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COMMENT

**Taking Out the Trash — Where Will We
Put All This Garbage?**

Daniel M. Weisberg

I. Introduction

America is a throw away society. Over the years we have utilized many disposable items, such as lighters, diapers, and cameras.¹ The out of sight, out of mind mentality has finally caught up with society. While the garbage is carted away, and therefore disposed to the naked eye, most of this garbage ends up in a local landfill.² Recent figures estimate that Americans generated approximately 180 million tons of non-hazardous solid waste in 1989.³ Eighty percent of all trash works its way to a landfill as its final resting place, of which many are already filled to capacity.⁴ Unfortunately, years of poor plan-

1. See Jonathan P. Meyers, *Confronting the Garbage Crisis: Increased Federal Involvement As a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567 (1991).

2. The correct terminology is "sanitary landfill," and is described as "a system of trash and garbage disposal in which the waste is buried between layers of earth" WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 672 (1983).

3. See UNITED STATES EPA, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE ES-3 (1990).

4. See Meyers, *supra* note 1, at 570.

ning and lack of foresight have caught up with the American throw away lifestyle. There has been a tremendous decrease in the amount of active landfill space available, mainly due to the serious environmental and health hazards posed by existing landfills, many of which closed because they could not meet increasingly stringent regulations.⁵ With fewer landfills operational, many communities are faced with limited choices. Particularly in the eastern states, there were few options. As the number of available landfills decreased, the search for practical solutions has increased. More and more, communities have turned to waste reduction and recycling,⁶ but these options are long range alternatives that will not serve to alleviate the landfill crisis today. Unfortunately, most plans for alleviating the solid waste crunch take time, a luxury many communities cannot afford.⁷ Attempts to create more landfill space are often met with disdain by local residents, and there are fewer parcels of land available for consideration when siting a new landfill.⁸ To some communities, the only viable al-

5. New Jersey landfills decreased from over 400 active sites before 1970 to 12 by 1989. See *id.* at 571. In New York, active landfills decreased from 600 in 1980 to 188 in 1989. Predictions are that New York could run out of landfill space as early as 1995. See Joseph Forti, *Solving the Solid Waste Crisis in New York State*, 61 N.Y. ST. B.J. 30, 31 (July 1989). Nationwide, an estimated 14,000 landfills closed between 1978 and 1988. See Bradford C. Mank, *Out-of-State Trash: Solid Waste and the Dormant Commerce Clause*, 38 WASH. U. J. URB. & CONTEMP. L. 25, 41 (1990) (citing Kevaks and Anderson, *States as Market Participants in Solid Waste Disposal Services - Fair Competition or Destruction of the Private Sector*, 18 ENVTL. L. 779-82 (1988)).

6. The Environmental Protection Agency (EPA) has formulated an integrated waste management strategy, which combines a variety of waste management practices to safely handle the municipal waste stream, with minimal adverse impact on human health and the environment. This strategy includes source reduction, which minimizes the volume and level of toxics in products at the manufacturing level; recycling of materials, including composting of yard wastes; waste combustion (incineration) with energy recovery capabilities; and land disposal. See OFFICE OF SOLID WASTE, UNITED STATES EPA, *THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION* (1989); see also *SITES FOR OUR SOLID WASTE*, *infra* note 8.

7. Alternatives to landfill disposal include waste reduction, recycling, or burning garbage. See Meyers, *supra* note 1, at 570.

8. The acronym NIMBY (not in my backyard) has been coined to describe the feelings of most residents when a landfill is to be sited in their community. The not in my backyard syndrome is, however, only one of many considerations that interplay when attempting to site a new landfill. Other factors include economic, health and

ternative is to ship out the trash. Many municipalities must ship their trash to other localities while they formulate plans for long range solutions. Sending garbage to other counties within a state, to another state, or to international destinations is not always a welcome decision for the receiving locality. In one highly publicized debacle, a barge loaded with 3,186 tons of waste from New York City became a symbol of the magnitude of the waste disposal problem, as it searched for a new home.⁹ After 6,000 miles and five months at sea, the barge eventually unloaded its cargo back in New York, having been rejected by at least six states and three countries.¹⁰ A similar journey by a barge carrying 14,000 tons of incinerator ash from Philadelphia points to an ever increasing wariness when it comes to accepting others' trash.¹¹

This paper will examine the shipment of solid waste between communities as an answer to the landfill crisis, and the competing trends associated with the free flow of garbage across state or county borders. It will also examine the attempts to block the flow of waste at the interstate or intrastate level, as well as looking at those communities that welcome the trash, or even mandate that it stay at home. Section II looks at the constitutional barriers which prevent the barricading of trash at state lines through the Commerce Clause of the United States Constitution. Section III examines some alternative approaches enabling governments to maneuver around the Commerce Clause prohibitions. Section IV evaluates the federal approach to solid waste via the Resource Con-

safety, and environmental concerns. See OFFICE OF SOLID WASTE, UNITED STATES EPA, *SITES FOR OUR SOLID WASTE: A GUIDEBOOK FOR EFFECTIVE PUBLIC INVOLVEMENT* (1990).

9. Robert D. McFadden, *Garbage Barge Returns in Search of a Dump*, N.Y. TIMES, May 18, 1987, at A1.

10. *Id.* The barge was rejected by North Carolina, Alabama, Mississippi, Louisiana, Texas and Florida, as well as Mexico, Belize and the Bahamas. *Id.* The actual journey at sea was eight weeks, however, the remainder of the five month period was spent anchored in a local harbor while legal battles were fought over the fate of the garbage. See *Garbage Barge's Odyssey Over — 155 Day Dump-Site Hunt Ends at Brooklyn Incinerator*, CHI. TRIB., Aug. 25, 1987, at 5.

11. See Julianne I. Adler, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 AM. U. L. REV. 885, 885 (1991).

servation and Recovery Act. Section V looks at those communities that welcome trash, and the reasons behind the acceptance of trash others do not want. Section VI concludes with some thoughts about the continuing solid waste crisis, and the importation problem.

II. The Constitutional Barriers to Waste Transportation

Any attempt to interfere with the free flow of waste between states raises a constitutional question, since the movement of trash has been held to be an item of trade and, as such, within the protection of the Commerce Clause.¹²

A. The Interstate Blockade

As states became increasingly aware of the growing shortage of landfill space, they attempted to hoard the remaining space by blockading importation of waste that originated outside state borders. Challenges to these state laws were quickly upheld by the courts, especially when the regulations were economic, protectionist measures.¹³ Perhaps the most well known of the cases in this area, and the starting point for constitutional analysis, is *City of Philadelphia v. New Jersey*,¹⁴ wherein the State of New Jersey attempted to stop importation of trash into New Jersey landfills. The Supreme Court in *City of Philadelphia* held that enacting such a discriminatory ban against out-of-state solid waste, while placing no similar restrictions on trash generated within the

12. The Commerce Clause of the United States Constitution provides "[t]he Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3. It has been held to be restrictive of otherwise permissible state regulation, even in the absence of a conflicting federal statute, if the regulation interferes with interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). These negative restrictions by implication are referred to as the dormant Commerce Clause. See generally Mank, *supra* note 5, at 28.

The Supreme Court has defined "waste" as a product within the meaning of interstate commerce, and decreed that "[a]ll objects of interstate trade merit Commerce Clause protection . . ." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

13. See, e.g., *City of Philadelphia*, 437 U.S. at 624.

14. 437 U.S. 617.

state, violated the dormant Commerce Clause of the United States Constitution.¹⁵ While there are no direct prohibitions contained in the Commerce Clause itself, the provisions implied in the dormant Commerce Clause forbid states from substantially interfering with the free flow of interstate commerce.¹⁶ The Court said that a state could not discriminate against waste merely based on its point of origin, if such discrimination burdens interstate commerce.¹⁷ There was no reason why the out-of-state waste should be treated differently from the waste generated within the state.¹⁸ New Jersey argued that the statute had a legitimate local purpose — to protect the public health and safety — and that any effect on interstate commerce was incidental; therefore, the statute should be upheld unless the burden imposed on commerce was clearly excessive in relation to the putative local benefits.¹⁹ This rationale was rejected by the Court which found that motive was irrelevant when the purported regulation is facially discriminatory.²⁰ The Court stated that absence of protectionist purpose does not establish the validity of the regulation because “the evil of protectionism can reside in legislative means as well as legislative ends.”²¹

The degree of impact the holding in *City of Philadelphia* actually has is questionable since the Court only addressed private landfills.²² The Supreme Court expressly left open the question whether a state could discriminate vis-à-vis imported trash when the government owns or operates a landfill.²³ Since eighty-one percent of all landfills are government owned or operated,²⁴ it would seem that *City of Philadelphia* has a loophole big enough to drive a garbage truck through.

15. *Id.* at 629.

16. *Id.* at 623; see also *supra* note 12.

17. *City of Philadelphia*, 437 U.S. at 626-27.

18. *Id.* at 629.

19. *Id.* at 624; see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

20. *City of Philadelphia*, 437 U.S. at 627.

21. *Id.* at 626.

22. *Id.* at 627.

23. *Id.* at 627 n.6.

24. See *Mank*, *supra* note 5, at 41.

1. The Market Participant Doctrine

In addressing whether a state which owns or operates a landfill may discriminate against imported waste, the courts have applied the market participant doctrine.²⁵ Where a state is itself participating in the market, and is not regulating the industry, but is acting as another consumer competing in the free market, it may lawfully discriminate on behalf of its citizens.²⁶

This doctrine was originally recognized and applied in *Hughes v. Alexandria Scrap Corp.*²⁷ In *Alexandria Scrap*, the State of Maryland effectively discriminated against out-of-state scrap haulers to the benefit of local haulers, by requiring stricter title documentation from those out of state who wished to buy junk cars in Maryland and collect on state offered bounties paid to haulers of junk cars which were previously titled in Maryland.²⁸ The Supreme Court found that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."²⁹ The Supreme Court revisited

25. See, e.g., *Swin Resource Sys. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), cert. denied, 493 U.S. 1077 (1990); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Sys. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127 (D. Or. 1986), aff'd, 820 F.2d 1482 (9th Cir. 1987); *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Comm'rs v. Stevens*, 473 A.2d 12 (Md. 1984).

26. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980).

27. 426 U.S. 794 (1976).

28. *Id.* at 796-802. Maryland had a policy of paying a bounty to scrap haulers who removed abandoned vehicles that had previously been titled in Maryland. In 1974, the state legislature passed an amendment requiring certain documentation when processing hulks (abandoned cars over eight years old), which constituted the great majority of abandoned, and therefore, processed vehicles. See MD. ANN. CODE, art. 66½, § 11-1002.2(f)(5) (repealed 1977). The in-state processors were required to produce a single document in which the person delivering the hulk to the processor certified his right to the hulk and agreed to indemnify the processor from third-party claims arising from the destruction of the vehicle. *Alexandria Scrap*, 426 U.S. at 801. The out-of-state processor was required to submit documentation relating to valid title for the hulk, a much tougher standard of proof, which was a prerequisite for collecting a bounty from Maryland. *Id.* at 801-02.

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

the market participant doctrine in *Reeves, Inc. v. Stake*,³⁰ wherein South Dakota discriminated against out-of-state purchasers of cement from state plants. By restricting the sale of the cement to state residents, the state was merely acting as a market participant, and thus was not violating the provisions of the dormant Commerce Clause.³¹ The Court found "no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market."³² The market participant doctrine has also been held to allow states to discriminate against waste from out-of-state, even where the only landfill in the destination state is state owned or operated.³³

However, the market participant doctrine does have its limitations. These limits were defined in *South-Central Timber Development, Inc. v. Wunnicke*,³⁴ where the State of Alaska passed legislation requiring timber purchased within the state to be processed in the state before shipment out of state.³⁵ The Supreme Court declined to extend the market participant doctrine because it found Alaska to be a market participant in the timber sales market, not the timber

30. 447 U.S. 429 (1980).

31. *Id.* at 440. South Dakota had supplied both residents and non-residents with cement from its state run plant for over 50 years until its supply could not keep up with the demand for cement. As a result, the South Dakota State Cement Commission instituted a policy of supplying only state residents with cement from the plant, with any excess volume available to non-residents on a first come, first served basis. *Id.* at 432-33. *Reeves, Inc.*, a non-resident of South Dakota, had been purchasing 95% of its cement from the plant, and was forced to cut its production by 76% after the Commission's policy took effect. *Id.* at 433.

32. *Id.* at 437; see also *White v. Massachusetts Council of Constr. Workers*, 460 U.S. 204 (1983) (upholding [under the market participant doctrine] constitutionality of executive order issued by Mayor of Boston requiring construction projects funded by the city to contain at least 50% Boston residents).

33. See *Lefrancois*, 669 F. Supp. at 1212. While Rhode Island ran the only landfill which accepted all types of non-hazardous solid waste (through the services of a state formed corporation — the Rhode Island Solid Waste Management Corporation (RISWMC)), nothing in the enacted legislation prevented any party from purchasing land in Rhode Island and constructing a landfill. *Id.* at 1211.

34. 467 U.S. 82 (1984).

35. *Id.* at 84. The Alaska Department of Natural Resources had proposed to sell approximately 49 million board-feet of timber and gave notice pursuant to an Alaskan statute that successful bidders for the timber would have to partially process the timber within the state. *Id.*; see ALASKA ADMIN. CODE § 76.130 (1974) (repealed 1982).

processing market.³⁶ "The limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but [does not] allow[] it to . . . impose conditions . . . that have a substantial regulatory effect outside of that particular market."³⁷

In the context of solid waste, the market participant doctrine has been applied by five courts, each holding that a state or local landfill may discriminate against out-of-state waste without violating the dormant Commerce Clause.³⁸ The most recent application was by the Third Circuit Court of Appeals in *Swin Resource Systems, Inc. v. Lycoming County*.³⁹ In *Swin*, the county operated landfill charged higher tipping fees and placed weight restrictions on trash generated out-of-state.⁴⁰ Lycoming County argued that it was a market participant, and thus could lawfully avoid the Commerce Clause restrictions.⁴¹ The court analogized Lycoming County's activities to other situations where the market participant doctrine was applied, such as restrictions on the sale of state-produced cement,⁴² restrictions on hiring only local residents,⁴³ and restrictions on which junk cars were entitled to state bounties.⁴⁴ The Third Circuit found that the activity here was of a similar nature, and thus the activity constituted market participa-

36. *South-Central Timber*, 467 U.S. at 98.

37. *Id.* at 97.

38. See *Swin Resource Sys. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), cert. denied, 493 U.S. 1077 (1990); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Sys. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987); *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Comm'rs v. Stevens*, 473 A.2d 12 (Md. 1984).

39. 883 F.2d 245 (3d Cir. 1989).

40. *Id.* at 247-48. Tipping fees are generally an amount paid for each ton of trash deposited at a landfill, and are paid to the landfill operator and then forwarded to the state. *Government Suppliers Consol. Servs., Inc. v. Bayh*, 734 F. Supp. 853, 856 (S.D. Ind. 1990).

41. *Id.* at 246.

42. *Id.* at 250 (referring to *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980)).

43. *Id.* (referring to *White v. Massachusetts Council of Constr. Workers*, 460 U.S. 204 (1983)).

44. *Id.* (referring to *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)).

tion.⁴⁵ The court distinguished *South-Central Timber* by noting that the activity regulated here was strictly applicable to the county landfill, and was therefore restricted to the market within which the county was participating.⁴⁶ The court found that Lycoming County "ha[d] not crossed the line that Alaska crossed when that state attempted to regulate the timber processing market by conditioning its timber sales on guarantees that the purchasers would act in a certain way in a downstream market."⁴⁷ Thus, a state which acts as a market participant, even though its actions are discriminatory, is not bound by the dormant Commerce Clause.

2. Exceptions to the Market Participant Doctrine

Two important exceptions have been carved out of the market participant doctrine. The first occurs when a state is dealing with a natural resource.⁴⁸ A state is not allowed to hoard natural resources within its borders for the exclusive benefit of its citizens.⁴⁹ Therefore, a threshold determination must be reached whether the landfill and its activities constitute a natural resource. Those who oppose the application of the market participant doctrine claim that the land on which the landfills rest are scarce natural resources and therefore the doctrine is inapplicable.⁵⁰ Most courts have rejected this reasoning, principally based on the expenditures necessary to

45. *Id.*

46. *Id.*

47. *Id.*

48. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (holding that the market participant doctrine might not be applied in circumstances involving natural resources). In *Reeves*, the item in commerce was cement, and the court held that this was not a natural resource. Examples of natural resources given by the *Reeves* court were coal, timber, wild game or minerals. *Id.* at 443-44. Cement was a product of manufacturing; however, some of the components of cement may constitute a natural resource, such as limestone. *Id.*

49. *Id.*; see also *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (striking down West Virginia statute giving preference to domestic consumers of natural gas over out-of-state users); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (prohibiting Oklahoma from barring out-of-state transportation of natural gas).

50. See *Meyers*, *supra* note 1; see also *Swin Resource Sys.*, 883 F.2d at 259 (Gibbons, J., dissenting).

create the landfill, such as funds and labor.⁵¹ As the court noted in *Swin*, the landfill did not exist "simply [by] happenstance" and was therefore not a natural resource.⁵²

The second exception occurs when the state is not only participating in the market, but is actually regulating the very market in which it seeks to compete.⁵³ Arguments have been made that when a state or local government has the power to establish where landfills will be and sets permit requirements for landfill operations, it is not merely participating in the market but is actually regulating the industry.⁵⁴ The Supreme Court has held that where a state acts as a market regulator, the market participant doctrine does not apply.⁵⁵ Such a determination was reached in *South-Central Timber*,⁵⁶ when Alaska attempted to force timber purchased within the state to also be processed in the state before being shipped out of state.⁵⁷ Such downstream regulation has been expressly prohibited,⁵⁸ and a close examination must be made to determine if a state is merely a participant or whether it is also regulating the market. As a threshold matter, a distinction must be made as to the precise market in which the state is participating. Only by defining the market of participation can a determination be made whether the state is participating in that market, or regulating that market or another downstream market.⁵⁹ In *Swin*, the court determined that Lycoming

51. See, e.g., *Swin Resource Sys.*, 883 F.2d at 252 (landfill, unlike natural resources, did not occur by happenstance; rather, funds were needed to construct same); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1211 (D.R.I. 1987) (landfill services are not a natural resource market); *Evergreen Waste Sys. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 132 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987) (landfill is more than raw resource, it is highly regulated, costly waste disposal facility); *County Comm'rs v. Stevens*, 473 A.2d 12, 20 (Md. 1984) (landfill is result of complex process of costly physical plant and human labor acting on raw materials, not a natural resource).

52. *Swin Resource Sys.*, 883 F.2d at 252.

53. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-08 (1976).

54. See *Meyers*, *supra* note 1, at 579.

55. *Alexandria Scrap*, 426 U.S. at 806-08.

56. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

57. *Id.* at 88.

58. *Id.* at 99.

59. See *Swin Resource Sys.*, 883 F.2d at 249.

County had acted as a market participant in the landfill service market, rather than as a market regulator.⁶⁰ Similarly, other courts faced with this issue have generally found landfills to be part of a landfill service market, and have measured the participation or regulation by the state relative to that specific market.⁶¹

3. Non-Market Participant Analysis

Where a state is not acting as a market participant, a different analysis must be applied to the proposed legislative blockade. If the statute at hand is discriminatory on its face, and is merely a "protectionist" measure, it will be subject to a "virtual[] *per se* rule of invalidity."⁶² This rule stems from the very notions that spawned the Constitution as originally prescribed by the framers.⁶³ In forming a union of states, it was necessary "to avoid the tendencies toward economic Balkanization that had plagued . . . the [c]olonies"⁶⁴ No balancing of interests occurs to determine if the effect on interstate commerce is minimal. Only if the state can proffer a compelling reason for the distinction between waste based on its origin will the discrimination be allowed.⁶⁵ Mere recitation by the state that a compelling interest exists will not suffice.⁶⁶ Several courts have handed down decisions which indicates that a compelling interest standard is difficult to meet.⁶⁷

60. *Id.* at 254.

61. *See, e.g., Lefrancois*, 669 F. Supp. at 1211 (holding that state was participating in the landfill service market, not the landfill site market); *Evergreen Waste Sys.*, 643 F. Supp. at 131 (holding that district was participating in landfill service, and was selling service to haulers); *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128, 1134 (D.D.C. 1984) (holding district, by expending funds, provided public service by operating landfill, and was not a participant in the waste market); *Stevens*, 473 A.2d at 19 (holding that market was landfill services, not the handling of waste).

62. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

63. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

64. *Id.*

65. *See Maine v. Taylor*, 477 U.S. 131, 141 (1986) (preventing importation of parasites into the state was a compelling reason, where the in-state supply of baitfish was virtually parasite free).

66. *Hughes v. Oklahoma*, 441 U.S. at 336; *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 783 (D.R.I. 1991).

67. *See Taylor*, 477 U.S. 131; *cf. City of Philadelphia*, 437 U.S. 617; *Pike v.*

In *Maine v. Taylor*,⁶⁸ the Court found that a statute which discriminated on its face was valid because there was a compelling state interest at stake.⁶⁹ The Maine regulation criminalized the importation of live baitfish into the state.⁷⁰ The Supreme Court distinguished this regulation from those in *City of Philadelphia*, which were found to be an example of simple economic protectionism.⁷¹ Here, the Court found a compelling interest in protecting the wild fish population from importation of infectious parasites that were prevalent outside Maine, but were not common within the state.⁷² The Court held that not all protectionist regulations are invalid, despite their discriminatory nature. In *Sporhase v. Nebraska ex rel. Douglas*,⁷³ the Supreme Court held that there was a legitimate difference between economic protectionism and health and safety regulations.⁷⁴ In analyzing a state statute restricting out-of-state use of groundwater, the Court looked past the statute and considered the entire regulatory framework within which the law was to operate to determine whether it was constitutional.⁷⁵ The key aspect to the Court's holding was the imposition by the state of severe restrictions on groundwater withdrawal by its own citizens.⁷⁶ The Supreme Court noted that "a state that imposes severe . . . restrictions on its own citizens is not discriminating against interstate commerce" when it seeks to place similar controls on shipment out of state.⁷⁷ In addition to proving that a compelling reason for the statute exists, a state must also demonstrate that the same

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

68. 477 U.S. 131.

69. *Id.* at 137.

70. *Id.* at 132; see ME. REV. STAT. ANN. tit. 12, § 7613 (West 1981).

71. *Taylor*, 477 U.S. at 148; *City of Philadelphia*, 437 U.S. at 627.

72. *Taylor*, 477 U.S. at 141.

73. 458 U.S. 941 (1982).

74. *Id.* at 956.

75. *Id.* at 958.

76. *Id.* at 955-56. The Court examined the overall regulatory framework and found that, although the particular statute may have impermissibly discriminated against interstate commerce, the finding that other Nebraska regulations placed severe restrictions on the citizens within the state was taken into consideration in determining the overall discriminatory effect of the challenged regulation. *Id.*

77. *Id.*

purpose or goal could not be achieved through an available non-discriminatory alternative.⁷⁸ The Court in *Taylor* also found that there were no non-discriminatory alternatives available that would accomplish the state's purpose.⁷⁹ The Court held that a state could regulate to protect the health and safety of its citizens, as long as it does not place itself in "a position of economic isolation."⁸⁰

However, if a statute treats interstate and intrastate waste even-handedly, it may be valid even though it has a discriminatory effect as long as the effects on interstate commerce are only incidental.⁸¹ After determining that the statute regulates even-handedly, an inquiry is then made to determine if there is a legitimate local purpose, and to what degree the statute interferes with interstate commerce.⁸² Several factors must be taken into consideration, including the potential harm to health and safety of the environment or human life, and the availability or lack of viable alternatives to accomplish the purposes envisioned by the act.⁸³

B. The Intrastate Dilemma

While the battle rages over whether a state can constitutionally block the flow of garbage at its borders, local communities have also taken a stance against outside garbage, not from another state, but from other counties within their state.

Several cases have discussed the issue of intrastate blockades of waste shipment, and not surprisingly, the courts have split on whether this is permissible. In a 1985 decision, a Florida county was allowed to ban waste from other counties within the state.⁸⁴ This decision was based on two factors.

78. *Taylor*, 477 U.S. at 140.

79. *Id.* at 151.

80. *Id.* (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

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

82. *City of Philadelphia*, 437 U.S. at 624.

83. *See, e.g., Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 945 (11th Cir. 1991) (applying *Pike* test in determining that viable alternatives were available, thereby rendering statute at hand unconstitutional).

84. *Waste Aid Sys., Inc. v. Citrus County, Fla.*, 613 F. Supp. 102 (M.D. Fla. 1985).

First, the court took notice that although waste was banned from the county-owned landfill, other landfills within the county were available for non-resident use.⁸⁵ Second, the court felt that the ban was rationally related to a legitimate governmental purpose — to protect the health, safety and welfare of state residents.⁸⁶ However, the decision was based on equal protection grounds, and since no suspect classification was involved, the statute only needed to pass the rational basis test.⁸⁷ This, of course, is not the test applied under Commerce Clause analysis, as laid down by the Supreme Court.⁸⁸

In another intrastate case, *Diamond Waste, Inc. v. Monroe County*,⁸⁹ the Eleventh Circuit struck down a county resolution similarly seeking to ban all waste from entering the county into a regional landfill.⁹⁰ While the court found the resolution regulated even-handedly and accomplished a legitimate local purpose, it was "loathe to characterize the possible effects . . . on interstate commerce as 'incidental.'"⁹¹ The court indicated, however, that had the county demonstrated "a more pressing need for preserving landfill space," the regulation may very well have been upheld.⁹²

Most recently, the Supreme Court granted certiorari to the Sixth Circuit to hear the appeal of *Bill Kettlewell Excavating v. Michigan Department of Natural Resources*.⁹³ In *Kettlewell*, the Sixth Circuit held that a county within the State of Michigan could refuse to accept waste generated by another county within the state.⁹⁴ The court reasoned that the statute applied even-handedly in its treatment of in-state and

85. *Id.* at 106-07.

86. *Id.* at 104-07.

87. *Id.* at 105.

88. See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

89. 939 F.2d 941 (11th Cir. 1991).

90. *Id.* at 942.

91. *Id.* at 944.

92. *Id.* at 946.

93. 931 F.2d 413 (6th Cir. 1991), *rev'd*, *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); see *infra* notes 98-105.

94. *Bill Kettlewell Excavating*, 931 F.2d at 417.

out-of-state waste, and went on to find that there was a legitimate local purpose, and only an incidental burden on interstate commerce.⁹⁵ The statute was upheld because it authorized banning importation of waste from anywhere outside the county, including waste from within the state, for legitimate local purposes. In this instance, the purpose was to maintain compliance with a comprehensive local plan for waste disposal, which had been authorized by the Michigan legislature.⁹⁶

On appeal, the Supreme Court reversed the Sixth Circuit.⁹⁷ In *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*,⁹⁸ the Supreme Court once again returned to the very beginning of Commerce Clause analysis, relying on *City of Philadelphia*⁹⁹ in finding the intrastate ban was violative of the Commerce Clause, in that it placed an impermissible burden on the free flow of interstate commerce.¹⁰⁰ It is important to recognize that the decision in *Fort Gratiot* only applies to restrictions involving private landfills, and has no bearing on the market participant doctrine.¹⁰¹ The Court noted that Michigan had not identified any reason, legitimate or otherwise, to justify treating waste originating outside the county differently from waste originating

95. *Id.*

96. *Id.* at 417-18. See also Solid Waste Management Act of 1978, 1978 Mich. Pub. Acts 641 (codified as amended at MICH. COMP. LAWS ANN. §§ 299.413a, 299.430(2) (West 1984 & Supp. 1992)). The statute involved was part of Michigan's Solid Waste Management Act (SWMA), which was amended in 1988 by adding two waste import restriction sections:

"A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." MICH. COMP. LAWS ANN. § 299.413a (West 1984 & Supp. 1992).

"In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county." MICH. COMP. LAWS ANN. § 299.430(2) (West 1984 & Supp. 1992).

97. *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992).

98. *Id.*

99. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

100. *Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2027.

101. *Id.* at 2023.

within.¹⁰² The Court also rejected the notion that the statute regulates even-handedly, since it purports to treat waste from within Michigan (but outside the affected county) no differently than out-of-state waste.¹⁰³ In addition, the statute was claimed to further legitimate local interests, with a minimal burden on interstate commerce, and that burden "was not clearly excessive in relation to the local benefits."¹⁰⁴ This rationale, which seeks to legitimize discrimination against out-of-state interests by similarly burdening interests within the state, has been clearly rejected by the Court.¹⁰⁵ Finally, the Court also rejected Michigan's claim that the Supreme Court authorized discrimination, such as that found here, by its opinion in *Sporhase*,¹⁰⁶ wherein the Court differentiated between economic protectionist measures, and legitimate health and safety regulations.¹⁰⁷ The Court stated that while the rest of the Michigan SWMA might be examined as legitimate "health and safety regulations with no protectionist purpose," the waste import restrictions at issue here were not of the same character, and were clearly discriminatory on their face.¹⁰⁸ As such, these regulations could only be valid if the state could prove there were legitimate health and safety concerns that could not be adequately addressed through the use of non-discriminatory alternatives,¹⁰⁹ a burden the state failed to meet.¹¹⁰

These cases illustrate that economic discrimination, at least where private solid waste facilities are concerned, will not be tolerated. Nothing in the Supreme Court's decisions indicate any similar restrictions where the state is acting as a market participant. Furthermore, the Supreme Court has indicated several ways in which states can block the flow of out-

102. *Id.* at 2024.

103. *Id.*

104. *Id.*

105. *Id.* at 2025-26.

106. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

107. *Id.* at 956.

108. *Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2027.

109. *Id.*

110. *Id.*

of-state trash without violating the Commerce Clause.

III. Alternative Methods Around the Constitutional Prohibitions

Despite the rather onerous burden of proof required to justify regulations which bar the flow of trash in interstate commerce, states have instituted creative alternatives to accomplish the same goals. The majority of states have enacted solid waste plans, through which they establish legitimate health and environmental goals, and the policies necessary to carry out these goals.¹¹¹ Through the authority granted by state legislatures, states or local communities have been granted the authority to treat waste from outside localities differently, so long as they do not violate the Commerce Clause restrictions.¹¹² In formulating local or regional plans to deal with the solid waste problem, various methods have been employed in an attempt to block the importation of solid waste. Some localities have raised the fees charged at landfills for accepting waste, or have set a scale which charges different rates depending on the origin of the trash, with out-of-state waste carrying a higher fee than in-state waste.¹¹³ However, it is not clear whether such a fee system is constitutional, since

111. While most states already have drafted solid waste plans, or are in the process of doing so, new RCRA provisions will mandate that all states have such plans. These plans provide a road map for state initiatives in handling their solid wastes. *See, e.g.*, DEPARTMENT OF ENVTL. REGULATION, SOLID WASTE MANAGEMENT IN FLORIDA, 1990 ANNUAL REPORT (1991); DIVISION OF SOLID WASTE, N.Y. STATE DEP'T OF ENVTL. CONSERV., SOLID WASTE MANAGEMENT PLAN, 1990-91 UPDATE (1991); WASHINGTON STATE DEP'T OF ECOLOGY, WASHINGTON STATE SOLID WASTE MANAGEMENT PLAN (1991).

112. While various states' legislation may give states authority to block the flow of waste, the various court challenges throughout this paper indicate that such legislation may not be constitutional, despite legitimate state intentions.

113. *See, e.g.*, ALA. CODE § 22-30B-2 (1990 & Supp. 1992) CAL. PUB. RES. CODE § 41,903 (West 1986 & Supp. 1991); OHIO REV. CODE ANN. § 3734.57 (Anderson 1992). The Alabama code allowed imposition of an additional \$72 per ton fee on hazardous waste from out of state. This fee was upheld by the Alabama Supreme Court, but was struck down by the United States Supreme Court as unconstitutional. *See* Guy Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367 (1991), *rev'd*, 112 S. Ct. 2009 (1992).

it invariably has some effect on interstate commerce.¹¹⁴ This type of fee system was recently challenged when Ohio instituted a three-tiered fee scale, with out-of-state waste paying a higher fee than in-state waste.¹¹⁵ In *National Solid Wastes Management Ass'n v. Voinovich*,¹¹⁶ the district court ruled the statute at hand unconstitutional, in that the statute discriminated against interstate commerce and the state did not have a compelling reason for such discrimination.¹¹⁷ On appeal, the Sixth Circuit reversed, and remanded the case to the lower court for an evidentiary hearing to determine whether the state did indeed have a compelling reason for discriminating against the out-of-state waste.¹¹⁸ Ohio had argued that the likelihood of hazardous waste (which would be harmful to its citizens) entering the state required greater efforts in the areas of inspection, clean-up and enforcement, all of which justified the higher fees.¹¹⁹ The court found this justification (if found to exist after a hearing) to be similar to that in *Maine v. Taylor*,¹²⁰ and concluded that the district court must assess whether Ohio had such a compelling reason for the statute, and whether less discriminatory means were available to accomplish the statute's goals.¹²¹

On the same day that the decision in *Fort Gratiot*¹²² was announced, the Supreme Court, in *Chemical Waste Manage-*

114. See *supra* notes 66-84 and accompanying text (discussing when a state may permissibly burden interstate commerce).

115. OHIO REV. CODE ANN. § 3734.57 (Anderson 1992). The statute authorizes a tax of \$0.70 per ton for waste generated within the district, \$1.20 for waste outside the district but within the state, and \$1.70 for waste generated outside the state. *Id.* § 3734.57(A). The statute further imposes additional fees that range from 42% to 300% higher for out-of-state waste. See *National Solid Wastes Management Ass'n v. Voinovich*, 763 F. Supp. 244, 254 (S.D. Ohio 1991), *rev'd*, 959 F.2d 590 (6th Cir. 1992).

116. 763 F. Supp. 244 (S.D. Ohio 1991), *rev'd*, 959 F.2d 590 (6th Cir. 1992).

117. *Id.* at 262.

118. *National Solid Wastes Management Ass'n v. Voinovich*, 959 F.2d 590, 594 (6th Cir. 1992), *reh'g en banc denied*, 1992 U.S. App. LEXIS 11641 (6th Cir. May 14, 1992).

119. *Id.* at 593.

120. 477 U.S. 131 (1986).

121. *Voinovich*, 959 F.2d at 593.

122. *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992).

ment, Inc. v. Hunt,¹²³ also struck down as unconstitutional an Alabama statute authorizing higher fees for the disposal of hazardous waste generated outside the state but disposed of within Alabama.¹²⁴ The Alabama Supreme Court found the statute to be valid, stating that it served legitimate local purposes that could not be served by less discriminatory alternatives.¹²⁵ The United States Supreme Court rejected the lesser scrutiny of the *Pike*¹²⁶ test applied by the state court,¹²⁷ and instead analyzed the statute using "the strictest scrutiny."¹²⁸ While the Court found that there were legitimate local purposes for the discriminatory fees, none of these purposes were enough to overcome the Commerce Clause violation caused by the discrimination.¹²⁹ There was simply "no evidence before [the] Court that waste generated outside Alabama is more dangerous than waste generated in Alabama."¹³⁰ Furthermore, the Court pointed out several less discriminatory alternatives available to the state, such as per mile taxes, across the board caps, or additional fees on all waste disposed of within the state, regardless of origin.¹³¹

Other tactics used to prevent waste from being imported into a state are more unique. The State of Maine, acquiescing to the fact that out-of-state waste cannot be banned from landfills (except those in which the state is a market participant), has chosen to prohibit new commercial solid waste facilities from operating in the state.¹³² Since this type of measure apparently regulates even-handedly, it is not likely to be

123. 112 S. Ct. 2009 (1992).

124. *Id.* at 2017. Alabama enacted Act No. 90-326, which authorized an additional fee on out-of-state hazardous waste of \$72 per ton. See 1990 Ala. Acts 326, § 3; ALA. CODE § 22-30B-2(b) (1990 & Supp. 1992).

125. *Chemical Waste Management*, 112 S. Ct. at 2012 (citing *Chemical Waste Management*, 584 So. 2d at 1390).

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

127. *Chemical Waste Management*, 112 S. Ct. at 2014 n.5.

128. *Id.* at 2014.

129. *Id.*

130. *Id.* at 2015.

131. *Id.*

132. OFFICE OF PLANNING, STATE OF MAINE, WASTE MANAGEMENT AND RECYCLING PLAN 22 (July 1990).

challenged. Another innovative measure involves reciprocal agreements between states to limit the importation and/or exportation of trash. Indiana has such an agreement with both New York and New Jersey.¹³³ Under these agreements, waste is not accepted from companies not properly licensed in the home state.¹³⁴ While not a *per se* ban on importation, Indiana has successfully blocked trash shipments from over a dozen New Jersey and four New York transfer stations,¹³⁵ thereby decreasing the trash entering its landfills. Whether these types of interstate agreements will withstand constitutional challenges remains unanswered.

Furthermore, any state is free to limit the amount of trash entering the landfills within the state by placing caps on the amount of trash allowed in a landfill.¹³⁶ The only prerequisite to this type of restriction is that it may not discriminate against waste solely based on its origin.¹³⁷ So long as the cap applies equally to in-state or out-of-state waste, it will generally be upheld as constitutional.¹³⁸

In light of the Supreme Court's decisions in *Fort Gratiot* and *Chemical Waste*, state legislative attempts to allow circumvention of the Commerce Clause prohibitions concerning out-of-state trash seem likely to fail. Whether disguised as a necessary tax for health and safety reasons, or claimed as an even-handed regulation because it treats in-state and out-of-state waste alike, the discriminatory nature, absent a compelling reason, will not withstand the Commerce Clause's strict

133. *Indiana Signs Waste Agreement With N.Y.; Starts Talks With Ontario, Canada*, INTEGRATED WASTE MANAGEMENT, Jan. 22, 1992, at 1 (hereinafter *Waste Agreement*). Prior to entering into these agreements, Indiana had enacted legislation allowing higher tipping fees to be charged on out-of-state waste and requiring certification from waste haulers as to the origin of the waste. See IND. CODE §§ 13-9.5-5-1, 13-7-22-2.7(c)(1) (1990), respectively. These statutes, like most similar legislative attempts to block waste shipments, were held unconstitutional. See *Government Suppliers Consol. Servs., Inc. v. Bayh*, 734 F. Supp. 853 (S.D. Ind. 1990).

134. *Waste Agreement*, *supra* note 133, at 1.

135. *Id.*

136. *Chemical Waste Management*, 112 S. Ct. at 2015.

137. *Id.* at 2016.

138. *Id.*; see also *State Considers Combination of Higher Fees, Subsidies for In-State Waste*, Official Says [23 Current Developments] Env't Rep. (BNA) No. 15, at 1160 (Aug. 8, 1992).

scrutiny standard.

IV. Resource Conservation and Recovery Act

The statutory authority for waste management at the federal level is contained within the Solid Waste Disposal Act (SWDA),¹³⁹ more commonly referred to by its amended version, the Resource Conservation and Recovery Act of 1976 (RCRA).¹⁴⁰ While RCRA authorizes federal oversight of solid waste,¹⁴¹ the main thrust of the act has focused on the evils of hazardous waste,¹⁴² leaving the problems associated with non-hazardous waste to the states to resolve.¹⁴³ In actuality, Congress specifically envisioned that solid waste would be handled on a local basis, as stated in the congressional findings in section 1002 of RCRA.¹⁴⁴

RCRA was scheduled for reauthorization in 1992,¹⁴⁵ and it appears that Congress has realized that the problems of solid waste have not been adequately addressed under the current version of the Act. RCRA, as amended by the proposed legislation, would contain various provisions addressing solid waste, including stricter requirements for controlling pollution emanating from landfills.¹⁴⁶ Perhaps the most signif-

139. Pub. L. No. 89-272, tit. II, 79 Stat. 992 (1965) (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

140. Pub. L. No. 94-580, § 2, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)). All references hereinafter will refer to RCRA.

141. RCRA § 1002, 42 U.S.C. § 6901.

142. See Meyers, *supra* note 1, at 569; see also 137 CONG. REC. S5282 (daily ed. Apr. 25, 1991) (statement of Sen. Chafee) (noting that the 1984 RCRA amendments concentrated on hazardous wastes, while the primary focus of the current reauthorization is on non-hazardous solid wastes).

143. *Id.*

144. RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4) states "[t]he collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies."

145. See *Outlook 1992: Solid, Hazardous Waste*, [22 Current Developments] Env't Rep. (BNA) No. 39, at 2195 (Jan. 24, 1992) (hereinafter *Outlook*). RCRA was last amended in 1984 at which time funding for the statute was authorized through 1988. Congress has since authorized funding on a yearly basis through appropriations bills. See *Congressional Wrap-Up*, [23 Current Developments] Env't Rep. (BNA) No. 26, at 1653 (Oct. 23, 1992).

146. See *infra* note 167.

icant provisions, however, are those that effect the interstate import and/or export of waste. Provisions in the proposed Senate and House versions of the bill will allow states to discriminate against out-of-state waste, either by allowing increased fees for waste imported into the state,¹⁴⁷ or by granting local governments the authority to approve waste imports.¹⁴⁸ These are the very economic, protectionist measures rejected by the Supreme Court as violative of the Commerce Clause.¹⁴⁹ The desire to allow states to discriminate against waste imports has caused quite a stir within both houses of Congress. Some members of Congress are staunch supporters of the right of a state to discriminate against waste imports in order to protect the health and environment of a particular state's citizens.¹⁵⁰ Senator Dan Coats of Indiana has been one of the main advocates in pushing legislation that would allow states to decide what to do with trash at their

147. See S. 976, 102d Cong., 1st Sess. § 407 (1991) (authorizing states to impose fees on out-of-state waste up to five times the rate charged for in-state waste, effective upon enactment of the bill, and up to 10 times the amount after 36 months); H.R. 3865, 102d Cong., 1st Sess. § 106 (1991) (authorizing fees starting six months after enactment that can be four times the in-state rate rising to 10 times the amount after 42 months). The House version also provides for placing limits on the amount of imported trash should a state decide not to impose a higher fee. *Id.*

While neither bill allows an outright ban on waste importation, the fee system could amount to a *de facto* ban. See *House Subcommittee Draft of RCRA Legislation Would Allow Higher Fees on Out-of-State Waste*, [22 Current Developments] Env't Rep. (BNA) No. 23, at 1404 (Oct. 4, 1991).

148. See *Subcommittee Adopts RCRA Amendment to Allow Localities to Ban Out-of-State Waste Shipments*, [22 Current Developments] Env't Rep. (BNA) No. 48, at 2628 (Mar. 27, 1992); *New Draft of Senate RCRA Reauthorization Would Expand TRI, Promote Industry Recycling*, [22 Current Developments] Env't Rep. (BNA) No. 49, at 2660 (Apr. 3, 1992) (discussing House and Senate amendments prohibiting landfills from accepting out-of-state solid waste without permission of the local government).

149. See *supra* notes 13-21 and accompanying text. Congress, of course, has the power to authorize states to regulate conduct that would otherwise be violative of the Commerce Clause. *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citing *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)). However, unless the congressional intent is "unmistakably clear," the Supreme Court has refused to exempt state statutes from Commerce Clause limitations. *Id.* at 139 (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)).

150. See 138 CONG. REC. S9917 (daily ed. July 20, 1992) (statement of Sen. Coats); 137 CONG. REC. S5283, 5285 (daily ed. Apr. 25, 1991) (statements of Sens. Chafee and Burdick).

borders.¹⁵¹ However, in the face of strong opposition from industry and environmental groups and legislators from states which must ship trash to avoid imminent crisis situations, neither the House nor the Senate bills to reauthorize RCRA reached the floor in the respective part of Congress.¹⁵² The Senate, realizing that a RCRA reauthorization could not be accomplished before the end of the 102d Congress, substituted an interstate waste transportation bill, hoping to at least solve

151. Senator Coats first proposed allowing states to restrict the flow of waste imports in September, 1990, as part of a District of Columbia appropriations bill. See H.R. 5311, 101st Cong., 2d Sess. § 111 (1990); see also *Legislation Allowing States to Ban Interstate Waste Transport Passes Senate*, [21 Current Developments] Env't Rep. (BNA) No. 21, at 1045 (Sept. 21, 1990) (hereinafter *Waste Transport*). Senator Coats was also a sponsor of S. 2877, which was the interstate waste bill substituted for the proposed RCRA amendments in the Senate. S. 2877, 102d Cong., 2d Sess. (1992).

152. The sponsor of the RCRA bill in the House, Rep. Al Swift, attacked industry and environmental sources for slowing the reauthorization process. The House attempted to separate the interstate waste provisions from the full RCRA bill, but this action was fought by critics who felt that the pared down version might be called a RCRA reauthorization later on, leaving many important reauthorization issues potentially unsolved. See *Impasse on House RCRA Bill Continues; House Panel Chairman Lashes Out at Industry*, [23 Current Developments] Env't Rep. (BNA) No. 23, at 1506 (Oct. 2, 1992).

As early as 1990, Indiana legislators had introduced bills to allow states to block the flow of imported waste. Senator Dan Coats and Reps. John Myers and Phil Sharp sought to protect states, such as Indiana (which had an estimated eight years of landfill space available) from the continual influx of out-of-state waste. See *Waste Transport*, *supra* note 152, at 1045; see also Judith B. Austin, Sharp, Other Hoosiers Unite to Keep Garbage Out of State, Gannett News Serv., Apr. 25, 1991 available in LEXIS, Nexis Library, GNS File.

As strongly as these legislators pushed for the passage of their bills, the same could be said of the resiliency of the opposition. Congressmen from states such as New Jersey, which had critical shortages of landfill space which necessitated out-of-state shipment of waste, vehemently opposed legislation allowing the blockage of waste shipments in interstate commerce. See *Senators See "Civil War" Over Waste Imports; Coats Says He Will Offer Import Ban Bill Again*, [22 Current Developments] Env't Rep. (BNA) No. 8, at 485 (June 21, 1991).

Other groups resisting import bans are the Natural Resources Defense Council (NRDC) and the National Solid Wastes Management Association (NSWMA). See *Congress Should Not Allow States to Ban Interstate Transport of Waste*, *Industry Says*, [22 Current Developments] Env't Rep. (BNA) No. 2, at 107 (May 10, 1991). Allen Moore, president of NSWMA, has stated that bans on interstate transport of waste could lead to materials being dumped in substandard landfills, or to illegal dumping. *Id.*

the waste transportation dilemma.¹⁵³ While this bill overwhelmingly passed in the Senate,¹⁵⁴ it met with a cold shoulder in the conference committee, and was not enacted before Congress ended its session.¹⁵⁵ While members of Congress debate whether states should be allowed to restrict the interstate flow of waste, other political groups have also wrestled with the proposition to restrict waste imports.¹⁵⁶ Politicians are not alone in their crusade against amending RCRA to allow states to discriminate against interstate shipment of waste. The Bush administration also publicly opposed the legislative efforts.¹⁵⁷ Comments by both then EPA Administrator, William K. Reilly, and the former top waste official at EPA, Don Clay,¹⁵⁸ clearly stated that the suggested provisions

153. See S. 2877, 102d Cong., 2d Sess. (1992); see also *Baucus, Coats Offer Interstate Waste Bill; Prospects for RCRA Rewrite Fade, Staff Says*, [23 Current Developments] Env't Rep. (BNA) No. 9, at 700-01 (July 26, 1992).

154. The Interstate Transportation of Municipal Waste Act of 1992 passed in the Senate by a vote of 89 to 2 on September 23, 1992. See 138 CONG. REC. S10,168 (daily ed. July 23, 1992).

155. See 138 CONG. REC. H12,605 (daily ed. Oct. 9, 1992). The early days of the 103d Congress saw the introduction of two solid waste bills in the House, H.R. 105, 103d Cong., 1st Sess. (1993) and H.R. 599, 103d Cong., 1st Sess. (1993), both of which were sent to the House Energy and Commerce Committee. See *Bill on Solid Waste Transport Introduced*, [23 Current Developments] Env't Rep. (BNA) No. 41, at 2656 (Feb. 5, 1993); *First Two Days of 103d Congress See Introduction of 16 Environmental Bills*, [23 Current Developments] Env't Rep. (BNA) No. 38 at 2352 (Jan. 15, 1993).

156. The National Governors' Association advisory panel has come out against state bans and fees on waste imports. See *Governors' Panel Reject Management Policy; Controversy Continues Over Interstate Shipping*, [22 Current Developments] Env't Rep. (BNA) No. 41, at 2332 (Feb. 7, 1992). But see *Ban on Out-of-State Waste Shipments Proposed to Legislature by Governor*, [22 Current Developments] Env't Rep. (BNA) No. 37, at 2132 (Jan. 10, 1992) (Pennsylvania Governor Robert Casey proposed solid waste legislation banning all out-of-state waste from being shipped into Pennsylvania). Furthermore, support for interstate waste legislation has come from the U.S. Conference of Mayors. See *House Committee Approves Compromise RCRA Bill With Support From Most Democrats, Republicans*, [23 Current Developments] Env't Rep. (BNA) No. 11, at 756-57 (July 10, 1992).

157. See *Outlook*, *supra* note 145, at 2195-96.

158. Mr. Clay was the Assistant Administrator for EPA's Office of Solid Waste and Emergency Response, and both Mr. Reilly and Mr. Clay were replaced under the new administration of President Clinton. The new head of EPA, Carol Browner, has not yet indicated a position on the transportation of waste issue.

amending Subtitle D¹⁵⁹ are technically infeasible and inefficient at solving the national solid waste problem.¹⁶⁰ These provisions could also lead to greater environmental harm. Regulations already in place under Subtitle D, which take effect in October, 1993,¹⁶¹ will force many smaller landfills to close when they are unable to conform to new federal regulations, thereby frustrating the purpose behind the regulations — to insure that waste ends up in environmentally sound landfills.¹⁶² Allowing states to discriminate against importation of waste would prevent the utilization of safer, larger landfills, forcing states to place waste in potentially unsafe local landfills.¹⁶³

RCRA's proposed amendments contain many provisions which require more stringent controls on landfills.¹⁶⁴ Some of these controls will have a devastating effect on local landfills. One solid waste engineer stated that the less flexible RCRA requirements could lead to the imminent closing of New York City's only landfill years before state regulations would have required closure.¹⁶⁵ Should this take place, one can only imag-

159. RCRA §§ 4001-4010, 42 U.S.C. §§ 6941-6949(a). Subtitle D is the common industry term for these RCRA sections dealing with non-hazardous solid waste.

160. See *Outlook*, *supra* note 145, at 2195-96; see also *Market Approaches, Existing RCRA Authority Preferable to Reauthorization*, EPA Official Says, [22 Current Developments] Env't Rep. (BNA) No. 46, at 2515 (Mar. 13, 1992) (hereinafter *Market Approaches*). EPA has estimated that new RCRA legislation could carry costs up to \$46 billion annually, while reducing risks only nominally. See *Senate RCRA Legislation Could Cost Up to \$46 Billion Per Year*, EPA Estimates, [23 Current Developments] Env't Rep. (BNA) No. 12, at 888 (July 17, 1992) (quoting letter from Don Clay, Assistant Administrator for Solid Waste, EPA, to Sen. Max Baucus).

161. EPA issued new Subtitle D regulations on Oct. 9, 1991, which include location standards for landfill siting, liner and leachate system upgrades, groundwater monitoring, increased post-closure care, and enhanced financial responsibility requirements. See Kenneth M. Kastner, *1991 Highlights for the Resource Conservation and Recovery Act*, [22 Current Developments] Env't Rep. (BNA) 2161 (Jan. 17, 1992). For the complete rule as promulgated, see 40 C.F.R. pts. 257, 258.

162. See *Market Approaches*, *supra* note 160, at 2515.

163. *Id.*

164. Minimum requirements for all landfills, both new and existing, would include double liner systems, leachate collection and removal systems, construction quality assurance plans, and siting prohibitions. See S. 976, 102d Cong., 1st Sess. § 404 (1991).

165. Interview with Richard Bruzzone, Solid Waste Engineer, New York State Department of Environmental Conservation, Region 2, in New York, N.Y. (Mar. 16,

ine the horrors that would accompany the landfill's closing as New York searches for alternative disposal sites.¹⁶⁶

V. We Welcome Your Trash

While the battle to stop the flow of trash has become of prime importance, it does not present the full picture of the solid waste importation issue. Some communities actually welcome waste, and some even seek to penalize those that seek to send waste out of the area. Gilliam County, Oregon, is one such community that welcomes trash.¹⁶⁷ It is a desolate, economically depressed area that has welcomed trash not only from areas within the state, such as Portland, but also from neighboring states and their large cities, like Seattle, Washington.¹⁶⁸ The potential economic benefits that will accrue to this area from accepting the trash far outweigh the negative aspects most communities dread.¹⁶⁹ Regional landfills can potentially handle great amounts of trash in an economical manner due to economies of scale and are an attractive, environmentally sound approach to handling the solid waste crunch.¹⁷⁰

1992). Region 2 is responsible for permitting and enforcement, within New York City, Department of Environmental Conservation (DEC) regulations (6 N.Y. COMP. CODES R. & REGS. Pt. 360 (1991)), and the provisions of the Environmental Conservation Law (N.Y. ENVTL. CONSERV. LAW §§ 27-0101 to 1517 (McKinney 1984 & Supp. 1991)).

166. See *supra* notes 9-11 and accompanying text. Estimates by New York State DEC indicate that enactment of proposed RCRA legislation could force New York to expend an additional \$283.5 million per year to ship waste to other locations. Memorandum from David R. O'Toole, Chief, Bureau of Municipal Waste Permitting to Albert H. Muench, Chief, Bureau of Program Resource Management (Mar. 26, 1992) (on file with the New York State Department of Environmental Conservation).

167. See Robert T. Nelson, *Dealing With Waste — Oregon, Here We Come — First Seattle Shipment of Garbage Set for Next Month*, SEATTLE TIMES, Mar. 24, 1991, at B1.

168. *Id.*

169. *Id.* It is estimated that the Columbia Ridge landfill in Gilliam County will provide over 100 permanent jobs, contribute \$30 million in property taxes to the community (leading to property tax rebates for residents), as well as provide free trash collection for the county. *Id.*

170. See REGION 10 SOLID WASTE AND STATE PROGRAMS SECTION, UNITED STATES EPA, ANALYSIS OF THE POLICY IMPLICATIONS OF REGIONAL MSW DISPOSAL 2 (1990). "Mega-landfills" are expected to increase in number as smaller landfills are forced to close due to stricter requirements which limit potential sites for new landfills. See

While communities like Gilliam County welcome waste, a problem arises when a community or state enacts legislation requiring all trash generated within the municipality or state to be disposed of within its borders. This, in effect, is the reverse of the problem of state blockades of imported trash — here the blockade is on exportation. The analysis applied, however, is the same as in importation problems. The question that arises is one of interference with the free flow of commerce. In *Stephen D. DeVito, Jr. Trucking, Inc. v. The Rhode Island Solid Waste Management Corp.*,¹⁷¹ the State of Rhode Island created a public corporation to oversee the regulation of collection, transportation and disposal of solid waste within the state.¹⁷² A resolution was adopted directing that all solid waste originating within the state had to be disposed of at a facility licensed by the state-created corporation.¹⁷³ Since the state corporation had no power to license out-of-state facilities, the resolution effectively mandated that all waste generated within the state must not be transported outside Rhode Island.¹⁷⁴ The district court followed the same Commerce Clause analysis applied to restrictions on imports of solid waste and refused to uphold the legislative pronouncement that there was a legitimate purpose behind the statute.¹⁷⁵ After finding that the statute discriminated on its face, in that it did not apply even-handedly to interstate and intra-state interests, the court continued its analysis to determine if there was a legitimate (compelling) local purpose being advanced and whether that interest could be served by reasona-

Cost of Compliance With RCRA Subtitle D Will Lead to "Mega-Landfills," Consultant Says, [23 Current Developments] Env't Rep. (BNA) No. 16, at 1204 (Aug. 14, 1992). The Eagle Mountain landfill, located in the California Desert 60 miles East of Palm Springs, is expected to operate for 100 years, with the capacity to handle 20,000 tons of non-hazardous waste per day. See *Kaiser Steel EIR for Eagle Mountain Landfill to be Circulated in Summer*, INTEGRATED WASTE MANAGEMENT, July 10, 1991, at 1.

171. 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991).

172. *Stephen D. DeVito, Jr. Trucking*, 770 F. Supp. at 777.

173. *Id.*

174. *Id.* at 778.

175. *Id.* at 779-81.

ble, non-discriminatory alternatives.¹⁷⁶ Having found no such legitimate local purpose, the statute was struck down as unconstitutional.¹⁷⁷ "It does not matter that the [s]tate has shut the article of commerce inside the [s]tate in one case and outside the [s]tate in the other."¹⁷⁸ The same result was handed down in *Waste Systems Corp. v. County of Martin*,¹⁷⁹ which had facts strikingly similar to those of *DeVito*.¹⁸⁰ The district court found the ordinances at issue, which mandated that all waste generated within the county be sent to a county built waste composting facility, were clearly economic protectionist measures.¹⁸¹ As such, they violated the Commerce Clause, and while there may have been a legitimate local purpose, there were certainly less discriminatory alternatives available.¹⁸²

Nevertheless, some communities have successfully enacted legislation keeping waste within governmental borders.¹⁸³ In *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*,¹⁸⁴ the Third Circuit Court of Appeals upheld a local regulation promulgated pursuant to New Jersey's Solid Waste Management Act which mandated that all waste collected in Hunterdon County (New Jersey) be deposited at a transfer station within the county.¹⁸⁵ The court found no discriminatory burden on interstate commerce and applied the *Pike*¹⁸⁶ test, balancing the incidental burden on interstate commerce with the local benefits to be derived from

176. *Id.* at 783.

177. *Id.* at 785.

178. *Id.* at 780 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 628).

179. 784 F. Supp. 641 (D. Minn. 1992).

180. *Waste Sys.*, 784 F. Supp. at 644.

181. *Id.*

182. *Id.* at 645.

183. See, e.g., *J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Env'tl. Protection*, 857 F.2d 913 (3d Cir. 1988).

184. 857 F.2d 913 (3d Cir. 1988).

185. *Id.* at 923; see N.J. ADMIN. CODE tit. 7, § 7:26-6.5(k)(3) (1992) (All solid waste types [including municipal solid waste] . . . generated from within Hunterdon County municipalities shall be transported to the Hunterdon County transfer station . . .).

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

the statute.¹⁸⁷ In so doing, the court stated that although burdening in-state and out-of-state interests alike does not necessarily validate the statute,¹⁸⁸ in this particular case the party challenging the statute had failed to show that the statute was protectionist in nature.¹⁸⁹ The court looked at the burden on the haulers of the trash, not the trash itself, and found the burdens were equal on both in-state and out-of-state residents.¹⁹⁰

The clearly diverse interpretations by the courts that have examined the issue vis-à-vis the mandate that trash stay within the county makes it quite likely that this is yet another aspect of trash regulation that the Supreme Court needs to tackle.

VI. Conclusion

The solid waste crisis is firmly entrenched, and solutions are not close at hand. As communities grapple with waste disposal, temporary solutions must be worked out. The problem must be categorized as either national in scope, in which case state barriers to waste shipment must fail, or as local problems which each state, region or local community must resolve on their own. Yet virtually every state transports some portion of its waste stream out-of-state, and few states have adequate facilities to handle all waste disposal within the state.¹⁹¹ New regulations are forcing many older landfills to close, resulting in higher fees at the remaining landfills. As a consequence, it is becoming financially expedient to ship some trash out of state. Closing these avenues will mean a higher rate of illegal dumping, along with waste being deposited in inadequately constructed landfills. Clearly, the Supreme Court has felt that waste shipment is part of interstate com-

187. *J. Filiberto Sanitation*, 857 F.2d at 922.

188. *Id.* at 919 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-52 (1977)).

189. *Id.* at 922.

190. *Id.* at 921.

191. See *House Subcommittee to Solicit Comments on Outline of RCRA Reauthorization Bill*, [22 Current Developments] *Env't Rep. (BNA)* No. 13, at 782 (July 26, 1991).

merce and has struck down most state attempts to block waste shipment, especially when the measures are merely economic, protectionist measures. However, Congress, in the proposed reauthorization of RCRA, as well as in separate interstate waste legislation, has decided to focus on solid waste, realizing that the states alone are not adequately addressing this issue. In so doing, sponsors of various bills in Congress are seeking to allow states to discriminate against out-of-state waste, thereby actually leaving to each state how best to deal with its landfill resources and its trash. Any solution to the waste shipment problem will be temporary at best, and America must strive to find alternatives to the landfill crisis. Land is a resource of defined quantity; once it runs out, America must have other waste disposal resources and technology available. If not, we may all be buried under our own garbage.