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The Constitution and State Powers of Export Limitation

Larry D Barnett

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Historians of the future are likely to view the decade of the 1970's as significant at least partially because it was the decade in which Americans underwent a fundamental change in economic philosophy, discarding their long-held belief that unlimited material abundance was possible. The change resulted from a number of factors, among them the environmental movement that began in the late 1960's[1] and the Arab oil embargo of 1973. Another factor was the publication of a number of scientific studies by well-respected organizations and individuals emphasizing that the raw materials on which the American industrial economy depended were indeed insufficient to satisfy past levels of consumption much longer. For example, in 1973 the Geological Survey of the Department of the Interior sponsored a study of minerals important to the economy and their availability from domestic sources. The study concluded that

> only a few commodities are readily available to the United States in quantities adequate to last for hundreds of years. By no means is it too early to become concerned about future mineral supplies—and to start planning. [T]he decrease in mineral supplies . . . is placing modern American affluence in jeopardy. The real extent of our dependence on mineral resources places in jeopardy not merely affluence, but world civilization.[2]

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1. Studies indicate that the intensity of concern with environmental problems was never great among the American public as a whole. G. GROSSMAN & H. POTTER, A LONGITUDINAL ANALYSIS OF ENVIRONMENTAL CONCERN: EVIDENCE FROM NATIONAL SURVEYS 10-12 (Working Paper No.142, Institute for the Study of Social Change, Dep't of Sociology & Anthropology, Purdue Univ. August 1977). However, while the concern was not generally intense, it apparently was sufficiently pervasive to help counter the traditional belief in the possibility of unlimited growth, particularly when combined with the occurrence of other events that caused questioning of the belief.

2. Brobst & Pratt, *Introduction*, in U.S. DEPT. OF INTERIOR, UNITED STATES MINER-

Evidence of the new economic philosophy appeared in 1977 in a national survey of public opinion conducted by pollster Louis Harris. When asked whether they would place greater emphasis upon "teaching people how to live more with basic essentials" or upon "reaching higher standards of living," four out of five American adults chose the former. Similarly, three out of four chose "learning to get our pleasure out of non-material experiences" over "satisfying our needs for more goods and services." Two out of three believed that society would be improved if there were emphasis on "learning to appreciate human values more than material values" rather than on "finding ways to create more jobs for producing more goods."[3] At least verbally then, Americans appear to be rejecting the philosophy that resources are limitless and economic growth is intrinsically desirable.

It is impossible to predict exactly how difficult the actual transition will be from an economy of relative abundance to an economy of material limitations. The availability of raw materials depends on many factors, only one of which is the existence of minerals in the ground. Energy is one important factor, since it is necessary in both the extraction and processing of raw materials. As readily-accessible deposits of minerals have been mined, less-accessible deposits have of necessity been utilized, requiring greater quantities of energy; thus we are now witnessing the energy-expensive development of off-shore oil extraction and the procurement of oil from land areas distant from population and industrial centers, e.g., northern Alaska. Moreover, ever-lower grades of ore are being used to obtain minerals, making the cost and availability of the necessary amounts of energy probably the single most important factor determining whether mineral deposits can be mined economically.[4] The "energy crunch" which the United States is experiencing is thus a vital part of the overall problem of mineral availability, and it requires

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AL RESOURCES 7 (Geological Survey Paper No. 820, D. Brobst & W. Pratt eds. 1973). [hereinafter cited as Brobst & Pratt].

Other studies reaching the same general conclusion include COMMITTEE ON RESOURCES AND MAN, NATIONAL ACADEMY OF SCIENCES-NATIONAL RESEARCH COUNCIL, RESOURCES AND MAN (1969) [hereinafter cited as COMMITTEE ON RESOURCES AND MAN]; D.H. MEADOWS, D.L. MEADOWS, J. RANDERS, & W. BEHRENS, THE LIMITS TO GROWTH (1972) [hereinafter cited as THE LIMITS TO GROWTH]; COMMITTEE ON MINERAL RESOURCES AND THE ENVIRONMENT, COMMISSION ON NATURAL RESOURCES, NATIONAL ACADEMY OF SCIENCES-NATIONAL RESEARCH COUNCIL, MINERAL RESOURCES AND THE ENVIRONMENT (1975) [hereinafter cited as COMMITTEE ON MINERAL RESOURCES AND THE ENVIRONMENT].

3. WASHINGTON POST, May 23, 1977, at A10, col. 1.

On the basis of his survey, which contained additional sets of statements besides those presented, Harris concluded that "[t]he American people have begun to show a deep skepticism about the nation's capacity for unlimited economic growth, and they are wary of the benefits that growth is supposed to bring." *Id.*

4. Brobst & Pratt, *supra* note 2, at 8.

note of two well-publicized events occurring less than one month apart in the Spring of 1977. The first was the address of President Carter to a joint session of Congress on April 20. Labelling the energy crisis "the greatest domestic challenge that our Nation will face in our lifetime" and warning that disregard of it "would subject our people to an impending catastrophe," the President called for measures to curtail substantially oil consumption.[5] The second event was the announcement on May 17 of the results of a two-and-a-half year study of current energy sources sponsored by the Massachusetts Institue of Technology. The thirty-five authors of the study, coming from fifteen nations and from science as well as industry, concluded unanimously that demand for oil might exceed supply as early as 1983 and that demand would definitely exceed supply no later than 1995.[6] Oil, which currently accounts for approximately 45 percent of total energy consumption in the United States,[7] will be difficult to obtain in sufficient quantity in less than two decades. The potential impact on mineral supplies would appear to be substantial.

Further complicating the ability of the American economy to obtain raw materials in adequate amounts is the continued growth of population in the United States.[8] Population growth affects resource availability by accelerating the depletion of nonrenewable resources while at the same time increasing the need for them. Since population growth causes problems of both supply and demand, it is instructive to note the number by which births exceeded deaths in this country since 1970:

1970	1,810,355
1971	1,628,428
1972	1,294,467
1973	1,163,962
1974	1,225,570
1975	1,251,319
1976 (provisional)	1,253,000[9]

5. 13 WEEKLY COMP. OF PRES. DOC. 566 (April 25, 1977).

6. N.Y. TIMES, May 17, 1977, at 1, col. 3 (city ed).

7. Calculated from BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, at 531 (96th ed. 1975).

8. For an explanation of the apparently widespread misconception that population growth has stopped in the United States, see Barnett, *The Constitutionality of Selected Fertility Control Policies*, 55 N.C. L. REV. 357 (1977) [hereinafter cited as Barnett].

9. Calculated from MONTHLY VITAL STATISTICS REPORT. Data for 1970 come from 22 *id.*, No. 11 Supp., at 1 (1974) and 22 *id.*, No. 12 Supp., at 1 (1974). Data for 1971 come from 23 *id.*, No. 3 Supp., at 1 (1974) and 23 *id.* No. 3 Supp. (3), at 1 (1974). Data for 1972 come from 23 *id.*, No. 8 Supp., at 1 and 23 *id.*, No. 8 Supp. (2), at 1 (1974). Data for 1973 come from 23 *id.*, No. 11 Supp., at 1 (1975) and 23 *id.*, No. 11 Supp. (2) at 1 (1975). Data for 1974 come from 24 *id.*, No. 11 Supp., at 1 (1976) and 24 *id.*, No. 11 Supp. 2, at 1 (1976). Data for 1975 come from 25 *id.*, No. 10 Supp., at 1 (1976) and 25 *id.*, No. 11 Supp., at 1 (1977). Data for 1976 are from 25 *id.*, No. 12 (1977).

As the figures show, population growth is appreciable, and the excess of births over deaths has been increasing since 1973.[10] Data for 1976 indicate that women 18-24 years of age expect to bear 2.03 children each,[11] but an immediate halt to population growth requires that these women have only 1.2 children each.[12] Measures to motivate Americans to have fewer children have not concerned political leaders,[13] but as the director of the United States Geological Survey wrote in his agency's 1973 study:

> Our own population, to say nothing of the world's, is already too large to exist without industrialized, high energy- and mineral-consuming agriculture, transportation, and manufacturing. If our supply of critical materials is enough to meet our needs for only a few decades, a mere tapering off in the rate of increase of their use, or even a modest cutback, would stretch out these supplies for only a trivial period. If resource adequacy cannot be assured into the far-distant future, a major reorientation of our philosophy, goals, and way of life will be necessary. And if we do need to revert to a low resource-consuming economy, we will have to begin the process as quickly as possible in order to avoid chaos and catastrophe.[14]

Measures designed not merely to halt population growth but to reduce the size of the population rapidly will thus be necessary, at least if the general conclusions of the study[15] are accepted. However, even a call for population stabilization by the end of the century which emanated in 1969 from a committee of the National Academy of Sciences,[16] has gone unheeded by political leaders.

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10. The excess of births over deaths during the first ten months of 1977 is provisionally estimated to be 1,197,000 as compared to 1,040,000 in the same period of 1976. 26 *id.*, No. 10, at 1 (1978).

11. BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REP., Series P-20, No. 300, at 2 (1976).

12. Frejka, *Reflections on the Demographic Conditions Needed to Establish a U.S. Stationary Population Growth*, 22 POPULATION STUDIES 379, 382 (1968).

13. Constitutional measures to control fertility are, however, available. See Barnett, *supra* note 8, and Rabin, *Population Control Through Financial Incentives*, 23 HASTINGS L.J. 1353 (1972).

14. McKelvey, *Mineral Resource Estimates and Public Policy*, in U.S. DEPT. OF INTERIOR, UNITED STATES MINERAL RESOURCES, 9, 18 (1973).

15. *See* text accompanying note 2, *supra*.

16. COMMITTEE ON RESOURCES AND MAN, *supra* note 2, at 11. The Committee concluded that, in order for adequate resources to be available,

> population control is the absolute primary essential without which all other efforts are nullified. Our Department of State and of Health, Education, and Welfare should adopt the goal of real population *control* both in North America and throughout the world. Ultimately, this implies that the community and society as a whole, and not only the parents, must have a say about the number of children a couple may have.

Id.

It is impossible to be certain at this point in history whether population size has already exceeded potential mineral supplies or whether population size is approaching the limit of potential supplies. Regardless of the viewpoint one adopts, however, a shortage of raw materials seems inevitable. For even if one accepts the latter, more optimistic view that population numbers have not yet exceeded potential supplies, it does not appear that the stringent measures necessary for a rapid curtailment of fertility will be accepted by political leaders either in the United States or in the world at large. Seemingly destined to prevail is the traditional family planning approach which assumes that couples will have the optimum number of children needed by their society if they are given information about and access to contraception and abortion.[17] While such an approach may ultimately halt population growth, the magnitude of the population increase which it permits will create intense competition for resources worldwide. Assuming a decline in fertility that is more rapid than is likely to occur, the population of the world will rise from 3.6 billion in 1970 to 5.8 billion in 2000 and 7.9 billion in 2050. This is an increase of 4.3 billion in just 80 years, and the increase is larger than the total population of the world in 1970. If replacement-level fertility in developing countries does not occur by the year 2000, as is assumed by the preceding projection, but occurs instead by 2040, world population will jump from 3.6 billion in 1970 to 6.6 billion in 2000 and to 13.0 billion in 2050.[18] It does not seem probable that mineral supplies will be adequate under even the more optimistic projection, especially when one

17. There is evidence that the utilization of birth control methods and the decline in the rate of population growth in developing and developed societies is primarily due to the motivation to limit family size rather than the availability of birth control technology. Blake & Gupta, *Reproductive Motivation versus Contraceptive Technology: Is Recent American Experience an Exception*? 1 POPULATION & DEV. REV. 229 (1975); Davis, *Population Policy: Will Current Programs Succeed?*, 158 SCI. 730 (1967); *cf.* Udry, Bauman, & Morris, *The Effect of Subsidized Family Planning Services on Reproductive Behavior in the United States, 1969-1974*, 13 DEMOGRAPHY 463 (1976).

18. COMMITTEE ON MINERAL RESOURCES AND THE ENVIRONMENT, *supra* note 2, at 286.

"Replacement-level fertility" does not halt population growth immediately in these projections because of the disproportionately large number of individuals in their child-bearing years in most countries of the world. These individuals add to the size of the population by producing children but do not leave the population because of their comparatively low death rate. Thus, for example, in the two projections presented, replacement-level fertility was assumed to exist for the developed countries beginning in 1970, but the population of such countries still increased from 1.1 billion in 1970 to 1.3 billion in 2000 and to 1.4 billion in 2050. *id.*

While the rate of population growth has declined in the developed regions over the last two decades, there appears to have been no decline in the developing regions. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, WORLD POPULATION: 1975 at 9 (1976). *But see* POPULATION REFERENCE BUREAU, WORLD POPULATION GROWTH AND RESPONSE: 1965-1975 at 265 (1976). [hereinafter cited as POPULATION REFERENCE BUREAU] keeps in mind that the production of minerals just since the start of World War II has roughly equalled the total production in the thousands of years before,[19] and that only some 30 percent of the world's population currently lives in developed countries[20] from which most of the demand for minerals arises.[21]

If there are to be serious shortages of resources in the future, it is important to begin to identify and evaluate the reactions that may take place in our legal and social institutions. One such reaction is likely to be attempts by states to control the shipment of raw materials obtainable within their borders to other states and to foreign countries in order to assure sufficient supplies for their own residents.[22] Most proven reserves of oil are in just two states—Alaska and Texas.[23] The primary domestic source of mercury, which is also expected to be in short supply[24] and for many uses of which adequate substitutes do not exist, is one state—California.[25] If Alaska, Texas, and California decide to restrict exports of their minerals, can they do so? It is the purpose of this paper to evaluate the ability of a state to limit exports under the United States Constitution.

SUBSIDIES FOR SALES TO RESIDENTS

A recent decision by the United States Supreme Court gives support to the view that a state can establish monetary subsidies for private firms located within its boundaries which utilize raw materials obtainable within the state, permitting these firms to pay higher prices and outbid non-resident competitors for the materials, and that the state can pay a subsidy to the firms for sales of the materials to residents. Through such a

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19. Lovering, *Minerals Resources from the Land*, in COMMITTEE ON RESOURCES AND MAN, *supra* note 2, at 120.

20. COMMITTEE ON MINERAL RESOURCES AND THE ENVIRONMENT, *supra* note 2, at 286.

21. Among nineteen nonrenewable minerals vital to an industrial economy, the United States by itself consumes at least 20 percent of the annual world consumption of almost every one. For example, the proportion of total world consumption for which the United States is responsible is 40 percent or larger in the case of aluminum, coal, and molybdenum; 30-39 percent in the case of copper, nickel, petroleum, and the platinum group; and 20-29 percent in the case of gold, iron, lead, mercury, silver, tin, and zinc. THE LIMITS TO GROWTH, *supra* note 2, at 57, 59. The population of the United States constitutes approximately five percent of the total population of the world. Calculated from POPULATION REFERENCE BUREAU, *supra* note 18, at 266.

22. Van Baalen, *Mineral Export Legislation—Can It Withstand Federal Preemption and Commerce Clause Challenges?*, 12 LAND & WATER L. REV. 131, 134 (1977).

23. I BUREAU OF MINES, U.S. DEPT. OF INTERIOR, MINERALS YEARBOOK: 1973 at 940 (1975).

24. Brobst & Pratt, *supra* note 2; COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 309, 313 (fifth annual report, 1974).

25. Bailey, Clark & Smith, *Mercury*, in U.S. DEPT. OF INTERIOR, *supra* note 2, at 402, 403.

program of subsidies, a state can influence market forces in such a way as to promote the retention of raw materials for its own population.

The decision upon which this conclusion is based is *Hughes v. Alexandria Scrap Corporation*,[26] which involved an attempt by the State of Maryland to reduce the number of abandoned automobiles cluttering its landscape. Subsidies were established for scrap metal processors for each old and inoperable abandoned automobile (termed a "hulk") that they scrapped. The subsidies received by the processors were shared with the suppliers of the automobiles; in the case of wreckers which supplied automobiles and which were residents of and licensed by the state, the statute required sharing. In the case of unlicensed suppliers, the subsidies were of necessity shared in the form of higher purchase prices in order to promote the flow of automobile hulks for scrapping. However, to receive the subsidy, the processor had to furnish the state with evidence of title to the automobile. Scrap processors were not required to be residents of Maryland, but if they were not, the documentation needed for the subsidy was considerably more difficult to obtain for hulks from unlicensed suppliers. "The practical effect of the [subsidy program] . . . was to limit the enhanced price available to unlicensed suppliers to hulks that stayed inside Maryland, thus discouraging such suppliers from taking their hulks out of State for processing. The result was that the movement of hulks in interstate commerce was reduced."[27] Appellee, a Virginia scrap processor, challenged the distinction made between resident and nonresident processors because of the deleterious impact on the number of automobiles it received from Maryland. The Court rejected the challenge, holding that the subsidy program did not violate either the commerce clause, which gives to Congress the authority to regulate interstate (and foreign) commerce,[28] or the equal protection clause, which prohibits a state from denying a person within its jurisdiction the equal protection of the laws.[29]

With regard to the commerce clause, the appellee argued that the subsidy program was a substantial burden on interstate commerce in that it reduced the flow of hulks across state lines. However, *Hughes* differed from prior situations faced by the Court, because Maryland did not prohibit automobile hulks from moving to other states, and it did not regulate the conditions under which hulks could be removed from the

26. 426 U.S. 794 (1976).
27. *Id.* at 803.
28. U.S. CONST. art. I, § 8
29. U.S. CONST. amend. XIV, § 1.

state.[30] Consequently, the Court held, the subsidy program did not run afoul of the commerce clause:

> [T]he effect upon the flow of hulks resting within the State is [that] . . . they will tend to be processed inside the State rather than flowing to foreign processors. But no trade barrier of the type forbidden by the Commerce Clause . . . impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State. Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.[31]

With regard to the equal protection clause, appellee contended that the classification of resident and nonresident processors did not achieve the purpose of the subsidy program—namely, removing abandoned automobiles from the state—as effectively as a classification based on the location of the abandoned hulk. The subsidy, the appellee argued, should have been made contingent upon proof that the hulk was abandoned in Maryland, creating a classification of in-state/out-of-state abandonment that would be more useful in fulfilling the purpose of the subsidy.

The Court admitted that a more effective classification could have been devised but nonetheless upheld the subsidy program on the ground that the classification used was reasonably related to the program purpose. The state developed the classification on the assumption that hulks received by Maryland processors had probably been abandoned in the state and that hulks received by foreign processors had probably been abandoned elsewhere. The Court held the assumptions to be reasonable, even without supporting statistical evidence, and suggested that they could justify totally discontinuing subsidies to out-of-state processors.[32]

The Supreme Court, then, will permit a state to enter the market with financial incentives that foster the flow of materials to its own industries. Indirect influences through subsidies are permissible for retaining materials for processing within the state, though mandatory requirements for such retention are not when the materials are owned by private individuals or organizations.[33] Presumably, a state can also offer financial incentives to processors and distributors which sell the materials to its residents. *Hughes* did not directly deal with this question, but the

30. 426 U.S. at 806.
31. *Id.* at 809-10.
32. *Id.* at 813, 814.
33. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

conclusion of the Court that a state has the authority to favor its own citizens in and through a subsidy program is sufficiently general to encompass a subsidy for sales to resident consumers. Moreover, this issue is implicit in two cases which upheld state requirements that private business firms choosing to receive public funds prefer residents over nonresidents. The decisions support the proposition that a state is free to utilize its treasury to motivate private enterprise to act in ways which promote the economic interests of residents at the expense of nonresidents; a subsidy for sales to residents is within this proposition. Let us, therefore, look more closely at the two cases.

In the first, the State of Florida required that all printing for the state and its agencies be done in the state. The plaintiff printing company had no facilities within Florida and was thus refused contracts to print yearbooks for state universities. It challenged the constitutionality of the statute and regulations under which the state acted, arguing that they violated both the commerce clause and the equal protection clause. A three-judge federal district court rejected the arguments of the plaintiff, and the decision was affirmed without opinion by the Supreme Court.[34] On the commerce clause issue, the district court held that the state did not directly interfere with interstate commerce and that the clause was not applicable to actions by a state in conducting its own business affairs. Under the equal protection clause, the court distinguished governmental from proprietary power. Governmental power is that utilized in governing and regulating the conduct of people, while proprietary power refers to the means by "which the government acts and contracts for the *private* advantage of its constituents and of the government itself."[35] In exercising governmental power, the state must abide by the federal Constitution as well as its own constitution. In exercising proprietary power, however, the state is no more subject to constitutional restrictions than a private enterprise. Moreover, when acting in a proprietary capacity,

> the state is like a trustee; the citizens are the beneficiaries. It may be necessary for the state to adopt discriminatory purchasing policies . . . to insure that the interest of the people is best served. In fact it is conceivable that the failure to do so would constitute a breach of the state's duty to its residents.[36]

There is, then, no denial of equal protection to private parties when the state discriminates on the basis of residence in the expenditure of funds

34. American Yearbook Co. v. Askew, 339 F. Supp. 719 (N.D. Fla. 1972), *aff'd*, 409 U.S. 904 (1972).
35. 339 F. Supp. at 721 (emphasis added).
36. *Id*. at 722, 723.

under its proprietary power. A state program of subsidies for sales to residents would seem to be within the proprietary domain inasmuch as the program is promoting a private benefit for state residents; regulation of private behavior, which would invoke governmental power, is not its goal. Accordingly, the subsidy program, being an exercise of proprietary power, would appear to be constitutional.

The second case, decided by the Supreme Court of Illinois, involved a state statute under which private parties contracting for public works projects with any state or local governmental entity were required to employ Illinois residents to the extent they were available.[37] The court held that the statute did not violate the equal protection clause or the privileges and immunities clause[38] (discussed more fully below) inasmuch as it promoted employment in the state and reduced welfare rolls. The court further held that the statute met the requirements of the commerce clause because the state does not burden interstate commerce by imposing reasonable conditions in contracts it writes with those doing business with it.

In short, a state may utilize its economic resources to promote the welfare of its residents, and it may require that business firms prefer residents over nonresidents in order to receive public funds. It logically follows that a state can establish subsidies to private organizations as an incentive for sales to residents.

State Organizations as Competitors with Private Enterprise

A state can go further than providing subsidies to private firms to promote the sale of needed resources to residents. It can create and control organizations that will purchase resources and sell them to residents. The state-controlled organizations can compete with private enterprise, which may be taxed for the funds needed to operate such organizations.

In 1920, the Supreme Court faced a challenge to a series of laws enacted by North Dakota which, among other things, created a home building association whose purpose was to provide homes for state residents by purchase, lease, or construction and which authorized bonds for first mortgage loans on real estate, the state pledging its full faith and credit for the repayment of the bonds.[39] The laws were challenged on the

37. Holland v. Bleigh Construction Co., 61 Ill.2d 258, 335 N.E.2d 469 (1975).
38. U.S. Const. art. IV, § 2, which provides: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."
39. Green v. Frazier, 253 U.S. 233, *aff'g* 44 N.D. 395, 176 N.W. 11 (1920).

ground that they promoted a private rather than a public purpose and therefore violated the due process clause of the fourteenth amendment. The Supreme Court accepted the conclusion of the legislature and Supreme Court of North Dakota that the purpose of the measures was public and upheld the laws, pointing out that there is a strong presumption in favor of a public purpose in measures exercising the taxing power of the state. The Court noted that the existence of a public purpose is not confined to situations where the state is forced to act out of necessity in order to prevent anarchy or a public health disaster and that the concept of public purpose extends to the expenditure of funds for projects which promote the economic prosperity, psychological well-being, and general welfare of society.[40] The provision of housing was clearly within the boundaries of that definition.

Thus, the Supreme Court has sanctioned the entry of state government into fields where it competes with private enterprise for the purpose of providing residents with resources important to their welfare, and it has approved the use of the taxing power in furtherance of the state's efforts. However, it is not only housing that a state can acquire for, and sell to, its residents. The City of Portland, Maine established a yard to sell wood, coal, and fuel to its inhabitants at cost and operated the yard with revenues raised by taxation. The Supreme Court upheld the action of the city, saying that a public purpose is served by the provision of items such as heat which are necessities of life.[41]

It should be noted that the taxing power of government can be applied to the very businesses with which the state is in competition. The revenues need not come from the public at large or from activities other than those with which government competes. Consequently, a city tax of three percent of gross income applied to a private firm furnishing electric power to consumers was upheld, even though the city owned and operated a utility furnishing such power and its utility was not subject to the tax.[42] In reaching its decision that there was no equal protection violation in the tax, the Supreme Court reasoned that public and private enterprises were not equivalent because they possessed different goals:

> The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function

40. 253 U.S. at 240.
41. Jones v. City of Portland, 245 U.S. 217 (1917).
42. Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619 (1934).

> only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains if any must be used for public ends. Hence equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business.[43]

If government can compete with private enterprise and can tax its competition, the question arises as to whether the taxing power can be used to eliminate the private organizations. A government competing for resources vital to the welfare of its residents may be tempted to increase taxes to the point where competing private firms are forced to cease operating. Whether it can do so, however, is not clear. The City of Pittsburg imposed a twenty percent tax on the gross receipts of private parking lots, rendering the majority of such lots financially unprofitable, at the same time that it operated a series of public parking facilities.[44] The Supreme Court upheld the tax, denying the argument of the parking lot owners that the tax amounted to a destruction of property without due process of law. The Court pointed out that the tax raised substantial revenue, although this was not necessary for its constitutionality; that the tax simply discouraged the use of automobiles and promoted other forms of transportation, a goal well within the constitutional power of the city to pursue; and that the judiciary cannot invalidate a tax "from the fact, *alone*, that the tax appears excessive or even so high as to threaten the existence of an occupation or business."[45] The language suggests that a tax enacted by a government for the sole and exclusive purpose of destroying competition from private enterprise may run afoul of the Constitution.[46]

Let us summarize the material to this point. Simply stated, the principle that emerges is that a state can employ its economic power to acquire resources and retain them for its residents. It can do so either by providing subsidies to private enterprise for sales to its residents or by establishing its own organizations to compete with private firms, and the financial support for either approach can be obtained through taxation,

43. *Id.* at 624.
44. City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).
45. *Id.* at 376 (emphasis added).
46. In his concurring opinion, Justice Powell appears to stress this point: "It is conceivable . . . that punitive taxation of a private industry and direct economic competition through a governmental entity enjoying special competitive advantages would effectively expropriate a private business for public profit," requiring the payment of compensation or an injunction against the tax. *Id.* at 379.

even taxation confined to the state's competitors. However, it should be noted that these efforts by a state involve economic power, have a positive tone in that the state is seeking to promote the public welfare by entering the market rather than by regulating the behavior of individuals and organizations, and are directed within its boundaries. Are there other means by which a state can retain resources for its residents—means that are not economic in nature, that are negative in tone in attempting to prohibit private parties from acting so as to deprive state residents of resources, and/or that are directed outside the state, i.e., against organizations and individuals which are not residents?

Exclusion of Nonresidents From Use of State Resources

A number of cases have involved a ban on the utilization of marine resources within a state by nonresidents or the imposition of a fee for a fishing license where the fee was considerably higher for nonresidents than for residents. The cases have primarily been decided under the privileges and immunities clause.

In a leading case interpreting the clause, South Carolina required the payment of a fee for a license to engage in commercial shrimp fishing in a three-mile belt extending off the coast of the state. The fee was $25 for a shrimp boat owned by a resident of South Carolina and $2500 for a boat owned by a nonresident; the fee paid by a nonresident was thus one hundred times larger than that paid by a resident. In assessing the constitutionality of the discrepancy, the Supreme Court in *Toomer v. Witsell*[47] stated that the purpose of the privileges and immunities clause was to guarantee that the privileges possessed by the citizens of one state—including the privilege of conducting business—will be conferred upon a citizen of a second state who enters the first state unless there exist reasons for discrimination against noncitizens which are independent of and not contingent upon merely the fact that they are not citizens. The purpose of the clause "is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed."[48]

Examining the South Carolina license fees, the Court found nothing to suggest that non-citizens were more of a threat than citizens to conservation of shrimp supplies, the alleged purpose of the statute authorizing the fees. Even if they were a greater threat, the state was able to deal with the situation in ways other than a classification by citizenship;

47. 334 U.S. 385 (1948).
48. *Id.* at 398.

for example, the state could restrict the type of fishing equipment used or charge fees the amount of which varied with the size of the boat. Accordingly, the Court concluded, the discrimination against non-citizens by South Carolina violated the privileges and immunities clause.[49]

In reaching its conclusion in *Toomer*, the Court recognized the presence of two important facts which distinguished the case from its 1877 decision in *McCready v. Virginia*.[50] The first was that the fees were applicable to the pursuit of a free-swimming fish that migrated through the waters of several states; the second was that the fishing occurred not inland waters but at sea.[51] As a result, the resource to which South Carolina wished to limit access by nonresidents was not one over which the state had total and permanent control. *McCready* differed in this respect. There, Virginia prohibited the citizens of other states from planting oysters in the bottom of a designated river but gave the privilege to Virginia citizens. Since the state owned the river and its bottom, the Court upheld the statute, saying that the privileges and immunities clause did not require that the state open to nonresidents the land which it owns, whether watercovered or not, and the resources found on or under such

49. It is instructive to note that the license fees had also been attacked under the equal protection clause. The Court did not deal with this clause, but its language in striking the fees under the privileges and immunities clause could well have been written for equal protection:

> We would be closing our eyes to reality, we believe, if we concluded that there was a *reasonable relationship* between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.

Id. at 399 (emphasis added).

> And since we have previously concluded that the reasons advanced in support of the statute do not bear a *reasonable relationship* to the high degree of discrimination practiced upon citizens of other States, it follows that [the statute authorizing the difference in license fees] violates Art. IV, § 2 of the Constitution.

Id. at 403 (emphasis added).

In discussing the subsidy for automobile hulks under the equal protection clause, the Supreme Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), upheld the different treatment of resident and nonresident scrap processors because the difference "bears a *rational relationship* to Maryland's purpose of using its limited funds to clean up its own environment, and that is all the Constitution requires." *Id.* at 814 (emphasis added).

The Court appears, therefore, to utilize the same test under the privileges and immunities clause as it does under the equal protection clause when a classification by residence is at issue. The test is whether there is a rational link between the classification and the purpose of the statute creating the classification. If the classification is reasonable in light of the end which it seeks to achieve, there is no violation of either constitutional provision.

It should be kept in mind that an artificial entity such as a corporation cannot claim the protection of the privileges and immunities clause, which is limited to "citizens." An artificial entity, however, is a "person" within the meaning of the equal protection (and due process) clause. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

50. 94 U.S. 391 (1877).

51. Toomer v. Witsell, 334 U.S. 385, 401 (1948).

land. That which is owned in common by the people need not be made available to those who do not own it.[52]

In his concurring opinion in *Toomer*, Justice Frankfurter took exception to the majority's reliance on the privileges and immunities clause, feeling that the decision was based on a disruption of interstate commerce and that the commerce clause prohibiting the states from regulating such commerce was therefore the appropriate ground for finding a constitutional violation.[53] The point is well-taken, for South Carolina was attempting to exclude nonresidents from access to fish that regularly moved along the coast of several states. However, whether one follows the majority in *Toomer* and distinguishes land-based resources owned by the public, or whether one accepts the view that the commerce clause is the correct constitutional basis of *Toomer*, Justice Frankfurter appears to be on solid ground when he says that the privileges and immunities clause, as interpreted by *McCready* and other cases,

> does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.[54]

Following this principle, the Supreme Court of Maine recently upheld a state statute which authorized municipalities to discriminate between residents and nonresidents, even to the point of excluding the latter, in regulating the taking of shellfish from coastal areas within their

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On the basis of these facts, *Toomer* was relied upon to invalidate an Alaskan statute which authorized the state to halt salmon fishing off the coast by nonresident commercial fishermen whenever the quantity of salmon caught by residents was expected to be insufficient for the latter to maintain a reasonable standard of living. Brown v. Anderson, 202 F. Supp. 96 (D. Alas. 1962).

52. 94 U.S. at 396-97.

53. 334 U.S. at 407-09.

54. *Id.* at 408 (Frankfurter, J., concurring). *See* Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) (discussed *infra*); Geer v. Connecticut, 161 U.S. 519 (1896) (the ownership of wild game by the state and the police power of the state are sufficient constitutional grounds for upholding a statute which prohibits the killing in the state of wild game birds or the possession of killed birds for the purpose of transporting them to other states); Doe v. Bolton, 410 U.S. 179, 200 (1973) (Geogia statute providing that only residents can obtain abortions is unconstitutional under privileges and immunities clause, since "[i]t is not based on any policy of preserving state-supported facilities for Georgia residents" and "[t]here is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents.")

jurisdiction.[55] While striking down the ordinance excluding nonresidents adopted by one municipality because of a lack of evidence that the ordinance was reasonably necessary in the situation, the court held that the enabling statute was valid under *McCready* because title to the shellfish was in the state and because there was a proper governmental purpose in protecting shellfish, to which purpose the discrimination against nonresidents bore a substantial relationship.

In sum, it appears that a state can utilize the resources which it owns for supplying the needs of its residents and that nonresidents have no constitutional right to those resources. A state can purchase mines and oil fields and prohibit distribution of the output to nonresidents, at least where there would be an inadequate supply for residents in the absence of such state efforts.[56]

Export Limitations on Privately-Owned Items

May a state retain for its residents only those resources to which it can make some claim of ownership? Or may a state go beyond such resources to those already in private hands and require that businesses within its jurisdiction not transport out of state materials in short supply or at least that they give preference to residents in selling such materials?

There is language in a 1908 decision of the Supreme Court which lends support to the view that a state can indeed reach items owned by a private party and restrict their sale to within its boundaries. In the case, New Jersey prohibited the diversion of water from any fresh lake or river in the state for delivery to any other state.[57] The New Jersey courts upheld the statute on the ground that the state possessed a degree of ownership in the water and that those with a right to take the water could divert it for only a reasonable distance. The Supreme Court affirmed but pointed out that, without revising the basis of the judgment of the state courts, it rested its decision on a premise that was broader than and independent of the ownership by the state of the water.[58] The premise was that the state had the constitutional power to retain natural resources

55. State v. Norton, 335 A.2d 607 (Me. 1975).

56. Both McCready v. Virginia, 94 U.S. 391 (1877), and Geer v. Connecticut, 161 U.S. 519 (1896), found no interstate commerce to exist, but the test employed for such a determination has been changed by the Supreme Court, raising the question of whether a commerce clause violation might be found today in similar situations. *See* text accompanying notes 86-90 *infra*. However, a commerce clause violation in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), did not keep the Court from indicating that a state can retain its resources for its residents. *See* text accompanying notes 63-66 *infra*.

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

58. *Id.* at 355.

found within its borders for its own citizens and that it could exercise the power without showing any justification, including the degree to which the resources were needed for current or future consumption by its citizens. The Court appeared to be suggesting that, even after a natural resource is under private control, the state can dictate its ultimate destination.

The suggestion that resources in private hands can be restricted to in-state uses was, however, not fully accepted in later decisions by the Court. In 1966, the Court in *City of Altus, Oklahoma v. Carr*[59] limited the broad premise in its 1908 opinion by affirming the decision of a three-judge federal district court which held unconstitutional a Texas statute prohibiting the withdrawal of underground water for transportation to and use in another state. Since Texas law gave landowners the right to extract and sell underground water, the statute was found to violate the commerce clause by restricting interstate commerce after the water had come under the ownership of private parties.

Two cases decided by the Supreme Court had been the foundation for the decision of the district court. The first involved an Oklahoma statute which prohibited domestic corporations, organized for the purpose of transporting natural gas, from sending the gas outside the state and which precluded any foreign corporation, organized for the same purpose, from conducting business in the state.[60] An attempt was made to justify the statute on the grounds that the only sources of fuel within the state were coal, oil and natural gas; that domestically-produced oil was already being shipped out of the state while domestic coal was rapidly escalating in price; and thus that natural gas was the only practical source of fuel for residents of the state, many of whom did not yet even have access to it. The Court, however, held that the statute discriminated against interstate commerce and accordingly violated the commerce clause. The Court emphasized that the gas sought to be controlled by the state was privately owned and that private parties have the right to send the gas in interstate commerce if they choose to do so: "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce."[61]

The second case revolved around a West Virginia statute that was

59. 385 U.S. 35, *aff'g per curiam*, 255 F. Supp. 828 (W.D. Tex. 1966).
60. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).
61. *Id*. at 255.

enacted because the production of natural gas within the state was insufficient to supply demand. The statute required that suppliers provide gas to customers in the state before providing gas to customers in other states and that suppliers with a gas surplus transfer the excess to suppliers with a deficiency.[62] The state defended the statute with the arguments that suppliers of gas are engaged in a quasi-public business, making it reasonable to impose a requirement that preference be given to in-state needs, and that gas produced within the state constitutes a natural resource which the state has the authority to regulate in the interest of its citizens. The first argument was rejected by the Supreme Court because there had long been interstate commerce in gas produced in West Virginia prior to the statute, partly as the result of efforts of the state itself. The second argument was rejected because the gas to be controlled by the statute was already privately owned. Consequently, said the Court, the statute could not stand under the commerce clause.

In spite of these cases, however, the Supreme Court has not necessarily sanctioned the blanket premise that a state can never retain resources once they have reached private ownership. In *Foster-Fountain Packing Co. v. Haydel*,[63] the Court faced a challenge to a Lousiana "Shrimp Act" which declared shrimp in state waters to be the property of the state, granted the right to take and process shrimp to residents and organizations operating processing facilities within the state, and prohibited the exportation of shrimp from which the heads and hulls had not been removed. Shrimp processing facilities were at the time concentrated in Mississippi, and the silent purpose of the Act was seen by the Court to be the development of such facilities in the state.[64] This, said the Court, was not permissible under the commerce clause:

> The State does not require any part of the shrimp to be retained for consumption or use therein. . . . Consistently with the Act all may be, and in fact nearly all is, caught for transportation and sale in interstate commerce. As to such shrimp the protection of the commerce clause attaches at the time of the taking. . . . *As the representative of its people, the State might have retained the shrimp for consumption and use therein*. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. *The purpose is not to retain the shrimp for the use of the people of Louisiana*; . . . . [B]y permitting its

62. Pennsylvania v. West Virginia, 262 U.S. 553 (1923).
63. 278 U.S. 1 (1928).
64. *Id*. at 10.

> shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control.[65]

In reaching this conclusion, the Court distinguished an earlier decision in which it had upheld a Connecticut statute which prohibited killing wild game birds in the state or possessing killed birds when the birds were to be sent to other states.[66] The decision was based on the fact that the state possessed title to or at least the power of control over game and fish within its borders. This, of course, was true of the shrimp in Louisiana, but Louisiana was attempting to impose a prerequisite to interstate commerce not for the purpose of retaining the shrimp for domestic consumption but only for the purpose of processing, following which the shrimp were free to move in interstate commerce. Consequently, the correct interpretation of ***Foster-Fountain Packing Co.*** appears to be that, if the state owns or controls a resource, it may require private parties given access to it to confine its distribution within the state for the purpose of consumption by state residents but not for the limited purpose of promoting its processing. The restriction on exportation must be an all-or-none proposition; it cannot be limited only to the point where the resource is processed into a finished product but must extend to the ultimate consumption of the resource.

This interpretation is consistent with *City of Altus* discussed earlier in this section.[67] The total prohibition on the exportation of underground water in that case was voided because Texas law had previously given landowners the right to appropriate and sell the water to whomever they wished, a right that was part of their interest in the land. The statute enacted by the legislature was therefore attempting to withdraw the right to utilize that which the landowner already owned; it was not attempting to regulate the distribution of that which the state owned and to which the state had granted private parties a right of access and use.

This interpretation is also consistent with the opinion of the Supreme Court in ***H.P. Hood & Sons v. Du Mond***.[68] There, a corporation purchased raw milk from New York producers and transported it to Massachusetts for processing and sale. The corporation operated three receiving depots in New York under license from the state, but it was denied a license for a fourth depot on the grounds that excessive competi-

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65. *Id.* at 12, 13 (emphasis added).
66. Geer v. Connecticut, 161 U.S. 519 (1896).
67. *See* text accompanying note 59 *supra*.
68. 336 U.S. 525 (1949).

tion and an inadequate supply of milk for residents would result. The Court held that the statute authorizing the license denial was invalid under the commerce clause because, while the production and distribution of milk is important to and may be regulated to promote the public health, the open purpose and inevitable effect of the statute was the curtailment of interstate commerce. Although the Court did not call attention to the fact, it is important to note that the resource involved (i.e., milk) was privately-owned and that the state had never possessed title to it.

In short, a state may purchase a natural resource such as a mineral deposit (if it is not already on publicly-owned lands) and sell a right of access to and use of it to private enterprise. At the time of the sale, it appears capable of requiring that the resource be re-sold only within the state for consumption by residents of the state. Though such a condition may restrict the volume of interstate commerce, it does not appear to be a violation of the commerce clause itself.

FEDERAL CONTROL OVER STATE EXPORT LIMITATIONS

We have seen that a state may curb exports of minerals found within its jurisdiction in a number of ways. To synthesize the principles thus far developed, it appears that a state may act: 1) By providing financial subsidies to private enterprise for the sale of minerals to residents; and 2) By acquiring ownership of the minerals, even to the extent of a monopoly, and making them available only to residents for processing (if necessary) and consumption.

In identifying these possibilities, we have been concerned with situations where there has been no action by Congress attempting to intervene in the state effort to limit exports. Let us now examine the question of whether the Constitution grants the federal government the authority to override the means a state might employ to retain resources for its residents.

There is little reason to doubt that Congress can condition federal aid on an agreement by states not to discriminate against nonresidents through a subsidy to private firms or through the sale of publicly-owned resources, and that federal monies can be withheld from a state failing to enter or breaking such an agreement.[69] However, the more difficult issue

69. *See* Lau v. Nichols, 414 U.S. 563, 569 (1974); Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127, 142-44 (1947); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 525-26 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548, 593-94, 597-98 (1937); Massachusetts v. Mellon, 262 U.S. 447, 482-83 (1923).

is whether Congress can impose a statutory ban on discrimination against nonresidents. In *Hughes v. Alexandria Scrap Corp.*,[70] the Court expressly reserved judgment on whether Congress, acting under the authority of the commerce clause, could prohibit subsidies favoring residents.[71] The dissent, however, suggested that there is a logical inconsistency between such a prohibition and the conclusion of the majority that a state subsidy was not the type of action with which the commerce clause was concerned.[72] Moreover, the action by the Court in *National League of Cities v. Usery*[73] in voiding a federal statute establishing minimum wages and maximum working hours for employees of states on the ground that such a statute was not within the authority committed to Congress by the commerce clause, led three dissenting justices to suggest that state-owned business operations may thus be outside the ability of Congress to regulate under the clause and an exception to the power of the federal government to control interstate commerce.[74] Nonetheless, as the following analysis suggests, a federal ban on discrimination against nonresidents by states is likely to be upheld.

To understand what Congress *can* do, it is perhaps best to discuss first what Congress *cannot* do. Specifically, Congress cannot impose a duty on a state to engage in a specified conduct in areas of traditional governmental activity; that is, affirmative action of a designated type cannot be mandated for state officers by federal legislation when dealing with functions for which state governments were created and which they have historically served. Thus, the Court has held unenforceable the requirement of the Constitution[75] and a federal statute[76] that a state extradite a resident charged with a crime in another state on the demand of the latter: "[T]he Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."[77] The same principle was followed and elaborated on in *National League of Cities*, the Court holding that the commerce clause did not give Congress the authority to specify minimum

70. 426 U.S. 794 (1976).
71. *Id.* at 810 n.19.
72. *Id.* at 822 n.4 (Brennan, J., dissenting).
73. 426 U.S. 833 (1976).
74. *Id.* at 872-73 (Brennan, J., with whom White, J., and Marshall, J., join dissenting).
75. U.S. CONST. art. IV § 2 provides in pertinent part:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

76. Act of Feb. 12, 1793, 1 Stat. 302, §§ 1,2.
77. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1860).

wages and maximum working hours for state employees and thereby displace the ability of states to structure their internal operations in all areas, including those which are traditional governmental functions: "Congress may not exercise [its power to regulate interstate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[78]

The principle that the federal government cannot require a state to pursue certain conduct when traditional governmental functions are involved would have been more thoroughly delineated if the Supreme Court had not recently vacated several companion cases in which the Environmental Protection Agency had attempted to compel states to implement Agency programs to reduce air pollution, the implementation process including the development of regulations and the enactment of statutes by the states.[79] The cases were remanded to determine whether they were moot after the Agency decided to remove the requirement that regulations and statutes be adopted. It is instructive, nevertheless, to consider the opinions of the three courts of appeals whose decisions were vacated.[80] Each court upheld the authority of the Agency under the commerce clause to regulate directly all sources of air pollution, whether the sources were owned by private parties or by the state, but each suggested that a requirement placed on a state to adopt statutes or regulations was invalid either because it was outside the power given the federal government in the commerce clause, because it ran afoul of article IV, § 4 of the Constitution guaranteeing a republican form of government to every state, and/or because it violated the tenth amendment reserving to the states all powers not delegated to the federal government or prohibited by the Constitution.[81] In a separate case, the Third Circuit, while agreeing that the federal government can regulate public as well as private sources of air pollution, held that the commerce clause provided the necessary authority to compel a state to adopt regulations and enforce a federally-created program.[82] However, the

78. 426 U.S. at 855.

79. Environmental Protection Agency v. Brown, 97 S.Ct. 1635 (1977).

80. Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded to determine mootness*, 97 S.Ct. 1635 (1977); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded to determine mootness*, 97 S.Ct. 1635 (1977); Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded to determine mootness*, 97 S.Ct. 1635 (1977).

81. Maryland v. Environmental Protection Agency, 530 F.2d 215, 225-26 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 987-94 (D.C. Cir. 1975); Brown v. Environmental Protection Agency, 521 F.2d 827, 837-42 (9th Cir. 1975).

82. Pennsylvania v. Environmental Protection Agency, 500 F.2d 246 (3d Cir. 1974).

continued viability of this case is questionable, since it was based on a decision which was overruled in *National League of Cities*.

How, then, will the courts react to a federal statute overriding state laws and regulations which compel the retention for residents of publicly-owned minerals or which subsidize the retention of privately-owned minerals? If the federal government attempted to coerce a state into rescinding such laws and regulations, the situation would not seem to be significantly different from that faced by states required to adopt laws and regulations, since state officers would be forced to engage in designated forms of conduct in an area (legislation and regulations) which is clearly a traditional governmental function. However, there is an important distinction between forcing a state to act to rescind laws and regulations and forcing it to discontinue certain actions. A federal ban on continuing to discriminate against nonresidents would be in the latter category inasmuch as it would simply require that a state cease and desist from efforts in which it was then engaged. Although the Supreme Court did not expressly employ this reasoning, the vice of the federal statute in *National League of Cities* appears to be that Congress was attempting to require state officers to increase wages and decrease working hours for employees and thus perform an affirmative act affecting the delivery of services in areas such as fire and police protection which are traditional governmental functions; Congress was not simply imposing a prohibition against certain conduct by a state. Congressional enactments which are strictly prohibitions can be sustained. In an earlier decision, the Court stopped the State of Illinois from continuing to divert excessive amounts of water from Lake Michigan. The diversion was affecting the water level of the lake, reducing its navigable capacity, and was enjoined on the basis of a federal statute and the commerce clause.[83]

A state which discriminates against nonresidents in efforts to retain minerals, moreover, may not be engaged in a traditional governmental function. Such efforts would appear to constitute a proprietary function in that they are directed toward providing a private benefit to citizens rather than regulating their conduct.[84] In this situation, there is a basis for believing that Congress can require even affirmative conduct by state

83. Sanitary Dist. v. United States, 266 U.S. 405 (1925).

In forcing a state to cease certain conduct, it appears to be irrelevant whether a traditional governmental function is involved. In *Sanitary District*, the state was enjoined from diverting water even though it was pursuing a typical governmental function, the elimination of sewage and the promotion of the public health. *National League of Cities v. Usery*, 426 U.S. 833, 851, specifies sanitation and public health as a traditional governmental service.

84. *See* text accompanying notes 35 & 36 *supra*.

officers to conform to federal mandates. For example, where a state owned and operated a railroad involved in interstate commerce, the Court unanimously concluded that the state must abide by a federal statute requiring the use of certain equipment.[85] *National League of Cities* expressly re-affirmed the holding on the ground that the state was not pursuing an activity which constituted a traditional governmental function.[86]

A federal statute banning discrimination against nonresidents in the sale of minerals can be justified under the fourteenth amendment and under the commerce clause. With regard to the fourteenth amendment, its privileges and immunities clause or its equal protection clause may be the basis for invalidating a classification by residence,[87] and its provision giving Congress the authority to enforce the amendment by appropriate legislation is likely to supply an adequate constitutional foundation for the statute inasmuch as the statute can reasonably be expected to minimize economic conflict between states. This appears to be true even if state attempts to retain minerals are held to be a traditional governmental function and outside the authority of Congress to regulate under the commerce clause.[88]

> The prohibitions of the fourteenth amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.[89]

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85. United States v. California, 297 U.S. 175 (1936). *See* Parden v. Terminal Ry., 377 U.S. 184 (1964); Int'l Longshoremen's Ass'n v. N. Carolina Ports Auth., 511 F.2d 1007 (4th Cir. 1975), *aff'g* 370 F. Supp. 33 (E.D.N.C. 1974).

86. 426 U.S. at 854 n.18.

87. The privileges and immunities clause specifies that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV § 1. Even in the absence of federal legislation, the clause prohibits a state from forbidding the sale of goods produced by nonresidents unless the same goods produced by residents are also banned. Whitfield v. Ohio, 297 U.S. 430, 437 (1936). This suggests that the clause will not permit a state to exclude nonresidents from the purchase of goods.

88. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); Usery v. Edward J. Meyer Memorial Hospital, 428 F. Supp. 1368 (W.D.N.Y. 1977); Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 97 S.Ct. 2959 (1977); Usery v. Board of Educ., 421 F.Supp. 718 (D. Utah 1976); Usery v. Dallas Independent School Dist., 421 F. Supp. 111 (N.D. Texas 1976).

89. Ex parte Virginia, 100 U.S. 339, 346 (1880) (*quoted in* Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976)).

The statute, however, can also be justified under the commerce clause. To utilize the clause, interstate commerce must be involved, and an affirmative answer would appear inevitable to the question of whether, by acting to retain minerals produced within its jurisdiction, a state is discriminating against and burdening interstate commerce. In one case already discussed, a Virginia prohibition against the planting of oysters in a river by nonresidents was held not to involve interstate commerce because there was an effect only on cultivation and production, not on transportation or sale.[90] In another case mentioned earlier, a state prohibition on killing wild game birds or the possession of killed birds in order to transport them to other states was held by the Court not to involve interstate commerce because the prohibition kept the birds from becoming part of such commerce and thus concerned only the internal commerce of the state.[91] However, these decisions utilized reasoning which is unlikely to be followed. The test of interstate commerce today is not dependent upon the application of labels such as "production," "transportation," "internal," or "local"; the test is whether the activity in question has an effect on interstate commerce: "Even activity which is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations."[92]

A 1942 case decided by the Supreme Court illustrates the reach of the commerce clause and suggests the clause would provide Congress with the authority to ban discrimination against nonresidents by states seeking to retain domestically produced minerals. At issue in the case was a federal statute establishing quotas for the amount of wheat grown by individual farmers.[93] The Court upheld its application to a farmer who exceeded his quota, concluding that the excess produced, though it might be consumed on the premises, could seriously damage interstate commerce in wheat. By producing only for his own needs, the individual reduced the amount of wheat that would otherwise flow in interstate commerce, and although the effect on commerce of any one individual was insignificant, there would be a substantial impact from the combined actions of all individuals behaving similarly. Accordingly, the Court

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90. McCready v. Virginia, 94 U.S. 391 (1877).
91. Geer v. Connecticut, 161 U.S. 519 (1896).
92. Fry v. United States, 421 U.S. 542, 547 (1975).
The ability of Congress to pre-empt state activity affecting interstate commerce may be greater than the authority of the courts to void state activity under the commerce clause. Douglas v. Seacoast Products, Inc., 97 S.Ct. 1740, 1750 n.17 (1977).
93. Wickard v. Filburn, 317 U.S. 111 (1942).

reasoned, the commerce clause permitted Congress to regulate the amount of wheat grown. If prohibiting excess production is justified because interstate commerce is affected, prohibiting states from banning or discouraging sales to nonresidents would also seem justified, for interstate commerce would unquestionably be affected by the exercise of such state power. In the words of the Supreme Court:

> If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? [The] . . . influence on interstate commerce need not be pointed out. . . . If one State has [such power], all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. . . . [Avoiding such a situation] was the purpose, as it is the result, of the interstate commerce clause of the Constitution.[94]

By way of conclusion, an attempt may be made to use the commerce clause to justify a federal statute of the type under consideration here as an emergency measure. State attempts to limit the exportation of their raw materials will be a response to inadequate supplies of raw materials and will quickly jeopardize the ability of the economy to produce sufficient goods and provide sufficient employment. A similar threat from inadequate energy supplies led Congress in 1973 to adopt the Emergency Petroleum Allocation Act[95] which required the President to impose mandatory measures to allocate petroleum and which expressly pre-empted any conflicting allocation program established by a State. The Act has been upheld under the commerce clause,[96] and challenges to it under other constitutional provisions have also been rejected.[97] However, since all of these decisions emanated from lower federal courts, an examination is necessary of the criteria imposed by the Supreme Court for validating emergency measures under the commerce clause.

National League of Cities distinguished, but re-affirmed an earlier

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94. West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911); *cf.* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976).

95. Pub. L. No. 93-159, 87 Stat. 628 (as amended; codified at 15 U.S.C. §§ 751-756 (Supp. V 1975)).

96. Fuel Merchants Ass'n v. United States, 387 F. Supp. 699 (D.N.J. 1974).

97. Cities Service Co. v. Federal Energy Admin., 529 F.2d 1016 (Emer. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976); Condor Operating Co. v. Sawhill, 514 F.2d 351 (Emer. Ct. App. 1975), *cert. denied*, 421 U.S. 976 (1975); United States v. Gulf Oil Corp., 408 F. Supp. 450 (W.D. Pa. 1975); Gulf Oil Corp. v. Federal Energy Admin., 391 F. Supp. 856 (W.D. Pa. 1975), *dismissed for lack of jurisdiction*, 521 F.2d 810 (Emer. Ct. App. 1975).

decision[98] holding that legislation authorizing the federal government to place limits on wages and salaries was valid under the commerce clause as applied to state and local governments. In discussing the prior decision, the Supreme Court stressed that the legislation there was an emergency measure to combat severe inflation and that it was acceptable because: 1) It was to be in effect only for a "very limited, specific period of time."[99] 2) It did not affect the structure, i.e., manner of delivery, of governmental operations or require states to act affirmatively to restructure those operations in a designated way.[100]

Though it is the latest statement of the Court on the subject, this test for emergency legislation under the commerce clause is not useful for determining the constitutionality of a statute. The second criterion simply reiterates the general test articulated in *National League of Cities* for legislation affecting states enacted under the commerce clause. The first criterion is superfluous in a constitutional examination, for if the second criterion is satisfied, the length of time the legislation is in effect will not determine its constitutionality, only whether it is labelled an "emergency" measure. Moreover, since the shortages of minerals likely to exist in the future will be permanent, inasmuch as minerals are nonrenewable in nature and finite in amount, the statute will not be capable of being a temporary, emergency measure. Therefore, the question concerning federal legislation dealing with state export limitations will not be its emergency character, but whether it imposes a duty of affirmative action on states in an area of a traditional governmental function.

CONCLUSION

If this country is to continue to be the *United* States, the federal government cannot permit states to retain their minerals. If Congress does not utilize its authority under the Constitution to suppress state action directed to this end, the result will be internal economic warfare. "The Constitution," in the words of Mr. Justice Cordozo, "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[101]

However, as this country moves into an era of resource scarcity,

98. 426 U.S. at 852-53 (distinguishing Fry v. United States, 421 U.S. 542 (1975)).
99. 426 U.S. at 853.
The temporary nature of an emergency measure was also stressed in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 441, 447 (1934), and in Block v. Hirsh, 256 U.S. 135, 157 (1921).
100. *Id.*
101. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

Congress may not want to place a complete ban on state efforts to retain minerals. A total ban would permit the economic forces of the market to determine distribution, and this may yield results inconsistent with the public welfare. Accordingly, the most effective approach may be a federal agency to supervise distribution, allowing states to retain minerals where appropriate and overruling them where necessary.

If there is to be a federal agency, the question arises as to the criteria it will employ in determining distribution. Given an inadequate supply of a mineral, how should it be divided among those needing it? One criterion which should be employed in making this determination is the sociological impact that would result from the alternative courses of action that might be followed.

Sociology is a relatively young science, and concern among sociologists with environmental and resource issues is even more recent; indeed, a Section on Environmental Sociology was created by the American Sociological Association only in 1976.[102] As a result, the sociological dimensions to be examined in a decision affecting resource distribution are not yet clearly established.[103] However, the perceptive analyses of sociologist William Catton suggest the directions that might be followed in identifying the sociological consequences of decisions on resource distribution. Catton proceeds on the premise that the environmental sociologist accepts the framework of the branch of biology known as ecology, including its assumption that the human species is but one part of an interdependent, interacting system of living organisms on the planet and that the resources of the planet are finite, placing limits on economic growth and social phenomena.[104] Those limits are believed to have been exceeded by current population numbers, however,[105] and the result expected is that which ensues when overpopulation occurs in other living organisms—a substantial and uncontrollable reduction in the size of the population. Since it is the social implications of this prospect with which environmental sociologists should be concerned, Catton suggests the following specific foci:

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102. ENVT'L SOC., No. 9, Oct. 1976, at 2.

103. Sociological variables are rarely considered, let alone quantified, in environmental impact statements required by the National Environmental Policy Act of 1969. Friesma & Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339 (1976); Flynn, *Science and Speculation in Social Impact Assessment*, in SOC. IMPACT ASSESSMENT 5 (Nov.-Dec. 1976).

104. Catton, *Memorandum: Difference Between Environmental Sociology and Human Ecology*, ENVT'L SOC., No. 8, Dec. 1975, at 9.

105. As Catton phrases it, "[b]y the time a substantial number of people began to worry out loud about what to do 'if' the world 'eventually' were to become overpopulated, it already was." Catton, *Depending on Ghosts*, 2 HUMBOLDT J. SOC. REL. 45 (1974).

1. The stresses likely to be added to or eliminated from the structure of social institutions, such as government, which (structure) developed in an era of material abundance.
2. The types of collective behavior (for example, rumoring and rioting) which are probable results of the destruction of established and expected behavior patterns whose existence was dependent upon material abundance.
3. The short- and long-term effects on the attitudes of the public of a resource allocation decision, including the extent to which the decision may reinforce or reduce the belief in the limitlessness of economic expansion and the acceptance of new social structures that are consistent with resource scarcity and reduced population numbers.[106]

Whether or not one accepts the pessimistic outlook of the Catton position, the sociological dimension needs to be considered in resource allocation decisions. The dimension is important because sociological factors can alternatively exacerbate or reduce already-existing shortages. Regrettably, the predictive utility of sociological information is less than one might desire, but at the very least the information will sensitize the decisionmaker to important aspects of the allocation problem and provide the basis for educated guesses that should be more effective than decisions based on speculation.

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106. Catton, *NEPA, Sociologists and Succession: A Position Paper*, ENVT'L SOC., No. 5, Jan. 1975, at 8, 18-19.