den upon that commerce if the State restricts its trade to its own citizens or businesses within the State." [1026]

Affirming and extending this precedent, the Court held that a state operating a cement plant could in times of shortage (and presumably at any time) confine the sale of cement by the plant to residents of the state.[1027] "[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." [1028] It is yet unclear how far this concept of the state as market participant rather than market regulator will be extended.[1029]

The Congressional Authorization Exception.—The Supreme Court has heeded the lesson that was administered to it by the Act of Congress of August 31, 1852,[1030] which pronounced the Wheeling Bridge "a lawful structure," thereby setting aside the Court's determination to the contrary earlier the same year.[1031] The lesson, subsequently observed the Court, is that "[i]t is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce." [1032] Similarly, when in the late 1880s and the early 1890s statewide alcohol prohibition laws began making their appearance, Congress again authorized state laws that the Court had held to violate the dormant commerce clause.

For instance, although the Court had held that a state was entitled to prohibit the manufacture and sale of intoxicants within its boundaries,[1033] it contemporaneously laid down the rule, that, so

---

[1026] 426 U.S. at 808.

[1027] Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

[1028] 447 U.S. at 436–37.

[1029] *See also* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (city may favor its own residents in construction projects paid for with city funds); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (illustrating the deep divisions in the Court respecting the scope of the exception).

[1030] Ch. 111, 10 Stat. 112, § 6.

[1031] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852), statute sustained in Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). The latter decision seemed facially contrary to a dictum of Justice Curtis in Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299, 318 (1851), *and cf.* Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 263 n.4 (1987) (Justice Scalia concurring in part and dissenting in part), but if indeed the Court is interpreting the silence of Congress as a bar to action under the dormant commerce clause, then when Congress speaks it is enacting a regulatory authorization for the states to act.

[1032] Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883).

[1033] Mugler v. Kansas, 123 U.S. 623 (1887). Relying on the distinction between manufacture and commerce, the Court soon applied this ruling to authorize states to prohibit manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888).