Solid Waste Transport: Commerce Clause Restrictions and Free Market Incentives

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SOLID WASTE TRANSPORT: COMMERCE CLAUSE RESTRICTIONS AND FREE MARKET INCENTIVES

INTRODUCTION

America has become a "throwaway society." From disposable diapers to fast-food packaging, "[Americans] generate enough solid waste every day to fill the New Orleans Superdome from floor to ceiling twice." Until recently, however, most citizens' concern extended no further than the curb. But in March 1987, the nation's attention focused on the "Mobro," a smelly barge loaded with 3,168 tons of garbage. As it left New York, the Mobro embarked on a 6,000 mile, 162 day odyssey only to return loaded with the same cargo. No place could be found for its disposal. The news accounts—sometimes humorous, sometimes serious—helped change the attitude of a nation. Solid waste disposal is everyone's problem, and must be attacked with fervor and ingenuity.

As densely populated areas, particularly in the Northeast corridor, run out of available disposal capacity, more states and local governments look towards shipping wastes to other areas of the country where space is available and disposal is relatively inexpensive. In turn, residents of those areas often resent what they view as unwarranted dumping of foreign wastes and exert significant political pressure to prevent such disposal.

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1 C. MILLER & L. BERRY, WASTES, 4 (1986). Figures from 1986 estimate that while the United States comprises about 5% of the world's population, Americans consume 40% of the world's resources. Id.
2 Solid Waste Disposal Act, 42 U.S.C. § 6901-6992 (1980). Solid waste includes garbage, refuse and/or sludge resulting from industrial, commercial, agricultural or community activities. 42 U.S.C. § 6903 (27) (1989). While § 6903(5)(B) states that the term solid waste includes those wastes hazardous to human health or the environment, this Comment focuses on disposal of non-hazardous solid waste.
3 C. MILLER & L. BERRY, supra note 1, at 7.
5 K. O'CONNOR, GARBAGE, 9 (1989). The barge "Mobro" left Islip, New York after local officials refused to accept commercial solid wastes at local landfills. Id.
6 Id.
7 Id. at 14. On Aug. 10, 1987, a Brooklyn superior court judge ordered the incineration of the waste. Id.
8 Id. at 14-17.
11 Government Suppliers, 753 F. Supp. at 748. Disposal costs in Indiana landfills are approximately $12/ton compared with $125/ton fee charged at the Fresh Kills landfill on Long Island. Id.
Within this framework of problems and concerns, all branches of government must strive to seek both short and long term solutions to a dilemma which threatens to literally bury America in its own waste.

THE SCOPE OF THE PROBLEM

Estimates of the volume of waste generated vary greatly, but by any measure, the scope of the problem is enormous. In New York City alone, approximately 24,000 tons of household and commercial refuse are collected daily. "On the West Coast, Los Angeles County's Puente Hills landfill reaches its daily quota of twelve thousand tons of trash before noon." While the problem is most keenly felt in older cities, and densely populated suburban areas, the impact of the problem is felt nationwide.

As the volume of disposable waste continues to grow, state and local officials are faced with the unenviable task of figuring out what to do with it. Long term solutions such as recycling, resource recovery techniques, composting and incineration provide some hope for the future. While some immediate relief can be found in non-exotic techniques such as baling, compacting and shredding, none of these methods provide adequate solutions to the acute shortage of available disposal capacity.

Disposal problems are further exacerbated by the dwindling number of
landfills properly licensed to receive waste. According to some estimates, "[h]alf of the country's 18,500 landfills which were open ten years ago are now closed." Consequentially, the cost of waste disposal has increased dramatically. In cities such as Boston and Philadelphia, disposal costs have soared to a range of $90 to $150 per ton. Cost estimates for waste removal in New York rose from $5 per ton in 1986 to $150 in 1989.

Faced with the numerous problems associated with increasing costs and decreasing capacity, it is not surprising that states are looking towards other areas of the country for available space. In 1988, New Jersey began to export its garbage to neighboring states. In Pennsylvania, Lawrence County officials have adopted a 10 year solid waste plan which calls for 60% of its disposable waste to be hauled to a landfill in Ohio. In Indiana, where landfill capacity is still available and the cost of disposal relatively low, large quantities of waste are shipped in daily from various portions of the Eastern States.

Local opposition to the importation of foreign waste is often swift and intense. Judicial recognition of the Not In My Backyard syndrome (NIMBY) frequently appears in cases challenging importation. Commentators recognize that well-organized local opposition can be a politically potent force. For example, in 1988, a "Stop The Dump" group in Mississippi successfully introduced legislation which required county referendums to permit hazardous waste siting. Similarly, public opinion in Utah was instrumental in the passage of stringent siting criteria.

Thus the nation faces a dilemma of mounting proportions. Clearly, disposal of solid waste is not a local problem nor one which can be solved in the short term.

*Id.* In 1934, New York had 89 landfills. In 1984, only three remained. *Id.* Nationwide, only half of the 9,244 municipal landfills have valid operating permits. *Id.* New Jersey officials report only 13 remaining landfills while Michigan and Washington are experiencing similar problems. Hershkowitz, *supra* note 22, at 26. In Ohio, the only existing landfill in Columbiana County is appealing an EPA closure order. Wilkinson, *Three-County District Approves Sketchy 10-year Disposal Plan*, The Youngstown Vindicator, Dec. 2, 1990 at B4 col. 1.


*Id.* at 19.

*Id.* at 20.

*Id.* at 18.

The Youngstown Vindicator, Feb. 6, 1991, at B7 col. 3.


*Id.* at 748. Even including transportation costs of $30-$35 per ton, Indiana’s disposal costs remain substantially lower than those at East Coast landfills. *Id.*

*Id.* Teams of volunteers at one Indiana landfill were able to document 5,500 trucks headed for the site, many from out of state. Plaintiff Castenova, a trash broker, testified that about 60% of Government’s business resulted from transporting wastes from New York, New Jersey and Pennsylvania to Indiana. *Id.* at 749.


*Id.* at 3.

*Id.* The Environmental Protection Agency (EPA) has expressed concern over adoption of such rules. *Id.* More than 20 states have been identified as having restrictive siting laws. *Id.*
Valid solutions must balance the needs of those communities with a shortage of disposal capacity and the interests of those who are forced to accept large amounts of foreign wastes.

This Comment explores the Commerce Clause of the United States Constitution and the restraints it places on state and local governments which attempt to restrict the importation of waste. Additionally, it will focus on the development of exclusionary alternatives including the market participant exception and regulatory schemes designed to avoid Commerce Clause scrutiny. Finally, this Comment will examine the possibility of using free market techniques to develop an alternative to the traditional command and control methods of regulation.

THE COMMERCE CLAUSE

The free flow of goods and services goes to the very essence of our national existence. However, conflict arises when the flow of commerce is in "goods" which are potentially harmful. Solid and hazardous wastes are such "goods". Whether couched in terms of protecting local health and safety, preserving scarce local resources or protecting the local economic integrity, efforts to halt the importation of waste inevitably involve protectionist measures which impede the free flow of commerce. The tension which results from these competing interests serves as the backdrop for legal challenges to state and local efforts to reduce the influx of waste.

Article I, § 8, cl. 3 of the U.S. Constitution grants Congress plenary authority to "regulate commerce with foreign nations, and among the several states...," Clearly, the importance of this authority was not lost on the Framers. Indeed, many historians argue that the need for Federal control of commerce served as a major catalyst in the efforts to amend the Articles of Confederation. As Justice Jackson explains in H. P. Hood & Sons, Inc. v. Du Mond: "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to 'take into consideration the trade of the United States...'. No other federal power..."
was so universally assumed to be necessary, no other state power was so readily relinquished.”

While deceptively simple in its language, this regulatory power has evolved over the course of two centuries to become the most far reaching of all peace-time powers granted Congress. Today, this power is manifested in a judicial construction which preserves national solidarity by preventing the rivalries and reprisals associated with the economic self interests of individual sovereign states.

In practice, the Commerce Clause exists in two forms. In its unexercised or dormant form, state actions which impinge upon free trade are barred in spite of Congressional silence. In its active form, Congress has exercised its power to regulate commerce, and therefore, contrary state action must yield in light of the Supremacy Clause.

In spite of numerous pieces of federal legislation generally affecting waste disposal, Congress has not exercised direct regulatory control. Thus most Commerce Clause attacks are launched against state attempts to restrict the importation of exogenous wastes and are based upon the dormant Commerce Clause. In the majority of these cases, the court employs a balancing approach which permits limited incursion upon free trade when a statute evenhandedly effectuates a legitimate local public interest and the effects on interstate commerce are only incidental. Such statutes will be upheld “unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits.” The question become one in which the court must determine the nature and extent of such burdens, and weigh their relative value in light of Commerce Clause proscriptions.

--GUNTHER, supra note 42, at 99.

In the 200 years since ratification, the judiciary has imposed very few checks on the commerce power. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522-23 (1935). See also G. GUNTHER, supra note 42, at 99. The Framers envisioned a national commerce which would end hostile state restrictions, retaliatory trade regulations and protective tariffs. Id.


U.S. Const. art IV.; See also G. GUNTHER, supra note 42, at 231. Once Congress has indicated a policy, state action may be successfully challenged if it conflicts with the “supreme” national legislation. Id.


Government Suppliers, 753 F. Supp. at 763 n. 26. Congress may authorize the state to engage in regulation that the Commerce Clause would otherwise prohibit. The Bayh court, however, found no such federal enactment. Id.

Note, Hazardous Waste In Interstate Commerce: Minimizing The Problem After City Of Philadelphia v. New Jersey, 24 Val. U.L. Rev. 77, 92-93 (1989). Commerce Clause analysis traditionally contains two prongs: a per se rule of invalidity in cases of overt or practical economic protectionism, and a balancing test where discrimination is not present. Id.

An Exception To Restraint

In 1976, The Supreme Court developed a somewhat curious exception to Commerce Clause restraints. In Hughes v. Alexandria Scrap Corp., plaintiffs mounted a Commerce Clause challenge against a Maryland scheme which paid a bounty for the collection of abandoned automobiles. The scheme favored in-state scrappers over those outside Maryland. In rejecting the Commerce Clause challenge, Justice Powell explained that unlike the usual attempts to restrict trade, Maryland had entered the market as a participant rather than a regulator. He found that “nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others.” Thus traditional Commerce Clause restraints were relaxed for states willing to enter the market place as active participants.

In succeeding cases, this newly found market participant exception survived as it struggled for a conceptual basis. In Reeves, Inc. v. Stake, the Court upheld a South Dakota plan which confined the sale of cement from a state owned plant to state residents in a time of shortage. Justice Blackmun, writing for the Court, counseled that there is “no indication of a constitutional plan to limit the ability of the States themselves to operate freely in a free market.” States may fairly claim some measure of sovereign interest in retaining freedom to decide how, with whom and for whose benefit to deal.

The parameters of this doctrine were further brought into focus in South Central Timer Development, Inc. v. Wunnicke. Here the Court rejected a market participant defense of a statute which attempted to limit the sale of timber to those who would later process it. The Court found the state action too attenuated from actual participation in the market to justify the “downstream” restraints on commerce. Justice White defined the limits of the doctrine as follows: a State may impose burdens on commerce within the market in which it is a participant, it may not impose substantial regulatory effects outside that particular market.

Certainly not all observers share a view that the market participant exception is well founded or of continuing vitality. In a sharp dissent to Swin Resource Sys. v. Lycoming County, Judge Gibson found the notion that state enterprises “partici-
In Judge Gibson’s view, “the whole charade of the market participant exception” is a “peculiar manifestation of a ‘new federalism’ run amok.” Moreover, Judge Gibson believes that notwithstanding the doctrine’s theoretical basis, the Supreme Court effectively overruled the market participant exception in *Garcia v. San Antonio Metro. Transit Auth.*, and thus it is no longer a viable exception to the Commerce Clause. Nevertheless, subsequent cases continue to employ the doctrine, and the market participant exception remains a viable alternative for states that wish to exercise some control over waste importation.

**B. Landfill Space As A Natural Resource**

As typified by the reasoning in *Hughes v. Oklahoma*, and *New England Power Co. v. New Hampshire*, the modern Court has attempted to deal with state efforts to restrict access of certain natural resources to in-state residents at the expense of national users. Generally, the cases hold that when natural resources occur by the peculiar effects of climate or geology, such resources are part of the national bounty. Without more, a state which happens to be blessed with an abundance of such resources may not hoard or reserve access without violating the Commerce Clause. However, the Court has drawn a distinction between those “natural” resources which are a product of pure happenstance, and those which have some “indicia of goods publicly produced and owned in which a state may legitimately favor its own citizens in time of shortage.”

With respect to landfills, two questions arise. First, should the market participant exception apply when a state attempts to regulate the exploitation of a

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62 Id. at 261-62 (Gibson, J., dissenting).
66 Id.
67 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), cert. denied, 488 U.S. 889 (1988) (Garcia held that the Tenth Amendment does not preclude Congress from preempting state activities which are considered traditional governmental functions).
68 See article and accompanying text cited infra note 70.
70 Pomper, supra note 46, at 1319-22. According to Pomper, the theoretical basis of the market participant exception can be based on grounds other than traditional governmental functions, and should thus survive Garcia. Id. at 1320.
71 Hughes v. Oklahoma, 441 U.S. 322 (1979) (State law restricting the exportation of minnows procured within the waters of Oklahoma held invalid.)
72 New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). The Court found that a New Hampshire plan to reserve hydroelectric power to state residents was a protectionist scheme designed to gain economic advantage. Id. at 339. The Court condemned the scheme as an invalid attempt to restrain the exportation of a natural resource. Id. at 344.
73 Swin Resource Sys., 883 F.2d at 254.
74 Id.
75 Reeves, 447 U.S. at 443. The Court held that the market participant exception of *Alexandria Scrap* did not permit a state to hoard resources which were found within its borders by mere happenstance. Id.
"natural resource?" Second, does landfill space qualify as a "natural resource?"
With respect to the first question, the signals are mixed. A survey of Supreme Court
dicta indicates some willingness to apply the market participant exception doctrine
to natural resources when some level of state involvement is reflected by conserva-
tion or exploitation. 77 At other times, the Court appears reluctant to extend the
doctrine beyond the sale of quantities actually produced by the state. 78

If a state may permissibly reserve the finished products of natural resources
to its own residents, 79 then there is no logical point at which the finished product
becomes disconnected from its constituent parts. The exportation of natural
resources which have been exploited by state activities so that their form becomes
usable should not be exempted from the market participant exception. Thus, if the
"natural" resource is a product of substantial state involvement, rather than mere
 happenstance, the doctrine should apply. It follows that space developed for a
landfill is not a natural resource in the same sense as geological deposits, and should
not be exempted from the market participant exception. It is tempting to find that
land is a natural resource per se and is not subject to restricted access under usual
Commerce Clause principles. 80 However, such an approach fails to account for the
extensive economic expenditures necessary to meet all federal, state and local
requirements for the operation of a landfill. 81 Certainly such extensive development
is more than mere happenstance. A land-use natural resource requires a particular-
ized inquiry rather than a general conclusion before exclusion from the market
participant exception is warranted.

THE LEGACY OF CITY OF PHILADELPHIA v. NEW JERSEY

The relationship between the Commerce Clause and attempts to restrict the
flow of exogenous waste came into focus in 1978 when the Supreme Court decided
City of Philadelphia v. New Jersey. 82 Fearing the depletion of usable landfill space,
the New Jersey legislature enacted the Waste Control Act 83 which effectively placed
the burden of preservation upon out-of-state sources of solid waste. 84 In upholding
the constitutional challenge, the Court determined that wastes were articles of
commerce 85 and subject to the strictures of Commerce Clause protection. 86 The

77 Sporhase, 458 U.S. at 957.
79 See Reeves 447 U.S. at 443.
80 Swin Resource Sys., 883 F.2d at 253.
81 See supra note 49. Substantial federal standards are imposed under RCRA, while state and local
restrictions may superimpose additional obligations.
the Act because it promoted vital health and environmental objectives. City of Philadelphia, 437 U.S. at 620,
626.
84 Waste Control Act, N.J. STAT. ANN. § 13:11-10 (West 1979). Ch. 363 blocked the importation of all
categories of wastes unless exempted by rules of the State Commissioner of Environmental Protection.
85 City of Philadelphia, 437 U.S. at 622.
86 Id. at 622-23.
Court found the Act to be protectionist with its primary purpose to disadvantage out-of-state residents by restricting the free flow of commerce. The Court held the Act to be an impermissible attempt to gain economic advantage at the expense of free trade.

Whether correctly decided or not, the legacy of Philadelphia lives on. Invariably, plaintiffs who mount a Commerce Clause attack invoke Philadelphia as the foundation of their challenge.

ATTEMPTS TO CIRCUMVENT CITY OF PHILADELPHIA v. NEW JERSEY

In the years since Philadelphia, state and local governments have employed various methods to circumvent its restrictions. Although widely divergent in their detail, these schemes may be broadly categorized into three groups: the creation of economic incentives, the market participant exception and the development of county-wide disposal plans. Each of these methods has something to offer in the search for a solution to the overall problem.

A. Economic Methods

The economic incentive to ship solid waste from its point of origin to some foreign disposal site is obvious. When the costs of in-state disposal exceed the combined costs of transportation and disposal elsewhere, it becomes economically advantageous to do so. The problem for receiving sites, whether publicly or privately owned, relates to the external costs not typically reimbursed by disposal fees. To view these costs in perspective, it is helpful to characterize the problem as the exportation of goods and services from the receiving state rather than the importation of foreign waste by the receiving state. Clearly, the receiving state exports access to its landfill sites. The relative scarcity of that commodity will in part determine the fee paid by the shipping state. But, in addition, the receiving state

97 Id. at 628.
98 Id. at 626. The Court found protectionism can reside in legislative means as well as ends. Id. The statute was found to be discriminatory both on its face and in its plain effect, and thus the Pike balancing test was unnecessary. Id.
99 Id. at 629.
100 Id. at 632 (Rehnquist, C.J., dissenting). In dissent, Justice Rehnquist argued that the case should have been decided under previous rulings which have exempted state quarantine laws banning the importation of materials which were "diseased, decayed or otherwise" from scrutiny. See Bowman v. Chicago & Northwestern Ry., 125 U.S. 465 (1888).
102 Note, supra note 51, at 91-99.
103 Pomper, supra note 47, at 1337. This Comment does not examine a fourth alternative: direct federal intervention via detailed regulation.
104 F. ANDERSON, supra note 37, at 35-36.
105 Note, supra note 51 at 91-93.
exports services in the form of site acquisition, construction, maintenance and compliance with governmental regulation.\textsuperscript{96} Again, the fixed costs associated with these services will generally be reflected in the fees charged to shipping states.\textsuperscript{97} There are, however, additional costs which the receiving state must bear. The social costs related to health risks, possible environmental degradation\textsuperscript{98} and reduced land use values near dump sites are examples of external costs not reimbursed by the shipping state. Ironically, when the receiving state bears these external costs, it alleviates the shipping state from absorbing the same.\textsuperscript{99} When the burden of external costs becomes excessive, the receiving state is forced to attempt to correct the imbalance of costs and benefits. Generally, these measures seek to reduce the economic incentive to import by imposing regulatory controls upon the volume of waste imported.\textsuperscript{100}

1. Indiana’s Experience

Legislative and executive efforts to eliminate economic incentives was the focus of Indiana’s statutory attempt to curb the importation of foreign waste.\textsuperscript{101} The citizens of Indiana, as well as those of many Midwestern states, reside in an area which has become an economically favorable dumping ground for the solid wastes of the Eastern States.\textsuperscript{102} On April 9, 1990, the governor of Indiana, Evan Bayh, called upon the state legislature to take “aggressive action to ensure that Indiana did not become the dumping-ground of . . . the East Coast.”\textsuperscript{103} Later, in his State of the State address, Bayh reiterated his position stating, “we must end the financial incentive that literally makes it pay for out-of-staters to dump in Indiana.”\textsuperscript{104} This speech was accompanied by a legislative proposal which attempted to directly restrict the influx of exogenous waste.\textsuperscript{105} This legislation, HEA 1240, placed three major restrictions upon waste importation. First, the Act required the operator of any vehicle carrying waste to be deposited in Indiana to present the landfill operator with a verified statement describing the “location in which the largest part of the solid waste was generated” (hauler certification).\textsuperscript{106} Secondly, the law prohibited in-state dumping of foreign waste unless the drive presented a document from a health officer of the shipping state certifying that the solid waste did not contain any hazardous or

\textsuperscript{96} See supra note 49. 
\textsuperscript{97} Government Suppliers, 753 F. Supp. at 770. The state may pass along legitimate fees associated with its processing of out-of-state wastes. Id. 
\textsuperscript{98} Id. at 1332. 
\textsuperscript{99} Id. at 1333. 
\textsuperscript{100} Stewart, Controlling Environmental Risks Through Economic Incentives, 13 Colum. J. Envnt. L. 153, 154-58 (1988). Although regulatory commands have been employed for 20 years, to achieve environmental goals, they are inherently incapable of efficiently securing these goals. Id. 
\textsuperscript{101} IND. CODE ANN § 13-7-22-2.7 (c), (d), & (e) (Burns Supp. 1990); Ind. Code 13-9.5-5-1 (a)(2)(A) (Burns 1990). 
\textsuperscript{102} Government Suppliers, 753 F. Supp. at 743. 
\textsuperscript{103} Id. at 745. 
\textsuperscript{104} Id. at 746. 
\textsuperscript{105} Id. 
\textsuperscript{106} Id.
infectious waste in violation of federal or Indiana law (health certificate). Finally, the law imposed a tipping fee which varied with the point of origin of the waste. Essentially, the fee was set so that the total cost of dumping foreign waste in Indiana would equal the cost of dumping the trash at the landfill nearest the point of generation (tipping fee). House Enrolled Act 1240 was signed into law March 20, 1990, by Governor Bayh. The first two provisions of the law became effective immediately, while the tipping fee was to become effective Jan. 1, 1991.

Out-of-state haulers immediately challenged HEA 1240 as a violation of the Commerce Clause. In Government Suppliers Consolidating Servs., Inc. v. Bayh, U.S. District Judge Tinder issued an extensive opinion which examined each requirement of the Act in light of Commerce Clause restraints. To determine the facial or practical discriminatory effect upon interstate commerce, the court subjected each requirement to a test of “elevated scrutiny”. The court explained that if the requirement survived “elevated scrutiny”, it would then be analyzed under the Pike v. Bruce Church balancing test for its evenhandedness. Under the Pike test, legitimate local interests which incidentally burden commerce will be tolerated unless the burden is clearly excessive in relation to the local benefits.

Clearly, the tipping fee provision was the heart of the economic control Indiana wished to exert on out-of-state shippers. Thus, the validity of this provision was essential to the implementation of the Act. Judge Tinder found that the State had facially articulated a legitimate local purpose and that the fee scheme would, as a direct result, preserve valuable landfill space and reduce the overall need for hazardous waste cleanup. The court thus concluded that the tipping fee provision did advance the State’s general interest in the health and safety of its citizens. However, the court found that reasonable nondiscriminatory alternatives existed.

107 IND. CODE ANN. § 13-7-22-2.7 (c) (2) (Burns Supp. 1990).
109 Government Suppliers, 753 F. Supp. at 743. House Enrolled Act 1240 was codified upon passage. See supra notes 104-06 and accompanying text.
111 Government Suppliers, 734 F. Supp. 853 (S.D. Ind. 1990). Plaintiffs sought immediate relief in the form of a temporary restraining order which the court converted into a motion for preliminary injunction. Id. at 857. However, only the health certificate requirement was enjoined. Id. at 871-72.
113 Id. at 763. This would require the state to justify the burden placed upon commerce by showing that the statute has a legitimate local purpose, serves this interest and there does not exist an adequate non-discriminatory alternative. Id.
116 Pike, 397 U.S. at 142.
118 Id. at 769.
119 Id. at 770.
120 Id. For example, all waste disposal could be slowed by the imposition of a flat fee on all shipments.
and held the fee provision discriminatory in practical effect. As a result, the tipping fee was struck down as violative of the Commerce Clause.

In similar fashion, the provision requiring the health officer certification was struck for the same reasons. The provision requiring the hauler certificate survived “elevated scrutiny”, but it succumbed to the Pike balancing test. The court found that, even though evenhanded in its application, the provision imposed burdens clearly in excess of their putative local benefits.

The court noted in conclusion that while the three regulations could not survive as formulated, the holding was not to be interpreted as foreclosing future regulatory efforts to control the influx of out-of-state waste.

While the Bayh holding speaks directly to the three specific provisions of House Enrollment Act 1240, the tone is clear and strong. In order to be effective, economic restraints must be severe enough to remove the incentive to import waste. However, the evenhanded application of such restraints requires the same burdens be placed upon the disposal of local wastes. While such an approach would pass Commerce Clause scrutiny, the political reality of imposing such requirements makes them impractical. It appears the federal courts are not prepared to enlarge the traditional Commerce Clause doctrine to sanction purely economic regulation of interstate waste transport.

B. Market Participant Exception

The most obvious yet unappealing alternative is to put the state in the position of landfill operator and apply the market participant exception. In LeFrancois v. State of Rhode Island, the district court upheld the prohibition of out-of-state dumping at the state operated, sole disposal facility in Rhode Island. The court held that when a state directly operates a landfill, it enters the market as a provider

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121 Id. at 772.
122 Id.
123 Id. at 773-74. An obvious non-discriminatory alternative was to force all haulers to present a health certificate. Id. at 774. Such an evenhanded approach would effectively slow the dumping of all waste and promote alternative disposal methods. Id.
124 Id. at 776.
125 Id. at 778-79.
126 Id. at 779.
127 Id. at 780. Following the ruling, Bayh stated, “We will not let down in the fight against the indiscriminate dumping of trash in Indiana.” Bayh said he planned to meet with state legislators and governors to solicit help in getting federal law changed. The Youngstown Vindicator, Dec. 21, 1990, B1 at col. 1.
128 City of Philadelphia, 437 U.S. at 626-27. The slowing of all waste would be permissible if done evenhandedly. Id.
129 Pomper, supra note 47, at 1311 (citing 53 Fed. Reg. 33,318 (1988)). Municipal solid waste landfills are predominantly owned by local governments (80%) and an additional 1% are owned by state governments. Id.
131 Id. at 1206-07.
of services\textsuperscript{132} and not as a participant in the natural resource market.\textsuperscript{133} As such, the state escapes the usual Commerce Clause restraints.\textsuperscript{134}

However, even if a state were prepared to enter the landfill business, it could not prevent private entrepreneurs from entering the market as well. Therefore, any economic sanctions which might be effective under the market participant exception would be lost on the private operator.\textsuperscript{135} Again, direct economic regulation on a state wide basis fails to produce the desired effect.

C. A Modified Participant Exception: The County-Wide Approach

While the courts have demonstrated reluctance to find state-wide regulatory action within the scope of legitimate control, a trend seems to be emerging which affords some deference to county and regional waste management districts.\textsuperscript{136} In 1965, Congress enacted the Solid Waste Disposal Act (SWDA)\textsuperscript{137} which, in part, provides for the development and implementation of state or regional solid waste plans.\textsuperscript{138} Under such plans, each state is required to identify areas within its boundaries which are appropriate for carrying out regional solid waste management. Typically, these management regions are established on a county-wide basis,\textsuperscript{139} but in the case of rural areas, a multi-county region may be created.\textsuperscript{140} Each state plan must contain requirements that all solid waste, including waste originating in other states, be disposed of in an environmentally sound manner.\textsuperscript{141} While each state has discretion within SWDA to develop individual plans,\textsuperscript{142} the individual management regions have emerged as quasi-market regulators which may effectively prohibit the importation of much foreign waste.\textsuperscript{143}

In \textit{Kettlewell v. Michigan Dep't of Natural Resources},\textsuperscript{144} the owner of a private

\textsuperscript{132} Id. at 1211.

\textsuperscript{133} Id.

\textsuperscript{134} Id. at 1212. Plaintiffs urged the court to develop a "monopoly exception" which would impose a duty on the state to deal with out-of-state haulers. \textit{Id.} Quoting Shayne Bros. Inc., v. District of Columbia, 592 F. Supp. 1128, 1134 (D.D.C. 1984), the court found the state expenditures that provide landfill services were indistinguishable from those used for police, firefighters and teachers, and that those activities do not offend the Commerce Clause. \textit{Id.}

\textsuperscript{135} Pomper, supra note 47 at 1338-39. Pomper argues that excessive social costs could justify withholding private landfill space as well. \textit{Id.}


\textsuperscript{138} Id. at § 6941.

\textsuperscript{139} Id. at § 6942.

\textsuperscript{140} Id. at § 6949.

\textsuperscript{141} Id. at § 6943 (a)(2).

\textsuperscript{142} Id. at § 6941a(6). Congress found that conservation and recovery programs should be available to communities in proportion to their individual needs and potential. \textit{Id.}

\textsuperscript{143} See Evergreen Waste Sys. v. Metropolitan Service Dist., 820 F.2d. 1482 (9th Cir. 1987). (Held that evenhandedness requires simply that out-of-state waste be treated no differently from most in-state waste.)

\textsuperscript{144} \textit{Kettlewell Excavating}, 732 F. Supp. at 761.
landfill challenged a Michigan law which required explicit approval of a county waste management district before any waste generated outside the county could be deposited there. In applying a traditional Commerce Clause analysis, the court concluded the plan was not facially discriminatory because the requirement applied equally to Michigan counties outside the management region as well as to out-of-state entities. The court went on to apply the Pike balancing test, and found the policy to serve a legitimate local purpose by extending the useful life of the county’s landfills while imposing minimal burdens on interstate commerce.

Similarly, in Swin v. Lycoming County, the county operated a landfill for the management district comprised of Lycoming and parts of five surrounding counties. The management district accepted out-of-state waste, but chose to limit the volume and charge substantially higher fees than those charged to sources within the district. The court found the county, through its waste management district, to be a market participant and thus exempt from Commerce Clause scrutiny.

Ohio emphasizes conserving sufficient solid waste disposal capacity. State law requires that each county or joint solid waste management district prepare a plan that provides for and certifies the availability of sufficient capacity to meet the needs of the district for a ten year period. Each plan must include an inventory of all existing facilities as well as projections of volumes of disposable waste generated within the district and to be imported from outside sources. Pursuant to this plan, a county may prohibit or limit the receipt of solid wastes generated outside the district consistent with its projections of availability. While this scheme does not directly insert the county into market participation, it does vest the county with the ability to control the importation of foreign waste. Since the statutory plan does not overtly prohibit all importation of wastes and treats all extra-district waste identically, it should escape judicial condemnation as facially or practically discriminatory. Like Kettlewell, Ohio’s plan should also survive Pike as a legitimate exercise of the state’s police power, and not be found to violate the Commerce Clause.

146 Kettlewell Excavating 732 F. Supp. at 762.
147 Id. at 764.
148 Id. at 766.
149 Id.
150 Swin Resource Sys., 883 F.2d at 245.
151 Id. at 247.
152 Id. at 247-48. Effective Sept. 1987, Lycoming charged a tipping fee of $30/ton for waste generated outside the management district, and $10-$13.25/ton for waste generated inside the district. Id. at 248.
153 Id. at 254-55.
155 Id. at § 3734.53(A)(6).
156 Id. at § 3734.53(C)(1).
157 See Evergreen Waste Sys. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987).
These cases and statutes underscore an emerging judicial attitude concerning the relationship between legitimate local concern over waste importation and the restraints of the Commerce Clause. Absent Congressional intervention, only a more tolerant approach by the courts can provide relief from the increasingly difficult balance of interests involved in this dilemma.

**NON-REGULATORY ECONOMIC INCENTIVES**

For many years this country has sought to control the problem of environmental degradation by relying upon the "Great Regulatory Tradition." This so-called command and control approach relies extensively on regulatory decisions and legal rules to effectuate desired environmental outcomes. A growing number of commentators, however, view this method as creating an irresolvable conflict between environmental goals and economic growth.

For example, Professor Richard Stewart, in an address on environmental policy, characterized bureaucratic centralization and litigation as factors which seriously aggravate the inevitable dysfunction of command and control regulation and a misallocation of burdens which needlessly increase the costs of pollution control. Alternatively, Stewart advocates an economic model based upon transferable pollution permits and waste deposit refund programs, similar to those already in place under provisions of the Clean Air Act. Under this scheme, freely marketable pollution permits would be issued in an amount equal to the number of units of pollution permitted, and each polluter would be required to relinquish such permits equal to his discharge. This method, Stewart argues, creates market based incentives to engage in recycling and proper disposal of waste. The incentive level can be adjusted to achieve the level of environmental protection desired.

Given the nature of solid waste disposal, it does not appear economically or politically feasible to entirely abandon regulatory control. Under a free market system, local municipalities would have to purchase disposal rights on an equal footing with foreign generators. Even Stewart recognizes equity may require that certain polluters, such as municipalities or economically marginal firms, be sub-

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159 F. ANDERSON, supra note 37, at 65. The phrase is attributed to Professor James Krier. Id.
160 Stewart, supra note 100, at 153.
161 Id. at 154-58.
162 Byrne Professor of Administrative Law, Harvard Law School.
164 Stewart, supra note 100, at 156.
165 Id. at 158.
167 Stewart, supra note 100, at 159.
168 Id.
169 Id.
dized by issuing them permits at reduced fees. 170

A POSSIBLE SOLUTION

Effective and efficient solutions can be found when the incentives of the market place are allowed to operate within environmentally sound parameters. While any regional solution must reflect the political willingness of an area to accept foreign waste, a sense of realistic cooperation is required for implementation.

A hybrid version of the current regulatory schemes and free market incentives could be a viable alternative. Under a regulatory scheme such as Ohio’s, a given waste management district could assess its projected local needs and the desired level of excess disposal capacity it would be willing to market to the outside. Such excess capacity could be “sold” in the form of freely negotiable permits. The cost of such permits would reflect the political desire of that district to import waste. Since these permits would be freely marketable, all foreign waste would be treated similarly and should escape Commerce Clause restraints. The net effect is to limit importation of foreign waste into those districts which environmentally or politically determine such reduction is necessary, while providing the economic incentive to assure adequate capacity nationwide.

Additionally, all parties must recognize the diverse yet valid interests at stake and make some accommodation towards resolution. A recent example of such cooperation was demonstrated by the resolution of a long standing dispute between the operators of the Browning-Ferris Industries’ (BFI) Carbon Limestone Landfill in Mahoning County, Ohio and nearby residents. 171 Concerned about the quality of local water supplies, residents opposed the expansion of the landfill. 172 After three years of highly charged rhetoric173 and legal battles, 174 BFI agreed to provide pipeline water service to local residents in exchange for their agreement to permit expansion. 175 The final agreement will assure disposal capacity for county residents for the next 30 years. 176 To achieve this goal, BFI agreed to voluntarily reduce its intake of foreign waste generated beyond 150 miles. 177 This blend of market incentives and

170 Id. at 164.
172 Id. at A3, col 2. Residents fought to shut the landfill because they said it contaminated ground water and created traffic problems. Id.
173 Id. at A1, col. 4. The citizen’s group Don’t Use My Property (DUMP) had sought to have the landfill’s operating permit revoked. Id.
174 Id.
175 The agreement contains a commitment from BFI to spend $1.5 million to extend water service to residents whose well water may have been affected. Id. at A3, col. 2.
176 Id. at A1, col. 5. Once the license application is approved by the Ohio Environmental Protection Agency, BFI will be permitted to expand the landfill’s area from 150 acres currently in use to more than 700 acres. Id. at A3, col. 3. This additional capacity should serve local disposal needs for approximately 30 years. Id. at A3, col. 2-3.
177 Id. at A3, col. 2-3.
voluntary restraint illustrates that solutions do exist, but require the innovative cooperation of everyone involved.

CONCLUSION

Clearly, the Commerce Clause places substantial restraints on state efforts to curb the influx of foreign waste. The market participant exception provides local and state governments with limited ability to avoid scrutiny. However, in densely populated areas and in those without adequate landfill capacity, it is unlikely that control of the waste market will be exclusively within the public sector. While state legislatures continue to develop regulatory schemes to prohibit interstate dumping or reduce the attendant economic incentives, these measures are inevitably protectionist and run afoul of the Commerce Clause. Governmental efforts to encourage recycling may provide some limited relief, but the burden of efficient waste management must fall to the forces of the free market system. Providing economic incentives through freely negotiable pollution permits in coordination with county or regional management would assure the existence of adequate disposal capacity while reducing the incentive to ship large volumes of waste to interstate disposal sites.

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