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INTERSTATE EXPLOITATION AND JUDICIAL INTERVENTION

*Saul Levmore**

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ECONOMIC warfare among the fifty states must trouble even the most optimistic observer. In theory, "interferences" with free trade should not last long because the futility of aggression will often become apparent to the warring states. For example,¹ if Mississippi bars the sale of Louisiana milk because Louisiana refuses milk processed in Mississippi, the two states may come to recognize the advantages of free trade² and, in the absence of real health concerns,³ cease hostilities. In addition, Mississippi milk consumers may realize that despite the benefits to some in-state producers, they face higher milk prices because of the import ban. These resident consumers can then work through the political system to overturn the ban on Louisiana milk. In practice, however, the history of analogous tariffs and other obstacles to international trade⁴ suggests that some interstate commercial aggression will persist, and that intervention on behalf of commerce clause principles by some neutral agency is desirable.⁵ Moreover, even if an interference is eventually withdrawn, the harm it does while it survives may justify intervention to hasten its collapse.

There is even less room for optimism when an aggressive state can exploit a unique advantage it enjoys because of its location, history, or resources. Victimized states cannot retaliate as easily against such "exploitations," and all the residents of the aggressor state may gain by exploiting their advantage. Furthermore, if a number of states together enjoy an exploitable resource, they can

¹ See *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

² To the extent trade involves voluntary bargains it is an economically "efficient" activity. Free trade in the commerce clause area, however, sometimes refers to uniform national rules, in which case it may be efficient because state-imposed barriers are absent. It also may be inefficient because citizens are offered few real choices although there are numerous "suppliers" (i.e., states) and because jurisdictions have little reason to "compete" with one another for citizens' approval. See W. Oates, *Fiscal Federalism* 11-13 (1972); Regulation, Federalism, and Interstate Commerce 11, 96 (A. Tarlock ed. 1981).

³ 424 U.S. at 377 (noting that the state could apply its own standards of inspection to shipments from a nonreciprocating state instead of banning such trade).

⁴ C. Kindleberger & P. Lindert, *International Economics* 214-27 (6th ed. 1978) (suggesting that proliferation of international trade barriers despite limited net gains from such barriers derives from "biases in lobbying power").

⁵ This article develops themes concerning interstate economic tensions and relates these themes to a variety of cases and issues. It does not emphasize specific constitutional doctrines and language. Thus, the term "commerce clause" refers to general considerations of interstate economic activity, usually arising in the context of one state's imposing a barrier to interstate trade; the term is not necessarily limited to the commerce clause, either in its explicit or in its "dormant," or "negative," form.

join in pressing their advantage with little fear that victimized states will respond with a cartel of their own. Exploitations are thus most troubling because their likely persistence more seriously threatens the potential benefits of trade within a large and diverse nation.

The United States Supreme Court has most frequently based its response to interstate trade barriers on the "negative" commerce clause,⁶ yet its approach has been confused and chaotic.⁷ The Court has treated analytically similar barriers such as subsidies and taxes differently even though they may have the same effects on interstate commerce. Moreover, the Court has balanced local and national interests in reviewing some interstate barriers but has adopted more comprehensive rules that preclude balancing in reviewing other sorts of state actions.

The major purpose of this article is to show that the distinction between "interferences" and "exploitations" has descriptive and normative value in understanding the judicial response to interstate trade barriers. The distinction is descriptively useful because the Court has struck down exploitations with remarkable regularity and generally upheld state actions that lack exploitative potential. The distinction does not alone describe all the cases perfectly, however, because the Court has invalidated other state actions even though they also lacked exploitative potential. This article will explore the reasons for this mixed treatment of nonexploitative interstate trade barriers.

Part I considers the nature and advisability of intervention by the federal courts on behalf of free interstate trade. The discussion distinguishes the judicial role in this area from that in other constitutional contexts and describes the courts as surrogates of Congress in reviewing state-created trade barriers. Because such judicial intervention requires no more than the creation of federal common law, the courts should base their decisions on commerce clause principles rather than on other, less reversible, constitutional grounds.

The analysis in Part II contrasts "interferences" and "exploitations" and shows that while all forms of state-imposed barriers can

⁶ See Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 425 n.1, 426 nn.3-5 (1982).

⁷ See *infra* text accompanying notes 71-77, 82-86, 106-15, 141-43.

interfere with free trade, only some are capable of *exploiting* a monopolistic advantage at the expense of other states. Part III shows the normative and descriptive value of this distinction by applying it to the various forms of interstate barriers that the courts have considered.

Finally, Part IV explores one impediment in current law to explicit adoption of the suggested interference-exploitation distinction: the state action exemption in antitrust law. The article reinterprets the source of this exemption and argues that it be reformulated and restricted to state actions that do not pose the threat of interstate exploitation.

I. THE NATURE OF JUDICIAL INTERVENTION

There is a striking volume and variety of commentary on the proper role of the judiciary in defending free interstate trade.⁸ Although the various views are not strictly comparable because they focus on different forms of state-imposed interstate barriers, they have been characterized as reflecting either "process" or "value" perspectives.⁹ Process approaches emphasize the need for courts to review state laws that burden parties not represented in the local legislative process; value orientations support judicial intervention when, as a matter of substantive economic policy, the burdens on free trade imposed by a particular law appear to exceed the legitimate benefits derived from it.

Neither of these perspectives is satisfactory unblended with the other. Process arguments that focus on political underrepresentation may tell courts when to intervene but clearly not *what* to decide; the latter requires "value" considerations or other instructions.¹⁰ On the other hand, a result-orientation that emphasizes the

⁸ For a range of views see Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 *Yale L.J.* 219 (1957); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *Yale L.J.* 425 (1982); Kitch, *Regulation and the American Common Market*, in *Regulation, Federalism, and Interstate Commerce* 9 (A. Tarlock ed. 1981); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 *Wis. L. Rev.* 125.

⁹ Eule, *supra* note 8, at 438-43 (characterizing commentators in other areas of law and suggesting that similar dichotomy is present in dormant commerce clause).

¹⁰ This limitation of pure process arguments is often missed. Eule is disturbed by the court's balancing of interests and seeks to avoid a balancing requirement in his representation-enforcing approach. *Id.* at 441-42. He suggests measuring the disproportionality of a state action's impact, called the "outsider impact percentage" ("OIP"), and asserts that no disproportionality exists when the burden of legislation falls equally upon those within and

"value" of an open economy contains the implicit assumption that intervention is not necessary when the economic burdens of a state action fall almost entirely within the legislating state. Thus, no commentator suggests that courts consider intervening when faced with state regulation of certain occupational licensing or of a utility company operating solely within the state's borders,¹¹ even though such state actions may affect the country's economic well-being more than do most interstate trade barriers. Even the most value-oriented observer apparently assumes that in such cases the national interest does not conflict with local determination.¹²

The appropriate blend of judicial and legislative activity on behalf of free trade is no different from that in other areas in which subsequent legislative pronouncements may overrule common law. Until the legislative branch acts, courts do what they think wise, or, where possible, what they discern to be legislative policy. This approach to judicial review of interstate trade barriers is not novel.

without the state. *Id.* at 460-74.

This approach is problematic. In the first place, it too requires the balancing of "value" considerations because in determining whether alternative methods could accomplish the state's legitimate purposes, courts must necessarily consider and compare the values of the state's purposes and the foregone free trade. See *id.* at 473, 474, 474 nn.250-51. Furthermore, the OIP measure begs the question. Although impotent out-of-state residents and businesses are surely worse off when no in-state forces share their interests, the mere fact that a state's action burdens in-state and out-of-state interests equally guarantees nothing. If *all* the benefits of a state action remain in-state, then a state can profit at the expense of unrepresented out-of-state interests even if a majority of the burdens fall in-state. The real problem is that a state may consider the in-state costs and benefits, ignoring those that flow out of the state. Although the problem is one of degree, it is hardly solved by an unresponsive measure. In any event, Eule's calculation of the OIP measure sometimes ignores the in-state burdens of trade barriers. *Id.* at 461 (overlooking higher cost of financial services when out-of-state banks are excluded from the market and also failing to consider burden on employers unable to hire nonresidents).

Tushnet, *supra* note 8, on the other hand, realizes that process theories necessarily contain value judgments. His approach is logical in requiring judicial intervention on substantive due process terms when "no organized interest group appears to oppose inefficient [state actions]." *Id.* at 149. It therefore is simultaneously very optimistic about the wisdom of judicial intervention and quite pessimistic about the political process. In contrast, the approach in this article emphasizes Congress' ability to override all judicial decisions in this area. The interference-exploitation theme, however, ought to be useful to "process-oriented" readers who do not share the view of judicial intervention expressed in Part I.

¹¹ But see Tushnet, *supra* note 8, at 141-50 (arguing that substantive judicial review is appropriate whenever political accountability is seriously flawed).

¹² There are, after all, costs (including error costs) associated with judicial intervention and every reason to expect that those affected by the state's decision can demonstrate their potential burden to the state legislature as easily as to Congress.

Some twenty-five years ago, Professor Ernest Brown argued eloquently in favor of common-law judicial activism in support of an open economy:

[W]hen the limits that the federal system imposes upon its components are in question, when the centrifugal, isolating or hostile forces of localism are manifested in state legislation, the interests of union require that these factors be recognized and the judicial negative be interposed. It [is] hardly necessary to add what some [justices] have not always recognized—the Court might the more readily intervene against state legislation under a commerce clause challenge, since it would at most make what it believed a proper allocation of power, tentative and subject to reallocation by Congress; a negative in the name of substantive due process [is], however, presumably universal and final.¹³

Of course, the federal response to unwanted localism could be legislative. Congress could exercise its power to regulate interstate commerce to preempt most, if not all, fields where interstate barriers are erected.¹⁴ Victimized states, producers, and consumers might therefore seek congressional action to check interstate aggression. But what if Congress cannot focus its attention on the myriad local laws and practices that penetrate state borders in one way or another? In such cases, congressional action may eventually overturn an aggressive state law but only after considerable delay. Judicial intervention would restore the benefits of free trade more quickly.

One might view the federal judiciary then as a surrogate or agency¹⁵ of Congress instructed to protect the national interest by overturning those state actions which an attentive Congress would disapprove. This role requires that judicial decisions not be on inflexible and irreversible constitutional grounds. The argument for

¹³ Brown, *supra* note 8, at 220-21. See Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Colum. L. Rev. 547, 551-52 (1947).

¹⁴ L. Tribe, *American Constitutional Law* 238-42 (1978) (noting that the commerce power is limited by Congress' own internal political realities). Note that Congress can encourage nonuniformity among states and experimentation consistent with the federal system. See *infra* note 31.

¹⁵ See Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552, 1585, 1587 n.194 (1977) (noting that in reviewing state encroachments the judiciary "acts only as an intermediate agency between the state and Congress" and suggesting that a federal agency with expertise and a better sense of congressional wishes might be established to act in its stead); Dowling, *supra* note 13, at 558.

judicial activism is thus little more than a reference to the continuing attractiveness of the common law.¹⁶ That Congress could itself police interstate aggression strengthens, rather than weakens, the case for common-law judicial activism. If, compared to Congress' wishes, the federal courts prove overzealous in protecting free trade, insufficiently deferential to state interests and determinations, or simply inadequate in exploring and interpreting facts, then Congress can step in and use its commerce power to override the courts.¹⁷

II. INTERFERENCES AND EXPLOITATIONS: THE THEORETICAL FRAMEWORK

A. *How Exploitations Differ From Other Trade Barriers*

Consider, for illustrative purposes, State *E* that taxes a unique advantage that it enjoys—such as coal in Montana¹⁸ or stock trans-

¹⁶ There are, of course, many examples of laws that are created and applied by courts and modified by reviewing legislatures. Even when a state legislature or Congress has enacted a comprehensive statutory framework, the common-law approach retains vitality. Courts cannot always construe statutes according to their simple language both because statutes do not, despite their typical length, deal with every conceivable situation and because the legislature may intentionally adopt ambiguous language.

¹⁷ Of course, courts can do harm. Apart from the costs associated with litigation, misguided decisions will bring on the costs of legislative action as Congress acts to override the courts' errors. In justifying the legislative costs of reversing judicial intervention, the question is *not* whether courts are better than Congress at protecting the national interest but rather whether courts are more responsive to the national interest than are state legislatures.

In this regard, the constitutional and judicial posture toward multistate compacts is noteworthy. The compact clause of article I, § 10 of the Constitution, requiring congressional consent to a state's compacts and agreements with other states, can be interpreted to reflect the themes of this article. The compact clause may be an exception to the general rule that state actions affecting interstate commerce are reviewed by the federal courts and only occasionally by Congress itself; when an interstate compact is arranged, it is so likely to affect unrepresented interests that Congress is called in to review the arrangement at the outset. In actual practice, this review has been limited because the compact clause has been interpreted to require immediate congressional review only when the arrangement in question "would enhance the political power of the member [s]tates in a way that encroaches upon the supremacy of the United States." *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472 (1978). To the extent that "political power" in this statement really refers to economic power, the suggested interpretation of the compact clause is reinforced. There are, however, too few cases on the subject to characterize the judicial posture. A study of compacts reviewed by Congress and the lessons to be drawn from their approval or rejection is beyond the scope of this effort.

¹⁸ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

fers in New York,¹⁹ to cite but two examples recently reviewed by the Court—and State *S* that, much to the chagrin of other states, subsidizes an in-state product or industry. In a fundamental, unrecognized way, State *E*'s action threatens national economic welfare more than does State *S*'s, because State *E* may create a monopoly that generates "deadweight," or welfare losses. The essential evil of a monopoly is, of course, its limited output. A successfully collusive oil cartel, for example, cuts back on oil production to raise its members' profits, leaving some consumers with unsatisfied demand, although they are willing to pay more for the oil than the social marginal cost of supplying it.²⁰ A competitive market, in contrast, supplies goods to all users willing to pay the marginal cost of the good.

State *E*'s tax has many of the same effects as an agreement among producers in that state to raise their prices in concert by the amount of the tax. Thus, if the state contains a sufficient portion of the available coal, the state tax on coal may cause a decrease in coal production—and an increase in its price—to monopoly levels.²¹ The difference between state *E*'s tax and the private cartel's fixed price is that the state government, rather than the producers, directly receives the monopoly profit. The citizens of State *E* may broadly support the tax, however, because the state treasury can redistribute the monopoly profits and do so in such a way that all state residents would prefer the monopoly scheme.²²

This monopolization effected by a state's tax is only successful to the extent that competing sources in other states cannot take up the slack in production and provide the resource to users who are willing to pay more than its marginal cost. The extent of the ex-

¹⁹ *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

²⁰ B. Moore, *An Introduction to Modern Economic Theory* 167-68 (1973).

²¹ J. Henderson & R. Quandt, *Microeconomic Theory* 124-26, 220-21 (2d ed. 1971) (demonstrating the reduction of output that follows from a unit tax imposed on competitive and monopolistic firms).

²² Clearly, the more injured consumers are nonresidents, the less monopoly profits are needed to compensate the losers. The economically inclined reader might consider the relationship of consumer and deadweight losses to monopoly profits as a function of the demand curve and especially of the marginal cost curve (which yields smaller deadweight losses when it is steeper because the missing output would have been produced at greater cost). But a detailed, technical analysis of these variables would generate no surprises: with even a moderate fraction of consumers out-of-state (and not atypical cost and demand functions), the monopolist-state can exploit successfully as described in the text.

exploitable monopoly advantage therefore depends on aggregate in-state market power. This power may derive from natural resources, migratory patterns, industry entry barriers, geographic location, or a variety of other factors. Even if market power is divided among sources in several states, the potential for monopolistic exploitation still exists if all of those states impose similar barriers. In the Montana coal case, other coal-producing states actually have enacted similar severance taxes,²³ so that a real monopoly problem exists to the extent that other energy sources are inadequate substitutes for coal.

In contrast to state exploitation of monopoly power through limiting production at the expense of consumers in other states, consider State *S*'s support of its own production in a way that equally harms some economic interests in other states. A production subsidy encourages and expands output beyond presubsidy levels, avoiding the monopoly danger of limiting output. Even if State *S* enjoys a unique and exploitable advantage, it must limit output in order to effect monopolization. A subsidy, unlike a tax or regulation, is simply not such a limiting device, and is therefore unobjectionable on monopoly grounds. State *S* also cannot monopolize at the expense of other states unless it enjoys an exploitable advantage. If a state erects a barrier that does not pertain to a unique resource, its interference with trade is largely at its own expense, even if the barrier has the effect of limiting output. Just as in the Mississippi ban on Louisiana milk,²⁴ in-state interests, such as consumers burdened by the regulation, are likely to object to the interference.²⁵ Additionally, injured states may retaliate in a manner that eventually leads to the dismantling of all the barriers.²⁶ Perhaps more importantly, any surviving interferences may reflect unselfish local judgments about the need for government intervention in the marketplace.

²³ *Commonwealth Edison v. Montana*, 453 U.S. at 638-42 (Blackmun, J., dissenting) (noting the substantial fossil fuel resources held and taxes enacted by Montana, Wyoming, and North Dakota).

²⁴ *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

²⁵ The disadvantaged in-state interests also include those that pay taxes or other charges to finance the state support and those that compete with the product that the state subsidizes.

²⁶ No exploitable advantage is required for such retaliation.

B. Significance of the Distinction Between Exploitations and Interferences

This theoretical framework does not suggest that interferences—that is, barriers that do not both limit output and concern a unique resource—are harmless. Indeed some interferences can generate welfare losses that exceed those generated by exploitative monopolies, even though they do not exploit consumers in other states. Because of their likely persistence, however, exploitations are more troublesome than interferences and should trigger more careful judicial scrutiny.

The importance of the interference-exploitation distinction is perhaps better stated in terms that reflect the justifications for common-law judicial intervention discussed in Part I. For purposes of restating the distinction, state-imposed barriers might be regarded as falling into one of three categories: (1) those with the potential to use monopoly power to exploit other states—that is, “exploitations”; (2) those that substantially burden out-of-state interests in nonexploitative fashion—here, “interferences”; and (3) those that impose virtually all their costs on in-state interests.

Courts making common law subject to congressional review should disallow state statutes that exploit monopoly power and benefit the legislating state at the expense of other states. Monopolistic inefficiency is undesirable and there is every reason to think that Congress itself disapproves of monopolization.²⁷ Furthermore, the political incentives for creating and maintaining exploitations lead one to suspect that, in contrast to interferences, they are more likely to persist and to be based on motives that are inconsistent with the national interest. Therefore, the judiciary should presume that Congress, in the case of exploitations, would be unlikely to defer to local decisionmaking.

In contrast to exploitations, courts might strike down interferences only when the economic costs they create clearly exceed their benefits. As in the case of exploitations, the justification for intervention in this setting is twofold. First, although burdened in-state interests may benefit nonresidents indirectly by overturning an interference through their state political process, federal courts might use commerce clause principles to protect nonresidents from

²⁷ The antitrust laws are substantial evidence for this proposition.

the vagaries and imperfections of in-state politics.²⁸ This justification suggests judicial inquiry into, but not necessarily invalidation of, a state-imposed barrier. Invalidation would occur only if the burdens of the barrier as a substantive matter overwhelm its benefits when viewed from a neutral national perspective. Second, one might justify judicial intervention in cases of interferences as a means of enacting implied congressional wishes, thereby foreshadowing and conserving legislative effort. While such courtroom activism might provoke criticism, judicial balancing in this area is no more unpredictable than either congressional balancing resulting in detailed legislation or other familiar common-law case dispositions. The Court presently takes this approach in reviewing many types of interstate barriers. Of course, the Court might lighten its own workload and allow other neutral observers, such as the lower federal courts, to engage in this balancing, leaving the Court to review only *state* supreme court cases in this area. But whatever scope of review the Supreme Court employs, it should not be criticized simply because the substance of its review of interferences often turns on small facts and lacks precedential value, as common-law decisions in other areas of the law "suffer" from the same shortcomings.

Finally, there is the question whether the federal courts should intervene when confronted with state actions that are neither exploitations nor interferences as defined in this article, but instead impose virtually no costs outside the legislating state. Here there is no threat of exploitation of out-of-state interests. Nor is there need to protect nonresidents from the legislating state's political process; any "process" objection can be argued before neutral state courts. Conceivably, federal courts might intervene if they could predict Congress' intentions, but surely it is hard to divine these intentions, unless the question is already one of federal preemption.²⁹ One might assume instead that Congress would accept local legislation when its costs are borne within the legislating jurisdiction, both because in many areas state legislatures may be appro-

²⁸ Theoretically, nonresident interests have access to the political process because they can support the election of legislators who are sympathetic to their plight. But this is true of all plaintiffs in common law courts.

²⁹ If Congress has already acted in a way that indicates its view on the issue before the court, then the court's subordinate position concerning Congress' commerce power makes its task clear.

prate regulators,³⁰ and because Congress may wish to allow political and regulatory experimentation.³¹

III. APPLICATION OF THE INTERFERENCE-EXPLOITATION THEME TO THE DECIDED CASES

This portion of the article explores the usefulness of the interference-exploitation theme in explaining the Supreme Court's treatment of interstate trade barriers. The discussion does not claim that the decided cases can be characterized as allowing all interferences and disallowing all exploitations. The prevailing doctrines and pigeonholes are far too numerous, muddled, and traditionally detached from one another to permit such clean recharacterization.³² Instead, the discussion demonstrates that exploitations are

³⁰ For example, Congress is unlikely to be a better regulator of a typical local utility than is the state in which such an enterprise is located.

³¹ The "right" amount of federalism and experimentation is one substantial theme not explored in this article. However likely states are to exploit nonresidents and enact inefficient statutes, there is some reason to greet with discomfort most federal legislation that regulates trade. For a provocative article on this theme, see Kitch, *supra* note 8. Note that a process-oriented perspective may also cause skepticism regarding the wisdom of Congress' economic role; special interest groups might generate more inefficient legislation if they need only direct attention to Congress rather than to fifty state legislatures.

Another argument against uniform national legislation (be it enacted by Congress or by cooperation among some states) is that it eliminates choice and, presumably, "consumer" welfare. If migration costs are relatively low, then citizens can choose the "package" of government programs that they prefer. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956). Migrants may not internalize the "congestion costs" they impose unless property values fully reflect crowding, W. Oates, *Fiscal Federalism* 50-51, 155-57 (1972), but the point remains that federalism may offer choice in a way that citizens would prefer. To some extent, citizens who prefer choice, and the prospect of migration, can be expected to support nonuniform national legislation. See Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. Pol. Econ. 152, 157 (1981). Even putting interest-group considerations aside, there may be enough citizens interested in nonuniformity to populate several states and increase the total welfare that derives from "choice," but still too few such citizens to vote for nonuniformity at a national level.

Although these arguments are obviously related to the discussion in this article, they do not contradict its themes. First, they are really arguments against a strong, *positive* commerce clause. This article accepts the fact that Congress can, for the most part, do as it pleases in these spheres and discusses the role of the judiciary within this inherited framework. Moreover, the article adopts a normative posture only with regard to interstate "exploitations" as described in the text. The danger of legislation that imposes burdens in another jurisdiction and that imposes deadweight losses to boot is worthy of judicial consideration regardless of whether courts ought to intervene when facing nonexploitative barriers.

³² Indeed, Mississippi's barrier to imported milk, reviewed in *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976), was struck down.

more regularly disallowed by the Court. Interferences, on the other hand, are treated in a less predictable fashion. The distinction between interferences and exploitations is, therefore, descriptively useful in that—with a few serious exceptions discussed below³³—one can characterize judicial decisions as disallowing exploitative state statutes.

The Supreme Court's method for reviewing state actions affecting interstate commerce has been to focus on the *forms* that these barriers assume. In applying the interference-exploitation theme, therefore, Part III examines in turn the forms recognized in the decided cases, including: subsidies (of residents and of in-state business), preferences (in state procurement contracts, for example), quarantines, taxes affecting interstate commerce, and "other regulations." This last category contains state actions that, unlike taxes and subsidies, are not immediately reducible to monetary terms, but that do not impose quarantines or create preferences. The Supreme Court seems to have treated state actions that concern the disposition of natural resources differently from other actions that are of similar form but that concern different subject matter. Part III therefore considers the natural resource cases after reviewing judicial responses to the various forms of interstate barriers. Finally, this Part relates the Court's treatment of state laws governing corporate takeovers to the interference-exploitation theme.

The analysis of each form of interstate barrier begins with a critical description of the Court's treatment of that form; it then attempts to rationalize the Court's treatment using currently prevailing doctrines and to point to the weaknesses in, as well as the untapped potential of, those doctrines. The analysis also evaluates the utility of the interference-exploitation distinction in explaining how the judiciary both does and should treat a particular form.

The Court's form orientation has the obvious value of creating useful precedent and simplifying future review. To the extent that prevailing judicial doctrines dealing with interstate barriers are tailored to the forms of these barriers, current law might be regarded as sensible and efficient. Unfortunately, the Supreme Court has not established a coherent and workable doctrinal structure in its

³³ A major exception is *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), although it too can be salvaged. See *infra* text accompanying notes 141-43, 217-21.

treatments of interstate barriers. A major objective of this article is to suggest the contours of guidelines that are both substantively sensible and precedentially valuable.

A. Subsidies and Preferences

1. The Court's Approach and Current Doctrines

a. General Economic Intervention

There is so little doubt about a state's ability to prefer its own citizens³⁴ that few subsidy cases are litigated and no commentators pause to consider the potential precedential value of these cases with regard to other forms of state action. Thus, although states regularly promote their own industries and build roads and other facilities that assist private in-state business and in relative terms disadvantage out-of-state business, such expenditures are never attacked by the disadvantaged interests.³⁵ Subsidies are accepted even though they may stem from parochial motives that are contrary to a national perspective. For example, expenditures that support a tourist industry may draw away tourists from other states so that a "national tourist board" would choose a lower level of expenditures than the sum of the states' expenditures, which partially offset one another.

Clearly, the courts would be entirely unsympathetic to suits by disadvantaged out-of-state interests attacking such subsidies. The Supreme Court has distinguished market "participation" from market "regulation" by a state and indicated that the commerce clause responds principally to state taxes and regulations that impede trade and not to state operations in the free market.³⁶

³⁴ Constitutionally, there is even less objection to state programs that discriminate in favor of another state's citizens. The program would not appear "parochial" and would invite no conceivable equal protection claim.

Note the interesting analogy to the international scene in which governments accuse one another of subsidizing export industries or dumping goods in export markets. See C. Kindleberger & P. Lindert, *International Economics* 165-69 (1978) (noting the misplaced objections and responses to such trade schemes).

³⁵ These interests are unrepresented in the political process that injures both them and, as the text shows, the nation's economy as a whole. Note that a "pure" process approach, as described in Part I, has little descriptive power with regard to these subsidy cases because subsidies surely hurt unrepresented interests, which are unable to attract congressional assistance, as much as other forms of state-imposed barriers.

³⁶ See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 435-39 (1980); *Hughes v. Alexandria Scrap*

Two cases illustrate that the judiciary will accept even an explicitly parochial state action if it takes the form of a subsidy or preference. In *Reeves, Inc. v. Stake*,³⁷ the Supreme Court upheld a South Dakota policy of supplying cement produced by a plant owned and operated by the state to all resident customers and leaving nonresident orders unfilled. The state's action hurt an out-of-state purchaser, Reeves, by forcing it either to use less cement or to purchase at a higher price from other sources, including South Dakotans who could purchase from the state's facility and resell at a profit.³⁸ Similarly, in *Hughes v. Alexandria Scrap Corp.*,³⁹ the Court upheld a Maryland statute that offered a bounty to scrap processors that disposed of junked automobiles, but imposed forbidding paperwork requirements on out-of-state processors.⁴⁰ The Court viewed the state as "participating in the market and exercising the right to favor its own citizens over others."⁴¹

Subsidies in the form of in-state procurement contract preferences are quite common; typically they either require state purchases of specified goods to be from in-state sources or provide that the lowest in-state bidder be awarded a contract if no out-of-state bid undercuts the lowest in-state bid by more than a specified percentage.⁴² With rare exceptions, such preferences are validated.⁴³ One of the rare exceptions concerns preferential statutes

Corp., 426 U.S. 794, 806, 810 (1976).

³⁷ 447 U.S. 429 (1980).

³⁸ In upholding the plan, the Court pointed to the "patently unobjectionable purpose of state government—to serve the citizens of the State" and characterized South Dakota's role as unquestionably fitting the "market participant" label. *Id.* at 442. The state's project was clearly a subsidy; were it selling cement at a market-clearing, competitive price, there would have been no "shortage" of supply to in-state buyers and nothing to trigger the in-state preference policy. The existence of a shortage implies a purposefully low, subsidized price.

³⁹ 426 U.S. 794 (1976).

⁴⁰ *Id.* at 801 n.11.

⁴¹ *Id.* at 810.

⁴² See Note, Home-State Preferences in Public Contracting: A Study in Economic Balkanization, 58 Iowa L. Rev. 576 (1973); Comment, In-State Preferences in Public Contracting: States' Rights Versus Economic Sectionalism, 49 U. Colo. L. Rev. 205 (1978) (describing the percentage and other preferences that are mandatory, reciprocal, or discretionary in the overwhelming majority of states as probably unconstitutional).

⁴³ The Supreme Court has never fully considered a state statute characterized as a preference. For the general rule upholding preferences, see *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.) (assembling Supreme Court views and concluding that an in-state preference for state printing contracts is not unconstitutional because it merely specifies the

that are not limited to state purchases but extend to private contracts; judicial disfavor of such statutes may stem from the courts' sense that the state is "regulating" as well as "participating."⁴⁴

The Court has not made clear *why* subsidies and most preferences should be treated differently from other forms of barriers. A recent illustration of the resulting confusion in the lower courts is

conditions of state purchases), *aff'd mem.*, 409 U.S. 904 (1972); *American Yearbook* was cited approvingly in *Reeves*, 447 U.S. 429, 437 n.9. See also *White v. Massachusetts Council of Constr. Employers*, 103 S. Ct. 1042 (1983) (upholding over commerce clause challenge mayor's executive order requiring all construction projects funded in whole or in part by city funds to be performed by a workforce at least half of which is city residents); *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill. 2d 258, 335 N.E.2d 469 (1975) (upholding a portion of a statute that provided a preference for residents or laborers on public works projects despite equal protection, privileges and immunities, and commerce clause challenges); *Equitable Shipyards v. State*, 93 Wash. 2d 465, 611 P.2d 396 (1980); cases collected in Comment, *supra* note 42, at 218-22. The Comment seeks to describe a new, anti-preference trend by describing *Hughes v. Alexandria Scrap Corp.* as exceptional because the state was there experimenting with the laudable goal of environmental protection. *Id.* at 221. The Comment describes *American Yearbook* as "clearly wrong." *Id.* at 223. Interestingly, businesses, unlike students, have apparently not challenged the length of residency requirements. See *Galesburg Constr. Co. v. Board of Trustees*, 641 P.2d 745 (Wyo. 1982) (validating a preference to in-state businesses but not evaluating the one-year residency requirement because plaintiff did not challenge the duration or enforcement of the requirement though it was applicable).

Three of the exceptions to the general rule are straightforward. *People ex rel. Treat v. Coler*, 166 N.Y. 144, 59 N.E. 776 (1901) (invalidating a state statute requiring stone used in public projects to be worked within the state) was effectively overruled by *Atkin v. Kansas*, 191 U.S. 207 (1903) (announcing that a state may regulate work done on its behalf as it pleases). *Image Carrier Corp. v. Beame*, 430 F. Supp. 579 (S.D.N.Y. 1977), cert. denied, 440 U.S. 979 (1979), concerned a city's discrimination against nonunion, not nonresident, contractors. *Rayco Constr. Co. v. Vorsanger*, 397 F. Supp. 1105, 1109-10 (E.D. Ark. 1975), was not invalidated on commerce clause grounds but simply because the statute under review was vague, overbroad, and irrational ("[W]e find that Act 264 violates both the Due Process and Equal Protection Clauses of the 14th Amendment. We find it unnecessary to decide whether the Act also violates the Commerce Clause" *Id.* at 1110). The other preference invalidations are discussed *infra* note 44.

⁴⁴ See *MacMillan Co. v. Johnson*, 269 F. 28, 32 (1920) (invalidating on freedom of contract and due process grounds portion of statute regulating textbook sales that forced compliance on general public).

In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the Court invalidated an Alaska statute requiring contractors dealing with Alaska-owned oil to prefer residents to nonresidents in their hiring. Because the statute operated through union hiring halls, *id.* at 521, it imposed burdens on private arrangements. *Hicklin* contains an element emphasized in Part III of this article: the state was not required to expend its own funds in support of the preference it legislated. See also *Garden State Dairies, Inc. v. Sills*, 46 N.J. 349, 217 A.2d 126 (1966), on remand, 98 N.J. Super. 109, 236 A.2d 176 (1967), rev'd, 53 N.J. 71, 248 A.2d 427 (1968) (finding, on remand, a requirement that prospective seller's in-state purchases in each of two years be at least as great as the prospective single-year sale to the state to be an unreasonable restraint on interstate commerce).

Smith v. Department of Agriculture,⁴⁵ which concerned a state practice that relegated out-of-state farmer-vendors to substantially inferior locations during busy seasons at a farmers' market. The marketplace was owned by the state, but the state contributed less than fifty percent of the market's operating expenses. The majority's decision invalidating the preference for in-state sellers cited Supreme Court decisions rejecting state statutes that protected local citizens from outside competition.⁴⁶ The decision also cited subsidy cases, noting that the practice would have been acceptable if Georgia had been acting in a proprietary capacity.⁴⁷ The concurring judge viewed the case as turning on whether the market in question was for sale booths—in which case Georgia was a proprietor—or for vegetables—in which case the state was a regulator.⁴⁸ Drawn to the latter view, the judge agreed to invalidate the preference, noting quite logically—in contrast to the Supreme Court cases—that the case did not differ in principle from one involving total exclusion of nonresidents.⁴⁹ The dissent insisted, of course, on the relevance of the subsidy cases.⁵⁰

One cannot help but share the Fifth Circuit's mixed reaction. Certainly, the state could assign better booths to the highest bidders, or it could adopt a random assignment or first-come-first-served procedure. Less restrictive (but often more bureaucratically demanding) alternatives are virtually always available; their recognition simply complicates a court's task and highlights the differences among the various forms of interstate barriers, for it is unimaginable that state expenditures would be invalidated even if less burdensome programs could be created by a clever court.

b. Residence Benefits

State subsidization of residents is also involved in the common

⁴⁵ 630 F.2d 1081 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981).

⁴⁶ *Id.* at 1084-85 (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Buck v. Kuykendall*, 267 U.S. 307 (1925)).

⁴⁷ *Smith*, 630 F.2d at 1083 (citing *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980)); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

⁴⁸ *Smith*, 630 F.2d at 1086 (Gee, J., concurring).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1086-88 (Randall, J., dissenting).

practice of offering a product or service, such as education, at a lower price to residents than to nonresidents. Clearly, the different tuitions in question are subsidies and not taxes. Even out-of-state students pay less than the "real" cost of an education. Residents are merely subsidized more than nonresidents. The underlying policy of such subsidies is surely acceptable to the Court,⁵¹ perhaps as state "participation" in the marketplace.

Subsidies such as tuition differentials may be invalidated, however, if they are tied to objectionable residence requirements.⁵² Most recently, in *Zobel v. Williams*,⁵³ the Court invalidated Alaska's program to pay its citizens dividends that varied according to their length of residence. The Court was not convinced that the differentiation among citizens was rationally related to valid state interests.⁵⁴ The Court's opinion gives no indication that it would invalidate a dividend program that discriminated only against nonresidents. In fact, Alaska has now turned to such a distribution program.⁵⁵

Subsidies or benefits that depend on residence qualifications raise an assortment of both constitutional issues and judicial sensitivities. Besides tuition differentials, such benefits include welfare

⁵¹ See *Spatt v. New York*, 361 F. Supp. 1048, 1053 (E.D.N.Y.) (states can make their own products more attractive so long as "imports" are not penalized; education is not a fundamental right, and student is free to migrate and seek financial aid in another state), *aff'd mem.*, 414 U.S. 1058 (1973); *Starns v. Malkerson*, 326 F. Supp. 234, 241 (D. Minn. 1970) (state can subsidize those who have demonstrated an intention to remain and contribute), *aff'd mem.*, 401 U.S. 985 (1971); *Kirk v. Board of Regents*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969) (state interest a valid one and resident can be reclassified after one year), appeal dismissed, 396 U.S. 564 (1970).

⁵² See *Vlandis v. Kline*, 412 U.S. 441 (1973) (irreversible, irrebuttable presumption of nonresidency for a single person who had been out of state at any time in the preceding year invalidated on due process grounds).

⁵³ 102 S. Ct. 2309 (1982).

⁵⁴ The state's asserted interests in the creation of an incentive to encourage migration to Alaska and in the encouragement of prudent, far-sighted management of its oil revenues were regarded as unrelated to the dividend plan's generous grants based on *past* residency. *Id.* at 2313-14. A third stated interest, in recognizing past contributions of residents, was found unconvincing and illegitimate. *Id.* at 2314. But see *id.* at 2324 (Rehnquist, J., dissenting).

⁵⁵ N.Y. Times, June 5, 1982, at A7, col. 6.

The Alaska program seems altogether more responsive to the needs of politicians than to those of the national economy or state residents. Any dividend plan it adopts will almost surely yield taxable income to recipients; instead, the state could distribute the funds to local governments for road-building and other projects of general use.

payments,⁵⁶ health care,⁵⁷ unemployment compensation,⁵⁸ and public housing.⁵⁹ Apparently, the more the courts regard the benefit as a "basic necessity of life,"⁶⁰ the more likely they are to use equal protection or "right to travel" grounds to strike down any substantial residence requirement as invidious and therefore unconstitutional discrimination. The law in this area might have evolved differently had the state statutes carefully promoted fiscal integrity and deterred strategic migration without imposing an obvious burden on the amorphous right to travel. Thus, the Court might well have upheld a statute that promised newcomers the benefits they would have enjoyed in their "old" state, but that denied for one year the increase available in the new state. But the states drafted no such statutes and, given the constitutional rhetoric now assembled, it is unlikely that more careful statutes would now be allowed.⁶¹

⁵⁶ *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating on equal protection and unascrbed right-to-travel grounds one-year residency requirement as overbroad method of accomplishing valid state purposes).

⁵⁷ *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (invalidating one-year residency requirement for receipt of nonemergency medical care because no asserted justifications found compelling).

⁵⁸ *Galvan v. Catherwood*, 324 F. Supp. 1016 (S.D.N.Y. 1971) (upholding denial of state unemployment benefits to applicants moving to an area with no reasonable opportunity for employment because state's policy requiring claimant to be "ready, willing and able to work" found reasonable and because restriction regarded as minor), *aff'd sub nom. Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973).

⁵⁹ *Compare Lane v. McGarry*, 320 F. Supp. 562 (N.D.N.Y. 1970) (upholding one-year residency requirement as not unreasonably restricting right to travel and as reasonably allocating available housing) with *Cole v. Housing Auth.*, 435 F.2d 807 (1st Cir. 1970) (invalidating two-year requirement as discriminating against bona fide residents and not merely transients). The mixed treatment of public housing claimants may reflect uncertainty regarding the way Congress itself would vote on such "travel" restrictions. Although Congress might be expected to disapprove of restrictions only when it senses that the locality will continue to expend funds to provide housing (for otherwise all poor citizens would be worse off), any court that disposed of a case with such "agency" reasoning would surely elicit the expected arguments from the local authorities (insisting that without restrictions no expenditures would be forthcoming). See *Cole*, 435 F.2d at 812 (refusing to "pander" to voters who, it was argued on appeal, would vote down public housing projects if open to newcomers).

⁶⁰ *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974).

⁶¹ See Opinion of the Justices to the House of Representatives, 357 Mass. 827 (1970) (advising legislature that *proposed* statute giving newcomers some—but not equal—benefits would be unconstitutional).

The argument for allowing statutes that limit newcomers to their past level of benefits is strengthened by the fact that a state (or the United States) certainly need not continue high benefits to citizens who move to jurisdictions that offer lower benefits, although such non-

Even when "basic necessities" are not at stake, subsidies that follow residence qualifications may be found to violate due process. In this manner, a college tuition preference for state residents was struck down because the scheme contained an irrebuttable presumption that nonresident applicants could not demonstrate that they had attained resident status.⁶² This development has little practical impact both because states can carry out their preferential intentions without irrebuttable presumptions and because the "irrebuttable presumption" idea has been recognized as an unprincipled smokescreen.⁶³ Curiously, no residence requirement cases have involved business preferences, although there must be similar difficulties in determining which enterprises qualify as in-state contractors or suppliers.

Most, if not all, of the residence benefit cases would have been better decided on commerce clause grounds than on equal protection or due process grounds. The right to travel itself could be ignored or, better yet, described as derivative of the negative commerce clause. As noted in Part I, the effect of such judicial intervention would be to permit Congress to override courts acting in their common-law capacity. Regardless of the practical obstacles to developing political coalitions in Congress sufficient to enact legislation that denies or permits states to deny necessities to migrants, it is likely that the Court itself considers Congress theoretically able to tie government expenditures to local residence requirements. For example, Congress presently redistributes wealth to states suffering loss of revenues due to substantial emigration by shifting the incidence of federal taxing and spending programs, but it could achieve the same result by employing the more dramatic, yet surely equivalent, measure of placing tolls on interstate travelers.

payment surely discourages travel. See *Califano v. Torres*, 435 U.S. 1 (1978).

⁶² *Vlandis v. Kline*, 412 U.S. 441 (1973).

⁶³ See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 660 (1974) (Rehnquist, J., dissenting) (noting that lawmaking requires drawing of lines in arbitrary places); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 *Stan. L. Rev.* 449 (1975).

2. *The Interference-Exploitation Theme Applied to Subsidies and Preferences*

a. *General Economic Intervention and the Conscious Funding Concept*

The failure of commerce clause objections to a state's expenditures in favor of its own citizens follows rather neatly from the realization that such payments are positive inducements that stimulate output rather than restrict it to monopoly levels. Thus, the subsidization of both cement production⁶⁴ and in-state automobile hulk disposal,⁶⁵ and the channeling of state expenditures to in-state contractors,⁶⁶ hardly can promote monopolistic exploitation of other states. In all such cases the statutes are likely to yield increased production levels. Although these statutes might well cause overproduction as inefficient as a monopoly's underproduction, the legislating state itself pays for its action rather than profits from it, so that the legislature's judgment may be thought more reliable than parochial.⁶⁷

The interference-exploitation theme by itself cannot explain the judicial response to subsidies and preferences. If it did, so that all exploitations were disallowed and all interferences upheld, then even preferences that extended to private contracts would be allowed. Private contract preference statutes are interferences in that they do not appear to support monopolization and cannot be used to exploit other states. A second distinction therefore is needed to explain how the courts decide among interferences, al-

⁶⁴ See *supra* notes 37-38 and accompanying text.

⁶⁵ See *supra* notes 39-41 and accompanying text.

⁶⁶ See *supra* notes 42-43.

⁶⁷ In fact, nonresidents often profit as a result of a state's subsidy or preference. For example, South Dakota's cement product surely satisfied some previously held demand for cement; nonresident users of cement surely enjoyed lower prices once some consumers were supplied by the state's facility.

The notion of inefficient overspending on the part of a community is a difficult one. Communities often subsidize roads, water treatment facilities, and communications facilities in ways that favor otherwise remote regions. Are such subsidies inefficient simply because they do not resemble user fees? How does one evaluate the congestion costs that are saved by such subsidies or the possibility that these subsidies reflect the community's desires rather than the friction in the political process or the impossibility theorem? For a discussion of the impossibility theorem in a legal context, see Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802 (1982). In sum, it is appealing to uphold all "consciously funded" projects and focus on the monopoly inefficiencies at stake in exploitations.

lowing those that are funded by the state government, but rejecting others.

The "conscious funding" concept suggests such a distinction. Where the funds for a subsidy or preference benefitting some state residents come out of the state treasury, reviewing courts might assume that the state legislature has considered the burdens and benefits of its action. The state probably knows the magnitude of at least some part of the cost of the subsidy or preference. Although the cost that appears in the state budget may bear only a very rough relationship to the magnitude of the subsidy's true economic cost, the state government is at least aware of the former amount. To the extent that a preference is imposed on private contracts, however, the entire subsidy comes directly out of private pockets, and there is no reason to believe that the state has estimated, much less carefully considered, any part of the costs. Such reasoning is consistent with the distinction that has been drawn between "participation" and "regulation," and may help explain why the Court upholds interferences in the form of subsidies or preferences by the state government, but rejects those imposed on private parties.

The descriptive utility of the "conscious funding" concept is thus apparent; its normative value is less clear. The *ideal* judicial treatment of a state-imposed preference reaching private contracts, such as one that rewards new home buyers who purchase locally manufactured construction materials,⁶⁸ is a difficult policy question. The approach to interferences suggested in Part II involved balancing their total national burdens and benefits. To the extent that "conscious funding" means that balancing of at least some of these factors has been done at the state level, the courts might properly be more tolerant of interferences where part of the cost comes out of the state treasury.

One form of preference imposed on private contracts that should arguably always be suspect is one that exempts state purchases.⁶⁹

⁶⁸ The example in the text is purely hypothetical.

⁶⁹ Congress might be regarded as generally supportive of experimentation or "choice," *supra* note 31, but if the state excludes itself from the experiment its intentions are suspicious. It is simply not possible to construct a sensible hypothetical in which the state wishes to offer a different "package" of programs—but then removes its own activities from the experiment.

⁷⁰ A possible example of such state action is *Hicklin v. Orbeck*, 437 U.S. 518 (1978), in which

A court might properly disallow such laws, although they do not appear exploitative. The scheme would so carefully avoid imposing costs on the state itself as to raise substantial doubts about its advisability.

Nevertheless there are reasons why some interferences that are not "consciously funded" should be allowed. Some such barriers may not be purely parochial; for example, the state might expect its scheme to produce positive environmental or technological benefits. More generally, Congress might regard such nonexploitative state actions as appropriate experimentation consistent with the federal structure of government.⁷⁰

In sum, the interference-exploitation distinction, together with the conscious-funding notion, is capable of describing the judicial treatment of subsidies and preferences. The general acceptance of these forms of state action is easily linked to their nonexploitative nature and the enacting state's direct assumption of their costs.

b. Residence Benefits and Zobel v. Williams

The Court's response to the residence benefits cases is consistent with the interference-exploitation theme. Because most residence benefit schemes are subsidies and lack exploitative potential, the Court's principal task has been to distinguish among various forms of interferences.

Some residence benefits not only do not involve monopolistic exploitation, but also may actually *increase* output in areas that would otherwise be monopolized. The generally favorable judicial treatment of these in-state preferences is therefore sensible. State university tuition schedules that favor residents are particularly interesting in this regard. State-subsidized tuition for medical students, for example, may be viewed as increasing output in a field that without state-supported production would run a greater risk of monopolization. Disallowance of discriminatory tuition schedules might be counterproductive as a matter of national economic

the state's attempted regulation of union hiring halls was a purely private imposition if the state itself did not employ union labor.

⁷⁰ "Experimentation" continues to refer to any plausible combination of novelty and choice of which Congress would approve. Professor Kitch notes that the laboratory notion of federalism (which is not inconsistent with our constitutional structure) is a concoction of the Progressive Era and not of the drafters. Regulation, Federalism, and Interstate Commerce 114 (A. Tarlock ed. 1981).

policy because it would lead voters and legislatures to decrease their support of educational institutions. In fact, a state university system that excludes nonresidents entirely seems unobjectionable. Although newcomers might still object to the particular methods used to distinguish nonresidents from eligible residents, such a scheme would be regarded as nonexploitative, consciously funded, and therefore acceptable.

As a purely descriptive matter, the most troubling subsidy case in interference-exploitation terms is *Zobel v. Williams*,⁷¹ in which the Court declared unconstitutional Alaska's plan to distribute money to citizens in proportion to the length of their residence.⁷² The plan did not impose a threshold waiting period for the receipt of benefits.⁷³ The Court strongly objected to the notion that state programs or taxes could divide citizens into permanent classes—based in this instance on length of residence.⁷⁴ A concurrence by four justices more explicitly tied invalidation of the dividend plan to the right to travel but declined to root this right permanently in the commerce or privileges and immunities clauses. The concurrence indicated, in addition, that even a *prospective* dividend plan was objectionable when measured against the “federal interest in free interstate migration.”⁷⁵ A separate concurring opinion by Justice O'Connor is at least as strong in expressing this same sentiment, although it roots the interest in free migration in the privileges and immunities clause of article IV of the Constitution.⁷⁶ Thus at least five justices appear to be prepared to strike down a state subsidy that seems not only nonexploitative but also reasonably designed to encourage the rapid settlement of a vast state.

Viewed as an interference, the prospective part of Alaska's plan might reasonably be struck down on commerce clause grounds if it were prototypical and not isolated. The concurrences could argue that if many states had such plans, then migration would in the aggregate be discouraged. Mature and skilled citizens in each state

⁷¹ 102 S. Ct. 2309 (1982).

⁷² The plan distributed one unit (fifty dollars in 1979) to each citizen, 18 or older, for each year of residency subsequent to statehood in 1959. *Id.* at 2311.

⁷³ *Id.* at 2312.

⁷⁴ *Id.* at 2314-15.

⁷⁵ *Id.* at 2316 (Brennan, J., concurring).

⁷⁶ *Id.* at 2320 (O'Connor, J., concurring).

would hesitate to relocate—even when national economic conditions make such migration desirable—because by moving they would exchange their advantageous positions for the relatively low benefits accorded newcomers. Thus the prospective part of Alaska's plan might damage national economic welfare to the extent that skilled workers are discouraged from moving to states in which such workers might prefer to be put to their best economic use.

The problem with this view of *Zobel* is that such "lock-in plans" already exist in the form of seniority and pension systems in both state and private employment. It is hardly likely that the majority of the justices mean to strike down these workplace seniority plans, although they certainly diminish the tendency to travel. The concurring language in *Zobel* is thus probably best put aside and the case viewed as limited to the actual retrospective plan under review; the case is not about commerce and migration incentives but rather about a more unique problem concerning the differential treatment of established citizens.⁷⁷

Arguably, the prospective part of Alaska's scheme has exploitative potential to the extent that it discourages mature and skilled citizens from emigrating and allows the state to develop a unique, exploitable resource. The possibility that a dividend plan, once in effect, would support hoarding and monopolization is part of a larger theoretical issue: if subsidies are always allowed, could not a state accumulate a resource—skilled workers or nuclear power plants perhaps—and then, if favorable circumstances develop, enjoy monopoly power at the expense of other states until they "enter the market" by training workers or building power plants of their own?

The argument that the potential for exploitation justifies the *Zobel* decision is not very convincing, however. It is far from clear that exploitation, when preceded by accumulation, should cause concern. Unlike the prototypical Montana coal case considered in Part II, the state itself will have expended funds to create its unique advantage. Moreover, the state is taking the risk that circumstances will not develop in its favor. The labor force may need workers with different skills, or other energy sources may under-

⁷⁷ The decision remains open to criticism because there does not appear to be a group that is disadvantaged in a constitutional, rather than economic, sense.

price the nuclear power plants. The hypothetical "accumulating" state might be regarded then as investing in the future. If it is denied rewards even though the future develops as the subsidizing state has conjectured, then such investments will be discouraged and the economy as a whole may be worsened.⁷⁸ Thus exploitation that follows conscious accumulation might be regarded benignly, as are the rewards to an inventor in the patent system.

A second response to concern about this potential for accumulation draws on the ideas expressed in Part I, given that Congress can always put an end to the exploitation if it so chooses. Because successful accumulation-exploitation schemes are probably extremely rare, congressional attention is relatively assured.⁷⁹ In such a situation, judicial supervision on behalf of Congress is less necessary than in the case of other exploitations.

In sum, the principal value of the interference-exploitation theme in understanding judicial review of subsidies in general and residency benefits in particular is to emphasize the absence of the danger of exploitation. Accumulation, and other subsidy and preference plans, can be comfortably allowed so long as actual exploitations made possible by such plans are discovered and carefully limited. Part IV's discussion of the state action exemption in antitrust law reconsiders this special need to monitor carefully for exploitations in a scheme that permits all subsidies.

B. Quarantines

1. Current Doctrines

Until recently, the courts treated facially reasonable state-imposed quarantines and similar restraints on imports from other states as per se valid, much as subsidies and preferences. Again, this judicial acceptance extended to state actions that clearly discriminated against other states' products. Thus, *Reid v. Colorado*⁸⁰

⁷⁸ A successful speculator that sells competitively will increase consumer welfare but one that sells monopolistically may or may not (depending on whether the deadweight loss exceeds the gain generated from the speculator's resource-shifting). Lerner, *My Son the Speculator*, in *Everybody's Business* 32-40 (1962).

⁷⁹ Such schemes are also likely to be of large scale and, therefore, readily noticed.

⁸⁰ 187 U.S. 137 (1902). But see *Railroad Co. v. Husen*, 95 U.S. 465 (1877), where the Court struck down a purported quarantine by Missouri which prohibited the importation of all Texan, Mexican, or Indian cattle between March 1 and November 1. The breadth of the state action led the Court to conclude that it was neither a quarantine nor an inspection law

upheld Colorado's statute criminalizing the importation of suspect livestock. Although the Court reserved the right to consider whether a state's quarantines were reasonable, it tolerated state actions that claimed to protect health and similar local concerns.⁸¹

The Court's recent invalidation in *City of Philadelphia v. New Jersey*⁸² of a statute excluding unacceptable out-of-state waste⁸³ demonstrates, however, that even in this relatively minor pigeon-hole the Court's form orientation has resulted in confusion and a diminishing of precedential value. The Court distinguished the New Jersey statute from the old quarantine cases by asserting that the latter concerned "articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils."⁸⁴ Had New Jersey based its statute on such danger of movement rather than on harm arising after the disposal of waste in landfill sites, the Court might have approved the scheme, declining to inquire into the hazards of waste or into available alternative protective measures.

The unreasoned form orientation and the resulting lack of careful inquiry in the earlier quarantine cases seems doomed to be exposed by labelling difficulties. So many interstate barriers can be reformulated as quarantines that the Court must either abdicate its role as a protector of free trade or abandon its tolerant posture toward this form of state action. Consider the evolution of "quarantine law" that could have followed the Court's acceptance of the

but a "plain intrusion" upon interstate commerce under the pretense of state police power. *Id.* at 473. *Reid's* distinguishing feature was almost surely the quarantine-true structure of its statute. Imported cattle were not entirely banned; provided they were inspected or quarantined for a specified period of time, the cattle were allowed. It is extremely unlikely that a court would consider the reasonableness of the specified period or the severity of the feared disease.

⁸¹ Clearly, a state may impose a quarantine that "discriminates" against interstate commerce; Colorado almost surely contained livestock within its boundaries and there is no indication that these animals were expelled. In imposing a legitimate quarantine, the state simply tries to keep a bad situation from getting worse. This feature of quarantines was apparently missed in *Illinois v. General Elec. Co.*, 683 F.2d 206, 214 (7th Cir. 1982) (invalidating statute banning importation of spent nuclear fuel because state was "quite willing to allow the storage and even the shipment for storage of spent nuclear fuel . . . provided only that its origin is intrastate").

⁸² 437 U.S. 617 (1978).

⁸³ Waste materials intended for recycling were excepted from the quarantine. *Id.* at 619 n.2. The quarantine also did not apply to waste materials certified by the appropriate state commissioner.

⁸⁴ *Id.* at 628-29.

New Jersey waste-control statute on the basis of precedents such as *Reid*. In *Great Atlantic and Pacific Tea Co. v. Cottrell*,⁸⁵ in which the Court invalidated the ban on milk imports referred to at the beginning of this article, the state might have argued more forcefully that, because of the perceived health dangers of "foreign" milk, it was enacting a quarantine.⁸⁶ Thus, although the Court's review of the New Jersey waste-control statute did introduce uncertainty, uncertainty was the inevitable product of the Court's form orientation.

2. *Exploitative Potential of Quarantines*

The interference-exploitation distinction is of some value in this area. In consonance with the suggested approach, courts could allow reasonable-looking quarantines and inquire more deeply only when the quarantine poses monopoly or monopsony⁸⁷ dangers. Thus, quarantines on uninspected cattle or fruit would be unobjectionable, as nonexploitative, unless the state somehow possesses a regional monopoly on grazing land or processing plants, enjoys an unusually strategic location on the way to market, or contains a high proportion of the quarantined product's consumers.⁸⁸

The state's exclusion of waste intended for in-state disposal, invalidated in *City of Philadelphia v. New Jersey*, was not an exploitative barrier unless out-of-state interests owned the landfill sites in New Jersey and such sites were limited. In that case, the state might wish to exclude other buyers of landfill space in order to exploit in-state monopsony power. Even if in-state interests own all the waste disposal sites, the state might also have wished to exclude other buyers in order to keep down its own price of waste disposal. But the latter is an in-state distribution and efficiency

⁸⁵ 424 U.S. 366 (1976). See *supra* notes 1-5 and accompanying text.

⁸⁶ In the actual case, which of course preceded the waste-control case, the Court dismissed Mississippi's health interest as "border[ing] on the frivolous," noting that even if Louisiana's milk standards were lower than Mississippi's, the Mississippi statute would have still admitted Louisiana milk if the two states had entered a reciprocity agreement. *Cottrell*, 424 U.S. at 375.

⁸⁷ For a basic analysis of buyers with market power, or monopsonists, see W. Vickrey, *Microstatics* 291-94 (1964).

⁸⁸ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), might be regarded as an illustrative example. California's high share of consumers, on the other hand, may have stemmed from efforts expended in that state. See *infra* note 154.

issue burdening, for the most part, those New Jerseyans who own property that might be used for landfill. Thus the decision might be regarded as a common-law review of an interference, in which case the interference-exploitation distinction itself offers little guidance as to the proper disposition.

In any event, the usefulness of the interference-exploitation distinction in analyzing quarantine cases is limited for the reason expressed above: it is difficult to draw a sensible line between quarantines and other forms of interstate barriers because so many barriers can be reformulated as quarantines.⁸⁹ In appealing to the federal courts to invalidate interstate barriers, plaintiffs might increase their chances for success by showing how the "quarantines" they face might be replaced by alternatives that satisfy the state's interest in public health and that offer less potential for monopolistic or monopsonistic exploitation.

C. Taxes and Tolls

1. Current Doctrines

Historically, the Court has treated taxes affecting interstate commerce less deferentially than subsidies and other expenditures. The Court has generally struck down taxes that superficially appear designed to fall more heavily on nonresidents—for example, commuters or multistate businesses—and has upheld other, apparently neutral taxes. This treatment sharply contrasts with the Court's general approval of avowedly discriminatory expenditures.⁹⁰

a. Taxes on Interstate Business

The Court has announced that it will not permit taxes that "discriminate" against interstate commerce.⁹¹ The Court's approach is

⁸⁹ See *supra* text accompanying notes 82-86.

⁹⁰ See *supra* text accompanying notes 35-43 and note 51.

⁹¹ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The history of judicial treatment of state taxes affecting interstate commerce has been analyzed elsewhere. See J. Hellerstein & W. Hellerstein, *State and Local Taxation* 237-51 (4th ed. 1978); Hellerstein, *Constitutional Limitations on State Tax Exportation*, 1982 *Am. B. Found. Research J.* 1, 12-23. Briefly put, the Supreme Court first drew hair-splitting and unpredictable lines between state taxes imposed "directly" on interstate commerce and taxes that it viewed as indirect, incidental, or local in nature. Compare *Alpha Portland Cement Co. v. Massachusetts*, 268

to look only at a tax's most superficial and obvious impact and generally to ignore whether any apparently discriminatory impact merely offsets other state fiscal programs that might discriminate in favor of nonresidents. If the tax on its face seems designed to affect interstate businesses or nonresidents more severely, the Court places the burden of proving the tax's neutrality on the state; in contrast, if discrimination is not obvious, the burden of proof is on the party challenging the tax. Because it is difficult either to allocate net income or to assess the benefits that an interstate business receives from specific states, a business can rarely prove that a tax discriminates nor can a state prove that the tax does not. Thus, the Court's original allocation of the burden of proof based on a very superficial inquiry virtually decides the issue.

One frequently litigated type of tax scheme that illustrates the Court's approach is state apportionment and taxation of the in-

U.S. 203 (1925) (invalidating a franchise tax measured by interstate activity which applied to both interstate and intrastate business) with *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891) (upholding a property tax on rolling stock levied on interstate and intrastate businesses as "indirect"). See *Postal Tel. Cable Co. v. Adams*, 155 U.S. 688 (1895) (upholding a tax carefully levied on foreign corporations' in-state property in lieu of other taxes on intrastate business). During this period the Court viewed exclusively interstate business as beyond the reach of a state's taxing power. See *Alpha Portland Cement Co.*, 268 U.S. at 218.

Beginning, however, with its acceptance in 1938 of a state tax on the total revenues of a locally published but broadly circulated magazine, the Court moved towards its current position: a state may impose a "nondiscriminatory" income tax on an out-of-state corporation doing interstate business in the taxing state. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). See generally J. Hellerstein & W. Hellerstein, *supra*, at 242-88.

In *Complete Auto Transit*, the Court announced four criteria for the validity of such a tax: (1) The tax must be applied to an activity or property that has a substantial nexus with the taxing state; (2) The tax must be fairly apportioned to in-state activities; (3) The tax must not discriminate against interstate commerce; (4) The tax must not be unfairly disproportional to benefits received from the state. *Id.* at 287. See Hellerstein, *supra*, at 19-23.

Three of these criteria are so easily met as to be unimportant in practice. Requirements (1), (2), and (4) are so easily discovered by a sympathetic Court—on the basis of a single employee (nexus), arbitrarily chosen tax bases (fair apportionment), and the advantages of a civilized society (state benefits)—that the test seems to collapse into the third requirement. See Hellerstein, *supra*, at 19-23. Therefore, only this requirement—that the tax must not "discriminate" against interstate commerce—is of much interest. A state may not, consistent with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quoting a case decided before *Complete Auto Transit*, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

come of multistate business entities. In the context of apportionment schemes, discrimination means duplicative, or multiple, taxation. A tax on the income of an interstate business is discriminatory if the same income is taxed by two different states and the income of a domestic business would be taxed only once. The reason for apportionment schemes is clear: if a state could only tax those enterprises incorporated within it, then it could tax all the income earned by these businesses and not be considered to discriminate, because by hypothesis no other state could also tax that income.⁹² But states would then compete for business incorporations with the possible result that businesses would not pay for the benefits that they enjoy. Moreover, the place of incorporation is not necessarily where a business earns its profit.⁹³ Therefore, instead of taxing only locally incorporated business, a state typically uses a formula to determine the fraction of a multistate entity's income that is economically attributable to business within the state. If all states adopted the same formula or Congress insisted on such a formula,⁹⁴ there would be no multiple taxation⁹⁵ and, therefore, no discrimination against interstate business. But the states have adopted a variety of formulas over the years,⁹⁶ and their inconsistency has surely led to a fair amount of multiple taxation—and undertaxation as well.

The Court generally approves apportionment schemes because of their apparent neutrality. *Moorman Manufacturing Co. v. Bair*,⁹⁷ in which the Court considered the multiple taxation issue, exemplifies this approval. The plaintiff was a firm doing business in both Illinois and Iowa. Like a majority of states, Illinois employs a

⁹² On average, therefore, interstate activity would not make businesses worse off. Some states of course might have higher tax rates than others so that some businesses would prefer a different tax treatment of interstate activities. Courts implicitly assume, as will this discussion, that such rates are not purposefully raised by states that regularly contain parts of interstate businesses.

⁹³ Delaware's well-known popularity as a place for incorporation is the most obvious example. For a quantification of this popularity, see Dodd & Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" versus Federal Regulation*, 53 J. Bus. 259 (1980).

⁹⁴ Substantial effort has been expended to arrive at such a uniform formula, but no legislation has emerged. See H.R. Rep. No. 952, 89th Cong., 1st Sess. (1965) (four volumes).

⁹⁵ In general, "multiple taxation" refers to a situation in which an entity's tax base is subject to repeated (more than 100 percent) taxation by other jurisdictions that tax the entity (at whatever combined rate).

⁹⁶ For a collection of the various tax bases, see Hellerstein, *supra* note 91, at 21.

⁹⁷ 437 U.S. 287 (1978).

three-factor formula that includes the in-state fractions of a firm's total sales, payroll, and property.⁹⁸ Iowa, in contrast, uses only the first of these three factors.⁹⁹ The Court upheld Iowa's tax and characterized the discrimination claim as merely describing the potential consequences of nonuniform state rules;¹⁰⁰ any undue tax burden, the majority noted, resulted no more from Iowa's statute than from Illinois'.¹⁰¹ The Court insisted that the plaintiff had failed to prove multiple or duplicative taxation.¹⁰²

The proof of duplicative taxation that the Court asked for in *Moorman* is nearly impossible to obtain; businesses, like the states that seek to tax them, can hardly trace their profits to particular sales, employees, or assets in a way that is anything but speculative.¹⁰³ Nor can businesses assess the benefits that they receive from specific states any more than can the states themselves determine accurate user fees.¹⁰⁴ The apparent placement of the burden of proof on the business thus determines the outcome for challenges to this form of tax. Apportionment formulas, like state expenditures, are thus virtually always acceptable to the Court despite their discriminatory potential. In reviewing this form of tax, the Court has declined "agency work"¹⁰⁵ and refused to use the commerce clause to impose uniformity among the various apportionment strategies of the states.

The Court has invalidated as discriminatory, however, taxes on business income that seem on the surface designed to affect out-of-state businesses more severely than in-state businesses. If discrimination seems obvious, the Court puts the burden of showing the tax's neutrality on the state and does not consider the impact of the state's fiscal programs as a whole. In *Wheeling Steel Corp. v.*

⁹⁸ 437 U.S. at 283.

⁹⁹ The taxpayer was, as a result, subject to overlapping taxes on about six percent of its income. *Id.* at 270 n.3, 271 n.4.

¹⁰⁰ *Id.* at 277 n.12.

¹⁰¹ *Id.* at 276-77.

¹⁰² *Id.* at 276.

¹⁰³ *Id.* at 276 & n.11.

¹⁰⁴ Although many state services might be financed by accurate and efficient user charges, many other government-provided goods are not easily priced to reflect either their marginal cost or their value to individual users. See R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 195-97 (1973).

¹⁰⁵ For a sense of the enormity of such work, see H.R. Rep. No. 952, 89th Cong., 1st Sess. (1965) (four volumes of reports, reflecting consideration of a variety of tax bases, statutes, proposals, and difficulties).

Glander,¹⁰⁶ for example, Ohio taxed accounts receivable of out-of-state corporations attributable to goods shipped from or sales made in Ohio and quite consistently exempted such receivables of in-state corporations attributable to goods shipped from or sales made out-of-state. If all states adopted Ohio's strategy, there would be little, if any, overlapping of formulas or multiple taxation. But because most states—including Wheeling's home state—tax *all* intangibles of their domestic corporations,¹⁰⁷ the Court ruled Ohio's taxing scheme invalid because it discriminated against out-of-state business.¹⁰⁸ Although *Moorman* fails to distinguish—or even to mention—*Wheeling*, there is no reason to think that *Wheeling* would be decided any differently today; the multiple taxation of interstate business in a scheme such as Ohio's is so obvious that—although it is no more the result of Ohio's statute than other states' taxing schemes—the Court could not possibly expect Congress to approve of the state's action.

Ohio might have defended the tax by arguing that it should not be examined independently of the state's whole fiscal structure, and that the seemingly discriminatory tax on intangibles helped to ensure that out-of-state businesses fairly supported the state-funded services that they enjoyed. Out-of-state businesses, for example, are less subject to property taxes that provide benefits, such as a skilled labor force, that in turn benefit out-of-state business.¹⁰⁹ In short, Ohio might have argued that its apparently discriminatory tax simply offset other taxes that discriminate in their impact against in-state interests. Whether or not this assertion would have ultimately proven true, the Court's failure even to consider the issue illustrates the generally superficial nature of its inquiry.

¹⁰⁶ 337 U.S. 562 (1949).

¹⁰⁷ *Id.* at 574.

¹⁰⁸ The decision was based on equal protection considerations. *Id.* at 570-72.

¹⁰⁹ Of course, Ohio might have imposed a duplicative tax on property owned out-of-state to compensate for use of the property tax as an in-state revenue raising device. Such a tax, however, would be vulnerable to objection because a state has no "nexus" with out-of-state property that it wishes to tax. The objection would likely be on due process grounds. The incorporation of the nexus requirement into commerce clause decisions, see *Hellerstein*, *supra* note 91, at 19, 20 & n.107, reflects the inevitable process orientation of negative commerce clause analysis. Presumably, Congress could itself approve of interstate property taxation in a way that satisfied process-oriented observers, inasmuch as all interests are, theoretically, represented in Congress.

The Court also invalidated a superficially discriminatory tax in *Austin v. New Hampshire*.¹¹⁰ In that case, the Court struck down a tax on commuting nonresidents employed in New Hampshire, which had no income tax of its own. As in *Wheeling*, the state might have argued this case on "offsetting discrimination" grounds. In invalidating the tax under the privileges and immunities clause, the Court noted both that the tax was not offset by the state's ten-dollar annual resident tax,¹¹¹ and that the state's taxes on business profits, real estate transfers, and property were paid by residents and nonresidents alike.¹¹² This analysis, however, looks only at the superficial characteristics of these taxes. New Hampshire might have claimed that property ownership and use—like many tax bases—are poorly correlated with enjoyment of state-funded services, and that the separate tax on commuters offset the discrimination of an apparently neutral property tax against residents. As in *Wheeling*, the Court failed to examine this possibility.

*Nippert v. City of Richmond*¹¹³ provides a third example of judicial invalidation of a superficially discriminatory tax. In that case, the Court invalidated a city ordinance that levied an annual license tax on solicitors, or "drummers." The tax, although applied to all solicitors whether employed by local or interstate businesses, probably fell more heavily on the latter, because relatively few local businesses employed roving salespeople. In this case, as in *Wheeling* and *Austin*, the taxing authority might have argued that the license fee structure involved at most merely offset other taxes, such as property taxes, routinely paid by local business.¹¹⁴

It is quite unlikely that the Court would have decided any of these three cases differently had the offsetting discrimination argument been made. Taxes that superficially appear to affect interstate business more severely—whatever their actual impact—elicit judicial intervention. These cases are, then, at odds with *Moor-*

¹¹⁰ 420 U.S. 656 (1975).

¹¹¹ *Id.* at 665 n.10.

¹¹² *Id.* at 659 n.3.

¹¹³ 327 U.S. 416 (1946).

¹¹⁴ The discussion in the text does not imply that such offset arguments should automatically overcome judicial objections. Indeed, even when the fiscal system—including taxes, charges, and all benefit programs—is viewed in its entirety, nonresidents may still suffer discrimination.

man, in which the Court placed the burden of proving discrimination on the taxpayer and did not ask the state to demonstrate neutrality. Clearly, the forms of the taxes in *Wheeling*, *Austin*, and *Nippert* aroused the Court's fear of local favoritism,¹¹⁵ while the form of the tax in *Moorman* appeared less likely to pose this danger. Although the three invalidation cases may reflect fiscal systems that actually discriminate in favor of in-state businesses and *Moorman* may not, the Court never reached this question. Instead, it assigned the determinative burden of proof according to the superficial effects of the tax in question.

An important exception to the Court's myopic view of discriminatory tax burdens is its treatment of sales taxes and "use," or "compensating," taxes. Typically, when a state imposes a sales tax, residents are inclined to purchase goods in other states that do not tax retail sales to nonresidents.¹¹⁶ To discourage such jurisdiction-shopping, a state might enact a tax on the in-state use of goods purchased out-of-state. In *Henneford v. Silas Mason Co.*,¹¹⁷ the Court upheld such a tax, recognizing, however, that a superficial view of the use tax would find it discriminatory because it applies only to interstate business.¹¹⁸ Of course, use taxes and sales taxes are more easily linked to one another than are drummers' license fees and property taxes in *Nippert* or commuter and property taxes in *Austin*. Nonetheless, all of these cases do present the same issue of offsetting discrimination once one strips away the differences in their forms and looks more carefully at the effects of the taxes involved.

¹¹⁵ 327 U.S. at 434-35.

¹¹⁶ The buyer will only take physical possession in the buyer's home state. The "selling state" could impose a property tax on retail stores in lieu of a sales tax but such a tax would discourage inventory maintenance and would raise prices relative to other states (to which consumers could flock).

¹¹⁷ 300 U.S. 577 (1937).

¹¹⁸ *Id.* at 583-84. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court invalidated a use tax that reached equipment that would not have been subject to the state sales tax if purchased in state. The Court's sensible but limited attraction to the compensating feature of the use tax is thus clear. *Id.* at 69-70.

The nexus (due process) requirement that is apparently not met in the case of use taxes was "solved" by focusing on the in-state location of the good between the time of importation and consumption. See *Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 180-81 (1939).

b. *Tolls and Taxes on Common Carriers*

A toll is an interesting but surprisingly unlitigated form of tax that deserves special mention. Tolls collected on bridges, tunnels, and older highways may sometimes bring in more revenue than is needed for the surrounding facility and may, with little subtlety, discriminate against out-of-state vehicles.¹¹⁹ Yet there has been no litigation regarding such tolls.

Courts, however, have reviewed tolls that take the form of taxes on vehicles and common carriers. As in the apportionment cases, the superficial neutrality of tolls means that the burden of proof of discrimination is placed on the challenger, and, as in the apportionment cases, the burden of proof is dispositive. A tollpayer that must prove that the toll paid exceeds the value of the benefits received is surely doomed to failure. In *Capital Greyhound Lines v. Brice*,¹²⁰ the Court considered a Maryland title tax equal to two percent of the value of the appellant's vehicles. The statute also imposed a tax of one-thirtieth of a cent per passenger seat-mile. Both taxes applied to all common carriers and so, although Greyhound's vehicles travelled on only nine miles of the state's roads, the statute did not seem grotesquely discriminatory in form. The Court upheld the tax, agreeing that the state need not relate taxes to the benefits of road use in a precise manner.¹²¹ Thus, there is every reason to think that all tolls, like apportionment formulas, would survive judicial review.

c. *Excise Taxes*

The Court's treatment of state excise taxes on specific goods or privileges seems even more superficial and difficult to rationalize than its treatment of the taxes already discussed. Again, the Court upholds taxes in this category so long as they are facially neutral. Thus, state taxes on the privilege of doing business in corporate form have been upheld,¹²² without any analysis of the burdens that

¹¹⁹ For example, some toll facilities offer discount books that are useful only to frequent users who are, of course, local residents and not occasional passers-by. States also tend to place toll booths near their borders and to use tollroad funds for local road maintenance. See *Wall St. J.*, June 22, 1982, at 37, col. 1.

¹²⁰ 339 U.S. 542 (1950).

¹²¹ The decision is elegantly and soundly criticized in *Brown*, *supra* note 8, at 232.

¹²² *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975).

they impose on interstate commerce. Similarly, a Montana severance tax on coal extracted in that state was held valid. The Court did not suggest an analysis of the true impact or incidence of the tax but simply noted that the tax applied without regard to whether the coal remained in-state or was exported.¹²³

Similarly, the Court has struck down facially discriminatory taxes without careful examination of their total impact. In *Boston Stock Exchange v. State Tax Commission*,¹²⁴ the Court found that a New York transfer tax on securities transactions discriminated against interstate commerce "by providing a direct commercial advantage to local business."¹²⁵ The tax was by its terms significantly more severe with respect to out-of-state sales than in-state ones.¹²⁶ In *Maryland v. Louisiana*,¹²⁷ the Court invalidated a Louisiana tax that contained provisions clearly intended to exempt in-state consumers from the tax imposed on natural gas coming into the state from the outer continental shelf.¹²⁸ In neither case did the Court consider the relationship between the incidence of the tax and the benefits provided by the state, but in neither does it seem likely that the tax could have been so justified.

On its current path, the Court might never examine more than the most obvious characteristics of the kinds of taxes discussed above.¹²⁹ The Court's approach to these cases is simplistic and somewhat predictable. Regardless of their actual impact, these taxes will be invalidated when they seem, at least on the surface, designed to affect out-of-state businesses and residents more severely than local ones. This treatment is therefore quite different from the course that the Court has taken with regard to other

¹²³ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The case is discussed *infra* at text accompanying notes 141-43, 217-22.

¹²⁴ 429 U.S. 318 (1977).

¹²⁵ *Id.* at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

¹²⁶ The transfer tax, applied to transactions conducted at least in part in-state, was reduced 50% for nonresidents selling in New York, and was limited to a maximum (of \$350) for any one transaction involving an in-state sale. 429 U.S. at 324.

¹²⁷ 451 U.S. 725 (1981).

¹²⁸ The Court focused on the credits and exemptions available to local utilities, distributors, and other in-state users. *Id.* at 756.

¹²⁹ Such an examination would involve difficult tax-incidence and tax-benefit analyses. See R. Musgrave & P. Musgrave, *supra* note 104, at 354-72; Hellerstein, *supra* note 91, at 27-42.

forms of interstate barriers.¹³⁰

2. *Exploitative Potential of Taxes and Tolls*

The exploitative potential of taxes and other state-imposed barriers that constrain production for out-of-state sale—rather than encourage in-state supply—is apparent in a broad variety of circumstances. As in all monopolistic settings, this exploitative power vanishes as substitutes emerge for the good in question. Thus if a state enjoys a unique resource, such as a port facility, it can use that resource to exploit out-of-state consumers by any means that limits the “sale” of port usage, including taxation and regulation of vessels, tonnage, or labor. If the state owns the facility itself, then it can limit output and achieve monopoly profits directly through the prices that it charges. The monopoly is nonetheless limited by the extent to which other harbors, methods of transportation, and nonimported goods can be substituted at a cost lower than the monopoly premium. Developers of these substitutes may be deterred from entry, however, because the exploitative state can always lower its price and inflict grave losses on these developers who, by hypothesis, cannot survive in a more competitive environment.¹³¹

Even where the state does not itself own the unique resource, monopolistic exploitation is possible. If an industry has concentrated in one state, for example, that state has the opportunity to exploit. The location of the major capital markets in New York is a good illustration. A tax, a state-enforced price schedule, or other regulation of security sales or brokers’ licenses can easily enable the state to exploit nonresident consumers in a way that more than compensates residents who also pay higher prices. The “barrier” thus does not need to be discriminatory on its face. Of course the larger the percentage of consumers of the taxed item who live in-state, the less successful the exploitation will be. Furthermore, the industry can inigrate to another state that promises not to exploit the monopoly that will develop. But such migration requires time, organization, and relocation expenditures, and businesses that consider moving must take the risk that these promises will be broken.

¹³⁰ See *supra* text accompanying notes 34-44, 80-81.

¹³¹ See F. Scherer, *Industrial Market Structure and Economic Performance* 234 (2d ed. 1980) (describing dominant firm’s ability to keep out entrants if their unit cost exceeds that of the dominant firm).

Not all taxes on such an industry would create monopolistic welfare loss, however. A *profits* tax on a captive industry, such as the stock brokerage business in New York, will also yield the state a portion of the available economic rent, but unlike most other taxes and regulations it will not cause firms to limit output.¹³² Thus, some kinds of state taxes concerning unique advantages and resources do not support monopolistic exploitation but instead simply transfer wealth from specific enterprises to state citizens. Once again, if too burdensome, such a tax operates effectively only until firms relocate to other jurisdictions.

On a smaller scale and over a still shorter period, virtually every successful business that is owned by nonresidents offers a unique resource to exploit. The state's ability to exploit through use of a tax is limited, once again, by the business' ability to relocate.¹³³ The potential for such exploitation might have justified the early judicial intolerance of all taxes imposed "directly" on interstate commerce.¹³⁴

a. Taxes on Interstate Business

The Supreme Court's invalidation of "discriminatory" taxes on interstate business can be recharacterized as disallowance of state actions with exploitative potential. *Austin v. New Hampshire*¹³⁵ illustrates this possibility. The location of businesses in New Hampshire employing out-of-state residents offers an opportunity for exploitation. Commuting employees who must sell their labor in New Hampshire can be exploited monopsonistically by a tax on their earnings. Exploitation is, of course, limited by the ability of employers and workers to migrate out of state. Such relocation, however, is more difficult the more both the in-state businesses and the exploited workers would need to reinvest in alternative arrangements. Thus, taxes such as New Hampshire's might properly be regarded with suspicion to the extent that they are imposed on businesses and workers who cannot easily relocate. The Court's invalidation of the commuter tax might follow from the conclusion

¹³² See J. Henderson & R. Quandt, *Microeconomic Theory* 219-21 (2d ed. 1971).

¹³³ For a case involving such relocation, see *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

¹³⁴ See *supra* note 91 and accompanying text.

¹³⁵ 420 U.S. 656 (1975).

that it would be relatively expensive for the affected businesses to relocate or for their commuting employees to find other work appropriate to their skills.

Arguably, the Court's intolerance of facially discriminatory taxes is consistent with the exploitation-interference theme. Such taxes seem more likely to be designed to exploit out-of-state interests than taxes that affect in-state and out-of-state interests uniformly.

The interference-exploitation distinction is particularly interesting with regard to the Court's exceptionally sympathetic treatment of use taxes on goods purchased out of state.¹³⁶ Although use taxes cannot support monopolistic exploitation because they are imposed on goods produced out-of-state, they might support monopsonistic exploitation if the state's goal is to limit demand in an anticompetitive manner. Such a scheme can hardly be translated into practice, however; it is difficult to identify a state that contains most of the buyers of a good produced out-of-state—and that therefore could organize a monopsony—much less a state that could profitably monopsonize the markets for the range of retail goods covered by sales and use taxes. The Court's acceptance of compensating use taxes seems sensible, therefore, because such taxes prevent residents who shop out-of-state from avoiding their responsibility to pay for the state services they enjoy, and such taxes seem unlikely to be exploitative. On the other hand, the Court might make an exception to its tolerant treatment of use taxes in the rare case where monopsonistic exploitation is possible. A use tax narrowly focused to coordinate with a jurisdiction's substantial purchasing power ought to be struck down. For example, a city tax imposed on Christmas trees purchased elsewhere and then brought within the city's boundaries, which allegedly compete with the handful of trees grown and sold within the city and subject to its sales tax, is more likely to be a monopsonistic coordination of the city's purchasing power than a measure designed to prevent taxpayers from avoiding their responsibilities.

b. Tolls and Taxes on Common Carriers

The interference-exploitation theme might at first glance appear inconsistent with tolerant treatment of tolls. Tolls are most often

¹³⁶ See *supra* notes 116-18 and accompanying text.

charged for the use of bridges and other facilities that offer substantial opportunities for monopolistic exploitation. The development of a close substitute is normally a time-consuming undertaking requiring a large investment. Yet there is little reason to expect that tolls would not survive judicial review.

Tolls seem more acceptable when viewed as exploitations that are necessarily preceded by investments by the state. The analogy to a patent, suggested earlier in the discussion of *Zobel v. Williams*,¹³⁷ is helpful. From the standpoint of a state considering the investment, a toll facility might most accurately be viewed as a single project, just as monopoly profits arising from a patent should be considered from the perspective of an inventor deciding whether to invest in research. In both cases, the prospect that the exploitation phase of the "project-as-a-whole" will later be ruled illegal may serve to deter the original investment. Toll facilities, in this view, may be *subsidies* that expand rather than limit output. Favorable judicial treatment is, therefore, no surprise. Tolls that may fall more heavily on out-of-state users are, thus, similar to higher tuitions charged to nonresident students who attend attractive state colleges that have been built and supported with state funds. Of course, some state facilities may exploit strategic location and entry barriers in a manner not essential to the creation of these facilities. Judicial review of such schemes ought to be available.

c. *Excise Taxes*

The Court's treatment of excise taxes is also consistent with the interference-exploitation distinction. New York's disallowed transfer tax on securities¹³⁸ could have been used to exploit out-of-state customers.¹³⁹ Similarly, Louisiana's tax on natural gas passing through the state might have been struck down as potentially exploitative.¹⁴⁰ In each case the state enjoyed a unique advantage protected, at least in the short run, from substitutes. On the other hand, no state has more than the most fleeting monopoly on distri-

¹³⁷ See *supra* note 78 and accompanying text.

¹³⁸ *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

¹³⁹ See *supra* text accompanying notes 124-26.

¹⁴⁰ *Maryland v. Louisiana*, 451 U.S. 725 (1981). See *supra* text accompanying notes 127-28.

bution of the privilege to do business in corporate form. Judicial approval of taxes on this privilege is, therefore, quite consistent with the suggested theme.

The major excise tax case that does not "fit" is *Commonwealth Edison Co. v. Montana*,¹⁴¹ in which the Court upheld Montana's facially nondiscriminatory severance tax on coal. Normatively, this case is troubling and was probably wrongly decided. It can, with a deep breath, be forced into the interference-exploitation scheme using the "project-as-a-whole" argument outlined above.¹⁴² This questionable exercise is left to the discussion of cases that, like *Commonwealth Edison*, deal with the disposition of natural resources.¹⁴³

D. Other State Regulations Affecting Interstate Commerce

1. Current Doctrines

The remaining cases concern state-imposed trade barriers that do not fit into the categories already considered; these cases form an unpredictable area of the law. In common-law fashion, the Court has balanced local and national interests on a case-by-case basis.¹⁴⁴ Although commentators and dissenting justices have shown increasing hostility toward the Court's approach to such regulations,¹⁴⁵ there is no reason to criticize severely the Court's methodology. Even though the balancing technique may be poor at providing guidance to the lower courts, its unpredictable results after all are consistent with common-law jurisprudence;¹⁴⁶ one would hardly expect common-law tort or contract cases always to be de-

¹⁴¹ 453 U.S. 609 (1981).

¹⁴² See *supra* text accompanying note 137.

Arguably, Montana's coal—in a world with recently cartelized oil—presented an opportunity to tax economic rent in a way that distorts allocative efficiency less than most other taxes, which encourage substitution of untaxed goods. But if a state wishes to tax or confiscate rent that results from cartelization of substitutes, then it can just as easily impose a windfall profits tax that does not reduce output in the way a tax on the product itself does.

¹⁴³ See *infra* text accompanying notes 218-22.

¹⁴⁴ For cases the Court itself cites for this proposition, see *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁴⁵ See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (Rehnquist, J., dissenting); *Eule*, *supra* note 8; *Kitch*, *supra* note 8.

¹⁴⁶ There is nothing wrong, of course, with case-by-case determinations in the common law tradition. But the Court ought to clarify the nature of its intervention, and most importantly, ought to tell lower courts what to search for in the fact-finding process.

cided for (or against) railroads or merchants.

One important group of cases might be dubbed the "transportation decisions" because they concern state regulations imposed on interstate carriers. The Court has occasionally invalidated these regulations, expressing skepticism about the safety or other local benefits that they are said to generate. Thus, the Court has voided regulations requiring nonconforming mudguards on trucks,¹⁴⁷ unusually strict length limitations on trucks¹⁴⁸ and trains,¹⁴⁹ and disruptive speed limits on trains approaching road crossings.¹⁵⁰ The Court, however, has not struck down all such "safety" regulation. In *South Carolina State Highway Department v. Barnwell Brothers*,¹⁵¹ for example, it accepted a regulation prohibiting trucks wider than ninety inches and heavier than ten tons even though these restrictions effectively banned the great majority of interstate trucks.

The Court has made similar case-by-case determinations outside the transportation area, accepting some state restrictions on interstate trade while invalidating others. For example, the Court upheld Detroit's smoke abatement standards in *Huron Portland Cement v. City of Detroit*,¹⁵² despite their likely burden on interstate commerce. The Court, however, has refused to accept claims that health concerns justified restricting or barring sale of out-of-state milk.¹⁵³ The Court has approached in similar fashion state regulations allegedly designed to assist consumers, and has balanced the state's interest against the burden on interstate commerce.¹⁵⁴

¹⁴⁷ *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

¹⁴⁸ *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978).

¹⁴⁹ *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

¹⁵⁰ *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).

¹⁵¹ 303 U.S. 177 (1938).

¹⁵² 362 U.S. 440 (1960). See also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding market regulation because of plausible environmental concern).

¹⁵³ *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (refusing to accept Mississippi's health reasons for banning Louisiana milk); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (rejecting an ordinance blocking the sale of milk pasteurized more than five miles away because less burdensome alternatives appeared available). See also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (expressing skepticism regarding the connection between healthful sanitation and high profits that would result from price regulation of milk bought out of state as well as in state).

¹⁵⁴ See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (invalidating a North Carolina statute that kept competing apple crates from bearing more

Although state interests in health and consumer protection sometimes justify state regulation affecting interstate trade, the Court is generally unsympathetic to explicit attempts to distort prices and other market features. The Court, for example, struck down a North Dakota statute allowing grain inspectors to determine the profit margin allowed on sales by grain dealers.¹⁵⁵ Similarly, the Court overturned an Arizona statute which had the ostensible purpose of enhancing the reputation of the state's produce and the deleterious effect of requiring a fruit grower to spend a quarter of a million dollars building a duplicative packing plant in-state so that its containers would conform to state standards.¹⁵⁶ Of course, if a state is serious about its anticompetitive goals, it can enter an industry itself and drive prices or output in the preferred direction.¹⁵⁷ Alternatively, the state can direct similar behavior by

information than required by U.S. Department of Agriculture standards, allegedly to protect consumers from confusion of overinformation).

The Court, however, was not inclined to engage in such balancing in *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), which concerned a California prohibition on the importation of avocados with less than eight percent oil content. Competing Florida avocados were of a different variety from California avocados and could not practically meet the California requirement. The Court remanded the case to the district court because evidence relevant to commerce clause considerations had not been admitted at the first trial. *Id.* at 156. The record, though, already contained far more evidence than the Supreme Court has often had for its balancing work in this area. Compare *Florida Lime & Avocado*, 373 U.S. at 140 (describing sources, relative oil content, storage features, and shipping qualities of avocados) with *Washington Apple*, 432 U.S. at 350-53 (describing barrier's effect on relative marketing costs and advantages without any supporting empirical evidence).

One argument that California might have made for its limitation on the import of competing avocados is that California contains a disproportionate share of the consumers of avocados, perhaps in part because of investments by California growers in developing this market, and that the growers should be assisted in keeping out free-riding competitors. This form of protection seems quite extreme, however, when compared to, for example, the more limited protection given ideas and inventions by the copyright laws. The notion underlying this argument, that trade regulations should not be viewed in isolation but rather as the second stage of desirable investments by a state, is at least plausible, however, and is the same as the "project as a whole" theory discussed *supra* text accompanying note 137.

¹⁵⁵ *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922). See also *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949) (invalidating a New York statute stifling the entry and expansion of milk-receiving facilities that were pointedly described by a state commissioner as threatening "destructive competition").

¹⁵⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Apparently the Court is unsympathetic to market regulation affecting interstate commerce unless the effect is "incidental." See *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 353 (1939) (upholding minimum price legislation and "distinguishing" *Lemke*).

¹⁵⁷ See *supra* notes 34-44 and accompanying text.

private parties. In either case, the state can take refuge in the state action exemption from the antitrust laws, first announced in *Parker v. Brown*.¹⁵⁸ This extreme and paradoxical treatment¹⁵⁹ of state regulation is discussed in Part IV of this article and is assumed not to affect the analysis of the cases discussed in this section.

In sum, the Court's approach to state regulation is case-specific and gives the lower courts little guidance in dealing with these uncategorized types of state action. This is perhaps best shown by comparing the Court's different responses to two similar state regulations. In *Exxon Corp. v. Governor of Maryland*,¹⁶⁰ the Court upheld a statute prohibiting oil refiners from operating service stations in the state. Although the state's interest in regulating the gasoline retail market was used to dispose of a substantive due process argument,¹⁶¹ the Court's commerce clause analysis focused on the lack of burden on interstate commerce. The Court emphasized that the statute did not discriminate against interstate sales because out-of-state corporations that were not refiners could continue to sell gasoline in the state.¹⁶²

Two years later, in *Lewis v. BT Investment Managers, Inc.*,¹⁶³ the Court struck down a Florida law excluding out-of-state bank holding companies from the state's capital markets. The Court's opinion distinguished *Exxon*, claiming that Maryland's statute did not discriminate between interstate and local producer-refiners, whereas the Florida statute discriminated between out-of-state and in-state bank holding companies.¹⁶⁴ The distinction is unconvincing, given that Florida permitted out-of-state investment companies that were not bank holding companies, banks, or trust companies to compete in the Florida market. Both the Florida and

¹⁵⁸ 317 U.S. 341 (1943).

¹⁵⁹ It is paradoxical that minor state interference with commerce can be objectionable while major involvement fits the *Parker* exemption. It is not paradoxical if one views the "procedural" requirements of the *Parker* exemption, see Areeda, Antitrust Immunity for "State Action" After *Lafayette*, 95 Harv. L. Rev. 435, 437-38 (1981) (reviewing requirement that state closely supervise regulation), as Congress' way of ensuring careful "agency" work by the states.

¹⁶⁰ 437 U.S. 117 (1978).

¹⁶¹ *Id.* at 124-25.

¹⁶² *Id.* at 125-26.

¹⁶³ 447 U.S. 27 (1980).

¹⁶⁴ *Id.* at 42.

Maryland statutes protected local businesses from a substantial set of out-of-state competitors, and both permitted a small, less threatening set of out-of-state enterprises to compete. The burden on interstate commerce, therefore, is not obviously different, and the local interest in controlling the gasoline market hardly seems greater than the state's interest in controlling the market for financial services.¹⁶⁵

2. *Relevance of the Interference-Exploitation Distinction*

Despite their limiting effect on economic activity, the great majority of these state-imposed barriers not involving subsidies, preferences, traditional quarantines, taxes, or tolls do not concern unique, exploitable advantages. Thus, the now-familiar Mississippi ban on Louisiana milk does not promote any monopolistic exploitation of out-of-state interests by Mississippi. Furthermore, that ban is also unlikely to support a buying cartel, as a substantial number of the potential customers for Louisiana milk live outside Mississippi. Because the state actions involved in these cases generally lack clear exploitative potential, they are best classified as interferences. Interestingly, the Court's balancing approach is in fact similar to the judicial approach to interferences suggested earlier.¹⁶⁶

The proper approach to such cases is therefore the proposed judicial posture toward interferences. Courts might expect that Congress would object to many such barriers both because they are inefficient and because they are slow to disappear (perhaps due to the power of special interest groups in the legislating state's political process). Yet, courts might also expect an attentive Congress to approve many other barriers imposed by the local regulatory pro-

¹⁶⁵ *Exxon* and *BT Investment* might be viewed as reflecting the Court's sudden, or subtle, process-orientation. The Court in *BT Investment* might have been motivated by its sense that the statute was the result of lobbying by well-organized banking groups and inaction by less organized and less informed consumers. *Id.* at 31. Presumably, the Court must also have decided that, on balance, the statute yielded greater burdens than benefits. The decision in *Exxon* may reflect the Court's sense that no intervention was necessary, rather than the desirability of that statute over the one in *BT Investment*. As a factual matter, it is not obvious that consumers in *Exxon* were better organized. Just as businesses may have lobbied against the major oil companies in *Exxon*, so too might they have lobbied in *BT Investment*.

¹⁶⁶ See *supra* text accompanying note 28.

cess, deferring to decisionmakers more familiar with local conditions. The same courts which are especially suspicious of state actions that are conceivably exploitative should be more hesitant to invalidate barriers that are simply interferences. Nevertheless, they should overturn some such barriers in common-law fashion when they find that the benefits do not justify the costs. So long as these judicial invalidations are based on commerce clause principles and not on less reversible constitutional grounds, Congress can correct any judicial errors that might arise.

This approach does not imply that the courts are without guidance in deciding these regulation cases. In examining local regulations, courts should be more suspicious of those imposing substantial costs out-of-state than those placing costs primarily within the legislating jurisdiction. Courts should also be concerned when formidable entry barriers make it particularly wasteful for out-of-state businesses to adapt to a regulation: such barriers may facilitate exploitation, at least in the short run. *Pike v. Bruce Church, Inc.*¹⁶⁷ is a fine example of a case in which these concerns should have been strong; there, the least expensive way around Arizona's regulation was apparently to build a plant that unnecessarily duplicated one already in existence.

The reason for particular judicial scrutiny where a regulation imposes heavy costs out of state or results in significant economic waste is not that such regulations are necessarily exploitative, but rather that they seem most likely to impose costs on the nation that cannot be justified by local interests. The transportation decisions¹⁶⁸ offer general examples. The Court has struck down statutes that, in the name of safety, place burdens on trucks and trains. Although the advantageous location between population centers of the states imposing these regulations cannot escape notice,¹⁶⁹ the potential for exploitation in the monopolistic sense is small; it is conceivable, but unlikely, that after requiring unique

¹⁶⁷ 397 U.S. 137 (1970). See *supra* text accompanying note 156.

¹⁶⁸ See *supra* text accompanying notes 145-51.

¹⁶⁹ The states included Arizona, *Southern Pac. v. Arizona*, 325 U.S. 761 (1945); Iowa, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); South Carolina, *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938); and Wisconsin, *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978). All these states are situated in major hauling streams, yet do not participate heavily in exports. They are therefore perfectly situated to exploit carriers without causing great harm to themselves.

mudguards on trucks, a state could use its locational advantage to control the market for mudguards and extract a monopoly profit from their sale. The more troublesome aspect of such a statute is, instead, its striking disproportionality: a state may pass legislation that yields relatively minor benefits to itself but imposes substantial burdens on nonresidents. Thus, many of the transportation decisions invalidating safety regulations would conform to the approach suggested in this article.¹⁷⁰ Of course, even some interferences that impose their costs primarily out of state should be upheld. A traditional quarantine might be an example. When safety claims appear convincing and burdens on interstate commerce seem small, a reviewing court—and Congress itself—should approve state regulations despite their disproportionate impact on nonresidents.

In sum, interstate barriers should be inspected for exploitative potential. But when no such potential is present, the Court's decisions are, for the most part, unsatisfactory only in the sense that they do not articulate the nature of common-law review. Unless the Court wishes to announce reliance on particular concerns such as those just suggested, the lower courts can learn little from the Court's decisions. The inability of states and other interested parties to predict the results in many regulation cases, however, is no more troubling than the familiar inability to predict congressional actions in this and other areas.¹⁷¹

E. Natural Resources

Because the Supreme Court regards dispositions of natural resources as a special category of state actions affecting interstate commerce,¹⁷² this article does the same. The distinct treatment

¹⁷⁰ See *supra* text accompanying note 28.

¹⁷¹ Of course one difference between the two is that a court's unpredictable decision will be retrospective while an unpredictable congressional decision is, at least technically, prospective in its impact. The unpredictability of judicial decisionmaking might therefore be somewhat more troubling to some observers. My own skepticism regarding this traditional distinction causes me to pass over its relationship to the nature and substance of judicial, or agency, review discussed in this article.

¹⁷² See *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896), which had regarded states as owning the wild animals they contain, and declaring that state regulations of such animals "should be considered according to the same general rule applied to state regulation of other natural resources").

that the Court continues to give the natural resource cases stems from the traditional notion that a state owns natural resources within its borders that are not privately controlled. Although modern decisions have made clear that such ownership can be no more than an obsolete fiction,¹⁷³ the category retains predictive value.

1. Current Doctrines

Supreme Court treatment of the natural resource cases reflects a discernible theme; with a few exceptions, total bans on trade are invalidated while less-than-impenetrable barriers are accepted more readily than in cases not dealing with natural resources. Thus, the Court has struck down the following state actions: a city's ban on the exportation of water,¹⁷⁴ an Oklahoma ban on the export of oil and gas,¹⁷⁵ a Louisiana requirement that all shrimp caught in its waters be shelled in-state,¹⁷⁶ a similar South Carolina statute requiring that all shrimp be processed in-state,¹⁷⁷ an Alaska law forbidding any work associated with Alaskan oil unless state residents were preferred in hiring over nonresidents,¹⁷⁸ a New Hampshire law prohibiting the export of electric power until in-state needs were satisfied,¹⁷⁹ and a West Virginia statute forbidding the export of gas unless all in-state demand had been met.¹⁸⁰ Similarly, in *Hughes v. Oklahoma*,¹⁸¹ the Court's invalidation of a statute prohibiting the export of minnows "seined or procured within the waters" of the state¹⁸² also appears to fit the total-ban theme. It might be argued that because the statute permitted the

¹⁷³ *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977). For a discussion of the natural resources cases, see Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 S. Ct. Rev. 51.

¹⁷⁴ *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966). For a discussion of water embargoes, see Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 Tex. L. Rev. 1249 (1981).

¹⁷⁵ *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

¹⁷⁶ *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

¹⁷⁷ *Toomer v. Witsell*, 334 U.S. 385 (1948).

¹⁷⁸ *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

¹⁷⁹ *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

¹⁸⁰ *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Nothing in any of these cases invalidating export restrictions appears to prevent a state from expending its own funds to purchase all the available resource and then retaining the resource in-state.

¹⁸¹ 441 U.S. 322 (1979).

¹⁸² *Id.* at 323.

export of hatchery-bred minnows,¹⁸³ it did not impose a total ban. Such hatchery minnows are not a natural resource in the same sense that natural minnows are, however, so that their different treatment is not an exception to the total ban on the export of a natural resource. In this sense, *Hughes v. Oklahoma* can scarcely be regarded as a counterexample to the total-ban theme.¹⁸⁴

The Court, in contrast, has upheld less restrictive limitations including an Oklahoma tax on natural gas destined primarily for out-of-state use,¹⁸⁵ a Montana severance tax on coal,¹⁸⁶ and a Montana elk-hunting license fee charging nonresidents seven and one-half times more than residents.¹⁸⁷ Significantly, these three restrictions did not totally ban nonresidents from participating in economic activity, although they did impose substantial burdens.

The few exceptions to this approach are instructive. One may view the Court's upholding in 1908 of a New Jersey ban on water exportation,¹⁸⁸ and in 1876 of a Virginia statute prohibiting nonresidents from oystering in the state's tidewaters,¹⁸⁹ as "eroded precedents."¹⁹⁰ The first,¹⁹¹ and perhaps the second,¹⁹² of these cases can also easily be reinterpreted using the interference-exploitation theme. For the present, however, it is useful to note that neither statute was enacted to retaliate or reciprocate for another state's barrier. In contrast, in *Sporhase v. Nebraska*,¹⁹³ the Court recently invalidated a restrictive water extraction and exportation policy, emphasizing that under the Nebraska statute the grant of a permit to export to another state was conditioned on that state's offer of reciprocal water rights.¹⁹⁴ The Court's distaste for "recipro-

¹⁸³ See id. at 345 (Rehnquist, J., dissenting).

¹⁸⁴ The Court's description of the statute indicates that it did not view this exception as important. See id. at 323-24.

¹⁸⁵ *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950).

¹⁸⁶ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

¹⁸⁷ *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

¹⁸⁸ *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

¹⁸⁹ *McCready v. Virginia*, 94 U.S. 391 (1876).

¹⁹⁰ See *Sporhase v. Nebraska*, 102 S. Ct. 3456, 3459-60 (1982); Hellerstein, *supra* note 173, at 87.

¹⁹¹ See *infra* text accompanying note 210.

¹⁹² See *infra* note 212.

¹⁹³ 102 S. Ct. 3456 (1982).

¹⁹⁴ It is the reciprocity requirement that fails to survive judicial scrutiny. Id. at 3465 (citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951)).

cal restrictions" is, of course, not limited to the natural resource cases.¹⁹⁵

More recent exceptions are distinguishable. The importance of limestone deposits in *Reeves*, in which the Court sustained the practice of selling cement to in-state customers exclusively,¹⁹⁶ might classify it as a natural resource case and a counterexample to the total-ban approach. Arguably, however, the law did not completely ban exports because nonresidents could easily buy cement from residents who bought the state's output. Alternatively, because the state owned the cement-producing facility, *Reeves* conceivably shows that subsidy cases form an exception to the total-ban approach to natural resource restrictions.

In another apparent exception, *Dayton Power & Light Co. v. Lindley*,¹⁹⁷ an Ohio court invalidated on commerce clause grounds a consumption tax inversely related to the sulphur content of coal. Ohio's high-sulphur coal was, therefore, favored by the tax. The tax hardly appears more objectionable than Montana's severance tax on coal.¹⁹⁸ This invalidation of a less-than-total ban might be distinguished on the ground that it was decided by a state court detached from the Supreme Court's apparent, though unarticulated, approach to natural resource cases. This case can be rationalized, however, using the interference-exploitation theme.¹⁹⁹

The total-ban approach seemingly taken by the Court in natural resource cases is a corollary to the sort of balancing that the Court undertakes in reviewing state regulations in general. The Court might see a total ban as a signal that the legislating state has not considered less restrictive alternatives that, although less convenient to the state,²⁰⁰ would be in the national interest. As noted earlier, the quarantine cases also reflect this approach; a broad quarantine is regarded more readily as an illegal intrusion on interstate commerce than one with exceptions.²⁰¹

¹⁹⁵ See *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

¹⁹⁶ See *supra* text accompanying notes 37-38.

¹⁹⁷ 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979).

¹⁹⁸ Although one is paid by consumers and the other by producers, both are marginal taxes and likely to yield similar effects.

¹⁹⁹ See text accompanying notes 212-16.

²⁰⁰ Once again, the state could struggle with user charges that would ensure nondiscrimination (and, perhaps, more sensible allocation of the resource).

²⁰¹ See *supra* notes 80-86 and accompanying text.

However great the descriptive or predictive value of the total-ban theme, standing alone it is an unsatisfactory judicial approach. So long as states can selfishly block free trade by simply drafting statutes that avoid imposing a total ban, they can easily undermine the protection of free trade. If, for example, a cartel of states can severely constrain the export of a mineral or grain—or tax the export to achieve the same result—in a way that is acceptable under the total-ban approach, then the approach is ineffective. The different and unpredictable judicial treatment of similar interstate barriers in natural resource cases, with emphasis on the form of the barrier involved rather than the severity of its effect on free trade, reflects the inadequacy of prevailing doctrines and methods.

2. *Exploitative Potential of Natural Resource Restrictions*

Truly total bans on the export of a natural resource cannot be used for monopolistic exploitation; the resource is not sold at a monopoly price to nonresidents, but is, instead, not sold at all. As interferences, these total bans—like broad quarantines²⁰²—appear to arouse fears that the state is regulating with an unnecessarily broad brush only because a substantial share of the burdens produced by the barrier fall out of state.

In reality, however, some of the bans treated by the Court as total are not complete bans and therefore do have exploitative potential. For example, a requirement that all shrimp caught in state waters be shelled in-state²⁰³ presents the obvious danger of cartelization by the state's shelling industry. Oklahoma's prohibition on the export of minnows, coupled with an exception for those bred in hatcheries, also contains exploitative potential; its invalidation by the Court²⁰⁴ therefore seems consistent with the approach suggested in this article. More importantly, statutes²⁰⁵ that prohibit export of a good until after satisfaction of "all" in-state needs may tend to limit exports to monopoly levels. To the extent that nonresidents will find it expensive to shift to other suppliers, exploitation can succeed.

Application of the interference-exploitation theme is often con-

²⁰² See *supra* note 80.

²⁰³ See *supra* note 176 and accompanying text.

²⁰⁴ See *supra* notes 181-84 and accompanying text.

²⁰⁵ See *supra* notes 179-80 and accompanying text.

sistent with the Court's more charitable view of less-than-total bans in natural resource cases. As noted in the discussion of subsidies earlier in this article, the in-state preference in sales of cement in *Reeves*²⁰⁶ clearly lacks exploitative potential. It was, instead, an output-expanding interference that the state had "consciously funded."

The discriminatory hunting license fee schedule in *Baldwin v. Fish and Game Commission*²⁰⁷ provides a more striking case because the Court upheld a scheme in which the state openly adopted tactics that are easily viewed as monopolistic.²⁰⁸ Yet, it is a decision that grows on the student of interstate barriers. Is it not possible that Montana's elks have survived as the result of state expenditures, or because the state has forgone development and accompanying tax revenues? Thus, the state law at issue seems to resemble both discriminatory state university tuition schedules and some state-constructed toll facilities that do not exploit non-residents but rather offer them a windfall. To the extent that a state employs user license fees, residents pay lower user charges than nonresidents because residents have already contributed to the project through their state's tax system. Perhaps many barriers to the use of a state's natural resources stem from such "public goods" decisions; the state supports a conservation scheme with general revenues rather than financing it through administratively inconvenient user charges alone. In this view, some natural resource cases—like other "projects-as-a-whole" discussed earlier²⁰⁹—come to the courts as tax or regulation cases but are really subsidy cases and not at all exploitative.

Interestingly enough, some early validations of total bans, which have been described above as "eroded precedents,"²¹⁰ can be reinterpreted as belonging to this set of "public good" cases. State expenditures or deliberate restraints on economic development may

²⁰⁶ See *supra* notes 37-38 and accompanying text.

²⁰⁷ 436 U.S. 371 (1978). See *supra* note 187 and accompanying text.

²⁰⁸ The case, of course, could be distinguished as a privileges and immunities decision dealing with pure recreation and not "commerce" at all. But the discussion continues to develop the interference-exploitation theme without reference to the traditional reach of particular constitutional phrases and doctrines.

²⁰⁹ See *supra* text accompanying note 137.

²¹⁰ See *supra* note 190 and accompanying text.

have made water plentiful in New Jersey in 1908.²¹¹ The state might not have continued these expenditures or restraints if the Court had not permitted the state to control use of water by nonresidents.

Not all natural resource cases fit this sympathetic mode, however.²¹² The Ohio coal-consumption tax at issue in *Dayton Power & Light*²¹³ does not appear to have been part of a state project to create or protect a public good. Because the tax was inversely related to the sulphur content of coal, it favored local coal over cleaner low-sulphur coal found in competitor states. The decision of the Ohio Supreme Court to invalidate the tax therefore seems clearly correct.²¹⁴ Moreover, to the extent that judicial intervention in these cases is justified because it anticipates Congress' response and therefore conserves legislative resources, the case is correctly decided, in light of the federal environmental policy of discouraging sulphur oxide emissions.²¹⁵ The area might, in fact, be regarded as quasi-preempted; if, contrary to Ohio in *Dayton Power & Light*, a state were to enact a consumption tax positively related to sulphur content, the courts probably would uphold it, even though it imposed a barrier on interstate commerce. Such a tax would seem in harmony with congressional actions; it might also be part of a "public good" project to promote cleaner air.²¹⁶

The analytic tension in *Commonwealth Edison* is now apparent.²¹⁷ On the one hand, the Montana coal severance tax involved seems clearly exploitative. As a normative matter, the case there-

²¹¹ *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

²¹² For example, the other "eroded precedent," *McCready v. Virginia*, 94 U.S. 391 (1876), is not rescued with a reinterpretation unless Virginia somehow invested in the maintenance of oyster beds, which seems extremely unlikely in the 1870's.

²¹³ 58 Ohio St. 2d 465, 466, 391 N.E.2d 716, 717 (1979). See *supra* text accompanying notes 197-99.

²¹⁴ As a descriptive matter, the statute's invalidation is probably better understood as the product of a very tough state supreme court. See, e.g., *Panhandle E. Pipe Line Co. v. Public Util. Comm'n*, 56 Ohio St. 2d 334, 383 N.E.2d 1163 (1978) (invalidating on commerce clause grounds a statute that required a public utility to secure the approval of a state regulatory commission before issuing securities of maturity greater than one year).

²¹⁵ See, e.g., 40 C.F.R. § 50.4 (1971) (setting national primary ambient air quality standards for sulphur oxides).

²¹⁶ Note the potential conflict between quasi-preemption and conscious-funding. If the state expended its own funds to favor dirty coal, presumably the reviewing court should first consider the clarity of Congress' instructions.

²¹⁷ See *supra* notes 18-22, 186 and accompanying text.

fore seems wrongly decided. The coincidental enactment of similar taxes in neighboring coal-producing states²¹⁸ raised a barrier to substituting other coal sources to avoid Montana's monopoly price. The exploitation thus permitted by the Court's decision is the most harmful sort of state action involved in the commerce clause cases. If the reason that the tax has escaped invalidation is that it involves a natural resource but is not a total ban, then the inadequacy of the prevailing doctrines in the natural resource cases is simply made clearer.²¹⁹

On the other hand, Montana's coal tax could be viewed as one part of a nonexploitative "public good" project. Without a severance tax, the state legislature might limit all mining operations for conservation reasons, yielding higher energy prices to nonresidents than those that result from the tax. Perhaps there are state subsidies for mining research that would cease if the severance tax were not permitted.²²⁰

Nonetheless, these arguments seem somewhat implausible, given the opportunistic timing of Montana's tax,²²¹ and to entertain the project-as-a-whole argument in these circumstances may tempt exploitative states to create paper records supporting claims of conservation efforts. Yet, a rule of thumb approach that accepts barriers concerning natural resources more readily than similar barriers in other contexts seems reasonable; in natural resource cases, project-as-a-whole arguments are generally more plausible than they are in cases involving stock exchanges, fruit growing industries, highways, or railroads.²²²

²¹⁸ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 640 & n.5 (1981) (Blackmun, J., dissenting).

²¹⁹ See *supra* text accompanying note 201.

²²⁰ Note that *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981), and *supra* text accompanying notes 45-50, remains a difficult case. To the extent that the state's subsidy of the marketplace enabled it to operate, that "project as a whole" is clearly nonexploitative. The interference-exploitation theme simply does not resolve the Court's inquiry in one step, but rather focuses the factfinding process.

²²¹ The tax was raised considerably in 1975 following the Arab oil embargo. *Commonwealth Edison*, 453 U.S. at 639 (Blackmun, J., dissenting).

²²² An interesting "project as a whole" argument can be made with regard to a locality's zoning statutes. The relevance of zoning to interstate commerce has been recognized. *Regulation, Federalism, and Interstate Commerce* 135-36 (A. Tarlock ed. 1981). Clearly, zoning can be viewed as an attempt by residents to exploit newcomers. On the other hand, zoning can efficiently place polluters near one another and can encourage efficiencies in transportation and labor markets. See Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules,*

*F. A Final Application: Corporate Takeover Statutes**1. Edgar v. MITE and Interstate Exploitation*

In *Edgar v. MITE Corp.*,²²³ the Supreme Court recently invalidated on commerce clause grounds a state statute regulating corporate acquisitions. Such statutes present the danger of interstate exploitation, and the Court's decision therefore is in harmony with the approach suggested in this article. The treatment of corporate takeover statutes in *MITE* departs from the general judicial tolerance for other state securities regulation laws. Generally, lack of exploitative potential and implicit approval by Congress justifies judicial acceptance of these blue-sky laws.

a. The MITE Decision

The relationship between federal and state regulatory schemes best explains the judicial response to state securities laws in general and the *MITE* decision in particular. Federal law regulates the issue and sale of securities. Individual states also regulate such transactions and no doubt interfere with interstate trade. But commerce clause challenges to these state blue-sky laws have failed both because the courts have viewed blue-sky laws as only regulating in-state transactions—an unsatisfying rationale²²⁴—and because Congress has implicitly and explicitly approved the coexistence of state and federal regulatory schemes.²²⁵

Parallel federal and state schemes also regulate corporate takeovers. In 1968, Congress passed the Williams Act,²²⁶ which imposes informational and substantive requirements on cash tender offers. Some states have also passed “takeover statutes” which impose constraints on tender offers and generally give state officials the

and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681 (1973) (finding zoning in need of substantial curtailment or replacement with other means). Although the subject is beyond the immediate reach of this article, alternatives to zoning, such as nuisance laws, could also run into commerce clause principles unless the “project as a whole” is viewed as nonexploitative or otherwise not inconsistent with the wishes of Congress.

²²³ 102 S. Ct. 2629 (1982).

²²⁴ This view is as unsatisfying as the *Parker v. Brown* concept. See *infra* text accompanying note 257-59.

²²⁵ See W. Cary & M. Eisenberg, *Cases and Materials on Corporations* 1329 (5th ed. 1980).

²²⁶ Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m (d)-(e), 78n (d)-(f) (1976 & Supp. V 1981)).

power to delay an acquisition and to evaluate its treatment of interested parties.²²⁷

There is less reason to think that Congress would approve of co-existent federal and state regulation of corporate takeovers than of securities issue and sale. Unlike the Securities Act of 1933, which was passed years after state blue-sky laws were common, the Williams Act was passed when only one state had a takeover statute—and that statute was only a few months old. Congress therefore cannot be said to have approved the takeover laws subsequently enacted in more than two-thirds of the states.²²⁸ Additionally—and this argument was decisive in *MITE*²²⁹—the policies of the Williams Act are different from those of state takeover statutes. The Williams Act can be reasonably viewed as showing Congress' wish to be neutral between the target corporation's management and the takeover bidder in a battle for control. State takeover laws, in contrast, generally favor the target's management by putting constraints only on bidders.²³⁰ As an implementation of congressional policy, the Court's invalidation of the Illinois statute in *MITE* therefore seems reasonably sound.

The *MITE* decision is based on the negative commerce clause as well as on preemption by federal securities law.²³¹ The Court's commerce clause discussion—alas, separated from the preemption discussion—is latently provocative and deserves special attention. The decision focuses on the effects of the Illinois statute outside the state. The law applied to a takeover if ten percent of a target's shareholders were Illinois residents or if any two of the following three conditions were met: (1) the target had its principal office in Illinois, (2) it was organized under Illinois laws, or (3) it had at least ten percent of its stated capital and paid-in surplus in-state.

²²⁷ The Illinois act involved in *Edgar v. MITE* directed the state official to deny registration to a tender offer if it "would work or tend to work a fraud or deceit upon the offerees." 102 S. Ct. at 2633. For reviews of some of the state statutes and discussions of their coexistence with the Williams Act, see Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1 (1976); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510 (1979).

²²⁸ Note, *supra* note 227, at 514.

²²⁹ This argument clearly motivated the Court's invalidation of the Illinois statute in *MITE*. 102 S. Ct. at 2636-37, 2639.

²³⁰ For example, the Illinois statute permitted the target company to communicate with its shareholders while the bidder was to remain silent. *Id.* at 2637.

²³¹ *Id.* at 2640-43.

The Court concluded:

Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other states; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.²³²

Later in the opinion,²³³ the Court emphasized this concern with potentially overlapping state schemes by distinguishing a state's regulation of the "internal affairs of a corporation incorporated under its laws" from the Illinois statute. The Court argued that the former generates no overlap and ensures that a corporation will not face conflicting state demands. The decision is thus reminiscent of the tax cases in which the Court has disfavored overlapping, or duplicative, schemes.²³⁴

If *MITE* does no more than invalidate overlapping state schemes, then it is rather straightforward but of limited importance as precedent, for the many state takeover laws are by no means identical. Some generate very little "direct" interference with interstate commerce because no more than one state can claim jurisdiction. For example, a statute might define the target company as one that was incorporated in the state *and* had its principal place of business there.²³⁵ In comparison, if all states cop-

²³² Id. at 2641.

²³³ Id. at 2642-43.

²³⁴ See *supra* text accompanying notes 106-08.

²³⁵ If a state's takeover statute applies only when target companies are incorporated in the state *and* have their principal place of business in-state, then, at most, only one state's statute would apply to any one target company. Connecticut, Hawaii, and Indiana define the target company in their statutes in this manner. Of course, a statute that defines a target only as one incorporated in the state is also not overlapping. Maryland and Virginia have what are, essentially, such statutes.

Takeover statutes often define the target as incorporated in the state *or* having its principal place of business in the state. If every state had such a statute, then two states' laws would often apply to a takeover because many enterprises are incorporated in a state other than where their principal place of business is located. Alaska, Colorado, Idaho, Kansas, Kentucky, Massachusetts, Missouri, New York, Ohio, and Pennsylvania have essentially this "overlap" definition of targets.

Finally, another common target company definition is one incorporated in the state *or* having its principal place of business there *or* maintaining significant assets there. If adopted by all states, this definition would lead to more than two statutes applying because

ied the Illinois statute, the number of states imposing conflicting demands on a corporate acquisition could be one, two or more, or zero (zero if no state contained at least two of the three requisites for assets, principal office, or place of incorporation). In short, *Edgar v. MITE* does not by its terms or reasoning consume the other state takeover statutes still in effect.²³⁶

b. Takeover Statutes and Interstate Exploitation

The Court's continuing acceptance of state blue-sky laws contrasted with its invalidation of the Illinois takeover statute neatly reflects the interference-exploitation theme. State blue-sky laws regulating the initial issue of securities seem to lack exploitative potential. Admittedly, if a business wishes to get underway or expand by combining the capital of many investors, its interstate efforts might be hampered by a state regulatory scheme that imposes requirements in addition to those of the federal securities law. But the enterprise could avoid the state scheme by finding investors in other states.²³⁷ The regulatory scheme would lack exploitative potential unless, of course, a single state contained investors with a large share of available capital.

But what if an enterprise already exists and an "outsider" seeks to acquire it, perhaps because the outsider can guide it to greater profits through innovation, better management, or profitable synergistic combination with a different business? Such a potential purchaser might be unwilling to proceed without a large share of the ownership, for the presence of other owners will dilute the rewards to the acquirer's talents, ideas, or previous efforts. This innovative entrepreneur might be relegated to less efficient alternatives such as starting the business from scratch, buying another

many corporations have substantial assets in a great many states. This definition has been adopted in Louisiana, Nebraska, New Jersey, South Dakota, and Utah.

²³⁶ But courts that have reviewed state takeover statutes after *Edgar v. MITE* have not focused on the "relative overlap" of the various statutes. See *Bendix Corp. v. Martin-Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982) (invalidating Maryland statute that contained no "overlap"); *Telvest, Inc. v. Bradshaw*, 547 F. Supp. 791 (E.D. Va. 1982) (striking down Virginia statute generating no overlap and focusing on level of contact with in-state shareholders). But see *Agency Rent-a-Car, Inc. v. Connolly*, 686 F.2d 1029 (1st Cir. 1982) (finding *Edgar v. MITE* not clearly dispositive—with respect to a statute potentially overlapping that of one other state—and remanding for balancing of burdens and benefits).

²³⁷ Of course, some of the burden of the regulatory scheme is borne by potential in-state investors who will lose opportunities to join a capital-pooling enterprise.

company, or bargaining for the direct sale of assets.²³⁸

The undesirable effects of such a takeover statute do not arise merely when out-of-state buyers enter the market. Even if a state's takeover statute blocks only offers to its own residents, potential sellers may use it to earn "holdout" profits, thereby stifling innovation and commerce to a greater extent than any blue-sky law. A business faced with a restrictive blue-sky law can go to other states to raise capital, but when it seeks control of another business, the shares that it needs are already distributed so that one state's restriction may forestall the purchase of the necessary fraction of total ownership. The acquirer or innovator cannot simply go elsewhere to buy the shares that it needs. The relative exploitative potential of takeover statutes thus distinguishes them from blue-sky laws. The welfare loss imposed on the nation by this type of exploitation is the loss of the innovation or other benefits that may flow from a change in corporate ownership. Overlapping takeover statutes are, of course, still worse because they expand the number of states that can exploit a single business.

The exploitative potential of this holdout power is difficult to realize in this direct sense, however, because the Williams Act prevents payment of different prices to different sellers.²³⁹ Nevertheless, the legislating state may still be able to use a takeover law for exploitative purposes by restricting the exit of assets or employment opportunities from the state. This characterization of a state takeover law as a substitute for direct exit barriers offers a useful restatement of the differences in exploitative potential between takeover statutes and the blue-sky laws. While the former may be part of a scheme to block the exit of existing assets, blue-sky laws cannot have such effect. By preventing the movement of these resources, the state can protect its ability to exploit them through taxation and other methods. In other words, the state can use a takeover law to protect its monopoly on the current location of assets. If the state succeeds in obstructing their migration, an innovator faces the substantial barrier of recreating the assets elsewhere. Takeover statutes are particularly attractive to states intent

²³⁸ See Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 Va. L. Rev. 771, 838 (1982).

²³⁹ All sellers (regardless of home state) will receive the same price so that the holdout state treats nonresidents exactly as it does residents.

on hoarding these resources because unfriendly corporate acquisitions increase the probability that the business will be moved and because use of a more direct "exit-obstacle" to movement of assets or job opportunities would be unacceptable to the courts.²⁴⁰ It comes as no surprise that states occasionally admit to exit-obstacle intentions.²⁴¹

2. *Implications of MITE for State Corporate Law*

No case or commentator seems to notice the rather startling potential for commerce clause claims in corporate law after *MITE*. The Court insisted that its decision did not affect the state interest in regulating internal corporate affairs because "[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."²⁴² But this statement either papers over or misunderstands many aspects of corporate law. In fact, there is no clear line between "internal affairs" and the commerce clause concerns underlying *MITE*. It is also difficult to see a difference in the exploitative potential in the two areas of law.

²⁴⁰ See Note, Commerce Clause Limitations upon State Regulation of Tender Offers, 47 S. Cal. L. Rev. 1133, 1158 (1974); Note, *supra* note 227, at 528.

An exploiting state might agree with a surprising comment in a concurrence to *Edgar v. MITE*:

Often the offeror possesses resources, in terms of professional personnel experienced in takeovers as well as of capital, that vastly exceed those of the takeover target. This disparity in resources may seriously disadvantage a relatively small or regional target corporation. Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and State.* [* The corporate headquarters of the great national and multinational corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.]

102 S. Ct. at 2643 (Powell, J., concurring).

²⁴¹ See *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1216 (D.N.J. 1981) (noting state official's concern regarding the closing of target's in-state plants).

It is difficult to imagine such comments and concerns with respect to the analogous, if not identical, possibility of a state's imposing an exit tax on persons rather than enterprises. See *Crandall v. Nevada*, 73 U.S. 35 (1867).

²⁴² 102 S. Ct. at 2643.

Consider, for example, the law regarding "sale of control," an area that is much less settled in both theory and practice than some commentators care to admit.²⁴³ In the classic case,²⁴⁴ a small shareholder sues for a pro-rata share of the premium above "market" price received by the seller of a controlling bloc of shares. If a state court or legislature sympathizes with such small shareholders and adopts an "equal opportunity rule," does not *MITE* raise the possibility that the defendant will appeal to commerce clause principles in arguing that the state rule will make interstate acquisitions more expensive and therefore less likely?²⁴⁵ Whole portions of the opinions in *MITE* are directly transferable to cases regarding sale of control.

Similarly, other "internal affairs" of the corporation may involve the commerce clause concerns expressed in *MITE*. Examples include any rules that affect the potential for speedy interstate acquisitions: shareholder voting rights, supermajority voting requirements, proxy regulation, restrictions on share transferability, compensation schemes that tend to "lock in" management, regulations affecting corporate combinations, and, most interestingly, state remedies with respect to insider trading that exceed those provided under federal laws.²⁴⁶

A reasonable but not entirely satisfying response to the preceding argument draws on the importance of the preemption ground

²⁴³ The discussion in the text includes both "equal opportunity" claims and frozen-out (dissenting) minority shareholders' claims as part of the sale-of-control area. See Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 *Yale L.J.* ____ (1983); *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979) (sympathizing with frozen-out shareholder in what was essentially a "going private" transaction and reviewing cases on treatment of frozen-out shareholders).

²⁴⁴ See *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955). For conceivable precedents for an "equal opportunity rule," see *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); *Donahue v. Rodd Electrotypes Co.*, 367 Mass. 578, 328 N.E.2d 505 (1975) (requiring some sharing in a very close corporation setting).

²⁴⁵ For example, it is arguable that, on commerce clause grounds, state-imposed fiduciary obligations with respect to a target's repurchase of shares ought to be no more flexible than the state's treatment of bidders.

²⁴⁶ State corporate law might discourage an acquirer who will fear that after an unsuccessful takeover attempt, disposition of the target's stock will be objectionable and therefore expensive. Any such state law, whether statutory or judge-made, might be objected to on, as the text goes on to describe, quasi-preemption grounds; the Supreme Court's interpretation of the securities acts in a way that is unsympathetic to such a relatively uninformed "insider" might be taken as the final word. See *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973).

for the *MITE* decision. *MITE* could be regarded as addressing only state statutes that are quasi-preempted because an expression of congressional intent—the Williams Act—operates nearby. Most state corporation law, in contrast, has little federal law nearby.²⁴⁷ Therefore, the response might run, state regulation of internal corporate affairs is entitled to more leeway.

This response would be more convincing if it could build on the differing vulnerability to retaliation of interferences and exploitations. Thus it would be tempting to suggest that sale-of-control law lacks the exploitative potential of takeover statutes, because other states can retaliate more easily. While Montana's out-of-state coal customers, for example, cannot seriously threaten retaliatory action, many states could enact counteracting sale-of-control laws. Additionally, sale-of-control law has minimal exploitative potential because corporations can easily make paper migrations, reincorporating in less restrictive states.

Both of these suggestions are helpful, but do not entirely distinguish *Edgar v. MITE*. States can also retaliate against the enactment of takeover statutes with similar laws of their own. Also, contrary to the suggested view of *MITE* as dealing only with the danger of overlapping takeover laws, the case does not suggest that states can inhibit acquisitions so long as jurisdiction is based solely on the target company's state of incorporation. This failure does not mean that the Court should not be explicit about the desirability of nonoverlapping—and, therefore, not as easily exploitative—jurisdictional claims, but there is simply no such explication in the Court's opinion. In any event, there is no escape—nor should there be—from the notion that state corporation law *can* run into commerce clause principles.

IV. RETHINKING THE STATE ACTION EXEMPTION IN ANTITRUST LAW²⁴⁸

An historical impediment to complete acceptance of the interfer-

²⁴⁷ Under this view, when there is federal law "nearby," as in the case of insider trading regulation, more restrictive state law may be troubling (if potentially interfering with interstate commerce).

²⁴⁸ After my own "rethinking" (and a much longer draft of this Part), I was fortunate to read Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23 (1983). As I indicate in the text, my own views on the state action exemption in antitrust law are much like Professor Easterbrook's—who shares (at least in the antitrust framework) my

ence-exploitation approach is the famous decision of *Parker v. Brown*,²⁴⁹ in which the Court is understood to have exempted monopolies controlled by state governments from the antitrust laws.²⁵⁰ The *Parker* doctrine clearly does permit a variety of exploitative maneuvers by states. The original case involved state-directed price-fixing among raisin growers who produced nearly all domestic raisins and fifty percent of the world's raisin crop.²⁵¹ Therefore, if *Parker's* formulation of the state action exemption is applied, there is little room to examine a state's exploitation under commerce clause principles, because *Parker v. Brown* itself considered and essentially rejected the commerce clause argument.²⁵²

My own view is similar to that of Professor Easterbrook: the state action exemption should be reformulated to exclude circumstances ripe for interstate exploitation.²⁵³ The doctrine, for example, should exempt typical state regulation of a local electric utility but should not protect regulation that "exports" monopoly burdens to nonresidents.²⁵⁴ The courts should allow the latter type of regulation, like other exploitations, only where Congress has indicated specific approval.

The result in *Parker* itself is not inconsistent with such a reformulation; the problem is rather with later cases that have followed it with little thought. Clearly, Congress can permit interstate exploitation if it chooses; the interference-exploitation distinction

concern for "exploitation." As such, the discussion in this Part describes the relationship between the exemption and the other themes explored in this article and does not rehearse the dangers of exploitation unchecked by the antitrust laws.

²⁴⁹ 317 U.S. 341 (1943).

²⁵⁰ See Areeda, Antitrust Immunity for "State Action" After *Lafayette*, 95 Harv. L. Rev. 435 (1981) (reviewing recent decisions and suggesting that antitrust liability not be expanded to control anticompetitive practices by states); Blumstein & Calvani, State Action as a Shield and a Sword in a Medical Services Antitrust Context: *Parker v. Brown* in Constitutional Perspective, 1978 Duke L.J. 389 (interpreting the state action exemption as a manifestation of both the states' eleventh amendment sovereign immunity and tenth amendment reserved powers); Page, Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After *Midcal Aluminum*, 61 B.U.L. Rev. 1099 (1981) (arguing against a requirement that states "supervise" their anticompetitive schemes); Verkuil, State Action, Due Process and Antitrust: Reflections on *Parker v. Brown*, 75 Colum. L. Rev. 328 (1975) (doubting that review of state regulatory schemes with antitrust tools would fare better than substantive review under the due process clause).

²⁵¹ 317 U.S. at 345.

²⁵² Id. at 359-68.

²⁵³ See supra note 248.

²⁵⁴ See supra note 22.

builds on the notion that courts should apply sound economic policies only in the absence of explicit congressional direction. In *Parker* such direction may have been present: the California legislation at issue was so similar to existing federal agricultural policies that the Court might reasonably have believed that Congress would have approved California's scheme despite its exploitative potential.²⁵⁵ Moreover, officials of the U.S. Department of Agriculture had collaborated in drafting the state's raisin program.²⁵⁶ The Court could easily have believed that the area was "quasi-preempted" and that the judicial role was to implement congressional policy by upholding the state's scheme, no matter how exploitative. One could read *Parker*, therefore, as allowing state-created exploitations only where they seem consistent with explicit congressional policy.

Parker, however, has not been read this way because the *Parker* Court illogically separated the preemption and commerce clause discussions in its opinion. The opinion first uses the relationship between the state and federal programs to dispense with the preemption argument;²⁵⁷ it then avoids the reach of the negative commerce clause by insisting that the state action affected the raisins before they entered the stream of interstate commerce.²⁵⁸ Instead, the Court should have combined the two issues into one argument: not only was the state statute not preempted by any federal law, but also the two were so similar as to show congressional approval of—and therefore no commerce clause objection to—California's action.²⁵⁹ This suggested reformulation of the state action exemption to exclude exploitation in general would not, of course, stand in the way of any congressional decisions to permit particular state exploitations.

The reformulation of the state action exemption to establish the relative dominance of commerce clause principles may be especially important if state "subsidies" are regularly approved—either

²⁵⁵ 317 U.S. at 353.

²⁵⁶ *Id.* at 356.

²⁵⁷ *Id.* at 358.

²⁵⁸ *Id.* at 361.

²⁵⁹ At the end of its commerce clause discussion, the Court does combine preemption and commerce clause arguments by noting that whatever effect the California program had on interstate commerce, "it is one which it has been the policy of Congress to aid and encourage." *Id.* at 368.

under current doctrine or under the suggested interference-exploitation approach. As noted in the discussion of *Zobel v. Williams* earlier,²⁶⁰ a state might use a subsidy to accumulate a resource, and then at some later time enjoy monopoly power.²⁶¹ Some accumulation-exploitation schemes may be tolerated as necessary to encourage innovation and risk-taking; but other such schemes do not produce these benefits,²⁶² and judicial efforts to invalidate them should not be blocked by unthinking reliance on *Parker v. Brown*.

V. CONCLUSION

The potential for monopolistic exploitation is an important theme in the vast number of cases concerning interstate economic tensions. As a purely descriptive matter, the interference-exploitation theme is quite successful in broad terms—as, for example, in

²⁶⁰ See *supra* text accompanying notes 71-77.

²⁶¹ One possible illustration concerns airports. Conceivably an airport can be built that will deter new entrants and charge monopolistic user fees or taxes that are borne in large part by travelers from other jurisdictions. Alternatively, the exploitative taxes could be levied through airport restaurant charges or taxicab fares. In the only Supreme Court case in this area, *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972), a statute charging one dollar to each commercial passenger was upheld. The Court again placed the burden of proof of discrimination on the “taxpayer.” See *supra* text accompanying note 102.

Two state courts, though, have invalidated airport taxes having some exploitative potential. In *Allegheny Airlines v. Sills*, 110 N.J. Super. 54, 264 A.2d 268 (1970), the invalidated service charge applied only to airports within a municipality of 100,000 or more in population. Inasmuch as the tax appears only to have applied in the Newark airport, servicing many travelers to and from nearby New York City who might find it more convenient than alternatives, the case seems well-decided because the tax’s potential for exploitation is clear. Moreover, the multistate Port Authority helped develop the airport, so that a “project as a whole” argument is unconvincing. A tax on commercial passengers whose travels originate at the jurisdiction’s airport was also invalidated in *Northwest Airlines v. Joint City-County Airport Bd.*, 154 Mont. 352, 463 P.2d 470 (1970). If many users were from surrounding counties, then the exploitative potential of the tax is clear. In short, although these cases cite the “right to travel” precedents of *Edwards v. California*, 314 U.S. 160 (1941) (invalidating statute forbidding interstate transportation of indigents on commerce clause grounds) and *Crandall v. Nevada*, 73 U.S. 35 (1867) (invalidating tax on interstate passengers), they comfortably fit within the interference-exploitation framework.

Finally, with respect to airport exploitation through levies on related activities, compare *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568 (N.D. Cal. 1981) (supporting state’s legislative policy involving limits on car rental companies) with *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978) (denying existence of cities’ authority to award monopoly taxicab franchise at airport).

²⁶² See *supra* note 222 and text accompanying notes 219-22.

portraying the different judicial treatment of subsidy and tax cases—and somewhat successful in rationalizing individual cases. The theme also has the practical value of clarifying the economic stakes involved in particular state actions. An appreciation by courts of the potential for exploitation in state actions affecting interstate trade should help focus attention on relevant facts and structural relationships rather than on doctrinal recitation.

With a project as long and broad-brush as this one, it is perhaps best to conclude by pointing out some themes that have not been considered. First, there is a haunting analogy between limitations and subsidies on the one hand and “rights and privileges” on the other.²⁶³ The state’s ability to spend in discriminatory interstate fashion and its inability to tax similarly is not unlike the state’s ability to distribute vast fortunes in somewhat unequal ways and its sometime inability to take away relatively small benefits without substantial safeguards. At the heart of both these distinctions is the preservation of the status quo. Surely this is a rich area for further inspection, but the distinction seems to have limited use in considering the cases that deal with interstate economic issues. Most subsidies are financed by taxes and thus are likely to disturb the inherited wealth distribution at the very start. So the rights-privileges notion, whatever its descriptive value in other contexts, can hardly provide a satisfying basis for understanding the different treatments accorded taxes and subsidies. The interference-exploitation theme, in contrast, does provide such a basis.

The discussion has also all but ignored both traditional constitutional doctrines and the intricacies of the positions taken by individual justices over time. The article is about “commerce clause” principles in a generic sense—be they derived from the commerce clause in section 8 of article I, the privileges and immunities clause in section 2 of article IV, the equal protection clause (or, for that matter, the privileges and immunities phrase) of the fourteenth amendment, the right to travel, or the structure of the Constitution taken as a whole. As noted several times above, the approach this article suggests is more convincing and complete if these principles are derived in such a way that leaves judicial determinations subject to later congressional review. But the interference-exploita-

²⁶³ See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

tion theme surely retains vitality even for those who are uncomfortable with viewing the Court's role in this area as developing constitutional common law or for those who, convinced that the cases must mean what they say, are tied to specific constitutional provisions independent of congressional or judicial common law decisionmaking.

Acknowledgment that this article leaves these subjects unexplored is meant to emphasize that my purpose has been to develop only one perspective on the commerce clause cases. Together with other possible perspectives, it may form a richer and more coherent picture of the many concerns that run through this area of the law.