Chapter 9

A Private-Rights Standing Model to Promote Public-Regarding Behaviour by Government Owned Corporations

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The question of how to define proper boundaries and relationships between government and the private sector has long interested economists and political scientists. It also has great practical significance to lawyers. Within the United States, for example, legal standards vary significantly depending upon whether the government is cast in its traditional regulatory capacity or, instead, in the role of employer, provider of largesse, or entrepreneur. From a legal perspective, the inherent problem is that the answer to such questions is invariably both. And yet, such legal issues as whether individuals can sue the state, whether the state can choose with whom to deal and on what terms, and whether the various arms of the state can discipline or fire employees as it sees fit, just to name a few examples, often turn on how the deciding court characterises the state action under review. While there is no doubt a continuum between the state functioning as regulator or as market participant, the need for legal clarity generally forces a binary choice. The resolution of close factual questions can therefore have great consequence for state powers on the one hand and for individual rights and liabilities on the other.

Closely connected to the various bodies of law that test the regulator-to-market-participant spectrum is the question of standing. Do private individuals have the right to sue the government – or to claim a defence to the government's legal action against them – by positing that the relationship in question is on the favorable side of the market participant-regulatory continuum? Of course, which side of that continuum favours the individual can vary depending upon the legal context. Thus a government employee who claims wrongful treatment at the hands of an agency head will benefit if they can successfully place their employer in a regulatory box. Conversely, a private bank seeking to preclude a state agency from infringing a patent or from engaging in an unfair business practice will benefit if it succeeds in the opposite characterisation, casting the government in the role of market actor.

Government Owned Corporations (GOCs), as distinguished from bureaucracies on the one hand and from publicly held corporations on the other, pose a unique opportunity to consider the role of government as it relates to the private sector. In most contexts, the duality of government roles – regulator and market participant – inevitably follows from the nature of the underlying activity. A regulatory agency needs employees to run, and must have the power to hire, promote, and discharge. A city providing access to a public park must have the power to determine the conditions of beneficial use. An agency issuing licences, variances, or welfare payments must have the power to define and apply eligibility criteria. While we can inquire whether the government in each case is a regulator or a market participant, we know that the answer inevitably reflects a legal conclusion, rather than an underlying philosophical truth. In contrast, when the government deliberately structures a GOC as its vehicle for furthering a desired objective, it has apparently elected to shed the trappings of regulator and to adopt at least the outward appearance of a private market participant for the particular activity in question. And yet, adopting a corporate form does not alone ensure that the relevant government actors will mimic their private sector counterparts.[1]

Other chapters have considered how, short of abolishing the GOC and privatising the underlying economic activity, one can best structure the GOC to encourage it to act as would a similarly situated private firm.[2] This chapter focuses on a related subsidiary question, namely how litigation can provide valuable information to a well-structured GOC (meaning one that minimises agency costs to the maximum feasible extent) to encourage it to engage in public regarding behaviour. In this chapter, I suggest that a properly integrated litigation model – like the models of structure, mandate, compensation, and shareholding – can have a profound shaping effect on the public corporation. If the managers are responsive to litigation, then they will manage the firm in a manner that seeks to avoid losses in court. A GOC with a well defined statutory mandate and with limited resources – controlled primarily through cash flows rather than taxpayer subsidisation – should care about the risk of resource depletion in litigation, at least if it is responsible for costs[3] and for awards paid.

This chapter's thesis is simple, if counter-intuitive. I begin with the premise that the GOC is intended to promote public-regarding purposes, meaning that it should pursue its statutory mandate in a cost-effective manner and decline to go beyond that mandate in a way that allows taxpayer subsidisation to drive out private sector activity that provides goods and services of better quality or at lower cost.[4] If so, then the optimal litigation model is one grounded in vindicating private rights. The GOC is more likely to engage in public regarding conduct if the those whose private interests are directly harmed by GOC conduct have standing to sue. Conversely, I argue, a litigation model grounded in vindicating public rights is less likely to drive the GOC to act in public-regarding ways. After sketching some of the informational difficulties that confront GOC managers and shareholders, I will review some United States constitutional law decisions that involve the regulator to market participant spectrum.[5] The discussion will help to develop a proposed standing model, which will completes the chapter.

Private Firms, GOCs, Information Asymmetries and Agency Costs

A growing literature has well documented both the incentives to create GOCs and the difficulties in structuring such a firm to further its intended objectives (Fox and Heller 2001; Zeckhauser and Horn 1989; Peltzman 1989; Whincop 2001). The GOC is at once a response to the difficulties that confront the procurement of public goods, and plagued by the very same difficulties (for an introduction to the literature, see Stearns [1997, pp. 1–134]; Hayes [1981]; Aranson [1981]; Olson [1971]). Ideally, we might imagine that the GOC will be formed in response to some perceived market failure.[6] If so, the ideal GOC should seek to provide those desired goods and services that the market has failed to provide and then tailor its provision of those services by adopting a structure that resembles in several, but not all, significant respects a private firm. As Peltzman (1989) has aptly demonstrated, however, while GOCs exist across a spectrum of industries, their prevalence in certain dominant industrial sectors suggests that they tend to fill a more narrow function as a general matter.

In general, governments establish GOCs in sectors characterised by natural monopoly, meaning those with declining average costs, which therefore tend to drive out competition in favor of a single dominant firm.[7] Predictably, private firms operating in such an environment will engage in a noncompetitive pricing strategy that will yield a reduction in quality or quantity with a corresponding increase in price relative to a firm operating within a competitive environment. Governments sometimes pursue a regulatory strategy – for example, when dealing with utility companies. Alternatively, they can undertake to enter the market on their own by adopting the corporate form. In some instances, the GOC is intended as temporary, with the eventual goal of transferring the public firm into private hands (Fox and Heller 2001). But, whatever the ultimate objective, questions remain about how to produce benign incentives on the part of the GOC, however long it operates.

Of course, GOCs operate in other contexts as well, and in Australia, they appear to operate more broadly than in the United States. Even in the United States, various levels, or arms, of government sometimes try to mimic private sector incentives. When private actors challenge the government in such circumstances, courts invariably must decide whether to characterise the underlying activity as entrepreneurial or regulatory, each conclusion carrying different legal standards. The resulting case law is helpful in thinking through the role of litigation in providing information to the relevant actors concerning whether the government, acting in a quasi-entrepreneurial capacity, is furthering public regarding aims. When the government establishes a GOC, interest groups are then motivated to push that firm to act in ways that might not be public regarding. Such strategies can include encouraging the GOC to go beyond its statutory mandate – whether or not by formally altering the corporate charter – thus providing goods and services that the private sector can provide more efficiently, or encouraging it to pursue its statutory mandate in a manner that raises costs but benefits narrow constituencies.

Two sets of impediments remain in the GOC's efforts to mimic private sector behavior: (1) agency costs and (2) information asymmetries. While these categories overlap, it remains important to keep them distinct. We can see this most easily by imagining either difficulty to have been eliminated and then asking whether the other difficulty might nevertheless remain. In each case, solving one problem does not necessarily solve the other. For our immediate purposes, a GOC that has solved the seemingly intractable agency cost problems might nevertheless lack critical information with which to pursue a public regarding course. It is here that a proper litigation model is important.

While a private rights based litigation model can certainly have a benign effect in reducing agency costs, its most significant benefit is in conveying critical information to GOC Ministers or managers signalling that the GOC has engaged in a course of conduct that threatens to undermine productive private sector activity. As a general matter, other structural changes within in the GOC will prove necessary to encourage GOC managers to respond favourably to the beneficial information about market performance that an optimal – private rights based – litigation model is able to provide.

To be clear, one might imagine that if each of the cases discussed below were decided in the opposite fashion, the GOC would still receive the benefit of the information that the litigation provides concerning GOC infringement on private sector activity. But this argument misses the central point. When information-producing litigation is thwarted based upon the market participant doctrine or sovereign immunity, for example, potential litigants will be discouraged from raising such claims – and thus from signalling suboptimal managerial performance – in the future. It is, after all, only the realistic prospect of recovery that encourages litigatants to proceed. In addition, the mere fact that such suits, if presented, are likely to succeed can have a prophylactic effect of discouraging GOC expansions into areas that tend to drive out productive private sector activity.

Information Asymmetries and Agency Costs in Privately Owned Firms

In the publicly traded firm, deferred compensation schemes that are linked to eventual stock price performance provide managers with appropriate incentives to pursue profit maximising activities. While the divergence of ownership and management in a publicly traded firm invites opportunities by management to act inconsistently with the best interests of the owners of the firm, deferred and stock based compensation schemes achieve two objectives. First, they encourage managers to engage in profit maximising activities. And second, stock price fluctuations inform managers as to the success or failure in the market place of chosen business strategies.

Stock price fluctuations play a critical role in reducing the collective action problems that would otherwise plague diffuse ownership of publicly traded firms. While proxy voting, a 'voice' strategy, allows a limited check on mismanagement, such voting is laden with free rider problems. In contrast, 'exit' and 'entry' allow privately motivated shareholders to signal relative managerial performance through the stockmarket (Tiebout 1956; Hirschman 1970; discussed in Stearns 1997, p. 416). The corporation's board of directors operates as the conduit through which dispersed owners exert pressure on and discipline managers. Exit and entry provide more effective signals to management and directors precisely because they require no altruism on the part of shareholders. While public trading does not ensure perfect signals as to managerial performance, we need only heed the admonition that it is less fruitful to compare the ideal against the real than it is to contrast alternative reals against each other (Coase 1981; Demsetz 1969; Stearns 1994).

Even share price fluctuations do not on their own ensure that management will act favourably in response to the signal that have been sent. This explains in part why information asymmetries and agency costs, though related, remain separate problems for the GOC. If, for example, corporate managers were given a fixed compensation and life tenure, which is roughly the model for compensating federal judges in the United States,[8] then the relative performance of the corporations revealed through stock price fluctuation might well be a matter of primarily academic concern. This, of course, is well known, and as a result, managerial compensation at successful firms generally includes stock options, often as part of an elaborate retirement program, which does not permit (or which at least considerably restrains) early liquidation. Such compensation schemes link managerial compensation in the long term to overall firm profitability, thus encouraging managers to respond favourably to the important stock price signal. If managers own a significant number of nonalienable shares, and hold those shares as part of a lopsided investment portfolio, self-interest will better align managerial incentives with those of dispersed shareholders. Thus a stock-based compensation scheme and robust stock market signalling combine to encourage managers to respond to the important information available through the combined strategy of exit and entry on the part of shareholders. And even if directors are unwilling to discipline management on their own, the market offers the alternative disciplining technique in the form of a corporate takeover.

Information Asymmetries and Agency Costs in GOCs

The preceding discussion went to the problem of agency costs. We will now focus on the related problem of information asymmetries. Whatever the imperfections of stock market signalling, its absence in the GOC context necessarily raises the cost of tracking managerial performance and disciplining non-public regarding behavior. It is tempting to simply compare the GOC with the privately owned firm and recommend transforming the former into the latter. But in doing so, it is possible to fall victim to the nirvana fallacy. If Peltzman (1989) is correct that in nations with highly developed economies, the GOC is most often a response to a regulatory problem that would otherwise confront the state in its efforts to discipline a natural monopoly, then the relevant comparison is between a regulated private firm and a GOC, and not between private, widely held corporation operating in an unregulated market and a GOC. If so, privatisation might not be a practical solution in at least a considerable range of instances in which GOCs operate.[9]

Characterising the GOC as closely held, based upon the number of formal shareholders, or widely held, recognising the citizenry as the true residual beneficiaries, is ultimately beside the point. The GOC's 'profits', that might be defined, however, are not the personal profits of the Ministers. Rather, they are the profits of the government, thus inuring to the benefit of the citizens. But of course the citizens are plagued with collective action problems in disciplining the GOC on their own. And indeed to the extent that the shareholding Ministers are susceptible to interest group pressures, such pressures are unlikely to drive managers to limit GOC resources to public regarding pursuits.[10]

The question then arises as to how best to inform the GOC that it is engaging in non-public regarding activity that is tending to undermine private sector activity that can produce the same goods or services at lower cost. Unlike in publicly traded firms, the residual claimants to the GOC – the voters or their proxy, the various Ministers who formally hold shares – are left primarily, if not exclusively, with a voice strategy. But this strategy is afflicted with problems of mixed signals – rarely will we vote against a government executive because we are unhappy with the way the postal service or Amtrak is run – in addition to the pervasive free rider problem. In addition, those seeking to have the GOC benefit constituents, even if in doing so it is undermining private sector activity, are likely to have a rather loud voice. And of course, this is not a context in which we can rely upon the market for corporate control as a back-up disciplinary mechanism.

Any benefit associated with voicing opposition to the conduct of the GOC is a classic public good in the sense that those who produce the satisfactory result of limiting the GOC to public regarding pursuits cannot prevent those who remained silent from reaping the benefit. Moreover, because GOC managers are government employees, they are not subject to the rough and tumble corporate culture in which repeated failures result in corporate discipline, loss of employment, or even necessarily the loss of prestige. In short, GOCs are characterised by effective dispersion of ownership, however the shares are formally held, without the beneficial signal that stock price fluctuations provide.

In the next section, I will consider litigation as an alternative mechanism that can help close the information asymmetry between owners – the public – and managers of a GOC. As a general matter, a private-rights based litigation model can help to overcome information asymmetries, but cannot ensure benign compliance with the signals that have been sent.[11] Thus, to the extent that a properly structured standing model is a 'solution', it is at best partial. Nonetheless, this partial solution remains vitally important if properly integrated with the remaining structural aspects of the GOC.

Private Rights Litigation to Discipline Government Procurement of Goods and Services

This part will review several constitutional decisions that test the regulator-to-market-participant continuum. Throughout this discussion, I will keep details about the underlying doctrines of American Constitutional Law to a minimum and focus instead on the factual contexts, which can meaningfully be generalised to consider the implications for signalling suboptimal GOC performance to managers and directors. I will present three groups of cases, divided as follows: (1) Fair Trade; (2) Fair Competition; and (3) Fair Employment. My purpose in discussing these cases is to develop a proposed set of standing rules that will help to facilitate the flow of beneficial information to those who run, or who are empowered to discipline, a GOC.[12] In the next part, I will recast these doctrines as a proposed set of standing rules.

Fair Trade

The court initially developed the market participation doctrine as an exception to its general dormant commerce clause doctrine. For somewhat peculiar historical reasons, under the guise of this market participant exception, the United States Supreme Court affords the state *greater latitude* to engage in seemingly noncompetitive conduct precisely because it is *not* acting in a regulatory capacity.

The court has arguably applied the resulting doctrine in a perverse manner if one assumes that, when the state assumes an entrepreneurial mantle, it should do its best to mimic the behaviour of similarly situated private firms.[13]

A brief background on the commerce clause will help to place these cases in their doctrinal context. In Article I, section 8, the Constitution grants Congress the power to regulate commerce with foreign nations, Indian tribes, and among the states.[14] The relevant clause for present purposes involves interstate commerce. This clause was essentially intended to end the trade rivalries between and among the states that plagued the United States during the formative period under the Articles of Confederation, and instead to facilitate a single common market among states. While the dormant commerce clause doctrine also achieves other objectives (Stearns 2002), one way to conceive the doctrine is as a constitutionally imposed multilateral most favoured nation status treaty among the states.

The commerce clause is couched in terms of an affirmative regulatory grant to Congress. And yet, it has also been construed to empower the federal courts to strike down state laws that are inconsistent with the notion of a uniform national market, at least absent approving federal legislation.[15] When this occurs, the resulting doctrine is called the 'dormant' commerce clause, meaning that Congress has remained dormant in failing to enact a statute that prohibits the state law that the federal court is asked to declare unconstitutional. Unlike most other constitutional rules, the judiciary's rulings can be overturned through ordinary legislation pursuant to Congress's commerce clause powers.[16] But in the absence of such federal legislation, state legislatures are themselves presumed powerless to obstruct the constitutionally imposed free market among states, or even to enact legislation that conditions free markets with neighbouring states upon reciprocal grants by those states.[17]

Conservative critics of the dormant commerce clause doctrine maintain that Article I, section 8 does not give the federal courts the power to strike down state laws that do not violate a federal statute enacted pursuant to the commerce clause simply because the state law somehow contravenes the notion of a uniform national market. While this position might appear surprising given the generally greater concern among conservative jurists for free markets,[18] in the commerce clause context, conservative jurists have tended to privilege their concern for federalism and deference to state and local law making over their concern for free markets. The market participant exception to the dormant commerce clause thus arose in large part as a vehicle through which conservative jurists could exempt certain state practices from ordinary dormant commerce clause scrutiny by claiming that different rules applied when the State elected to act in an entrepreneurial – as opposed to regulatory – capacity. The result has been a set of doctrines that somewhat perversely protect the power of states to discriminate in commerce because they have chosen to operate as entrepreneurs. While at one level this appears peculiar – when the state acts as an entrepreneur, it should not use taxpayer revenues to favor local businesses over businesses in other states (Wells and Hellerstein 1980) – at another it appears intuitive. As a general matter and barring some independent constitutional objection like equal protection, private market actors are entirely free to select with whom they choose to deal. Thus, the argument goes, when the state operates in an entrepreneurial capacity, it too should have comparable free reign, even if that means favouring locals.

The central thesis of this chapter is that the above intuition fails to appreciate an important distinction between private entrepreneurs and the state acting as an entrepreneur. While we can reasonably assume that markets will discipline private entrepreneurs who act arbitrarily in selecting with whom to deal, the same assumption cannot be made for state actors who have entered the marketplace. As a result, closer scrutiny may be appropriate when the state acts as a market participant because otherwise the state is free to select trade partners based upon local favoritism, or other nonmarket factors, without any countervailing market discipline.

I will now summarise four market participant cases, all but one of which worked an effective exemption from ordinary dormant commerce clause jurisprudence. The exceptional case, *South-Central Timber Development v. Wunnicke*,[19] summarised and distinguished the other three in a successful effort to bypass the market participant exception to the dormant commerce clause. As a result, *Wunnicke* imposed ordinary dormant commerce clause restrictions upon the State of Alaska's inclusion of an in-state processing requirement in a contract for the sale of 49 million board of timber with a Japanese buyer. And in the absence of the market participant exception, this requirement clearly violated the dormant commerce clause's prohibition against economically motivated state laws that facially discriminate in commerce. After summarising each of the three earlier cases, I will return to *Wunnicke*.

In *Hughes v. Alexandria Scrap Corp.*,[20] the State of Maryland, sought to reduce junked cars in the state by establishing a 'bounty' for cars that bore a Maryland licence plate and by imposing more stringent documentation requirements on out-of-state than on in-state scrap processors. An out-of-state processor attacked the program on dormant commerce clause grounds. The *Hughes* Court rejected the challenge, stating that '[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action from participating in the market and exercising the right to favor its own citizens over others'.[21]

In *Reeves, Inc. v. Stake*,[22] the Court rejected a dormant commerce clause challenge to a South Dakota law that restricted the sale of cement from a state-owned plant to state residents. The *Reeves* Court stated: 'the basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law'.[23] The Court further acknowledged 'the long recognized right of trader or manufacturer, engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal',[24] and extended that right to the state in its entrepreneurial capacity.

Finally, in *White v. Massachusetts Council of Construction Employers, Inc.*,[25] the Supreme Court rejected a dormant commerce clause challenge to an executive order issued by the Mayor of Boston, Massachusetts that required all city funded construction projects to be performed by a workforce comprising at least 50% City of Boston residents. The critical difference between *White* and two prior cases was that the Mayor of Boston had demanded the inclusion of a provision in contracts to which the city itself was not in privity, requiring city contractors and subcontractors to ensure a minimum 50% in city employment. Nonetheless, the *White* Court applied the market participant exception to sustain the municipal employment requirement. The Court stated that it was not necessary to determine the limits on the power of a state or local government to impose restrictions beyond the immediate parties to a contract in the present case. The Court reasoned, '[e]veryone affected by the order [was], in a substantial if informal sense, "working for the city"'.[26] The *White* Court found this to be a 'crucial' fact, dictating that the market participant exception, rather than dormant commerce clause, governed the challenge to the executive order.[27]

Against the background of these cases, the *Wunnicke* Court assessed whether Alaska's in-state processing requirement was subject to ordinary dormant commerce clause analysis, under which it would fail, or the market participant escape hatch. The *Wunnicke* Court distinguished the three prior market participant cases and held the challenged provision invalid under the dormant commerce clause. The *Wunnicke* Court distinguished *Alexandria Scrap* and *Reeves* on the ground that those cases did not involve state efforts to impose out of privity conditions on those contracting with the state.[28] The more difficult case was *White*, which did involve an out-of-privity restriction. The *Wunnicke* Court determined that, unlike in *White*, Alaska had imposed an out-of-privity requirement beyond the relevant market in which the state was operating. Applying generic antitrust principles, the court added:

> Unless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local activity.[29]

As then-Associate Justice Rehnquist observed in dissent, the *Wunnicke* Court's economic analysis appears problematic in that it provided the purchaser a windfall if we assume that that the contract price capitalised the in-state processing requirement. For present purposes, the more important point is to recognise the seeming peculiarity that these cases produce in discouraging the state from adopting private market incentives. In each of the pre-*Wunnicke* cases, the Court effectively allowed the fact that the state was acting as an entrepreneur to insulate it from market pressures. In *Alexandria Scrap*, the Court limited the efforts of out-of-state scrap processors to offer competitive services at lower cost by allowing the state to impose more stringent documentation requirements. In addition, the Court allowed taxpayer subsidisation of in-state processing by sustaining a scheme that effected a bounty in local junked cars. Similarly, in *Reeves*, the Court allowed the state to restrict sales from a state-owned plant to in-state residents, thus preventing out-of-state purchasers from revealing that they place a higher value on the plant's output by bidding up the price. And in *White*, the Court limited the labour market pool in contracts in and out of privity, thus artificially raising the wages for local employees by reducing competition. The difficulty is that simply labelling state conduct entrepreneurial does not ensure that the state will respond to market pressures and thus pursue profit maximisation, as opposed to local favouritism. If the purpose of having the state assume an entrepreneurial posture is to encourage it to act like a business, then judicial scrutiny appears appropriate when disadvantaged private market actors bring suit claiming that they have been treated in a manner that reflects local bias.[30]

In each case, a privately motivated lawsuit signalled to the government acting in an entrepreneurial capacity that it had effectively engaged in local favouritism. The only suit allowed to proceed on that basis was *Wunnicke*. In the other three cases, the

Court applied the market participant doctrine to shield the state from close scrutiny precisely because the state purported to mimic private market actors. Because the litigants in each case stood to gain directly in the event that they won, their efforts to vindicate traditional private rights provided the critical information with which the Court in each case could have promoted public regarding behaviour on the part of the state. While the state was aware of the litigation in each of the four cases, the denial of relief in all but the last case discourages future privately motivated litigation that would help promote public regarding behaviour by closing the information asymmetries. The next subsection considers another context in which the state can insulate itself from private market pressures when structuring its affairs in the form of a GOC.

Fair Competition

In two recent sovereign immunity cases, the Supreme Court considered whether a private market competitor can sue a government entity operating in commerce based upon allegations of unfair trade practices or patent infringement. A private bank sued an arm of the State of Florida in each case relying upon a federal statute that expressly abrogated state sovereign immunity. Despite the federal statutory waiver, the Court held in each case that the bank could not sue the state for monetary damages. The denial of access to a federal court allowed the government to undermine private sector activity that appeared to provide the same or close substitute goods and services absent taxpayer subsidisation. In effect, the Court disallowed those with private incentives to monitor and detect potential cheating by the state in the marketplace. If the suit had been allowed to proceed, the precedent would have encouraged future private litigants to inform the state through litigation when it was using its entrepreneurial mantle to undermine public regarding private market behaviour. Before proceeding, it is worth noting that, unlike in the fair trade discussion, where the market participant exception was used to extend prerogatives to the state shared by private market counterparts, in this context sovereign immunity operates to shield the state from legal challenges that would confront private enterprises engaged in the same alleged activities.

An extended treatment of sovereign immunity is unnecessary for present purposes. The important point is that the Court used one of the two *Florida Prepaid* cases to reject outright a theory that had allowed Congress by statute to presume that in specified areas, when a state enters into the marketplace, it simultaneously relinquishes any claim to sovereign immunity with respect to a federal statutory right. In doing so, the Court threatened to cut off incentives on the part of future private market actors to employ litigation as a vehicle through which to notify the state actors when their entrepreneurial activities undermine, rather than further, public regarding objectives.

In two separate actions, the College Savings Bank ('College Savings') sued the Florida Prepaid Post Secondary Education Expense Board ('Florida Prepaid'), an arm of the State of Florida, for false and misleading advertising under the *Trademark Remedy Clarification Act* (*TRCA*).[31] The *TRCA* subjects states to suit under section 43(a) of the *Trademark Act* of 1946 (the *Lanham Act*).[32] The *Lanham Act*, enacted in 1946, created a private cause of action against '"any person" who uses false descriptions or makes false representations in commerce'.[33] The *TRCA* amended the *Lanham Act* to define 'any person' to include 'any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity'.[34] The *TRCA* further provided that such state entities:

> shall not be immune, under the 11th amendment of the Constitution of the United States or any other doctrine of sovereign immunity, from suit in federal court by any person, including any governmental or nongovernmental entity for any violation under this act.[35]

The same provision stated that parties suing states are entitled to the same range of remedies available when suing other persons under the Act. In 1992, Congress also passed the Patent and Plant Variety Protection Remedy Clarification Act (the 'Patent Remedy Act'),[36] which expressly abrogated state sovereign immunity for patent infringement claims.[37]

Since 1987, College Savings Bank, a New Jersey chartered bank, had marketed and sold CollegeSure certificates of deposit, a college savings vehicle for which it held a patent. Beginning in 1988, Florida Prepaid administered a tuition prepayment plan, which was also intended to ensure sufficient funds to cover future college costs. In *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*,[38] College Savings alleged that Florida Prepaid 'violated section 43(a) of the *Lanham Act* by making misstatements about its own tuition savings plan in its brochures and annual reports'.[39] And in *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank*,[40] College Savings alleged that Florida Prepaid had infringed the patent it held on the CollegeSure certificates of deposit. In both cases, the Supreme Court had to determine whether Congress, in expressly waiving state sovereign immunity in the *TRCA* and the *Patent Remedy Act*, respectively, had violated the 11th amendment. At the time the suits were filed, College Savings could rely on only two bases for the power of Congress to abrogate state sovereign immunity, first pursuant to Congress's enforcement power under the 14th amendment, or second, based upon conditional market entry. In these two cases, the Court overturned an earlier case allowing abrogation based upon conditional market entry,[41] and further held that Congress, given the subject matter of the statutes, could not rely upon the 14th amendment as a basis for abrogating state sovereign immunity.

In the *Lanham Act* case, College Savings maintained that the constructive waiver theory remained viable on two conditions: first, if Congress unambiguously provided that the state would be subject to suit if it engaged in certain federally regulated activities; and second, if the state voluntarily elected to engage in such an activity. Justice Scalia characterised the argument as follows:

> In this latter regard, their argument goes, a State is never deemed to have constructively waived its sovereign immunity by engaging in activities that it cannot realistically choose to abandon, such as the operation of a police force; but constructive waiver is appropriate where the state runs an enterprise for profit, operates in a field traditionally occupied by private persons or corporations, engages in activities sufficiently removed from 'core [state] functions' or otherwise acts as a 'market participant' in interstate commerce. On this theory, Florida Prepaid constructively waived its immunity from suit by engaging in the voluntary and nonessential activity of selling and advertising a for-profit educational

> investment vehicle in interstate commerce after being put on notice by the clear language of the *TRCA* that it would be subject to *Lanham Act* liability for doing so.[42]

Justice Scalia then proceeded to reject the constructive waiver theory and to argue that the market participant exception to the dormant commerce clause doctrine was inapposite:

> The 'market participant' exception to judicially created dormant-Commerce-Clause restrictions makes sense because the evil addressed by those restrictions – the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens – is entirely absent where the States are buying and selling in the market. In contrast, a suit by an individual against an unconsenting State is the very evil at which the Eleventh Amendment is directed – and it exists whether or not the State is acting for profit, in a traditionally 'private' enterprise, and as a 'market participant'.[43]

Justice Scalia did not explain why the government, when acting as a market participant, is necessarily immune from political pressures that might well cause it to act in a manner that favours local residents and citizens at the expense of a national market. Neither economic intuition nor the general experience with GOCs appears to bear out Justice Scalia's intuition. Indeed, Justice Scalia's argument appears to disregard the difficulties associated with information asymmetries and agency costs that characterise the state when it assumes an entrepreneurial posture.

In contrast, Justice Breyer, writing in dissent, observed the anomaly that the Court's ruling had produced:

> The line the Court today rejects has been drawn by this Court to place States outside the ordinary dormant Commerce Clause rules when they act as 'market participants'. And Congress has drawn this same line in the related context of foreign state sovereign immunity ... Indeed, given the widely accepted view among modern nations that when a State engages in ordinary commercial activity sovereign immunity has no significant role to play, it is today's holding ... that creates the legal 'anomaly'.[44]

And in a separate dissent, Justice Stevens echoed the same theme:

> Sovereigns did not [in the eighteenth century] play the kind of role in the commercial marketplace that they do today. In future cases, it may ... be appropriate to limit the coverage of state sovereign immunity by treating the commercial enterprises of the States like the commercial activities of foreign sovereigns under the Foreign Sovereign Immunities Act of 1976.[45]

Before proceeding, it is important to distinguish the legal context of the 11th amendment with that of the market participant exception to the dormant commerce clause. In *Alexandria Scrap*, *Reeves*, and *White*, the Court inhibited a flow of beneficial information to relevant government actors by failing to treat the government *differently* from the way it would treat private market actors. When the state acts in an entrepreneurial capacity, I argued, market forces do not discipline its conduct even if it has engaged in activities benefiting local actors at the expense of alternative cost effective pursuits. In contrast, in the sovereign immunity context, the same analysis yields a seemingly opposite doctrinal outcome. When the state seeks immunity, it is *asking to be* treated differently from its private sector counterparts who would be subject to suit by other private actors for the same alleged conduct. In this context, sovereign immunity becomes a shield insulating the state from allegedly illegal activities that provide it a privileged position as compared with private competitors. Declining to allow sovereign immunity, and thus treating the government as entrepreneur in the same manner as a private entrepreneur, thus proves to be a necessary means of ensuring that the government engages in fair competition.[46]

In these two cases, the allegations, if proved, would have demonstrated Florida Prepaid to have misrepresented its product to gain an unfair advantage over Savings Bank and like competitors, and even to have infringed upon a patent protected by federal law. This is the very type of information about fair dealing with competitors that could be used to curtail managerial misconduct, thus limiting the government's conduct to public regarding pursuits. If the facts as alleged were proven, Florida Prepaid risked driving out private sector activity that provided a superior product at lower cost, and did so by shielding its non-public regarding activity behind an ill-suited doctrine of sovereign immunity.

The cases reveal several counter-intuitions. First, while Justice Scalia tried to distinguish the market participant cases that arose under the dormant commerce clause doctrine, his analysis suggests that when the state enters the marketplace it is less likely to be subject to political pressures to behave in non-public-regarding ways. But the market participant cases themselves show the suspect nature of Scalia's premise. Each of the cases involves an effort on the part of the state to favour local interests at taxpayer expense. And the same interest group pressures can drive the state to engage in non-public-regarding activity in the form of unfair practices with respect to competitors. We will now consider one final context in which a private litigation model can inform the GOC, that of favouritism in employment.

Fair Employment

In this part, we will consider *Air Courier Conference of America v. American Postal Workers Union*,[47] a case in which the Court denied standing to plaintiffs, including the postal union, which sought to challenge an exception to the postal monopoly established in a group of statutes referred to as Private Express Statutes (PES), involving international re-mailing. The PES were reenacted as part of the *Postal Reorganization Act* (*PRA*). The Court of Appeals, which had conferred standing upon the postal union, determined that the 'key impetus and principal purpose of the *PRA* was to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal workers'.[48] The issue in the case was whether the union could claim standing to challenge the exception to the postal monopoly pursuant to the PES, based upon the protections afforded workers under the *PRA*. Writing for a majority, Chief Justice Rehnquist reversed, denying standing.

Rehnquist determined that the historical justification for establishing the postal monopoly, which the PES partially relaxed, was not to benefit postal workers. Instead, it was to ensure that potential competitors with the postal service did not elect to compete in only the most profitable postal routes, thereby driving down the price in those areas, and leaving the postal service to serve the more costly outlying areas without the benefit of cross-subsidisation. In essence, the postal monopoly was established in recognition of the high fixed costs associated with maintaining a national mailing service. To provide service at equal cost throughout the nation, Congress deemed it essential to provide the postal service with monopoly power. This would allow profits from lower cost routes to subsidise the additional costs of service to the less profitable service areas. Rehnquist determined that, because this history did not reflect a desire to ensure that the postal employees received the benefits of working in a monopolistic industry, the postal union lacked standing.

Because plaintiffs relied for standing upon the postal monopoly statute, the standing denial was equivalent to a substantive ruling that the postal employees had no right to the employment security and benefits associated with the continued existence of the federal postal monopoly as a result of Congress's decision to establish that monopoly. I have previously defended this holding as a defensible applications of the Court's zone of interest test (Stearns 2000, pp. 267–268), on the ground that it expresses fidelity to the intended scope of the underlying statute on which the claim of standing was based. The postal monopoly statute was apparently intended to facilitate the delivery of mail in a cost-effective manner at a time when the startup costs of establishing a national postal service were viewed as potentially prohibitive. Over time, however, Congress recognised that certain related services provided by the United States, including international remailing, no longer needed to be safeguarded from competition to promote the original purpose of the postal monopoly. Congress therefore relaxed that part of the monopoly.

Allowing the postal employees to challenge the removal of the monopoly would have created the potential for any federal employees to challenge in federal court changes in the structure of the agencies for which they work, if those changes potentially operated to the detriment of their employment. *Air Courier* appears sound because it denies standing to federal employees who might in the future rely upon mandating statutes to secure wages or other terms of employment that they would be unable to secure in the private market, and to do so at the expense of allocating those resources in a more public regarding manner – for example, reducing postal rates (or preventing even greater rate increases than might otherwise occur), or improving service. In short, the postal union improperly sought to use the mandating statute for the postal monopoly to extract a form of rent, when the purpose of the statute was to use available rents to offset the cost of providing a public service in high cost and low density areas.

The critical point for present purposes is that the pursuit of the underlying statutory mandate did not include a perk, in the form of protected employment, for union members. Instead, the mandate was to provide a public regarding service, even if it was one that ultimately could be provided in part by private sector activity. In fact, an interesting aspect of this case is that some protection from market forces was necessary to facilitate the provision of service to low-density, high-cost areas. In this case, the Court appears to have achieved a defensible outcome on standing. Standing is not designed to supplant legislative expectations with some judicially imposed preference for private market efficiency. Rather, it is to ensure the cost-effective pursuit of the underlying statutory mandate, which necessarily requires furthering legislative expectations whether or not those expectations are efficient.

This approach is especially compelling in the postal context, in which the Court perceived Congress's intent to develop a firm-based approach to production and distribution in the context of a natural monopoly.

We have now completed the survey of selected United States public law doctrines that can be used to inform the government, acting as a market participant, when it has engaged in non-public-regarding conduct. We are now ready to translate the analysis into a set of proposed standing rules.

Structuring Private Standing Rules to Discipline the GOC

This chapter began with the premise that in structuring its activities in the form of a GOC, the government cannot ensure that the GOC acts in the same manner as would a private firm. Instead, the GOC confronts information asymmetries and agency costs that are substantially ameliorated in private firms through stock price fluctuations. This chapter considered how to inform the GOC when it has engaged in a non-public-regarding course of conduct that threatens to undermine productive private sector activity. To ensure that the firm responds favourably to whatever information a private rights litigation model is able to provide, other structural changes might well prove necessary, and that is why the model developed here is only a partial solution to the general problems that confront the GOC. But at a minimum, if we assume that the GOC is structured to respond favourably to such information, then a private rights litigation model can provide valuable information to GOC managers and shareholders as to whether it is acting in a public regarding manner. And, most importantly, the model is dependent solely upon private interests rather than altruism in bringing that information forward.[49]

In this chapter, I have defined a private rights litigation model as one in which individuals or firms bring suit to ensure that the GOC behaves towards them as would a private corporation in like circumstances. This does not mean however that the legal system should always treat the GOC as it would a private firm. A court must first consider whether the context in which the suit has arisen is such that the market is disciplining GOC conduct in the same manner that it disciplines the conduct of a private firm. If the answer is no, as will most often be the case, the court must ask whether the GOC is more likely to obtain the relevant information as to how to mimic private firm behaviour if it treats the GOC in the same manner as, or differently from, a private firm. In trying to promote fair trade, the courts facilitate the benign flow of information to the GOC by treating it differently. That is because the market informs the private firm if it has undertaken a non-profit-maximising approach to its dealings with others. While firms with market power can get away with arbitrary dealings some of the time, the market eschews firms that do so systematically. This is not so with the GOC, which can simply go back to the legislature and ask for an offset. In contrast, when dealing with competitors, courts *prevent* the benign flow of information when they insulate the GOC from the legal regime to which private competitors are subject. Such insulation from competitive market forces is ultimately a form of subsidy, picked up by consumers who are harmed by the resulting limits on competition. Finally, in the context of fair employment, it is best not to insulate the GOC from the same market pressures that influence a private firm. But here, the standing rules are necessarily more complex. In *White*, achieving this result required treating the government differently because failing to do so would threaten to insulate local wages from broader geographic competition. But in *Air Courier*, allowing a benign flow of information requires treating the government in the same manner as a private firm. Just as we would not allow a union to sue a corporation for changing its marketing direction, so too we should not allow a union to prevent the government from streamlining one of its operations simply because the government has chosen to do so by setting up a corporate firm. The market will provide more valuable information if the government's employment decisions are subject to the same competitive pressures that confront private firms, rather than unique rules dictated by the enabling act defining the mandate of a GOC or bureau.

The analysis suggests that, in devising optimal standing rules, it is important to understand not only the legal context in which challenges to GOC conduct can arise, but also the role of the market and legal system in supplying valuable information to private firms on the one hand and GOCs on the other. The preceding part reveals that a private litigation model can help to provide critical information concerning the government operating as an entrepreneur by allowing those who are harmed by various unfair business practices to seek judicial redress. And in doing so, the private rights model does not require any publicly motivated action on the part of those who seek to convey that information. Privately motivated litigation by market competitors is certainly a weak substitute for the robust information concerning market performance that the stock value in a publicly held corporation is capable of providing. Yet it is likely to be far more useful than litigation prompted by narrow interest groups that claim that expanding some set of services, lowering prices, or altering GOC behaviour in some other way will improve what they present as the public interest.

My analysis of standing begins with two premises. My first premise is that the standing model should not be a vehicle through which the courts impose their own vision of the role of the GOC in place of that of the legislature. In a statutory context, standing rules should be designed to further, rather than undermine, legislative expectations. If the GOC mandate is to provide goods and services in a way that drives out some productive private sector activity, standing rules should not be the vehicle through which to curb the GOC in its pursuit of that mandate. It is only in furthering legislative expectations, as set out in the statutory mandate, that the judiciary plays a legitimate role in tailoring standing doctrine to ensure the critical flow of information to managers in an effort to reduce the information asymmetry that can inhibit the government's efforts to provide goods and services in a cost-effective manner and without unnecessarily driving out productive private sector activity.

My second premise is that in the absence of clear contrary guidance by the legislature, it is entirely reasonable to assume that, in structuring a GOC as its means of providing some set of goods or services, the government has revealed an intent to mimic as much as possible private firm behaviour. I therefore assume that the GOC is intended to promote public-regarding purposes, defined as the cost-effective pursuit of its statutory mandate. That said, I do not argue that a strict form of the *ultra vires* doctrine should plague GOCs as they evolve over time. But I do think that the rejection of *ultra vires* as it affects the private corporation should not imply that the doctrine has no role to play with the GOC. In the private corporation, we allow expansions beyond any corporate chartering objectives on the assumption that expansions are likely to be motivated by profit. There is no need to revisit the corporate charter if we assume that management is responsive to the market. But with the GOC, we obviously cannot make that assumption. We also do not want to unduly hamper the GOC, lest it be unable to respond to changing market conditions.

A private rights litigation model can help to facilitate the flow of information as to whether expansions beyond a GOC charter are likely motivated by the desire to provide needed goods and services that the market has failed to provide (in which case private market actors are less likely to have a basis for a suit) or it is benefiting some narrow constituency at the expense of valuable private sector activity (in which case such actors are likely to have a basis for a suit). This necessarily implies that the GOC is acting other than in a public-regarding way when it deploys resources to benefit narrow interest groups. While the model of standing cannot of its own force prevent the GOC from acting in ways that are not public-regarding (and thus while it cannot solve the related agency cost problem), it can at a minimum provide information that helps to close the information asymmetry that in the private sector is substantially offset by stock price fluctuations.

Throughout this chapter, I have reviewed cases drawn from the United States experience that illustrate how a private rights litigation model is more likely than a public rights model to provide such beneficial information. As with exit and entry in the stock market, but unlike voice in proxy voting, a private rights standing model facilitates the production of data concerning GOC performance that is entirely a function of the self interest of those sending the signals. As a consequence, such a model is least likely to be the product of distortions that might mask special interest benefits in the guise of some dubious public objective. The private rights litigation model allows those who are directly harmed by non-public-regarding GOC activities to pursue relief for their own benefit. But if the GOC is otherwise well structured, meaning that agency costs are minimised to the maximum feasible extent, the information sent by this form of litigation will inform managerial expectations concerning market-based performance.

Based upon these premises, I argue that the proper approach to standing to challenge the conduct of a GOC firm should proceed as follows. First, the court should comprehend the scope of the GOC's statutory mandate in an effort to determine which goods and services the GOC is intended to provide, and if the overall thrust of any expansion is generally consistent with the objectives set out in the corporate charter. This holds true even if the GOC is intended to provide goods and services that do not appear to further concerns of efficiency. In the absence of some constitutional barrier to pursuing the GOC's mandate, standing should not be used to check against an otherwise valid mandate simply because a judge might regard that mandate to be ill-conceived. Assuming the GOC mandate is otherwise proper, the question then concerns who has standing to challenge the GOC in the pursuit of its mandate or to check against unwarranted expansion.

There are three major categories of litigant who should have proper standing. In each case, the relevant question is not whether the GOC is being treated as would a private actor. Rather, it is whether the litigation in question, if allowed to proceed, will inhibit or provide a substitute for the benign flow of information that the private market would provide a similarly situated private firm. In the first case category, when the GOC is selecting with whom to deal and on what terms, any private business which is disadvantaged by the non-market-based selectivity should have standing to challenge the GOCs decisions, provided that the selection violates some independent legal principle, one mandated, for example, by relevant constitutional, statutory, or regulatory law. This can include preferences based upon geographic or other nonmarket based criteria. In the second context, fair dealings with competitors, private litigants challenging the GOC should have standing in the same capacity that they would if challenging the same types of conduct undertaken by a private firm. Any private party who is the subject of unfair competition, including but not limited to market-based misrepresentations, theft of intellectual property, or interference with contract should have standing to challenge such practices to the same extent that they would with respect to a private competitor. Otherwise, the legal system sets up a barrier to ensuring that the GOC, like similarly situated private firms, operate, on a level playing field with respect to the legal regime governing fair competition. Finally, GOCs should be presumed to serve the public trust. This means that the GOC should be expected to provide goods and services in as cost-effective a manner as is reasonable practicable (again, unless the charter mandates otherwise). This promotes the likelihood that the GOC will be self-financing, with minimal taxpayer offsets. Those who are disadvantaged based upon discriminatory business practices internal to the firm, including but not limited to those disadvantaged by geographically biased employment criteria, should have standing to challenge those practices. Conversely, a group that seeks to receive special benefits through GOC employment should be denied standing, just as it would if challenging a private firm.

Conclusion

In this chapter, I have used several United States constitutional law cases that test the regulator to market participant spectrum to develop a proposed set of standing rules designed to provide information to the GOC as to whether or not it is pursuing a public-regarding course of conduct. The suggested list of proper instances for standing is neither exhaustive nor conclusive. Instead, the important point is to identify a causal mechanism for encouraging privately interested actors to signal misconduct in an analogous manner to privately motivated stock market signalling with respect to publicly traded firms. If the remainder of the firm is structured to minimise agency costs, then my proposed standing model will encourage a flow of information to encourage GOCs to mimic more readily the behavior of similarly situated private firms.

Notes

1 This might in part be due to the alternative motivation of using the GOC form to move certain budgetary items 'off book' (see generally Zeckhauser and Horn 1989). Governments establish GOCs for other purposes as well (Fox and Heller 2001). Whatever the motivation for establishing GOCs, substantial difficulties plague the GOC in encouraging it to mimic the behaviour of similarly situated private firms. I argue that

whatever the motivation, the courts can produce benign results if they adopt an approach to standing that effectively takes the government at its word and assumes that the government intended the GOC to act as would a private entrepreneur. For a similar analysis in the context of statutory interpretation, see Macey (1986).

2 Of particular relevance to this paper are the chapters by King, Whincop, and Skeel, who consider the agency costs of management, the agency costs of governance, and the social costs of the GOC's impact on market competition.

3 Unlike the United States, Australia incorporates the English model in which the loser pays the winner's legal costs.

4 To be clear, I do not argue that courts should construe a GOC's statutory mandate to allow only the provision of goods and services that the private market is not capable of providing, or that the market is actually providing in a more cost-effective manner. The litigation model must operate against the background of whatever statutory mandate, assuming it to be otherwise legal, upon which the GOC is operating. Instead, I am arguing that if the GOC goes beyond its statutory mandate, or if its mandate is in some critical respect ambiguous, then an optimal litigation model is one that will allow those interested in vindicating private rights to provide a check against such expansion if the effect of the expansion is to drive out private sector activity.

5 My purpose is not to get mired in American constitutional law doctrines, but rather to show the factual contexts and legal doctrines that can facilitate a beneficial flow of information to GOC managers and shareholders.

6 Market failure includes such phenomena as monopoly, externalities, prisoners' dilemmas, and holdouts.

7 Thus Peltzman (1989) explains that, within most developed countries, the dominant sectors in which GOCs tend to arise are 'transport (mainly air and rail), energy (mainly electric, water and gas utilities) and communications (mainly telephone and post)' (pp. 69–70). Peltzman further explains that these industries are 'characterized by some combination of scale and density economies', which 'suggests that, absent state intervention, these industries would either be organized monopolistically or that resources would be wasted in rivalry' (p. 71).

8 'The Judges, both in the supreme and inferior Courts, shall hold Their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.' (U.S. *Constitution*, Art. III, § 1.)

9 I do not address here the interesting question whether a private regulated firm or a GOC is better suited to the problems associated with a natural monopoly.

10 To reiterate, I do not maintain that the GOC should only engage in public-regarding activities as I define that term, but rather that it should be presumed to pursue its mandated activities, whatever they happen to be, in a cost-effective manner. I further argue that in going beyond its mandate, the GOC should be judged according to whether it tends to drive out productive private sector activity. Should the legislature expand the GOC mandate to provide a perceived public service that does not meet this test, nothing in this chapter should be taken to suggest that the GOC's pursuit of that mandate would be improper.

11 One possible exception, not considered here, involves equitable actions for injunctive relief, where a successful suit enjoins the offensive conduct directly, thus solving the information and agency problems.

12 For those interested in my earlier work on standing, see Stearns (1995a, 1995b). Australian standing doctrine, which like its American counterpart is much criticised, appears to embody a similar set of rules. Thus Katzen and Douglas (1999, p. 87) explain that standing has been defended as 'protect[ing] the courts from busybodies' and citizens

from 'interference with their interests from those with no personal stake in the actual decision'.

13 For analyses on different but related aspects of the Supreme Court's distinction, see Stearns (2002), Wells and Hellerstein (1980, pp. 1124–1129).

14 'The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' (U.S. *Constitution*, Art. I, §8.)

15 The distinction between the power of Congress to regulate commerce and the power of the federal courts to invalidate state laws that infringe a national market goes back to the debate over the bases for invalidating a New York licence respecting navigable waters between New York and New Jersey: *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824). Because Congress had passed a statute pursuant to which Gibbons obtained a licence, and because the Court determined that navigation comprehended 'commerce', Chief Justice Marshall rested a judgment for Gibbons upon Congress's commerce clause powers. In contrast, Justice Johnson took the view that even in the absence of the federal statute, New York lacked the power to grant an exclusive licence to operate navigable interstate waters, and thus would have rested on what has become known as dormant commerce clause analysis.

16 While Congress can afford states the power to discriminate in commerce, such efforts remain subject to challenge on alternative constitutional bases. For an example in which the Court sustained an equal protection challenge against a federal statute enacted pursuant to the commerce clause that conferred upon states the power to regulate insurance, even if in doing so they discriminate in commerce, see *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

17 Thus, in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Court invalidated a Nebraska restriction upon ground water exports to states that did not grant reciprocal rights to import ground water into Nebraska.

18 This concern was most clearly seen in an earlier era associated with the economic substantive due process. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

19 467 U.S. 82 (1984).

20 426 U.S. 794 (1976).

21 426 U.S. at 810.

22 447 U.S. 429 (1980).

23 447 U.S. at 436–437.

24 477 U.S. at 438–439 (internal quotations omitted).

25 460 U.S. 204 (1983). *White* is also relevant to the final category, fair employment, discussed below.

26 460 U.S. at 211 n.7 (internal quotations omitted).

27 Ibid. For a factually similar case reaching a seemingly contrary holding under the Article IV privileges and immunities clause, see *United Building & Construction Trades Council v. Camden*, 465 U.S. 208 (1984). In that case, the Court struck down an ordinance enacted by the City of Camden, New Jersey requiring at least 40% of the employees of contractors and subcontractors working on city projects to be Camden residents. Writing for a majority, then-Associate Justice Rehnquist held that the Privileges and Immunities Clause provides an independent basis upon which to challenge the ordinance.

28 The *Reeves* Court also noted that close scrutiny might be more appropriate in *Wunnicke*, which involved the sale of a natural resource, than in *Reeves*, which involved the sale of cement, a complex manufactured good, and that close scrutiny might also be more appropriate when dealing with foreign purchasers.

29 467 U.S. at 97–98.

30 It is certainly true that privately owned businesses can and sometimes do favor local interests or otherwise indulge non-profit-minded objectives in selecting with whom to transact. And if a firm has substantial market power, then the firm can indulge such

preferences more often than could a firm operating within a highly competitive environment. But, in general, private businesses are more likely motivated by a desire to obtain the best goods or services at the lowest cost and to receive the highest price for the goods and services that they sell, than is the government operating in an entrepreneurial capacity.

31 106 Stat. 3567.

32 15 U.S.C. § 1125(a).

33 Ibid.

34 § 3(c), 106 Stat. 3568.

35 Ibid.

36 35 U.S.C. §§ 271(h), 296(a).

37 The Act stated that 'instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of patents' Pub. L. 102–560.

38 527 U.S. 666 (1999).

39 Ibid.

40 527 U.S. 627 (1999).

41 The conditional entry exception to state sovereign immunity was most fully developed in *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964). In *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), the Court overruled *Parden* to the extent that it permitted an implied conditional waiver of sovereign immunity. In *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 527 U.S. 666, the Court overruled the remaining part of *Parden*, which had suggested that Congress could expressly waive sovereign immunity as a condition of market entry.

42 527 U.S. at 679–80.

43 527 U.S. at 685.

44 527 U.S. at 699 (Breyer, J., dissenting).

45 527 U.S. at 691 (Stevens, J., dissenting).

46 The analysis might suggest a possible refinement to the doctrine of competitive neutrality. While that doctrine requires the state to treat GOCs in the same manner that it treats private firms that are similarly situated, the analysis in the text suggests that in some circumstances one achieves public regarding results by treating GOCs the same as, and in other cases differently from, such firms. The overriding concern, I suggest, is whether similar or differential treatment is likely to promote the flow of information that would encourage a well-structured GOC to act in a public-regarding manner. Cf. Qld: *Government Owned Corporations Act* 1993 s. 19(d).

47 498 U.S. 517 (1991). Portions of the discussion that follow are adapted from Stearns (2000, pp. 267–268).

48 498 U.S. at 520 (internal quotations omitted).

49 Of course, if the standing rules are opposite those that I suggest, then private parties will be disinclined to bring forth suits that they will inevitably lose. But if my proposed standing model were adopted, then private parties whose interests were thwarted by GOCs would have a correspondingly greater incentive to bring suits likely to promote public-regarding GOC behaviour.

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