

# Hazardous Waste in Interstate Commerce: The Triumph of Law Over Logic

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Both authors would like to acknowledge Stephen Owens, J.D. 1994, University of Utah, for contributions to this comment.

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## INTRODUCTION

The United States Supreme Court has declared, in the name of unimpeded interstate commerce, that states do not have the power to deny entry to hazardous waste and all of its attendant risks and harms.<sup>1</sup> These rulings are controversial, especially to residents of states that have effectively become national dumping grounds for hazardous waste. The debate over hazardous waste in interstate commerce can be broken down into two fundamental questions: (1) What is the most *efficient* way to dispose of the nation's hazardous waste?; and (2) What is the most *equitable* way to dispose of the nation's hazardous waste? In analyzing this debate, it is important to remember that hazardous waste treatment, storage, and disposal, although heavily regulated by state and federal law, are private activities. Thus, the confrontation between exporting states and importing states is not simply a contest of wills between more and less powerful state governments. The actors in hazardous waste disposal—generators, transporters, and operators of treatment, storage, and disposal (TSD) facilities—are in economic relationships that often transcend state boundaries.

The issue as it is currently framed, however, often pits state against state rather than states against generating or disposal facilities. Increasingly, "cheap land states"<sup>2</sup> are decrying their treatment at the hands of hazardous waste exporting states. Many of these states have acted to remedy what they perceive as inequitable dumping of out-of-state waste within their borders, which heightens health and safety risks for their residents and eliminates valuable hazardous waste landfill capacity. However, attempts by states to enact disposal regulations to limit in-state disposal of hazardous waste generated out-of-state are often challenged in court and must survive heightened Commerce Clause scrutiny.

Two recent Supreme Court decisions, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*<sup>3</sup> and *Chemical Waste Management, Inc. v. Hunt*,<sup>4</sup> provide the latest guidance to states on how

1. See *infra* part III.

2. Chief Justice Rehnquist frequently uses the term "cheap land states" when referring to those states that he believes currently bear most of the burden to dispose of hazardous waste. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2030 (1992) (Rehnquist, C.J., dissenting).

3. *Id.*

4. 112 S. Ct. 2009 (1992).

far they can go in regulating solid and hazardous waste generated out-of-state. In both cases, the Supreme Court chose to continue limiting a state's ability to regulate the importation of out-of-state waste.<sup>5</sup> The Court's Commerce Clause position demands that those states wishing to regulate the excessive importation of hazardous waste must look to less discriminatory alternatives than limitations based on the point of origin.<sup>6</sup>

At least part of the current inequitable disposal burden may be attributed to poor drafting of state hazardous waste import regulations. EPA's failure to enforce the federal statute mandating that states ensure adequate disposal capacity for hazardous waste generated within their borders has also contributed to the problem.<sup>7</sup> In any case, it is clear that maintenance of the status quo will not result in more equitable distribution of hazardous waste facilities. There are at least three possible solutions to resolving this inequity. First, Congress, as the exclusive regulator of interstate commerce,<sup>8</sup> could enact its own comprehensive regulation of hazardous waste in interstate commerce. Second, Congress could authorize state regulation of out-of-state waste.<sup>9</sup> Third, the states could develop strategies to regulate importation of hazardous waste that would survive a Commerce Clause challenge. Despite the common belief that state regulation of hazardous waste imports is futile, the authors of this comment believe that numerous strategies exist that may survive a Commerce Clause challenge.

The authors further believe, as a matter of policy, that all states should be responsible for the disposal of at least some portion of the waste generated by in-state industries. The disproportionate burdens of hazardous waste disposal faced by residents of cheap land states are similar to the inequities decried by the environmental justice movement.<sup>10</sup> In fact, the current regulatory scheme, which focuses disposal of hazardous waste in states with lower land values, could be contributing to the ineq-

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5. In *Fort Gratiot*, the Court ruled that Michigan's Waste Import Restrictions, which allowed a county to restrict the importation of all out-of-county waste, violated the dormant Commerce Clause. 112 S. Ct. at 2023-24. In *Hunt*, the Court ruled that Alabama's tipping fee for out-of-state waste was an undue burden on interstate commerce. 112 S. Ct. at 2015. The Commerce Clause issues involved apply with equal force to burdens on all types of imported waste—including commercial, industrial, hazardous, and nuclear waste. In general, this comment will not distinguish between these different types of waste.

6. *Hunt*, 112 S. Ct. at 2015.

7. For a discussion of the federal capacity assurance program, see *infra* notes 18-32 and accompanying text.

8. U.S. CONST. art. I, § 8, cl. 3.

9. See, e.g., *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984) ("Congress may redefine the distribution of power over interstate commerce by permit[ting] the states to regulate commerce in a manner which would be otherwise impermissible.") (alterations in original) (citation omitted).

10. See, e.g., William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar.-Apr. 1992, at 18, 18-19.

uitable distribution of environmental hazards to lower income people.<sup>11</sup> To remedy these inequities, those states now evading their hazardous waste disposal responsibilities must be strongly encouraged—if not compelled—to take responsibility for disposing of the waste generated by their citizens. Eventually, all states must establish some sort of hazardous waste disposal site. Unfortunately, there are currently few incentives, and many disincentives, for states to encourage or even permit the siting of new hazardous waste disposal facilities within their borders.

This comment examines several facets of the dilemma faced by disposal states that try to limit hazardous waste imports. Part I provides background on the hazardous waste regulation framework, current practices of the hazardous waste disposal industry, and local concerns that fuel the growing interstate antagonism over hazardous waste disposal. Part II introduces the dormant Commerce Clause doctrine and its application to hazardous waste disposal issues. Part III presents the dormant Commerce Clause case law addressing state regulation of waste generated out-of-state, including two recent Supreme Court cases, *Fort Gratiot* and *Hunt*. Part IV offers the authors' analysis of the Court's reasoning and conclusions. Part V presents potential congressional actions that would regulate the flow of hazardous waste across state borders and, perhaps more importantly, from region to region. Finally, part VI suggests strategies that states may use to avoid the hazards of the dormant Commerce Clause.

## I

### BACKGROUND

#### A. The Regulatory Environment

##### 1. Federal Legislation

Congress has adopted several pieces of significant legislation to regulate the generation, transport, storage, treatment, disposal, and cleanup of hazardous waste.<sup>12</sup> The Resource Conservation and Recovery Act<sup>13</sup>

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11. See generally Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 646 (1992).

12. Congress has defined "hazardous waste" as:

solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5)(A)-(B) (1988). Additionally, Congress has defined "hazardous substance," *id.* § 9601(14), 33 U.S.C. § 1321(a)(14) (1988); "toxic pollutant," 33 U.S.C. § 1317(a)(1); and "hazardous material," 49 U.S.C. §§ 1802(2), 1803 (1988 & Supp. III 1991).

13. Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6992 (West 1983 & Supp. 1993).

(RCRA) provides a comprehensive regulatory structure addressing these issues.<sup>14</sup> The Toxic Substance Control Act<sup>15</sup> (TSCA) regulates the manufacture, use, and distribution of dangerous chemicals. The Hazardous Material Transportation Act<sup>16</sup> (HMTA) delegates to the Department of Transportation the duty and power to oversee and regulate the transportation of hazardous materials throughout the United States.<sup>17</sup>

Perhaps the most crucial federal environmental statute, for the regulation of hazardous waste in interstate commerce, is the Comprehensive Environmental Response, Compensation and Liability Act<sup>18</sup> (CERCLA). CERCLA is better known for its provisions establishing liability and federal response authority for environmental mishaps.<sup>19</sup> The Act

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14. RCRA creates a complex system of permits, manifest documents, and performance standards to ensure that hazardous waste is transported, treated, and disposed of in a safe manner. It is designed to regulate hazardous waste from "cradle to grave." Accordingly, RCRA requires EPA, 42 U.S.C. § 6903(1), to identify materials considered to be "hazardous waste." *Id.* § 6921. EPA is also charged with developing standards and permit requirements for generators, *id.* § 6922, transporters, *id.* § 6923, and owners/operators of TSD facilities, 42 U.S.C.A. § 6924 (West 1983 & Supp. 1993). Finally, RCRA requires EPA to establish and enforce procedures for record-keeping, labelling, handling, containerization, and permitting of facilities handling hazardous wastes. *Id.* § 6925. RCRA's hazardous waste regulations are contained in 40 C.F.R. §§ 260.1-272.2501 (1992). For a complete overview of RCRA and its implementing regulations, see Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,254 (May 1991).

RCRA clearly envisions a system of state regulation under appropriate federal guidelines. RCRA subtitle D sets forth guidelines for the establishment of state waste management plans. See generally 42 U.S.C. §§ 6941-6949a (1988). The statute directs that "[n]othing in [subtitle D] shall be construed to prevent or affect any activities respecting solid waste planning or management which are carried out by State, regional, or local authorities unless such activities are inconsistent with a State plan approved by [EPA]." *Id.* § 6947(c) (1988). Additionally, the regulations grant states a great deal of flexibility in designing plans to meet local conditions. See 40 C.F.R. §§ 256.01-.65. Many states have responded to the call; by January 31, 1994, twenty-seven states were authorized to carry out at least part of the RCRA program, and many others were seeking authorization. Telephone Interview with EPA Staff, RCRA Hotline (Feb. 28, 1994). The current status of state programs is codified at 40 C.F.R. §§ 272.1-.2800, but the C.F.R.'s publication schedule has not kept up with state authorization.

15. 15 U.S.C.A. §§ 2601-2692 (West 1982 & Supp. 1993).

16. 49 U.S.C.A. §§ 1801-1819 (West 1976 & Supp. 1993).

17. See 49 C.F.R. §§ 171.1-180.417 (1992).

18. 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1993).

19. CERCLA was designed to deal with dangerous emergency conditions caused by illegal or improper dumping or accidental releases of hazardous substances. CERCLA establishes the Superfund, see 26 U.S.C. § 9507 (1988 & Supp. IV 1992), a multibillion-dollar account financed by taxes on corporations with taxable incomes in excess of \$2 million, *id.* § 59A, the petroleum industry, *id.* § 4611, and manufacturers of the chemical building blocks that become hazardous waste, *id.* §§ 4661, 4671. The Superfund helps finance the cleanup of contaminated sites. See 42 U.S.C. § 9611 (1988 & Supp. III 1991). CERCLA also imposes liability on defined responsible parties for qualified cleanup costs incurred by the government or private parties. *Id.* § 9607. CERCLA authorizes EPA to issue administrative orders to responsible parties requiring abatement of actual or threatened releases that may create "imminent and substantial endangerment" to health, welfare and the environment. *Id.* § 9606. Finally, CERCLA requires private parties to notify the National Response Center of any release of hazardous substances in a reportable quantity. *Id.* § 9603.

was modified by the Superfund Amendments and Reauthorization Act of 1986<sup>20</sup> (SARA), which mandates that each state demonstrate its ability to dispose of the hazardous waste generated within its borders during the next twenty years.<sup>21</sup> This capacity assurance requirement links a state's right to Superfund money to its willingness to create sufficient capacity to dispose of waste generated within its borders. CERCLA section 104(c)(9) provides:

[T]he President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority . . . .<sup>22</sup>

Unfortunately, the capacity assurance provisions have not alleviated the inequitable burden of hazardous waste disposal on cheap land states.<sup>23</sup> EPA has allowed states to fulfill their capacity assurance requirements by any of the following inadequate measures: identifying capacity shortfalls and preparing negotiated interstate agreements; increasing waste minimization efforts; or committing to increase in-state capacity.<sup>24</sup> Thus, to meet its capacity assurance requirements, a state need only submit a capacity assurance plan (CAP) that demonstrates its intention to deal with capacity shortfalls; states need not demonstrate sufficient *actual* capacity. A working group formed by EPA and the National Governors' Association (NGA) to review the capacity assurance program generally criticized the state plans as unrealistic.<sup>25</sup> Further, this group criticized EPA for inconsistent review of the plans and for not enforcing the program's requirements seriously.<sup>26</sup> The drastic hammer of shutting down all Superfund activities in a state that has not met its

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20. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675, 11000-11050 (1988 & Supp. III 1991)).

21. 42 U.S.C.A. § 9604(c)(9) (West Supp. 1993); see Robert O. Jenkins, Note, *Constitutionally Mandated Southern Hospitality: National Solid Wastes Management Ass'n & Chem. Waste Management, Inc. v. Alabama Dep't of Env'tl. Management*, 69 N.C. L. REV. 1001, 1012, 1030-40 (1991) (examining CERCLA provisions).

22. 42 U.S.C.A. § 9604(c)(9).

23. See *infra* notes 43-47 and accompanying text.

24. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY, OSWER DIRECTIVE 9010.02, GUIDANCE FOR CAPACITY ASSURANCE PLANNING: AGENCY PLANNING PURSUANT TO CERCLA § 104(c)(9), at 1.5 (1993).

25. *Id.* at 1.5-1.6.

26. *Id.*

capacity assurance requirements has likely forced EPA into its dishonest administration of the capacity assurance program. After all, a strict enforcement of CERCLA section 104 would likely shut down the Superfund program in many politically powerful states. Furthermore, application of the hammer would delay or stop hazardous waste cleanup activity, which is the primary purpose of the Superfund program.

This is not to say that the capacity assurance program has been useless. As the NGA working group noted, this program has provided a useful forum for discussing the nation's hazardous waste management needs and objectives.<sup>27</sup> Even EPA, however, has acknowledged that the program "did not necessarily encourage or enhance ongoing and potential future waste minimization efforts or efficiently promote needed capacity development."<sup>28</sup> Accordingly, EPA has recently revised the capacity assurance program. The Agency will now require, prior to disbursement of Superfund remedial action funds, that a state ensure the currency of its CAP and the commitments contained therein.<sup>29</sup> EPA refers to this new requirement as CAP maintenance.<sup>30</sup> To maintain a current CAP, a state must demonstrate that it is meeting milestones required within its plan for addressing capacity shortfalls.<sup>31</sup> In revising the program, however, EPA has also narrowed the focus to only those waste management technologies for which a national capacity shortfall is projected.<sup>32</sup> Thus, EPA will no longer require any capacity assurance from states for hazardous waste technologies for which there is sufficient national capacity.

It is unlikely that EPA's revisions to the capacity assurance program will have any appreciable effect on the inequitable distribution of hazardous waste facilities. By narrowing the focus of the program, EPA has abrogated the legislative intent of CERCLA section 104 to force each state to take some responsibility for the hazardous waste generated by its citizens. This will allow states without any facilities of a certain type (for which there is adequate national capacity) to continue to shirk their responsibility indefinitely. Further, given the drastic nature of the CERCLA section 104 hammer and all of the political fallout that would result from its invocation, it is unlikely, even with the new maintenance requirements, that EPA will ever seriously enforce this section.

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27. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 24, at 1.5.

28. *Id.* at 1.7.

29. *Id.* at 1.8-1.9.

30. *Id.*

31. *Id.*

32. *Id.* at 1.7.

## 2. State Action

The states exercise a great deal of control over the disposal of hazardous waste through permitting, taxation of disposal fees, and the creation of—or, in some circumstances, the failure to create—capacity for disposal. The decision whether to permit a TSD facility can involve a difficult balancing test. The need to create jobs and increase tax revenues must be balanced against short- and long-term risks from exposure to hazardous waste and the risk of transportation accidents. A state's permitting process alone can make it exceedingly difficult for a new facility to get off the ground.

Yet states vary widely in the exercise of their environmental regulatory powers.<sup>33</sup> When evaluating a state's claim that it is being "dumped on" by another state, it is useful to consider how the recipient state's laws, regulations, and taxes encourage disposal of hazardous waste in its landfills, often to the benefit of in-state industry. A state that claims it is being subjected to an overburdensome influx of out-of-state waste may be maintaining a "sweetheart deal" with its own industrial generators. In-state generators are favored over out-of-state generators because they create jobs for local communities and pay a great deal in state taxes. In a competitive economy, keeping an industry in the state often means making economic tradeoffs. As a result, a state's desire to placate in-state industry with low disposal rates may attract disposal by out-of-state companies.

## 3. Local Control

Local governments are often responsible for land use zoning and other restrictions that can either restrict or ease the siting of hazardous waste treatment facilities in a particular location.<sup>34</sup> Some rural commu-

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33. See James P. Lester, *A New Federalism? Environmental Policy in the States*, in ENVIRONMENTAL POLICY IN THE 1990'S, at 51, 58-59 (Norman J. Vig & Michael E. Kraft eds., 2d ed. 1994). In an overview of state environmental programs, the following states were labeled as progressive (defined as a high commitment to environmental protection coupled with strong institutional capabilities): California, Florida, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Washington, Wisconsin, and Virginia. *Id.* at 63. On the other hand, the following states were labeled as "regressives": Arizona, Colorado, Idaho, Kansas, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, Utah, and Wyoming. *Id.* at 64-65. A majority of these states lie in the less populated Western region of the country. According to the report: "These states will continue to promote economic development at the expense of environmental quality. At some point a catastrophe may turn the states in this category around, but at present they seem to be captured by an obsessive optimism that prevents their taking necessary precautions against further damage to the environment." *Id.* Often, states with the greatest history of hazardous waste problems are the most progressive in terms of hazardous waste remediation. Michigan, New Jersey, New York, Ohio, and Pennsylvania are good examples. All are heavily industrialized, and this industrialization may have been the impetus for adopting strong hazardous waste laws.

34. Roger D. Schwenke et al., *Local Control of Hazardous Wastes Through Land Use*



nities consider waste disposal—both solid and hazardous—to be the answer to their economic woes.<sup>35</sup> When deciding whether to permit a TSD facility, some rural local governments tend to place more emphasis on the economic benefits of the TSD facility, such as increased tax revenues and jobs, than on the associated risks.<sup>36</sup> As a result, TSD facilities, which can provide jobs lost in the nation's transition to an urban-centralized economy, are often sited in rural communities.<sup>37</sup> Yet, as hazardous waste exports from the more populous states of the Eastern and Western seaboard pour into more sparsely populated Western, Midwestern, and Southern States, one should question whether courting the hazardous waste industry to boost rural economies is such a wise economic decision. In contrast to the short-term economic benefits, the risks associated with a hazardous waste facility may be present hundreds of years into the future.

### B. Interstate Waste

In 1989, 197.5 million tons of RCRA hazardous waste were produced in the United States, almost ninety-eight percent of which was generated by the manufacturing industry.<sup>38</sup> The majority of hazardous waste is managed onsite; only eight million tons, or four percent of the total, were shipped offsite for management.<sup>39</sup> Half of these eight million tons was transported to a different state for management.<sup>40</sup> Thirty-three states and the District of Columbia are net exporters of hazardous waste.<sup>41</sup> Every state, to some degree, exports hazardous waste.<sup>42</sup>

A number of states believe they are serving as dumping grounds for other states. This position is supported by some rather telling evidence.

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*Regulation*, 21 REAL PROP. PROB. & TR. J. 603, 604 (1986).

35. See, e.g., Scott Allen, *Bay State Ships Out Its Waste Problems: Destination Often Poor, Rural Towns*, BOSTON GLOBE, Feb. 16, 1994, Metro/Region, at 1. (reporting rural counties courting hazardous waste facilities in an effort to obtain jobs for "several dozen" citizens).

36. David Hoyer, *Dumping on the Poor*, PHOENIX GAZETTE, Apr. 25, 1993, at G1.

37. See Allen, *supra* note 35, at 1. Generally, there is more risk associated with TSD facilities in densely populated urban areas—than in rural areas—because of an increased exposure population. In addition, a TSD facility proposal in an area with a greater exposure population is likely to generate more political opposition because it adversely affects a greater number of people.

38. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY, EPA530-R-92-027, EXECUTIVE SUMMARY: NATIONAL BIENNIAL RCRA HAZARDOUS WASTE REPORT (BASED ON 1989 DATA), at 1-2 (1993).

39. *Id.* at 6.

40. *Id.*

41. See *id.* at 3, 6.

42. See *id.* at 3. The average state imports and exports hazardous waste from and to 19 other states, and utilizes 12 different treatment or disposal technologies in other states. *Interstate Transportation of Solid Waste: Hearings before the Subcomm. on Transportation & Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 79 (1991) (testimony of Don Clay, Assistant Administrator for Solid Waste and Emergency Response) [hereinafter Testimony of Don Clay].

Six states (Alabama, Illinois, Indiana, Louisiana, Ohio, and Pennsylvania) receive more than fifty percent of all the hazardous waste imported annually.<sup>43</sup> Ten states (Alabama, Idaho, Indiana, Nebraska, Nevada, Oklahoma, Oregon, Rhode Island, South Carolina, and Utah) import more than twice the amount of hazardous waste that they export.<sup>44</sup> Current projections indicate that many of the present landfills will be filled in the near future.<sup>45</sup> Since 1980, however, only six hazardous waste landfills have been opened in the United States.<sup>46</sup> These statistics seem to indicate that an ever decreasing group of states are managing the bulk of the hazardous waste shipped offsite by industry.<sup>47</sup>

A number of historical, political, and economic factors have contributed to disparities in state hazardous waste disposal capacity. First, geographical, geological, and demographic factors impacted the initial round of TSD facility sitings.<sup>48</sup> States with low population densities and large amounts of undeveloped land were considered prime locations for hazardous waste disposal facilities. In addition, operators of TSD facilities have responded to the favorable economic and legal climate for business in some states. Accordingly, the authors believe, facilities have clustered in sparsely populated, pro-business states. Hazardous waste exporters, in turn, have made use of existing, available disposal sites.

The business practices of generating industries dictate that hazardous waste disposal must be treated as an expense. Thus, generating in-

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43. See OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 38, at 3.

44. See *id.*

45. *State Considers Combination of Higher Fees, Subsidies for In-State Waste*, 23 Env't Rep. (BNA) 1160 (Aug. 7, 1992); see also *Rep. Synar Blasts EPA for Delays in Closure of RCRA Waste Disposal Sites*, Wash. Insider (BNA) (June 1, 1992) (EPA delay in closing non-complying hazardous waste landfills increases threat of ground water contamination and harm to environment).

46. *Hazardous Waste: States Play Increasingly Important Role in Backing Commercial Facilities*, 18 Env't. Rep. (BNA) 1103 (Aug. 21, 1987) [hereinafter *States' Increasing Role*].

47. Not only the fifty states, but foreign countries are also allowed to dump their hazardous waste in the United States. See *Foreign Waste Ban Held Unconstitutional*, 10th Circuit Rules Under Commerce Clause, Wash. Insider (BNA) (Aug. 19, 1992) (statute barring importation, storage, treatment, and disposal of hazardous waste generated in foreign countries unconstitutional).

48. To a certain degree, the development of advanced storage facilities and leachate collection systems has made geographical and geological factors less crucial. As pointed out by Chief Justice Rehnquist in his *Fort Gratiot* dissent:

The modern landfill is a technically complex engineering exercise that comes replete with liners, leachate collection systems and highly regulated operating conditions. As a result, siting a modern landfill can now proceed largely independent of the landfill location's particular geological characteristics. See 56 Fed. Reg. 51009 (1991) (EPA-approved "composite liner system is designed to be protective in all locations, including poor locations"); *id.*, at 51004-05 (outlining additional technical requirements for only those landfill sites (1) near airports, (2) on floodplains, (3) on wetlands, (4) on fault areas, (5) on seismic impact zones, or (6) on unstable areas). Given this, the laws of economics suggest that landfills will sprout in places where land is cheapest and population densities least.

*Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting).

dustries often ship their hazardous waste out-of-state to take advantage of more permissive laws and cheaper disposal rates.<sup>49</sup> For example, California's 1981 hazardous waste disposal fees were \$7.50 per ton; by 1989, the fees were \$116 per ton.<sup>50</sup> As a result, many California companies have been sending their waste to neighboring states where disposal fees are substantially lower.<sup>51</sup>

Lower disposal costs, however, are not the only reason that industries ship their waste out-of-state. Many large national corporations seek to limit their future Superfund liability by selecting a limited number of disposal facilities.<sup>52</sup> Hazardous waste generators also ship waste across state lines to take advantage of specialized forms of treatment, such as incineration. Because it is inefficient to site every specialized form of treatment in every state, such facilities are usually created to serve regional or national needs.<sup>53</sup> Thus, restrictions on the interstate movement of hazardous waste may interfere with corporate waste management strategies.

Political pressure is another important factor. At the state level, political pressure is influenced by differences in the states' historical dependence on natural resources, concern for the environment, level of education, and relative economic strength. At the local level, private citizens often split into two camps: one group supports TSD facility siting for the economic benefits; and a second group opposes TSD facilities because of the dangers and damaged reputation associated with hazardous waste—the so called “Not in My Backyard” (NIMBY) syndrome.<sup>54</sup> The concerns of private citizens are not limited to the particular community that stands to be affected by the siting of a hazardous waste facility. Concern often extends to neighboring communities, which fear the impact that a TSD facility may have on their quality of life. Depending on the nature of the hazardous waste to be treated and stored, this zone of impact may cover great distances; it often crosses state lines.

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49. For a discussion of states' varying levels of environmental regulation, see Lester, *supra* note 33, at 57-59.

50. Vlae Kershner, *State May Cut Its Exports of Toxic Wastes*, S.F. CHRON., July 17, 1989, at A1, A16.

51. In 1989, California exported over 204,000 tons of hazardous waste, which is more than seven times the amount of hazardous waste California imported in 1989. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 38, at 3.

52. See Testimony of Don Clay, *supra* note 42, at 82.

53. See *id.* at 88.

54. See generally Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437 (1988). North Carolina, which has consistently been unable to site a hazardous waste treatment facility because of local political pressure, is the paradigmatic example of the NIMBY syndrome. For a description of the political situation in North Carolina, see Jenkins, *supra* note 21, at 1027 n.167.

It has been difficult, if not impossible, to site a hazardous waste disposal facility in some states.<sup>55</sup> The hazardous waste disposal industry, having learned its lesson from past siting challenges, no longer submits permit applications in areas where the proposal will be subjected to stringent regulations or will likely cause an emotional NIMBY battle.<sup>56</sup> As a consequence, states with existing disposal capacity are receiving applications for additional facilities, while states that have repeatedly resisted efforts to create disposal capacity, despite CERCLA's capacity assurance provisions, are receiving none.<sup>57</sup>

Similarly, the inability of individual states to develop a comprehensive state plan that will satisfy the Commerce Clause points out the failure of current laws to create an efficient, equitable system of hazardous waste disposal. In *Fort Gratiot* and *Hunt*, Michigan and Alabama, respectively, answered the call to create a comprehensive state waste plan under RCRA, only to have their plans shot down by the Supreme Court. These states might justifiably believe that they have been punished for their efforts to create a comprehensive hazardous waste strategy. Other states considering the example of Michigan and Alabama might choose to abandon their responsibility to establish their own program.

The disposal of hazardous waste is a "hot potato" not easily cooled. The advent of the NIMBY syndrome and the reluctance of elected officials to deal with this dilemma has aggravated the hazardous waste disposal debate. The involvement of the dormant Commerce Clause in this morass of political, economic, and philosophical conflicts of interests and power only serves to aggravate an already volatile issue. Attempts by states importing hazardous waste to stop the influx of waste have been repeatedly undermined by the Commerce Clause. The Supreme Court's interpretation of the Commerce Clause has left the primary importing states defenseless before an ever-rising wave of hazardous waste.

## II

### THE COMMERCE CLAUSE

The framers of the Constitution feared interstate feuding.<sup>58</sup> To prevent interstate rivalries from causing state economic isolationism, they included in the Constitution the Commerce Clause, which states: "The Congress shall have Power . . . to regulate Commerce . . . among the

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55. See generally Jenkins, *supra* note 21, at 1027.

56. See Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 405 (1991).

57. There are eighteen states with no commercial hazardous waste facilities and no applications pending for such a facility. Only six of 36 pending siting applications are in states with no commercial facilities. *States' Increasing Role*, *supra* note 46, at 1104.

58. David Pomper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1313 (1989) (citations omitted).

several States.”<sup>59</sup> Although Congress’ power to regulate interstate commerce is broad, Congress leaves many potential subjects of federal regulation unaddressed. In the absence of federal legislation, states may address these subjects, but they are constrained by the dormant Commerce Clause.<sup>60</sup> The dormant Commerce Clause doctrine expresses the Supreme Court’s view that the Constitution does not allow a state to isolate itself from the national economy.<sup>61</sup> Its principle function is to prohibit barriers between states that could inhibit freeflowing trade.<sup>62</sup> For this reason, the negative or dormant aspect of the Commerce Clause requires courts to strike down state legislation that conflicts with the constitutional purpose of avoiding economic isolationism between states.<sup>63</sup> Congress, however, may authorize laws that the dormant Commerce Clause would invalidate.<sup>64</sup>

The dormant aspects of the Commerce Clause were first recognized in the 1820’s by Chief Justice Marshall in *Gibbons v. Ogden*<sup>65</sup> and *Wilson v. Black Bird Creek Marsh, Co.*<sup>66</sup> Yet the doctrine was not fully established until 1851 when the Court decided *Cooley v. Board of Wardens*.<sup>67</sup> Since *Cooley*, the Supreme Court has considered the Commerce Clause with little coherence.<sup>68</sup> As observed by Justice Rutledge in 1946, the Commerce Clause “is not the simple, clean-cutting tool supposed . . . . [I]ts implied negative operation on state power has been uneven, at times highly variable . . . [T]he history of the Commerce Clause has been one of very considerable *judicial oscillation*.”<sup>69</sup> Contemporary Justices also find dormant Commerce Clause analysis wanting. In *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, Justice Scalia complained:

The fact is that in the 114 years since the doctrine of the negative Commerce Clause was formally adopted as a holding of this Court, and in the 50 years prior to that in which it was alluded to in various dicta of the

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59. U.S. CONST. art. I, § 8, cl. 3.

60. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

61. See *id.* at 623-24.

62. See, e.g., *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 373-74 (1964) (Constitution prohibits states setting barriers to interstate commerce); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 531-35 (1949) (state cannot burden interstate commerce to promote its own economic interests).

63. See *City of Philadelphia*, 437 U.S. at 623.

64. See *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983).

65. 22 U.S. (9 Wheat.) 1 (1824).

66. 27 U.S. (2 Pet.) 245 (1829).

67. 53 U.S. (12 How.) 299 (1851). For a more exhaustive treatment of the dormant aspects of the Commerce Clause, see Jenkins, *supra* note 21, at 1009. See also Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 576-77.

68. Jenkins, *supra* note 21, at 1009.

69. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 418, 420 (1946) (emphasis added).

Court, our applications of the doctrine have, not to put too fine a point on the matter, made no sense.<sup>70</sup>

As Chief Justice Rehnquist has observed, "the 'negative side' of the Commerce Clause remains *hopelessly confused*."<sup>71</sup>

In theory, Commerce Clause analysis proceeds on two tracks. The Court has distinguished between state statutes that are basically protectionist measures and those that further legitimate state objectives with only incidental burdens on interstate commerce.<sup>72</sup> When the Court finds a state statute to be a protectionist measure, it applies a strict scrutiny test.<sup>73</sup> But when the Court finds that a state statute advances legitimate objectives with only incidental affects on interstate commerce, it applies a more flexible balancing test.<sup>74</sup> At best, these options illustrate the Court's "alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people."<sup>75</sup> In practice, however, the critical line of demarcation between the strict scrutiny and balancing tests is often blurred.<sup>76</sup>

### A. *The Strict Scrutiny Test*

A court reviewing allegations of a Commerce Clause violation will apply strict scrutiny to a statute that it finds to be basically a protectionist measure. Economic protectionism may be proven by establishing either a statute's discriminatory purpose or discriminatory effect.<sup>77</sup> When strict scrutiny is applied, the statute will be invalidated unless the state proves that "(1) the regulation has a legitimate local purpose; (2) the regulation serves this interest, and (3) reasonable nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not

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70. 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring and dissenting) (citations omitted).

71. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, C.J., dissenting) (emphasis added).

72. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). The *City of Philadelphia* Court stated that a "crucial inquiry . . . must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id.* at 624.

73. *Id.* at 624.

74. *Id.*

75. *Id.* at 623-24.

76. See *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (acknowledging that "there is no clear line separating the category of state regulation that is . . . [subject to strict scrutiny], and the category subject to . . . [a] balancing approach").

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

available.”<sup>78</sup> When a court applies strict scrutiny to a state law, invalidation of the law is practically assured.<sup>79</sup>

### B. The Balancing Test

The balancing test parameters were initially established by Justice Stewart in *Pike v. Bruce Church, Inc.*: “Where the statute regulates evenhandedly 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.”<sup>80</sup> Thus, a statute that only incidentally burdens interstate commerce will withstand attack as long as its burden on interstate commerce is outweighed by local benefits.<sup>81</sup> As with the strict scrutiny test, courts applying the balancing test usually will consider whether the law has a legitimate purpose and whether less discriminatory alternatives could facilitate the same purpose. Courts have generally accorded a presumption of validity, however, to state legislation based on “health and welfare” with only incidental effects on interstate commerce.<sup>82</sup> Thus, a challenged statute has a much better chance of surviving the balancing test where its legitimate purposes are weighed against what the reviewing court has found to be incidental burdens on interstate commerce.

### C. Application to Hazardous Waste

It is not immediately obvious that hazardous waste should be considered an article of interstate commerce and therefore subject to the dormant Commerce Clause. Although the transport, treatment, and disposal of hazardous waste provide the basis for a multibillion-dollar industry, there is, arguably, no “market” in hazardous waste. Such waste is not a commodity that is bought and sold; rather, its generators pay others to deal with it. Moreover, the transport and disposal of hazardous waste is perceived to implicate long-term costs to citizens and

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78. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1377 (Ala. 1991), *rev'd*, 112 S. Ct. 2009 (1992).

79. *City of Philadelphia*, 437 U.S. at 624 (“[W]here simple economic protectionism is effected by state legislation, a virtual *per se* rule of invalidity has been erected.”).

80. 397 U.S. 137, 142 (1970) (balancing Arizona’s interest in protecting its residents from unfit goods and in maximizing in-state industry profits against incidental burdens on interstate commerce).

81. *Id.*

82. See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986). The Supreme Court upheld the constitutionality of a Maine law banning the importation of live baitfish into Maine. Maine argued that importation of nonnative baitfish species threatened local species. The Supreme Court accepted Maine’s argument that protection of the marine environment is a legitimate state purpose and, concluding that no less discriminatory alternative to an outright ban existed, upheld the statute.

natural resources.<sup>83</sup> Thus, hazardous waste poses unique problems for Commerce Clause analysis.

This issue was resolved by the Supreme Court in *City of Philadelphia v. New Jersey*, which held that solid waste is an article of commerce.<sup>84</sup> The Court distinguished prior cases that allowed states to ban the importation of noxious goods, stating that those decisions "held simply that because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines."<sup>85</sup> Applying this rationale, the Court of Appeals for the Eleventh Circuit Court has expressly ruled that hazardous waste is "commerce" within the meaning of the Commerce Clause.<sup>86</sup> Thus, hazardous waste is an economically viable, albeit dangerous, "good" in the stream of interstate commerce.<sup>87</sup>

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83. There is precedent recognizing that states can prohibit, without violating the Commerce Clause, importation of items that would bring in and spread disease, pestilence, and death, or are unfit for human use or consumption. *See, e.g.,* *Clason v. Indiana*, 306 U.S. 439 (1939) (upholding Indiana regulation prohibiting importation of animal carcasses by nonlicensed operators); *Mintz v. Baldwin*, 289 U.S. 346 (1933) (certification that imported herds did not have bangs disease not unnecessary burden on interstate commerce); *Oregon-Washington R.R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926) (state exercising police powers may erect quarantines to protect inhabitants, stock, agriculture, trees, or plants from injury, disease, or destruction even if impacts interstate commerce); *Sligh v. Kirkwood*, 237 U.S. 52 (1915) (state may legislate to prevent exportation of citrus fruits unfit for consumption); *Asbell v. Kansas*, 209 U.S. 251 (1908) (upholding regulation requiring inspection of cattle imported for slaughter); *Crossman v. Lurman*, 192 U.S. 189 (1904) (prohibition of sale of adulterated food is a valid exercise of police power under Commerce Clause); *Reid v. Colorado*, 187 U.S. 137 (1902) (statute requiring certification of health or 90-days quarantine on cattle imported from below 36th parallel valid under Commerce Clause); *Compagnie Francaise v. State Bd. of Health, Louisiana*, 186 U.S. 380 (1902) (Louisiana Act preventing healthy persons from entering area infested with contagious disease not unconstitutional regulation of commerce); *Smith v. St. Louis & Southwestern Ry. Co.*, 181 U.S. 248 (1901) (Texas quarantine law prohibiting import of cattle from Louisiana after report of anthrax outbreak is a valid exercise of police power); *Rasmussen v. Idaho*, 181 U.S. 198 (1901) (Idaho sheep quarantine act allowing government to prevent importing sheep from infested locales within police power of Commerce Clause); *Louisiana v. Texas*, 176 U.S. 1, 3 (1899) (Texas statute established quarantines for vessels, persons, and property coming into state from places infected with diseases; upon report of yellow fever in New Orleans, Texas's absolute prohibition on anything coming from New Orleans did not violate the Commerce Clause); *Missouri, Kan., & Tex. Ry. v. Haber*, 169 U.S. 613 (1898) (holding that Kansas statute providing for civil action if individual imports cattle carrying disease did not regulate interstate commerce); *Kimmish v. Ball*, 129 U.S. 217 (1889) (Iowa statute imposing liability on person importing cattle that may suffer from Texas fever not regulation of interstate commerce); *see also City of Philadelphia v. New Jersey*, 437 U.S. 617, 632-33 (1978) (Rehnquist, C.J., dissenting).

84. 437 U.S. at 622.

85. *Id.* In determining that waste has economic value, the Court focused on the amount a generator is willing to pay for its disposal. The Court failed to consider adequately the long-term dangers associated with such disposal.

86. "Although the hazardous waste involved in this case may be innately more dangerous than the solid and liquid waste involved in *City of Philadelphia*, we cannot say that the dangers of hazardous waste outweigh its worth in interstate commerce." *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 710, 718-19 (1990).

87. This conclusion was implicitly reaffirmed in *Chemical Waste Management, Inc. v.*



III  
THE CASES: HAZARDOUS WASTE AND THE COMMERCE  
CLAUSE

*A. Prior State Efforts to Restrict Imported Waste*

A number of states would like to regulate the importation of hazardous waste using traditional state and local police powers.<sup>88</sup> State governments have tried a number of approaches to shield themselves from the importation of hazardous waste. These approaches include complete bans on out-of-state waste,<sup>89</sup> laws designed to restrict importation of waste from states that have not built in-state capacity or signed an interstate compact,<sup>90</sup> two-tiered fee schedules,<sup>91</sup> and additional documentation requirements.<sup>92</sup> The courts have treated all of these approaches with great suspicion.

*City of Philadelphia v. New Jersey*<sup>93</sup> was the first case to discuss the constitutionality of a state ban on the importation of out-of-state waste. The New Jersey Legislature sought to protect the state's environment by limiting the volume of waste deposited in state landfills. It enacted a statute providing that:

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, . . . until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.<sup>94</sup>

New Jersey authorities promulgated regulations under this law that effectively banned the importation of out-of-state waste to New Jersey landfills.<sup>95</sup>

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Hunt, 112 S. Ct. 2009, 2013-14 (1992) (reasoning that a tax on hazardous waste is a burden on interstate commerce). For discussion of this case, see *infra* part III.C.

88. State and local police powers emanate from the Tenth Amendment to the United States Constitution, which states: "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." U.S. CONST. amend. X.

89. See generally *City of Philadelphia*, 437 U.S. at 617.

90. See generally *National Solid Wastes Management Ass'n*, 910 F.2d 710 (1990).

91. In a two-tiered fee schedule, a state charges a greater per-ton fee for out-of-state waste than it charges for in-state waste. See *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991), *rev'd*, 112 S. Ct. 2009 (1992). For more discussion on this case, see *infra* part III.C. For more information on two-tiered fees, see *infra* notes 245-55 and accompanying text.

92. See *Government Suppliers Consol. Servs. v. Bayh*, 734 F. Supp. 853 (S.D. Ind. 1990) (striking down a state statute that required additional documentation for hazardous waste transporters as an undue burden on interstate commerce).

93. *City of Philadelphia*, 437 U.S. at 617.

94. *Id.* at 618-19.

95. *Id.* at 619 & n.2.

The Supreme Court first addressed whether the statute constituted "simple economic protectionism," subject to strict scrutiny, or whether credible state legislative purposes had been put forth that would permit the Court to apply the more flexible balancing test.<sup>96</sup> It concluded that the New Jersey statute was "an attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."<sup>97</sup> Thus, the New Jersey statute was not only facially discriminatory, but facially invalid.<sup>98</sup>

The Court found that:

[I]t does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination.<sup>99</sup>

Thus, the Court did not even reach New Jersey's argument that the statute primarily served the state interests of protecting the health and safety of New Jersey residents and conserving valuable New Jersey landfill capacity. Because the Court found the statute to be facially discriminatory, it held that these legislative purposes "would not be relevant to the constitutional issue in this case."<sup>100</sup> The *City of Philadelphia* Court seems to have laid out a hard and fast rule—a state cannot pass legislation that bans certain waste based solely on the waste's point of origin.<sup>101</sup>

The next important decision on hazardous waste importation and the Commerce Clause was *National Solid Wastes Management Association v. Alabama Department of Environmental Management*.<sup>102</sup> At issue was an Alabama statute, known as the Holley bill, which barred commercial hazardous waste disposal facilities located in Alabama from treating or disposing of hazardous waste generated outside of Alabama if the state generating the hazardous waste:

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

97. *Id.* at 628.

98. *Id.* at 626-27.

99. *Id.*

100. *Id.* at 626.

101. *Id.* at 627-28. Although the waste in *City of Philadelphia* was municipal solid waste, the logic behind this hard and fast rule is equally applicable to hazardous waste. See *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992).

102. 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991).

- 1) prohibited treatment or disposal of hazardous waste within its borders and had no hazardous waste treatment or disposal facility; or
- 2) had no facility for treatment or disposal of hazardous waste and had not entered into an interstate or regional waste disposal agreement to which Alabama was a signatory.<sup>103</sup>

This legislation was not intended as a complete ban on the importation of all hazardous waste.<sup>104</sup> Rather, it was designed to protect Alabama's citizens and preserve Alabama's hazardous waste disposal capacity by keeping out waste from those states that have refused to take any responsibility for hazardous waste disposal.<sup>105</sup>

Even though the legislation was arguably consistent with the CERCLA capacity assurance requirements, it was struck down on Commerce Clause grounds.<sup>106</sup> The Eleventh Circuit, citing *City of Philadelphia*, invalidated Alabama's statute because "the ban does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation."<sup>107</sup> The court rejected Alabama's argument that the limitation was necessary to preserve capacity assurance for waste created in the state of Alabama. The court ironically observed that if the state needed additional capacity to deal with in-state waste, it should site an additional facility or enter into interstate compacts to make up for its inability to dispose of all Alabama created waste.<sup>108</sup> The *National Solid Wastes Management Association* decision blindly follows the reasoning of *City of Philadelphia* at the expense of the legislative intent of CERCLA's capacity assurance provisions; it has been strongly criticized on policy grounds.<sup>109</sup>

## B. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources

In *Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources*<sup>110</sup> (referred to as *Fort Gratiot* in later proceedings), the Sixth Circuit provided a glimmer of hope that a state restriction on the importation of hazardous waste based on point of origin might survive a

103. ALA. CODE § 22-30-11 (1990) (cited in *National Solid Wastes Management Ass'n*, 910 F.2d at 717-18 n.7). The Holley Bill also prohibits waste management facilities in Alabama from contracting with other states to satisfy the other states' capacity assurance obligation under CERCLA. *Id.*

104. Although 22 states were listed on the state's "blacklist," the bulk of the hazardous waste affected originated in only a few states. See Jenkins, *supra* note 21, at 1005 nn.29-30.

105. For more information on the hazardous waste disposal burden placed on Alabama's citizens, see *infra* notes 147-53 and accompanying text.

106. *National Solid Wastes Management Ass'n*, 910 F.2d at 719.

107. *Id.* at 721.

108. At the time of the litigation, Alabama's Emelle facility was receiving waste from 48 of the 50 states. *Id.* at 715; see Jenkins, *supra* note 21, at 1005.

109. See Jenkins, *supra* note 21, at 1001.

110. 931 F.2d 413 (6th Cir. 1991), *rev'd sub nom.*, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992).

Commerce Clause challenge. Kettlewell, a municipal solid waste landfill operator, challenged certain provisions of the Michigan Solid Waste Management Act (MSWMA),<sup>111</sup> which delegates much of the responsibility for the disposal of solid waste to individual counties. At issue in the case were two MSWMA provisions that had been added by amendment in 1988. The first provided that "[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."<sup>112</sup> The second required that, "[i]n order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must also be explicitly authorized in the approved solid waste management plan of the receiving county."<sup>113</sup> The uniqueness of the Michigan statute was that its restrictions focused on out-of-county waste rather than out-of-state waste. It treated waste from other Michigan counties and out-of-state waste the same; since both originate "outside the county," their importation could be restricted in the county's waste disposal plan.

Kettlewell had submitted an application to the St. Clair County Solid Waste Planning Committee requesting authorization for disposal of solid waste, including out-of-state waste.<sup>114</sup> In the application, Kettlewell agreed to reserve sufficient space to dispose of all solid waste generated within St. Clair County for the next twenty years.<sup>115</sup> Kettlewell's application was denied by the County Solid Waste Planning Committee pursuant to the county's policy banning importation of any waste generated outside the county.<sup>116</sup> Bypassing the appeals process under MSWMA,<sup>117</sup> Kettlewell challenged the importation ban under the Com-

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111. See MICH. COMP. LAWS ANN. § 299.401 to .437 (West Supp. 1993).

112. 1988 Mich. Pub. Acts No. 475, § 1 (current version at MICH. COMP. LAWS ANN. § 299.413a).

113. 1988 Mich. Pub. Acts No. 475, § 1 (current version at MICH. COMP. LAWS ANN. § 299.430(2)).

114. *Bill Kettlewell Excavating, Inc. v Michigan Dep't of Natural Resources*, 732 F. Supp. 761, 762 (E.D. Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991), *rev'd sub nom.*, *Fort Gratiot Sanitary Landfill, Inc. v Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992). The St. Clair County plan was approved by the Michigan Department of Natural Resources (MDNR) in 1983. In a previous case involving the same parties, MDNR admitted that the present County plan did not permit disposal of solid waste "originating outside of St. Clair County," but denied that there was any absolute ban on out-of-state waste. See *Bill Kettlewell Excavating, Inc.*, 931 F.2d at 415.

115. *Id.* at 414. Under MSWMA, each Michigan county is required to submit a 20-year solid waste management plan to provide for such waste generated in the county, or, under certain conditions, in another Michigan county. Each county is also required to update the plan every five years. MICH. COMP. LAWS ANN. § 299.425(1)-(2) (West 1984 & Supp. 1993). These provisions are similar to the capacity assurance provisions of CERCLA. See *supra* notes 19-32.

116. *Bill Kettlewell Excavating, Inc.*, 931 F.2d at 414-15.

117. MSWMA provides, *inter alia*, that "[a]n applicant for an operating license, within 3

merce Clause in federal district court.<sup>118</sup> Kettlewell argued that the Michigan statute impermissibly discriminated against interstate commerce by requiring county approval for the disposal of out-of-state waste.<sup>119</sup> Alternatively, Kettlewell argued that St. Clair County's policy banning waste generated outside the county was unconstitutional.<sup>120</sup>

### 1. Lower Courts

The district court denied Kettlewell's motion for summary judgment.<sup>121</sup> It concluded that strict scrutiny should not be applied to the statute or St. Clair's policy because they did not facially or effectively discriminate against out-of-state interests, but rather treated all waste from other Michigan counties in the same fashion, regardless of state of origin.<sup>122</sup> Accordingly, the district court applied the more flexible balancing test.<sup>123</sup> The court determined that neither the statute nor St. Clair County's policy precluded the importation of waste into Michigan; they only minimally burdened interstate commerce.<sup>124</sup> Thus, the court found that St. Clair's policy, as an application of MSWMA, was "a valid exercise of the County's police power."<sup>125</sup>

On appeal, the Sixth Circuit affirmed the district court ruling.<sup>126</sup> The circuit court, reviewing de novo, first applied the *City of Philadelphia* standard to the MSWMA amendments in question:

If the amendments are simply aimed at economic protectionism, the defendants must hurdle a "virtual . . . per se rule of invalidity" to survive constitutional challenge. . . . If, however, the amendments serve a legitimate public interest, and only incidentally burden interstate commerce, the amendments "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>127</sup>

Following the reasoning of the district court, the Sixth Circuit concluded that the MSWMA amendments were not protectionist. According to the court, "[the] 13.29(13a) language places in-county and out-of-county waste in separate categories, but it does not treat out-of-county waste from Michigan any differently than waste from other states."<sup>128</sup>

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months after a license denial, may resubmit the application, together with additional information or corrections as necessary to address the reasons for denial, without being required to pay an additional application fee." MICH. COMP. LAWS ANN. § 299.413(5).

118. *Bill Kettlewell Excavating, Inc.* 732 F. Supp. at 762.

119. *Id.*

120. *Id.* at 765.

121. *Id.* at 766.

122. *Id.* at 764.

123. *Id.* at 766.

124. *Id.*

125. *Id.*

126. *Bill Kettlewell Excavating, Inc.*, 931 F.2d at 418.

127. *Id.* at 416 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), and *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

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

The court, therefore, concluded that the Michigan statute was not facially discriminatory or discriminatory in effect.<sup>129</sup> It then examined whether St. Clair County's application of the Michigan statute was discriminatory:

The effect of the Planning Commission action was to bar all solid waste importation from outside St. Clair County. The stated goal of St. Clair County's plan was to preserve, protect, and manage its landfills with respect to disposition of the County's own solid waste. This policy treats both out-of-county Michigan solid waste and outside Michigan solid waste equally. If, in fact, it were alleged or proven that all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under *City of Philadelphia v. New Jersey*. Instead, we are now concerned with the policy in one Michigan county, authorized by state statute, which effectually bars importation of solid waste *into* the county.<sup>130</sup>

Finally, the Sixth Circuit did not disturb the district court's application of the balancing test, which found St. Clair County's action to be a valid exercise of the police power.<sup>131</sup>

At the time the *Kettlewell* decision was handed down, it was a rare positive precedent allowing states to influence directly the importation of out-of-state waste. The holding, however, did not go so far as to challenge the *City of Philadelphia* rule that a state may not regulate waste based only on the waste's state of origin. Rather, the Sixth Circuit's opinion stood only for the proposition that a state can create a regulatory scheme that has the incidental effect of banning out-of-state waste at the county level, so long as the scheme is not applied to restrict all out-of-state waste.

The Supreme Court granted certiorari, and briefs were filed by a number of states interested in the outcome.<sup>132</sup> Perceiving the likely outcome in the Supreme Court, Congressman Wayne Owens (D-Utah) introduced a bill to the House of Representatives (H.R. 816) designed to authorize states to prohibit the importation of hazardous waste for treat-

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129. *Id.* at 417-18.

130. *Id.* at 418 (emphasis in original).

131. The Sixth Circuit only reviewed the district court's conclusion that the statute was not a protectionist measure. *See id.* at 416-18. Finding no error, it affirmed. *Id.* at 418.

132. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992). In *Fort Gratiot*, amicus briefs were filed by two groups of states. Group 1 included Pennsylvania, Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming. Group 2 included Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon, and Virginia. Both groups supported the respondents, Michigan Department of Natural Resources. Amicus Brief in Support of Respondents, Amicus Brief of the States of Pennsylvania, Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, West Virginia, Wyoming (No 91-636); Brief for the States of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon, and Virginia as Amicus Curiae in Support of Respondents (No 91-636).

ment or disposal.<sup>133</sup> Congressional intervention would have taken the issue out of the Supreme Court's hands,<sup>134</sup> but the bill was not enacted.

## 2. *The Supreme Court*

The Supreme Court reversed the Sixth Circuit's decision and ruled that the Michigan statute violated the Commerce Clause.<sup>135</sup> Writing for seven members of the Court, Justice Stevens rejected the lower courts' reasoning that the St. Clair policy as authorized by the Michigan statute can be distinguished from the New Jersey statute in *City of Philadelphia*.<sup>136</sup> The Court stated that it considered the Michigan plan to be an attempt "to avoid" the Commerce Clause by "curtailing the movement of articles of commerce through the subdivisions of the State, rather than through the State itself."<sup>137</sup>

Citing the *City of Philadelphia* rationale that "the evil of protectionism can reside in legislative means as well as legislative ends," Justice Stevens concluded that:

[t]he Waste Import Restrictions enacted by Michigan authorize each of its 83 counties to isolate itself from the national economy. Indeed, unless a county acts affirmatively to permit other waste to enter its jurisdiction, the statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas.<sup>138</sup>

The Court concluded that the county policy as authorized by the state statute was a discriminatory ban, however applied. Stevens further stated:

Nor does the fact that the Michigan statute allows individual counties to accept solid waste from out-of-state qualify its discriminatory character. . . . [T]he fact that several Michigan counties accept out-of-state waste merely reduced the scope of the discrimination [because] the discriminatory ban remained in place. . . . [I]n this case St. Clair County's

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133. The bill would have authorized both importation bans and two-tiered fee schedules. H.R. 816, 102d Cong., 1st Sess. (1991).

134. See, e.g., *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984) ("It is equally clear that Congress may 'redefine the distribution of power over interstate commerce' by permit[ing] the states to regulate the commerce in a manner which would otherwise not be permissible.") (alteration in the original) (quoting *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945)).

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

136. *Id.* at 2024.

137. *Id.*

138. *Id.* Justice Stevens' conclusion seems to assume that local producers are actually in competition with out-of-state producers for limited disposal space—a fact that was never even discussed at trial. The real issues were whether Mr. Kettlewell could use his excess disposal capacity to generate short-term profits by accepting waste from out-of-state generators, and whether the state, or a political subdivision thereof, had the power to do anything about it.

total ban on out-of-state waste is unaffected by the fact that some other counties have adopted a different policy.<sup>139</sup>

The Court was also unpersuaded by Michigan's argument that the Waste Import Restrictions were part of a comprehensive health and safety regulation.<sup>140</sup> In the amicus briefs, a number of states argued persuasively that the inability to inspect waste at the point of generation made it impossible to ensure the safety of citizens in the disposal state.<sup>141</sup> Justice Stevens apparently found these allegations that out-of-state waste might differ from in state waste to be unsupported by any evidence. Stevens did note, however, that "[o]f course, our conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste."<sup>142</sup> But Stevens concluded that "the lower courts did not find—and respondents have not provided—any legitimate reason for allowing petitioner to accept waste from inside the county but not waste from outside the county."<sup>143</sup>

Chief Justice Rehnquist filed a dissenting opinion in which he continued to argue his position, first outlined in *City of Philadelphia*, that the "substantial environmental, aesthetic, health, and safety problems" associated with waste obviates the need for strict Commerce Clause scrutiny.<sup>144</sup> The Chief Justice commended "the commonsense notion that those responsible for a problem should be responsible for its solution to the degree they are responsible for the problem but not further."<sup>145</sup> He also made particular mention of the fact that the regulations will work to Michigan's economic disadvantage, noting that:

Commerce Clause concerns are at their nadir when a state act works in this fashion—raising prices for all the State's consumers, and working to the substantial disadvantage of other segments of the State's population—because in these circumstances "a State's own political processes will serve as a check against unduly burdensome regulations."<sup>146</sup>

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139. *Id.* at 2025.

140. *Id.* at 2026-27.

141. See Brief for the States of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon and Virginia as Amicus Curiae in Support of Respondents at 45 (No. 91-636), stating:

The monopoly control which government may exercise over a waste stream serves several functions, including ensuring that no improper waste enters the stream, that disposal habits are changed so that only certain types of waste enter the stream (e.g., recyclables and compostables removed), and that the waste is handled and transported all along the stream so there is the least possible damage to health and environment. An intrastate waste stream may be regulated, inspected and controlled from point of generation to point of disposal. A waste stream which originates out-of-state cannot be easily inspected or controlled by the state which will receive ultimate disposal burdens.

142. *Fort Gratiot*, 112 S. Ct. at 2027.

143. *Id.* at 2028.

144. *Id.* (Rehnquist, C.J., dissenting)

145. *Id.* at 2029.

146. *Id.* (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981)).



## C. Chemical Waste Management, Inc. v. Hunt

Alabama is home to the nation's largest commercial hazardous waste disposal facility, Chemical Waste Management's site in the City of Emelle.<sup>147</sup> The Emelle facility, opened in 1977,<sup>148</sup> has the capacity to continue accepting hazardous waste for the next one to two hundred years.<sup>149</sup> In 1978 the Emelle facility accepted less than 200 million pounds of hazardous waste; in 1989, it accepted an estimated 1.6 billion pounds.<sup>150</sup> Ninety percent of the waste permanently buried at the site each year comes from outside Alabama.<sup>151</sup>

Partly because of out-of-state disposal at Emelle, many Alabamians feel that their state is becoming the nation's dumping ground. Governor Hunt ably articulated this concern: "[W]e've got to do something to stop the flow of hazardous waste into the state, to *force other states to get their incinerators and do [the] job that they ought to do and that we've got a right to expect them to do.*"<sup>152</sup> Alabama has repeatedly attempted to stem the flow of hazardous materials into the state, but with little success.<sup>153</sup>

In 1990, undaunted by previous failures, the Alabama legislature enacted a \$72 per ton "additional fee" on hazardous waste generated

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147. Jenkins, *supra* note 21, at 1003.

148. Chemical Waste Management, Inc v. Hunt, 112 S. Ct. 2009, 2011 (1992).

149. *Id.*

150. *Id.*

151. *Id.* at 2012.

152. Brief for Petitioner at 11 n.9, *Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471) (emphasis added) (alterations in original). Governor Hunt also stated:

On the day I took office just over three years ago, toxic waste producers in other states could drive their problems to Alabama and dump them for only \$6 a ton. But today, Alabama is taking down the sale sign. With this law it's going to cost \$112 a ton to bring hazardous waste into Alabama from other states. Let the message go out. There are no more environmental bargains to be found here.

*Id.*

153. When the EPA granted the Emelle facility its final RCRA permit in 1987, the State of Alabama and four citizen groups appealed the decision to the EPA Administrator. These same parties appealed the Administrator's refusal to rescind the permit to the Eleventh Circuit, which affirmed the Administrator's decision. *See Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 502 (11th Cir. 1990).

In 1988, the State of Alabama again filed suit attempting to stop the importation of PCB waste from Texas. The Eleventh Circuit dismissed the case for lack of standing and jurisdiction. That court, however, noted that to "the extent plaintiffs . . . assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the Commerce Clause bars such a distinction." *Alabama v. EPA*, 871 F.2d 1548, 1555 n.3 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989).

In May 1989, the Alabama State Legislature enacted the Holley Bill. ALA. CODE 22-30-11(b)-(d) (1990). As discussed above, this bill barred commercial hazardous waste disposal facilities located in Alabama from treating or disposing of hazardous waste generated in states that have not met their responsibilities under the CERCLA capacity assurance provisions. *See supra* note 103 and accompanying text. The Eleventh Circuit struck down this law in *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 718 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991).

outside Alabama and disposed of at commercial hazardous waste facilities within Alabama.<sup>154</sup> Alabama also established a base fee of \$25.60 per ton for all waste, regardless of the state of origin.<sup>155</sup> Finally, Alabama established a limit on the amount of waste that could be disposed of at a commercial hazardous waste facility.<sup>156</sup> This "cap" was to be determined by the amount of waste imported into Alabama in the year beginning July 15, 1990, the same day the new fee schedule was to take effect.<sup>157</sup>

### 1. Lower Courts

Chemical Waste Management filed suit in Alabama state court,<sup>158</sup> alleging that the 1990 Act's additional fee, base fee, and cap provisions violated both the U.S. Constitution and the Alabama State Constitution.<sup>159</sup> The trial court upheld the base fee and cap provisions.<sup>160</sup> It invalidated the additional fee, however, finding that this conclusion was compelled by *City of Philadelphia*.<sup>161</sup> The trial court reasoned that "the Additional Fee facially discriminates against waste generated in States other than Alabama . . . . By its very terms, the fee applies only to out-

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154. Act effective July 15, 1990, No. 90-326, 1990 Ala. Acts 448 (codified in scattered sections of ALA. CODE §§ 22-30B-1 to -15 (1990)). The additional fee provision is at ALA. CODE § 22-30B-2(b).

155. ALA. CODE § 22-30B-2(a).

156. *Id.* §§ 22-30B-1.1(9), 22-30B-2.3. The cap provision was structured so that only the Emelle Facility would be affected; it exempted all facilities that received less than 100,000 tons of hazardous waste during the year beginning July 15, 1990. See *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1369 (1991), *rev'd*, 112 S. Ct. 2009 (1992).

157. Act effective July 15, 1990, No. 90-326, § 9, 1990 Ala. Acts 456, *repealed by* Act effective Sept. 30, 1992, No. 92-658, § 4.

158. The Tax Injunction Act, 28 U.S.C. § 1341 (1988 & Supp. IV 1992), barred Chemical Waste Management from proceeding in federal court. Brief for Petitioner at 12 n.11, *Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471).

159. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1370 (Ala. 1991), *rev'd*, 112 S. Ct. 2009 (1992). In addition to its Commerce Clause challenge, Chemical Waste Management asserted that the Act violated the Due Process and Equal Protection Clauses of the U.S. Constitution and equivalent provisions of the Alabama Constitution. 584 So. 2d at 1370. Chemical Waste Management also argued that the statute was preempted by RCRA and TSCA and that it constituted a "revenue bill" enacted during the last five days of the legislative session, in violation of article IV, section 70 of the Alabama Constitution. *Id.* at 1370 & n.1.

160. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d at 1370. The trial court concluded that there was no constitutional defect in the cap provision itself. The additional fees, however, had tainted the cap amount by depressing the volume of waste disposed of during the benchmark period. Brief for Petitioner at 15, *Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471). The volume of waste fell from 791,000 tons in 1989 to 290,000 tons in 1991. *Hunt*, 112 S. Ct. at 2014 n.4. The trial court posed two alternatives for dealing with this dilemma: (1) the taint could be removed if Alabama remedied the discrimination by retroactively imposing the higher fee on in-state waste; and (2) if the discrimination were cured by imposing a refund, then the cap provision had to be revised. The trial court stated that the volume cap for future years could not be based on a benchmark period that included any time during which an unconstitutionally discriminatory fee was assessed. Brief for Petitioner at 10-11.

161. See *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d at 1387.

of-state waste. Waste generated within Alabama . . . is completely exempted from the Additional Fee."<sup>162</sup>

Alabama appealed the trial court's ruling that the additional fee was unconstitutional, and Chemical Waste Management cross-appealed the trial court ruling upholding the base fee and the cap provision.<sup>163</sup> The Alabama Supreme Court rejected Chemical Waste Management's arguments that the base fee and the cap provision were unconstitutional.<sup>164</sup> The court then reversed the trial court's ruling that the additional fee violated the Commerce Clause.<sup>165</sup> It distinguished discriminatory measures aimed at obtaining an economic advantage from discriminatory measures aimed at protecting health, safety, and the environment, concluding that the Alabama law was a valid "way to deal with health and environmental hazards."<sup>166</sup>

Moreover, Alabama's Supreme Court concluded that the additional fee served legitimate local purposes that could not be adequately served by reasonable nondiscriminatory alternatives.<sup>167</sup> These local purposes included protecting the health and safety of the Alabama citizen from toxic substances, promoting conservation of the environment and the state's natural resources, providing compensatory revenues to cover the costs and burdens of dealing with the increased amounts of hazardous waste being dumped by out-of-state generators, and reducing the overall amount of waste traveling Alabama highways.<sup>168</sup> The Alabama high court stated:

There is nothing in the Commerce Clause that compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states. To tax Alabama-generated hazardous waste at the same rate as out-of-state waste is not an available non-discriminatory alternative, because Alabama is bearing a *grossly disproportionate share* of the burdens of hazardous waste disposal for the entire country.<sup>169</sup>

Thus, the Alabama Supreme Court concluded that the additional fee provision should survive the Commerce Clause challenge.<sup>170</sup>

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162. Brief for Petitioner at 9.

163. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d at 1370.

164. *Id.* at 1376-86.

165. *Id.* at 1390.

166. *Id.* at 1387.

167. *Id.* at 1388.

168. *Id.* at 1388-89.

169. *Id.* (emphasis added).

170. The Alabama Supreme Court's opinion was ambiguous on whether strict Commerce Clause scrutiny should be applied to the additional fee. *See id.* at 1386. The court stated that by establishing the fee, Alabama was merely retaining its "broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Id.* Accordingly, the fee was not "simple economic protectionism" and was possibly not subject to strict scrutiny. *Id.* at 1387 (distinguishing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)). Even if strict scrutiny were applied, however, the Alabama law would be valid under the court's analysis: "The evidence in this case amply supports the conclusion that the Additional

## 2. *The Supreme Court*

Chemical Waste Management filed a petition for a writ of certiorari from the U.S. Supreme Court, seeking review of the Alabama Supreme Court's treatment of the Commerce Clause challenges to the additional fee, base fee, and cap provisions.<sup>171</sup> The Supreme Court granted certiorari, limiting its review to the Commerce Clause assault on the additional fee.<sup>172</sup> Alabama argued that its facially discriminatory tax should be upheld as a necessary means to protect the state from the "volume" of out-of-state wastes.<sup>173</sup> The state also argued that its tax was similar to a "quarantine" for noxious articles that could properly be regulated.<sup>174</sup> Alabama asserted that even though the additional fee facially discriminates, under the reasoning of the quarantine cases, it was a legitimate exercise of Alabama's police power to protect the health and safety of its citizens and environment.<sup>175</sup> Alabama focused on the "distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment."<sup>176</sup> In support of its claims, Alabama quoted *H.P. Hood & Sons v. Du Mond*:

This distinction between the power of the State to shelter its people from *menaces to their health or safety* . . . even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.<sup>177</sup>

The Court first decided that the additional fee required strict scrutiny. Justice White, writing for the Court, examined the additional fee under *Hunt v. Washington Apple Advertising Commission*<sup>178</sup> and con-

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Fee serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives." *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d at 1390.

171. Amicus briefs were filed by a number of states interested in the outcome. Ohio, Kentucky, Indiana, Utah, New Mexico, South Dakota, Kansas, Louisiana, Wyoming, Michigan, and Tennessee supported the respondent, Governor Hunt. These briefs argued that it was time to limit or overrule *City of Philadelphia*. Amicus Curiae Brief in Support of Guy Hunt, Governor of the State of Alabama, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471).

172. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 964 (1992) (granting certiorari).

173. *Hunt*, 112 S. Ct. at 2012.

174. See *id.* at 2016. For cases upholding state quarantines or noxious items, see sources cited *supra* note 83.

175. See Brief for Respondents at 17-18, *Hunt* (No. 91-471).

176. See *Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367, 1387 (1991) (citing *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986)).

177. Brief for Respondents at 17 (citing *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949)) (emphasis added); see also *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982) (in a Commerce Clause analysis, there is a difference between economic protectionism and health and safety regulations).

178. 432 U.S. 333, 353 (1977).

cluded that the fee was facially discriminatory. Therefore, White concluded, Alabama had “to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”<sup>179</sup> Invoking the strict scrutiny analysis of *Hughes v. Oklahoma*, White stated that “[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”<sup>180</sup>

Alabama’s health and welfare arguments withered under the high Court’s strict scrutiny. The Court recognized that Alabama’s justifications of the fee were “legitimate local interests.”<sup>181</sup> It objected, however, to the fact that Alabama targeted “only interstate hazardous waste to meet these goals,” finding that “there is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama.”<sup>182</sup> The Court also found that nondiscriminatory alternatives existed to limit risks from out-of-state.<sup>183</sup>

Finally, the Court rejected Alabama’s argument that the fee should be characterized as a quarantine law. It concluded that “[t]he Act’s additional fee may not legitimately be deemed a quarantine law because Alabama permits both the generation and landfilling of hazardous waste within its borders and the importation of still more hazardous waste subject to the payment of the additional fee.”<sup>184</sup>

Thus, in the end, the Court reaffirmed the hard and fast rule established by *City of Philadelphia*: “whatever [Alabama’s] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”<sup>185</sup> Further, the Court extended the application of the *City of Philadelphia* rule beyond total bans of hazardous waste imports to any regulation aimed solely at waste generated out-of-state.<sup>186</sup>

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179. *Hunt*, 112 S. Ct. at 2014 (quoting *Washington Apple Advertising Comm’n*, 432 U.S. at 353).

180. *Hunt*, 112 S. Ct. at 2014 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

181. *Hunt*, 112 S.Ct. at 2014.

182. *Id.* at 2014-15.

183. The Court in *Hunt* listed three less discriminatory alternatives to help alleviate the legitimate local interests related to health and safety: (1) a generally applicable per-ton additional fee on all hazardous waste disposed of within the state; (2) a per-mile tax on all vehicles transporting hazardous waste across Alabama road; and (3) an even-handed cap on the total tonnage landfilled in the state. *Id.*

184. *Id.* at 2016.

185. *Id.* at 2015 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)); see also *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (state may validate discriminatory statute if it advances legitimate local purpose that cannot be achieved by less discriminatory alternatives).

186. See *Hunt*, 112 S. Ct. at 2016. The Court found the additional fee to be “an obvious effort to saddle those outside the state” with most of the burden of slowing the flow of waste

As in *Fort Gratiot*, Chief Justice Rehnquist dissented from the majority opinion, claiming that Alabama was simply exercising its traditional police powers to regulate health risks.<sup>187</sup> He argued that the two-tiered "tax" was an effective but less restrictive means than a ban for protecting environmental resources and that the environment, not waste, was the relevant commodity restricted.<sup>188</sup>

#### IV ANALYSIS

The Supreme Court's strict application of the dormant Commerce Clause to hazardous waste disposal may soundly adhere to precedent, but it sorely lacks common sense. The undisputed value of hazardous waste management is difficult to reconcile with the substantial risks and harms posed by imported waste to the health, safety, and welfare of the importing state's residents. The Supreme Court, however, did not squarely face Alabama's argument that "the 788,000 total tons of hazardous waste buried . . . at Emelle in 1989 present a *considerably greater* threat to Alabama than the 69,000 tons of Alabama-generated waste buried there that year."<sup>189</sup> Alabama's health and welfare concerns are based on the detrimental effects of the sheer volume of hazardous waste being dumped. Only ten percent of the waste dumped at Emelle was generated in Alabama; the Court did not consider the multiplication of risk caused by importing ten times the amount of waste generated in-state.

The Supreme Court's failure to consider adequately the health and welfare issue is particularly alarming since the toxicity of hazardous waste lasts for 5,000 years.<sup>190</sup> The trial court acknowledged that hazardous waste contained "poisonous and cancer causing chemicals . . . which can cause birth defects, genetic damage, blindness, crippling and death."<sup>191</sup> Moreover, the transportation of the large volume of waste into Alabama creates a significant risk of a catastrophic accident in Alabama. Given the mass of hazardous waste involved and its high level of toxicity, the summary dismissal of Alabama's health and welfare argument seems terribly short-sighted.

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into the Emelle facility. "That legislative effort is clearly impermissible under the Commerce Clause of the Constitution." *Id.* (quoting *City of Philadelphia*, 437 U.S. at 629). Thus, according to the Court, any legislative action designed to decrease or slow hazardous waste imports that focuses its burdens on out-of-state interests would be invalid. *See Hunt*, 112 S. Ct. at 2016.

187. *See Hunt*, 112 S. Ct. at 2017-18.

188. *Id.*

189. Brief for Respondents at 15 n.24, *Hunt* (No. 91-471) (emphasis added).

190. Brief for Amicus Curiae in Support of *Hunt* submitted by the States of Ohio and Kentucky at 10, *Hunt* (No. 91-471).

191. *Id.*

Further, the Court's analysis disregards the reality that only a few states are currently equipped to handle hazardous waste disposal.<sup>192</sup> Generators in states with inadequate hazardous waste disposal capacity follow the path of least resistance, shipping their hazardous waste to other states. Despite CERCLA section 104's capacity assurance requirement, many states have also chosen the path of least resistance by avoiding the siting of new hazardous waste facilities within their borders.<sup>193</sup> Albeit indirectly, the Supreme Court's application of strict scrutiny to invalidate hazardous waste importation regulation has benefitted states that have shirked their disposal responsibility, while punishing those states that have taken responsibility for disposal.

A rigid application of the Commerce Clause has also led to a perverse regulatory effect. One of the framers' chief purposes in including the Commerce Clause in the Constitution was to prevent "economic balkanization."<sup>194</sup> Yet, by applying the Commerce Clause to hazardous waste disposal, the Supreme Court's fear of potential protectionism has resulted in servitude. Under the current system, a state designing a comprehensive waste management plan must consider out-of-state waste over which it has no control and for which its citizens are not responsible.<sup>195</sup> Since states have no access to a crystal ball telling them the projected output of their neighbors, such uncertainty makes effective waste management planning virtually impossible. As one commentator noted:

The inability to exclude foreign waste from local landfills also creates a disincentive for states and municipalities to establish waste disposal services to serve the needs of their citizens. A community that hosts a landfill only benefits to the extent to which its citizens receive waste disposal services. These benefits are reduced to the extent that outside communities consume services, because *the host community bears the full expense of siting the landfill, as well as the associated environmental and public health costs.*<sup>196</sup>

Chief Justice Rehnquist has been an unwavering opponent of the Court's application of the Commerce Clause to cases involving solid and hazardous waste. In *Hunt* he argued: "States may take actions legiti-

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192. See *State Considers Combination of Higher Fees, Subsidies for In-State Waste*, *supra* note 45, at 1160.

193. Only one hazardous waste permit application has been approved in the nine states that allow the greatest degree of public participation. *States' Increasing Role*, *supra* note 46, at 1104. Eighteen states have no commercial hazardous waste facilities and no applications pending for such a facility. *Id.*

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

195. See, e.g., OHIO REV. CODE ANN. § 3734.53(A)(6) (Anderson 1988) (requiring that district solid waste management plans project amounts and composition of solid waste originating out-of-state).

196. Anne Ziebarth, *Environmental Law: Solid Waste Transport and Disposal Across State Lines—The Commerce Clause Versus the Garbage Crisis*, 1990 ANN. SURV. AM. L. 365, 388-89 (1993) (emphasis added).

mately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators."<sup>197</sup> Rehnquist is the only member of the Court to acknowledge that applying the Commerce Clause to waste disposal, particularly hazardous waste disposal, does not address the overall public policy issue of how to deal effectively with waste (solid or hazardous) on a national level. As he points out in *City of Philadelphia*:

The physical fact of life that [a state] must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State. Similarly, [a state] should be free under our past precedents to prohibit the importation of solid waste because of the *health and safety problems* that such waste poses to its citizens. The fact the [state] continues to, and indeed must continue to, dispose of its own solid waste does not mean that [the state] may not prohibit the importation of even more solid waste into the State. *I simply see no way to distinguish solid waste . . . from germ infected rags, diseased meat, and other noxious items.*<sup>198</sup>

In his *Fort Gratiot* dissent, Chief Justice Rehnquist focused on the "legitimate local concerns" addressed by the Michigan statute.<sup>199</sup> Rehnquist reiterated his belief that the importation of waste results in "substantial environmental, aesthetic, health, and safety problems" for the importing state.<sup>200</sup> He concluded that the Michigan statute was "at least arguably directed" to these concerns.<sup>201</sup> He also set forth a lengthy analysis of the present and pending landfill situation,<sup>202</sup> pointing out the quandary faced by waste-importing states: "Those locales that do provide disposal capacity to serve foreign wastes effectively are affording reduced environmental and safety risks to the states that *will not take charge of their own waste.*"<sup>203</sup> He concluded by questioning the majority's failure to properly acknowledge the larger problem of waste disposal:

The Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn *encouraging each State to ignore the waste problem in the hope that another will pick up the slack.* The Court's approach fails to recognize that the latter option is one that is quite real and quite attractive for many States—and becomes even more

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197. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2017 (1992) (Rehnquist, C.J., dissenting).

198. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 632 (1978) (emphasis added).

199. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Resources*, 112 S. Ct. 2019, 2028 (1992) (Rehnquist, C.J., dissenting).

200. *Id.*

201. *Id.*

202. *Id.* From 1975 to 1988, municipal solid wastes increased from 128.1 million tons to 179.6 million tons. This amount is expected to rise to 216 million tons by the year 2000. Scientists projected that by 1991, 45% of the landfills were expected to reach capacity. *Id.*

203. *Id.* (emphasis added).



so when the intermediate option of solving its own problems, but only its own problems, is eliminated.<sup>204</sup>

In his *Hunt* dissent,<sup>205</sup> Chief Justice Rehnquist referenced his dissents in *City of Philadelphia* and *Fort Gratiot*. His disagreement with the majority was more strident as he pondered their intransigence:

[T]he Court *continues to err* by its failure to recognize that waste—in this case admittedly hazardous waste—*presents risks to the public health and environment that a State may legitimately wish to avoid*, and that the State may pursue such an objective by means *less Draconian than an outright ban*. Under force of this Court's precedent, though, it increasingly appears that the only avenue by which a State may avoid the importation of hazardous wastes is to ban such waste disposal altogether, regardless of the wastes source of origin. I see little logic in creating, and nothing in the Commerce Clause that requires us to create, such *perverse regulatory incentives*.<sup>206</sup>

Chief Justice Rehnquist is the lone voice on the Court to consider the “bigger picture” and recognize that application of strict Commerce Clause scrutiny to waste importation regulation causes more harm than good to interstate commerce. Given the perverse regulatory incentives identified by Chief Justice Rehnquist, state officials have good reason to avoid siting a hazardous waste facility. Because siting a hazardous waste facility engenders intense political opposition, and could open the state up to becoming a “national dumping ground,” it is not surprising that very few hazardous waste facilities have been sited in recent years.<sup>207</sup>

To uphold waste importation regulations, Rehnquist has argued for a “quarantine” analysis by analogizing hazardous waste to dead animal carcasses and other noxious items that have the potential to carry disease.<sup>208</sup> The “quarantine exception” was given modern form in *Maine v. Taylor*, where the Court upheld Maine's ban on the importation of live baitfish because of the threat the imported baitfish posed to the native fish and habitats.<sup>209</sup> The Court noted: “Even overt discrimination against interstate trade may be justified where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the

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204. *Id.* at 2030-31 (emphasis added).

205. *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009, 2017 (1992) (Rehnquist, C.J., dissenting).

206. *Id.* at 2018 (emphasis added).

207. From 1980 to August 1987, only six hazardous waste landfills were opened in the United States. *States' Increasing Role*, *supra* note 46.

208. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 632-33 (1978) (Rehnquist, J., dissenting); *Fort Gratiot*, 112 S. Ct. at 2029-30 (Rehnquist, C.J., dissenting). For cases upholding state quarantines on noxious items, see sources cited *supra* note 83.

209. 477 U.S. 131 (1986). The Court concluded that Maine's statute withstands strict scrutiny because it serves a legitimate local purpose that could not adequately be served by other nondiscriminatory means. *Id.* at 151.

health and safety of a State's citizens or the integrity of its natural resources. . . ."210

The Court's analysis in *Maine v. Taylor* stands in sharp contrast to the *Hunt* Court's analysis.<sup>211</sup> The Court stated in *Maine v. Taylor*:

[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.<sup>212</sup>

There is no coherence between the Supreme Court's concern for the welfare of Maine's baitfish and its disregard for the dangers hazardous waste pose to Alabama's populace.<sup>213</sup> The specter of the commonly known effects of exposure to hazardous waste—disease, cancer, birth defects, etc.—on Alabama's human population apparently were not sufficient health concerns to warrant the protection provided Maine's baitfish. Perhaps the result would be different if Alabama's law aimed to protect fish and not humans.

## V

### ACTIONS BY CONGRESS

Congress could solve the waste disposal problems created by the Court's invalidation of state regulation of hazardous waste imports by enacting legislation to do one of the following: (1) establish comprehensive regulation of the movement of hazardous waste in interstate commerce, thereby preempting the field;<sup>214</sup> or (2) authorize states to regulate

210. *Id.* at 149 n.19.

211. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014-15 (1992).

212. *Maine*, 477 U.S. at 148 (citation omitted).

213. In *Hunt*, the Court distinguished *Maine v. Taylor* by reasoning that the banned baitfish posed special harm because they were contaminated with foreign parasites, while the hazardous waste subject to Alabama's additional fee posed the same dangers as hazardous waste generated in Alabama. *Hunt*, 112 S. Ct. at 2017. Chief Justice Rehnquist had earlier refuted this distinction in his *City of Philadelphia* dissent, stating:

I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions.

*City of Philadelphia v. New Jersey*, 437 U.S. 617, 632-33 (1978).

214. If Congress "preempts" the field of hazardous waste disposal, a state statute attempting to regulate the area would likely be invalid. See generally Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1, 30 (1990) (examining federal preemption); Karen L. Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307 (1982).

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), the Supreme Court analyzed whether a state action had been preempted by the Federal Government. The Court noted two circumstances wherein federal preemption may occur: (1) where compliance with both the federal and state (or local) regulation is physically impossible; and (2) where the state (or local)

hazardous waste imports.<sup>215</sup> Although it is difficult to muster the necessary consensus to address a topic as controversial as the movement of hazardous waste in interstate commerce,<sup>216</sup> the time has come for Congress to clarify the rights of states involved in interstate waste movement.

This part posits some potential congressional actions to remedy the inequitable burdens placed on cheap land states in the current regulatory environment. Hopefully, these suggestions will serve to spur academic debate and eventual congressional action in this area. First, Congress should modify the capacity assurance provisions to define the requirement more clearly and provide an effective "hammer" provision. Second, the Federal Government should create and oversee hazardous waste transportation "corridors" to reduce the risk of transport accidents on the nation's highways.

### A. Amendments to the CERCLA Capacity Assurance Requirements

The purposes of CERCLA's capacity assurance provisions are to force states to assess the volume of waste that will be generated within their borders for the next twenty years, and to require states to ensure

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regulation is an obstacle to the accomplishment of a congressional objective. *Id.* at 158. This test was applied to a Washington law that regulated "the design, size, and movement of oil tankers in Puget Sound." *Id.* at 155. Portions of the Washington statute were considered preempted by federal legislation. *Id.* at 165-74; see also Schwenke, *supra* note 34, at 608 n.28.

This control, however, does not automatically extend to the very limits of congressional power over commerce. Rather, as Professor Tribe has noted, "[a] law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-8, 316 (2d ed. 1988) (footnote omitted).

215. See *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984). The Supreme Court clarified that congressional authorization of state regulation of interstate commerce must be "unmistakably clear." *Id.* at 91. "[E]xpress authorization is not always necessary. There will be instances . . . where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." *Id.* at 88 (quoting *South-Cent. Timber Dev., Inc. v. Le Resche*, 639 F.2d 890, 893 (9th Cir. 1982)).

A year before *South-Cent. Timber Development*, the Supreme Court acknowledged its acceptance of implied congressional approval in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983) (Mayor's executive order favoring city residents comports with intent of federal statute to encourage economic revitalization and employment opportunities for poor and minorities).

216. Any solution will involve making difficult value judgements. Although the Federal Government, and especially the military, is responsible for the creation of a great deal of hazardous waste, it has yet to develop a comprehensive national scheme to deal with its own waste. The Federal Government comes in contact with a great deal of hazardous waste through the operation of its Superfund program. Instead of taking this waste to a single national site, or designated regional sites, the current policy is to dispose of waste at private facilities and to operate within the confines of particular state laws. Fearing any limitation on EPA's ability to dispose of waste generated through cleanups, the Federal Government has consistently argued against state authority to ban the importation of out-of-state waste. See Testimony of Don Clay, *supra* note 42, at 78.

adequate disposal capacity for this waste either at in-state facilities, or at out-of-state facilities pursuant to an interstate compact.<sup>217</sup> By enacting this program, Congress intended to increase national disposal capacity and achieve a more equitable distribution of facilities between states.<sup>218</sup> As discussed above, however, EPA's timid implementation of the capacity assurance program has failed to create a more equitable distribution of hazardous waste disposal facilities among states.<sup>219</sup> Further, EPA has now taken the position that by enacting CERCLA section 104, Congress only intended to ensure adequate national hazardous waste disposal capacity, not equitable distribution of the disposal burden among states.<sup>220</sup>

Congress should amend CERCLA section 104 to clarify to EPA that it intended this section to further equitable apportionment of hazardous waste facilities among the states as well as to ensure national capacity. This could be accomplished by specifying that the capacity assurance requirements apply to all hazardous waste disposal technologies, not just to those for which there is a projected national shortfall. Further, Congress should clarify that, to meet their capacity assurance obligations, states must demonstrate actual capacity in-state or out-of-state pursuant to an interstate compact.<sup>221</sup> Congress should also establish geographic limitations on the reach of interstate compacts. A state like Utah should be able to enter into an interstate compact with California (to which it is regionally and geographically linked and which provides the nearest population center), but should not be able to enter into compacts with Northeastern states for the purpose of providing capacity assurance.

The obligations of states, however, should not interfere with the right of generators or operators of TSD facilities to perform in a free market (subject to the applicable permits, of course).<sup>222</sup> Thus, although

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217. See 42 U.S.C.A. § 9604(c)(9) (West Supp. 1993).

218. See OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 24, at 1.1.

219. See *supra* notes 18-28 and accompanying text.

220. See *supra* note 32 and accompanying text.

221. EPA allows states to ensure their capacity assurance obligations with a commitment to increase in state disposal capacity and/or a commitment to reduce generation of hazardous waste. See OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 24, at 1.5.

222. This aspect of our suggestions should be contrasted with the Low-Level Radioactive Waste Policy Act (LLRWPA), Pub. L. No. 96-573, 94 Stat. 3347 (1980), amended by Low-Level Radioactive Waste Act Amendments of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985) (codified as amended in scattered sections of 42 U.S.C.). The LLRWPA includes strong provisions designed to force states to site low-level radioactive waste facilities. In an unusual political compromise, Congress authorized sited states to levy surcharges on disposing generators from unsited states that fail to meet mandated milestones either to site a facility or join an interstate compact. 42 U.S.C. § 2021e(d)(1). These surcharges become progressively larger as the period of noncompliance with the milestones increases; eventually the sited states may deny access to their facilities until compliance is achieved. *Id.* § 2021e. Further, the "take title" provision requires states that have not sited a low-level radioactive waste facility or joined a regional compact with such a facility by 1996 to take title to the low-level radioactive waste generated in-state. *Id.* § 2021e(d)(2)(C). However, the take title provision was invali-

Northeastern states could not use excess western capacity in their capacity assurance tabulation, generating industries in Northeastern states could continue to ship waste to Western states. Generating industries would thereby retain the necessary flexibility to create integrated waste disposal strategies. Regional exclusivity would also provide incentives for states to band together to provide accessible means of specialized treatment, such as incineration. Hopefully, regional exclusivity would also modify the current economics of hazardous waste disposal and result in more equitable distribution of hazardous waste disposal throughout the country.

Finally, and most importantly, Congress should establish a new hammer to enforce the revised capacity assurance requirements. As pointed out above, the existing hammer of withholding Superfund money resulted in EPA's timid implementation of the capacity assurance program.<sup>223</sup> A rigorous enforcement of CERCLA section 104 would likely shut down the Superfund program in many populous states. Further, this hammer is illogical and counterproductive because it will only delay needed remedial activity. A more appropriate hammer would be to authorize states to levy a surcharge on hazardous waste generated in noncompliant states. Thus, the hammer would be a congressionally authorized surcharge similar to the type struck down in *Hunt*.

Each state must have the flexibility to determine the level of the surcharge, taking into account its citizens' opinions about the attendant risks of handling additional waste volume and the needs of disposal facilities, which, after all, are permitted by the state and contribute to its economy. Congress should cap the surcharge, however, to ensure that it does not effectively become a mechanism to ban waste from noncompliant states. A ban on waste imports from noncompliant states should be avoided because such a step could lead to an environmental crisis—large volumes of waste with no place for disposal. Further, such a drastic hammer may result in the same timid enforcement that has emasculated the existing program.

The amended statute should establish a cap that would enable states to establish a surcharge that would equalize the cost of disposal in their state with the cost of disposal in the noncompliant exporting state. Each successive year of noncompliance would ratchet up the fee five percent to a maximum fee of 120% of the cost of disposal within the noncompliant state. If the cost of disposal within the noncompliant state is impossible to ascertain, the amended statute should authorize a surcharge of \$100 per ton of hazardous waste. Each successive year of noncompliance would ratchet up the fee \$25 per ton to a maximum fee of \$200 per ton.

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dated by the Supreme Court as an unconstitutional infringement on state power in *New York v. United States*, 112 S. Ct. 2408 (1992).

223. See *supra* notes 18-28, 32.

This authorization of stiff surcharges would create an effective incentive for states to comply with the program. Given the heavy waste disposal fees that will be applied to generators in noncompliant states, industry within each state will likely pressure its home state to comply. At the very least, the surcharges will be roughly compensatory for the burdens placed on the importing states.

### B. Transportation Issues

The large volume of hazardous waste in the stream of interstate commerce raises another important issue: the Federal Government's responsibility to protect citizens from hazardous waste transportation accidents. Transportation accident concerns are often expressed in state attempts to regulate hazardous waste imports.<sup>224</sup> The Commerce Clause invalidation of state import regulation, however, seems to etch the right of crossnational hazardous waste transport in stone. If, in fact, the federal policy on disposal capacity will stress national, rather than state-by-state capacity,<sup>225</sup> it stands to reason that the amount of miles traveled by hazardous waste transporters will remain about the same or even increase. Accordingly, the Federal Government must consider strategies to minimize the risks of hazardous waste transportation accidents on the nation's highways.

There are a number of strategies available to address the risks associated with interstate hazardous waste transportation. First, the Federal Government should study hazardous waste transportation patterns and designate transportation "corridors" that correspond to the safest routes in terms of road quality and population density. The process of creating such corridors will inevitably be arduous and time consuming. People living anywhere near a proposed corridor would passionately resist designation of the corridor.<sup>226</sup> In this case, however, NIMBY criticisms may be without basis. The sheer volume of hazardous waste transported across state lines<sup>227</sup> dictates that most major highways are used by haz-

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224. See, e.g., *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1389 (Ala. 1991) (finding the "reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens," to be a legitimate local purpose of the additional fee), *rev'd on other grounds*, 112 S. Ct. 2009 (1992).

225. See OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 24, at 1.7.

226. Such resistance is motivated by economic as well as health concerns. See *City of Santa Fe v. Komis*, 845 P.2d 753 (N.M. 1992). In this case, Komis' land was taken to construct a highway to transport nuclear waste. In the condemnation proceeding, Komis alleged that the value of the portion of the land not taken was severely depreciated by the public's fear of the land's planned use. The New Mexico Supreme Court held that the public's fear of a governmental use, whether well-founded or not, that causes diminution in value to the remaining land not taken is compensable. Plaintiffs were awarded \$337,815 for the loss of value of the property not taken in the condemnation proceeding. *Id.* at 755-77.

227. In 1989, 4 million tons of hazardous waste were transported across state lines for disposal. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, *supra* note 38, at 6.

ardous waste transporters. Thus, the designation process can serve to empower the impacted population, first by giving citizens accurate information on just how much hazardous waste is transported on nearby highways, and second, by educating citizens about emergency procedures in case of an accident. All Americans will collectively benefit from regulations requiring hazardous waste transporters to use the safest and most sensible routes.

The Federal Government should also take the lead in ensuring comprehensive readiness to address any hazardous waste transportation accident. Once a highway is designated as a hazardous waste "corridor," directed funds should be made available to develop state response teams, specialized road maintenance, and programs to educate affected citizens about safety procedures.<sup>228</sup> Once a workable system is in place, EPA should provide direct oversight of state protocols for response to transportation accidents; it should also review state response programs periodically to ensure compliance with federal standards.

Congress could also establish distance limitations on hazardous waste transportation. For example, since hazardous waste regulation is overseen by EPA, ten disposal regions could be created that correspond to EPA's ten regional office service areas. Representatives of EPA, state governments, and generating industries in each region could be brought together to design a comprehensive plan for hazardous waste transportation and disposal within the region.<sup>229</sup> These plans could address preferred transportation routes, response protocols, and citizen awareness. Generators would be urged to use disposal facilities within their regions, although they would also be able to use disposal facilities in bordering regions. Generators would not be able to transport their waste beyond a neighboring region, however, unless they showed that the particular treatment technology they were seeking was most appropriate and unavailable in their region or neighboring regions.

## VI

### STATE STRATEGIES

After *Hunt* and *Fort Gratiot*, it may seem that states simply cannot regulate importation of hazardous waste. There are, however, some hazardous waste import regulatory strategies that may survive the Supreme Court's dormant Commerce Clause doctrine. This part outlines some of these strategies.

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228. Perhaps such funds could be derived from a per-mile federal tax on hazardous waste transportation, which in turn would discourage long distance transportation of hazardous waste and encourage reductions in hazardous waste generation.

229. This meeting could also be used to resolve regional disposal capacity and pricing issues.

*A. Court Suggested Methods*

In *Hunt*, the Supreme Court posited less discriminatory means theoretically available to achieve the same ends if Alabama's concern truly were to reduce the hazardous waste in its landfills.<sup>230</sup> The Court suggested: (1) a per-ton additional fee on all hazardous waste disposed of in a state;<sup>231</sup> (2) a per-mile tax on every vehicle transporting hazardous waste on state roads;<sup>232</sup> or (3) a cap on the total amount of hazardous waste allowed at a given landfill.<sup>233</sup> These measures, explained the Court, would curtail waste volumes from all sources and yet, because they do not solely burden out-of-state waste, would likely survive a Commerce Clause challenge.<sup>234</sup>

The first suggestion by the Court in *Hunt* indicates that states may increase their fees on waste, as long as the same rate applies to both in-state and out-of-state waste.<sup>235</sup> Raising fees across the board, however, may be problematic. As the brief for *Hunt* asserts:

An equal fee, at any level, would necessarily fail to serve the State's purpose. An equal fee high enough to provide any significant deterrent to the importation of hazardous waste for landfilling in the State would amount to an attempt by the State to avoid its responsibility to deal with its own problems, by tending to cause in-state waste to be exported for disposal. An equal fee not so high as to amount to an attempt to force Alabama's own problems to be borne by citizens of other states would fail to provide any significant reduction in the enormous volumes of imported hazardous waste being dumped in the State.<sup>236</sup>

Despite these difficulties, states can walk a careful line with fees that are economically feasible for in-state facilities, yet still provide disincentives for out-of-state generators.<sup>237</sup> Conceivably, states could provide subsi-

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230. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2015 (1992)

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 2015-16.

235. *Id.* This option was also offered in both *City of Philadelphia* and *Fort Gratiot*: "Michigan could, for example, limit the amount of waste that landfill operators may accept each year." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2027 (1992); see *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981), a coal severance tax was upheld that was applied to both in-state and out-of-state consumers, even though it was incidentally levied against out-of-state consumers more often. The same rationale would seem to apply to disposal of hazardous waste. The Court reasoned that discrimination does not exist where "the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." *Id.*

236. Brief for Respondents at 46, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471).

237. The battle over whether to increase a state per-ton fee creates interesting lobbying dilemmas for disposal facilities. For instance, in a current fight in Utah over such fees, some California disposal facilities are lobbying Utah legislators and contributing to their campaign accounts so that they will raise the Utah fees. The reason is simple: if Utah fees are higher,



dies or other tax breaks to domestic industries that generate hazardous wastes to offset high per-ton fees at the in-state disposal facilities.<sup>238</sup>

The *Hunt* Court also indicated that states may choose to impose a per-mile tax on all vehicles transporting waste.<sup>239</sup> The problem with such a plan is that, depending upon the geography of the state, the scheme might actually favor out-of-state importation and hurt in-state industries. For instance, if an in-state generator is required to haul its waste several hundred miles to an in-state facility, it will pay a much heavier per-mile tax than it would to utilize the out-of-state facility just across the border. Thus, this scheme could actually backfire. Nevertheless, some states might find that a per-mile tax is an effective and permissible disincentive to out-of-state generators.

The final suggestion of the *Hunt* Court is the establishment of an annual cap on the total tonnage landfilled in the state.<sup>240</sup> “[I]t may be assumed [that states] may [slow] the flow of *all* waste into the State’s remaining landfills, even though interstate commerce may incidentally be affected.”<sup>241</sup> In *Hunt*, the Supreme Court did not address the Alabama Supreme Court’s affirmance of the state’s cap on hazardous waste disposal.<sup>242</sup> The Alabama Supreme Court reasoned that this cap did not violate the Commerce Clause because it did not discriminate against out-of-state waste.<sup>243</sup> Although Chief Justice Rehnquist calls such regulations “perverse,”<sup>244</sup> the state would meet its goal of protecting its citizens by limiting the volume of hazardous waste disposed of in the state.

A state may also overcome a Commerce Clause challenge to a surcharge on disposal of out-of-state waste if the state can successfully argue that the fee is simply compensatory for the greater regulatory or toxicity burdens posed by out-of-state waste. The Supreme Court in *Fort Gratiot* stated that “our conclusion would be different if the imported waste raised health or other concerns not presented by [Alabama] waste.”<sup>245</sup> Similarly, in *National Solid Waste Management Association v. Voinovich*, the court suggested, in dicta, that the state could charge fees

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California generators of waste will “stay-at-home” with California disposal facilities. Telephone Interview with Fred Nelson, Assistant Utah Attorney General, Environment and Natural Resources Division (Jan. 15, 1993).

238. See *Hunt*, 112 S. Ct. at 2019 (Rehnquist, C.J., dissenting).

239. See *id.* at 2015 (“Less discriminatory alternatives . . . are available . . . [including] a per-mile tax on *all* vehicles transporting hazardous waste across Alabama roads . . .”).

240. See *id.* (suggesting that “an even-handed cap on the total tonnage landfilled” in Alabama would be permissible).

241. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

242. See *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 964, 964 (1992) (certiorari limited to the additional fee).

243. See *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1380-81 (1991).

244. *Hunt*, 112 S. Ct. at 2018 (Rehnquist, C.J., dissenting).

245. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 112 S. Ct. 2019, 2027 (1992); see also *Hunt*, 112 S. Ct. at 2017.

commensurate with the cost of inspecting out-of-state waste.<sup>246</sup> Such higher fees for foreign waste would not necessarily run afoul of the Commerce Clause.<sup>247</sup> A state could justify a surcharge on foreign waste by demonstrating that the disposal of such imported waste results in increased costs to the state relative to disposal of waste generated in state.

The State of Oregon has taken such a compensatory fee approach. Oregon has enacted a statutory provision authorizing the Department of Environmental Quality to set a surcharge on waste generated out-of-state.<sup>248</sup> In setting the surcharge, the Department must consider costs for all of the following: (1) solid waste management; (2) issuing new and renewal permits for solid waste disposal sites; (3) environmental monitoring; (4) ground water monitoring; and (5) site closure and post-closure activities.<sup>249</sup> The surcharge, which the Department set at \$2.25 per ton of solid waste,<sup>250</sup> was challenged as violative of the Commerce Clause in *Gilliam County v. Department of Environmental Quality*.<sup>251</sup> The Oregon Supreme Court upheld the surcharge, reasoning that the fee was not discriminatory because it was based entirely on the state's determination of the increased disposal costs posed by imported waste.<sup>252</sup> The court did not scrutinize the surcharge's nexus to additional costs imposed by out-of-state waste. Instead, it summarily concluded that the surcharge constitutes a "compensatory fee."<sup>253</sup> The U.S. Supreme Court has granted certiorari in this case.<sup>254</sup> It may attack the state's purported nexus between the fee and additional costs imposed by out-of-state waste.<sup>255</sup>

In *Diamond Waste, Inc. v. Monroe County*,<sup>256</sup> the court invalidated a Monroe County, Georgia, resolution that prohibited the transportation of waste into the county from "other counties and other locations."<sup>257</sup> The Eleventh Circuit suggested, however, some other means by which a local governmental entity could limit the amount of hazardous waste be-

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246. National Solid Waste Management Ass'n v. Voinovich, 763 F. Supp. 244, 263 (S.D. Ohio 1991), *rev'd*, 959 F.2d 590 (6th Cir. 1992), *cert. granted*, 114 S. Ct. 38 (1993).

247. *Id.*

248. OR. REV. STAT. § 459.298 (1991).

249. *Id.*

250. OR. ADMIN. R. 340-61-120(7) (1992).

251. Gilliam County v. Department of Env'tl. Quality, 849 P.2d 500, 504, *cert. granted*, Oregon Waste Sys. Inc. v. Oregon Dep't of Env'tl. Quality, 114 S. Ct. 38 (1993).

252. *Id.* at 508.

253. *Id.* (internal quotations omitted).

254. Oregon Waste Sys. Inc. v. Oregon Dep't of Env'tl. Quality, 114 S. Ct. 38 (1993). For a summary of the oral arguments before the Court, see *Environment and Conservation: Disposal of Solid Waste Generated Outside State*, 62 U.S.L.W. 3501 (Feb. 1, 1994).

255. See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (scrutinizing the state's claimed nexus between the required dedication of a public easement for a development permit and the impact of the proposed development; holding that the state's exaction was an unconstitutional taking).

256. Diamond Waste, Inc. v. Monroe County, 731 F. Supp. 505 (M.D. Ga. 1990), *aff'd in part & vacated in part*, 939 F.2d 941 (11th Cir. 1991).

257. Diamond Waste, Inc. v. Monroe County, 939 F.2d 941, 946 (11th Cir. 1991).

ing disposed of without an undue burden on interstate commerce: (1) setting a reasonable daily tonnage limit on imported waste and allowing dumping on a first come, first served basis; (2) auctioning permits for the dumping of fixed amounts of out-of-county waste; or (3) establishing dumping rights for out-of-county waste by lottery.<sup>258</sup> However, all three of the Eleventh Circuit's suggestions arguably target out-of-state waste. Thus, it is unclear whether any of these suggestions would survive a Commerce Clause challenge.<sup>259</sup>

In *City of Elizabeth v. New Jersey Department of Environmental Protection*,<sup>260</sup> the court held that a New Jersey law specifying which in-state disposal facilities could receive foreign wastes was not protectionist.<sup>261</sup> The court reasoned that since the law was based on a legitimate concern over inadequate waste disposal capacities in some parts of the state, and since it did not *ban* imports, its direction of waste streams did not violate the Commerce Clause.<sup>262</sup> Here again, however, since the regulation treats out-of-state waste differently based only on the waste's state of origin, it is unclear whether such a regulation would survive a Commerce Clause challenge in federal court.

Perhaps the most radical suggestion is for an importing state to throw in the towel and join the other twenty-two states that have no commercial hazardous waste disposal facilities whatsoever.<sup>263</sup> If the remaining states were to pass disposal caps, waste managers might be unable to find a suitable final resting place for their waste. Some of this fear may be unfounded, however, since "[w]holesale disposal bans may impose excessive and thus invalid (albeit evenhanded) burdens on commerce, or may be preempted by federal legislation enacted under Commerce Clause authority."<sup>264</sup>

### B. The Market Participant Exception

One of the strongest barriers a state may erect to ward off hazardous waste is to own the hazardous waste disposal facilities under the market participant exception to the dormant Commerce Clause. Under the market participant doctrine, a state may discriminate against out-of-state commercial interests in deciding what to do with its own resources.<sup>265</sup>

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258. *Id.* at 945.

259. *See Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014-15 (1992) (holding that state cannot target out-of-state waste in any regulation unless there is some reason, apart from the waste's state of origin, justifying the regulation).

260. 486 A.2d 356 (N.J. Sup. Ct. App. Div. 1984).

261. *Id.* at 361.

262. *Id.*

263. *See States' Increasing Role*, *supra* note 46, at 1104.

264. Joshua D. Sarnoff, *Supreme Court Decisions in Waste Cases Settle Pending Issues but Promise Further Activity*, 23 *Env't Rep. (BNA)* 692, 693 (June 19, 1992).

265. *See William A. Campbell, State Ownership of Hazardous Waste Disposal Sites: A*

Some states have already restricted ownership of landfills to government agencies.<sup>266</sup> More than eighty percent of the municipal solid waste landfills in the United States are owned by state or local governments.<sup>267</sup>

The market participant exception to the Commerce Clause was initially considered by the Supreme Court in *Hughes v. Alexandria Scrap Corp.*<sup>268</sup> In *Hughes*, the Court upheld Maryland's subsidies aimed at promoting the recycling of junk automobiles.<sup>269</sup> The provision granted subsidies to both in-state and out-of-state scrap processors for each Maryland-titled hulk destroyed.<sup>270</sup> The state, however, imposed more stringent requirements on out-of-state scrap processors than on in-state processors.<sup>271</sup> Justice Powell, writing for the Court, concluded that Maryland "has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price."<sup>272</sup> Distinguishing the nature of the state action, the Court concluded 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."<sup>273</sup>

In 1980, the Court again examined the market participant theory in *Reeves, Inc. v. Stake*.<sup>274</sup> At issue in *Reeves* were South Dakota's attempts to limit sales from a state-owned cement plant solely to South Dakotans during a cement shortage.<sup>275</sup> The Supreme Court upheld South Dakota's selective practices, acknowledging the "long recognized right" of private traders to choose their own trading partners<sup>276</sup> and the "foresight, risk, and industry" South Dakota exercised in building a cement plant in the first place.<sup>277</sup>

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*Technique for Excluding Out-of-State Wastes?*, 14 ENVTL. L. 177, 183-88 (1983). For thorough discussions of the market participant doctrine, see Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989); Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism?*, 1985 DUKE L. J. 697.

266. Arizona and North Carolina require that the land used for disposal sites be conveyed to the state and do not permit private ownership of any sites. ARIZ. REV. STAT. ANN. § 36-2802 (West 1986 & Supp. 1993); N.C. GEN. STAT. § 104E-6.1 (1993). Maryland and Massachusetts authorize state agencies to acquire sites, but also allow private ownership of the sites. MD. ENVIR. CODE § 7-411 (1993); MASS. GEN. LAWS ANN. ch. 21D, § 17 (West Supp. 1993).

267. See 53 Fed. Reg. 33,314, 33,318 (1988) (80% of municipal solid waste landfills are owned by local governments with an additional 1% owned by state governments).

268. 426 U.S. 794 (1976).

269. *Id.* at 814.

270. *Id.* at 796-97.

271. *Id.* at 800-01.

272. *Id.* at 806.

273. *Id.* at 810.

274. 447 U.S. 429 (1980).

275. *Id.* at 432-33.

276. *Id.* at 438-39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

277. *Id.* at 446.

Two of the more recent state arguments for the market participant exception to the Commerce Clause have failed, largely because they attempted to regulate the activities of third parties. In *South-Central Timber Development, Inc. v. Wunnicke*, the Court struck down an Alaska state statute that required purchasers of state-owned timber to process the timber in Alaska prior to shipment outside the state.<sup>278</sup> The Court determined that Alaska was not a participant in the timber processing market and could not regulate the activities of "downstream" markets.<sup>279</sup> In *New Energy Co. v. Limbach*, the Court invalidated an Ohio statute aimed at boosting the production and use of gasohol by providing a tax credit for each gallon of ethanol sold against the fuel tax otherwise payable on gasoline and gasohol sales.<sup>280</sup> Ohio, however, refused to grant the tax credit to producers in any state that did not afford a reciprocal tax credit to Ohio producers.<sup>281</sup> The *Limbach* Court determined the fee assessment was not subject to the market participant exception because it was a tax, "a primeval government activity."<sup>282</sup>

Courts have acknowledged and applied the market participant exception in cases involving waste disposal. In *City of Philadelphia*, the Court declined to "express [its] opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources, or New Jersey's power to spend state funds solely on behalf of state residents and businesses."<sup>283</sup> Thus, the *City of Philadelphia* Court left open the possibility that the market participant exception may be a viable option for states to regulate hazardous waste imports.<sup>284</sup>

Three recent lower court decisions have upheld the utilization of the market participant exception when a state attempts to limit waste disposal at state-owned facilities. In *County Commissioners v. Stevens*, the court determined that the dormant Commerce Clause did not apply to a county's ban on the disposal of wastes generated outside the county since the county operated the landfill and, therefore, was acting as a market participant.<sup>285</sup> Similarly, in *Lefrancois v. Rhode Island*, the court allowed Rhode Island to prevent the dumping of out-of-state waste at a state-subsidized central landfill.<sup>286</sup> Finally, in *Shayne Bros. v. District of Columbia*, the court concluded that because the District of Columbia was expending public resources to maintain landfills, it was entitled to

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278. 467 U.S. 82, 101 (1984).

279. *Id.* at 99.

280. 486 U.S. 269, 272 (1988).

281. OHIO REV. CODE ANN. § 5735.145(B) (Anderson 1986).

282. *Limbach*, 486 U.S. at 277.

283. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978) (citations omitted).

284. *See id.* at 624.

285. 473 A.2d 12, 20-21 (Md. App. 1984).

286. 669 F. Supp. 1204, 1211-12 (D.R.I. 1987).

prefer its citizens without offending the Commerce Clause.<sup>287</sup> Thus, a state can exclude out-of-state hazardous waste by operating all of the in-state hazardous waste facilities. It may be a strain on the state's resources, however, to take such a drastic step. Further, the state, as an operator of a hazardous waste facility, would be liable under CERCLA if there were a release of waste from the facility.<sup>288</sup>

### C. *Graduated Fee Based on Tonnage*

A state could scale a fee based on the volume of waste dumped at a particular site. The State of Nevada has attempted such an approach. The Nevada Administrative Code establishes a graduated fee linked to disposal tonnage.<sup>289</sup> The more a company dumps, the more it pays. Economic persuasion will compel waste disposers to limit the tonnage disposed of in any one landfill. Since the vast majority of hazardous waste disposed of in Nevada comes from outside the state, this fee would fall more heavily on out-of-state users, but at the same time may not decimate the economic wellbeing of in-state producers. Further, by discouraging large volume disposal at Nevada landfills, the fee discourages importation, which is usually accomplished in large volume shipments.

This regulation was challenged by U.S. Ecology, Inc., which operates the landfill near Beatty, Nevada, under lease from the State of Nevada.<sup>290</sup> The statute was invalidated for reasons other than violation of the Commerce Clause.<sup>291</sup> The Environmental Commission established the fee schedule to encourage "waste minimization."<sup>292</sup> The *U.S. Ecology* court determined that the Agency exceeded its authority in establishing these regulations, because the purpose of the statute under which the regulation was developed<sup>293</sup> was to defray the costs of regulating the facility, not to minimize waste.<sup>294</sup> Although a Commerce Clause challenge was raised, the judge did not address it in his opinion. Nevada has a strong argument, however, that such a fee does not run afoul of the Commerce Clause because it does not burden waste based solely on the waste's out-of-state point of origin. Subsequently this case was settled before the Commerce Clause issues were fully adjudicated.<sup>295</sup>

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287. 592 F. Supp. 1128, 1133-34 (D.D.C. 1984).

288. See generally *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992) (finding that governmental entities such as municipalities may be held liable under CERCLA).

289. NEV. ADMIN. CODE ch. 40, § 444.8772 (1992).

290. See *U.S. Ecology, Inc. v. William A. Molini*, No. CV92-00125 (2d Jud. Dist. Ct. Nev., Washoe County, June 11, 1992).

291. *Id.* at 7.

292. *Id.*

293. NEV. REV. STAT. § 459.510 (1991).

294. *U.S. Ecology, Inc. v. William A. Molini*, No. CV92-00125, at 7 (2d Jud. Dist. Ct. Nev., Washoe County, June 11, 1992).

295. Cy Ryan, *State Pays to Close Dump*, LAS VEGAS SUN, Sept. 27, 1993, at A1; Telephone Interview with Robert Auer, Nevada Deputy Attorney General (Sept. 28, 1993).

## CONCLUSION

As aptly observed by the U.S. Supreme Court, "the peoples of the several states must sink or swim together,"<sup>296</sup> even in their collective garbage. The limited number of states shouldering the hazardous waste disposal burden of the United States, however, should be able to spread the disposal dangers among their sister states. Given the "perverse regulatory incentive[ ],"<sup>297</sup> created by the Supreme Court, it is unlikely that states currently shirking their hazardous waste disposal responsibility will voluntarily assume such responsibility. Congress should act to remedy this situation by revising the capacity assurance program statute so that the capacity assurance program more effectively eliminates the existing inequities in hazardous waste disposal. Congress should also enact statutes to provide for increased safety along designated hazardous waste "corridors." But given congressional cowardice, hazardous waste importing states likely will continue to have the unsavory responsibility to force their nonimporting counterparts to open more hazardous waste facilities. To achieve this goal in the face of the Commerce Clause is difficult. There are, however, methods states may utilize to place more pressure on recalcitrant states to address the waste problem closer to home, instead of shipping their toxins across state lines. States accepting hazardous waste must continue their battle to distribute the risks of disposal among all who create that risk. Perhaps only then will our nation make any real strides toward stemming the tidal wave of hazardous waste.

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296. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

297. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2018 (1992) (Rehnquist, C.J., dissenting).

