege with citizens of [other] States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"). Some commentators have argued that the Framers drafted the privileges and immunities and commerce clauses to preserve peace among the states and that this purpose requires a general rule of equality because discrimination in things both great and small threatens interstate harmony. See Simson, supra note 25, at 385; Varat, supra note 27, at 511-12. Interstate comity is important, but the continued existence of states implies some room for the pursuit by a state of its interests to the disappointment of its neighbors. Indeed, the Court has refused to bar state action that violates general norms of comity when the action transgresses no specific constitutional prohibition. See, e.g., Nevada v. Hall, 440 U.S. 410, 426-27 (1979) (recognizing the right of one state to permit lawsuits against another state in its courts).

158. See J. ELY, supra note 25, at 82-85. Professor Simson argues that provisions such as the privileges and immunities clause evidence a broad desire to protect the unrepresented from majoritarian abuse and that this purpose requires the prohibition of all discrimination because the evil of injury to the unrepresented is the same regardless of the magnitude or nature of the injury. See Simson, supra note 25, at 385. But the existence of separate states with power to act in matters of common interest means that alien authority sometimes will affect individuals. That no one represents their interests does not make this exercise of authority unconstitutional. Cf. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619, 636-37 (1981) (permitting Montana to impose a severance tax largely affecting outsiders).

159. Douglass v. Stephens, 1 Del. Ch. 465, 473 (Ridgely, C.), rev'd, 2 Del. Cas. 489 (1821). After what is perhaps the most thoughtful early discussion of the origins and purposes of the clause, Chancellor Ridgely ruled unconstitutional a state law granting Delaware citizens priority in the
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ory, and the suggestion that the provision granted equality of private rights rather than political or municipal rights. In the antebellum era, the Supreme Court issued no authoritative opinion interpreting the clause. In the one decision applying the clause, the Court declined to offer a general interpretation of "so broad a provision, involving matters not only of great delicacy and importance, but which are of such character, that any merely abstract definition could scarcely be correct." The Court only addressed the privileges and immunities clause in two other instances (both infamous), suggesting in one case that corporations and in the other that blacks were not citizens deserving of its protection. Although the state courts and lower federal courts encountered the clause most often in cases touching upon the rights of slave owners or free blacks, they also rejected privileges and immunities clause challenges in the attachment of a debtor's property upon suit, in the honoring of claims upon bankrupt or intestate estates, in the grant of rights to exploit natural resources, and in occupational licensing. In only a few instances did courts find a state law to violate the privileges and immunities clause, and those cases, interestingly, all involved core privileges of trade and commerce or rights that could be described as those of an alien friend.

After the Civil War, the Supreme Court began to grapple with the collection of debts against intestate estates. He was reversed by the full High Court of Errors and Appeals. 2 Del. Cas. at 501.


161. See, e.g., Campbell v. Morris, 3 H. & McH. 535, 554-55 (Md. 1797) (stating that the clause protects "personal rights," such as the right to hold property); Austin v. State, 10 Mo. 591, 593 (1847) (holding that a state might limit to citizens licenses to sell liquor).

162. Connor v. Elliott, 59 U.S. (18 How.) 591, 593 (1855). Instead, the Court limited itself to ruling that the grant by Louisiana of community property rights to persons either married or residing in Louisiana, but not to those both married and residing elsewhere, did not violate the clause. Id. at 594.


165. E.g., Campbell, 3 H. & McH. at 555-56; cf. Canadian N. Ry. v. Eggen, 252 U.S. 553, 561 (1920) ("From very early in our history... security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many States may be attached under conditions which would not justify the attaching of a resident citizen's property.").


168. People v. Coleman, 4 Cal. 46, 54-58 (1854) (taxes on importers and wholesale dealers of foreign goods); Austin v. State, 10 Mo. 591, 593 (1847) (licenses to sell liquor).

169. See, e.g., Magill v. Brown, 16 F. Cas. 408, 428 (C.C.E.D. Pa. 1833) (No. 8952) (striking down law disabling citizens of other states from sharing in a bequest); Wiley v. Palmer, 14 Ala. 627, 629-31 (1848) (invalidating a discriminatory tax); Miller v. Black, 47 N.C. (2 Jones) 341, 347 (1855) (holding that a citizen of one state may sue citizen of another in a third state).
The problem of distinguishing things that a state must share with outsiders from things that it could reserve for its own citizens. In *Paul v. Virginia* the Court suggested that the privileges and immunities clause protected only those rights "which are common to the citizens in the [several] States under their constitution and laws by virtue of their being citizens" and that it did not pertain to a class of "[s]pecial privileges enjoyed by citizens in their own States." The Court further explained this mysterious distinction only by ruling that the right to do business in a state in corporate form was a special privilege that the state could withhold from outsiders. The Court again invoked the distinction between special and general rights in *McCready v. Virginia*, finding that a state law restricting the exploitation of oyster beds to citizens did not violate the clause. "[T]he reason is obvious," the Court observed, "the right thus granted is not a privilege or immunity of general but of special citizenship." Justice Harlan, writing for the Court in *Blake v. McClung*, suggested that these general rights were those incident to trade and commerce. At issue was a state law providing resident creditors priority in the distribution of a bankrupt's assets. He observed:

The foundation upon which [our earlier] cases rest cannot, however, stand, if it be adjudged to be in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states.

The law was held unconstitutional because it "exclude[d] citizens of other states from transacting business . . . upon terms of equality."
Professor W.J. Meyers more fully developed the distinction between general and special rights at the turn of the century. Drawing on the experience of both federal and state courts in the preceding century, he recast the general rights protected by the clause as "private" rights, such as property and contract. Thus, Professor Meyers ordered an unwieldy body of cases by invoking the then popular notion that there was some sphere of private rights in which the state should not interfere. This notion justified nicely a state's restriction of voting rights, professional licenses, and public property to its citizens, for these public rights emanated from the state. This distinction between public and private rights seems to be at odds with the literal terms of the privileges and immunities clause because the term "privileges" connotes something bestowed by the state. Nevertheless, the distinction remained true to the spirit of the provision because it generally required a state to leave outsiders free to engage in trade and commerce.

The distinction between public and private rights, however, has not fared well in recent years. We have lost our forebears' sense of some private body of rights held independent of the state and now regard prop-

179. Id. at 364-77; see also Howell, supra note 111, at 323 ("[T]he class of rights covered by that provision consists in general of 'private' as opposed to 'public' rights.").
180. See Meyers, supra note 178, at 292-93.
181. See id. at 293-97.
182. See id. at 298-300.
183. Cf. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1454 (1968) ("Even a privilege, benefit, opportunity, or public advantage may not be granted [by a state] to some but withheld from others where the basis of classification and difference in treatment is arbitrary.").
184. See supra note 129 and accompanying text.
185. The Court continued to maintain that the privileges and immunities clause protected only certain fundamental rights until Toomer v. Witsell, 334 U.S. 385 (1948), but no cases caused it to advert to the public-private right distinction. Cf. Canadian N. Ry. v. Eggen, 252 U.S. 553, 560 (1920) (holding that the right to maintain suit in another state's courts is among the fundamental privileges); Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 154 (1907) (Harlan, J., dissenting) (noting that the right to sue and defend in courts of other states is protected by the Constitution because that right is fundamental). The Court's insistence in Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 387-88 (1978), that the privileges and immunities clause protects only fundamental rights is reminiscent of the old cases, but the direction of the rule to the momentous conclusion that elk hunting is not among the rights protected suggests that the Court latched on to the term "fundamental" only to justify a preference in something it thought trivial.
property and contract rights as impermanent artifacts of a changing society. Indeed, Professor Meyers and the nineteenth century Court erred in tolerating preferences in licensing and incorporation, an error that probably resulted from the conception of these rights as granted by the state rather than held by man in the state of nature. Today we realize that all rights originate in collective human action, and we can place licensing and incorporation with the general rights of trade and commerce that a state must share with outsiders. Nevertheless, the old rule is instructive because it reminds us that some class of public rights need not be shared with outsiders. This Article proposes that we redefine those rights to encompass goods that a state must keep for its citizens to enable them to act collectively for their common good.

IV. The Principles Applied

Recall the principles advanced in this Article. First, a state may not deny outsiders access to resources in the market. Second, a state may favor its own in the allocation of goods provided by the state when some redistributional or other interest justifies allocation by means other than market transactions. The second principle justifies a state’s keeping for its citizens most publicly funded social services, such as schools, public housing, public health care, and income support. These principles explain much that is noncontroversial in existing law.

An important exception to the second principle is that a state must share its highways, police protection, and courts with outsiders. Because these public services are essential to the market itself, the first principle requires the exception. The mandate that a state must allow outsiders to trade on equal terms would be meaningless if it could close its roads.


187. In *Martinez v. Bynum*, 461 U.S. 321 (1983), for example, the Supreme Court upheld a Texas law denying children residing in Mexico who were citizens of the United States admission to state public schools. The Court found sufficient justification for the law in the state’s interest “in assuring that services provided for its residents are enjoyed only by residents.” *Id.* at 328. That a state “is expending its own funds . . . is certainly a factor—perhaps the crucial factor—to be considered” by a court in passing upon a law denying public benefits, such as employment on municipal construction projects, to citizens of other states. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221 (1984). This Part argues that both decisions are right, as do most commentators. See Hellerstein, *supra* note 27, at 72-84; Varat, *supra* note 27, at 523.

188. Some argue that forced sharing of highways fits poorly with the proprietary activity exception or any broader principle permitting a state to harbor the goods it creates for its own citizens. *See Wells & Hellerstein, supra* note 97, at 1130 n.223. Varat suggests that the outsider’s need for these services and the absence of their availability in the market (i.e., the state’s monopoly over them) require that they be shared. Varat, *supra* note 27, at 536-40. The difficulty with that reasoning is that individuals need education, public support (if they are poor and hungry), and public healthcare (if they are poor and sick) as much as they need police protection and the use of public roads, and the state enjoys a similar monopoly in the provision of these types of public benefits. We
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because they are publicly funded. Indeed, a general liberty of navigation and commerce has a long tradition in this country.\textsuperscript{189} A general rule that a state may not assert selfish dominion over the channels of commerce explains consistent Supreme Court decisions regarding roads\textsuperscript{190} and other channels of commerce,\textsuperscript{191} including navigable waterways.\textsuperscript{192} The concerns of free commerce that may impel a state to hold streets and waterways open to its own citizens may also compel it to hold them open for citizens of other states.\textsuperscript{193}

Although the two principles explain the easy cases, this Part considers two issues of particular difficulty: commercial subsidies—both direct, such as cash grants and tax breaks, and indirect, such as buy-, hire-, acknowledge the outsider's right to roads and police protection, but not other public services, because we conceive of them as essential to his ability to do business in the state.

189. See, e.g., J. Angell, supra note 133, at 50 ("By the very act of confederation, it may be fairly implied, that so far as it relates to navigation, the tide waters of every State were to be free and open to the citizens of all the States."). Instruments such as the Northwest Ordinances reflect this tradition. The Northwest Ordinance provided for free use of "navigable waters" and "carrying places" and required that "in no case shall non-resident proprietors be taxed higher than residents." Northwest Ordinance of 1787, art. IV, reenacted Aug. 7, 1789, 1 Stat. 50, 52n.(a). Acts admitting new states to the Union also required states to hold open their navigable rivers to all. See, e.g., Enabling Act for Louisiana, ch. 21, § 3, 2 Stat. 641, 642 (1811) ("The river Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico, shall be the common highways and for ever free as well to the inhabitants of the said State and other citizens of the United States."). A similar provision is in the Admission Act for Louisiana, ch. 50, § 1, 2 Stat. 701, 703 (1812), and in An Act Concerning the Erection of the District of Kentucky into an Independent State, art. II, § 7 (1785), reprinted in 4 W. Swindle, supra note 133, at 129, 131.


191. In Smith v. Department of Agric., 630 F.2d 1081, 1084-85 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981), the Fifth Circuit held that a Georgia practice of giving citizens a preference in the allocation of space in an overcrowded farmer's market operated by the state violated the commerce clause. Judge Gee observed that the practice could not be permitted because it distorted the market for produce in favor of in-state sellers. Id. at 1085-86 (Gee, J., concurring). Varat criticizes this result, finding the measure indistinguishable from other sorts of subsidies. Varat, supra note 27, at 552 n.224. Levmore concludes that the case is difficult and should turn on whether the state would have built and operated the market if not allowed such a preference. Levmore, supra note 48, at 579-80, 618 n.220. I think the case is rightly decided. If a state chooses to enter the market to provide a place of trade, it must allow access to outsiders on the same terms as citizens. If the state wants compensation for its efforts, it must charge insiders and outsiders the same fee. One court has emphasized the publicness of tidal lands to find state charges for pumping oil across them not to be within the proprietary activities exception to the commerce clause. Western Oil & Gas Ass'n v. Cory, 726 F.2d 1340, 1343 (9th Cir. 1984), aff'd mem., 471 U.S. 81 (1985). Though the court's analysis is conclusory, one can easily draw an analogy between tidal lands used for transporting oil and roads and public waterways.

192. The national interest in waterways is so manifest that courts have created an equitable servitude by which the federal government may destroy the interest of riparian owners, including the state, through navigation projects without incurring an obligation to compensate them. See United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950); Gibson v. United States, 166 U.S. 269, 275-76 (1897). This servitude is in derogation of the interest of a state in surface water, as the Court recently observed in rejecting the claim of a state to ownership of hydroelectric power generated with those waters. See New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982).

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and sell-local laws—and preferences in the allocation of groundwater, a natural resource often not in private hands and for which there are no established markets. The formal rules are unavailing for these issues because the preferences may be plausibly cast either as protectionist interferences in the market or as efforts by a state to direct its wealth to the benefit of its own. To get at these cases, we need to consider, first, the likely efficiency and external costs of such measures and, second, the administrability and departure from tradition of a rule prohibiting such preferences.

A. Subsidies

Any rule dealing with state subsidies of commerce must strike a tenuous balance among the concerns for efficiency, administrability, and respect for tradition. Subsidies tend to be inefficient and to entail significant external costs, but they are arguably not as bad as embargoes or tariffs. A rule prohibiting subsidies would be difficult to administer because of the problems in distinguishing preferences in the allocation of public services from subsidies that improve the position of a state's citizens in the market. Finally, the traditional tolerance of subsidies cautions restraint. The balance of these concerns argues for per se rules prohibiting many impure subsidies, such as buy-, hire-, and sell-local laws and laws requiring private businesses to prefer state citizens, but allowing pure subsidies, such as cash grants and tax breaks.

1. Pure Subsidies.—State aids to local industry in the form of tax incentives, grants, or loans are tolerated, though they tend to distort

194. See, e.g., Allied Stores v. Bowers, 358 U.S. 522, 528 (1959) ("[I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."). Two recent decisions raise some doubt about the constitutionality of certain sorts of tax measures intended to attract commerce or investment. In Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332 (1977), the Court ruled that the commerce clause prohibited New York from taxing in-state sales of securities at a lesser rate than out-of-state sales. In Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 406 (1984), the Court ruled that New York could not calculate a Domestic International Sales Corporation (DISC) tax credit in a way that penalized firms for having proportionally greater foreign operations. These decisions may suggest that courts should invalidate any tax incentive to attract trade. See Tatarowicz & Mims-Velarde, An Analytical Approach to State Tax Discrimination Under the Commerce Clause, 39 Vand. L. Rev. 879, 931-32, 935 (1986). That result, however, was not the intent of the Court:

Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce . . . . We hold only that . . . no State may discriminatorily tax the products manufactured or the business operations performed in any other State. Boston Stock Exch., 429 U.S. at 336-37.
market decisions and encourage inefficient uses of resources.\textsuperscript{195} Those outside a state often bear the social cost of subsidies. When a subsidy attracts industry from other communities, those communities lose jobs, tax revenues, and other economic benefits. When a subsidy encourages local firms to increase production or new firms to enter a trade, the subsidy injures foreign producers through both a decline in the price of affected goods and a loss of market share. Indeed, the effects of subsidies are generally the same as those of tariffs.\textsuperscript{196} A tariff’s exploitation of outsiders is not the cost of a tariff because local consumers ultimately bear this cost; rather, a tariff’s exploitation shifts the terms of trade, which makes local goods relatively more attractive and foreign goods less attractive. A subsidy has the same effect.

Nevertheless, legal scholars in the United States maintain that subsidies are not as bad as tariffs or other sorts of impermissible interference in interstate commerce. They argue that subsidies may be beneficial to the extent they encourage increased competition and reduced commodity prices.\textsuperscript{197} Subsidies, unlike tariffs, benefit foreign buyers\textsuperscript{198} and tend to attract, rather than discourage, new entrants into an industry.\textsuperscript{199} Even the most stimulative subsidies, however, have harmful impacts both on firms that compete directly with those subsidized and on firms that compete in purchasing factors of production. Moreover, a subsidy may not stimulate increased production if, for example, a state causes an industry to relocate to a place where its marginal costs are higher, but where that decrease is offset by aid from the state.

A somewhat more convincing defense of pure subsidies is that their cost is borne largely within the state. Professor Saul Levmore rests his case for subsidies on a concept of “conscious funding,” observing that because subsidies entail a conscious expenditure of public funds, the state is likely to weigh the costs and benefits of its actions.\textsuperscript{200} Professor Donald Regan makes essentially the same point, arguing that the internal funding of subsidies acts as a natural check on their proliferation.\textsuperscript{201}

\textsuperscript{195} See, e.g., R. BALDWIN, supra note 70, at 130 (“The underlying principle of any code should be a condemnation of domestic production subsidies or subsidy-like policies that interfere with the benefits of trade that result from an efficient use of each country’s resources.”).

\textsuperscript{196} See id. at 112. For a demonstration of both the comparability of a subsidy and a tariff and the way in which they exploit foreign producers to benefit local interests, see I. PEARCE, INTERNATIONAL TRADE 157-227 (1970).

\textsuperscript{197} Cf. Varat, supra note 27, at 544 (arguing that subsidies may enhance “consumer access to cheaper goods in the interstate market”).

\textsuperscript{198} I. PEARCE, supra note 196, at 209.


\textsuperscript{200} Levmore, supra note 48, at 585-86.

\textsuperscript{201} Regan, supra note 22, at 1194-95. He is, perhaps, inconsistent in arguing that the internal
this argument ignores the costs of a subsidy borne outside a state either by communities that lose industry to a neighbor's enticements or by foreign producers that face a decline in price and market share. A state is unlikely to account for those external costs in weighing the merits of the subsidy.

A third, more cynical argument supporting unrestricted competition among states for industry or investment is that such competition encourages state and local governments to offer programs of tax, regulation, and public investment most attractive to industry and commerce. Proponents of this position predict that such competition among many small governments will cause them to decrease the size of government, shift towards forms of revenue raising that tax the beneficiaries of a service, and abandon local measures to redistribute wealth. Underlying this argument is an open hostility to government intervention in decisions about consumption, production, or investment. The focus, however, is retreat by government from the marketplace and not competitive interference. More to the point, when states profit by inflicting injury on each other, they will reach the point at which the utility of each and every community is maximized only in a descending cycle of action and retaliation.

These arguments for permitting subsidies are not always wrong: a subsidy may have beneficial consequences; it may signal a clear and identifiable cost to the state; and competition among states certainly has its place. These arguments must admit to exception, however, when the state's action exacts a cost that is borne by outsiders. If subsidies are not as bad as tariffs, embargoes, or other prohibited interferences, it is only a matter of degree.

The tolerance of subsidies is as much because of the concerns of administrability and respect for tradition as it is because they are less injurious to commerce than tariffs and similar measures. The prohibition of all subsidies would raise a host of difficult questions about the propri-

costs of tariffs—the increased price of goods—do not mediate against their abuse. Id. at 1115 n.56. This argument must be on the assumption that the cost of a subsidy is more obvious and so more likely to be taken into account.

202. See McClure, supra note 88, at 341-44. Critics of interstate or interjurisdictional competition suggest that unrestrained competition between governments may result in less than optimal choices about taxation, regulation, or the provision of public goods. See, e.g., Wildasin, Interstate Tax Competition: A Comment, 59 NAT'L TAX J. 353, 354-55 (1986).


204. McClure, supra note 88, at 346.

205. Id.

206. Pearce considers the possibility of a tariff war that ends with the respective states in an equilibrium position with an optimal level of tariffs. 1 PEARCE, supra note 196, at 188-94.
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ey of measures that are similar in effect, such as programs of capital improvement, education, or general regulation and tax. If granting specific tax breaks or cash to attract industry sometimes seems pernicious, a state often may achieve the same effect by investments in roads, schools, and similar attractive infrastructure or through general programs of tax relief. Of course, investments in education and infrastructure enhance aggregate welfare, albeit at some expense to outsiders, and so these measures are distinguishable from subsidies. Nonetheless, formulating a simple rule that can distinguish wealth-creating subsidies from those that are inefficient is virtually impossible.

The traditional tolerance of subsidies is also important. A sudden change in this area would disrupt arrangements upon which people have come to rely. Furthermore, the belief that a state by affirmative measures may accomplish ends foreclosed to it through sanctions is deeply embedded in our consciousness. The commerce clause always has focused on state interference in commerce through taxes and regulations. The Constitution generally requires a state to refrain from injurious action, but permits a state to exert its will through affirmative suasion. If people perceive subsidies as fair interstate competition and not as a point of special offense, then permitting subsidies may not run afoul of the concept of union and concern with interstate resentments.

207. Professor Simson suggests that hiring preferences for citizens should be forbidden because a state may combat unemployment through job-training programs. Simson, supra note 25, at 393. Outsiders competing with citizens for jobs, however, will see no difference between a hiring preference and job-training: tutored citizens will get scarce jobs instead of untutored outsiders. Tutoring is preferable for systemic reasons because by enhancing the skills of citizens, it ensures greater return from their employment and thus reduces the true social cost of the measure.


211. See Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 HARV. L. REV. 330, 330-35 (1985). A striking instance of this intuitive differentiation of these two modes of state action is the ruling that Puerto Rico did not violate the Constitution by regulating advertising in order to encourage tourists, but not its own residents, to come to its casinos and gamble. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 340-44 (1986). The regulation's effect was to ensure that Puerto Rico raised revenues in its casinos from outsiders, rather than citizens—something Puerto Rico clearly could not seek to accomplish more directly by imposing a tax solely on outsiders.

212. See Regan, supra note 22, at 1112-15. International experience, however, suggests that
The arguments are cumulative. Because of the lesser inefficiency of subsidies, the traditional toleration of subsidies, and the difficulty of crafting an administrable rule to prohibit subsidies, direct state aids to industry should be permissible.

2. Impure Subsidies.—Recent cases involving preferences in public employment,\textsuperscript{213} rewards for private participation in public programs,\textsuperscript{214} the sale of state-owned natural resources,\textsuperscript{215} and the operation of state-owned enterprises\textsuperscript{216} call into question the constitutional permissibility of a unique set of preferences, denoted here as “impure subsidies.” The Court generally has held such preferences immune from challenge under the commerce clause through an amorphous and often criticized\textsuperscript{217} exception for state proprietary activities.\textsuperscript{218} The recent decision in \textit{United Building} suggests that a hiring preference may also withstand scrutiny under the privileges and immunities clause when the state’s interest in combating unemployment is significant.\textsuperscript{219}

Each of these measures may be conceived of as a subsidy.\textsuperscript{220} In \textit{Wunnicke} Justice Rehnquist observed in dissent that Alaska could replicate the effect of its law requiring that timber purchased from the state be processed in the state by directly subsidizing in-state timber processors.\textsuperscript{221} The law simply shifted state revenues to the processing industry state aids to industry can be a subject of bitter squabbling. See L. GLICK, MULTILATERAL TRADE NEGOTIATIONS: WORLD TRADE AFTER THE TOKYO ROUND 23 (1984) (observing of international trade negotiations in the 1970s that “[t]he actual negotiations on subsidies and countervailing duties were heated” and the “[d]ifferences on the subsidies issue were perhaps greater than on any other issue in the [negotiations].”).


215. The two cases that have come before the Court involved secondary restraints on firms benefiting from the exploitation of a state resource. See South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); Hicklin v. Orbeck, 437 U.S. 518 (1978). These cases are treated here as though they involve the disposition of natural resources, because the Court assumed that Alaska owns these resources and so has the right to exploit them for the advantage of its citizens.


217. See Varat, supra note 27, at 501-08; Wells & Hellerstein, supra note 97, at 1073-75.


220. In the EEC, measures such as buy-local laws are prohibited as subsidies. Commission Directive 70/32, 13 J.O. COMM. EUR. (No. L (3)1 (1970); see Turpin, Public Contracts in the EEC, 9 COMMON MKT. L. REV. 411, 441 (1972).

through the intermediary of private purchasers of timber. The state charged considerably less than it otherwise would for timber sold subject to the restriction, presumably to compensate purchasers for the increased cost of Alaskan processing. Similarly, a buy- or hire-local law is theoretically indistinguishable in effect from a subsidy to local labor or industry. A law requiring that locals be hired on state projects can be virtually identical to a state-funded work relief program for the unemployed. Given the similarity between these preferences and direct grants of aid, the question is whether they possess any unique characteristics that may warrant their prohibition.

(a) Proprietary activities.—The proprietary activities exception to the commerce clause permits states to refuse to do business with outsiders, on the premise that states should be able “to operate freely in the free market.” This doctrine has been the cause of much confusion and acrimony on the Court, which is not surprising, for the Court has analyzed a group of cases posing very different issues under the exception. This Article advocates principles that would not provide proprietary activities a carte blanche exemption from the general rule that states must allow outsiders to do business on the same terms as citizens. Indeed, those state activities that are most clearly proprietary—government control of erstwhile private enterprises—provide the most compelling case for forbidding citizen preferences.

222. Id. at 85.
225. The Court has consistently demonstrated its internal divisions regarding the purpose and scope of the exception: the author of each opinion invoking it—Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (Powell, J.); Reeves Inc. v. Stake, 447 U.S. 429 (1980) (Blackmun, J.); White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983) (Rehnquist, J.)—has dissented in the next, with the pattern maintained by Justice Rehnquist’s dissent in South-Central Timber Dev., Inc. v. Wunnike, 467 U.S. 82, 101 (1984), in which the exception was held not to apply.
226. Public ownership of commercial enterprises is most pervasive in the area of power generation. In 1980 nonfederal publicly owned utilities (state projects, power districts, municipal utilities, and cooperatives) accounted for 12.6% of the generating capacity in the United States, and they are projected to own over 30% of the generating capacity coming on line in the 1980s. See P. JOSKOW & R. SCHMALENSEE, MARKETS FOR POWER 12, 19 (1983). Typically, commentators criticize public power generation because available subsidies, such as exemption from federal tax, ability to float tax-free bonds, and various federal preferences for public power, encourage the production and sale of electricity by publicly owned utilities without regard to its true economic cost. This encourages the inefficient production of generating capacity and wasteful consumption of electricity in areas with artificially low prices. See Pierce, A Proposal To Deregulate the Market for Bulk Power, 72 VA. L. REV. 1183, 1226-28 (1986).

Of concern here are preferences in the sale of public power, which may be costly both because they allocate power to low-yield consumers and because they frustrate efforts to form power pools. Many jurisdictions have constitutional or common-law rules, which courts have upheld, providing that local public enterprises, such as utilities, may not serve outsiders until the needs of residents are
At issue in *Hughes v. Alexandria Scrap Corp.* was a law imposing special documentation requirements on out-of-state scrapyards seeking a bounty from Maryland for disposing of junked automobiles. The Court found that Maryland's activities were those of a market participant and that the preference was exempt from the strictures of the commerce clause under the proprietary activities exception. Maryland might have justified its law as a way to ensure that the bounty was paid only for the removal of junked automobiles from Maryland roads, but the decision did not rest on this reasoning. The state could have better accomplished this environmental purpose by simply restricting the bounty to Maryland hulks. Yet administrative difficulties in determining the origin of abandoned vehicles and a perception that in-state scrapyards are most likely to reap the harvest of in-state hulks could justify the more roundabout measure. Thus, under the principles developed in this Article, *Hughes* was correctly decided. The *Hughes* decision may rest upon a simple application of the principle that a state funding a public good—cleaning up the environment—may limit its efforts territorially.

The law at issue in *White v. Massachusetts Council of Construction Employers*, which required firms working on municipal construction projects to prefer Boston residents in hiring, poses a more difficult issue. Although the Court upheld the measure under the proprietary activities exception, its validity under the principles developed here is far from clear. The municipal hiring preference is a subsidy to local labor. The measure will require the city to pay construction firms more to compensate them for the additional cost of hiring local labor with greater wage satisfaction. See, e.g., *Brown v. Housing Auth.*, 240 Ga. 647, 653-54, 242 S.E.2d 143, 147 (1978); *Fraccola v. City of Utica Bd. of Water Supply*, 70 A.D.2d 768, 769, 417 N.Y.S.2d 357, 358 (1979); *Okemo Trailside Condominiums v. Blais*, 135 Vt. 500, 503, 380 A.2d 84, 87 (1977). See generally 3 C. SANDS & M. LIBONATI, LOCAL GOVERNMENT LAW § 18.06, at 18-38 n.23 (1982) (citing cases from various jurisdictions upholding common-law rule enforcing public enterprise preference).

The Supreme Court recently ruled that a state may not require a privately owned utility to prefer in-state consumers, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339, 344 (1982); but in *Reeves*, both the majority, 447 U.S. at 442, and the dissent, *id.* at 453 n.6 (Powell, J., dissenting), intimated that a preference in the allocation of public power would survive a commerce clause challenge under the proprietary activity exception. The latter result is intolerable unless a state could show a significant redistributional element in public power or some other reason to allow a preference in the provision of a good capable of sale in the market.

228. *Id.* at 806-10.
233. *Id.* at 214-15.
demands. Undoubtedly, the law imposes a cost on nonresident laborers who face unemployment or work at a lesser return. Nevertheless, the measure may be of net benefit to society if by a small expenditure the city can encourage local employment and accrue substantial savings in public support from those escaping the dole, provided that the disappointed outsiders can find work at only slightly less return elsewhere. Indeed, resident preferences in hiring police and similar public servants may provide an additional gain in ensuring familiarity with the city. Support for these efficiency-based considerations cannot be found in the White decision, however, and cases such as White probably cannot rest on so particular an analysis. Rather, the argument for the hire-local law is that it is no different from a bonus program encouraging employers to hire locals or even a direct program of public work relief. Such programs fall well within the principle that a state may limit the benefits of public programs serving a redistributional interest to its citizens.

Reeves, Inc. v. Stake is the hardest case. The majority makes a respectable case for allowing South Dakota in times of shortage to prefer its citizens in the sale of cement from a state-owned plant, observing that South Dakota built the plant in response to an apparent failure of the market in the 1920s and arguing that to allow the preference would encourage states to exercise such “foresight, risk, and industry” in the future. This argument echoes the justification for allowing preferences for more common publicly created goods and is accepted by most scholars as a basis for the proprietary activity exception. But the arguments against the preference are stronger. The social cost of the South Dakota measure is evident; purchasers of cement sold by some criterion other than willingness to pay are likely to put it to less

234. If wages are fixed by a prevailing wage law, then the measure simply may capture for citizens the implicit subsidy in such laws.

235. Cf. Melay & Seiden, Municipal Residency Law and Local Public Budgets, 48 PUB. CHOICE 27, 32-33 (1986) (suggesting that residency laws increase the productivity of municipal employees but also that “packing” city with voting public employees encourages increased public spending).


237. Reeves presents an issue very different from that in White. The ordinance in White involved a preference in hiring for public works rather than a preference in the conduct of a state-owned commercial enterprise operated in entrepreneurial fashion. The latter preference is particularly troubling because the preference erodes free trade through the displacement of private enterprise by public ones. Preferences in public procurement also diminish the flow of trade but are less objectionable because their potential is bounded by the limits of traditional government operations. One finds in the General Agreement on Trades and Tariffs (GATT) such a distinction between preferences in state trading and preferences in public procurement. V. CURZON, supra note 70, at 108.

238. Reeves, 447 U.S. at 431 n.1.

239. Id. at 446.

240. See supra notes 77-79 and accompanying text.

241. See L. TRIBE, CONSTITUTIONAL CHOICES 145 (1985); Varat, supra note 27, at 550-52; Wells & Hellerstein, supra note 97, at 1130-35.
productive use, and those outside the state are likely to bear the significant part of that cost.\footnote{242} The majority's reward argument is unconvincing. The preference reduces the economic return to the state from the cement plant. Moreover, the cement plant was run like a private firm, which is decisive evidence that the program did not serve a redistributional interest in allocating cement other than by sale in the market.\footnote{243} Concerns for tradition do not protect state entrepreneurial enterprises like they might if schools, public housing, or public health care were at issue. Not only is cement capable of provision through the market, but historically it has been so produced. The rule that state enterprises that sell their product in the market must deal with outsiders is not hard to administer, because this characteristic readily distinguishes them from schools, hospitals, and public housing.\footnote{244} The preference also is troubling because it allows political pressures exerted by insiders during times of shortage to disrupt and dislocate outsiders by stopping a traditional source of supply to the outsiders.

Ultimately, preferences such as that in *Reeves* cannot be tolerated if we are to prevent state ownership of commercial enterprises from undermining our common market.\footnote{245} States cannot be permitted to accomplish through ownership what they could not accomplish through regulation of commerce.\footnote{246} United States scholars, reared in our pervasive...
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... shall be absolutely free*). It soon had to limit the exception, however, because it found states resorting to programs of forced seizure of goods as a ready alternative to the regulation of private sale. See, e.g., James v. South Austl., 40 C.L.R. 1, 34-36, 39 (Austl. 1927) (striking down law seizing dried fruits to maintain export quotas); see also C. Howard, Australian Federal Constitutional Law 330-34 (1985) (discussing Australian experience with state acquisition of commodities and its effects on free trade).

247. Some have even argued that preferences in the operation of publicly owned enterprises must be tolerated so as not to discourage the growth of the public sector. See Varat, supra note 27, at 530 n.175 (arguing that "the states should possess significant freedom to enlarge their public sectors if they wish, and as a practical matter their freedom is restricted if residence distinctions cannot be drawn"). This gets it exactly backwards.

248. A number of commentators have argued such measures should be prohibited per se. See, e.g., Anson & Schenken, supra note 48, at 92-95; Varat, supra note 27, at 564; cf. 3 C. Sands & M. Libonati, supra note 226, § 18.10, at 18-56 & nn.19-21 (discussing an analogous prohibition of some local measures that impose ancillary restrictions on customers of local utilities).


250. Id. at 99.


252. Id. at 529-31.


254. Id. at 222-23.

255. See Anson & Schenken, supra note 48, at 92-93. Downstream restraints may pose somewhat greater transaction costs than subsidies. In Wunnicke for example, timber purchasers probably incur some small additional cost in labeling and handling timber that must be processed in the state. These costs would be even greater in Hicklin because the state attempted to influence "all employ-
business with the state to hire only its citizens. The implication of *United Building* and *Hicklin* is that such a restraint on unrelated hiring by firms that do business with the state is prohibited. The measure will operate like a subsidy, however, because a firm will enter the transaction requiring it to choose a less qualified or more demanding resident over an outsider only if the state covers the increased marginal cost. If the state covers this cost by paying the firm more for goods or services, the measure differs from a subsidy only in that when the state awards the subsidy it does not expect such goods or services in return. Unlike a subsidy, however, this hypothetical restraint has a troubling *in terrorem* effect because it preys on uncertainty by telling firms that they must abandon all hope of doing business with the state if they hire any outsiders. Those in business, however, may well account for that uncertainty.256

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

The argument for prohibiting downstream restraints, though we tolerate subsidies of like effect, turns largely on concerns of administrability and respect for tradition. Downstream restraints are readily distinguishable from most subsidies or social welfare programs. When states require firms with whom they deal to favor citizens in other dealings, they appear to be interfering with the ability of out-of-staters to engage in entirely private transactions, something historically prohibited under the privileges and immunities clause.257 The rule against downstream restraints is also consistent with the line of commerce clause cases holding that a state may not prevent the export of natural resources once they are in private hands.258 Downstream restraints also resemble various sorts of

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256. The law in *Wunikke* did not even pose this risk. Purchasers of timber accurately could calculate the cost of in-state processing and pass that cost on to the state. Because the law did not affect the processing of timber purchased from other sources, the Alaskan law probably had no greater impact on outsiders than would the grant of a direct subsidy to timber processors, a point made by Justice Rehnquist in his dissent. *South-Central Timber Dev., Inc. v. Wunikke*, 467 U.S. 82, 103 (1984) (Rehnquist, J., dissenting).

257. *See supra* section III(B)(1).

private actions that are forbidden as acts of unfair competition, and a county or municipal ordinance of this character may implicate the anti-trust laws. Whatever the formal relevance of these rules, they may delimit the traditional prerogatives that a state as owner may claim in the use of its own property.

B. Groundwater: The Nascent Market

State control of groundwater is an issue of enormous importance in the arid western United States because groundwater is the only significant source of uncommitted water available for future development and growth. The decision in *Sporhase v. Nebraska ex rel. Douglas*, invalidating a portion of an anti-export statute, leaves many critical issues open. It is unclear whether a state might keep water, as the Court suggested in *Sporhase*, to protect the health of its citizens. Other unanswered questions include whether a state should enjoy some special claim to water because of its conservation efforts, again as the Court inti-

259. The Court observed in *Wunnicke*, 467 U.S. at 98-99, that the regulation was akin to a secondary boycott and may have constituted a tort at common law. See *Restatement (Second) of Torts* §§ 766A, 766B (1977); 2 R. Callmann, *The Law of Unfair Competition and Trade-Marks* § 38.1 (1950).

260. Cf. *Lorain Journal Co. v. United States*, 342 U.S. 143, 154-55 (1951) (holding that refusal by newspaper to deal with persons who advertised on competing radio station was an attempt to monopolize under the Sherman Act). Local governments are not immune from liability under the antitrust laws unless they can show the state directed their anticompetitive conduct. See M. Lee, *Antitrust Law and Local Government* 14 (1985). The antitrust laws do not, however, make such an action "per se" illegal, but [hold] it illegal only if the restraints have a discernable bite." L. Sullivan, *Handbook of the Law of Antitrust* 405 (1977). The analysis under the antitrust laws turns generally on whether secondary restraints such as tying arrangements affect a substantial volume of commerce. *Id.* at 438-40. Satisfaction of this condition occurs "[o]nly in the rare case where the sale of the tied product for use with the tying product represents a substantial share of all sales of the tied product." R. Posner, *Antitrust Law* 175 (1976).


262. The Court did not completely deny a state the right to reserve water for its own. Noting the historic control of water by states and the fact that state conservation efforts may give water "some indicia of a good publicly produced," the Court suggested that a state might impose "a limited preference for its own citizens in the utilization of water" and that such a preference particularly is warranted "in times of severe shortage" if necessary to preserve the health of a state's citizens "and not simply the health of its economy." *Id.* at 956.

263. *See id.* If taken seriously, the rule that a state may keep water for its citizens' health, but not for economic reasons, will prove difficult to enforce. The line between keeping water to protect local health and keeping water to protect the economy is elusive because individual welfare is tied inextricably to economic health. *See Rodgers, The Limits of State Activity in the Interstate Market*, 21 LAND & WATER L. REV. 357, 361 (1986). A standard permitting a state to harbor water in times of shortage would be difficult to administer because "shortage" must be defined either so restrictively, such as life-threatening need, as to render it practically meaningless; so expansively, such as at a price above zero, as to cause the exception to subsume the rule; or so vaguely as to set up federal courts as arbiters of closely competing uses. *Williams, Free Trade in Water Resources: Sporhase v. Nebraska ex rel. Douglas*, 2 SUP. CT. ECON. REV. 89, 95-98 (1983). If the Court intended to carve out an exception for an occasional embargo in which the internal benefit of keeping a resource outweighs the external cost, the Court poorly stated the shortage exception because it does not compare costs and benefits, but only looks to the magnitude of the internal benefit.
mated, and whether a state might keep water by engaging in the conservation and sale of water as a proprietary activity. Not surprisingly, the controversy over groundwater continues after Sporhase, most prominently in the effort by New Mexico to deny water to the city of El Paso.

Concerns of efficiency point clearly in one direction: water should flow freely across state lines to those who can use it best. For reasons noted previously, concerns of conservation and development do not provide an economic justification for preferences in the allocation of water. If anything, keeping water from its highest-yield uses should discourage conservation and management. Moreover, courts can ensure free commerce in water in a fairly straightforward fashion: they need only require states to allow outsiders equal access to internal markets for water. Indeed, that the state must allow outsiders to enter the internal market to acquire water for export seems plain from Sporhase. The Court emphasized the fact that Nebraska forbade an interstate transfer of water while it permitted similar intrastate transfers.

Difficulties arise with unappropriated groundwater for which there is no internal market. Under the first principle proposed here, it is difficult to challenge laws restricting the movement of resources for which no internal market with private rights and rules of exchange is established. The Court's reasoning in Sporhase presents the same problem. Although the Court held that water is an article of commerce which the state cannot embargo regardless of its status under state law, it also ruled that barriers to the transfer of water that apply even-
handedly to intra- and interstate transfers are not suspect. By basing its analysis upon a state’s internal rules regarding the transfer of water, the Sporhase Court left open the possibility that a state might prohibit exports by not permitting similar intrastate transfers. Thus a state might keep water for its citizens by allocating it among users administratively on an annual basis in a way that never gives rise to a private transferable interest.

The rule is anomalous because it restrains the state in a way that depends on whether and how the state chooses to create the particular market. This anomaly results from the form of the rule—its reference to state-created markets—and implies nothing about the powers of a state. It can be dealt with by modifying the rule. If a state, for instance, creates an intrastate market but does not allow a particular type of intrastate transfer with the intent or effect of blocking most interstate transfers, then its refusal to allow that sort of transfer may be held unconstitutional. Applying similar reasoning, the federal district court in the El Paso-New Mexico litigation struck down New Mexico’s de facto moratorium on appropriations from basins in the southern part of the state. Although the restrictions applied to all transfers from the basin, the long history of New Mexican efforts to keep the water from El Paso and the fact that only El Paso made significant demands on the affected basins suggest that the measure was a protectionist act directed against outsiders. And, if a state chooses to allocate water administratively rather than through the market, we may require it to treat citizens and outsiders similarly in assessing need and distributing water.

These problems are technical in nature. State claims of ownership of groundwater pose a more fundamental issue: Are unappropriated resources the property of states with which they may do as they wish? The Supreme Court dismissed such a claim to shrimp in Toomer v. Witsell with the comment that “[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate article of commerce if state law endowed private owners with a lesser right, reasoning that “appellee’s argument is still based on the legal fiction of state ownership.” Id. at 951. The Court did not take the next step and rely on the conclusion that a resource can be a commodity for purposes of commerce clause analysis without regard to its status under state law, but rather rejected the state’s claim of ownership by observing that water transfers were permitted under state law. Id.

274. See Sporhase, 458 U.S. at 955-56.
277. Id.
the exploitation of an important resource." The Sporhase Court tempered its seemingly sweeping rejection of "the legal fiction of state ownership" when it later harked back to it by suggesting that "appellee's claim to public ownership of Nebraska groundwater . . . may support a limited preference for its own citizens." The Court went so far as to suggest that the state might keep water "in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy." If states have such a right, it must derive from a property-like interest in water. Thus, the issue of state ownership of unappropriated water is very much alive.

Claims of state ownership of water may be entitled to deference if they can be firmly established. But we cannot indulge all claims of traditional ownership of property, because a state could style nearly any interest in a resource as one of property. At the very least, a state should

278. 334 U.S. 385, 402 (1948) (rejecting state ownership of shrimp); see also Hughes v. Oklahoma, 441 U.S. 322, 326-35 (1979) (discussing cases in which the Court rejected state claims of regulatory powers based on ownership theory). This is hardly a fair way to deal with a property claim. Any claim of property, public or private, could be restated in purely instrumental terms. Society furthers the production or conservation of goods by endowing the individual with certain rights of ownership, but all arguments directed to that end fall far short of justifying any particular regime of property rights, much less the current regime. See, e.g., Kennedy & Michelman, Are Property and Contract Efficient?, 8 Hofstra L. Rev. 711, 717-20 (1980); Michelman, supra note 79, at 1208.


280. Id. at 956.

281. Id.

282. For example, the California Public Utilities Commission tried to justify a ruling requiring utilities to print messages to consumers on their billings by claiming a space on the mailing as the consumer's "property." Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 17-18 (1986) (plurality opinion); id. at 22 n.1 (Marshall, J., concurring).

Other commentators have proposed that we respect "conventional" or "actual" property claims, but not claims that are "unusual" or "fictional." Anson & Schenkkan, supra note 48, at 96; Hellerstein, supra note 27, at 84. They would reject a state's property interest in wildlife as unusual or fictional. See Anson & Schenkkan, supra note 48, at 96; Hellerstein, supra note 27, at 84-86. This follows Justice Field's argument in dissent in Geer v. Connecticut that a state's interest in wildlife is not truly a property interest because the state never actually has control or possession of the animals but has regulatory authority over them once they are in private hands. See 161 U.S. 519, 539-40 (1896) (Field, J., dissenting), overruled, Hughes v. Oklahoma, 441 U.S. 322 (1979). On the other hand, Professor Hellerstein intimates that some unusual state property interests may deserve recognition that is not afforded to interests in wildlife. See Hellerstein, supra note 27, at 88-89. He relies on the continuing force of McCready v. Virginia, 94 U.S. 391 (1876), which upheld a preferential allocation of rights to oyster beds in state tidal lands, and argues that the state's interest in tidal lands is more substantial than its interest in free roaming birds and fish. See Hellerstein, supra note 27, at 88-89. To Hellerstein, the interest in tidal lands seems more like that in "state mineral holdings or state forests," which, he posits, "contemplate the possibility of some in-state preferences." Id.; see also Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 795 (1988) (reaffirming state ownership of tidal lands). But cf. Tangier Sound Watermen's Assoc. v. Douglas, 541 F. Supp. 1287, 1292, 1301 (E.D. Va. 1982) (overturning state law prohibiting out-of-state citizens from harvesting blue crabs and rejecting state's defense that it "is the owner of the subaqueous bottomlands to the navigable waters within its jurisdiction [and that it] possesse[d] all the rights of any private landowner to the surface and subsurface").
base its claim firmly in history. But this task may prove impossible. State claims to ownership of water are of fairly recent origin, and a historical analysis casts doubt on perhaps the most crucial link in the state's claim—that selfish dominion over unappropriated resources is a traditional incident of state sovereignty in the federal union.

Proponents of state ownership of unappropriated resources base their claim on McCready v. Virginia, Geer v. Connecticut, and Hudson County Water Co. v. McCarter, which recognized state ownership of fish and water. Of course, the Court has since repudiated this line of cases, though its reasoning that the common interest in such property was only regulatory is historically inaccurate. McCready and its progeny are better challenged on the ground that the common interest in fisheries, and by implication other unappropriated resources, runs to the people of the nation as a whole.

In McCready the Supreme Court looked back to Martin v. Waddell as establishing that the states succeeded to the full prerogatives of the sovereign after the Revolution and so presumably inherited the fish. Although language to that effect may be found in Martin, the Court held only that the original royal charter did not vest private ownership of

283. At common law, water rights in the richly watered regions of England and the eastern United States were private and riparian. Persons adjacent to a stream had the right to divert and to use reasonable flows of water. See L. Teclaff, Water Law in Historical Perspective 6-8 (1985). The state claimed no superseding interest in water. In the West, water was at first privately owned through appropriation. Only in the late nineteenth century did western states claim to own water by constitution, statute, and regulation. See Trelease, Government Ownership and Trusteeship of Water, 45 Cal. L. Rev. 638, 640-43 (1957).

284. See I S. Wiel, Water Rights in the Western United States 211-12 (1911); Trelease, supra note 275, at 361-68.

285. 94 U.S. 391 (1876).


289. In Toomer the Court questioned the state's interest in fish, observing that the fiction of state ownership "apparently gained currency partly as a result of confusion between the Roman term imperium, or governmental power to regulate, and dominium, or ownership. Power over fish and game was, in origin, imperium." 334 U.S. at 402 n.37 (citing R. Pound, An Introduction to the Philosophy of Law 197-202 (1922)). But this restyling of the state's interest in common property is not historically accurate. See generally Coquille, Moses from an Old Manse: Another Look at Some Historic Property Cases About the Environment, 64 Cornell L. Rev. 761, 801-04 (1979) (discussing doctrine of res communes, or nonexclusive ownership, and its origin in Roman law); Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 Sea Grant L.J. 13, 21-36 (1976) (discussing early Roman law and development of the doctrine that seashores and rivers were public in nature). By 1787 fish were considered the property of the King's subjects. See Deveney, supra, at 42-49; see also Rose, supra note 193, at 729-30, 747-48 (sketching development of public trust doctrine in American law and its application to fish).


292. Id. at 410-11.
New Jersey oyster beds. The Court reasoned that because of the public nature of the resource, it would not lightly find a grant of private interest. Nothing in Martin established the right of a state to keep fish for its own citizens, a point the Court emphasized several years later in Smith v. Maryland. In Smith, the Court held that Maryland could regulate oyster beds to protect the common interest in them, but noted that it need not decide "[w]hether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by all citizens of the United States."

McCready may be wrong. Fish may have been a common resource. The charters of several colonies required them to hold their fisheries open to all the King's subjects. Not only does the privilege of fishing fit naturally among those that the framers of the Articles of Confederation sought to perpetuate, but contemporaneous commentary stated that "[t]here can . . . be but little doubt, but that the people of one State have a right to fish in the salt waters of another State, in the charter of which the reservation of the right was general." In sum, proponents of state ownership of unappropriated water cannot rest their case on the nineteenth century decisions, for those decisions are without firm foundation.

Contrary to what opponents of free trade in unappropriated groundwater suggest, requiring a state to allow outsiders equal access to inter-

293. Rather than casting the charter aside, the Court based its decision "not upon the meaning of instruments framed by the people of New Jersey, or by their authority, but upon charters granted by the British Crown." Id. at 417.

294. 49 U.S. (18 How.) 71 (1855).

295. Id. at 75.

296. See, e.g., Charter of Massachusetts Bay (1691), reprinted in 5 W. Swindler, supra note 133, at 75; Charter of Connecticut (1662), reprinted in 2 W. Swindler, supra note 133, at 131; Charter of June 20, 1632, reprinted in 4 W. Swindler, supra note 133, at 350; Charter of the Colony of New Plymouth (1629), reprinted in 5 W. Swindler, supra note 133, at 26. But see J. Angell, supra note 133, at 57-59 (noting that the charter of New Jersey contained no such provision). Additionally, compacts between states ensured shared access to boundary fisheries. See, e.g., Wharton v. Wise, 153 U.S. 155, 162-67 (1894) (discussing 1785 Maryland and Virginia compact requiring that citizens be given equal access to fishing in the Chesapeake Bay and the Pocomoke River); Bennett v. Boggs, 3 F. Cas. 221, 225-29 (C.C.D.N.J. 1830) (No. 1319) (discussing New Jersey and Pennsylvania compact).

297. J. Angell, supra note 133, at 54. Some colonies, however, were under no such restriction and prior to the revolution did restrict fishing to inhabitants. See, e.g., An Act for the Preserving of Oysters in the Province of New Jersey (1719), reprinted in 2 Laws of the Royal Colony of New Jersey 261 (1977) (setting out the 1719 Act that prohibited nonresidents from harvesting oysters in New Jersey waters).

298. See, e.g., Trelease, supra note 275, at 357.
nal markets for groundwater does not wholly deny a state’s interest in the resource. A state may ensure that its citizens realize the value of the resource by initially vesting title in them, which enables them to reap its value by sale or use. A state also may impose a tax on groundwater. Such a tax, if imposed evenhandedly on citizens and outsiders alike, should withstand constitutional challenges. Admittedly, taxes levied by a state are partly exported, or passed on to outsiders. The concern is thus the familiar one of externalities, but it is difficult to justify significant restraints on the taxing power of a state on this basis. In-state producers can pass on the cost of a severance tax to out-of-state consumers only if they face an inelastic demand curve abroad. In other words, in-state producers must have a relatively dominant position in the market in order to demand a higher price without a significant loss in demand. Consequently, in-state producers rarely will have sufficient leverage to pass on a tax to outsiders. This uncertainty, coupled with the difficulty of a case-by-case determination of the incidence of challenged taxes, provide good reasons to overlook objections based on exportation of taxes.

More fundamentally, a state may properly exact a toll for the loss of a resource that raises its price in the market. Even if we assume that a

299. Neutral state taxes imposed on activities with some reasonable nexus to a state rarely run afoul of the commerce, due process, or privileges and immunities clauses. In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), the Court seemingly ruled that a severance tax on coal bore the requisite fair relation to the services provided by the state as long as it did not exceed the value of the coal mined. Id. at 624-27; see Hellerstein, Constitutional Limitations on State Tax Exportation, 1982 AM. B. FOUND. RES. J. 1, 51-53. But cf. Western Oil & Gas Ass’n v. Cory, 726 F.2d 1340, 1345 (9th Cir. 1984) (invalidating unreasonably high surcharge on oil pumped across state-owned lands because it overcompensated state for the use of the land), aff’d mem. 471 U.S. 81 (1985).

300. A seminal work on tax exportation is McClure, Commodity Tax Incidence in Open Economies, 17 NAT’L TAX J. 187 (1964). On severance taxes in particular, see Hogan & Shelton, Interstate Tax Exportation and States’ Fiscal Structure, 26 NAT’L TAX J. 553 (1973). For a general discussion of the constitutionality of tax exportation, see Hellerstein, supra note 299. See also Levmore, supra note 48, at 601-05 (not mentioning tax exportation, but criticizing similar occurrences as exploitative taxes by which a state exacts monopoly profits by taking advantage of a position of dominance over a resource or activity).

301. See McClure, Severance Taxes on Energy Resources in the United States: Comment, 10 GROWTH & CHANGE 72, 72 (1979); McClure, supra note 300, at 198.


303. The Supreme Court has refused to hold a state severance tax borne by outsiders unconstitutional on the ground that it felt such assessment to be beyond its competence. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619-20 n.8 (1981). For a sympathetic review of the decision, see McClure, Tax Exporting and the Commerce Clause, in FISCAL FEDERALISM AND THE TAXATION OF NATURAL RESOURCES 169, 170 (1983).

state may not demand whatever price the market will bear for its resources by taxing them and that the tax must bear some relation to the state's loss from the exploitation of the resource, rent-maximizing taxes are difficult to challenge. Intervention by the state to drive up the price of a resource may ensure that the price better reflects the cost to the state of exploiting the resource, including the opportunity cost to future generations of alienating the state's natural wealth. The elements of cost, in particular opportunity cost, are sufficiently difficult to calculate that rarely can we be certain whether a state is abusing its position to command an unfair price for a resource or merely insisting upon a sufficient return to compensate its loss. For these reasons we generally should permit a state to reap the value of its groundwater resources through evenhanded severance taxes or charges, but not through prohibitions on the export of water.

V. Conclusion

The Constitution ordains no particular solution to the problem of the selfish state. One may glean from the history of the privileges and immunities clause, both in its preconstitutional background and in its interpretation through the early years of this century, a rule that a state must open its internal markets to outsiders and allow them to compete on terms of equality with citizens. The principle suggested here is that a state may not interfere in the market, by discriminating against outsiders,

state's interest in "preventing rapid and uneconomic dissipation of one of its chief natural resources"); Turnbull, Recent Trends in the Allocation of Constitutional Powers over the Regulation of Provincial Resources: The Saskatchewan Potash Case, 6 QUEEN'S L.J. 295, 301-07 (1980) (arguing that conservation "of potash preserves in order to prevent the death of the industry and the accompanying economic and social malaise" is a legitimate interest underlying provincial resource regulation).

305. Some argue that a state may tax only to compensate losses it sustains from the exploitation of a resource (e.g., to pay for services required by the industry and to clean up its environmental damage). See, e.g., Commonwealth Edison, 453 U.S. at 646-51 (Blackmun, J., dissenting); Note, Commerce Clause Restraints on State Taxation of Energy Resources: A Suggested Framework for Analysis, 60 WASH. U.L.Q. 425, 452-54 (1982). This position is wrong because it would prevent a state from capturing the rents—the price the commodity commands in the market because it is in short supply—from the in-state owners of the resource if they exceed the costs inflicted upon the state by their activity. In Commonwealth Edison, the majority rejected the argument that the tax must bear a fair relation to the state's costs, reasoning that "interstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit.'" 453 U.S. at 627 n.16.

306. In Western Oil & Gas Ass'n v. Cory, 726 F.2d 1340, 1345 (9th Cir. 1984), aff'd mem., 471 U.S. 81 (1985), the Ninth Circuit did strike down as unreasonably high a charge by California for pumping oil across state-owned tidal lands. It is unlikely that the Supreme Court's summary affirmation of this decision presages an era in which more heed is given to arguments that severance taxes are unreasonable in amount. The facts in Cory are unusual both because the state had a monopoly in the resource, see id. at 1343, and because there was no depletion of the resource, and thus no loss to future generations, to justify the charge, see id. at 1344.
to gain some commercial advantage for its citizens. Conversely, the general assumption that a state might direct its wealth to aid only its citizens is reformulated as the principle that a state may keep publicly funded goods for its citizens if it has some redistributational or other interest to justify allocating them by communal affiliation. These principles suffice to explain why a state may not bar outsiders from dumping wastes in the state on private lands, while it may limit schools and other publicly funded goods to citizens.

Within the terms of the principles, we cannot easily explain whether the preferences in Reeves and Sporhase are constitutional because the line between public and private is so clouded that such measures are not readily classed either as a prohibited interference in the market or as a permitted preference in the allocation of a publicly created good. Thus, this Article does not and could not claim that the Constitution clearly forbids South Dakota from preferring its citizens in the sale of cement or prohibits Nebraska from keeping groundwater for its own. Rather, this Article argues only that our constitutional tradition permits such rulings, and that from a perspective of efficiency, the world would be a better place for them. In the end, the principle of noninterference and its converse, which allows preferences in the allocation of publicly created wealth, better describe and legitimate what courts are doing in the resource cases than does the principle of interstate equality or that of state sovereignty. The rationale for much of what this Article proposes is to define state power over resources in an efficient way so as to facilitate the individual and communal quest for happiness.