American Yearbook: An Early Portrait of the Market Participant Exception to the Dormant Commerce Clause

Cem Akleman

American Yearbook: An Early Portrait of the Market Participant Exception to the Dormant Commerce Clause

American Yearbook v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972)

by Cem Akleman

In *American Yearbook Co. v. Askew*,[1] a three-judge[2] panel[3] of the U.S. District Court for the Middle District of Florida upheld several Florida laws requiring that printed materials purchased

Cem Akleman is a J.D. Candidate (2013) at the University of Florida Levin College of Law. The author thanks Paul Pakidis, Zack Smith, Erica Perdomo, and Kathryn Kimball, each of whom kindly provided input and encouragement.

1 339 F. Supp. 719 (M.D. Fla. 1972).

2 The opinion was written by then-District Court Judge Gerald Bard Tjoflat, who was later appointed to the U.S. Court of Appeals for the Fifth Circuit. When the United States Court of Appeals for the Eleventh Circuit was created by Congress, Judge Tjoflat was reassigned to it and later served as chief judge from 1989 to 1996. *See Biographical Directory of Federal Judges: Tjoflat, Gerald Bard*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=2674&cid=999&ctype=na&instate=na (last visited Mar. 16, 2012). Judge George C. Young also served on the panel. Judge Young was a member of all three district courts in Florida and served as the Middle District's Chief Judge from 1973 until he took senior status in 1981. *See Biographical Directory of Federal Judges: Young, George Cressler*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=2393&cid=999&ctype=na&instate=na (last visited Mar. 23, 2012). The final judge on the panel was Judge David Dyer, who served on the U.S. Court of Appeals for the Fifth Circuit and then on the newly created Eleventh Circuit until his passing in 1998. *See Biographical Directory of Federal Judges: Dyer, David William*, FED. JUD. CTR., http://www.fjc.gov/servlet/nGetInfo?jid=675&cid=999&ctype=na&instate=na (last visited Mar. 16, 2012).

3 Three-judge panels were formerly required to issue "an interlocutory or permanent injunction restraining the enforcement, operation or execution of

by the state be manufactured in Florida.[4] The court held that the laws were proper under the Dormant Commerce Clause[5] and the Equal Protection Clause[6] of the Fourteenth Amendment and constituted a proper delegation of power by the Florida Legislature under the Florida Constitution.[7] The opinion was later summarily affirmed by the Supreme Court[8] and subsequently cited[9] by the Court in opinions that set forth the market participant exception[10] to the Dormant Commerce Clause.

This Comment explains the background of the case and relates the history of the relevant doctrines on which the district court relied to make its decision. Finally, this Comment discusses how *American Yearbook* was forward-looking and quite possibly the first case to set forth the then-unformed market participant exception.

American Yearbook Company operated an out-of-state business printing yearbooks for secondary schools and colleges, both public and private.[11] Prior to 1970, American Yearbook won contracts to

---

a State statute on grounds of unconstitutionality." 28 U.S.C. § 2281 (repealed 1976). A three-judge panel carries with it an appeal of as a matter of right to the Supreme Court. 28 U.S.C. § 1253 (2006). However, in 1976, Congress repealed most statutes requiring the use of three-judge panels. The remaining statutes requiring three-judge panels include 28 U.S.C. § 2284 (2006), which involves actions "challenging the constitutionality of the apportionment of . . . districts or . . . legislative bod[ies]," and the Voting Rights Act of 1965, 42 U.S.C. § 1973b(a)(5) (2006), which requires panels in cases about voter qualifications in suspect jurisdictions. *See generally* ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 90–140 (5th ed. 1978) (discussing appellate jurisdiction over three-judge panels).

4 *Am. Yearbook*, 339 F. Supp. at 719–20, 725.

5 Unlike the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, the Dormant Commerce Clause (also called the Negative Commerce Clause) is not expressly stated in the Constitution. Rather, it is a constitutional doctrine that courts have developed to address the negative or converse implied by the Commerce Clause. It is premised on the idea that when a state passes a law that unduly burdens interstate commerce, that law improperly infringes on Congress' exclusive power to regulate interstate commerce. *See, e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179–80 (1995).

6 U.S. CONST. amend. XIV, § 1.

7 *Am. Yearbook*, 339 F. Supp. at 720–21, 725.

8 *Am. Yearbook Co. v. Askew*, 409 U.S. 904 (1972).

9 *See infra* notes 49–73 and accompanying text.

10 In brief, the market participant exception provides that when a state is participating in the marketplace like a private business (rather than acting in its governmental function as a sovereign), it is not regulating commerce and thus is not subject to the Dormant Commerce Clause. For a fuller explanation of this principle, see *infra* notes 49–58 and accompanying text.

11 *Am. Yearbook*, 339 F. Supp. at 720.

print yearbooks for schools in Florida.[12] In 1970, the company bid on a yearbook contract at the University of South Florida.[13] Even though it entered the lowest bid, the university denied American Yearbook the contract because the company did not have any manufacturing facilities within the state, and state law[14] prohibited the out-of-state fulfillment and manufacturing of public printing contracts.[15]

American Yearbook then brought suit in the Middle District of Florida, challenging the constitutionality of the printing statutes on three separate grounds.[16] First, the company argued that the Florida Legislature had, in violation of the Florida Constitution, improperly delegated to the Department of General Services the power to determine whether printings were Class A (those printings ordered by the Florida Legislature or Florida Supreme Court) or Class B (all other state printings).[17] The court dismissed this argument on its face, reasoning that while it is true that the Florida Legislature cannot delegate its legislative power, it had clearly defined the classes of printings—the legislative portion of the governmental act—and only allowed the Department of General Services "to regulate the manner by which Class B contracts can be let."[18] Thus, the Legislature had not run afoul of the nondelegation doctrine.

Next, American Yearbook argued that the state statutes violated the Equal Protection Clause of the Fourteenth Amendment by

12 Brief for Appellant at 5, Am. Yearbook Co. v. Askew, 409 U.S. 904 (1972) (No. 72-25).

13 *Id.* At the time of the action, the university had campuses in Tampa and St. Petersburg, Florida, the heart of the Middle District. *See USF History*, Univ. S. Fla., http://www.usf.edu/About-USF/usf-history.asp (last visited Mar. 16, 2012).

14 The company focused primarily on three subsections of Section 283 of the *Florida Statutes*. *See Am. Yearbook*, 339 F. Supp. at 719–20 nn.1–3. Section 283.03 required that "[a]ll the public printing of this state shall be done in the state." Fla. Stat. § 283.03 (1927) (repealed 1983). Section 283.04 divided printing into two classes: Class A was defined as "printing required for the legislative department of the state government," and Class B was defined as any printing by the state "not included in class A." Fla. Stat. § 283.04 (1969) (repealed 1983). Section 283.10 loosened the requirements for Class B printings, but still required that the printer "manufacture the [printings] within the state." Fla. Stat. § 283.10(1) (1969) (repealed 1983). The printings at issue were Class B as defined by the statutes.

15 Brief for Appellant, *supra* note 12, at 5.

16 *Am. Yearbook*, 339 F. Supp. at 720.

17 *Id.*

18 *Id.* at 720–21.

differing in their treatment of public and private contracts.[19] To begin its analysis, the court distinguished the two types of power that a state exercises with respect to the Commerce Clause. One type is governmental power, which is the use of power by the sovereign to govern and regulate its people. The other is proprietary or business power, which arises when the state acts to requisition property through public contracts or otherwise provide for the internal needs of the government.[20]

The court looked to the rationale in *Atkin v. Kansas*[21] to answer the question of whether the printing contracts fell within the governmental function or proprietary function of the state.[22] In *Atkin*, the Supreme Court upheld the constitutionality of a state statute imposing criminal liability on employers who forced their employees to work more than eight hours per day on a state contract.[23] The Court found no equal protection violation, even though that same conduct was legal when working on a private contract, because placing conditions on a state contract fell within the proprietary function of the state.[24] The Supreme Court further explained that "[t]he rule of conduct prescribed by [the law] applies alike to all who contract to do work on behalf . . . of the State . . . ."[25] Similarly, with respect to public school printing contracts, the statute applied equally to all printers, even though it did not apply to printing contracts at private schools.[26]

To counter the unfavorable rule from *Atkin*, American Yearbook argued that the rulings of the Supreme Court in *Shapiro v. Thompson*[27] and *Graham v. Richardson*[28] undermined the holding in *Atkin* such that the Equal Protection Clause required the court to strike down the printing statute.[29] *Shapiro* and *Graham* invalidated

19 *Id.* at 720. The Fourteenth Amendment states, in relevant part, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
20 *Am. Yearbook*, 339 F. Supp. at 721.
21 191 U.S. 207 (1903).
22 *Am. Yearbook*, 339 F. Supp. at 721–22.
23 *See Atkin*, 191 U.S. at 207–08, 223–24.
24 *Id.* at 222–23.
25 *Id.* at 224.
26 *Cf. Am. Yearbook*, 339 F. Supp. at 723 (finding no Equal Protection Clause violation).
27 394 U.S. 618 (1969).
28 403 U.S. 365 (1971).
29 *Am. Yearbook*, 339 F. Supp. at 722.

state welfare laws that discriminated against protected classes.[30] The *American Yearbook* court distinguished those cases on the ground that welfare is clearly a governmental, as opposed to a proprietary, function of the state, while the action in this case was proprietary; additionally, those cases discriminated against suspect classes whereas the instant case did not involve any protected classes.[31] Therefore, the court found that the statutes did not violate the Equal Protection Clause.

Finally, and most importantly, American Yearbook argued that the printing statute was such an undue burden on interstate commerce that it violated the Dormant Commerce Clause.[32] The court again deployed the distinction between the governmental and proprietary functions of the state.[33] It drew on *Field v. Barber Asphalt Paving Co.*,[34] a Supreme Court case analyzing a Missouri statute that required that asphalt for a public paving project originate from a specific asphalt deposit.[35] The plaintiff in *Field* pointed out that some of the required asphalt was from a foreign country, and argued that, by bypassing asphalt available from other states, the statute burdened interstate commerce.[36] The Court rejected this argument, noting that while there was some burden on interstate commerce, the effect was too remote to be considered a direct interference with Congress' exclusive power to regulate interstate commerce.[37] The *American Yearbook* court used this rule as support for the proposition that while proprietary purchases do affect interstate commerce, the effect must be substantial enough to trigger an examination under the Dormant Commerce Clause.

The court also considered *MacMillan Co. v. Johnson*,[38] which upheld a Michigan statute specifying the condition of textbooks purchased by state school districts.[39] The plaintiffs in *MacMillan* argued that by dictating the condition of books that school districts could purchase, the state controlled the price of books shipped

30 *See id.*
31 *Id.* at 722–23.
32 *Id.* at 723.
33 *Id.*
34 194 U.S. 618 (1904).
35 *Id.* at 619.
36 *See id.* at 623.
37 *See id.*
38 269 F. 28 (E.D. Mich. 1920).
39 *Id.* at 29, 32–33.

into the state.[40] The *MacMillan* court reasoned that the law merely required that when the state enters into a contract to buy books, those books must be of a certain quality.[41] Similarly, the printing statute only specified the manner in which the contract could be fulfilled, rather than controlling the interstate price of printing.

The court then surveyed various state supreme court decisions about trade regulations.[42] The court stated that the general rule from those cases and subsequent Supreme Court cases[43] was that while trade regulations are subject to Commerce Clause scrutiny, "statutes that merely specify the conditions of state purchases are not."[44]

The court rejected a contrary opinion in *Garden State Dairies of Vineland, Inc. v. Sills*.[45] In *Sills*, the New Jersey Supreme Court examined a statute requiring any vendor supplying milk to a state agency to certify that it had purchased at least that same amount of milk from a producer within New Jersey.[46] The New Jersey Supreme Court reasoned that although the purchase of milk fell within the proprietary function of the state, the expansion of proprietary activities was "troublesome" enough that the state could not take advantage of the presumption that those proprietary activities place insubstantial burdens on interstate commerce.[47] Rejecting the rationale of the New Jersey Supreme Court, the *American Yearbook* court noted that "[t]o subject every job specification to an *ad hoc* measurement of its effect on interstate commerce would unduly interfere with state proprietary functions . . . ."[48] Thus, drawing on *Field*, *MacMillan*, and the trade regulations cases, the court held

40 *Id.* at 30.
41 *See id.* at 31.
42 The court cited cases from Arizona (Schrey v. Allison Steel Mfg. Co., 255 P.2d 604 (Ariz. 1953)), Colorado (City & Cnty. of Denver v. Bossie, 266 P. 214 (Colo. 1928)), Idaho (*Ex parte* Gemmill, 119 P. 298 (Idaho 1911)), Mississippi (State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 76 So. 258 (Miss. 1917)), Missouri (Pasche v. S. St. Joseph Town-Site Co., 190 S.W. 30 (Mo. Ct. App. 1916)), Montana (Hersey v. Nelson, 131 P. 30 (Mont. 1913)), and North Dakota (Knight v. Barnes, 75 N.W. 904 (N.D. 1898)). *See* Am. Yearbook Co. v. Askew, 339 F. Supp. 719, 724 n.29 (M.D. Fla. 1972).
43 The court cited *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) and *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964). *Am. Yearbook*, 339 F. Supp. at 724 nn.31–32. With the exception of the Arizona Supreme Court decision, these cases were decided after the state court cases cited in note 42.
44 *Id.* at 725.
45 217 A.2d 126 (N.J. 1966).
46 *Id.* at 127.
47 *Id.* at 130.
48 *Am. Yearbook*, 339 F. Supp. at 725.

that because the statutes fell within the proprietary function of the state, they did not violate the Dormant Commerce Clause.

The *American Yearbook* court's presumption, and later affirmance by the Supreme Court, that proprietary functions of the state do not violate the Dormant Commerce Clause directly contributed to the development of the market participant exception. The exception allows a state acting like a private producer or purchaser of goods or services to evade scrutiny under the Dormant Commerce Clause. The Supreme Court first expressly introduced[49] this doctrine in *Hughes v. Alexandria Scrap Corp.*,[50] four years after *American Yearbook* was decided. In *Alexandria Scrap*, Maryland instituted a regulatory scheme that paid a monetary reward to processors located in the state for destroying automobile hulks that were previously titled in the state.[51] The Supreme Court heard the appeal from a three-judge panel that struck down the regulatory scheme on equal protection and Dormant Commerce Clause grounds.[52]

Applying the balancing test created by the Supreme Court in *Pike v. Bruce Church, Inc.*,[53] the district court in *Alexandria Scrap* explained that "any evaluation of the validity of the impact of a state statute upon interstate commerce depends not only upon the strength of local interests, but upon whether those interests can be promoted by other means."[54] In its rationale, the district court in *Alexandria Scrap* performed an in-depth analysis of *American Yearbook*'s discussion of proprietary and governmental functions of the state.[55] Ultimately, the *Alexandria Scrap* district court incorrectly cited *American Yearbook* as support for the proposition

49 *But see infra* notes 74–76 and accompanying text.

50 426 U.S. 794 (1976).

51 *Id.* at 797.

52 *Id.* at 796.

53 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960))). The *Pike* balancing test is still used to evaluate Dormant Commerce Clause cases that do not fall within the market participant exception. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007); *see also* Dan T. Coenen, *The Supreme Court's Municipal Bond Decision and the Market-Participant Exception to the Dormant Commerce Clause*, 70 Ohio St. L.J. 1179, 1205–06 (2009) (analyzing the Supreme Court's use of the *Pike* balancing test in *United Haulers*).

54 Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46, 60 (D. Md. 1975).

55 *Id.* at 54–55.

that the Maryland regulatory scheme was within the state's police power, but not within its proprietary function.[56] The district court therefore held that the regulatory scheme was not exempt from scrutiny under the Dormant Commerce Clause.

When the Supreme Court evaluated the Commerce Clause claim in *Alexandria Scrap*, it did not dispute that Maryland's regulatory scheme imposed a burden on interstate commerce. Rather, it questioned whether "Maryland's action [was] a burden which the Commerce Clause was intended to make suspect."[57] This was exactly the rationale that the *American Yearbook* court used when it explained that a state can impose any conditions on purchases it chooses to make.[58] The Supreme Court held that nothing "prohibits a State, in the absence of Congressional action, from participating in the market and exercising the right to favor its own citizens over others."[59] Similarly, the *American Yearbook* court found that Commerce Clause did not prevent the facially discriminatory Florida printing statute from favoring Florida citizens.

After *Alexandria Scrap*, the Supreme Court heard many seminal commerce cases, including *City of Philadelphia v. New Jersey*,[60] *Hughes*

56 *Id.* at 55. The *Alexandria Scrap* district court focused on the purpose of the purchases, which was to enact the regulatory scheme. Both the *American Yearbook* court and the Supreme Court, however, only drew the distinction between a state entering the market and the direct exercise of police powers. It did not matter that the purpose of the market participation was to enforce a regulatory scheme that could otherwise be effected through the state's police powers.

57 Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 807 (1976). Justice William Brennan's dissent cited *American Yearbook* for the proposition that restrictive purchasing statutes only applied to goods purchased for their "end use." *Id.* at 824 (Brennan, J., dissenting) ("[E]ven those courts and commentators that have concluded that facially restrictive state purchasing statutes are permissible under the Commerce Clause . . . have restricted this conclusion to instances where the State in a 'proprietary' capacity is purchasing items of commerce for end use . . . ."). This is not quite what the court in *American Yearbook* actually concluded. Rather, the court said that a state could set conditions on its purchases and that the Commerce Clause does not require an inquiry into the burden on interstate commerce for purchases the state makes. *See* Am. Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (M.D. Fla. 1972).

58 *See supra* note 44 and accompanying text.

59 *Alexandria Scrap*, 426 U.S. at 810.

60 437 U.S. 617 (1978). In *City of Philadelphia*, the Supreme Court struck down, on Dormant Commerce Clause grounds, a New Jersey law that facially discriminated between in-state and out-of-state trash, banning the latter. *Id.* at 629.

v. Oklahoma,[61] *Hunt v. Washington State Apple Advertising Commission*,[62] and *Baldwin v. Fish and Game Commission of Montana*.[63] The 1970s and '80s were an important time for trade regulation, and while these cases fleshed out Commerce Clause and Privileges and Immunities Clause issues related to state regulations on trade, they did not specifically address the market participant exception. It was not until *Reeves, Inc. v. Stake*,[64] the next market participant case decided by the Supreme Court, that *American Yearbook* again reemerged.

In *Reeves*, the Supreme Court considered a trade regulation case from South Dakota. The state had opened a cement plant in the early twentieth century to reduce its chronic cement shortages.[65] The plant provided cement to the state and several other states in the region until 1978, when, facing high demand and technical problems resulting in supply shortages, the State Cement Commission began fulfilling in-state orders before out-of-state orders.[66] An out-of-state concrete distributor that relied on cement from the plant sought an injunction against the facially discriminatory practice.[67] The U.S. Court of Appeals for the Eighth Circuit held that South Dakota had "simply acted in a proprietary capacity," and therefore did not violate the Dormant Commerce Clause.[68] The Supreme Court vacated and remanded the decision because of its ruling in *Hughes v. Oklahoma*,[69] but on remand, the Eighth Circuit distinguished *Hughes*

61 441 U.S. 322 (1979). *Hughes* was a Dormant Commerce Clause case that struck down a law limiting the number of minnows that could be removed from Oklahoma rivers. *Id.* at 338. The Court rejected the legal fiction that a state owns the animals or resources within its boundaries and, thus, may use discriminatory regulations. *Id.* at 339.

62 432 U.S. 333 (1977). *Hunt* struck down, on Dormant Commerce Clause grounds, a North Carolina statute that banned the sale of apples bearing an inspection grade from any organization or government agency other than the U.S. Department of Agriculture. *Id.* at 352–53.

63 436 U.S. 371 (1978). *Baldwin* upheld the practice of price discrimination in hunting licenses against out-of-state residents who wanted to hunt within Montana, despite claims that it violated the Dormant Commerce Clause and the Privileges and Immunities Clause. *Id.* at 393–94.

64 447 U.S. 429, 437–38 (1980).

65 *Id.* at 430.

66 *Id.* at 432.

67 *Id.* at 433.

68 *Id.* at 433 (quoting Reeves, Inc. v. Kelley, 586 F.2d 1230, 1232 (8th Cir. 1978)).

69 For a brief summary of the case, see *supra* note 61.

and reaffirmed its earlier decision, setting the stage for a second review by the Supreme Court.[70]

On further review, the Supreme Court noted the distinction between market regulators and market participants, citing *American Yearbook* along with *Alexandria Scrap*.[71] It found that the South Dakota cement plant was a market participant and that it therefore fell within the exception set forth in *Alexandria Scrap*.[72] Citing *American Yearbook*, the Court explained "that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct."[73]

As a district court in Tennessee later observed, "While *Alexandria Scrap* is often regarded as the Supreme Court's first acceptance of the market participant doctrine, four years earlier, the Court had affirmed a lower court's ruling sustaining a Florida statute requiring all public printing . . . be done within the state."[74] The summary affirmance by the Supreme Court in *American Yearbook*[75] is binding precedent,[76] and as such it should be credited as the first market participant exception case. While *American Yearbook* did not lay out the exception as clearly as did *Alexandria Scrap* or *Reeves*, it laid out very similar principles. *American Yearbook* was forward-looking and arguably the first court to recognize the market participant exception to the Dormant Commerce Clause, an important piece of jurisprudence that has lasted for decades.

70 Reeves, Inc. v. Kelley, 603 F.2d 736, 738 (8th Cir. 1979), *aff'd sub nom.* Reeves, Inc. v. Stake, 447 U.S. 429 (1980). Citing several cases, including *American Yearbook*, the Eighth Circuit explained that its previous decision was not based on the rationale in *Hughes* and noted that "[a] state may freely purchase to meet its needs." *Id.* at 737 & n.1.

71 *See Reeves*, 447 U.S. at 437 n.9. The Court cited as additional support almost a dozen state cases, including two that also cited *American Yearbook*. *Id.*

72 *Id.* at 440.

73 *Id.* at 438 n.10.

74 Barker Bros. Waste v. Dyer Cnty. Legislative Body, 923 F. Supp. 1042, 1053 n.16 (W.D. Tenn. 1996).

75 Am. Yearbook Co. v. Askew, 409 U.S. 904, 904 (1972).

76 *See* Hicks v. Miranda, 422 U.S. 332, 344–45 (1975).