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The Burger Court, The Commerce Clause, and The Problem of Differential Treatment

EARL M. MALTZ*

The question of the extent to which the commerce clause by its own force acts as a check on state power has been a prolific source of litigation since well before the Civil War.1 At a minimum, states have generally been required to treat commerce from out-of-state in the same manner as that originating in-state. This article will examine the Burger Court's treatment of state laws which have differential impacts on in-state and out-of-state commercial interests.

FACIAL DISCRIMINATIONS

Both facial and intentional discriminations have, with few exceptions,2 historically been constitutionally suspect.3 Boston Stock Exchange v. State Tax Commission4 is a classic case of the type of discrimination which the commerce clause prohibits. The case dealt with a New York tax on securities transactions. The tax was applicable to a transfer of securities if any one or more of five taxable events took place within the state; for transactions involving sales, the rate of tax was determined by the selling price per share.5 Prior to 1968, a transaction involving a sale and transfer of stock in New York was treated the same as an in-state transfer arising from an out-of-state sale; however, in that year the tax was amended so that nonresidents of New York were afforded a 50% reduction in the rate of tax for transactions involving in-state sales and

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2 See text at notes 75-116, infra.


limiting the total tax liability for any taxpayer on a New York sale to $350. Obviously, where the transfer of stock was to take place, the amendment made it more advantageous to have the sale of stock made on the New York Stock Exchange than on, for example, the Boston Stock Exchange. One of the avowed purposes of the amendment was "to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock."  

Applying the fundamental principle that "[n]o State may, consistent with the commerce clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business,'" the Court struck the amendment down as unconstitutional. It rejected the argument that the amendment should be validated because it was enacted merely to "neutralize" the competitive advantage that the existence of the New York transfer tax gave to other states which had no such tax. This argument was based on the cases which have upheld imposition of compensating use taxes for goods bought out-of-state where the same good would be subject to a sales tax if bought in-state. The Court reasoned that in the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase would make the choice without regard to the tax consequences, since he would have to pay the same amount of tax no matter where he bought the goods. In Boston Stock Exchange, on the other hand, the intention and almost certain effect of the 1968 amendments was to influence the seller of stock to consummate his transaction within New York.

The Burger Court dealt with the problem of facial discrimination in a different context in Great Atlantic & Pacific Tea Co. v. Cottrell. There, Mississippi had a regulation which prohibited the sale of milk processed out-of-state unless the state of origin accepted milk processed in Mississippi on a reciprocal basis. The plaintiff maintained a milk processing plant in Louisiana and wished to sell milk processed there in Mississippi. Although the processing plant met sanitation requirements which were substantially equivalent to those imposed by the state of Mississippi on its own producers, the milk was barred from Mississippi markets because Louisiana had no reciprocity agreement with Mississippi.

On its face, the Mississippi regulations discriminated against out-of-state milk processors; out-of-state milk which met the standards required

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11 Id. at 367.
12 Id. at 369-70.
of that processed in-state was barred from the market unless an additional condition was met. Indeed, as the Court noted, the regulations had the practical effect of excluding all Louisiana-processed milk from the Mississippi markets. Thus, following earlier cases which dealt with other discriminatory regulations of the sale of milk, the Court had little trouble striking down the statute under the commerce clause. In doing so, it rejected a number of arguments put forth by the state to justify its reciprocity requirement. First, Mississippi asserted that the requirement promoted the state interest in maintaining its health standards. The Court dismissed this argument as "border[ing] on the frivolous," noting that if there were a reciprocity agreement, milk processed in Louisiana could be sold in Mississippi even if it did not meet the Mississippi standards. Next, the state suggested that the reciprocity requirement enabled it to assure itself that the reciprocating states' standards are the "substantial equivalent" of those of Mississippi. Apparently, this position was based on the theory that Mississippi would simply refuse to sign a reciprocity agreement if the reciprocating state's standards were insufficiently high. The Court rejected this rationale on the ground that Mississippi had available a less discriminatory alternative; it could simply apply its own standards of inspection to milk from nonreciprocating states.

In addition to the rather standard health arguments, Mississippi also relied on the novel contention that its regulation, far from being prohibited by the commerce clause, actually advanced the free-trade policy inherent in the Constitution. This argument was two-fold. First, Mississippi contended that the reciprocity requirements helped to eliminate "hypertechnical" differences in inspection requirements between states which burden commerce by requiring costly duplicative or out-of-state inspections where for health purposes the standards were "substantially equivalent." While recognizing that "mutually beneficial objectives may be promoted by voluntary reciprocity agreements," the Court rejected this justification for the challenged regulation, holding that "Mississippi may not use the threat of economic isolation as a weapon to force sister states to enter into even a desirable reciprocity agreement."

Finally, Mississippi asserted that the reciprocity requirement was justified as a means of demolishing the economic barriers which Louisiana had erected to prevent the sale of Mississippi milk in Louisiana—barriers which allegedly themselves violated the commerce

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13Id. at 375.
15424 U.S. at 375-76.
16Id. at 375-77. See Dean Milk Co. v. Madison, 340 U.S. 349 (1951).
17Id. at 378-79.
18Id. at 379.
clause. Here the Court considered two cases. First, if Louisiana in fact unconstitutionally burdened the interstate flow of milk then the reciprocity requirement was unnecessary; Mississippi milk producers could directly vindicate their constitutional rights in court. And if, on the other hand, Louisiana was legitimately exercising its police powers to protect the health of its citizens, "Mississippi is not privileged under the commerce clause to force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk."21

FACIALLY NEUTRAL STATUTES WITH DISCRIMINATORY EFFECT

Boston Stock Exchange and Cottrell both were basically straightforward applications of well-established principles of commerce clause analysis.22 But determining whether other laws should be placed in the "discriminatory" category for purposes of commerce clause analysis is often not quite so simple, and may often be critical in deciding whether the law survives a constitutional challenge. Hunt v. Washington State Apple Commission23 provides an interesting case in point. Hunt involved a North Carolina statute which required that all closed containers of apples sold, offered for sale or shipped into the state display the applicable U.S.D.A. grade or none at all.24 The state of Washington, the nation's largest producer of apples, had developed its own inspection program, and required all apples shipped from the state to be tested and graded according to the state standards; the Washington state grades were widely accepted in the trade and each such grade was the equivalent of, or superior to, the comparable U.S.D.A. grade.25 A substantial portion of the Washington apples were packed in boxes preprinted with the applicable state grades and stored in refrigerated warehouses well before shipment. At the time of storage there was no way of determining which apples were to be shipped to North Carolina—the only state in the country to forbid the use of the Washington grades.26 Thus, if they were to ship apples to North Carolina at all, the Washington growers were faced with four rather unappetizing alternatives; they could either discontinue the use of preprinted boxes altogether, repack the apples bound for North Carolina in new boxes when the final destination was known, prepack the estimated number of apples to be sold to North Carolina sources in special boxes without the Washington grades, or

19Id.
20Id. at 379-80.
21Id. at 380.
25Id. at 336.
26Id. at 338.
obliterate the state grades on boxes bound for North Carolina, leaving the product with a damaged appearance. Because of understandable reluctance of the apple growers to pursue any of these courses of action, the Washington State Apple Advertising Commission challenged the North Carolina statute as violative of the commerce clause.

Affirming a district court decision striking down the North Carolina law, Chief Justice Burger's opinion for a unanimous court conceded that the multiplicity of inconsistent state grades under similar descriptive labels posed dangers of deception and confusion in the North Carolina market; further, the Court also recognized that the commerce clause left a "residuum" of power in the states to deal with problems of local concern and that this residuum was particularly strong when the state acts to protect its citizenry in matters pertaining to the sale of foodstuffs.

However, the Hunt court found that the challenged statute discriminated against Washington producers by raising their cost of doing business in North Carolina, due to the necessity of adopting a new marketing system for that state, while North Carolina growers, who had no independent grading system, were free to continue as before in the state; by stripping the Washington growers of the competitive advantage which they had earned through the use of their inspection and grading system; and finally by producing a leveling effect which "insidiously" operated to the advantage of North Carolina producers, since in essence each Washington State grade signified an apple that was equal or superior to an apple with the comparable U.S.D.A. grade. Since discrimination was present, the Court stated that the state had the burden of not only showing that the adverse effect on commerce was outweighed by the state interest in the regulation, but also that no less discriminatory alternative exists which was adequate to preserve the local interest.

The Court found that the challenged statute failed both tests. For a number of reasons, the North Carolina scheme was found to do "remarkably little" to prevent confusion and deception in the marketing

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27Id.
28The Washington State Apple Advertising Commission is a Washington state agency charged with the statutory duty of promoting and protecting the state's apple industry. The Commission is composed of 13 Washington apple growers and dealers, nominated and elected by their fellow growers and dealers. Its activities include the promotion of Washington apples in both domestic and foreign markets and scientific research into the uses, development and improvement of apples. See 432 U.S. at 337.
31Mr. Justice Rehnquist did not participate. See 432 U.S. at 354.
33Id at 353, citing Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).
of foodstuffs. First, Chief Justice Burger noted that the statute allowed
the marketing of closed containers with no grades at all, a practice which,
he asserted, magnified the problems of deception and confusion by
depriving the purchasers of such apples of all quality information what-
soever. Second, he noted that the statute’s primary efforts were not
aimed at consumers at large, but rather at apple wholesalers and
brokers—the group which, presumably being the most knowledgeable in
the area, was the least in need of protection. The Court also asserted that
because Washington grades in all cases are equal or superior to their
U.S.D.A. counterparts, a purchaser of apples marked with such grades
could only be misled to his benefit. Thus the Court appeared to dismiss
the means by which the state attempted to achieve a legitimate purpose
as not serving to further that purpose.36

Moreover, the opinion went on to suggest two less discriminatory alter-
natives. The state could either require the U.S.D.A. grade in addition to
any other state grades or alternatively, ban the use of any state grade
which, unlike Washington’s, could not be demonstrated to be equal or
superior to corresponding U.S.D.A. grades. While the Court conceded
that some possibility of confusion would remain, Chief Justice Burger
concluded that “it is the type of ‘confusion’ that the national interest in
the free flow of goods between states demands be tolerated.”37

As with many cases, one can challenge the weight which the Court ac-
corded various state interests in the balancing process in Hunt. Chief
Justice Burger appears to have undervalued the state interest in its
statute. His reliance on the fact that North Carolina allows apples to be
sold in ungraded cartons was misplaced. The North Carolina statute was
aimed not at the situation in which the buyer has no information, but
rather at the danger that the buyer will be misled by the information
which he does receive. If a box of apples is ungraded, the buyer will pay a
fair price based on the probable random distribution of apples; in effect,
he is gambling on the possibility that the apples will be better than the
normal random group, but he knows that he is gambling because of the
lack of information. The North Carolina statute, on the other hand, was
concerned with the potential confusion of a buyer confusing apples
marked “U.S.D.A. X” with those graded “Washington X.” Assuming
the latter denotes superior apples, North Carolina was trying to prevent
the buyer from paying an unfairly high price for U.S.D.A. X apples
because he assumes that they are the same quality as those graded
Washington X.

The Hunt Court also overemphasizes the fact that Washington grades
are all “equal or superior”; thus, the opinion argues that buyers of
Washington apples can only be deceived to their benefit by any confusion
with apples bearing only the U.S.D.A. grade. However, Chief Justice
Burger overlooked the possibility that because of the presence of the

36 432 U.S. at 353-354.
37 Id. at 354.
Washington grades in the marketplace, buyers of other apples bearing only the U.S.D.A. grades may pay an unfairly high price on the assumption that they are receiving apples equal in quality to those bearing Washington grades. Moreover, if there were a third grading system—hypothetically, that of Wisconsin—which used grades similar in form but each denoting apples superior to both the U.S.D.A. and the Washington system, then buyers might also overpay for Washington apples on the belief that they are receiving apples equal in quality to those bearing the equivalent Wisconsin grade. The only method by which these possibilities of confusion can be eliminated is by a requirement like that of North Carolina—that all apples bear a grade applied by a single, uniform system or bear no grade at all.

Even if one accepts Chief Justice Burger’s view of the factual situation, the Court’s assertion that the North Carolina law was discriminatory is crucial to its analysis, given the recognition of the state’s generally broad powers to control the conditions of sale of foodstuffs. The Chief Justice cites five cases in support of his contention that “[w]hen discrimination of the type we have found [in Hunt] is demonstrated,” the stringent standard of review he invoked in that case is appropriate.43

Two of those—Polar Ice Cream & Creamery Co. v. Andrews44 and Baldwin v. G.A.F. Seelig, Inc.45—can be quickly dismissed as situations in which bad motive was the deciding factor; both involved state statutes which were overtly intended to protect in-state producers from competition from out-of-state.44 While the Court in Hunt suggested that such a motive might have underlay the North Carolina apple regulations, the opinion explicitly disclaimed any reliance on the existence of such improper purpose.46 Each of the other three cited cases—Great Atlantic & Pacific Tea Co. v. Cottrell,47 Pike v. Bruce Church, Inc.48 and Dean Milk Co. v. Madison49—did involve regulations which allegedly had permissible purposes. In Cottrell, as already noted, Mississippi denied Louisiana milk producers the rights to sell milk in Mississippi unless Louisiana signed a reciprocity agreement allowing Grade A milk products from Mississippi to be sold in Louisiana; the only legitimate

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43 432 U.S. at 353.
45 294 U.S. 511 (1935).
46 “In Polar Ice Cream the Court struck down a complicated Florida regulatory scheme which required in-state processors and distributors of milk to accept its total supply of so-called “Class I” milk from local producers thereby excluding out-of-state milk producers from this market. In Baldwin, New York banned the sale of any milk bought outside the state unless the price paid to the producer was at or above the minimum which could legally be paid to in-state producers. The Court struck this scheme down, noting that “the avowed purpose of the [statute] is to suppress or mitigate the consequences of competition between the states.” 294 U.S. at 522.
47 432 U.S. at 352-53.
justification advanced was that the regulation was designed to assure the
distribution of healthful milk products to the people of Mississippi either
directly, or indirectly by guaranteeing that Louisiana maintained proper
inspection standards.4 In Bruce Church, at issue was an Arizona regula-
tion requiring that cantaloupes be packed in "closed standard
containers" within the state before being offered for sale; the state pur-
portedly feared that some growers were shipping inferior or deceptively
packaged produce, thus hurting the reputation of Arizona growers
generally, or, alternatively that superior Arizona cantaloupes were not
labeled as such.47 Finally, in Dean Milk—the seminal case in this
line—the city of Madison, Wisconsin forbade the sale of milk as
pasteurized unless processed and bottled at an approved pasteurization
plant within five miles of the city and also, in effect forbade the sale of
any milk in Madison unless the source of supply was within twenty-five
miles of the city; as in Cottrell, the asserted purpose was to ensure that
sanitary milk was being sold in the city.48

However, in each of these cases, out-of-state actors were disadvantaged
even if they met the relevant standards set by the jurisdiction. Thus, in
Cottrell and Dean Milk, out-of-state producers which processed milk in
the same manner which would allow producers in Mississippi and Mad-
dison to sell milk in their respective jurisdiction would nonetheless be for-
bidden to sell their milk solely because the location of their processing
plants. Similarly, a California packaging plant which used the same
packaging methods which would be approved if used by an Arizona plant
in Bruce Church would nonetheless not be an acceptable packager for
Arizona cantaloupes—again solely because the plant was out-of-state.49

The situation in Hunt was quite different; any Washington apple pro-
ducer which met the same packaging standards which would be
acceptable for a North Carolina producer could sell Washington apples in
North Carolina. The out-of-state producers were thus not arguing that
they were being discriminated against because of their location, but
rather that they were "discriminated" against because it was uninten-
tionally more inconvenient (or disadvantageous) for them than for in-
state producers to meet the uniform standards imposed.50

4See 424 U.S. at 370-378.
4See 397 U.S. at 142-143.
4See 340 U.S. at 353-354.
"The district court also relied on Best & Co. v. Maxwell, 311 U.S. 454 (1941) and Min-
Holshouser, 408 F.Supp. 857, 860 (E.D.N.C. 1976) (three-judge court). In Best, the court
struck down as discriminatory a tax of $250 "on every person or corporation, not a regular
retail merchant in [this] state, who displays samples in any hotel room rented or occupied
temporarily for the purpose of securing retail orders." See 311 U.S. at 455. In Barber, a
statute requiring all animals must be inspected in Minnesota if fresh meat were to be sold
in the state was invalidated under the Commerce Clause. In both cases, as in Dean Milk,
the statutes on their faces discriminated on the basis of location.
motive, disparate racial impact insufficient to trigger strict scrutiny under equal protec-
tion clause).
Although not cited by the Court, the prior case which most closely approximated Hunt is Breard v. City of Alexandria. Breard dealt with a city ordinance which prohibited door-to-door solicitation by vendors unless the occupant being solicited had previously invited the vendor to his home. The Court seemed to acknowledge that the ordinance had its primary effect on nonlocal merchants, noting that the local retail competitors generally operated from stores. Nonetheless, the Court upheld the ordinance against a commerce clause challenge, holding that the ordinance was a valid exercise of the police power and that there was no cognizable discrimination against interstate commerce.

The parallels between Breard and Hunt are striking. Both cases involved statutes, neutral on their face which prohibited certain marketing techniques. Further, in both cases, the prohibitions tended to favor local interests because they had not adopted the prohibited practices while these practices were an integral part of the techniques employed by out-of-state competitors. Nonetheless, the cases reach opposite conclusions on the question of whether the situations involve discrimination for purposes of commerce clause analysis.

Subsequent to Hunt, the picture was further clouded by the Court’s decision in Exxon Corp. v. Governor of Maryland. That case involved a Maryland statute which was enacted after the oil crisis of 1973. A state government-conducted survey indicated that during the gasoline shortage, oil producers and refiners had given preference to stations which they themselves owned over dealer-owned service stations. In response to these findings, the state legislature passed a statute forbidding any producer or refiner of petroleum products from operating any retail service station within Maryland and requiring each such refiner and producer to extend all “voluntary allowances” uniformly to all service stations which it supplied. This law was challenged as, among other things, being an unconstitutional discrimination against interstate commerce.


Id. at 639. See also id. at 647-48 (Vinson, C.J., dissenting).

Id. at 641.

Id., at 636-38 (by implication).


Some commentators have suggested that the differing results in Dean Milk and Breard are based in the Court’s perception that the state interests in the latter were more weighty in the former. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 260 (1978). However, this theory simply ignores the Court’s apparent conclusion that a less stringent standard of review was appropriate in Breard because, unlike Dean Milk, the challenged regulation was neutral on its face. See 341 U.S. at 637 (by implication).


See id. at 2211.


Those challenging the statute also argued unsuccessfully that even if non-discriminatory the statute was an unconstitutional burden on commerce; that the statute
Justice Stevens’ opinion for the Court made short work of this contention, notwithstanding that almost all of the excluded dealers were out-of-state companies. He argued that the Maryland law was not discriminatory because it neither created a barrier to the flow of interstate goods, prohibited such a flow, placed any added costs on such goods, nor distinguished between in-state and out-of-state companies in the retail market. Noting that independent dealers were not given any advantage over similarly situated out-of-state dealers, the Court distinguished Hunt on the ground that in the latter case “the challenged state statute raised the cost of doing business for out-of-state dealers, and in various other ways, favored the in-state dealer in the local market.”

As Justice Blackmun noted in dissent, the fact that some out-of-state dealers—those who did not operate oil refining or producing facilities—could still operate in Maryland does not adequately distinguish Exxon from Hunt. All out-of-state producers were not disadvantaged in the latter; only those which used distributors located in states which had grading systems different from that of the U.S.D.A. suffered at all from the North Carolina statute. Similarly, Justice Stevens’s argument that Hunt was inapplicable because there was no showing of increased cost to out-of-state producers in Exxon is also unconvincing; the effect upon the merchants excluded in the latter—total exclusion from the affected market—is far more serious than a mere increase in the cost of doing business.

Thus, if Hunt and Exxon are to be satisfactorily reconciled it must be on the basis of a footnote in the latter in which Justice Stevens suggested that there was no discrimination in Exxon because, unlike Hunt, there would be no diminution of the share of the Maryland market possessed by goods from out-of-state. But this distinction makes little sense in terms of the policies underlying the commerce clause. One purpose of this clause was to prevent states from protecting their local commercial interests from competition from out-of-state interests; such protection can be accomplished by excluding out-of-state competitors themselves as well as by erecting barriers to the importation of goods. Thus, this distinction also seems insubstantial.

violated the Due Process Clause of the Fourteenth Amendment; and that the state law was invalid because it conflicted with federal antitrust laws.

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See 437 U.S. at 125-29.

See 437 U.S. at 137-39 (Blackmun, J., dissenting).

437 U.S. at 126.

Id.

See 437 U.S. at 147 (Blackmun, J., dissenting).

In Hunt, although growers from thirteen states marketed apples in North Carolina, only seven employed grading systems different from that established by the U.S.D.A. See 432 U.S. at 349.

See 437 U.S. at 126-27 n.16.

Cf. e.g., Hicklin v. Orbeck, ___ U.S. ___ (1978) (Privileges and Immunities Clause violated by requirement that all Alaskan oil and gas leases, easements or right-of-way permits for
Given the apparent inconsistency between *Hunt* on the one hand and *Breard* and *Exxon* on the other, the question becomes which approach is more appropriate in commerce clause analysis. The strongest argument for the intrusive standard of review employed in *Hunt* is based on the realities of the political process. One of the justifications for deference to state legislature in such situations is that the in-state producers or marketers will act as a political check, preventing the legislature from unduly burdening commerce. Thus, for example, in *South Carolina Highway Dept. v. Barnwell Bros.* the Court applied a very lenient standard of review in upholding South Carolina's width and weight restrictions on trucks, notwithstanding that these restrictions excluded 85 to 95 percent of the trucks in interstate commerce. The Court relied in part on the idea that in-state trucking interests would act as a brake on the state legislature, insuring that unreasonable restrictions were not imposed.

Implicitly, *Breard* also placed some reliance on the concept of the political check. Unlike the situations such as *Dean Milk*, where the challenged ordinance by its terms only affected non-local producers, the potentiality for such a check does exist whenever, as in *Breard* and *Hunt*, a regulation limits the activity of local business people as well as outsiders. But where a regulation, while neutral on its face, prohibits practices in which only nonlocal commercial interests are engaged, the political pressures from local interests are likely to be in favor of the restriction—especially where, as in *Hunt*, the prohibited practices tended to give the out-of-state interests a competitive advantage. Thus, the political "check" is reversed; rather than working toward free trade, it will tend toward the creation of commercial restrictions.

On the other hand, the deference shown in *Breard* and *Exxon* finds its greatest support in the concept of state sovereignty. The basic theory underlying American constitutional federalism is that the states bear the general responsibility for protecting the general welfare of their citizenry. In order to fulfill this mandate, the states have traditionally had broad discretion to regulate the conditions of commercial activity with their boundaries, as even the *Hunt* Court recognized.

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oil and gas pipelines, and unitization agreements contain preference for living Alaska residents over nonresidents; Toomer v. Witsell, 334 U.S. 385 (1948) (state may not charge higher fees to out-of-state fisherman for privilege of shrimping commercially).

*See also* Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (whether state tax discriminates against interstate commerce to be determined without reference to other states' systems of taxation).


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

*Id.* at 187.

*341* U.S. 622 (1951).

Of course, this authority must yield where its exercise conflicts with some legitimate Congressional action. But *Hunt* did not involve a conflict between the state and federal governments on a question of public policy; rather, basically the case was a dispute between the government of North Carolina and a Washington state agency over the most effective means of conveying to the buyer information on apples sold in North Carolina. Given that Washington has no general constitutional power or authority to prescribe conditions of sale in North Carolina, to hold as the *Hunt* Court that North Carolina must meet a heavy burden of justification simply because the hardships caused by its regulation fall unintentionally more heavily on out-of-state interests constitutes a significant intrusion on the concept of state sovereignty. It is at best questionable whether the general free-trade bias inherent in the commerce clause is sufficiently strong to support such an intrusion.

**EXCEPTIONS TO THE PROHIBITION AGAINST DIFFERENTIAL TREATMENT**

Despite the general rule against discrimination against non-domestic business, in some cases special limitations on out-of-state producers have been allowed. The classic cases involve limitations on the importation of diseased livestock. In *Mintz v. Baldwin*, for example, the Court upheld a New York regulation which prohibited the importation of cattle for dairy or breeding purposes unless the herd from which they had come was certified to be free from Bang’s disease by the chief sanitary official of the state of origin of the cattle. Similarly, in *Asbell v. Kansas*, the Court rejected a constitutional challenge to a Kansas law which prohibited the importation of cattle into the state except for immediate slaughter unless a state official had certified them as healthy. In both cases the commerce clause attack was rejected notwithstanding that the challenged enactment effectively restricted the flow of cattle into a state from outside while leaving domestic producers unaffected.

The Burger Court had occasion to consider the scope of the exception to the prohibition against disparate treatment created by these so-called "inspection" or "quarantine" laws in *City of Philadelphia v. New Jersey*. New Jersey law prohibited, with certain limited exceptions, the importation from out-of-state of any solid or liquid waste. Brushing aside claims that waste materials did not constitute commerce at all, Justice Stewart’s majority opinion saw the issue as whether the prohibition "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon in-

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*289 U.S. 346 (1933).*
*209 U.S. 251 (1908).*
*98 S. Ct. at 2534-35.*
terstate commerce that are only incidental." Since the expressed legislative purpose underlying the prohibition was the conservation of scarce landfill sites, the Court found the question of whether the basic motivation was economic or environmental to be irrelevant; rather it concluded that the New Jersey law violated the principle of nondiscrimination "[b]oth its face and in its plain effect." The quarantine cases were distinguished as situations in which the very movement of the banned goods raised the risk of contagion; by contrast, City of Philadelphia was viewed as a case where the harm caused by the waste took place only after its disposal, and that at that point, there was no distinction between domestic waste and that generated out-of-state.

Justice Rehnquist, joined by Chief Justice Burger, dissented. He noted that even if disposed of in landfills, solid waste still posed significant health hazards. Further, he argued that solid waste was as much a hazard in transit as at the disposal site. Finally, even accepting the possibility that solid waste could be transported safely, he saw as "pointless" any distinction between those goods whose very transport creates hazards and those which would be transported safely but whose disposal caused problems. Thus Justice Rehnquist found City of Philadelphia indistinguishable from the quarantine cases.

The majority and dissent differed sharply in their perception of the proper focus for the analysis of the commerce clause issue. Justice Rehnquist saw the importation of the waste itself as the overriding concern. If one accepts this position, then his conclusion seems inescapable. Like the diseased cattle in the quarantine cases, solid waste is an unwanted health risk. Moreover, in terms of the dangers against which the commerce clause was designed to protect, if only the waste itself is considered the New Jersey law posed less of a threat than the laws upheld in the quarantine cases. While one could picture an inspection law designed to protect a state's domestic cattle industry from out-of-state economic interests, it is hard to conceive of a state attempting to encourage domestic garbage production by banning outside competition.

But the majority did not see the main problem as the New Jersey statute's effect on the importation of waste; rather, Justice Stewart focused on the idea of the statute's acting as a restriction on out-of-state access to a New Jersey resource: sanitary landfills. Thus the New Jersey statute could not withstand commerce clause scrutiny for the same reasons that, for example, a state may not prohibit the export of

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8"Id. at 2536.
9"Id. at 2537.
10"Id. at 2538.
11"Id. at 2538-40 (Rehnquist, J., dissenting).
12"Id. at 2539 (Rehnquist, J., dissenting).
13"Id. at 2540 (Rehnquist, J., dissenting).
14"Id.
15"Id. at 2537.
natural gas.\textsuperscript{88}

But City of Philadelphia differs significantly from the cases\textsuperscript{89} on which the majority relied. There obviously will be no attempt to move the landfills out of New Jersey, as there is in most of the cases involving natural resources. Nor is there any distinction between the uses to which residents and nonresidents may put any given landfill; the statute only deals with the source of refuse, rather than differentiating among the residences of landfill owners. In such a context, Justice Rehnquist's argument retains considerable force; since New Jersey would no doubt prefer there to be no solid waste and no necessity for landfills, and the statute must be seen as an attempt to protect the state from an increase in health hazards stemming from out-of-state sources. Thus viewed, City of Philadelphia stands as a retreat from the general principles underlying the quarantine cases.

In sharp contrast to City of Philadelphia, Hughes v. Alexandria Scrap Corp.\textsuperscript{90} upheld a state statute notwithstanding the fact that on its face it treated in-state commercial interests more favorably than out-of-state interests. Hughes dealt with a Maryland statute which was designed to deal with the problem of disposing of vehicles which were abandoned in the state. The state legislature found that a number of bottlenecks existed in the course that a vehicle follows from abandonment to processing into scrap metal for ultimate reuse by steel mills; and such a bottleneck occurred in the junkyards of wrecking companies which tended to accumulate abandoned vehicles for the resale value of their parts.\textsuperscript{91} To remedy the situation, the state required that each Maryland wrecker desiring to keep abandoned vehicles on its premises obtain a license and pay a recurring fine for any vehicle of a specified age retained for more than a year.\textsuperscript{92} In addition, to enhance the profits earned by wreckers and others for delivering vehicles to scrap processors, the statute provided for a bounty to be paid by the state for the destruction by a licensed processor of any vehicle formerly titled in Maryland.\textsuperscript{93} When a licensed wrecker delivered the abandoned vehicle, the statute entitled the wrecker to share the bounty equally with the processor; otherwise the processor was entitled to retain the entire bounty. While wreckers had to be Maryland residents in order to be licensed, processors could be residents

\textsuperscript{88}See Pennsylvania v. West Virginia, 262 U.S. 553 (1921); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). \textit{See also} Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).


\textsuperscript{90}426 U.S. 794 (1976).

\textsuperscript{91}See 426 U.S. at 796.


\textsuperscript{93}See id., \textit{citing} Md. Ann. Code, Art. 66 1/2, §5-205 (Supp. 1975). At the time the suit was filed, the bounty was $16 per vehicle. 426 U.S. at 797 n.5.
of any state.\textsuperscript{44}

The \textit{Hughes} litigation focused on the documentation requirements for obtaining bounties for the destruction of inoperable vehicles more than eight years old ("hulks"). As initially enacted, the statute required no title documentation either on out-of-state or in-state scrap processors.\textsuperscript{45} In 1974 the program was changed to require title documentation from all processors of such hulks. However, while in-state processors had only to submit a document from the person who delivered the hulk certifying that person's rights to it and agreeing to indemnify the processor against third-party claims, in order to receive a bounty on a hulk an out-of-state processor had to supply either a certificate of title, a police certificate vesting title, a bill of sale from a police auction, or—if the hulk was obtained from a licensed wrecker—a so-called "Wrecker's Certificate"\textsuperscript{96} (essentially a clear title secured by following certain statutory notice procedures).\textsuperscript{97} The result was that a higher percentage of hulks flowed to in-state rather than out-of-state processors. The out-of-state processors challenged the disparate documentation requirements, alleging that they impermissibly interfered with the flow of bounty-eligible hulks across state lines, and thus ran afoul of the commerce clause.\textsuperscript{98}

A three-judge United States District Court struck down the 1974 amendments, holding that they created an impermissible burden on commerce.\textsuperscript{99} The Supreme Court reversed. Justice Powell's majority opinion\textsuperscript{100} stated that before the question of the extent of the burden on interstate commerce was considered, one first had to determine whether Maryland's amendment "was the kind of action with which the Com-

\textsuperscript{44}See \textit{id.} at 797.

In addition to licensed wreckers, at times processors received abandoned vehicles from the owners of the vehicles or from unlicensed wreckers who, rather than retaining abandoned vehicles for their spare-part value, tow such vehicles directly to processors. In order to ensure a constant supply of abandoned vehicles, processors were often willing to "rebat[e]" part of the bounty to even unlicensed wreckers. For example, the plaintiff in the \textit{Hughes} case regularly paid $14 of the $16 bounty to unlicensed suppliers. \textit{See} 426 U.S. at 797-98 nn. 4 & 5.

\textsuperscript{45}426 U.S. at 799. A participating processor did, however, have to meet statutory requirements relating to its storage area for vehicles, its records and books of account, and its processing equipment. \textit{id.} at 799, n.9, \textit{citing} Md. Ann. Code art. 66 \textsection 5-202 (Supp. 1975). In addition, out-of-state processors were required to maintain an "office" in the state, approved by the State Motor Vehicle Administration, \textit{id. citing} Md.A.R.R.\textsection 11.02.05.45.

\textsuperscript{46}The documentation requirements imposed on out-of-state processors of hulks were the same as those imposed on all processors with respect to vehicles which were not hulks. \textit{See} 426 U.S. at 798.

\textsuperscript{47}426 U.S. at 800-01 & n.10, \textit{citing} 1974 Md. Laws 465.

\textsuperscript{48}426 U.S. at 802. The processor also argued that the disparate documentation requirement violated the equal protection clause. The Court rejected this challenge. 426 U.S. at 810-14.


\textsuperscript{50}Six justices joined in the majority opinion. Justice Stevens also filed a concurring opinion. 426 U.S. at 814-17. Justice Brennan filed a dissenting opinion in which Justices White and Marshall concurred. \textit{id.} at 817-32 (Brennan, J., dissenting).
merce Clause is concerned.'"101 After reviewing cases in which the Court had struck down state actions as undue interferences with commerce, the opinion stated that

The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. There has been an impact upon the interstate flow of hulks only because, since the 1974 amendment, Maryland effectively has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland rather than take them outside the State.102

The majority concluded that "[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."103

Justice Brennan, in dissent, took a quite different view of the case. Rejecting the contention that the fact that Hughes involved a state subsidy was relevant under the commerce clause, he asserted that "a State's refusal for purposes of economic protectionism to purchase for end use items produced elsewhere is a facial and obvious 'discrimination against interstate commerce' that...the commerce clause by its own force prohibits...."104 Even assuming a legitimate state purpose, he would have required that the discrimination be struck down if there was less discriminatory alternative available.105 Because the case came before the Court in a summary judgment posture, Justice Brennan would have remanded for the development of a fuller factual record.106

There can be no doubt that there was facial discrimination between in-state and out-of-state processors in the Hughes case. Nonetheless, the majority upheld that statute, in effect creating a subcategory of state actions apparently immune from commerce clause scrutiny. The clash between the majority and dissenting opinions on this point graphically illustrates the tensions between competing principles of federalism which underlies commerce clause jurisprudence. Justice Brennan's opinion focuses on the principle that the concept of national unity requires that

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101426 U.S. at 805.
102Id. at 806 (footnote omitted).
103Id. at 810 (footnotes omitted). Justice Powell explicitly distinguished those cases in which a foreign corporation enters a state in response to private market forces and is then subjected to discriminating taxes or regulations. Id. at 810 n. 20.
105426 U.S. at 831. (Brennan, J., dissenting).
106Id. at 831-32 (Brennan, J., dissenting).
all producers have access to markets on the same terms—the principle which was ultimately decisive in *Hunt* and *City of Philadelphia*. But the dissent entirely discounts a countervailing principle of federalism that is basic to the constitutional scheme—the principle that the states remain sovereign (or at least quasi-sovereign). It is this latter concept which informed the Court's decision in *Exxon* and the dissenting opinion in *City of Philadelphia*.

*Hughes* implicates one of the most basic incidents of state sovereignty—that a state may limit its largesse to persons residing within its borders. While recent developments in equal protection law have limited each state's ability to discriminate among its residents, no case has held that a state which pays benefits to those within its own jurisdiction must also pay to those who reside elsewhere. Thus, for example, while *Shapiro v. Thompson* held that a state may not exclude recent arrivals for welfare benefits, the Court indicated in that case that insuring that recipients of welfare benefits were state residents was a legitimate state interest.

This theme was reemphasized in *McCarthy v. Philadelphia Civil Service Commission*. There a requirement that Philadelphia policemen reside in the city was challenged under the Equal Protection Clause. Despite the requirement's obvious impact on policemen's right to travel—their right to migrate and settle where they please—the Court upheld the regulation against constitutional attack. Similarly, in *Califano v. Torres* the Court was faced with a challenge to a provision of the Social Security Act which provided certain benefits to residents of

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107 This principle of federalism appears to have provided the major underpinning for Justice Stevens's concurring opinion. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) (commerce clause does not inhibit "a state's power to experiment with different methods of encouraging local industry"). See also *id.* at 822 n.4 (Brennan, J., dissenting).

Commentators have suggested a variety of possible justifications for the *Hughes* result. Some have argued that it may rest upon the theory that the commerce clause does not affect the "proprietary" as opposed to the "governmental" actions of the states. See, e.g., L. Tribe, *American Constitutional Law* 336 (1978); Note, 18 B.C. IND. & COMM. L. REV. 893, 910-18 (1977). See also American Yearbook Co. v. Askew, 409 U.S. 904 aff'd. Mem. 339 F. Supp. 719 (M.D. Fla. 1972) (three-judge court) (Summary affirmance of lower court decision relying on proprietary/governmental function distinction to reject challenge to Florida statute and regulations requiring that all public printing for state be done in Florida. Another suggested justification is the theory that the commerce clause is aimed primarily at maximizing consumer choice rather than producers' access to markets. See L. Tribe, supra, at 337; *The Supreme Court, 1975 Term*, 90 HARY L. REV. 56, 61-62 (1976). Finally, one commentator has suggested that some attempt might be made to justify *Hughes* on the theory that the commerce clause does not constrain state actions where "traditional state governmental functions" are involved. Note, 18 B.C. IND. & COMM. L. REV. 893, 918-20, *citing* National League of Cities v. Usery, 426 U.S. 833 (1976).


109 *Id.* at 634 (describing determination of residency of applicant for welfare as admittedly permissible state objective).


111 *Compare* Hicklin v. Orbeck, 98 S.Ct. 2482 (1978) (striking down requirement that private businesses give preference to residents of state).

112 435 U.S. 1 (1978) (per curiam).
the fifty states and the District of Columbia but not to residents of Puerto Rico. Reversing a district court holding that the exclusion of Puerto Rico impermissibly interfered with potential recipients, the Court stated that:

This Court has never held that the constitutional right to travel embraces any such doctrine, and we decline to do so now. Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any persons who had once resided there. And the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents.\textsuperscript{113}

Of course, neither Torres nor McCarthy dealt directly with commerce clause challenges. However, the similar considerations of federalism control both right-to-travel and commerce clause analyses.\textsuperscript{114} Indeed, if anything these principles have been seen as giving greater protection to the right to travel than to the free flow of commerce.\textsuperscript{115} To illustrate the applicability to Hughes of the principles underlying McCarthy and Torres, consider the following hypothetical. Assume that the only source for the element zinchronium is a mine in the state of Maryland. While there are a number of uses for the element, zinchronium is most valuable, and thus brings its highest price, for use in the manufacture of Maryland license plates (all other states make their license plates from tin). Further assume that Maryland has been buying its license plates from a Virginia manufacturer who specializes in zinchronium products. Thus zinchronium flows from Maryland to Virginia; license plates flow from Virginia to Maryland. Certainly there would be no constitutional objection to Maryland's deciding (for any reason) to cease buying plates and

\textsuperscript{113}Id. at 4-5 (footnote omitted).

One possible ground for decision that the Court might have adopted in Torres is that interferences with the right to travel to Puerto Rico should be governed by the more lenient standards applied to regulations of international as opposed to interstate travel. Compare, e.g., Zemel v. Rusk, 381 U.S. 1 (1965) (international travel) with e.g., United States v. Guest, 383 U.S. 745, 757-58 (1966) (interstate travel). However, Torres was decided on the assumption that, just as with interstate travel, there is a "virtually unqualified" constitutional right to travel between Puerto Rico and any of the 50 states of the Union. See 435 U.S. at 4 n.6.


instead, setting up a Department of License Plates in the state capitol to buy zinchronium and produce its own plates. Further, under *McCarthy* there is no constitutional impediment to Maryland limiting employment in the Department of License Plates to state residents.

If one substitutes unprocessed hulks for zinchronium and processed hulks for license plates, for commerce clause purposes the *Hughes* situation is exactly the same as the license plate hypothetical. Both cases involve a state subsidized market; both involve a change in state policy which effectively reallocates any profit from the state market to state residents from out-of-state producers; and both have the result of reducing the outflow of a raw material. The only distinction between the two situations is that in *Hughes*, the junkyard owners were independent contractors, working only part-time on state business, rather than full time state employees, as in the license plate hypothetical. However, this difference is irrelevant to any of the policies which underlie the commerce clause; certainly it makes no difference to the Virginia producer who is excluded from the market. Thus while the *Hughes* result may seem incongruous if viewed in terms of the commerce clause in isolation,\(^{116}\) the case seems perfectly in concert with the general principles which form the basis for the Constitution as a whole.

**CONCLUSION**

In dealing with cases involving laws with differential effects on interstate and intrastate commerce, it is entirely too easy to be beguiled by the simplicity of the formulation that discrimination equals automatic invalidation. But like many commerce clause problems, delicate accommodations between competing concerns of state sovereignty and national unity are often necessary to reach appropriate conclusions when such laws are challenged. At times—particularly in *Hughes*—the Burger Court has shown admirable sensitivity to these conflicting concerns in avoiding a jurisprudence based on mere mechanical recitation of sometimes inappropriate formulas. But in other cases, an apparent inability to come to grips with the relevant considerations has led to inconsistent results, as is demonstrated by *Hunt* and *Exxon*. Hopefully, future cases will resolve these inconsistencies and give coherence to this important area of constitutional jurisprudence.

\(^{116}\) See Note, supra n. 108, at 921-29.