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Jason J. Czarnezki

States as Market Participants in the U.S. and the EU?

Public purchasing and the environment

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Preface

In light of the Europe 2020 strategy, public authorities in the European Union ought to make better use of public procurement in support of general societal goals. The Member States should therefore use their purchasing power to procure goods and services that foster innovation, respect the environment and combat climate change, while also improving employment, public health and social conditions. However, the overarching objective of the procurement rules in the Union is primarily to strengthen the single market and the EU's competitiveness. An important issue is therefore how much space public authorities have at their disposal in order to support social or environmental objectives. The situation is different in the U.S. where American States can encourage, and in some cases require, public institutions to purchase products produced in the state (i.e., a geographic preference) due to the so called Market Participant Exception.

Against this background, the report *States as Market Participants in the U.S. and EU? – Public Purchasing and the Environment*, written by the American Professor Jason Czarnezki, analyses U.S. law in comparison to EU law and discusses the ability of public authorities to make environmental demands when purchasing products. Given that the EU is presently revising its procurement legislation, the report, published in the context of SIEPS' research project *The Future Single Market*, provides a useful analysis to determine the space for social and environmental requirements in EU public procurement law.

Anna Stellinger
Head of Agency

SIEPS carries out multidisciplinary research in current European affairs. As an independent governmental agency, we connect academic analysis and policy-making at Swedish and European levels.

About the author

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Professor Czarnezki wishes to thank his research assistants Andrew Homan and Elena Mihaly for their help on this project.

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Executive summary

In efforts to promote environmental interests and help local economies, American states can pass legislation to encourage, and in some cases require, public institutions to purchase products produced in the state (i.e., a geographic preference) due to the market-participant exception. The use of a market participant exception to allow for geographic preferences would face stiff legal challenge under European Union (EU) law. Despite the existence of the exception under U.S. law and its lack of viability in Europe, American states and Member States may be able to use public procurement to encourage or require the purchase of environmentally friendly goods, defined through any of a variety of measures, or might pass legislation to apply to all products sold within the state.

This report analyzes U.S. law in comparison to EU law and discusses the ability of public institutions to make environmental demands when purchasing products. Should public authorities be allowed to make environmental demands when acting on the market? After all, this is the same type of choice allowed by the individual consumer. Given that the EU is presently revising its procurement legislation, this report provides a useful analysis to determine the space for social and environmental requirements in EU public procurement law.

Despite its risks, the market participant exception has proven relatively successful in the United States. American states should endeavor to become more creative in establishing ecological criteria for public procurement in taking advantage of this exception to dormant commerce clause analysis. However, the geographic preferences often used in market participant exceptions under U.S. law are antithetical to many of the underlying goals of the founding of the European Union. With revisions in EU public procurement law underway, it will be worthwhile for the EU to experiment with the inclusion of environmental criteria in their formalized and non-discriminatory public procurement process.

The EU might consider increasing general environmental standards for all durables and consumables within the EU, making them applicable to all member states to ensure environmental sustainability in the life-cycle of

all products. The same could be said for the U.S., but the EU's founding documents provide a much better foundation for environmental protection compared to the U.S., which has passed few environmental laws since the environmental legislation boom of the 1970s.

Given that new, national environmental legislation remains unlikely, the potential role of environmental federalism remains greater in the United States than Europe. American states should begin to increase environmental standards when products enter state borders to further the economic and environmental interests of the states. The EU should continue to support EU-wide environmental law and regulation. Regardless of the future of U.S. federal environmental legislation and EU environmental law, both American states and EU Member States can and should take environmental considerations into account in the public procurement process.

States in both the U.S. and Europe may better achieve environmental policies through more direct and general regulation of the goods and services in question. Standing in the way of the success of such regulations are the high bars set by the dormant commerce clause and preemption doctrine in the U.S. and the internal market principles and harmonisation doctrine in the E.U. If states are to create innovative solutions to environmental problems, the evaluation of restrictions of trade must grant more weight to environmental standards as a legitimate government interest.

1 Introduction

In efforts to promote environmental interests and help local economies, American states can pass legislation to encourage, and in some cases require, public institutions to purchase products produced in the state (i.e., a geographic preference) due to the market-participant exception. The use of a market participant exception to allow for geographic preferences would face stiff legal challenge under European Union (EU) law. Despite the existence of the exception under U.S. law and its lack of viability in Europe, American states and Member States may be able to use public procurement to encourage or require the purchase of environmentally friendly goods, defined through any of a variety of measures, or might pass legislation to apply to all products sold within the state.

This report analyzes U.S. law in comparison to EU law and discusses the ability of public institutions to make environmental demands when purchasing products. Specifically, this report discusses local food purchasing in the United States as an example of a geographic restriction that both implicates economic protectionism and may lead to environmental benefits. Should public authorities be allowed to make environmental demands when acting on the market? After all, this is the same type of choice allowed by the individual consumer. Topics considered in this report include geographic/local preferences, discrimination based on nationality, international trade, and economic protectionism.

Part 2 of this report defines the market participant exception under U.S. law through a discussion of the Commerce Clause of the U.S. Constitution and its counterpart, the judicially created doctrine of the dormant commerce clause, as well as recognizes the authority of the preemption doctrine. Part 3 discusses EU public procurement law and its relationship to the consideration of environmental and social factors. Part 4 addresses the dominant legal and policy question in comparing U.S. and EU law as it relates to public procurement, geographic restrictions, and the environment: whether it is better (and lawful) to create general environmental standards or allow a market participant exception in public procurement to achieve ecological goals (though these options may not be mutually exclusive). Given that the EU

is presently revising its procurement legislation,[1] this report provides a useful analysis to determine the space for social and environmental requirements in EU public procurement law. This report concludes by addressing the proposed EU public procurement directive, the implications of which are disputed by scholars.

[1] European Commission, New Legislative Proposals, http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm.

2 The U.S. Market Participant Exception and the environment

The notion of federalism[2] allows American states, as sovereign entities, to pursue legislation and policies that further state interests,[3] so long as they are not pre-empted by federal (i.e., national) legislation.[4] In the United States, the term "environmental federalism" refers to the ability of states to establish more rigorous or creative environmental protection legislation than that of the national government.[5] This idea is not new. In his dissenting opinion in *New State Ice Co. v. Liebmann*, U.S. Supreme Court Justice Louis Brandeis stated, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[6]

In the U.S., laws that require, or provide incentives for, purchasing products produced within a defined geographic boundary (e.g., local food) or products meeting certain environmental standards may be "vulnerable to challenge under the U.S. Constitution's restrictions on local and state laws that discriminate against goods and commerce from other states, known as the dormant Commerce Clause doctrine."[7] However, American states may use

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2 *See, e.g.,* John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in A Federal System,* 99 Nw. U. L. Rev. 89 (2004).

3 U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

4 U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

5 *See generally* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models,* 54 Md. L. Rev. 1141 (1995).

6 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

7 Brannon P. Denning et al., *Laws to Require Purchase of Locally Grown Food and Constitutional Limits on State and Local Government: Suggestions for Policymakers and Advocates*, 1 Journal of Agriculture, Food Systems, and Community Development 139, 139 (2010), http://www.agdevjournal.com/attachments/115_JAFSCD_Laws_on_Locally_Grown_Food_Corrected_10-10.pdf. *See also* Amy S. Ackerman, *Buy Healthy, Buy Local: An Analysis of Potential Legal Challenges to State and Local Government Local Purchase Preferences*, The Urban Lawyer 1015 (Fall 2011).

the "market-participant exception" to apply such constraints or conditions to direct government purchasing. The exception draws a distinction between state governments acting as market regulators (such as when imposing a tax or banning an unhealthy ingredient) and acting as market participant (by directly buying or selling goods).[8] "In other words, state and local governments can act as any private buyer or seller would in deciding with whom and on what terms they will deal."[9] Under the principles of federalism, for example, a state has the right to create regulations requiring state governmental entities to give geographic preference to local state farmers. A state, as a regulator however, may also have the ability to pass even-handed regulation, outside the context of public procurement to promote environment interests in the state,[10] where a court will balance the impact of a statute on interstate commerce against the state's justifications for the statute.[11]

As the environmental (and economic) benefits of local food markets and other ecologically preferential characteristics become more obvious,[12] states and local governments are considering the implementation of such regulations and legislation; yet fears of constitutional challenges and retaliatory measures from other states may prevent legislative passage.[13] Part 2 defines the market participant exception under U.S. law; offers examples of how American states are using it in the context of local food purchasing; offers guidance for how policy makers, if they desire, can more effectively use the market participant exception to support the purchase of local foods and other environmentally sound products; and considers the legality of legislation to promote environmental considerations in purchasing beyond the context of public procurement.

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8 Denning et al., *supra* note 7, at 139.

9 *Id.* at 142.

10 *See* Minnesota v. Clover Leaf Creamery Co., Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 461 (1981) (where the U.S. Supreme Court held a state law prohibiting the use of non-recyclable plastic containers for milk non-discriminatory and valid).

11 Dan T. Coenen, *Untangling the Market-Participant Exception to the Dormant Commerce Clause,* 88 Mich. L. Rev. 395, 399 n.26 (1989).

12 *See* Jason J. Czarnezki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 Utah Envtl. L. Rev. 263 (2011).

13 *See* Denning et al., *supra* note 7, at 140 (stating that "[w]e have heard anecdotally that some cities or counties have expressed concerns about considering any local purchase policies due to legal questions about the [dormant commerce clause] and a lack of clarity on how to avoid challenges").

2.1 What is the Market Participant Exception?

The U.S. Constitution delegates authority to the Congress "[t]o regulate commerce . . . among the several states."[14] While, in the federal system, the individual states maintain sovereignty, a judicially-created dormant commerce clause doctrine limits state action that may place burdens on successful interstate commerce. Despite this, American states maintain their ability to act as consumers via public procurement, and may pass generally applicable legislation that benefits state interests. The "market participant exception" allows states to restrict interstate trade when acting as purchasers or sellers rather than as regulators.

2.1.1 The Commerce Clause

The Commerce Clause, found in Article I of the U.S Constitution, grants Congress the power to regulate interstate commerce.[15] In the seminal case *Gibbons v. Ogden,*[16] the U.S. Supreme Court concluded that a 1793 federal law authorizing the operation a ferry in New York waters was valid and determined that federal law preempted the New York granted monopoly to another ferry company.[17] The Court also found the New York monopoly to be an impermissible restriction of interstate commerce.[18]

Three main conclusions survive from *Gibbons:* one, "commerce" describes the commercial intercourse between nations, and parts of nations, in all its forms, including navigation;[19] two, "among the states" means "that commerce which concerns more States than one . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself;"[20] three, that state sovereignty and the Tenth Amendment do not limit Congress's powers.[21] "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[22]

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14 U.S. Const. art. I, § 8, cl. 3 (granting the authority for Congress "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes").

15 *Id.*

16 Gibbons v. Ogden, 22 U.S. 1 (1824).

17 *Id*. at 3.

18 *Id*

19 *Id*

20 *Id* at 195.

21 *Id.*

22 *Id*. at 196.

In *Wickard v. Filburn,*[23] the U.S Supreme Court cemented the expansive power and scope of the federal government in regulating interstate commerce. The Court upheld the application of the Agricultural Adjustment Act, and the resulting wheat production allotment for individual farmers, to a farmer who grew wheat primarily for his own consumption,[24] which, the farmer argued, was not part of interstate commerce, and therefore beyond the federal government's regulatory authority under the Commerce Clause.[25] The Court ruled that, in the aggregate, homegrown wheat can have a substantial effect on interstate commerce,[26] as the farmer's "own contribution to the demand for wheat may be trivial by itself [, it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[27] The Court has found few federal laws to unconstitutionally exceed the scope of Congress's power pursuant to the Commerce clause,[28] and continues to broadly construe federal commerce power.[29]

2.1.2 The Dormant Commerce Clause

While the Commerce Clause functions to authorize congressional legislation related to interstate commerce, it also serves the function of limiting state and local law that may restrain interstate commerce. This so-called dormant commerce clause is the judicially created principle, not explicitly stated in the U.S. Constitution, though inferred from the Commerce Clause, "that state

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23 Wickard v. Filburn, 317 U.S. 111 (1942).

24 *Id.* at 114.

25 *Id.* at 118.

26 *Id.* at 127.

27 *Id.* at 127-128.

28 *But see* U.S. v. Lopez, 514 U.S. 549 (1995) (declaring unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal crime to have a gun within 1,000 feet of a school; the relationship to interstate commerce was too tangential and uncertain to uphold the law as a valid exercise of Congress's commerce power); U.S. v. Morrison, 529 U.S. 598 (2000) (holding that Congress did not have authority under the Commerce Clause to regulate gender-motivated violence).

29 *See,* e.g., Pierce Cnty., Wash. v. Guillen, 537 U.S. 129 (2003) (unanimously reaffirming broad authority for Congress to legislate concerning road safety as part of its power to regulate the channels of interstate commerce). In Gonzales v. Raich, the Court held that Congress may constitutionally use its power to regulate commerce among the states to prohibit the cultivation and possession of small amounts of marijuana for medicinal purposes. Gonzales v. Raich, 545 U.S. 1 (2005).

and local laws are unconstitutional if they place an undue burden on interstate commerce."[30]

A two-part test is used by courts to determine if a law or regulation violates the dormant commerce clause.[31] First, the court asks: Is the law facially discriminatory,[32] or is the purpose or effect of the law discriminatory?[33] The court considers whether the state law discriminates against individuals or entities not from the state that passed the legislation, whether it treats all citizens alike regardless of residence,[34] or it has a discriminatory impact.[35] These state laws that are "simple economic protectionism" are essentially per se invalid.[36] Second, if the regulation at issue is not invalidated on the basis of facial discrimination or discriminatory impact, the court conducts a judicially-developed balancing test whereupon it weighs the state's interest in promulgating a statute against the burden that the statute imposes on interstate commerce.[37] In other words, does the state law impose "an undue burden on interstate commerce"?[38]

Under part one of the test, in cases where state law overtly discriminates against out-of-state economic interests through means such as a tariff, tax, quota, or outright embargo, the Supreme Court has routinely adopted an

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30 Erwin Chemerinsky, Constitutional Law: Principles and Policies 391 (2006). *See also* Coenen, *supra* note 11, at 399 n.26 (1989) (citing Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951)) ("The leading modern statement of the Court's dormant commerce clause 'balancing' test appears in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).").

31 *See, e.g.,* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338, 345, 347 (2007); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389-90 (1994) (employing a two-tiered dormant commerce clause test).

32 *See* City of Phila. v. N. J., 437 U.S. 617, 628 (1978).

33 *See, e.g.,* Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354, (1951) (holding that an even-handed local milk ordinance "in practical effect" discriminated against out-of-state milk suppliers).

34 *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

35 *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Hunt v. Wash. State Apple Adver. Comm'n., 432 U.S. 333 (1977).

36 Coenen, *supra* note 11, at 399 n.22, n.23 (citing *City of Philadelphia,* 437 U.S. at 623-24; accord, Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). *City of Philadelphia,* 437 U.S. at 624; accord, e.g., Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979)).

37 *Pike,* 397 U.S. at 142.

38 Coenen, *supra* note 11, at 399 n.26 (citing *Dean Milk Co.*, 340 U.S. at 353).

almost per se rule of invalidity.[39] The Supreme Court has also struck down laws as discriminatory under the dormant commerce clause when the law draws an express distinction between in-state and out-of-state entities such as prohibiting out-of-state ownership of certain business interests, or price restrictions on out-of-state foods or other products,[40] and when local regulation discriminates against both out-of-state and in-state ventures in the interest of local economic protectionism.[41] Also, if the law is facially neutral, but the purpose or the effect is to discriminate, then it will be found unconstitutional. Discriminatory impact is sufficient for invalidation.[42]

If the law or regulation at issue is not found to be facially discriminatory and the purpose or effect of the law is not discriminatory, then the court will move to the second part of the test. The court conducts a balancing test weighing the state interest in promulgating a statute against the burden that

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[39] Granholm v. Heald, 544 U.S. 460, 476 (2005) (quoting *City of Phila.*, 437 U.S. at 624) ("State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity'").

[40] *See* Lewis v. BT Investment Managers, 447 U.S. 27, 44 (1978) (declaring unconstitutional a state law that prevented out-of-state banks from owning investment advisory businesses within the state); Baldwin v. G.A.F. Seelig, 294 U.S. 511, 521 (1935) (declaring unconstitutional a state law that restricted prices of milk produced out-of-state and prevented it from being sold at a price lower than in-state milk).

[41] *See* Dean's Milk Co. v. Madison, 340 U.S. 349 (1951) (reviewing a city ordinance that required that all milk sold in the city had to pasteurized within five miles of the city). In *Dean's Milk Co.*, the Court declared: "In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce." Id. at 354. The Court held the fact that Wisconsin milk from outside the Madison area was also subjected to the same proscription as that moving in interstate commerce as "immaterial." *Id*. at 354 n.4.

[42] *See, e.g.,* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Hunt v. Wash. State Apple Adver. Comm'n., 432 U.S. 333 (1977) (finding discrimination based on the disparate impact of a law against out-of-staters). In Hunt, a North Carolina law required that all closed containers of apples sold or shipped into the state bear "no grade other than the applicable U.S. grade or standard." *Id.* at 339 (citing N.C. Gen. Stat. §106-189.1 (1973)). The law was facially neutral in that all apples sold in the state – whether produced from within or from out-of-state – had to comply with the rule. This notwithstanding, the Court held that the law was discriminatory because of its effect on the sale of Washington apples. *Id.* at 350. Washington had a system for grading apples that was different from the federal standard, so the law effectively prohibited Washington growers and dealers from marketing apples under their State's existing grades. The Court deemed this an unconstitutional "leveling effect which insidiously operate[d] to the advantage of local apple producers." *Id.* at 351.

the law imposes on interstate commerce.[43] "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."[44]

While courts have significant discretion, they generally uphold state laws once the law has already been determined to be non-discriminatory. For example, in *Minnesota v. Clover Leaf Creamery Co.,* the Court upheld a state law prohibiting the use of non-recyclable plastic containers for milk,[45] since the environmental benefits of the law outweighed any harms to interstate commerce.[46]

That said, despite a finding that the state law is non-discriminatory, the law may place a significant burden on interstate commerce and, thus, be found unconstitutional. For example, in *Bibb v. Navajo Freight Lines*, the Court declared unconstitutional a state law that required all trucks in the state use curved mudguards to prevent spatter and enhance road safety.[47] The Court found the law to substantially burden interstate commerce because straight mudguards were legal in 45 other states and curved mudguards were illegal in one other state.[48] Furthermore, since the trial court found that curved mud flaps had "no" safety benefits over straight ones and may create "hazards previously unknown" by increasing the heat around a truck's tires, the Court declared the law unconstitutional.[49] The Court described it as "one of those cases – few in

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43 Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970).

44 *Id.* (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

45 Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 461 (1981).

46 *Id.* at 473 ("Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnestoa pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources . . . ."). *See also* Maine v. Taylor, 477 U.S. 131, 151 (1986) (upholding a statute banning the import of out-of-state minnow fish) ("The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.") In *Taylor,* the Court found that Maine's ban on the importation of live baitfish was well within its regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. *Id*.

47 Bibb v. Navajo Freight Lines, 359 U.S. 520, 530 (1959).

48 *Id.* at 523.

49 *Id.* at 525.

number – where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."[50]

Despite the existence of the dormant commerce clause, two exceptions exist for constitutional permissibility. First, "[e]ven a clearly unconstitutional, discriminatory state law will be allowed if approved by Congress because Congress has plenary power to regulate commerce among the states."[51] Second, under the market participant exception, "[a] state may favor its own citizens in receiving benefits from government programs or in dealing with government-owned businesses."[52] "The federal courts of appeal have rejected most Commerce Clause challenges to in-state preference laws, holding that the market participant exception applies."[53]

2.1.3 The Market Participant Exception

The market participant exception may prove to be a useful tool for states to encourage the production of locally produced or environmentally preferred foods, goods and services.[54] "The market participant exception provides that a state may favor its own citizens in dealing with government-owned business and in receiving benefits from government programs."[55] Thus, a state, when acting as a consumer in the market or a "market participant," rather than as a "market regulator," can make restrictive choices in public procurement that might otherwise be found to violate the Commerce Clause of the U.S. Constitution.[56]

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50 *Id.* at 529.

51 Chemerinsky, *supra* note 30, at 449.

52 *Id.*

53 Ackerman, *supra* note 7.

54 Others have argued that local food legislation should also be upheld under the Republican Guarantee Clause of Article IV. See Gabe Johnson-Karp, *Local Food Systems and the Reawakening of Republicanism,* Faculty Law Blog (May 31, 2011), http://law.marquette.edu/facultyblog/2011/05/31/local-food-systems-and-the-reawakening-of-republicanism/ (last visited June 4, 2012).

55 Chemerinsky, *supra* note 30, at 451. *See also* Coenen, *supra* note 11, for a comprehensive overview of the market participant exception.

56 Coenen, *supra* note 11, at 397 (citing Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980); and Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis – Protecting Protectionism?*, 1985 Duke L.J. 697, 697-98 ("certain state actions taking the form of market participation will be summarily upheld that would, in a different form, be summarily struck down as invalid per se")).

In *Hughes v. Alexandria Scrap Corp.*, the Supreme Court first recognized the market participant exception and stated:

> Nothing 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.[57]

Four years later, in the *Reeves* holding, the Court said that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[58]

The market participant exception suggests that states can favor its own citizens and local businesses (e.g., local food producers and processors) when wanting to encourage local interests and when engaged in the purchasing itself. For example, in *White v. Massachusetts Council of Construction Employers*,[59] the Supreme Court upheld a city's ordinance that required all construction projects financed by the city to use a workforce comprised of at least 50 percent residents of the city.[60] In upholding the ordinance, the Court noted that "*Alexandria Scrap* and *Reeves* . . . stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."[61] Invoking the market participant exception, the U.S. Supreme Court has "shielded from commerce clause attack favoritism of local interests when a state or municipality buys printing services, sells cement, purchases goods, or hires workers."[62]

While the market participant exception makes valid state discrimination when acting in the marketplace, this seemingly per se validity does not always operate.

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57 Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (upholding a state law that required more extensive documentation when out-of-state scrap processors purchased junk cars).

58 Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980).

59 White v. Mass. Council of Constr. Emp'rs., 460 U.S. 204 (1983).

60 *Id*. at 206.

61 *Id*. at 208.

62 Coenen, *supra* note 11, at 397 (citing American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972) (three-judge court), affd. mem., 409 U.S. 904 (1973); Reeves, 447 U.S. at 446; Alexandria Scrap Corp., 426 U.S. 794; and White, 460 U.S. 204).

> [E]ven if a state looks quite like a buyer or seller choosing trading partners, the Court has left itself room not to treat the state as such. The Court may accomplish this result by recognizing an "exception" to the "general rule" or by characterizing the state as a "market regulator" notwithstanding its superficial appearance as a "market participant." Both roads lead to the same place. The key point is that they remain open.[63]

One important limitation that the Court has imposed on the scope of the market participant exception is that state businesses may favor in-state producers and vendors, but they may not attach conditions to a sale that discriminates against interstate commerce.[64] For example, a state can require that all government agencies purchase potatoes grown within the state, but it cannot require that any purchaser (in or out-of-state) have the potatoes processed in the state before they can be exported.[65]

Thus, despite years of judicial interpretation, "[t]he precise contours of the market participant doctrine have yet to be established."[66] "What exactly comprises *market participation* versus *market regulation* is still being explored in the realm of climate change, electric power regulation, and more recently, public food procurement."[67] It is clear that "states and local

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63 *Id.* at 404-05 (internal citations omitted).

64 *See, e.g.*, S.-Cent. Timber Dev. Inc. v. Wunnicke, 467 U.S. 82, 98 (1984) (plurality opinion) (drawing a distinction between the ability of a state to prefer its own citizens in the "initial disposition of goods when it is a market participant" and a "State's attachment of restrictions on dispositions subsequent to the goods coming to rest in private hands").

65 Elena Mihaly, *How to Promote Local Food Economies Through State and Local Public Procurement Practices 14–15* (2012) (unpublished manuscript on file with the author).

66 *S. Cent. Timber Dev.,* 467 U.S. at 93.

67 Mihaly, *supra* note 65, at 15 (citing Michael Burger, *It's Not Easy Being Green: Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. Cin. L. Rev. 835, 835 (2010) (discussing whether the market participant exception should be interpreted to exempt local climate change and sustainability initiatives from the "ceilings" imposed by existing environmental laws). *See* Andrew F. Adams, *It's Getting Hot in Herre: California Senate Bill 1368 and the Dormant Commerce Clause,* 1 San Diego J. Climate & Energy L. 287, 289-290 (2011) (addressing whether a local California climate bill will hold up to a commerce clause challenge under the market participant exception); N. England Power Co. v. N. H., 455 U.S. 331, 338 (1982) (declaring unconstitutional a law that limited the ability of electricity to be shipped out of the state without the permission of the state's public utility commission); Denning et al., *supra* note 7, at 140 (discussing states' use of the market participant exception to pass local food legislation).

governments can rely on the market participant exception to enact laws that allow public procurement agencies to give preference to local food."[68]

But more generally, when courts consider whether any activity falls within the market participant exception, courts consider whether the program reflects an effort of state government to favor state residents when selecting the recipients of the state's own resources; whether the program is consistent with the values of federalism, local experimentation, and responsiveness to local concerns; to what extent the program threatens the underlying commerce clause values of a free market; and whether the state appears to be "participating in" rather than "regulating" the market.[69]

Even when falling into the contours of the market participant exception, there are risks to states invoking it in a discriminatory fashion. It may induce neighboring states to retaliate and undermine current interstate trade. A recent law review article on the subject articulates that "[b]ecause such protectionist policies have detrimental effects on out-of-state foreign bidders, negatively impacted jurisdictions… sometimes employ reciprocal or retaliatory responses to exclude or inhibit bidders from the 'offending' state from participating in procurement."[70] For example, the state of Pennsylvania took an eye-for-an-eye approach, enacting a reciprocal preference against states that institute preference with respect to supplies, equipment, or materials produced, manufactured, mined, or grown in that state.[71] Under the statute, "[t]he amount of the preference shall be equal to the amount of the preference applied by the other state for that particular supply."[72] New York used a penalty provision, applying retaliatory sanctions against bidders with a principle place of business located in a state that penalizes New York vendors through bid price distortions and procurement preferences.[73] According to Section 165(6)(b), New York State Commissioner of Economic Development

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68 Mihaly, *supra* note 65, at 15.

69 Coenen, *supra* note 11, at 441.

70 Kingsley S. Osei, *The Best of Both Worlds: Reciprocal Preference and Punitive Retaliation in Public Contracts,* 40 Pub. Cont. L.J. 715, 716 (2011).

71 Pennsylvania Reciprocal Limitations Act, 62 PA. Const. Stat. Ann. § 107 (West 1986).

72 *Id.*

73 New York State Omnibus Procurement Act (1994) (codified as amended at 1994 N.Y. Laws 3553 and 2000 N.Y. Laws 3032).

developed a list of six states as jurisdictions that discriminate against New York bidders in the procurement of commodities or services.[74] Pursuant to the statute, New York agencies, public authorities, and public benefit corporations are required to deny the award of contracts to businesses from these jurisdictions.[75] Thus, there are both potential costs and benefits when invoking the market participant exception.

2.2 Food, the environment & the Market Participant Exception

The mechanisms by which American states define the "procurement regulatory environment" are varied, ranging from legislation to administrative law and policy statements.[76] Food purchases are a prime example where states can exert their procurement power. "While a significant portion of a state's budget is spent on food procurement (for schools, prisons, etc.), most is currently not spent within the local state economy,"[77] as only about 10% of all food purchases within states are acquired by public funds.[78] That said, nationally, less than 3% of purchasing is directed to local food.[79]

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74 *Id.*

75 *Id.*

76 The National Association of State Procurement Officials (NASPO), Executive Summary, NASPO 2009 Survey of State Government Purchasing Practices Survey Questions 6 (2009) [hereinafter NASPO Survey] http://www.naspo.org/documents/2009_Survey_of_State_Government_Procurement_Exec_Summary.pdf ("All states have procurement laws, supporting rules and policies. This combination of directives is generally referred to as the procurement regulatory environment. The degree to which the regulatory environment is codified in law (statute, regulation or code) varies among the states. Some states embody all procurement requirements in law. Other states' procurement codes are fairly basic and place most of the regulation and direction of the process in the administrative code. There is a significant difference in these approaches. Laws, although they can be changed and amended over time, take acts of the state legislature to alter. Generally, state legislatures only meet for a period of time each year, and in some cases only every two years. This makes it difficult to modify the procurement regulatory environment when market conditions or other matters make it necessary to do so. On the other hand, if regulations are contained in administrative code, action by state legislatures is not necessary. Rather, most administration regulations can be modified via a public meeting or period of public inspection and comment on the recommended change. This process can often be completed in 30-60 days.").

77 Mihaly, *supra* note 65, at 16.

78 Oran B. Hesterman, Fair Food 191 (2011).

79 Mihaly, *supra* note 65, at 16.

The premise behind using institutional purchasing power to foster local food economies is twofold. One, if states can use the public funds normally going towards institutional food purchases to buy *local* food, then the government can be both fulfilling its duty to provide food, as well as stimulating the local food economy. Michigan, for example, spent $300 million on food procurement for all its school food and Department of Corrections services. By shifting even 20% of these funds to more local or regional producers and processing facilities, the state could infuse $60 million back into the local economy. Second, an important role of institutional local purchase policies is to serve as a "market primer." That is, if the public sector provides a steady source of demand for local food, it may allow local producers to scale up and expand into other markets.[80]

Changes in the public procurement of food may not only influence local economies, but there is a growing awareness of the link between local food, the environment, and sustainability.[81]

Legal challenges to state grown or local food preference laws are likely to be unsuccessful.[82] States and localities using the market participant exception to prefer local goods have enacted legislation that mandates the purchase of local food. For example:

- Illinois's Local Food, Farms and Jobs Act declares that 20% of all food and food products purchased by State agencies and State-owned facilities, including, without limitation, facilities for persons with mental health and developmental disabilities, correctional facilities, and public universities, shall, by 2020, be local farm or food products.[83]

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80 *Id.* at 17–18 citing (Hesterman, *supra* note 78, at 191, and Denning, *supra* note 7, at 40).

81 *See* Czarnezki, *supra* note 12.

82 Ackerman, *supra* note 7 ("It is unlikely that a Dormant Commerce Clause challenge will be successful to a state grown preference law. A state law requiring state agencies to apply a preference when purchasing state-grown goods is classic market participant activity. The majority of federal courts that have considered the issue have also found a state law imposing the same requirement on its political subdivisions to fall within the market participant exception. Similarly, a local entity that is empowered to set the parameters for its market purchases is exercising market participant power when imposing preferences on its purchases. Accordingly, local food purchasing preferences are not likely to violate the Dormant Commerce Clause.").

83 Local Foods, Farms, and Jobs Act, 30 Ill. Comp. Stat. 595/10 (2009).

- A San Francisco executive order contains the following imposing directive: "Beginning immediately, all city departments and agencies purchasing food for events or meetings using city funds will utilize guidelines for 'healthy meetings' and purchase healthy, locally produced and/or sustainably certified foods to the maximum extent possible."[84]

- A policy in Woodbury County, Iowa mandates that the county "shall purchase, by or through its food service contractor, locally produced organic food" for service in the Woodbury County jail, work release center, and juvenile detention facilities.[85] The Local Food Purchase Policy's preamble states that it is intended to "increase regional per capita income, provide incentives for job creation, attract economic investment, and promote the health and safety of its citizens and communities."[86]

Other states have simply passed legislation that encourages (as opposed to mandates) government entities to purchase local food. For example:

- The state of Oregon passed a law that allows contracting agencies using public funds to procure goods for public use to give preference towards an agricultural product that is produced and transported entirely within the state if the product costs not more than 10 percent more than a similar product grown out of the state.[87] Previously, schools, prisons and other government agencies had to choose the lowest bidder and were not allowed to consider the economic benefits of buying locally.[88]

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84 Executive Directive 09-03, Healthy and Sustainable Foods for San Francisco (July 9, 2009), Office of the Mayor City and County of San Francisco, http://civileats.com/wp-content/uploads/2009/07/Mayor-Newsom-Executive-Directive-on-Healthy-Sustainable-Food.pdf.

85 Woodbury County, Iowa, Policy for Rural Economic Revitalization: Local Food Policy (2006), http://www.iatp.org/files/258_2_96615.pdf.

86 *Id.*

87 H.B. 2763, 75th Legis. Assem. Reg. Sess. (Or. 2009). However, federal law can preempt this flexibility. For example, the application of such state law to the Federal Child Nutrition Programs (including the National School Lunch Program) is an entirely different matter. Because the National School Lunch Act grants the authority of whether or not to apply a geographic preference when conducting procurements for school food directly to the purchasing institution, states cannot mandate through law or policy that SFAs apply the State's adopted geographic preference regulation. http://www.fns.usda.gov/cnd/Governance/Policy-Memos/2011/SP18-2011_os.pdf at #12. Thus, no state geographic preference regulation can ever be applied to procurements made under the NSLA.

88 H.B. 2763.

- In Alabama, the awarding authority may give preference, "provided there is no sacrifice or loss in price or quality, to commodities produced in Alabama or sold by Alabama persons, firms, or corporations."[89]

- In Colorado, food authorities can award contracts for agricultural products to in-state bidders if their produce from the state is of equal quality, suitable for bidding, and sufficient in quantity, and if the bid price is equal to or does not reasonably exceed that of the lowest out-of-state bidder.[90]

- In Hawaii, a gradation of set preferences between three and ten percent is applied in favor of "Hawaii products" if they meet certain minimum requirements.[91]

- In Louisiana, products "assembled," "manufactured," or "processed" in Louisiana enjoy a set percentage preference over non-Louisiana products.[92]

- Montana allows public institutions more flexibility to buy Montana-produced food by providing an "optional exemption in the Montana Procurement Act."[93] The optional exemption allows food procurement officers to directly purchase higher priced Montana-produced food products when, in their discretion, the higher bid is "reasonable and capable of being paid out of that governmental body's existing budget."

"Before bringing a bill to the table however, lawmakers should run through an analysis to ensure that the law can claim the market participant exception. This entails making sure that the state government is merely acting as a player in the market, and is not venturing outside of the protective scope of the market participant exception."[94]

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89 Ala. Code § 41-16-57 (1975).

90 Colo. Rev. Stat. Ann. § 8-18-103 (2003).

91 Haw. Rev. Stat. Ann. § 103D-1002(a) (2006).

92 La. Rev. Stat. Ann. § 38:2251 (2005).

93 Derick Braaten, *Legal Issues in Local Food Systems,* 15 Drake J. Agric. L. 9, 10, (2010).

94 Mihaly, *supra* note 65, at 25. A common example of a state acting outside of its market participant exception allowance is if a state tries to shape the market through its tax structure. *See, e.g.*, Metro. Life Ins. v. Ward, 470 U.S. 869, 879 (1985) (declaring Alabama's implementation of a tax to increase state economy unconstitutional); Denning, et al., *supra* note 7, at145 (discussing how Iowa's Local Farmer and Food Security Act of 2010 that offers a 20 percent tax credit to grocers against the cost of purchasing "Local Farm Products" does not fall under protection of market participant exception). Another example is if a state uses its market power in one market to regulate behavior of private individuals outside of that market. *See* S.-Cent. Timber Dev. Inc. v. Wunnicke, 467 U.S. 82 (1984).

From a policy standpoint, states must consider where their interests would be most greatly met. In other words, where should the public purchasing power be focused? K-12 schools,[95] universities, hospitals, or correctional facilities? In the U.S., according to 2004 figures, K-12 schools rank first as the nation's largest institutional purchaser.[96] State colleges and universities are the second-largest institutional purchasers in the U.S.[97] The health care sector is the third largest institutional purchaser in the nation.[98] Any such analysis would be prudent to perform, regardless of the locale, in the U.S. or Europe, and in other market sectors beyond the food procurement context including environmental preferences on any durable or consumable goods.

2.3 Generally applicable environmental standards and regulation

State laws have been upheld because states are market participants and support state and local economies,[99] but what if the rationale is the environment or public health? For virtually any public procurement decision, including environmental standards, dormant commerce clause analysis does not apply due to the market participant exception. The decision will be upheld. But what if the state is acting as a regulator to promote state interests in environmental protection and sustainability? Could American states create these sorts of environmental conditions? Or would this violate the commerce clause?

Even-handed and non-discriminatory, in its intent or application, environmental regulation is the norm and will likely be upheld.

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95 The market participant exception has limited import to K-12 schools in the U.S., though these limitations are easily resolved under the National School Lunch Act. Mihaly, *supra* note 65, at 31.

96 Moira Beery & Mark Vallianatos, Center for Food Justice and Urban and Environmental Policy Institute, Occidental College, Farm to Hospital: Promoting Health and Supporting Local Agriculture 3 (2004), http://departments.oxy.edu/uepi/cfj/publications/farm_to_hospital.pdf.

97 *Id.*

98 *Id.*

99 *See* Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994) (upholding South Carolina's local preference law, requiring governmental agencies to purchase products made, manufactured, or grown in South Carolina, on the grounds that it was not a violation of the dormant commerce clause because the state was acting in the marketplace to purchase for its own consumption as a market participant, not a market regulator).

> Nevertheless there is a real risk that a state may pass legislation without adequately considering its impact elsewhere in the country. In addition risk also exists that a state will use what appears to be nondiscriminatory legislation as a covert means of burdening out of state businesses. Thus, some degree of judicial scrutiny seems warranted.[100]

In order to guard against these risks, the Court subjects nondiscriminatory state legislation to a balancing test, known as the *Pike* test.

In *Pike v. Bruce Church, Inc.*,[101] the Court stated that, in evaluating such regulation, the impact of a statute on interstate commerce is balanced against the state's justifications for the statute.

> 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.[102]

Environmental laws have fared well under this commerce clause doctrine test.[103] For example, in *Minnesota v. Clover Leaf Creamery Co.,* the Supreme Court upheld a state law prohibiting the use of non-recyclable plastic containers for milk.[104] The Court said that the environmental benefits of the law outweighed any harms to interstate commerce.[105] In *Maine v. Taylor*, the Supreme Court upheld a state ban on the importation of out-of-state baitfish under the theory that the state has a "legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible."[106]

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100 Daniel Farber, *Legal Guidelines for Cooperation Between the EU and American State Governments,* in Transatlantic Regulatory Cooperation: The Shifting Roles of the EU, the U.S. and California 3, 7-8 (David Vogel and Johan F.M. Swinnen eds., 2011).

101 Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

102 *Id.* at 142.

103 Farber, *supra* note 100, at 12.

104 Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 461 (1981).

105 *Id*. at 473 ("Even granting that the out-of-state plastics industry is burdened relatively more heavily than the pulpwood industry, we find that this burden is not clearly excessive in light of the substantial state interest in promoting conservation of energy and other natural resources . . . .").

106 Maine v. Taylor, 477 U.S. 131, 148 (1986).

2.4 Preemption doctrine: an additional factor when States regulate

In addition to possible violation of the "dormant" commerce clause, states that set higher environmental standards for products or processes must also be concerned with "preemption" by federal law. Article VI of the U.S. Constitution declares:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[107] Accordingly, when a state law "interferes with or is contrary to federal law," the state law is "preempted" and a court may invalidate it.[108]

In practice, courts hold that state or local environmental laws are preempted when there is either express or implied preemption.[109] "Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[110] Express preemption occurs when a federal law explicitly prohibits state and local governments from legislating or regulating.[111] For instance, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) contains an express preemption clause, stating that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section."[112]

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[107] U.S. Const., art. VI.

[108] Chemerinsky, *supra* note 30, at 392 (*citing* Gade v. National Solid Waste Management Association, 505 U.S. 88, 108). Chemerinsky notes that Chief Justice John Marshall had already held in 1824 that when a state law conflicts with federal law, "the law of State . . . must yield to it." *Id.* at 392 *(citing Gibbons v. Ogden, 22 U.S. (9 Wheat) 1.211 (1824))*.

[109] Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis,* 24 Harv. Envtl. L. Rev. 237, 238 (2000).

[110] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (*citing* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 152–153 (1982)). See Chemerinsky, *supra* note 30, at 394–95.

[111] *See* Weiland, *supra* note 109, at 253; Chemerinsky, *supra* note 30, at 396–97.

[112] 42 U.S.C.A. § 9621(e)(1) (2006). Even when Congress has included an express preemption clause, "it rarely provides guidance as to the scope of preemption." Chemerinsky, *supra* note 30, at 397.

Even when a statute includes no express provision for preemption, a court may hold that the state or local law is impliedly preempted. Preemption, in the case of state and local environmental laws, can be implied under two theories: "field preemption" and "conflict preemption."[113] Field preemption occurs "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[114] Conflict preemption, on the other hand, is found "where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[115]

A court may evoke "field preemption" when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[116] The Supreme Court has held that not only statutes, but also extensive federal regulations in a given field may preempt the enforcement of state and local laws.[117] Courts will consider several factors when determining whether Congress intended the federal laws to occupy the field, including whether the field has traditionally been regulated by the federal government, whether it has traditionally been a state or local interest, whether Congress expressed the intent (in the legislative history) that the law exclusively occupy the field, and whether the state/local laws could impede the federal regulations.[118]

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[113] See Weiland, *supra* note 109, at 253; Chemerinsky, *supra* note 30, at 394–395.

[114] *Gade,* 505 U.S. at 98 (*quoting* Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982)).

[115] *Id.* at 98 (*citing* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–143 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); and Perez v. Campbell, 402 U.S. 637, 649 (1971)). Chemerinsky identifies an additional variety of implied preemption, where the state law blocks the achievement of the "full purposes and objectives of Congress." Chemerinsky, *supra* note 30, at 395 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Additionally, states and local governments are preempted when they attempt to tax or regulate the federal government. *See generally* Chemerinsky, *supra* note 30, at 416–419.

[116] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[117] See Chemerinsky, *supra* note 30, at 406 (*citing* Rice v. Santa Fe Elevator Corporation, 331 U.S. 218 (1947)).

[118] *See id*. at 408.

"Conflict preemption" applies when it is impossible to comply with both federal and state law,[119] or when a state law sets a higher standard than a federal law that a court sees as an exclusive standard.[120] In *Florida Lime & Avocado Growers*, the Supreme Court determined that the federal standard for saleable avocados was a minimum, rather than exclusive, standard, and that a state could therefore enforce stricter standards without being preempted by the federal law.[121]

California's Safe Drinking Water and Toxic Enforcement Act of 1986,[122] also known as "Proposition 65", illuminates preemption doctrine because it has been repeatedly challenged on the basis of preemption – mostly unsuccessfully – for several decades. Proposition 65 does not restrict the quantity of hazardous substances in consumer products (including food), but rather, it requires warning labels that are triggered by quantities that are "orders of magnitude" lower than the federal limits of the listed chemicals.[123] Since federal law regulates the chemicals and also sets standards for any number of products that may contain the chemicals, Proposition 65 would seem to be susceptible to preemption challenges.

Proposition 65 has proven to robustly resist being preempted by federal law. Courts have held that the application of Proposition 65 does not contradict or interfere with federal interests as represented by the Federal Hazardous Substances Act,[124] FDA regulations under the Medical Devices Act,[125] and the Federal Insecticide, Fungicide, and Rodenticide Act,[126] to name just a few examples. Still, in some cases, where a federal law provided for express

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[119] *Gade,* 505 U.S. at 98 (*citing* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–143 (1963)).

[120] Chemerinsky, *supra* note 30, at 410.

[121] *Id.* at 410 (*citing* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963)).

[122] Cal. Health and Safety Code, Ch. 6.6 §§25249.5-25249.13.

[123] Trenton H. Norris, *Consumer Litigation and Fda-Regulated Products: The Unique State of California*, 61 Food & Drug L.J. 547, 549 (2006).

[124] *See* People ex rel. Lungren v. Cotter & Co., 53 Cal. App. 4th 1373, 1392, 62 Cal. Rptr. 2d 368, 381 (1997).

[125] *See* Comm. of Dental Amalgam Mfrs. & Distributors v. Stratton, 92 F.3d 807, 813-14 (9th Cir. 1996).

[126] *See* Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby, 958 F.2d 941 (9th Cir. 1992).

preemption[127] or when the California warning label conflicted with federal policy,[128] courts have ruled the specific application of Proposition 65 to be preempted by federal law.

[127] Am. Meat Inst. v. Leeman, 180 Cal. App. 4th 728, 761, 102 Cal. Rptr. 3d 759, 785 (2009).

[128] Dowhal v. SmithKline Beecham Consumer Healthcare, 32 Cal. 4th 910, 934-35, 88 P.3d 1, 15 (2004).

3 Environmental requirements in EU public procurement law

3.1 EU public procurement law and potential revisions

The Treaty on the Functioning of the European Union (TFEU) and the Treaty on Union (TEU) constitute the Treaties on which the European Union is founded.[129] The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market. This market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties (Article 26 TFEU). EU public procurement law is adopted with the aim of ensuring the functioning of the internal market. Important legal principles stemming from the TFEU in this regard are transparency, equal treatment, and non-discrimination. Accordingly, TFEU rules prohibit discrimination on grounds of nationality including in public procurement (for example, by reserving contracts for national suppliers).[130] In the awarding of public contracts, European Union (EU) law requires that,

> [w]here a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.[131]

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[129] Consolidated Version of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) (hereinafter, "TFEU").

[130] Sue Arrowsmith, *Introduction to the EU,* in EU Public Procurement Law: An Introduction 38 (Sue Arrowsmith, ed., 2010).

[131] Council Directive 2004/18/EC, art. 3, 2004 O.J. (L 134) 129. *See* also European Commission, Public Procurement In The European Union, Guide To The Community Rules On Public Procurement Of Services Other Than In The Water, Energy, Transport And Telecommunications Sectors, Directive 92/50/EEC, at 5 ("Nevertheless, the award of such contracts is, of course, subject to the Treaty rules concerning the freedom to provide services and to the general principles of Community law such as non-discrimination, equality of treatment, transparency and mutual recognition.").

The same non-discrimination principles apply to service providers who are nationals of other Member States.[132] In addition, according to EU law, contracts must be awarded on the basis of lowest price or the most economically advantageous tender.[133]

The European Union is currently considering revisions for EU public procurement law.[134] The objectives of the proposed Directive in the classic sector (public procurement procedures for works, goods and services) are to:

(1) Increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules…

(2) Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion, and ensuring the best possible conditions for the provision of high quality social services. [135]

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[132] European Commission, Public Procurement In The European Union, Guide To The Community Rules On Public Procurement Of Services Other Than In The Water, Energy, Transport And Telecommunications Sectors, at 49. The guide specifies that "the Services Directive requires that Member States and contracting authorities ensure that invitations to tender or negotiate are issued without discrimination to nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals." *Id.* "A provision which reserves a part of the works (or services) to tenderers having their registered office in the region where the works (or services) are to be carried out, amounts to a discrimination against tenderers from other Member States. *Id.* at 49 n. 126 (citing Case C-360/89, Commission v Italy, 1992 ECR I-3401; Case C-21/88, Du Pont de Nemours Italiana S.p.A. v Unità Sanitaria Locale No. 2 di Carrara, 1990 ECR I-889).

[133] Directive 2004/18, Article 53.

[134] *See* European Commission, *Reform Proposals*, http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm (last visited June 6, 2012). The original proposals are presented in COM/2011/895 final and COM/2011/896 final. The proposals, now modified, are presently discussed in the Council and European Parliament. However, for the purpose of this report, the important content in the proposals is unchanged.

[135] 52011PC0896, Proposal for a Directive of the European Parliament and of the Council on Public Procurement, COM (11) 0896 (final) – COM (11) 438, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:HTML (last visited June 6, 2012).

The proposed Directive seeks to allow Member States, in their contracting authority, to use their purchasing power "to procure goods and services that foster innovation, respect the environment and combat climate change while improving employment, public health and social conditions."[136] The proposed Directive suggests that the contracting authority can consider environmental factors through life-cycle analysis, eco-labeling, and sanctions for the violation of existing environmental law.[137]

- Life-cycle costing: The proposal gives public purchasers the possibility to base their award decisions on life-cycle costs of the products, services or works to be purchased. The life cycle covers all stages of the existence of a product or works or provision of a service, from raw material acquisition or generation of resources until disposal, clearance and finalisation…

- Labels: Contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they accept also equivalent labels. This applies for instance to European or (multi-) national eco-labels or labels certifying that a product is free of child-labour. The certification schemes in question must concern characteristics linked to the subject-matter of the contract and be drawn upon the basis of scientific information, established in an open and transparent procedure and accessible to all interested parties.

- Sanctioning violations of mandatory social, labour or environmental law: Under the proposed Directive, a contracting authority can exclude economic operators from the procedure, if it identifies infringements of obligations established by Union legislation in the field of social, labour or environmental law or of international labour law provisions. Moreover, contracting authorities will be obliged to reject tenders if they have established that they are abnormally low because of violations of Union legislation in the field of social, labour or environmental law.[138]

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136 *Id.*

137 *Id.*

138 *Id.*

3.2 Public procurement and environmental considerations

Some have argued for and considered the role of public procurement in the EU for encouraging innovation and more environmentally friendly economic growth.[139] At the same time others point out that "a fundamental requirement which must be respected in a public procurement process is that EU law is fully respected."[140] Without the market participant exception as available under U.S. law, Member States are not able to discriminate in favor of entities located within the contracting country. The basic requirements of EU law (here, in particular non-discrimination) must be complied with, but more stringent national regulations may be applied if they comply with TFEU provisions

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[139] Jens Fejø, *Social and Environmental Policies in EU Public Procurement Law*, *in* Arrowsmith, ed., *supra* note 130, at 298 ("In a recent report, the so called 'Monti Report', it is thus made one of the key recommendations to make public procurement work for innovation, green growth and social inclusion by imposing specific mandatory requirements.") (citing Mario Monti, A new strategy for the Single Market at the Service of Europe´s Economy and Society, Report to the President of the European Commission José Manuel Barroso 78 (9 May 2010)). *See also* Sue Arrowsmith, *The Public Sector Directive 2004/18: Scope of Coverage*, *in* Arrowsmith, *supra* note 130, at 119 ("Given the significant and influential role of public procurement in the economy, it is clear that it has the potential to impact on other policies (EU2020 objectives). The most frequently mentioned main areas for future strengthening of the rules are: environmental sustainability; respect for certain social conditions; and supporting innovation."); Sue Arrowsmith & Peter Kunzlik, Social and Environmental Policies in EC Procurement Law: New Directives and New Directions (2009); Roberto Caranta & Martin Trybus, The Law of Green and Social Procurement in Europe (2010); Jörgen Hettne, *Strategic Use of Public Procurement – limits and opportunities*, at 1 (2012) (draft paper on file with author) ("Other important issues such as social and environmental considerations can be promoted through public procurement.").

[140] Jörgen Hettne, Legal Analysis of The Possibilities of Imposing Requirements In Public Procurement That Go Beyond The Requirements of EU Law 1 (hereafter "Legal Analysis") (2012), available at http://upphandlingsutredningen.se/wp-content/uploads/2012/04/EU-requirements-and-Public-Procurement-20120419.pdf (last visited June 6, 2012). "The guiding principles were transparency, non-discrimination and impartiality. These principles should be respected when awarding contracts within the public sector." *Id.* at 6 (citing Christopher H. Bovis, EC Public Procurement: Case-Law and Regulation 12 (2005)). *See also* Hettne, Legal Analysis, *supra*, at 7-8 (stating that non-discrimination on basis of nationality is a key principle of EU Law) (citing Case C-324/98, Telaustria and Telefonadress, 2000 E.C.R. I-10745, para. 60; order in Case C 59/00 Vestergaard, 2001 E.C.R. I-9505, para. 20; see also Case C 264/03 Comm'n v. France, 2005 E.C.R. I-8831, para. 32; and Case C 6/05 Medipac-Kazantzidis, 2007 E.C.R. I-4557, para. 33.).

and are applied in a non-discriminatory manner,[141] though they need not be economic considerations and can be environmental considerations.[142] In the absence of harmonisation (see below), EU member states can impose national environmental requirements for certain products, but this must not be in violation of EU law.[143] American states can do the same, but only if not pre-empted by U.S. federal law, and so long as it would not violate the Commerce Clause of the U.S. Constitution as impeding interstate commerce. Under EU law, member states can only create more stringent regulations if they are applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable for securing the attainment of the objective which they pursue, and do not go beyond what is necessary in order to attain it.[144]

Article 34 of the TFEU prohibits "[q]uantitative restrictions on imports and all measures having equivalent effect."[145] However, according to Article 36,

> [t]he provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health

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141 Hettne, Legal Analysis, *supra* note 140, at 1 ("If there are minimum requirements, they must be respected, but more stringent national measures are allowed if they comply with the Treaty provisions, the case-law and the general principles of law; they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it.").

142 Hettne, Legal Analysis, *supra* note 140, at 2 ("The Court of Justice of the EU has accepted that each of the award criteria used by the contracting authorities to identify the most economically advantageous tender must not necessarily be of purely economic nature. These requirements are easier to justify than admission conditions, selection criteria, technical specifications etc., which are capable of totally excluding tenderers that cannot meet them. However, an award criterion must not be formulated so that in practice it constitutes a disguised technical specification or similar. Particular caution is required when requirements are set higher than harmonised standards in EU law. It is difficult to tell when it is possible to go beyond such standards, but it should not be excluded for instance that it is permissible to encourage technical innovation or environmental precaution that goes beyond the harmonised requirements, provided that products or services that meet the harmonised requirements are not excluded from the procurement process.").

143 *Id.* at 9.

144 Case C-55/94, Gebhard, 1995 E.C.R. I–4165.

145 TFEU, art. 34, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF (last accessed June 12, 2012).

> and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[146]

In public procurement, it is permissible to insert criteria based on environmental considerations as long as they are compatible with Union law in general and the subject matter of the contract in particular. And pursuant to Article 11 of the TFEU,[147] the Member State regulations must be consistent with EU policy on sustainable development, which would include the two objectives of the proposed Directive on public procurement if passed.

The European Court of Justice (ECJ) "has established that contracting authorities are free to determine the factors under which the most economically advantageous offer is to be assessed and that environmental considerations could be part of the award criteria, provided they do not discriminate between alternative offers, and that they have been clearly publicised in the tender or contract documents."[148] But the ECJ remains concerned that including environmental factors will limit the consideration of alternatives that cannot meet these standards.[149] "Criteria relating to the environment, in order to be permissible as additional criteria under the most economically advantageous offer, must satisfy a number of conditions, namely they must be objective, universally applicable, strictly relevant to the contract in question, and clearly contribute an economic advantage to the contracting

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146 TFEU, art. 36.

147 TFEU, art. 11. ("Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.").

148 Christopher H. Bovis, EU Public Procurement Law 276-77 (2007) (citing Case C-513/99, Concordia Bus Filandia v. Helsingin Kaupunki et HKLBussiliikenne, 2002 E.C.R. I-7213). "In Concordia, the Court was asked inter alia whether environmental considerations such as low emissions and noise levels of vehicles could be included amongst the factors in the most economically advantageous criterion, in order to promote certain types of vehicles that meet or exceed certain emission and noise levels." *Id*. at 107.

149 *Id.* at 276-77. *See also* Bovis, *supra* note 148, at 279-80 ("It appears, however, that there is a limit to the permissibility of certain minimum ecological standards where the criteria applied restrict the market for the services or goods to be supplied to the point where there is only one tenderer remaining.") (citing Case 45/87, Comm'n v. Ireland, 1988 E.C.R. 4929).

authority."[150] Thus, one must implicitly question whether it is appropriate to use the public procurement model to achieve environmental, as opposed to economic, goals,[151] as opposed to general environmental regulation.[152] That said, the protection of the environment can be included amongst the factors which determine the most economically advantageous offer, and Article 11 of the TFEU (previously Article 6 in the Treaty of the European Community) requires environmental protection to be integrated into the other policies of the Union.[153]

Some disagreement exists as to how the ECJ should and will determine whether a given procurement rule violates the TFEU. Hettne proposes that because procurement "basically expresses fundamental internal market principles," whenever a procurement rule involves "cross-border interest," it should be interpreted in terms of whether it restricts one of the "four freedoms of movement – of good, persons, services and capital"[154] as well as the principle of harmonization (see below).[155] In the context of discussing the

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[150] *Id*. 277. *See also id.* at 279 ("The Court concluded that where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.").

[151] Cf. Bovis, *supra* note 148, at 277 ("The Court considered that in public procurement the criteria for the decision must always be of an economic nature. If the objective of the contracting authority is to satisfy ecological or other considerations, it should have recourse to procedures other than public procurement procedures.").

[152] Cf. Hettne, Legal Analysis, *supra* note 140.

[153] *See* Bovis, *supra* note 148, at 277. *See also id*. at 278 (citing *Beentjes*, para. 19, *Evans Medical and Macfarlan Smith*, para.42, and *SIAC Construction*, para. 36) ("In the light of Article 130r(2) EC and Article 6 EC, which lay down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, the Court concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility of the contracting authority using criteria relating to the preservation of the environment when assessing the economically most advantageous tender. However, that does not mean that any criterion of that nature may be taken into consideration by contracting authorities. While Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract; that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender.").

[154] Hettne, Legal Analysis, *supra* note 140, at 7.

[155] *Id.* at 6.

relevant factors that the ECJ would use to determine whether a procurement rule violates internal market principles, Hettne discusses the principle of proportionality that is typically applied to the analysis of trade restrictions.[156] The two-part proportionality test asks whether the restriction is "suitable to achieve a legitimate aim" and whether it is "necessary to achieve that aim" (whether it is the least restrictive way to achieve the aim).[157] Citing the *Gebhard* case, Hettne synthesizes the tests: restrictions of trade must: (1) "be applied in a non-discriminatory manner"; (2) "be justified by imperative requirements in the general interest"; (3) "be suitable for securing the attainment of the objective which they pursue"; and (4) "not go beyond what is necessary in order to attain it."[158] As proof that this test would apply not only to a member state's regulatory restriction of trade, but also to public procurement policies that could have the effect of restricting trade, Hettne refers to the *Contse* case.[159]

In *Contse*, a Spanish authority soliciting contracts for home respiratory equipment required that potential tenderers maintain offices in specified towns, and one award criterion was that the tenderer operate production facilities within 1000 miles of the province.[160] For Hettne, *Contse* demonstrates that the *Gebhard* test applies to procurement rules, and that the ECJ will add an additional test: whether the criteria are "linked to the objective of the contract and are suitable for ensuring that it is attained."[161] Thus, Hettne states:

> Neither the new provisions in the EU Treaties regarding environmental and social considerations nor the proposed directive on public procurement alter the present legal situation. However, these developments underline that the EU pursues a multitude of interests which are not only economic. The possibility for the Member States to promote environmental or social interests in public procurement in support of existing EU legislation is therefore increased.[162]

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156 *Id.*at 10.

157 *Id.*at 10.

158 *Id.*at 11.

159 *Id.*at 11.

160 *Id.*at 22 (*citing* Case C-234/03, *Contse and others v Ingesa* [2005] ECR I-9315).

161 *Id.*at 31.

162 *Id.*at 2.

So, while Hettne supports the new directive, he views it as merely restating existing law,[163] but suggests it is symbolically important in reaffirming and suggesting that environmental and social considerations can be made in the public procurement process.[164] Hettne believes it is permissible take non-economic concerns into account in public procurement without violating EU internal market law by defining the object (i.e., what to buy) carefully, by closely relating the concerns to other developments in EU law and policy (e.g., progress in the environmental field), and using selection criteria rather than obligatory conditions.

Hettne additionally argues that the principle of harmonisation must be considered when evaluating procurement rules. The EU may issue directives that indicate "total" or "minimum" harmonisation in a given field.[165] With a totally harmonised rule, a member state may not restrict movement of goods that meet the requirements of the rule, and may not allow products that fail to meet the requirements; with minimum harmonisation, the member state must respect the minimum level but may develop stricter standards than the EU directives in certain fields, such as environmental protection, labor conditions, and consumer protection.[166] Hettne cites *Medipac* as an example of the

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[163] Jörgen Hettne, *Strategic Use of Public Procurement – limits and opportunitites* (hereafter, "Strategic Use") (SIEPS 2013) (unpublished manuscript on file with author) ("…the [ECJ] has accepted, more or less explicitly, that when the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration environmental or social criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Union law, in particular the principle of non-discrimination.").

[164] *Id.* ("I therefore conclude that the 'strategic use of public procurement' is associated with corresponding limitations that applied previously under EU law. Accordingly, the proposed directive does not alter the present legal situation (outside the procurement directives) which means that the contracting authorities which impose environmental and social requirement must respect the EU law in general (the criteria used must be applied in a non-discriminatory manner, be justified by imperative requirements in the general interest, be suitable for securing the attainment of the objective which they pursue, and not go beyond what is necessary in order to attain it). However, these developments underline that the EU pursues a multitude of interests which are not only economic. The possibility for the Member States to promote environmental or social interests in public procurement in support of existing EU legislation will therefore increase.").

[165] Hettne, Legal Analysis, *supra* note 140, at 24.

[166] *Id.*at 27.

ECJ's application of harmonisation principles to procurement policies.[167] In *Medipac*, a public hospital set a higher standard for surgical sutures than the EU (which required only CE marking).[168] According to Hettne, the ECJ ruled against the hospital's procurement rule because it "question[ed] the validity" of the totally harmonised rule that deemed CE certified sutures acceptable.[169]

Caranta and Kunzlik criticize Hettne's argument that case law supports the complex assessment of procurement rules based on the *Gebhard* rule and harmonisation. Caranta argues that environmental and social considerations may be inscribed in procurement rules more liberally than in regulations by Member States precisely because the ECJ will *not* apply the general interest prong of the test as outlined by Hettne.[170] *Contse*, according to Caranta, has been infrequently cited in the subsequent case law and should not be taken as an indication that the ECJ will apply internal market principles when analyzing other procurement rules.[171] Kunzlik follows Caranta's lead and further clarifies that after considering whether a procurement rule has "cross border interest," the ECJ will inquire whether the rule relates to "what to buy" or "access to the contract" decisions.[172] Citing *Concordia Bus Finland*, Kunzlik argues that when a rule relates to "what to buy," rather than "access to the contract," the ECJ has upheld procurement rules that are non-discriminatory and transparent.[173] Kunzlik points to further case law to underscore that the ECJ has declined to consider the degree to which a procurement rule actually achieves its goal;[174] thus contradicting Hettne's argument that the *Gebhard* test, including the proportionality test, applies to procurement rules. Kunzlik further argues that *Medipac* does not stand for the proposition that

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167 *Id.*at 28 (citing C-6/05 *Medipac* [2007] ECR I-4557).

168 *Id.* at 29.

169 *Id.*at 30.

170 Roberto Caranta, *On Jörgen Hettne's Legal Analysis of the Possibilities of Imposing Requirements in Public Procurement that Go Beyond the Requirements of EU Law*, at 1 (2012), http://upphandlingsutredningen.se/wp-content/uploads/2012/04/R-Caranta-Commentaries.pdf.

171 *Id.* at 1-3.

172 Peter Kunzlik, *Comment on Professor Jörgen Hettne's Paper, 'Legal Analysis of the Possibilities of Imposing Requirements in Public Procurement that Go Beyond the Requirements of EU Law' and Professor Roberto Caranta's Commentary*, at 2, http://upphandlingsutredningen.se/en-till-kommentar-pa-jorgen-hettnes-analys-prof-p-kunzlik.

173 *Id.*at 2-3 (citing *Corcordia Bus Finland*).

174 *Id.*at 3 (citing *EVN*).

harmonisation principles apply to procurement rules, but rather, the ECJ struck down the hospital's rule because the hospital had not been transparent about the technical specification for the sutures, but rather had originally allowed for sutures that bore the CE marking.[175] Kunzlik emphasizes that to apply harmonisation principles to the analysis of procurement rules would be "perverse" because it would "distort competition in the internal market by preventing innovative firms from reaping the rewards of responding to demand by means of dynamic competition: in short it would rig the internal market, so far as public contracts are concerned, in favour of less innovative firms."[176] According to Kunzlik, the current test for procurement rules is whether (1) the rule is non-discriminatory and (2) transparent; whereas if the proposed directive is enacted, the test will add the element of proportionality, thus bringing it closer to Hettne's description of the current test.[177]

While apparently opposed on their face and based on different perspectives, the arguments outlined by Hettne and Caranta/Kunzlik may not be so inconsistent in practice as all accept that using environmental and social considerations in public procurement is permissible. However, the debate highlights the inconsistency of the ECJ in its jurisprudence on procurement rules and/or disagreement among scholars in interpreting existing case law.[178] Kunzlik's distinction between "what to buy" and "access to contract," essentially paralleled in Hettne's distinction between "admission conditions" and "evaluation criteria,"[179] can be compared to the distinction between the state as regulator and the state as market participant in American dormant commerce clause jurisprudence. The fundamental difference between the European and American distinctions is that the ECJ will not uphold rules that are discriminatory even if they are "what to buy" (i.e., "market participant")

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175 *Id.*at 5.

176 *Id.*at 7.

177 *Id.*at 8.

178 Hettne, *Strategic Use, supra* note 163 ("Overall, it is difficult to give a clear answer regarding how much space contracting authorities dispose in order to support social or environmental objectives.").

179 Hettne, Legal Analysis, *supra* note 140, at 31. A comparison can also be seen in Hettne's claim that contracting authorities must carefully define what they really want (the subject matter). According to Hettne in some cases it may be perfectly legitimate to define the object of the contract to a very narrow category of goods or services and also to specify that a particular social or environmental policy is the object of the procurement process. Hettne, *Strategic Use, supra* note 163.

decisions, whereas American courts will allow discriminatory restrictions on interstate trade as long as a state is acting as a market participant rather than as a regulator.

As a result of this public procurement debate under EU law and the resulting question of the impact of the proposed directive if implement, Hettne is correct when he asserts that:

> A question that should be raised is therefore whether the Directive actually allows increased space for environmental and social considerations than hitherto.[180]

Caranta and Kunzlik's view of the law creates greater "federalism" in the EU in allowing environmental considerations to play a role in public procurement and thus the directive may actually raise the barriers to "environmental federalism." Meanwhile, Hettne, in viewing the directive as simply codifying current law, is far more concerned with undermining the EU internal market.[181]

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[180] Hettne, *Strategic Use, supra* note 163.

[181] *Id.* ("The contracting authorities within the EU can therefore not be given full freedom to set social and environmental requirements for the award of a public contract. Such a development would undermine the internal market which the EU has built up with great effort over more than 50 years, since a relatively large share of the total trade in the market is covered by public contracts.").

4 Comparing EU and U.S. law as it relates to Market Participant Exception and environmental considerations in public procurement

The dominant legal and policy question in comparing U.S. and EU law as it relates to public procurement, geographic restrictions and the environment is whether it is better (and lawful) for states to create general environmental standards to achieve ecological goals or to do so through use of a market participant exception. Granted, these options may not be mutually exclusive.

The market participant option, both in terms of states preferring goods from local sources or goods with certain environmental characteristics, exists in the U.S. In virtually any public procurement decision the dormant commerce clause analysis does not apply and, thus, the decision will not be struck down, though it may create retaliatory measures from other states.[182]

Any such similar broad-based market participant exception in the realm of public procurement would be problematic in the EU. Unlike the market participant exception in U.S. law, when Member States enter the market through public procurement, national law favoring local products or food would clearly violate EU trade law, though the inclusion of environmental preferences proves a more complex case.

A market participant exception allowing discrimination in favor of entities from the EU Member State would contradict a goal of European integration, namely that national regulations merely were proxies from national economic protectionism.[183] It has been noted that there are arguments in favor of allowing such a market exception for Member States. "Should not contracting authorities at least under certain circumstances be considered as

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[182] *See, e.g.*, Karl Manheim, *New-Age Federalism & Market Participant Doctrine*, 22 Ariz. St. L.J. 559 (1990).

[183] Hettne, Legal Analysis, *supra* note 140, at 9 ("This meaning of the prohibition of discrimination was very important in the past because there was a significant element of national protectionism concealed in national regulations when the European integration process began.").

simply purchasers and be entitled to buy what they want?"[184] Why should decisions on whether to make a purchase and what to purchase be treated as hindrance to trade, even when they are discriminatory in effect?[185] Regardless, consistent with the view of other scholars,[186] EU law contains no market participant exception for its member states in relation to geographic preferences. However, as discussed above, EU law and the proposed Directive on public procurement will allow EU Member States to include environmental considerations, to the extent they relate to economic outcomes, in the public procurement process.[187]

The next issue then is, absent a market participant exception, can American states and EU Member States create general state/national regulations requiring environmental characteristics for the product to be involved in the state's commerce, or, more narrowly, could such standards merely be adopted in the scope of public procurement? Looking at the United States:

> Most state legislation is neither proprietary nor discriminatory…State legislation of this kind is not as suspect as legislation that is discriminatory on its face, in its intent or in its application. Nevertheless, there is a real risk that a state may pass legislation without adequately considering its

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184 *Id.* at 37 ("There has been a discussion in the doctrine whether it is reasonable always to see the contracting authorities as part of the Member States and to require that they assume the same responsibility for the functioning of the internal market as the Member States are required to do. Should not contracting authorities at least under certain circumstances be considered as simply purchasers and be entitled to buy what they want? If contracting authorities were considered primarily as economic operators in a market when purchasing goods and services and public works, it could be argued that their choices of product features would fall outside Union law.").

185 *Id.*at 37 ("In the book Social and Environmental Policies in EC Procurement Law, Arrowsmith argues, together with Peter Kunzlik, that decisions on whether to make a purchase and what to purchase should not generally be treated as hindrance to trade, even when they are discriminatory in effect."). *See also Id.* at 37 ("A distinction between certain activity of the government as a 'buyer' and its other procurement activity, including activity as a regulator, according to the authors, gives reasons for a lower degree of scrutiny than is applied to many governmental decisions affecting the internal market.").

186 *Id.*at 38 ("However, in my opinion, this view is not supported by the present state of Union law which does not contain a market-participant exception and has a different objective and origin than American law.").

187 European Commission, Buying Green! A Handbook on Environmental Public Procurement (2004); European Commission, Buying Social, A Guide to taking account of social Considerations in Public Procurement (2010).

> impact elsewhere in the country. In addition, the risk also exists that a state will use what appears to be nondiscriminatory legislation as a covert means of burdening out of state businesses.[188]

A U.S. state, absent preemption by federal law, can adopt "even-handed" regulation or legislation that leads to environmental benefits,[189] unless the burdens of the law are clearly excessive compared to the benefits (i.e., the *Pike* test discussed above).[190]

The proposed EU public procurement Directive certainly would allow Members States to create even-handed environmental criteria for purchasing within the scope and context of public procurement. An EU member state could also adopt general environmental regulations, though it may perhaps face even greater risk than its American counterparts of pre-emption by EU law given the baseline treaty obligations.

Upon analysis, the two systems are actually more similar than different. While the market participant exception remains a legal non-starter for Member States within the EU, both American states and EU Member States can take environmental criteria into consideration when engaging in public procurement (though the EU administrative burdens are greater in the absence of the market participant exception) and both can pass generally applicable environmental legislation (if not pre-empted and not used as a disguise for discriminatory economic protectionism). In terms of generally applicable laws, American states remain subject to federal preemption and the *Pike* test – environmental laws are upheld unless that place an undue burden on interstate commerce.[191] Similar to *Pike,* under the EU law *Gebhard* factors, member states can only create more stringent regulations if they are applied in a non-discriminatory manner, justified by imperative requirements in the

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188 Farber, *supra* note 100, at 11-12: 21. A leading example of its application is *Kassel v. Consolidated* Freightways Corp., 450 U.S. 662 (1981) (striking down state restrictions on the use of certain extra-long truck-trailer combinations).

189 *See* Clover Leaf Creamery, 449 US 456 (1981) (upholding environmental regulation requiring biodegradable milk bottles); Exxon Corp v. MD, 437 U.S. 117 (1978) (upholding state law prohibiting producers from operating retail gas stations and requiring gasoline suppliers to extend uniform price reductions to all stations they supply).

190 Pike v. Bruce Church, 397 U.S. 137 (1971).

191 *Pike,* 397 U.S. at 142.

general interest, suitable for securing the attainment of the objective which they pursue, and do not go beyond what is necessary in order to attain it.[192]

Thus, the market participant exception/public procurement debate arises against a backdrop of the conflict between environmental protection/social justice and the free movement of goods (or what might be other stated as American commerce clause/EU internal market concerns), and continues the general debate of whether an American state or EU Member State is acting as a market participant versus state as a market regulator. This distinction, while sometimes difficult to assess in the U.S., may be more difficult to determine in Europe given the strong role of the welfare state.

Going further, while using public procurement to achieve environmental gains may have a better chance for survival under Kunzlik's interpretation of the law, if such decisions have to go through the *Gebhard* test (under Hettne's interpretation or as a result of the new directive), then such use may be functionally market regulating anyway. Does or can public procurement have so much impact that it is subject to harmonization? Is general environmental regulation that is automatically subject to harmonization the better route? Stated another way, if a state wants to buy widgets made of recycled materials, this is related to the subject matter of the contract and may be a permissible inclusion of environmental considerations in public procurement under any interpretation of the law due to its narrow and specific scope. But requiring life-cycle analysis for the widgets implicates much more than the widget itself (e.g., factory outputs, raw material inputs, and disposal) and raises the issues of hindrances on the internal market. Going further, a member state that passes a regulation or law that demands recycled materials or life-cycle analysis of all widgets sold in the country clearly raises harmonization concerns, though this may be the preferred route from a pure public policy statement.

This conflict between environmental protection and free movement of goods (market protection) is managed in different ways depending on whether there is total harmonization for the benefit of market interest (e.g., high EU-wide

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[192] Case C-55/94, Gebhard, 1995 E.C.R. I–4165.

environmental standard),[193] minimum harmonization (e.g., low baseline EU-wide environmental standard that member states can make stricter), or potential conflict with the EU treaty despite the lack of EU regulatory standards.[194] Thus, the question remains to what extent, pursuant to EU procurement or preemption law, Member States can promote environmental sustainability through purchase and legislation. This question persists in the U.S., though the doctrines remain less opaque compared to the EU.

[193] In the so-called *Salmonella case*, Case C-111/03, *Commission v Sweden* [2005] ECR I-8789, the ECJ ruled that Sweden could not conduct further inspection of imported meat and eggs because EU law was harmonized in that area.

[194] *See* Jan H. Jans & Hans H.B. Vedder, European Environmental Law (2012).

5 Conclusions

Despite its risks, the market participant exception has proven relatively successful in the United States to promote local interests, including the environment, and economies, with a growing interests in promoting local food systems. American states should endeavor to become more creative in establishing ecological criteria for public procurement in taking advantage of this exception to dormant commerce clause analysis. However, the geographic preferences often used in market participant exceptions under U.S. law are antithetical to many of the underlying goals of the founding of the European Union. With revisions in EU public procurement law underway, it will be worthwhile for the EU to experiment with the inclusion of environmental criteria in their formalized and non-discriminatory public procurement process.

The EU might also increase general environmental standards for all durables and consumables within the EU, making them applicable to all member states to ensure environmental sustainability in the life-cycle of all products. The same could be said for the U.S., but the EU's founding documents provide a much better foundation for environmental protection compared to the U.S., which has passed very few environmental laws since the environmental legislation boom of the 1970s.

Given that new, national environmental legislation remains unlikely due to the nature of governmental structures, the potential role of environmental federalism remains greater in the United States than Europe. American states should begin to increase environmental standards when products enter state borders to further the economic and environmental interests of the states. The EU should continue to support EU-wide environmental law and regulation. Regardless of the future of U.S. federal environmental legislation and EU environmental law, both American states and EU Member States can and should take environmental considerations into account in the public procurement process.

Whether or not the market participant exception (MPE) really gives an advantage to the U.S. in allowing states to use procurement rules to achieve environmental improvements depends on the Hettne-Caranta/Kunzlik debate.

If Hettne is correct that the case law indicates that procurement policies, in the absence of a MPE, will be analyzed according to the relatively strict scrutiny of the *Gebhard* test and must be attuned to the level of harmonisation regarding the good or service that is contracted, then it is true that European member states are limited in using procurement rules to pursue environmental policies, and the new directive, if enacted, may lessen (even if symbolically) such limitations. This would counsel in favor of enacting the directive. If, on the other hand, Caranta and Kunzlik are correct that the *Contse* case does not indicate that the ECJ will analyze procurement rules under internal market principles (especially proportionality), and that the *Medipac* case does not indicate that the ECJ will subject procurement rules to analysis under the principles of harmonisation, then the current case law does already allow for member states to use procurement rules to achieve environmental goals. Then the question becomes: Is the proposed directive necessary, or might it create more harm than good in promoting environmental considerations in public procurement? Moreover, while Hettne interprets the new directive as strengthening (at least symbolically) the ability of member states to restrict trade in the name of environmental considerations, Kunzlik argues that the new directive actually adds the proportionality criteria. So, the issue of the implications of the proposed directive rests on both interpretation of EU law and the views about the importance of conformity within the internal market.

Regardless of whether the MPE or its nearest equivalent in European law (Hettne's "evaluation criteria"/Kunzlik's "what to buy" decision) is used to allow procurement rules that restrict interstate/cross-border trade, states (in both the U.S. and Europe) may better achieve environmental policies through more direct and general regulation of the goods and services in question. Standing in the way of the success of such regulations are the high bars set by the dormant commerce clause and preemption doctrine in the U.S. and the internal market principles and harmonisation doctrine in the E.U. If states are to create innovative solutions to environmental problems, the evaluation of restrictions of trade must grant more weight to environmental standards as a legitimate government interest.

Sammanfattning på svenska

I arbetet med att främja miljöintressen och hjälpa den lokala ekonomin, kan amerikanska delstater anta lagstiftning för att uppmuntra och i vissa fall kräva att lokala myndigheter köper produkter som har tillverkats i delstaten (dvs. en geografisk preferens). Det kan ske med hänvisning till undantaget för s.k. marknadsdeltagande (*market participant exception*) då delstaterna inte är bundna av samma regler som när de beslutar om föreskrifter som påverkar handeln enligt den så kallade *dormant commerce clause*.

Ett sådant agerande, som alltså möjliggör lokala hänsyn vid upphandling, är dock inte lagligt inom Europeiska unionen (EU). Men även om detta undantag inte återspeglas i europeisk rätt, kan både amerikanska delstater och EU:s medlemsstater likväl använda offentlig upphandling för att uppmuntra eller till och med kräva att miljövänliga varor köps in. Både i enskilda upphandlingar eller genom att föreskrifter antas som är tillämpliga på alla produkter som säljs inom staten.

I denna rapport jämförs de olika förhållandena enligt amerikansk rätt med EU-rätten och författaren diskuterar möjligheterna för offentliga myndigheter att ställa miljökrav vid upphandling av produkter. En fråga som ställs är om offentliga myndigheter bör få ställa miljökrav när de själva agerar som konsumenter på marknaden och alltså inte uppträder som myndigheter i traditionell bemärkelse. Finns det skäl att inte låta myndigheterna göra den typ av val som den enskilde konsumenten tillåts att göra? Med tanke på att EU för närvarande ser över sin upphandlingslagstiftning, bidrar rapporten med en juridisk analys som kan tjäna som vägledning när utrymmet för sociala och miljömässiga krav ska fastställas i EU:s lagstiftning om offentlig upphandling.

Författaren konstaterar att även om undantaget för marknadsdeltagande (*market participant exception*) kan missbrukas, har det fungerat relativt väl i USA. Amerikanska delstater bör emellertid sträva efter att bli mer kreativa när de fastställer ekologiska kriterier vid offentlig upphandling och dra mer nytta av detta undantag. Men de lokala hänsyn som ofta rättfärdigas med stöd av undantaget i amerikansk rätt står ofta i motsättning till många av de grundläggande målen och bestämmelserna i EU:s rättsordning.

Mot bakgrund av den nu pågående revideringen av EU:s upphandlingslagstiftning menar författaren att man inom EU bör undersöka och pröva möjligheterna att införa ytterligare miljökriterier i det formaliserade upphandlingsförfarandet, under förutsättning att de inte är diskriminerande.

EU skulle vidare kunna överväga att inför ambitiösare miljökrav för alla kapitalvaror och förbrukningsvaror inom EU som blir tillämpliga i alla medlemsstater och därmed säkerställa en hållbar miljö för produkternas hela livscykel. Detsamma kan sägas om USA, men EU:s grundfördrag ger enligt författaren ett mycket starkare stöd för miljöskyddande lagstiftning än USA, som har antagit ytterst lite miljölagstiftning sedan den snabba framväxten av miljöregler på 1970-talet.

Med tanke på att det alltså är osannolikt att ny miljölagstiftning antas, är rollen för lokala myndigheter större i USA än i Europa när det gäller att tillgodose miljöintresset. Amerikanska delstater bör därför höja miljökraven när produkter passerar delstatsgränsen i syfte att främja statens ekonomiska och miljömässiga intressen. EU bör å sin sida fortsätta att anta miljölagstiftning som blir gällande i alla EU-länder. Oavsett hur det blir i framtiden med miljölagstiftning på federal nivå i USA och med EU:s miljölagstiftning, bör och kan amerikanska delstater och EU: s medlemsstater ta mer hänsyn till miljön än hittills vid offentlig upphandling.

I såväl USA som Europa kan delstaterna/medlemsstaterna bättre uppnå de miljöpolitiska målen om allmänt tillämpliga bestämmelser antas som direkt relaterar till de varor och tjänster det gäller. Svårigheten att fastställa sådana regler för delstater och medlemsstater beror på de stränga villkor som följer av skyldigheten att inte inskränka handeln mellan delstater (*dormant commerce clause*), att det inte är tillåtet att reglera områden som redan omfattas av federal lagstiftning (*preemption doctrine*) samt att motsvarande grundprinciper gäller för den inre marknaden och harmoniseringsverksamheten inom EU. Om staterna ska ha möjlighet att hitta innovativa lösningar på dagens miljöproblem, måste miljöintresset tilldelas större vikt än hittills i förhållande till handelsintresset.

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