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# ALASKA COULD NOT IMPOSE IN-STATE PROCESSING REQUIREMENT ON THE SALE OF STATE-OWNED TIMBER

COMMERCE CLAUSE: CONGRESSIONAL AUTHORIZATION OF STATE REGULATION; MARKET PARTICIPANT DOCTRINE—Congress, by authorizing the United States Forest Service to require in-state processing of timber harvested from federal lands, did not implicitly authorize Alaska to impose a similar requirement for timber sold from state lands. A plurality of the Court further found that Alaska's in-state processing requirement was not immune from dormant commerce clause scrutiny by operation of the market participant doctrine. The plurality also found that the in-state processing requirement was unconstitutional as unduly burdensome on interstate commerce. *South-Central Timber Development, Inc. v. Wunnicke*, ___U.S.___, 104 S. Ct. 2237 (1984).

## INTRODUCTION

The recent development of the market participant doctrine has offered states the prospect of adopting measures that would allow them to promote state and local economic interests where previous efforts had failed because of the Supreme Court's application of the dormant commerce clause.[1] According to the market participant doctrine, a state's actions are immune from dormant commerce clause scrutiny if the state acts as a participant in, and not as a regulator of, the market.[2] Since the Court's discussion of the market participant doctrine in *Hughes v. Alexandria Scrap Corp.*,[3] the Supreme Court[4] and other federal courts[5] have limited state efforts to take advantage of the market participant doctrine. *South-Central Timber*

1. For a general discussion of the dormant commerce clause and an analysis of the role of the courts in reviewing state statutes, see Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125. *See also* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

2. For a discussion of the market participant doctrine as applied to the sale of state-owned resources, see Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980).

3. 426 U.S. 794, 804–10 (1976).

4. *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982) (rejecting New Hampshire's argument that its ownership of state rivers justified a ban on the export of hydroelectric power).

5. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984) (invalidating an Illinois statute that required hiring of in-state construction companies for state-funded construction projects) and Smith v. Dep't of Agriculture of Ga., 630 F.2d 1081 (5th Cir. 1980) (refusing to apply the market participant doctrine where Georgia, as owner of the Columbus Farmers Market, rented market spaces on a preference basis to state residents), *cert. denied*, 452 U.S. 910 (1981).

*Development, Inc. v. Wunnicke*[6] is a recent example of the Supreme Court's unwillingness to allow the market participant exception to swallow up the dormant commerce clause rule. In *South-Central,* a plurality[7] of the Court limited the market participant doctrine by finding that a state could not require the buyer of state property to engage in post-sale activity if that activity discriminated against interstate commerce.

## SUMMARY OF THE CASE

In September of 1980, Alaska gave notice that it would sell 49,185,000 board feet of timber located on state-owned land. The notice of sale provided that the successful bidder would have to agree to have the harvested timber processed in Alaska.[8] The local processing provision required the successful bidder to precut the timber in accordance with a primary manufacture requirement.[9]

South-Central Timber Development, Inc. (hereinafter South-Central) was an Alaska corporation engaged in the business of buying, logging, and selling timber. South-Central sold most of its timber to Japan. Because South-Central did not maintain a sawmill in Alaska, it could not bid on the timber Alaska had offered for sale unless it hired a third party to process the timber in Alaska prior to export.[10] The added expense of in-state processing effectively prevented South-Central from bidding on the timber.[11]

South-Central brought an action in the Federal District Court of Alaska[12] and sought an injunction to prevent Alaska officials from conducting the timber sale when it learned of the in-state processing requirement. South-Central argued that Alaska's in-state processing requirement constituted an impermissible burden on interstate and foreign commerce and was

6. ___U.S.___, 104 S. Ct. 2237 (1984).

7. The precedential value of the plurality opinion on the market participant issue is uncertain. *See* Note, *The Precedential Value of Supreme Court Plurality Decisions,* 80 COLUM. L. REV. 756 (1980). In dealing with plurality opinions, the Supreme Court usually has at least a majority vote on a particular issue and will rely on the narrowest ground expressed in the plurality and concurring opinions. *See, e.g.,* Gregg v. Georgia, 428 U.S. 153 (1976), which was a plurality decision construing Furman v. Georgia, 408 U.S. 238 (1972), also a plurality decision. In *South-Central,* however, only four of the eight voting justices expressed the view that the market participant doctrine did not apply to Alaska's in-state processing requirement.

8. The successful bidder would have had to sign a contract with the following provision: "Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State." 104 S. Ct. at 2239 n.1.

9. Under state regulations, the harvested timber had to be cut into cants, slabs, or planks. 11 ALASKA ADMIN. CODE tit. 11, § 76.130 (1974) (repealed 1982). The current regulation specifies a maximum thickness of 8¾ inches for cants. 11 ALASKA ADMIN. CODE tit. 11, § 71.910 (1982).

10. 104 S. Ct. at 2239.

11. South-Central Timber Dev., Inc. v. LeResche, 693 F.2d 890, 892 (9th Cir. 1982).

12. South-Central Timber Dev., Inc. v. LeResche, 511 F. Supp. 139 (D. Alaska 1981).

therefore unconstitutional. The district court granted South-Central's motion for summary judgment and held that the in-state processing requirement violated the commerce clause. The Ninth Circuit Court of Appeals reversed the district court's decision and found that Congress, by previously authorizing the United States Forest Service to impose an in-state processing requirement on the sale of timber located on federal land, had implicitly authorized Alaska to impose a similar requirement.[13]

South-Central filed a petition for a writ of certiorari which the United States Supreme Court granted.[14] The Supreme Court, in a six to two decision, reversed the court of appeals and held that the parallel federal requirement of in-state processing was not a congressional authorization of Alaska to impose the same requirement. Justice White, together with three other justices, further found that Alaska's ownership of the timber did not trigger the market participant exception to dormant commerce clause scrutiny. The plurality of four also ruled that Alaska's in-state processing requirement was an impermissible burden on interstate and foreign commerce and therefore unconstitutional under ordinary commerce clause principles.[15]

Justice Powell, with whom Justice Burger joined, concurred in the Court's finding that Congress had not consented to Alaska's in-state processing requirement.[16] Justice Powell would have remanded the case to the court of appeals for resolution of the market participant issue and consideration, as necessary, of the constitutionality of the in-state processing requirement in light of *Pike v. Bruce Church, Inc.*[17] Justice Rehnquist, with whom Justice O'Connor joined, dissented. Justice Rehnquist questioned the soundness of the plurality's market participant analysis and would have affirmed the court of appeals' decision.[18]

## CONSTITUTIONAL BACKGROUND

Under the United States Constitution, Congress has the power to "[r]egulate Commerce with foreign Nations and among the Several States."[19] The Supreme Court has ruled that this grant of authority to Congress operates as an implicit restriction on states and prevents them from enacting statutes or pursuing regulatory measures that unduly burden in-

13. 693 F.2d 890 (9th Cir. 1982).
14. ___U.S.___, 104 S. Ct. 231 (1983).
15. 104 S. Ct. at 2247.
16. *Id.* at 2248.
17. 397 U.S. 137 (1970).
18. 104 S. Ct. at 2248–49.
19. U.S. CONST. art. I, § 8, cl. 3.

terstate commerce.[20] When Congress has not acted, the courts exercise dormant commerce clause review.[21] In the case of state measures that affect interstate commerce, the courts apply the test from *Pike v. Bruce Church, Inc.*[22] If the state measure operates evenhandedly to accomplish a legitimate local interest and only incidentally affects interstate commerce, then the courts will uphold the measure unless the burden on commerce is excessive. If the local interest is legitimate, the courts will allow a greater burden on commerce assuming the state has no other alternative means that would have a lesser impact.[23]

The courts do not impose dormant commerce clause scrutiny if Congress specifically authorizes the states to regulate a particular aspect of interstate commerce.[24] In such cases Congress delegates to the states its constitutional power to regulate commerce.[25] The courts will not find congressional authorization unless Congress has demonstrated a clear intent to authorize the states to act in the area.[26]

An important exception to the dormant commerce clause involves state participation in the marketplace. When a state acts as a buyer or a seller, the state is free to buy from or to sell to whomever it chooses.[27] The Supreme Court has not delineated the precise scope of the market participant exception. Because the market participant exception has the potential for being so vast that it could destroy the normal rule of the dormant commerce clause, the Supreme Court has been unwilling to expand the market participant exception.[28] The recent decision in *South-Central Tim-*

20. *See* H.P. Hood & Sons v. DuMond, 336 U.S. 525, 534–39 (1949). For a recent discussion of commerce clause jurisprudence, see Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981).

21. Some scholars have questioned the validity of this proposition and have argued that Congress, not the courts, should police state statutes. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 256–59 (10th ed. 1980); Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1041 (1978); Anson & Schenkkan, *supra* note 2, at 78–84 (1980). As a practical matter, however, the federal courts are better equipped to evaluate state statutes and regulations than is Congress. Congress has neither the time nor inclination to review the multitude of state measures potentially subject to review. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 222 (1957).

22. 397 U.S. 137 (1970).

23. *Id.* at 142. In contrast, a state statute that is discriminatory, as opposed to evenhanded, or a state statute that seeks to promote economic protectionism is generally invalid. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

24. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945).

25. *Id.*

26. *See* Sporhase v. Nebraska, 458 U.S. 941, 960 (1982).

27. *See* White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983); Reeves, Inc. v. Stake, 447 U.S. 429, 436–37 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976). For a recent state court decision applying the market participant doctrine, *see* County Comm'rs v. Stevens, 299 Md. 203, 473 A.2d 12 (1984).

28. The decisions in two cases may tend to limit the market participant exception. New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982) and Sporhase v. Nebraska, 458 U.S. 941, 956–58 (1982). In both cases, the Court found that the states' ownership of water was a fiction.

*ber Development, Inc. v. Wunnicke*[29] is the latest example of the Court's tendency to limit the market participant exception.

## THE COURT'S ANALYSIS OF THE ISSUES

In deciding *South-Central Timber Development, Inc. v. Wunnicke,* the Supreme Court addressed three important commerce clause issues. First, the Court explained the showing necessary to demonstrate congressional authorization of state regulation of interstate commerce.[30] The Court then discussed the limits of the market participant doctrine as applied to Alaska's timber sales.[31] And finally, the Court determined whether Alaska's in-state processing requirement survived dormant commerce clause scrutiny.[32]

### *1. Congressional Authorization*

As a general rule the Court finds congressional authorization if a statute or its legislative history clearly expresses Congress' intent to authorize a state to regulate interstate commerce.[33] In *South-Central* Alaska argued that Congress had implicitly authorized the in-state processing requirement by permitting the United States Forest Service to require in-state processing of timber harvested from federal lands. Alaska contended that the federal statutes[34] and regulations[35] were an affirmative expression of Congress' approval of the nearly identical state requirement. Although the Supreme Court readily conceded that the federal policy was to require in-state processing of federal timber, the Court refused to find that the

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Because the states did not actually own the water, the market participant doctrine, by definition, could not apply.

29. 104 S. Ct. 2237 (1984).
30. *Id.* at 2240–43.
31. *Id.* at 2243–47.
32. *Id.* at 2247.
33. Sporhase v. Nebraska, 458 U.S. 941, 960 (1982).
34. 16 U.S.C. §§ 471–539 (1982).
35. 36 C.F.R. § 223.10(c) (1983). This regulation provides:

> Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from National Forests which are geographically isolated from other processing facilities. In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (1) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire, or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

parallel nature of the state requirement justified a finding of implicit congressional approval.[36]

In rejecting Alaska's argument, the Court relied on general commerce clause principles. The Court noted that the commerce clause and underlying dormant commerce clause doctrine serve to prevent the fragmentation and disruption of the national economy that otherwise would result if states had the power to erect trade barriers for the sake of protecting or promoting local or state economies. The federal policy requiring in-state processing, however, constituted a legitimate exercise of congressional power because the decision took place on a national level in Congress where all segments of the country have representation.[37] Ultimately, the Court found that Congress had not authorized Alaska's in-state processing requirement even though such a requirement may have furthered the existing federal policy. Because Congress' statutory authorization extended only to federal lands, the Court refused to infer congressional intent to permit a similar policy for state-owned lands.[38]

*2. Market Participant Doctrine*

Alaska also contended that its in-state processing requirement did not violate accepted commerce clause principles because Alaska, as owner and seller of its timber, was a market participant and therefore free to sell the timber to whomever and on whatever terms it chose. A plurality[39] of the Court, however, found that Alaska's in-state processing requirement went beyond the permissible scope of the market participant doctrine. The plurality acknowledged that Alaska, as the owner and seller of the timber, was free to sell the timber to whomever it chose. The in-state processing requirement, however, involved Alaska in a second market involving the processing of harvested timber. The plurality found that Alaska could not be a participant in the processing market because Alaska would not own the timber at the time the seller would process it. Accordingly, the plurality ruled that Alaska operated as a market regulator and not as a market participant.[40]

In reaching its conclusion that Alaska operated as a market regulator, the plurality first distinguished the Court's three previous decisions that had held that a state, when it acts as a market participant, is immune from commerce clause scrutiny. The first of these cases, *Hughes v. Al-*

36. 104 S. Ct. at 2243.

37. Ironically, the Secretary of Agriculture, not Congress, imposed the in-state processing requirement for timber harvested from federal lands.

38. 104 S. Ct. at 2243.

39. For the precedential value of a plurality opinion, see discussion *supra* note 7.

40. 104 S. Ct. at 2246.

*exandria Scrap Corp.*,[41] was distinguishable because Maryland had entered the automobile hulk market as a purchaser by paying processors a bounty for each hulk they processed. Maryland operated the subsidy program in a way that discriminated against out-of-state processors by requiring them to satisfy stricter documentation rules in proving that the processed hulks actually belonged to them. Maryland entered the scrap market but did not impose additional requirements on the processors of hulks. Alaska, in contrast, imposed contract conditions requiring the timber buyer to process the timber in Alaska. Alaska's in-state processing requirement reached into the processing market, a market in which Alaska was not a participant.

The plurality also distinguished *Reeves, Inc. v. Stake*,[42] a case in which the Court held that South Dakota, as the owner and operator of a cement plant, was free to sell its cement only to residents of South Dakota. Although the plurality acknowledged that the Court in *Reeves* had approved of the proposition that a state can deal with whomever it chooses when it acts as a market participant, it also stated that *Reeves* fell short of permitting states to impose any restrictions they choose when selling state property. Accordingly, the plurality noted that South Dakota, unlike Alaska, did not attempt to limit resale of its state-produced cement. The plurality also noted that in *South-Central*, unlike *Reeves*, the transaction involved foreign commerce, the sale of a natural resource, and restrictions on resale.[43] For these reasons, *Reeves* was not controlling.

Finally, the plurality distinguished *White v. Massachusetts Council of Construction Employees, Inc.*[44] In *White*, the Court upheld the constitutionality of an executive order of the mayor of Boston who had required that all city-funded construction projects have a work force composed of 50% Boston residents. Alaska argued that Boston, in essence, required private contractors to deal with third parties (their employees) in the same way that buyers of state-owned timber had to deal with Alaska timber processors. The plurality, however, noted that employees of construction contractors were actually, if not formally, employees of the city. As an employer, Boston acted as a market participant within the market of its

41. 426 U.S. 794 (1976).

42. 447 U.S. 429 (1980).

43. The reference to natural resources in this part of the opinion is troublesome because the plurality seems to assume that Alaska would have come within the market participant exception but for the imposition of down-stream requirements. *See* text *infra* accompanying notes 60–63.

44. 460 U.S. 204 (1983). Justice Blackmun (who joined the plurality in *South-Central*) apparently was not troubled by the plurality's failure to read *White* as imposing downstream restrictions. In *White* Blackmun noted that the restrictions imposed by the mayor of Boston were regulatory in nature because such restrictions were, in essence, downstream restraints. *Id.* at 216–23 (Blackmun, J., concurring in part and dissenting in part).

own employees. Therefore, *White* did not endorse Alaska's in-state processing requirement.

A critical element of the plurality's analysis in *Alexandria Scrap, Reeves,* and *White* was the definition of a market. Alaska contended that it participated in the timber processing market. The plurality, however, found "as a matter of intuition"[45] that a market should be limited to the transaction involving the buyer and the seller. They reached this conclusion by noting that a seller in a private transaction has no interest in how the buyer later disposes of the purchased property. In addition, the plurality analogized Alaska's in-state processing requirement to vertical trade restraints subject to federal antitrust laws.[46]

The plurality also found that a state's post-sale restraints have a greater regulatory effect than does a state's decision to sell, not to sell, or to sell only to certain buyers. The plurality seemed to be saying that because a state's post-sale restrictions have a regulatory effect they do not involve the state as a market participant. According to the plurality, a state has the power of choice only over the purchasing activity of its buyers, whereas post-sale restrictions are by definition outside the scope of the market participant doctrine.

Of the plurality, Justice Brennan wrote a short concurring opinion[47] in which he questioned the prudence of the market participant doctrine. Justice Powell, with whom Chief Justice Burger joined, expressed no opinion regarding the plurality's analysis of the market participant doctrine.[48] Justice Powell, who wrote the dissent in *Reeves,* presumably would have favored a restrictive reading of the market participant doctrine along the lines adopted by the plurality.[49]

Justice Rehnquist, with whom Justice O'Connor joined, criticized the plurality's distinction between Alaska as a market participant and as a market regulator. Justice Rehnquist believed that Alaska was truly a market participant primarily because Alaska could have accomplished the same ends by choosing to sell its timber only to companies having timber processing facilities in Alaska, by providing a direct subsidy to those timber purchasers who processed the timber in Alaska, or by processing

45. 104 S. Ct. at 2246.

46. *Id. See also* 15 U.S.C. § 1 (1982).

47. Justice Brennan also joined in the plurality opinion.

48. Justice Powell and Chief Justice Burger expressed no opinion on the market participant issue. Instead, they would have remanded the case to the Ninth Circuit to address the issue. The Ninth Circuit did not reach the market participant issue because it found that Congress had implicitly authorized Alaska's in-state processing requirement. South-Central Timber Dev., Inc. v. LeResche, 693 F.2d 890 (9th Cir. 1982).

49. In his dissent in *Reeves,* Justice Powell, with whom Justices Brennan, White, and Stevens joined, indicated that the market participant doctrine initially put forth in *Alexandria Scrap* should not apply when a state sells state property to private customers. 447 U.S. at 447–54 (Powell, J., dissenting).

the timber itself. Justice Rehnquist further observed that the plurality had been unduly formalistic in their analysis by ignoring these alternatives available to Alaska.

### 3. *Dormant Commerce Clause*

After determining that the market participant doctrine did not apply to Alaska's timber sales, the plurality next considered whether the in-state processing requirement constituted an impermissible burden on interstate or foreign commerce. Alaska argued that the impact of the in-state processing requirement was minimal because the vast majority of Alaska timber came from federal lands.[50] The plurality did not address Alaska's *de minimus* argument. Instead, they noted that an in-state processing requirement is a restraint on export that falls squarely within the facts of *Pike v. Bruce Church, Inc.*[51] In *Pike,* Arizona enacted a statute that required cantaloupes grown in the state to be packed there. Such a restriction on export is almost always unconstitutional as a violation of the commerce clause.[52] The plurality further noted that Alaska's in-state processing requirement served only to protect or promote the local economic interests of in-state sawmills. As a result, Alaska's governmental interest did not justify the restraint on export.

The plurality also found that because the timber sold was bound primarily for foreign markets Alaska's restriction was subject to even greater scrutiny. Foreign commerce implicates national foreign policy.[53] As a result, regulation on a national level is necessary and therefore precludes almost all state-level regulation. Because Alaska could not impose an in-state processing requirement on timber sold in interstate commerce, it certainly could not impose such a requirement on timber bound for foreign markets.

## SIGNIFICANCE AND CRITICISM OF THE DECISION

As part of the Supreme Court's jurisprudence on the commerce clause, *South-Central Timber Development, Inc. v. Wunnicke* has major importance. The decision represents a continuation of the general rule that no congressional authorization exists absent a clear expression in the statute or legislative history that Congress intended to authorize a state to regulate

50. Respondent's Brief in Opposition to Petition for Certiorari at 15–16, South-Central Timber Dev., Inc. v. Wunnicke, ___U.S.___, 104 S. Ct. 2237 (1984).

51. 397 U.S. 137 (1970).

52. *Id.* at 143.

53. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976).

interstate or foreign commerce.[54] The Court, however, declined the opportunity to carve out a narrow exception to the rule in cases where state regulation actually furthers a congressional policy. The plurality's discussion of the market participant doctrine, however, indicates that the Court is currently having difficulty in defining the appropriate scope of the doctrine. A majority of the current Court will likely limit the doctrine in future cases.[55] The Court's discussion of the dormant commerce clause adds little to existing decisions of the Court; therefore, that part of the opinion receives no further comment.

*1. The Congressional Authorization Issue*

Even though the Court's decision on the congressional authorization issue is consistent with its recent decisions in the area,[56] the Court gave up the opportunity to carve out a limited exception that would have had beneficial results. A state that adopts statutory or regulatory measures consistent with congressionally adopted policies promotes federal goals. Assuming Congress has exercised its power over interstate commerce in a way that promotes national interests, then similar state actions will likewise benefit those same national objectives. In contrast, a state that adopts a statutory or regulatory program in conflict with federal policies may thwart or dilute federal goals.

In *South-Central,* for example, the United States Forest Service required in-state processing of timber harvested from federal lands in order to insure the continued productivity of the national forests.[57] The Forest Service believed that the absence of local processing facilities could have impaired the sustained yield of timber from national forests. Alaska's inability to impose an in-state processing requirement could cause local sawmills to close or prevent other sawmills from starting operations. Because the state and federal lands of Alaska are, in most areas, located next to each other, federal and state timber is likely to go through the same sawmills. In *South-Central,* Alaska decided to impose the in-state processing requirement in large part because the Forest Service had temporarily suspended timber sales in the same area.[58] The same sawmills

54. This part of the decision does not depart from existing decisions of the Court. Sporhase v. Nebraska, 458 U.S. 941, 958–60 (1982); New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982); Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652–55 (1981); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945).

55. Only Justices Rehnquist and O'Connor would favor a broad reading of the market participant doctrine. South-Central Timber Development, Inc. v. Wunnicke, ___U.S.___, ___, 104 S. Ct. 2237, 2248–49 (1984) (Rehnquist, J., joined by O'Connor, J., dissenting).

56. *Supra* note 54.

57. *See* 36 C.F.R. § 223.10(c) (1983).

58. South-Central Timber Dev., Inc. v. LeResche, 693 F.2d 890, 892 (9th Cir. 1982).

used to process federal timber could go out of business and ultimately be unavailable when the Forest Service again begins timber sales.

If the Supreme Court were to allow states to enact only a mirror-image of the existing federal rule, then no harm would come to the national economy, assuming the federal rule itself is not harmful. If Congress discontinued a particular policy, then the state would no longer be able to enforce its own mirror-image rule. Because the potential for harm to the national economy is nonexistent, interstate commerce, by definition, is not unduly burdened. Accordingly, state measures that further federal policies would be consistent with congressional goals.

*2. The Market Participant Issue*

The exact scope of the market participant doctrine is unclear. The Court's decisions in *Hughes v. Alexandria Scrap Corp.*[59] and *White v. Massachusetts Council of Construction Employees*[60] strongly suggest that a state's spending of its funds is exempt from dormant commerce clause scrutiny. *South-Central,* however, casts doubt on the proposition that state spending is always immune. The plurality in *South-Central,* in distinguishing *White,* noted that the mayor of Boston did not attempt to limit the city's contractors in their dealings with third parties.[61] After *South-Central* a state might not be free to impose certain restrictions on those who sell property or services to the state.[62]

In the case of a state acting as a seller of state-owned property, the plurality opinion also raises some new uncertainties. The Court's decision in *Reeves, Inc. v. Stake*[63] cautiously extended the market participant doctrine to states that sell state-manufactured goods during a time of shortage. In *Reeves* the Court allowed South Dakota to sell state-produced cement on a preference basis to in-state customers. The decision in *Reeves* suggests that the market participant doctrine would not extend to the sale of state-owned natural resources and would not apply in the absence of a shortage. Surprisingly, the plurality opinion in *South-Central* implicitly acknowledges that the market participant doctrine would have permitted Alaska to sell its timber only to Alaska residents even though timber is a natural resource and even though Alaska was suffering no timber short-

59. 426 U.S. 794 (1976).

60. 460 U.S. 204 (1983).

61. 104 S. Ct. at 2245.

62. For example, Alaska, by statute, requires the following: "In a project financed by state money in which the use of timber, lumber, and manufactured lumber products is required, only timber, lumber, and manufactured lumber products originating in this state from local forests shall be used wherever practicable." ALASKA STAT. §36.15.010 (1982). Alaska's ability to impose such a restriction, which seemed permissible under *White* and *Alexandria Scarp,* is now questionable under *South-Central.*

63. 447 U.S. 429 (1980).

age.[64] In the future, resource rich states may cite *South-Central* for the proposition that a state is free to sell its natural resources only to state residents whether or not there is a shortage.[65]

Even though the plurality opinion in *South-Central* may represent an expansion of *Reeves* in the area of state-owned natural resources and resident preferences in sales, the opinion nonetheless reflects the Court's general tendency to limit the market participant doctrine.[66] In a wildlife[67] and two water[68] cases, the Court did not apply the market participant doctrine because the state's ownership of the water and wildlife was only a fiction that served as a legal formalism to justify state regulation. The Court in *South-Central* properly found that Alaska's ownership of the timber was not a fiction. To limit Alaska's ability to impose an in-state processing requirement, the plurality used antitrust law rules to define timber sales and timber processing as separate markets.[69] The previous cases limited notions of state-ownership which, in turn, narrowed the possible scope of the market participant doctrine. In *South-Central,* the plurality opinion adopted an antitrust law definition of a market, which eliminated Alaska's ability to require in-state processing of state-owned timber.

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64. In the plurality opinion, Justice White admitted as much when he wrote: "We reject the contention that a State's action as a market regulator may be upheld against Commerce Clause challenge on the ground that the State could achieve the same end as a market participant. We therefore find it unimportant for present purposes that the State could support its processing industry by selling only to Alaska processors, by vertical integration, or by direct subsidy." 104 S. Ct. at 2246. Justices Rehnquist and O'Connor also agree that Alaska was free to sell only to Alaska processors. *Id.* at 2249 (Rehnquist, J., joined by O'Connor, J., dissenting).

For a discussion of why the market participant doctrine should apply to sales of state-owned natural resources, see Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources,* 1979 SUP. CT. REV. 51, 75–84. *But see* Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources,* 50 GEO. WASH. L. REV. 601, 616–26 (1982).

65. This aspect of *South-Central* is significant. To allow states to limit initial sale of state-owned natural resources to residents when there is no local shortage runs counter to the anti-hoarding notions discussed in *Reeves, Inc. v. Stake,* 447 U.S. 429, 443 (1980). *Consider* Anson & Schenkkan, *supra* note 2. Anson and Schenkkan contend that states should be free from dormant commerce clause scrutiny in the sale of state-owned natural resources irrespective of anti-hoarding policies. *Id.* at 99.

66. *See discussion supra* note 28.

67. *See* Hughes v. Oklahoma, 441 U.S. 322, 335–36 (1979).

68. *See* Sporhase v. Nebraska, 458 U.S. 941, 951 (1982) and New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982).

69. This part of the plurality's analysis troubled Justice Rehnquist. He stated:

> Perhaps the State's actions do raise antitrust problems. But what the plurality overlooks is that the antitrust laws apply to a State only when it is acting as a market participant. When the State acts as a market regulator, it is immune from antitrust scrutiny. Of course, the line of distinction in cases under the Commerce Clause need not necessarily parallel the line drawn in antitrust law. But the plurality can hardly justify placing Alaska in the market regulator category, in this Commerce Clause case, by relying on antitrust cases that are relevant only if the State is a market participant.

104 S. Ct. at 2248 (citations omitted) (Rehnquist, J., joined by O'Connor, J., dissenting).

The theoretical basis for limiting the market participant doctrine through narrowly defining state ownership and economic markets is uncertain. State ownership notions imply that if a state truly owns certain property then that state can dispose of it or restrict its use as the state sees fit (subject to restrictions on secondary and tertiary markets). Such reasoning would allow state ownership of highways, harbors, and airports to serve as a basis for denying non-residents use of them, a proposition the Court has rejected for years.[70] Although the Court has focused only on the type of ownership, a more relevant inquiry may be the type of property owned. State ownership of channels of commerce surely cannot provide a basis for immunizing states from dormant commerce clause scrutiny. Likewise, state ownership of certain kinds of natural resources should not provide automatic immunity from dormant commerce clause scrutiny if the resources involved are vital to or an integral part of interstate commerce.

Using the definition of a market as a means of limiting the scope of the market participant doctrine is also unsound. Under the market definition approach, a state can sell or lease state-owned property to whomever it pleases but cannot impose restrictions on how the buyer must deal with third parties. By extending its ownership interest into secondary and tertiary markets, a state could become a participant in those markets and thereby accomplish state goals that are contrary to the federal interest of preserving a national economy free of state-erected trade barriers.[71] In *South-Central,* for example, Alaska could have entered into a joint venture with a logging company and continued its actual ownership up to the timber processing stage. In continuing its ownership, Alaska could have chosen to sell the timber only to an in-state processor. Whether such state involvement in the development of natural resources should constitute a blanket immunity from dormant commerce clause scrutiny is questionable.[72]

Although the plurality opinion does not provide an adequate theoretical basis for limiting the market participant doctrine through definitions of state ownership and economic markets, the opinion does provide impor-

70. *See, e.g.,* South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 187–89 (1938). The Court rejected South Carolina's argument that its ownership of state highways justified discriminatory treatment of non-residents. The theoretical underpinnings of the market participant doctrine as developed in *Reeves, Inc. v. Stake,* 447 U.S. 429 (1980), do not justify blanket immunity from dormant commerce clause scrutiny. *See* Note, *The Supreme Court, 1982 Term,* 97 HARV. L. REV. 70, 72–77 (1983).

71. Justice Powell has criticized this aspect of the market participant doctrine in his dissent in *Reeves, Inc. v. Stake,* 447 U.S. 429, 447–54 (Powell, J., dissenting). He properly noted that state governments act, whether as market participants or as market regulators, to achieve governmental objectives. *Id.* at 450.

72. In arguing for a broad reading of the market participant doctrine, Justice Rehnquist contends in his dissent that the form of the transaction should not alter the outcome of the case. 104 S. Ct. at 2248–49 (1984) (Rehnquist, J., dissenting).

tant guidance to states that own natural resources. As an initial proposition the Court suggests that states are free to sell or lease natural resources to whomever they please. Such freedom presumably includes the freedom to sell or lease only to state residents. The opinion also approves of a state's ability to sell to certain classes of buyers, whether or not based on residency. An unanswered question is whether states can impose an anti-assignment provision in timber contracts or mineral leases.[73] Although private contracts and leases sometimes contain such provisions, the Court may view such restraints unfavorably.[74]

More importantly, the plurality opinion clearly indicates that a state cannot freely impose restrictions on buyers of state-owned natural resources. Restrictions that require the buyer to deal with third parties are not immune from dormant commerce clause scrutiny. The plurality's reasoning should apply with equal force to mineral leases.[75] As a result, private parties who hold state mineral leases may be tempted to reevaluate provisions that impose downstream restrictions.

Finally, the plurality opinion calls into question the continuing validity of certain state statutes that authorize state officials to impose certain contract terms that favor state economic interests.[76] To the extent that those statutes allow a state to impose downstream restrictions on buyers or lessees of state-owned resources, the statutes will have to survive dormant commerce clause scrutiny. If the measures discriminate against interstate commerce, then they will not likely withstand the test of *Pike v. Bruce Church, Inc.*[77]

## CONCLUSION

By developing the market participant doctrine in *Alexandria Scrap, Reeves,* and *White,* the Supreme Court created a major exception to normal dormant commerce clause scrutiny. The plurality opinion in *South-Central,* however, narrows the doctrine. Cases yet to be decided will test the vitality of the market participant doctrine. The *South-Central* opinion,

73. Such provisions would violate the general policy against restraints on alienation. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911). What role the dormant commerce clause should play in this area of the market participation exception is unclear. Restraints on alienation (resale or sublease) of state-owned water resources could accomplish the anti-export policies of a state. A state that had actual, as opposed to fictional, ownership of water rights could choose to sell only to residents and forbid resale or subleasing of those rights.

74. To prevent states from imposing a blanket prohibition on assignments or subleases, the court could apply the plurality's rationale in *South-Central,* which views downstream restrictions as outside the scope of the market participant doctrine.

75. *See* 104 S. Ct. at 2246 n.11.

76. For examples of such statutes, see ALASKA STAT. §§ 36.15.010, 36.15.020 (1982); LA. REV. STAT. ANN. §§ 30:144, 30:607 (West Supp. 1980); TEX. NAT. RES. CODE ANN. §§ 52.291–.296 (Vernon 1978).

77. 397 U.S. 137 (1970).

however, does not prevent states from investing state revenues in economic ventures designed to favor local interests. Whether such ventures should be totally immune from dormant commerce clause scrutiny is not altogether clear. In the future the Court will have to balance the desirability of encouraging state experimentation against the need for preserving a national economy free of state-erected trade barriers.

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