tions about this power can be discerned in the opinions for the Court,[1023] although individual Justices, to be sure, have urged renunciation of the power and remission to Congress for relief sought by litigants.[1024] This, however, has not been the course that has been followed.

The State Proprietary Activity (Market Participant) Exception.—The "dormant" commerce clause is not, however, without exceptions. In a case of first impression, the Court held that a Maryland bounty scheme by which the state paid scrap processors for each "hulk" automobile destroyed is "the kind of action with which the Commerce Clause is not concerned." [1025] As first enacted, the bounty plan did not distinguish between in-state and out-of-state processors, but it was amended in a manner that substantially disadvantaged out-of-state processors. The Court held "that entry by the State itself into the market itself as a purchaser, in effect, of a potential article of interstate commerce [does not] create[ ] a bur-

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[1023] *E.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Natural Resources Dep't, 504 U.S. 353, 359 (1992); Quill Corp. v. North Dakota, 504 U.S. 298 (1992); Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992). Indeed, the Court, in Dennis v. Higgins, 498 U.S. 439, 447–50 (1991), broadened its construction of the clause, holding that it confers a "right" upon individuals and companies to engage in interstate trade. With respect to the *exercise* of the power, the Court has recognized Congress' greater expertise to act and noted its hesitancy to impose uniformity on state taxation. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978). *Cf. Quill Corp.*, 504 U.S. at 318.

[1024] In McCarroll v. Dixie Lines, 309 U.S. 176, 183 (1940), Justice Black, for himself and Justices Frankfurter and Douglas, dissented, taking precisely this view. *See also* Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) (Justice Black dissenting in part); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939) (Justice Black dissenting); Southern Pacific Co. v. Arizona, 325 U.S. 761, 784 (1945) (Justice Black dissenting); id. at 795 (Justice Douglas dissenting). Justices Douglas and Frankfurter subsequently wrote and joined opinions applying the dormant commerce clause. In Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954), the Court rejected the urging that it uphold all not-patently discriminatory taxes and let Congress deal with conflicts. More recently, Justice Scalia has taken the view that, as a matter of original intent, a "dormant" or "negative" commerce power cannot be justified in either taxation or regulation cases, but, yielding to the force of precedent, he will vote to strike down state actions that discriminate against interstate commerce or that are governed by the Court's precedents, without extending any of those precedents. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 94 (1987) (concurring); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259 (1987) (concurring in part and dissenting in part); Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) (concurring in judgment); American Trucking Assn's v. Smith, 496 U.S. 167 (1990) (concurring); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Justice Scalia concurring) (reiterating view); Oklahoma Tax Comm'n v. Jefferson Lines, Inc.., 514 U.S. 175, 200–01 (1995) (Justice Scalia, with Justice Thomas joining) (same). Justice Thomas has written an extensive opinion rejecting both the historical and jurisprudential basis of the dormant commerce clause and expressing a preference for reliance on the imports-exports clause. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (dissenting; joined by Justice Scalia entirely and by Chief Justice Rehnquist as to the Commerce Clause but not the Imports-Exports Clause).

[1025] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805 (1976).