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The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space

JAMES HINSHAW*

And finally Sarah Cynthia Sylvia Stout said, "OK, I'll take the garbage out!"
But then, of course, it was too late...
The garbage reached across the state,
From New York to the Golden Gate.
And there, in the garbage she did hate,
Poor Sarah met an awful fate,
That I cannot right now relate
Because the hour is much too late.¹

INTRODUCTION

Because sanitary landfill space is rapidly diminishing, it is quickly becoming one of the United States' most sought after resources.² This situation has reached near-crisis proportions because, as our nation's population continues to grow, our land resources are increasingly used for residential and commercial development. In the latter half of this century, the United States has epitomized the "throw-away society," and its citizens have smugly found it convenient to ignore the consequences of their growth and behavior upon our environment and natural resources. Until recently, United States citizens have refused to responsibly resolve the problems created by their ever-increasing production of garbage.³ The repercussions of this past

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complacency toward the environment and the effects of our nation’s growth have led to the modern crisis of shortages in landfill space.

Because of these shortages in landfill space, a closely related controversy has developed regarding states that haul their municipal waste into other states and dump it there, thereby consuming existing landfill capacity within the recipient state while preserving their own remaining landfill capacities. This practice is a problem for all recipient states but particularly so for those states that have previously implemented solid-waste disposal planning in order to preserve landfill capacity for their own citizens. It renders past plans and efforts useless and future planning futile. Because a state has no ability to predict when and how much garbage another state will export, the recipient state has no ability to effectively plan, zone, and budget its land resources for the future needs of its own citizens.

State governments and their citizenry are often outraged by this situation. As a result, state legislators have increased their efforts to resolve the problem and meet constituencies’ demands. The United States Supreme Court has held, though, that a state may not legislate against out-of-state interests through regulations that either explicitly prohibit the importation of out-of-state garbage or have a discriminatory effect on “interstate commerce.” Furthermore, the federal government has declined to accept the challenge of resolving this dilemma. Thus, the burden of finding and developing a solution in this constitutionally restricted area still remains

4. This Note does not address the political and environmental issues of interstate garbage hauling per se. Rather, this Note focuses solely on the constitutional ability of a state government to control or regulate the rate of consumption of landfill capacity within its borders by out-of-state entities.


6. One significant result of a new environmental awareness in the nation’s communities is unprecedented “grass-roots” support of and response to recycling and source reduction programs. Citizens are getting involved and implementing solutions to the nation’s solid waste disposal problems. See, e.g., Scheckler, First Week of Recycling a Big Success, The Herald-Times (Bloomington, Ind.), Jan. 5, 1991 at Cl; see also Trash Glut Demands Recycling Solution, USA Today, Feb. 19, 1991, at 10A. Given increased awareness and genuine effort by local groups to reduce their own unnecessary production of garbage, waste of resources, and consumption of landfill space, it is understandable that citizens resent other states who dump their garbage in landfill space that the local community has been trying to preserve.

7. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.”). Even though the New Jersey legislature had not enacted its regulation to specifically protect economic interests within the state, id. at 625, the Court found the statute facially discriminatory and thus an impermissible means of achieving even a legitimate goal such as environmental protection or preservation of resources. Id. at 627. Also, the Court held that garbage was an article of commerce since “[a]ll objects of interstate trade merit commerce clause protection.” Id. at 622. Accordingly, garbage is not an exception to dormant commerce clause scrutiny under the rationale that it is either “innately harmful” or “valueless.” Id.

8. Although Congress has generally regulated waste disposal through the Solid Waste Disposal Act, 42 U.S.C.A. § 6901 (1991), it has not given the states the power to regulate the flow of out-of-state garbage coming into their landfills.
with the states—at least until Congress acts. The three most prominent methods developed for preserving landfill space involve, either independently or in combination, (1) recycling and resource recovery programs,9 (2) state control of landfill services,10 and (3) regulations which explicitly discriminate against out-of-state interests.11

State regulation of interstate solid-waste disposal is subject to constitutional scrutiny under the dormant commerce clause doctrine. However, this doctrine was fundamentally altered by the broad federalism principles established in the Supreme Court case of Garcia v. San Antonio Metropolitan Transit Authority12 where "affirmative" commerce clause issues were addressed.13 In Garcia, the Supreme Court set forth the "political process theory" to explain the structure of our federal system of government whenever interstate commerce is regulated. According to this theory, state sovereignty rights are protected when Congress enacts interstate commerce legislation because state interests are directly represented in the national political processes by the composition of Congress. Because Congress's composition protects states' interests, the Court held that courts should not play any role in delineating and protecting an absolute sphere of state sovereignty rights. However, when the political processes are not operating effectively, the Supreme Court held that courts should intervene to protect states' interests. The dormant commerce clause situation provides such an occasion. Thus, the courts' role was fundamentally changed by Garcia since the dormant commerce clause situation is one where the nation's political processes are not operating to effectively protect states' interests. The courts are now obliged under the broad federalism principles set forth in Garcia to assertively protect states' interests in the dormant commerce clause doctrine's interest-balancing analysis. Although this fundamental change has

9. C. ANDRESS, supra note 3, at 35-63 (a comprehensive survey of states' activities in this area).
13. There is a significant distinction between the dormant commerce clause and the affirmative commerce clause doctrines. The Constitution grants to Congress "[t]he Power to . . . regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Thus, any article of interstate commerce is a potential subject of Congressional regulation. The affirmative commerce clause comes into play when Congress actually asserts this power and regulates that article of interstate commerce. Even if Congress's regulation is in the form of a decision to defer to state control, Congress has still asserted its affirmative commerce clause powers. In contrast, the dormant commerce clause comes into play when Congress has not asserted any disposition of power to control an article of interstate commerce.
sweeping implications for dormant commerce clause doctrine in general, it should prove particularly beneficial to those states that are trying to regulate the consumption of their landfill capacities by out-of-state entities.

This Note will begin with an analysis of the Garcia opinion. The discussion will then turn to the general dormant commerce clause analysis, its underlying principles, and its “market participant” doctrine. After these preliminary matters, the Note will explain how the courts’ fundamental role in the dormant commerce clause context was changed by the Garcia opinion in such a way that the courts’ primary role is now to protect states’ interests. Finally, the Note will conclude with an application of this overall analysis to the dormant commerce clause issues that arise when states regulate interstate solid waste disposal.

I. GARCIA AND DORMANT COMMERCE CLAUSE ANALYSIS

In attempting to preserve landfill space through regulations which either discriminate against14 or unduly burden15 consumption by out-of-state interests, a state quickly finds itself in the midst of a struggle between state sovereignty rights and Congress’s commerce clause powers. When the Supreme Court disengaged economic substantive due process rights from the fourteenth amendment in 1937,16 the Court simultaneously cleared the way for the modern Court’s expansive interpretation of Congress’s commerce clause powers. For over half a century, the Court’s interpretation of the commerce clause enabled Congress to regulate activity in essentially any area regardless of the degree of its actual impact (or lack thereof) on interstate commerce.17 Thus, where fundamental notions of state sovereignty are allegedly infringed by Congress’s seemingly omnipotent commerce clause powers, significant disagreement results.18

18. See, e.g., Fry v. United States, 421 U.S. 542 (1975) (wage increases of state employees were limited by federal regulation); Maryland v. Wirtz, 392 U.S. 183 (1968) (federal minimum wage and hour regulations applied to employees of schools and hospitals operated by the state); Case v. Bowles, 327 U.S. 92 (1946) (federal price ceiling imposed against state's sales of state-owned timber); United States v. California, 297 U.S. 175 (1936) (federal penalty levied against state-owned railroad for violation of federal law).
From the New Deal era until 1976, this struggle invariably resulted in victories for Congress. However, in 1976 the Court held in *Usery v. National League of Cities*\(^9\) that the tenth amendment was intended to preserve a definable set of substantive sovereignty rights for the states. Thus, for a while, the tenth amendment theoretically served as an affirmative limit on Congress’s power to regulate under the commerce clause. However, while the Court followed and shaped this doctrine in theory for the following eight years, it never actually invoked it again to strike down federal commerce clause legislation.\(^{20}\) Then, in 1985, the Court explicitly overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority.*\(^{21}\)

### A. Garcia and the Affirmative Commerce Clause

In *National League of Cities*, the Court held that the states were immune from federal regulation that addressed traditional state governmental functions because the federalism structure contemplated in the Constitution and embodied in the tenth amendment prohibited such impositions. Thus, state laws would affirmatively preempt these federal regulations despite an otherwise valid exercise of commerce clause power.\(^{22}\)

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21. 469 U.S. 528, 557 (1985). While the *Garcia* opinion represents the Court’s current stance on state sovereignty rights and the basic structure of federalism under the commerce clause, the remarkable fervor with which the dissenters disagreed with the *Garcia* majority and their promises for a return to the principles embodied in *National League of Cities* indicate the instability of the theories within the Court itself. *See* *Garcia*, 469 U.S. 528, 580 (Rehnquist, J., dissenting) (“[The *National League of Cities*] principle ... will, I am confident, in time again command the support of a majority of this Court.”); *id.* at 589 (O’Connor, J., dissenting) (“I share Justice Rehnquist’s belief ...”). This has never been more true than in recent years when three new justices have been appointed to the Court. More importantly, the independent validity of these theories is questionable as well. For extensive discussions and criticisms of *Garcia*, see J.C. GRIFFITH, FEDERALISM: THE SHIFTING BALANCE (1989); Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 COLUM. L. REV. 847 (1979); Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 SUP. CT. REV. 341; Van Alstyne, The Second Death of Federalism, 83 MICH. L. REV. 1709 (1985). Nevertheless, *Garcia* has found a firm niche in constitutional law. *See* South Carolina v. Baker, 485 U.S. 505 (1988) (application of political process theory adopted by Court in *Garcia* is affirmed). The scope of the larger principles of federalism which are embodied in *Garcia*’s holding have not yet been fully explored. Such a comprehensive task is beyond the scope of this Note. Instead, this Note will explore the limits of those principles as applied to the particular context of the dormant commerce clause.
22. In an attempt to help lower courts apply *National League of Cities*, the Court later identified several controlling factors in the analysis. Federal regulation under the commerce clause would violate the tenth amendment if it: (1) regulated the “States as States,” (2) addressed matters that were indisputable attributes of state sovereignty, (3) directly impaired a state’s ability to structure integral operations in areas of traditional governmental functions; and (4) did not justify state submission because of the weak nature of the federal interest. *Hodel*, 452 U.S. at 287-88 & n.29. However, the Supreme Court never again decided a case where these criteria for state sovereignty were actually satisfied.
Writing for the majority in *Garcia*, Justice Blackmun asserted that there were two fatal defects to the *National League of Cities* analysis. First, he stated that the *National League of Cities* 'function standard' was "unworkable." Indeed, as he pointed out, the lower courts were unable to discern any guiding principle which would consistently define those "traditional [state] governmental functions." The Supreme Court itself was thus unable to effectively articulate any organizing principles for discerning those state activities which fall within this absolute and elusive realm of state sovereignty.

Justice Blackmun's second criticism of *National League of Cities* was that the structure adopted there and "any other [doctrine] . . . purport[ing] to separate out important governmental functions can[not] be faithful to the role of federalism in a democratic society." The Court said that something was fundamentally wrong with trying to explain or define the sphere of state sovereignty through a judicial interpretation of what kind of activity is traditionally within the states' area of functioning. Any such structure would ultimately, and necessarily, turn on a judicial determination of what was or was not an integral, or "traditional," state government function. Thus, "[a]ny such rule [would] lead to inconsistent results at the same time that it disserves principles of democratic self-governance."

After explicitly overruling the *National League of Cities*' tenth amendment definition of state sovereignty, the Court faced the task of defining the "true" nature of the commerce clause relationship between the states and Congress. The Court's main obstacle lay "not [with] the perception that the Constitution's federal structure imposes limitations on the commerce clause, but rather [with] the nature and content of those limitations." Thus, "[i]f there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—[the Court] must look elsewhere to find them." The Court's search began with the reasoning that because the "text of the Constitution provides the beginning rather

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23. 426 U.S. 833. Ironically, both *National League of Cities* and *Garcia* were five to four opinions with Justice Blackmun being both the deciding vote in *National League of Cities* as well as the author of, and deciding vote in, the *Garcia* opinion.
25. Id. at 538. As the Court stated: "We find it difficult, if not impossible, to identify an organizing principle." Id. at 539 (emphasis added). Just prior to this language the Court cited a long list of cases in which these inconsistencies were demonstrated. Id. at 538.
26. Id. at 545-46.
27. Id.
28. Id. at 547.
29. Id. (emphasis added).
30. Id. (emphasis added). Notice that the language which Justice Blackmun has chosen to use is in the plural form. This implicitly acknowledges that there must be at least more than one source of a state sovereignty limitation on the federal government's commerce clause powers. This language will be important later in the discussion of the dormant commerce clause.
than the final answer to every inquiry into questions of federalism" it must therefore search "[b]ehind the words of the constitutional provisions [for] postulates which limit and control." The Court's new theory of federalism under the commerce clause began with Justice Blackmun's statement that "[a]part from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers ... the principal means chosen by the Framers" to preserve the states' sovereignty rights "lies in the structure of the Federal Government itself." Thus, the Court said that the fundamental limitation that the constitutional scheme imposes on the commerce clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of commerce clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." Because the states are represented in both houses of Congress, their "sovereign" interests are presumably protected "from overreaching by Congress." The principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. The Court thereby deflated the tenth amendment to a mere "truism" by holding that while the "[s]tates unquestionably do 'retain[n] a significant measure of sovereign authority,' they do so ... only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." Thus the Court held that the tenth amendment will no longer serve as an affirmative limit on the commerce power. Instead, states now must look to the national political processes for protection of their interests as states because these processes serve as the "primary" limit on Congress's commerce clause powers.

31. Id.
32. Id. (quoting Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).
33. Id. at 550 (emphasis added).
34. Id. at 554 (quoting EEOC v. Wyoming, 460 U.S. at 236).
35. Id. at 551.
36. Id. at 556.
37. The Court borrowed this phrase from Justice Stone in United States v. Darby, 312 U.S. 100, 124 (1941) (The tenth amendment "states but a truism that all is retained which has not been surrendered.").
38. Garcia, 469 U.S. at 549 (citation omitted) (quoting EEOC v. Wyoming, 460 U.S. at 269) (Powell, J., dissenting). "[T]oday's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the commerce clause." Id. at 560 (Powell, J., dissenting).
B. The Dormant Commerce Clause

1. The General Doctrine

When a state regulates an activity which is potentially subject to federal control because the activity involves "commerce among the states," such regulation raises dormant commerce clause issues. These issues arise when Congress has not asserted its control over that interstate activity by addressing it in any form. Accordingly, Congress's intentions are unknown. Because the text of the Constitution is silent regarding this dilemma, the Court has developed the dormant commerce clause doctrine to "guide" states' activities in this important area.40

There are two general situations where state regulation of interstate commerce has traditionally invoked judicial scrutiny under the dormant commerce clause doctrine. In 1986, the Court summarized this analysis as follows:

[We have] adopted what amounts to a two-tiered approach. . . . When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the [first] category of state regulation that is virtually per se invalid under the commerce clause, and the [second] category [which is] subject to the Pike v. Bruce Church balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.41

39. The lack of any truly helpful guidance from the Supreme Court was surmised by commentators who flippantly "restated" the dormant commerce clause doctrine as follows:

Although the power of the Federal Government over interstate commerce is plenary, the states may regulate commerce some, but not too much. If a state attempt to regulate commerce too much such regulation will be unconstitutional.

Caveat: This Restatement is not intended to express any opinion as to how much regulation is too much.


40. Significantly, even Justice Scalia has acknowledged some validity to this constitutional doctrine: "It has long been accepted that the commerce clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988).

41. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986) (citations omitted). Notice that while the Court speaks of a two-tier analysis, there are really three types of cases involved in the dormant commerce clause analysis: (1) discriminatory purpose cases, (2) discriminatory effect cases, and (3) unduly burdensome cases. See supra note 15 for the Pike balancing test.
While the Court describes its analysis as two-tiered, courts actually take into consideration several factors when deciding the tier into which a state regulation falls. This explains why the Court’s initial tier-delineation doctrine is not, and cannot be, “clear”—as the Supreme Court has itself acknowledged. Indeed, the “two-tiered” approach is ultimately a useless doctrine for either predicting the outcome of a decision or discovering the true nature of what the courts do in dormant commerce clause cases. This point was made implicitly in *Brown-Forman* when the Court said “[i]n *either* situation the critical consideration is the *overall* effect of the statute on both local and interstate activity.” The same point was made even clearer in *Bendix Autolite Corp. v. Midwesco Enterprises*, where Justice Kennedy stated “[t]he Ohio statute before us might have been held to be a discrimination that invalidates without extended inquiry. *We choose*, however, to assess the interests of the State, [as well as] . . . the burden imposed on interstate commerce.”

Since the analysis is fundamentally an evaluation of several variable factors, the tier analysis is simply a convenient generalization, or structure, imposed on the factor evaluation. Strict adherence to it leads to further confusion and frustration in understanding what the courts are really doing in the dormant commerce clause area and in predicting what the courts will do in this area in the future. To ignore this insight through a religious adherence to the two-tiered approach forecloses any meaningful analysis regarding the interests with which the courts are truly concerned in the dormant commerce clause cases.

42. See infra notes 48-74 and accompanying text. These factors correspond with those general factors that the Court balances in order to ultimately resolve any particular case.
44. 486 U.S. 888 (1988).
45. *Id.* at 891 (emphasis added) (The state had enacted a statute of limitation for breaches of contract and fraud that would be tolled for parties who were not present in the state.).
47. To be sure, the two-tiered approach is not entirely without merit. As I will explain later, before *Garcia*, state interests in autonomy and independence were, relatively speaking, not as important in dormant commerce clause analysis as they have become after *Garcia*. Because the courts gave state interests little weight before *Garcia*, they devoted their attentions only to the national economic and political unity interests when a state regulation had a discriminatory purpose or effect. Accordingly, the courts were doctrinally obliged to explicitly address the state autonomy interests only when the state regulation merely burdened interstate commerce. In this situation, the regulation would not threaten the national unity interests as much. Thus, the state sovereignty interests were not automatically overshadowed by the unity interests and the courts could overtly address these interests in this second-tier balancing analysis. Nevertheless, a multi-factor analysis was consistently maintained throughout both tiers of the dormant commerce clause doctrine. The only effective difference between the two tiers was the degree of importance doctrinally given to the unity interests in this multi-factor analysis, not the absence of any judicial consideration of the states’ sovereignty interests.
Courts evaluate several factors in dormant commerce clause analysis. Three of these factors disfavor state regulations that impede interstate commerce in any way: (1) the intent of the Framers, (2) fear of interstate hostilities—both economically and politically, and (3) apprehension of biased local political processes. On the other side of the balance are two factors that weigh in favor of state regulation of interstate commerce: (1) the traditional interests and notions of state sovereignty and (2) the limits of judicial competence.

The Framers of the Constitution created the nation's new government in an environment where economic warfare between the states was considered a threat to the unity of the nation. Indeed, one of the fundamental reasons the Framers were initially drawn to the Constitutional Convention in 1787 was to resolve these perceived problems by creating a centralized power to reign over interstate commerce. In particular, the Framers were concerned that some states had ports that other states needed to use to conduct interstate trade. As Justice Jackson stated in *H.P. Hood & Sons v. Du Mond*:

"[A] drift toward anarchy and commercial warfare between states began. Each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages..."

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48. Smith, *State Discriminations Against Interstate Commerce*, 74 CALIF. L. REV. 1203, 1205 (1986) ("Ultimately... [the dormant commerce clause situation presents] a question of degree. Imbued with legal realism, we no longer suppose that legal doctrines can be so precise as to leave no room for judgment... We realize that every legal value eventually conflicts with others and must be balanced against them.").

49. *Id.* at 1206.

50. *Id.* Donald Regan also has derived from these cases similar factors which weigh against state protectionism. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986). The essence of Regan's analysis, though, is that the only kind of state regulations that should be struck down by the courts are regulations that have *protectionist purposes*. Thus, he would look to discriminatory effect only as evidence of a protectionist purpose; he might not find that effect fatal in itself. Indeed, he would even look beyond the facially discriminatory language of a state regulation in search of a protectionist purpose. If none existed, then the statute would be upheld in spite of its explicit discrimination. As a result, he would entirely discontinue any interest-balancing analysis in the dormant commerce clause doctrine.

While Regan and Smith may have "similar" understandings of the dormant commerce clause doctrine, Smith, *supra* note 48, at 1204 n.8, Smith faults Regan (among others) for too much analysis of what the Court *ought* to be doing, rather than first describing, cogently and comprehensively, what the Court *is* doing. *Id.* at 1204.


or disadvantages of its position in a political or commercial view." This
came "to threaten at once the peace and safety of the Union." 54

The fundamental concern was that the states were imposing greater economic
burdens on out-of-state interests while granting economic advantages to
those interests within the state. 55 This imbalance created hostility and com-
mercial warfare among the states. The solution was to centralize power over
interstate commerce in Congress.

Thus, to the degree that the Framers' intentions are relevant in a modern
analysis of commerce clause issues, 56 their concern with the threat that
interstate commerce conflicts posed to the political and economic unity of
the nation was nevertheless legitimate. Unfortunately, the threat seems to
have transcended time. 57 Since such threats maintain their legitimacy today,
though perhaps to a lesser degree, they are still valid factors for the courts
to consider. 58

State regulations that impede interstate commerce threaten economic unity
by posing an obstacle for goods to overcome in their migration to higher-
valued uses. Economic efficiency cannot be achieved when society must
forego the use of a good that is artificially placed at a higher value than
the market would normally require. 59 This is precisely what occurs when a
state forces out-of-state entities to pay higher prices for access to its markets
and resources. Political unity is also threatened when a state regulates
against out-of-state interests. Regan refers to these phenomena as the
"resentment/retribution objection" to protectionist state regulation. 60 As he
explains:

Protectionist impositions cause resentment and invite protectionist retal-
iation. If protectionist legislation is permitted at all, it is likely to
generate a cycle of escalating animosity and isolation (and even of
hostility in the strongest sense, where the harm to foreign interests is
valued as such), eventually imperiling the political viability of the union
itself. 61

54. Id. at 533 (quoting 1 J. Story, Commentaries on the Constitution of the United
States §§ 259-60 (R. Rotunda and J. Nowak ed. 1987) (1st ed. 1833)).
55. 3 Convention Records, supra note 52, at 441.
56. For discussions of the value of the Framers' intent in constitutional analysis, see Garcia,
469 U.S. 528 (Powell, J., dissenting); J.C. Griffith, supra note 21, at 85 (Professor Frug
noted that any 'reference to framers' intent is a way to disguise one's own political positions
by suggesting the position is actually someone else's.'); Brest, The Misconceived Quest for
the Original Understanding, 60 B.U.L. Rev. 204 (1980); Dworkin, The Forum of Principle,
56 N.Y.U. L. Rev. 469, 471-500 (1981); Kay, Adherence to the Original Intentions in
57. See Regan, supra note 50, at 1114-15.
58. See City of Philadelphia, 437 U.S. at 623; H.P. Hood, 336 U.S. at 538.
efficiency in the context of market monopolies).
60. Regan, supra note 50, at 1114.
61. Id. (emphasis in original).
Finally, the courts are concerned with biases against unprotected out-of-state interests in the political processes of state or local governments. The courts' primary concern is that because foreign interests are not represented in the local legislative processes, their interests will not be fairly considered as a moderating factor. However, this factor has generally been insignificant in the courts' decisions.

While these three factors weigh against discriminatory state regulations, the courts consistently assert at least two factors that weigh in favor of allowing state protectionist regulation. As mentioned, these factors are the limits of judicial competence and traditional interests of state independence and sovereignty.

The Supreme Court acknowledged its own inability to assess "competing considerations in cases involving state proprietary action ... under traditional commerce clause analysis" because such considerations are "subtle, complex, [and] politically charged." As the Court stated in Reeves, Inc., "the adjustment of interests in this context is a task better suited for Congress than this Court." Michael Smith has also identified situations where courts are particularly incompetent to assess the competing interests under the commerce clause: "One ... require[s] the courts to distinguish among regulations according to the subjective intentions of those who enacted them. ... [The other] type ... require[s] the courts to assess the full economic incidence of state regulations." Thus, even if one concedes that the courts' analysis of the dormant commerce clause is legitimately grounded within the Constitution's vision, "it may [nevertheless] be too

62. This rationale was initially imported into the commerce clause doctrine by Justice Stone when he asserted it in South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938). The case was decided in the same year as United States v. Carolene Products Co., 304 U.S. 144, where the same argument was asserted in the context of individual rights.

63. Smith, supra note 48, at 1209; see also Pomper, supra note 2, at 1315 ("Furthermore, nonrepresentation of nonresidents is not a procedural flaw; rather it is fundamental to our federal system in which states retain a measure of independence ... ."); cf. Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425, 437-46 (1982) (asserting that the Court's major concern should be with the biases of local political processes, but that this concern should be constitutionally grounded in the privileges and immunities clause rather than the dormant commerce clause); Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125, 130-41 (arguing that different state discriminatory regulations implicate different local process concerns).


65. Id. at 439.

66. Smith, supra note 48, at 1211.

67. But cf. Anson & Schenkan, Federalism, the Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71 (1980) (asserting that there is no justification for applying the dormant commerce clause analysis in the context of natural resources); Redish & Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 Duke L.J. 569 (arguing that the Constitution provides no textual legitimacy for the dormant commerce clause doctrine and that consideration of such issues should be resolved under other, textually "legitimate," constitutional doctrines).
difficult or too delicate for judicial enforcement; it may be appropriate for enforcement only by political or moral means.\textsuperscript{68}

The most important factor favoring a state's regulation, and the one with which this Note is concerned, is the role of state sovereignty interests under the dormant commerce clause. Some of the more important interests encompassed in the concept of state sovereignty include the states' abilities to experiment and create a wide variety of solutions to problems occurring nationwide,\textsuperscript{69} to act as a means of local and democratic self-government,\textsuperscript{70} to serve as a counterbalance to the centralized power of our national government,\textsuperscript{71} and to more effectively protect the safety and health of its citizens.\textsuperscript{72} For examples of the courts' discussions of these underlying interests, one need only look to cases that fall into the "second tier" of the dormant commerce clause analysis—where the \textit{Pike v. Bruce Church} balancing analysis occurs.\textsuperscript{73} However, because the economic and political unity factors have dominated the balancing process when state regulations fall into the "first tier" of the analysis, the importance of state interests in autonomy has been obscured. Nevertheless, the Court has acknowledged both their existence and importance in this first tier of the analysis.\textsuperscript{74}

2. The Market Participant Exception to the Dormant Commerce Clause

The "market participant" doctrine was first established in 1976, the same year as the \textit{National League of Cities} decision. Before 1976, the Supreme Court only addressed state regulation of private interstate commerce activity. However, in \textit{Hughes v. Alexandria Scrap Corp.},\textsuperscript{75} the Court held that when a state regulates the conditions of its own participation in the market, rather than the market itself, even state regulations that are explicitly discriminatory

\textsuperscript{68} Smith, \textit{supra} note 48, at 1211.

\textsuperscript{69} "[A] principle advantage of a federal system [is] the use of the states as small-scale social laboratories, so that other states—or the federal government itself—might benefit by the experience, without incurring all of the possible risks that might result from a similar nationwide experiment." Redish & Nugent, \textit{supra} note 67, at 598.

\textsuperscript{70} "[T]he two key goals of our constitutional federalism [are] the encouragement of novel state experiments and the fostering of governmental responsiveness to distinctive local needs." Coenen, \textit{Untangling the Market-Participant Exemption to the Dormant Commerce Clause}, 88 \textit{Mich. L. Rev.} 395, 429-30 (1989).

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} See \textit{L. Tribe, American Constitutional Law} 539-40 (1988); Rapaczynski, \textit{supra} note 21, at 380-90.


\textsuperscript{74} \textit{Maine}, 477 U.S. 131; \textit{Sporhase}, 458 U.S. 941; \textit{City of Philadelphia}, 437 U.S. 617.

\textsuperscript{75} 426 U.S. 294 (1976).
against out-of-state interests are permissible. The Court's rationale for this doctrine was that market participation regulations are not the kind of regulations "with which the commerce clause is concerned." Thus, "[n]othing in the purposes animating the commerce clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."

Reeves, Inc. was the next Supreme Court case to address the market participant doctrine. In that case, South Dakota operated its own cement production plant. The state adopted a policy that it would sell to any buyer regardless of the buyer's residency so long as its plant could meet all of its orders. However, if the plant was unable to meet all of its orders, the state would discriminate against out-of-state buyers and only sell cement to resident buyers until all of their orders were met. The Court held that although the policy was clearly discriminatory it was not unconstitutional under the dormant commerce clause. Instead, because the State had created this resource through the construction of a "costly physical plant" and the use of "human labor"—both paid for by state tax revenues—the usual dormant commerce clause concerns with economically protectionist legislation would not be implicated.

Because the state's resolution did not directly interfere with interstate competition for the natural resources involved in the production of cement, but instead involved the selling of a commodity that the state had actually created, the legislation did not present a threat to the nation's economic and political unity. Significantly, the Reeves, Inc. Court reasoned that "[r]estraint in this area is also counseled by considerations of state sovereignty, [and] the role of each State 'as guardian and trustee for its people.'"

76. Indeed, Coenen refers to market participant regulations as being "virtually per se" valid. Coenen, supra note 70, at 404. This language was chosen to mimic Justice Stewart's language in City of Philadelphia, 437 U.S. at 624, where he stated that discriminatory market regulations are "virtually per se" invalid. However, Coenen makes it clear that in both cases "virtually" does not mean "always."

77. Hughes, 426 U.S. at 805.
78. Id. at 810.
80. Id. at 444. In this light, the Court also stated that the following warning clearly had no application in this situation: "If a state in this union, were allowed to hoard its commodities or resources for the use of their [sic] own residents only, a drastic situation might evolve. . . . The result being that embargo may be retaliated by embargo and commerce would be halted at state lines." Id. at 429.
81. The Court stated that the natural resource cases—which generally hold that natural resources are not unique articles of commerce deserving separate treatment under the dormant commerce clause—did not apply. Id. at 444; see Hughes, 441 U.S. 322; Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). See generally Anson & Schenkan, supra note 67.
82. Reeves, Inc., 447 U.S. at 438 (quoting Atkin v. Kansas, 191 U.S. 207, 222-23 (1903)).
The Court further stated that these "[c]onsiderations of sovereignty independently dictate that marketplace actions involving "integral operations in areas of traditional governmental functions" . . . may not be subject even to congressional regulation pursuant to the commerce power."83 Moreover, the Court stated immediately thereafter that "[e]ven where "integral operations" are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal."84 The Court also reasoned that the dormant commerce clause restrictions would significantly limit a state's ability to create a respectable relationship with its citizenry and that it would "threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse."85 Thus, "[a] healthy regard for federalism and good government" made the Court "reluctant to risk these results."86

Two cases following Reeves, Inc.-White v. Massachusetts Council of Construction Employers87 and South-Central Timber Development v. Wunnicke88—further modified the market participant doctrine. In White, the Court held that the doctrine protected a municipal ordinance even though the statute "impose[d] restrictions that reach[ed] beyond the immediate parties with which the government transacts business."89 Although two Justices dissented to the particular application of the market participant doctrine to the facts of White, all accepted the doctrine's validity.90

Wunnicke was the first case in which the Court declined to use the market participant doctrine to protect a state's discriminatory regulation.91 The plurality opinion said that the "limit of the market-participant doctrine must be that it allows a state to impose burdens on commerce within the market in which it is a participant, but allows it to go no further."92 The plurality's position was grounded in the concern that unless the market was defined narrowly the market participant doctrine would swallow the entire

83. Id. at 438 n.10 (quoting National League of Cities, 426 U.S. at 852).
84. Id. (emphasis added).
85. Id. at 441.
86. Id. The dissenters disagreed with the holding because it allowed explicit interference with the "free national economy" contemplated by the commerce clause. Id. at 454 (Powell, J., dissenting).
87. 460 U.S. 204 (1983) (The Court upheld a requirement that at least one half of the work force on city-funded projects be composed of that city's residents.).
88. 467 U.S. 82 (1984) (The Court struck down the state's law requiring that timber taken from state lands be processed in the state before it may be shipped elsewhere.).
89. White, 460 U.S. at 211 n.7.
90. Id. at 218-19 (Blackmun, J., dissenting). The Justices have not been consistent in their dissents to the application of the market participant doctrine. Coenen, supra note 70, at 405. Each Justice, though, has acknowledged the validity of the doctrine at one time or another.
91. Four Justices denied the application of the market participant doctrine, three Justices did not reach the issue, and two Justices dissented.
92. White, 467 U.S. at 97.
dormant commerce clause analysis.\textsuperscript{93} Thus, the Court prohibited the state from regulating state-owned timber beyond the moment it was sold.\textsuperscript{94}

Only two post-\textit{Garcia} Supreme Court cases have raised the market participant issue.\textsuperscript{95} The Court declined to consider its application in both of them. Because federal regulations had preempted the state regulation, the Court refused to apply the doctrine in \textit{Gould}.\textsuperscript{96} In \textit{Limbach}, the state regulation was not shielded from dormant commerce clause scrutiny simply because the nature of the state regulation did not invoke the market participant doctrine. The state had levied a tax against out-of-state interests while favoring its own citizenry. "The [state] action ultimately at issue [was]... its assessment and computation of taxes—a primeval governmental activity."\textsuperscript{97} Since the state regulation involved a fundamental government function, the state could not have acted as an ordinary market participant. Accordingly, the dormant commerce clause's economic and political unity concerns were squarely implicated. Thus, because the reasons for the doctrine did not apply, the Court disallowed the exception.

Two main factors in the market participant doctrine's evolution are related to the \textit{Garcia} opinion's effect on the dormant commerce clause analysis. First, the Supreme Court fully embraced the doctrine on the same day that \textit{National League of Cities} was decided. The Court has only had two other opportunities to consider the validity of the doctrine since \textit{Garcia} was decided. However, it declined to apply the doctrine or address its continuing validity in both cases. Therefore, the doctrine's theoretical validity after \textit{Garcia} is still unclear. The second factor is that the exception is recognized by the Court, as well as many commentators,\textsuperscript{98} as being grounded in "considerations of state sovereignty, [and] the role of each State as 'guardian and trustee for its people.'"\textsuperscript{99}

\textbf{C. Garcia's Effect on Dormant Commerce Clause Analysis}

While \textit{Garcia} held that the tenth amendment is but a truism and that the political process theory explains the role of states' rights in our federal

\textsuperscript{93} Id.
\textsuperscript{94} Thus, the state will be protected from dormant commerce clause restrictions when it discriminatorily stipulates to whom it will sell the good, but the state cannot dictate how those purchasers are to use or process that resource.
\textsuperscript{95} \textit{Limbach}, 486 U.S. at 277 ("The market participant doctrine has no application here."); Wisconsin Dep't of Indus., Labor, and Human Relations v. Gould, 475 U.S. 282 (1986).
\textsuperscript{96} \textit{Gould}, 475 U.S. at 289.
\textsuperscript{97} Id.
\textsuperscript{98} Anson & Schenkkan, \textit{supra} note 67; Coenen, \textit{supra} note 70; Regan, \textit{supra} note 50. As Coenen stated: "[T]he market-participant exemption to the dormant commerce clause" is an "important vehicle through which the modern Court has moved to protect local prerogatives." Coenen, \textit{supra} note 70, at 397.
\textsuperscript{99} Smith, \textit{supra} note 48, at 1210.
system whenever interstate commerce is regulated, the Court specifically qualified the scope and impact of the political process theory by stating that this process is only the "basic" and "primary" means of protecting state interests. Implicit in the Court's language is its recognition that there are other means of protecting state interests when interstate commerce is involved. This conclusion is not only supported by the Court's use of specific qualifying language, but also by the Court's citation to Coyle v. Oklahoma, the reservation of its role in policing this "process" to ensure that the governmental processes will function properly to protect state interests, and its explicit statement that there are other affirmative limitations on Congress's commerce clause powers. Although the Court did not specify what other means of protection it was referring to, this Note asserts that these qualifications were directed toward the dormant commerce clause and the market participant doctrines. The Court could not have intended for these secondary means of state protection to be left untouched by the sweeping federalism principles established in Garcia. Thus, proceeding on the premise that Garcia is "correct," I will apply the Garcia principles and structure to the dormant commerce clause analysis of balancing federal and state interests.

The Garcia Court concluded that the primary means for protecting state interests was through the political processes envisioned in the constitutional structure of our federal government. The Court reasoned that it was constitutionally required to defer to Congress any role in protecting state interests because state interests are structurally represented in Congress and because Congress is the most capable and democratic institution established for proper consideration of these interests. The main role Garcia reserved for the judiciary under the commerce clause and the political process theory is to police these political processes to ensure their proper functioning. Thus, as Justice Blackmun stated, "Any substantive restraint on the exercise of commerce clause powers must find its justification in the procedural nature of this basic limitation, and must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" Accordingly, the judiciary's role is to ensure that state interests are properly represented in Congress. And when the political processes cannot ensure such representation, the courts must then intervene in the process to champion state interests.

101. See also supra notes 22-38 and accompanying text.
102. 221 U.S. 559 (1911), cited in Garcia, 469 U.S. at 556.
103. The Court further reserved the right to analyze a situation and apply its own standards of judicial review when the political processes are not working properly.
104. Garcia, 469 U.S. at 554-57.
105. 469 U.S. at 554 (emphasis added) (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).
However, *Garcia* did not specifically address the question of whether the federalism structure and principles it embodied extend to dormant commerce clause analysis. To answer that question, one must address two other issues. The first question is whether the principles that justify the political process theory in *Garcia* also support the theory's application to the dormant commerce clause. Assuming that the principles behind the theory do support its application, the second question is whether the national political processes nevertheless fail to protect states' interests in dormant commerce clause situations—thereby obligating the courts to step in to insure that state interests are being protected when interstate commerce issues are involved.

1. Applying *Garcia*'s Principles to the Dormant Commerce Clause

The *Garcia* Court relied primarily on two principles in adopting its political process theory. The first principle is that any delineation of an absolute sphere of state sovereignty is unworkable.\(^{106}\) The second principle is that the judiciary is the least appropriate branch for identifying and balancing interests when deciding which state activities deserve preemptive status despite national interests in that activity. These two principles apply to dormant commerce clause situations as well. Thus, the federalism structure adopted in *Garcia* should also govern dormant commerce clause analysis.

Courts addressing dormant commerce clause issues have long recognized the validity of the principle that any attempt to delineate an absolute sphere of state sovereignty rights is untenable. Although initially used in a different context, the substance of the following comment is appropriate here: "[W]hen interests are described as 'rights,' accommodation is impeded. Defining an interest as a right masks the nature and complexity of what is actually at stake . . . [and it] makes accommodation seem to be the breaching . . . or the defining away of a right and thus, a . . . political wrong."\(^{107}\) Thus, if the Supreme Court were to hold that states have absolute sovereignty in certain areas under the dormant commerce clause, the courts would quickly become entangled in the difficult situation of either respecting that right by protecting it in all of its legitimate extensions\(^{108}\) or whittling it away through unprincipled redefinitions and suspiciously narrow applications whenever it

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106. *Id.* at 556-57.
108. This would be particularly true in a situation where Congress later decides that federal regulation is needed. If the Court held that the state was sovereign, this predicament would fall into the scope of the *Garcia* and *National League of Cities* confrontation.
conflicted with other interests the courts needed to recognize. Two consequences often result from these kinds of dilemmas. First, a line of irreconcilable cases usually develops, such as the situation that occurred under National League of Cities. Second, the Supreme Court, and the judiciary in general, lose the public’s respect as an impartial institution of justice, at least to the degree that the accommodation is perceived as being unprincipled.

While the Court arrested these problems in Garcia, the Court did not hold that the judiciary should entirely stop considering the state sovereignty interests. Indeed, the Court considers these interests along with competing interests under the dormant commerce clause balancing analysis. Thus, the fact that the Court continues to recognize state sovereignty interests in its analysis under the dormant commerce clause is not inconsistent with Garcia, and it indicates that this analysis falls under the exception to Garcia’s political process theory.110

The second principle addressed by the Garcia Court is found in its holding that the very process of judicial delineations of absolute spheres of state sovereignty is inappropriate because such delineations are undemocratic. Through such delineations, the courts would disregard the constitutionally established means of resolving state issues through Congress. Indeed, as the Court has recognized, this principle is partially applicable to the dormant commerce clause analysis as well.111 However, this recognition does not indicate that the Court’s continued balancing analysis under the dormant commerce clause is inconsistent with the concerns embodied in this principle. To understand why this element of the Garcia Court’s analysis does not extend completely to the dormant commerce clause situation, it is necessary

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109. As new issues are brought before the courts, they will be faced with tasks that they cannot effectively undertake without seeming to impinge upon the state’s absolute right. For example, suppose the Court holds that states are sovereign when they do X. When a state is doing X, federal legislation cannot interfere with it. Assume also that when a state is doing X, it infringes upon individual rights. These citizens cannot turn to their congressional representatives to enact protective legislation, even if the other states in the nation disagree with the state’s behavior, because each state is sovereign while it is doing X.

Thus, the only effective way for citizens to seek redress is for courts to hold that their individual rights are constitutionally protected. However, courts must proceed cautiously here because without clear textual support from the Constitution they often face the criticism of recognizing only those individual rights which comport with their own judicial biases and political agendas. If individuals are to have fundamental constitutional rights, their rights should not be subject to these kinds of variations. This controversy is most prevalent in the area of substantive due process rights. D. Lockard, The Perverted Priorities of American Politics 89-99 (2d ed. 1976).

110. See infra notes 120-27.

111. Several commentators have suggested that the courts should step entirely out of the dormant commerce clause analysis for this reason alone. Anson & Schenkkan, supra note 67; Redish & Nugent, supra note 67.
to first understand why the Court found the judiciary's intervention to be inappropriate in the affirmative commerce clause context.

The Court offered two rationales to support its conclusion that the judicial branch should not delineate the respective spheres of sovereignty. First, the judicial branch itself is an undemocratic institution. Although the Court did not elaborate on this rationale, presumably it was referring to the concern that because of the very nature of our adversary legal system courts would make delineation decisions based upon imperfect and nonrepresentational information. The core characteristic of this system is that the courts must generally deliberate only on those arguments and interests that the advocates bring before them and then only in the light which those advocates have chosen to cast upon their case. Furthermore, the judiciary is not capable of independently and adequately investigating the empirical support or factual validity of the information presented in the arguments before it. Accordingly, the courts would delineate absolute spheres based upon information that is likely to be both incomplete and skewed in favor of the advocate presenting it.

Because the judiciary is not a democratic institution, the "full story" cannot be told. Courts do not open their doors for true representation and equal consideration of every interest that has a legitimate stake in the outcome of their decisions. Because the courts are limited to case-by-case adversarial resolutions, they would make sweeping and absolute decisions based upon imperfect information. When the political processes are operating effectively, the Garcia Court reasoned that this would be particularly unacceptable because the democratic and investigative features of Congress established it as the more appropriate institution for rendering such decisions.

Thus, the second reason for the Garcia Court's self-disqualification is that while the courts are the least capable institutions for making delineation decisions Congress is the best institution for that function. Congress is an institution where there is the opportunity, at least theoretically, for all competing interests to be fully represented and investigated. Thus, the Court reasoned that when it is functioning properly Congress is the most capable institution available for balancing the state and federal interests involved whenever interstate commerce is regulated.

These two rationales partially apply to the dormant commerce clause analysis. While the Court should not necessarily remove itself completely

112. Garcia, 469 U.S. at 554.
113. This is not to say that a democratic institution such as a legislature operates on perfect information because it is representational. Instead, the relationship is relative. A democratic institution is better suited for acquiring perfect information than the courts.
114. See Garcia, 469 U.S. at 547-55.
115. See generally D. LOCKARD, supra note 109, at 49-89.
116. While in both commerce clause situations the Court is concerned with the common
from the dormant commerce clause analysis based on these rationales, the Court should recognize that its capabilities to competently balance the interests involved in the dormant commerce clause are extremely limited. To be sure, the Court has recognized these institutional limitations in the dormant commerce clause context. However, the courts should pursue these concerns by actually limiting the scope of their balancing role in the dormant commerce clause analysis.

The Garcia Court ultimately held that a judicial delineation of absolute state sovereignty rights was improper and undemocratic because the Constitution had already provided for the protection of state interests through Congress, which structurally represents the entire spectrum of state sovereignty interests through its political processes. The principles adopted in Garcia in support of this political process structure endorse its application to the dormant commerce clause situation as well. The courts have not attempted to delineate absolute spheres of state sovereignty in that context, and this is consistent with Garcia's principle that they should not even attempt to do so. Moreover, the judiciary is a relatively incompetent institution for balancing the interests involved in determining the level of recognition to be given to state interests in the dormant commerce clause context. Finally, the Framers intended that the federalism structure embodied in the Constitution account entirely for state interests whenever interstate commerce is involved—including situations where Congress had yet to act. Thus, the principles of the political process theory extend from the affirmative commerce clause context to the Court's role in the dormant commerce clause situation as well.

2. The Adequacy of Protection for State Interests Under Garcia

Since the political process theory applies to the dormant commerce clause, the next question is whether those political processes are indeed operating
to adequately protect the states' sovereignty interests.120 Under Garcia, when Congress affirmatively decides either to act or defer to state control, by virtue of its very composition, it takes into consideration the states' interests. The same conclusion does not follow, though, in the dormant commerce clause situation where Congress has not decided anything at all. Thus, the states' interests are left in a constitutional limbo where they are unaccounted for and unprotected. Accordingly, the courts' role is to accommodate this lapse of structural protection by assuming the responsibility of affirmatively protecting—but not necessarily guaranteeing—these state interests. For the past fifty years, the courts have divined the national interests in a unified economy and polity. Thus, this change of roles represents a fundamental change in the dormant commerce clause analysis.

Whether the courts should even continue to play a role in the dormant commerce clause analysis after Garcia is a difficult issue to resolve because two divergent conclusions seem equally plausible under the political process theory. The first conclusion is that the courts should have no role at all because the political processes would continue to adequately protect the states' interests even though Congress has not yet acted. The underlying rationale here is that if the states are dissatisfied with the status quo they can always resort to federal legislation to change it. For example, even if the Court held that there is exclusive federal jurisdiction over all interstate commerce, the states could still protect their interests by resorting to federal legislation in any particular area.121 Similarly, if the Court were to hold the opposite—that the states may freely regulate interstate commerce until Congress decides to regulate—and certain state regulations were causing economic and political disunity, the states, acting vicariously through Congress, could again change the status quo established by the Court. Until that point there would be no real threat to national unity, or Congress would have responded to resolve that problem through its political processes and regulatory powers. The distinguishing characteristic of this alternative is that the courts would have absolutely no role under the dormant commerce clause other than to define the initial status quo of jurisdiction over interstate commerce.122

120. See supra text accompanying notes 100-06.
121. This is not too different from the Court's current stance under the dormant commerce clause. The key difference, though, is that the Court has emphasized only a strong preference for protecting national unity interests in interstate commerce. The Court has not held that these federal interests have exclusive jurisdiction. Thus, courts continue to balance all of the relevant interests—including the states'.
122. Indeed, several commentators have argued for such a result. Redish & Nugent, supra note 67; Anson & Schenkkan, supra note 67; Tushnet, supra note 63. The common thread of criticism levied against the courts is that once an article of commerce is identified as being involved in interstate commerce, under the dormant commerce clause balancing analysis, the courts are performing functions which Congress was constitutionally designed to perform democratically. Thus, these commentators conclude that courts should step out of the analysis entirely.
This alternative represents an extreme view of the impropriety of the judiciary's role in the dormant commerce clause analysis. In addition, it is out of touch with the reality of the courts' continued role in the doctrine's interest-balancing analysis. More importantly, though, this alternative is not necessarily dictated by the application of *Garcia* to the dormant commerce clause situation because, while the "judicial incompetence" principle underlying the political process theory applies in part to the dormant commerce clause, the federal political processes do not adequately protect the states' interests. Because there are simply too many competing interests which need to be considered and balanced in applying the dormant commerce clause—where neither the text of the Constitution nor Congressional action provide any guidance for the proper resolution of these interests—*Garcia*’s structural protection does not apply. To protect these interests, the courts must continue to play some role in the dormant commerce clause analysis.\(^{123}\)

The opposite approach appears more practical and in line with the courts' actual practice.\(^{124}\) It recognizes that because the political processes do not function effectively when Congress has not acted affirmatively the courts' continued intervention is necessary to protect the states' interests. The courts' continued intervention is dictated by the fact that state interests are left unprotected in this constitutional limbo and by the fact that there are legitimate national unity interests implicated when states regulate interstate commerce. The need for a resolution of these interests outweighs the *Garcia* Court's reasoning that the judiciary is institutionally incompetent for resolving such issues—particularly in light of the fact that Congress is unwilling to address these important interests. Nevertheless, *Garcia*’s reasoning does indicate that the courts should significantly restrain their analysis.

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123. Also, were the judiciary to cease to fulfill its balancing role, it would represent a monumental change in the evolution of commerce clause doctrine. As one commentator has put it: "[I]t is unrealistic to expect the Court to abandon a doctrine that has been an important and firmly-rooted part of its federalism jurisprudence since Cooley v. Board of Wardens, 53 U.S. 299, 317-19 (1851)." Pomper, *supra* note 2, at 1314 n.29. Even Justice Scalia has accepted the legitimacy of the doctrine, albeit in a narrowly defined set of circumstances. *See* New Energy Co. v. Limbach of Ind., 486 U.S. 269 (1988). Such a monumental change would also force the Court to fashion a new theory for characterizing the status of states' interstate commerce regulations. For example, if the courts may not balance interests at all, does this mean that federal jurisdiction over interstate commerce is to be exclusive or concurrent? This is a dangerous predicament for the Court to place itself in because the implications of such a decision would be both far-reaching and unforeseeable.

Before *Garcia*, the courts arguably had a choice between which of the two general interests they would strive to protect under the dormant commerce clause—the states' interests or the national interests. After *Garcia* the courts no longer retain such a choice. The political process theory and its underlying principles apply to the dormant commerce clause, and the states' interests are protected primarily by that process. Therefore, if that process fails to function effectively, the Court's self-appointed role is to remedy that lapse by assuming for itself those protection functions. Since the dormant commerce clause situation provides such an occasion, the courts are now obligated to assertively protect states' interests in their balancing analysis.

It does not follow, though, that the courts are compelled to protect only states' interests while neglecting national unity interests. Rather, the courts simply have to give significantly more protection to states' interests than they have in the past. Due to the very nature of a multifactor balancing analysis, it is inherently impossible to say just how much more protection is required. Nonetheless, given this fundamental goal of protecting states' interests, and given the Court's declarations of its own inadequacies in performing a balancing analysis of national and states' interests, the courts should manifest a definite bias toward the protection of states' interests whenever states are regulating interstate commerce. Thus, after *Garcia*, state regulation of interstate commerce should encounter significantly less stringent standards of judicial review because the courts primary concerns should now lie with protecting states' interests—at least until Congress dictates otherwise.

**D. Garcia's Effects on the Market Participant Doctrine**

Because *Garcia* explicitly overruled *National League of Cities*, the continued vitality of the market participant doctrine has been questioned—at least to the degree that it is believed to be founded upon tenth amendment substantive state sovereignty rights. However, two theories shelter the doctrine from *Garcia's* sweeping changes. The first is that the Court recognized the market participant doctrine as a power reserved for the states under article IV, section 3, of the Constitution. As such, the doctrine represents one of the affirmative limits on Congress's commerce clause powers that the *Garcia* Court exempted from its political process structure of federalism. The second theory is that because the market participant doctrine arises when Congress fails to act the political processes are not functioning at all.

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125. *Garcia*, 469 U.S. at 554.
126. Indeed, this would conflict with *Garcia's* principle that there can be no absolute spheres of state sovereignty.
127. If Congress does not agree with a court's state-favored resolution of the interests at stake in a particular case, it can readily change the result through the political processes.
Thus, as in the dormant commerce clause context, the courts are obliged to protect states' interests in this particularly important area of state government.

Immediately after Justice Blackmun stated that it was not necessary under Garcia's facts to identify or define what other "affirmative limits the constitutional structure might impose on federal action affecting the States under the commerce clause," he cited Coyle v. Oklahoma as an example of one of these affirmative limits. Coyle holds that when Congress admits new states into the Union under its article IV, section 3 powers, it is obligated to grant new states the same sovereignty powers constitutionally retained by all other states. Thus, in a new state's enabling act, Congress could require certain conditions to be met which relate to matters wholly within its own sphere of federal power but not conditions relating to those constitutionally retained areas of state control.

In Coyle, as a condition to Oklahoma being admitted to the Union, Congress attempted to require it to move its state capital from Guthrie to Oklahoma City and to further desist from spending any of the state's public funds on the construction of a different capital building. The Supreme Court held that to allow Congress to do this would have "placed [the state] upon a plane of inequality with its sister States in the Union." Such congressional conditions of admission would not only lead to a nation composed of unequal states, but also deprive the states of their constitutionally retained powers and rights. Thus, the Court held that the state's powers to locate its own seat of government and to appropriate money for that purpose was constitutionally protected.

The Court extended this protection of states' rights to post-admission federal regulation as well. The Court held that "such powers may not be constitutionally diminished, impaired or shorn away by any conditions . . . embraced in the [enabling] act which would [also] not be valid and effectual if [it were] the subject of congressional legislation after admission." Thus, because the states' powers to locate their state capitals and spend their public funds were constitutionally protected before admission into the Union, it followed that they were also not constitutionally "valid and effectual . . . subject[s] of congressional legislation after admission" into the Union.

Through Coyle, the Garcia Court acknowledged that the states' power to spend public funds is a constitutionally retained affirmative limit against

128. Garcia, 469 U.S. at 556.
129. 221 U.S. 559 (1911).
130. Id. at 564.
131. Id. at 565.
132. Id.
133. Id. at 573.
134. Id.
Congress's commerce clause powers. This power was retained through the principles embodied in article IV, section 3, of the Constitution. Accordingly, these powers may not be "diminished, impaired, or shorn away" either by Congress acting under its affirmative commerce clause powers or by the courts acting through the dormant commerce clause analysis. The Garcia Court recognized the independent constitutional validity of the market participant exception and indicated that, as such, the exception would not be disturbed by its holding. Moreover, this constitutionally retained state power is precisely what the Court referred to in Reeves, Inc. when it stated that "[e]ven where 'integral operations' are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." This statement firmly establishes the Court's continued recognition that the market participant doctrine rests on an entirely separate conception of state sovereignty rights than those models rejected in Garcia. The doctrine is founded on a constitutional right retained by the states and not granted to Congress. It represents an affirmative limit on Congress's commerce clause powers. Accordingly, the doctrine survives Garcia.

Even if the market participant doctrine does not serve as an affirmative, independent constitutional limitation on Congress's commerce clause powers, the courts nevertheless use it appropriately when they apply it in dormant commerce clause cases to protect a state's regulation. This follows because the political processes are not operating effectively in the dormant commerce clause situation. After Garcia the courts' main purpose in such situations is to affirmatively protect states' sovereignty interests while at the same time recognizing their own institutional incompetency in this area. Accordingly, even if the doctrine is not a substantive constitutional right in itself, it is at least the embodiment of several extremely powerful state interests which the courts have consistently recognized under dormant commerce clause analysis.

This theory of the market participant doctrine is consistent with Coenen's assertion that the rule "has proven less rigid than some initially feared." Because the doctrine is one of the most powerful embodiments of the states' interests, it has usually outweighed, as opposed to absolutely preempted, the national unity interests. As Coenen and other commentators have pointed

135. Indeed, in this light, the use of the label "exception" is a bit of a misnomer.
136. 447 U.S. at 437, 438 n.10 (emphasis added) (citing The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 63 (1976)). "Integral operations" was the standard adopted in National League of Cities for delineating a sphere of absolute state sovereignty rights. 426 U.S. at 852. This standard and principle were rejected by Garcia as "unworkable." 469 U.S. at 546.
137. Coenen, supra note 70, at 397. Coenen's approach "rejects an all-or-nothing approach to these cases, advocating instead a sensitive application of the market-participation rule in light of its underlying justifications." Id. at 398.
out, the doctrine has its roots in several different state interests. The most important of these interests include the states’ abilities to provide services as the localized “guardian[s] and trustee[s] for [their] people” and to serve as social models and laboratories which are seeking, on a vast diversity of fronts, the optimal solutions to common national problems. When a state is “participating in the market,” these interests command a great deal of weight in the courts’ balancing analysis.

Moreover, the competing national interests in avoiding economic and political hostility are weak when the state is acting as a market participant. Political unity is not threatened because the scope of the state’s activity is, by definition, limited to only those contacts it makes as an ordinary market participant. While these contacts may not necessarily be small in number, they nevertheless do not invoke resentment among other states because the participant state’s discriminating activity is generally accepted in a capitalistic society where freedom of contract tends to reign. Thus, it seems equitable to all to allow a state to spend its own resources as it sees fit. Economic

138. Coenen provides a summary of the state sovereignty principles and values embodied in the doctrine:

First... it is fair and consistent with broadly shared conceptions of property. Second, the values of federalism suggest a need to avoid interference with state autonomy in this area.... Third, market-place preferences... pose less of a danger to commerce clause values. Fourth, formal considerations—emanating from constitutional text and history—suggest that states should have a free hand when dealing in the market.... And fifth, institutional considerations counsel heightened caution in applying the dormant commerce clause to market-participant cases.

Id at 420. The “institutional considerations” to which the author refers encompasses the relative incompetency of the courts as an institution for analyzing the competing interests involved in the commerce clause. See supra notes 64-68 and accompanying text; Gell, The Market Participant Exception to the Dormant Commerce Clause and Landfill Restrictions: An Analysis After Garcia v. San Antonio Metropolitan Transit Authority 10-14 (1990) (unpublished manuscript on file with the Indiana Law Journal); Regan, supra note 50, at 1193-1203; Pomper, supra note 2, at 1320-22.

139. Reeves, Inc., 447 U.S. at 438 (quoting Atkin v. Kansas, 191 U.S. 207, 222-23 (1903)).

140. Redish & Nugent, supra note 67, at 598. There are two further components to this interest. First, if our nation has a diversified set of environments in which to develop solutions to problems held in common across the nation, eventually the optimal, efficiency-maximizing solution will emerge. Second, if a state cannot retain for its citizens the benefits of its own experimentation (through recognition of some sort of constitutionally enforced property right), the state will not spend as much of its resources on such projects. Because of this classic “free rider problem,” states will not experiment and develop solutions to the nation’s problems without some sort of incentive, or personalized return, on its investments. Property rights provide such an incentive and defeat the “free rider problem” because they allow the state to exclude others from reaping the benefits of their investment. See J. DUKEMINIER & J. KRIER, PROPERTY 38-43 (2d ed. 1988); POSNER, supra note 59, at 30-40; Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967). If the investment is indeed efficient and productive, other states will emulate it—to the benefit of the nation. If not, other states will still have an incentive to create solutions that are more productive. In this way, the nation’s commonly held problems are effectively resolved by the states.
unity is not threatened when the state acts as a market participant because political unity is not assaulted. If the states do not resent one another’s individual business dealings, they also will not take retaliatory measures, such as purely all-encompassing out-of-state trade restrictions. Economic unity also is not threatened because the state’s policies are limited to only those parties operating in the same market as the state and those who are actually doing business with that state.141

Finally, the principles underlying Garcia do not necessarily apply to the market participant doctrine because courts are much more capable of delineating the boundaries of the doctrine through such inquiries as whether the state is participating in the market or regulating the market. Accordingly, such a delineation is not “unworkable.” Moreover, the doctrine is not necessarily an absolute sphere of substantive rights. Because different factors come into play according to the different factual contexts of any case, the courts will shun the process of attempting to define an absolute sphere of state control and will instead adopt a more flexible factor-balancing approach. This is especially true if the doctrine is perceived as being a generalized pattern or result of the courts’ balancing analysis under the dormant commerce clause. Additionally, the courts’ presence will not be undemocratic because it will either be protecting an affirmative constitutional right or intervening because of the lapse in structural protection created when the democratic political processes are not functioning to properly account for states’ interests.

Under either conceptualization of the market participant doctrine, Garcia does not eradicate it. Because the doctrine is either an affirmative constitutional limit on Congress’s commerce clause powers or a necessary intervention by the courts, its continued vitality is not inconsistent with Garcia.

II. STATE SOVEREIGNTY INTERESTS AND LANDFILL REGULATIONS

Because state regulation of solid waste disposal falls under the dormant commerce clause, this Note has addressed how Garcia fundamentally changed that doctrine so that the courts’ primary role now is to assertively protect state sovereignty interests. However, this is not to say that states have the freedom to regulate entirely as they please. Rather, the dormant commerce clause doctrine is still an analysis where competing interests are to be weighed and balanced. Accordingly, the constitutionality of any particular state regulation that burdens interstate commerce cannot be absolutely guaranteed. Nevertheless, because the courts’ fundamental role has shifted

141. Wells & Hellerstein, The Governmental-Proprietary Distinction in Constitutional Law, 66 VA. L. REV. 1073, 1127-35 (1980); Gell, supra note 138, at 11 (noting that this argument loses its strength as the size of the market increases).
to assertively protecting states’ interests—as opposed to primarily protecting national unity interests—and because of the courts’ lack of institutional competency in balancing these interests, the resolutions of dormant commerce clause cases should significantly favor state regulations. Accordingly, the states should have a great deal more freedom in regulating against the presently unrestrained consumption of their landfill capacities by out-of-state entities.

This Note will now briefly address three general types of “burdensome” landfill regulations which should typically be upheld under dormant commerce clause scrutiny: (1) socialization regulations, (2) resource recovery programs, and (3) facially discriminatory regulations. The ensuing analysis is intended to serve only as a skeletal outline of how the courts should approach these regulations under the theories and principles set forth in this Note. However, before these regulations can be discussed, a preliminary issue must first be addressed. This issue concerns the question of what exactly is the article of interstate commerce which is being burdened by state regulations in this area.

A. Articles of Commerce: Landfill Space, Landfill Services, and Garbage

In City of Philadelphia v. New Jersey, the Court held that a New Jersey regulation prohibiting the importation of solid or liquid waste created outside of the state was unconstitutional economic protectionism. The Court reasoned that even though the state had a legitimate noneconomic-protectionist goal in preserving the state’s remaining landfill resources and protecting the environment for its citizens, the legislative means discriminated against out-of-state interests in an unacceptable manner. The Court focused its analysis on the concept that garbage is an article of commerce despite its generally valueless characteristics.

Focusing solely on the rationale that garbage is an article of trade—and thus, an article of interstate commerce—confuses the true issues that underlie the problems associated with our nation’s landfill crisis. Not only does the

143. “We assume New Jersey has every right to protect its residents’ . . . environment.” Id. at 626.
144. The Court agreed with the plaintiffs who argued that the state’s covert interests were in “suppress[ing] competition and stabiliz[ing] the cost of solid waste disposal for New Jersey residents.” Id. The Court thus avoided the issue of deciding which purpose was the true goal of the regulation by focusing instead on the legislative means employed: “[T]his dispute about ultimate legislative purpose need not be resolved. . . . [T]he evil of protectionism can reside in legislative means as well.” Id.
145. “All objects of interstate trade merit commerce clause protection. . . . Hence, we reject the . . . suggestion that the state’s banning of ‘valueless’ out-of-state wastes . . . implicates no constitutional protection.” Id. at 622.
label contravene most notions of common sense, but it also contributes to a deeper sense of injustice being effected by the courts. This sense of injustice arises from the perception that the courts are basing their restrictive holdings on an entirely irrational premise. Thus, the constitutional doctrines courts rely on to prohibit the states from regulating against the importation of out-of-state garbage seem equally irrational because they too are based upon this unsound premise. Furthermore, after focusing their analysis solely on this premise, the courts often ground their decisions on the rationale that a state is shifting an unacceptable burden to out-of-state interests by denying access to its landfill resources. This rationale completely ignores the reasonable response that these same out-of-state entities equally shift a burden on the recipient state's citizens by making that recipient state the dumping grounds for the out-of-state citizens' garbage. Thus, the burden-shifting argument is also inconclusive and confusing if one focuses solely on garbage as an "article of commerce."

The courts should explicitly recognize that different conceptions of the "article of commerce" will more accurately reflect the true nature of the interests involved in our nation's landfill crisis. Accordingly, the Court should also analyze burdensome state regulations from the perspective that they restrict the interstate markets for landfill capacity and landfill services. The Supreme Court has indicated that these are proper focuses of analysis. However, the courts have not structured their analysis along those lines. The courts should thus recognize that all three definitions of the "article of commerce" are potentially involved when a state prohibits importing out-of-state garbage. By adopting these more focused definitions, the courts can significantly improve the clarity of analysis and public acceptance of their discussions of the various interests which are at stake when a state regulates against out-of-state entities in this area.

B. A Post-Garcia Analysis of States' Landfill Regulations

After Garcia, the courts' new role in the landfill regulation context is to assertively protect a state's interest in regulating against the consumption

146. Id. at 628.
147. "It is true that in our previous cases the scarce natural resource was itself the article of commerce, whereas here the scarce resource and the article of commerce are distinct." Id.
148. Additionally, the courts have sometimes mistakenly labelled landfill space as a "natural" resource. The only natural resource involved in landfilling is the actual underlying, raw land. When that land is then converted to serve a function for society, such as being a landfill, it is no longer in its natural state and ought not to be analyzed as such.

Thus, as the courts have acknowledged, there is no compelling need to address constitutional natural resource cases as distinctively important here. See Maine v. Taylor, 477 U.S. 131 (1986); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982); Hughes v. Oklahoma, 441 U.S. 322 (1979); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). But see Anson & Schenkkan, supra note 67 (arguing for a per se application of the market participant doctrine to all of a state's natural resource regulation).
of its landfill space by out-of-state interests. Also, Garcia significantlybridled the extent of the courts' balancing analysis because they cannot
effectively balance the competing interests involved in this area. As a result
of these changes, it should be significantly easier for states to regulate the
interstate solid waste disposal market as it pertains to the depletion of their
existing landfill capacity.

1. Socialization Regulations and the Market Participant Doctrine

Since 1978, the state regulations that have been the most successful at
avoiding the City of Philadelphia's definition of garbage as an article of
commerce are those which establish the state's activity as falling under the
market participant doctrine. Since Garcia did not eliminate the doctrine,
these regulatory attempts have largely been, and should continue to be,
successful. As one author has noted, over eighty-one percent of the nation's
landfills are owned and operated by the state or local government. Thus,
the implications of this application of the market participant doctrine are
quite significant.

A state can take advantage of the market participant doctrine in two
important ways. The first is to socialize the state's landfill industry. In
LeFrancois v. Rhode Island, for example, Rhode Island monopolized the
landfill industry operating within its borders. It then prohibited any disposal
of out-of-state waste in state-owned landfills. The district court upheld the
regulation as a valid exercise of the state's powers under the market
participant doctrine. The only major twist in the court's analysis was to
distinguish between the market for landfill sites and the market for landfill
services. The significance of this distinction is that if the state's actions
were characterized as "hoarding a resource"—landfill sites—it could still
face liability for federal antitrust violations, even if the state was protected
from dormant commerce clause scrutiny. By focusing on landfill services
and emphasizing that the state had not prohibited out-of-state interests from
purchasing and operating their own landfill sites within the state, the state
was able to avoid both commerce clause scrutiny and antitrust allegations.

149. See generally Swin Resource Sys. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989),
(S.D.W. Va. 1987); LeFrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987); Evergreen
(1987); Shayne Bros. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984); County

150. Pompar, supra note 2, at 1311 ("[T]he practical impact of these [cases] is to let the
exception swallow the Philadelphia v. New Jersey rule.").


152. Coenen, supra note 70, at 461 n.383. See, e.g., LeFrancois, 669 F. Supp. at 1211
(arguing that the relevant market is in neither refuse nor land, but rather in the services
rendered in disposing of garbage).
States could also benefit from the market participant doctrine by substantially subsidizing, instead of monopolizing, privately owned landfill facilities. The state would thereby make itself a silent partner to an entity that is participating in the landfill market. By investing its tax revenue dollars in that partnership with the expectation of an investment return, the state, too, would be participating in the market. As a result, it could set the partnership's policies regarding the entities with which it will do business. This approach under the market participant doctrine has yet to be tested. Nevertheless, if the proposal withstands judicial scrutiny, the market participant doctrine will allow the state to enact out-of-state discriminatory policies and preserve remaining landfill capacities for its own citizenry. However, like the first approach, this scheme would face public resistance—resistance to governmental intervention in this market and resistance to the vast expenditures of state revenues necessary to implement these schemes.

2. Resource Recovery Regulations

Another type of state regulation which would rely primarily upon the market participant doctrine for its protection is state-enacted recycling and resource recovery programs. For example, such programs might require all landfills to accept only solid waste that has first been separated as "true waste" through an effective recycling process. This requirement would facially apply evenhandedly to both in-state residents and out-of-state entities. Although the law would burden interstate commerce under the dormant commerce clause, the Supreme Court has affirmed the constitutionality of such regulations. In *Minnesota v. Clover Leaf Creamery Co.*, the Court held that a state regulation which prohibited the sale of milk in plastic bottles was a valid regulation. Because the regulation applied evenhandedly, and because the state had legitimate state interests in protecting the environment, conserving resources, and easing solid waste disposal problems, the fact that it burdened interstate commerce did not render the regulation constitutionally impermissible. Also, in *City of Philadelphia*, the Court stated that "it may be assumed... that New Jersey may pursue [similar legitimate] ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." The establishment of recycling and conservation programs is only the first step in my analysis under this regulatory scheme. The second step is to

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154. 437 U.S. at 626 (emphasis in original).
155. It is also helpful to recognize, as was implicit in *Reeves, Inc.*, that "states are people—people who have banded together." Coenen, supra note 70, at 422. As people, they are endowed with the right to engage in activities that allow them to accumulate property. In this regard, state governments are merely representational institutions that embody the interests
recognize that by enacting a statewide recycling and conservation regulation, the state is actually creating a resource—extra landfill capacity. For example, suppose the citizens of a state consume ten units of landfill space each year prior to the enactment of a recycling program. After a recycling program is operating, the state consumes only four units of landfill space per year. By engaging in these recycling and conservation efforts, the state—acting through its entire citizenry—has actually created six extra units of landfill capacity. This extra landfill space is the "end product of a complex process whereby... human labor" was expended in acquiring it.\textsuperscript{156} Under Reeves, Inc. this state would be entitled to dispose of that state-created resource however it desires because of the market participant doctrine's protection from dormant commerce clause scrutiny. Accordingly, the state could enact discriminatory regulations to ensure that its own solid waste disposal needs were met first.

The Court explicitly recognized the validity of this theory in Sporhase v. Nebraska.\textsuperscript{157} In Sporhase the state enacted a regulation to preserve its diminishing supplies of scarce groundwater. The regulation also prohibited the exportation of its groundwater to other states unless the recipient state had a "reciprocal agreement" allowing Nebraska to import water from the recipient state. Nebraska's regulatory scheme was challenged on the ground that other conservation provisions contained therein, which applied "even-handedly" to all interests, were "undue burdens" on interstate commerce. The Court rejected the rationale of this challenge to these conservation provisions: "[T]he continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."\textsuperscript{158} Thus, the Court did not merely reject the "undue burden" argument, but it also recognized the validity and propriety of the market participant theory here.\textsuperscript{159} Although the Court did not directly address the market participant theory and indeed invalidated the statute on

and rights of its citizenry. When the state government requires its constituency to engage in or abstain from a certain activity, it is essentially imposing those requirements upon itself. Accordingly, when the state enacts recycling and resource recovery regulations, it is imposing those resource recovery requirements upon itself.

\textsuperscript{156} Reeves, Inc. v. Stake, 447 U.S. 429, 444 (1980). The "costly" element of the human labor does not have to be measured in mere dollars and cents. The citizens have incurred other economic costs by forgoing the hassle-free solid waste disposal methods utilized before the recycling regulations were enacted.

\textsuperscript{157} 458 U.S. 941.

\textsuperscript{158} \textit{Id.} at 957 (citing Reeves, Inc., 447 U.S. 429).

\textsuperscript{159} The initiation of this theory into constitutional doctrine would have the positive effect of encouraging states to enact conservation and recycling programs since they would be able, through property rights, to retain the benefits of public goods which they have created. This result would be a significant development in our nation's struggle to reverse the detrimental effects of its past treatment of the environment.
other grounds, this rationale would apply to the "publicly produced" good of landfill space—a good created when a state undertakes conservation and recycling efforts in order to preserve its landfill capacities.\(^{160}\)

3. Facially Discriminatory Regulations

In 1986, the Supreme Court decided *Maine v. Taylor*.\(^{161}\) This case is significant because it is the first time the Court upheld a purely discriminatory state regulation\(^{162}\) under the dormant commerce clause and because it is a dormant commerce clause case decided after *Garcia*. The Court found the regulation to be constitutionally permissible because the discrimination was "justified by a valid factor unrelated to economic protectionism."\(^{163}\) Thus, the Court held that discriminatory regulations are constitutional if they "serve[] a legitimate local purpose, and the purpose is one that cannot be served as well by available nondiscriminatory means."\(^{164}\) This is a significantly different standard than that applied by the Court in *City of Philadelphia* where the Court held that it would apply "a virtually per se rule of invalidity" whenever discriminatory legislative means were involved.\(^{165}\)

When a state enacts a discriminatory regulation prohibiting out-of-state consumption of its landfill capacity, the Court has consistently recognized that the state has "legitimate local interests" in protecting the state's environment and preserving the state's resources.\(^{166}\) With *Maine*, the Court has demonstrated its willingness to aggressively protect these state interests in accordance with its modified role after *Garcia*. Under the *Maine* holding, the Court will only invalidate a state regulation if the challenger can establish

\(^{160}\) Even if the courts were to find the market participant doctrine inapplicable under this theory, the substantial state interests involved would, under the modified dormant commerce clause analysis, outweigh the national unity interests because "obviously, a state that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of [its resources] out of the state." *Sporhase*, 458 U.S. at 955-56. Since political and economic unity would not be implicated, the substantial state interests would undoubtedly be protected by the courts in the modified dormant commerce clause balancing analysis.

\(^{161}\) 477 U.S. 131.

\(^{162}\) The state regulation explicitly prohibited the importation of all species of live baitfish from out-of-state interests. *Id.* at 133.

\(^{163}\) New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988) (restating *Maine* in an overview of the Court's dormant commerce clause analysis as it was changed by that case).

\(^{164}\) 477 U.S. at 138.

\(^{165}\) *City of Philadelphia*, 437 U.S. at 624.

\(^{166}\) *Id.* at 626 ("[W]e assume New Jersey has every right to protect its residents' . . . environment."); *Clover Leaf Creamery*, 449 U.S. at 471 ([T]he states have legitimate local interests "[w]hen legislating in areas of legitimate local concern, such as environmental protection and resource conservation."). The weight of the state's interest is substantially increased when there is a crisis because of scarcities in the availability of the resources involved. See, e.g., *Sporhase*, 458 U.S. 941; *Reeves, Inc.*, 447 U.S. 429.
that there are no other reasonable purposes for the regulation other than "economic protectionism."\textsuperscript{167}

In \textit{Maine}, the regulation's legislative history demonstrated that there were clearly economic protectionist motives behind the regulation.\textsuperscript{168} However, the Court entirely discounted this fact by reasoning that despite this purpose, "there is little reason \ldots to believe that the legitimate justifications the State has put forward for its statute are merely sham[s] or 'post hoc rationalizations.'"\textsuperscript{169} Under this analysis, once the state asserts plausible legitimate interests, the challenger has the burden of proving them to be "shams or post hoc rationalizations." Significantly, though, Maine's asserted interests in protecting the environment and preserving its resource of domestic baitfish were particularly weak in this case.\textsuperscript{170} As the Court admitted, the state's interests could "ultimately prove to be negligible" because the state's arguments—that the importation of live baitfish from foreign waters threatened their own domestic resources and environment—were based entirely on "imperfectly understood environmental risks."\textsuperscript{171} Nevertheless, the Court held that the state was not required "to sit idly by and wait until potentially irreversible environmental damage" had occurred from the importation of these foreign articles of commerce despite the lack of any evidence whatsoever\textsuperscript{172} that they \textit{truly} threatened the domestic

\textsuperscript{167} Indeed, if the plaintiff can establish such a solitary motive, then the national unity interests would outweigh the state's sovereignty interests. Hence, the Court would be justified in striking down such a regulation under the modified dormant commerce clause. See also \textit{Healy v. Beer Institute, Inc.}, 491 U.S. 324 (1989) (citing \textit{Limbach}, 486 U.S. 269; \textit{Maine}, 477 U.S. 131; \textit{Sporhase}, 438 U.S. 322) ("[T]his Court \ldots [will] strik[е] down state statutes that clearly discriminate against interstate commerce \ldots unless that discrimination is demonstrably justified by a valid factor unrelated to economic protection." (emphasis added)). The \textit{Healy} Court struck down a state statute primarily on the grounds that it regulated interstate commerce activities "wholly outside its border." \textit{Id.} at 337. The Court further grounded its decision in the rationale that because the state had advanced no neutral justifications for the discriminatory legislation and because there was \textit{only} the economic protectionist purpose the statute could not withstand dormant commerce clause scrutiny.

\textsuperscript{168} \textit{See Maine}, 477 U.S. at 149. [We] can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, homegrown bait. There is also the possibility that such an industry could develop a lucrative export market [for us in our] neighboring states.

\textit{Id.} (quoting Baitfish Importation: The Position of the Maine Department of Inland Fisheries and Wildlife, App. 294, 309-10).

\textsuperscript{169} \textit{Id.} (quoting \textit{Hughes}, 441 U.S. at 338 n.20).

\textsuperscript{170} Shields, \textit{Maine v. Taylor Natural Resource Statutes Against the Commerce Clause or When Is a Hughes Not a Hughes But a Pike?}, 29 Nar. Res. J. 291, 299-300 (1989) ("Maine did not uphold its burden of proof. Maine did not prove that the importation \ldots would damage its [resources], it only conjectured possibilities. \ldots Allowing conjecture to undermine commerce clause scrutiny may create special dispensation for environmental regulations.").

\textsuperscript{171} \textit{Maine}, 477 U.S. at 149 (emphasis added).

\textsuperscript{172} \textit{Id.} For example, the state first alleged that the imported baitfish carried a parasite
environment. Thus, it will be extremely difficult for an out-of-state entity to ever meet its burden of proving that the regulating state’s interest are merely “shams or post hoc rationalizations.”

By upholding Maine’s purely discriminatory regulation on the ground that it was based on legitimate (yet entirely unsubstantiated) claims, the Court significantly changed the degree of scrutiny it will exercise in this “tier” of dormant commerce clause analysis. This change is in accord with this Note’s thesis that Garcia’s federalism principles and political process structure significantly modified the courts’ role in the dormant commerce clause to that of assertively protecting states’ interests. After Maine and Garcia, a state need only assert interests that are plausible and unrelated to economic protectionism in order for its regulation to be upheld. While these assertions must be plausibly related to the regulation, the state need not substantiate them. The plaintiff has the burden of proving that the regulation was enacted for the sole purpose of economic protectionism. This is a difficult burden because the plaintiff must disprove the state’s other plausible interests which are embodied in the regulation and, in the case of environmental regulations, which the Court has already recognized as legitimate.

The Maine analysis applies to discriminatory landfill regulations. After Maine and Garcia, the courts should uphold a state regulation which prohibits out-of-state solid waste because the recipient state has legitimate local interests in prohibiting that out-of-state garbage and landfill consumption. The Court has consistently acknowledged the legitimate local interests of environmental protection and resource conservation which strongly support these regulations. Furthermore, the courts’ primary role after Garcia is to protect these interests. Thus, a plaintiff challenging a state regulation which prohibits out-of-state garbage will not be able to overcome these state interests and convincingly establish that the nation’s unity interests are truly foreign to its own waters. The parasite would apparently harm certain species of domestic baitfish. However, Maine could not prove that this harm would occur because there was absolutely no evidence to support this contention. The state also was unable to prove that the parasites were not already in their own waters because out-of-state baitfish could easily swim into Maine’s waters. Finally, there was only one particular type of baitfish species which was even alleged to carry the parasites. However, the regulation prohibited the importation of all baitfish. Again, the Court overlooked this and accepted the state’s argument that this “threat” was significant enough to justify an absolute embargo against all species of baitfish.

173. In addition to the Maine and Healy decisions, the Court has only considered one other facially discriminatory state regulation in the dormant commerce clause context after Garcia. See Limbach, 486 U.S. 269. The Limbach regulation was struck down. However, the Court was justified in doing so not only because the regulation simply levied a tax against out-of-state entities, but also because the regulation’s clear purpose was pure economic protectionism. Thus, the national unity interests clearly outweighed the state’s interests involved in that case.

174. I choose not to use the phrase “rationally related” only because that term implies a constitutional standard where the Court will not scrutinize the regulation’s asserted interests at all. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964). I do not believe that to be true in these cases.
threatened because economic protectionism is the sole purpose of the regulation. Accordingly, the regulations should be upheld by the courts.\textsuperscript{175}

**CONCLUSION**

\textit{Garcia} fundamentally changed the judiciary's role in the dormant commerce clause analysis. Although \textit{Garcia} specifically addressed an affirmative commerce clause situation, the principles and political process theory structure adopted there have sweeping implications for all federalism issues involving interstate commerce. As part of its holding, the \textit{Garcia} Court reserved an important role for courts when the political processes are not operating effectively. In these situations, the courts are to assertively protect states' interests. Because the dormant commerce clause situation represents such an occasion, the courts now have an obligation to intervene to protect states' interests in the dormant commerce clause factor-balancing analysis. The implications of this theory are far-reaching. As applied to state regulations that prohibit the importation of out-of-state waste, courts should recognize their modified roles under this theory and uphold such regulations as constitutionally legitimate attempts to protect the rapidly diminishing resource of sanitary landfill space.
