YAKETY YAK, TAKE YOUR GARBAGE BACK: DO STATES HAVE ANY PROTECTION FROM BECOMING THE DUMPING GROUNDS FOR OUT-OF-STATE MUNICIPAL SOLID WASTE?

INTRODUCTION

The United States generates almost 200 million tons of municipal solid waste per annum[1] and the amount of waste rapidly increases every year.[2] By the year 2000, the amount of municipal solid waste deposited in landfills, consisting of household garbage and refuse, is expected to exceed 216 million tons per year.[3] While some municipal solid waste is incinerated[4] or recycled,[5] the majority is deposited into

1. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 233 (115th ed. 1995) [hereinafter STATISTICAL ABSTRACT] (indicating that the United States generated 206.9 million tons of municipal solid waste in 1993).

2. *See* 141 CONG. REC. E536-03 (daily ed. Mar. 7, 1995) (statement of Rep. Weldon).

3 Although municipal waste accounts for a significant amount of solid waste deposited annually into landfills, municipal solid waste only accounts for a small fraction of the 13.2 billion tons of the total solid waste generated in the United States annually. *See* ENVTL. AND ENERGY STUDY INST., 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS. 57 [hereinafter 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS.].

4. In 1990, the United States incinerated 31.9 million tons of municipal solid waste compared to 13.7 million tons in 1980. *See* STATISTICAL ABSTRACT, *supra* note 1, at 236. However, incinerating waste often raises the same objections as landfilling. *See, e.g.*, VT. STAT. ANN. tit. 10, § 6601(a) (1993); WASH. REV. CODE ANN. § 70.95.217(4) (West Supp. 1996). *See also infra* note 8. Environmentalists claim that the ash byproduct of incineration is toxic and that the government should enact tougher hazardous waste laws to regulate the incineration. *See*

landfills.[6] Landfilling, however, creates significant problems for local communities.[7]

Landfilling is disfavored primarily for two reasons. First, landfilling is potentially harmful to the public health and environment of surrounding communities.[8] Specifically, landfilling poses a contamination threat to the local groundwater.[9] Second, landfilling is becoming more expensive as the amount of landfill space decreases[10] due to stricter environmental regulations[11] and stronger opposition

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1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 58. Tougher regulations would create a significant deterrent to incinerators because local governments would risk the possibility of higher operating costs in the future if the ash byproduct turns out to be toxic. *See* City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1591 (1994) (requiring that incinerator ash byproduct which meets EPA hazardous waste toxicity standard be handled under hazardous waste disposal law).

5. *See infra* notes 14-16 and accompanying text.

6. Approximately 80% of municipal solid waste is deposited in landfills. *See* 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 5.

7. *See infra* Part I.

8. *See, e.g.*, VT. STAT. ANN. tit. 10, § 6601; WASH. REV. CODE ANN. § 70.95.217(4) ("The landfilling, incineration, and other disposal of solid waste may adversely impact public health and environmental quality . . . ."). Section 6601(a) of the Vermont Code states:

> The developed world continues to pollute the environment and add to the depletion of the world's resources by burning and burying resources as waste. Furthermore, inefficient and improper methods of managing solid and hazardous waste result in scenic blights, hazards to the public health, cause pollution to the air and water resources, increase the number of rodents and vectors of disease, have an adverse effect on land values, create public nuisances, and otherwise interfere with proper community life and development.

VT. STAT. ANN. tit. 10, § 6601(a).

9. *See* 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 58.

10. *See* 141 CONG. REC. E536-03 (daily ed. Mar. 7, 1995) (statement of Rep. Weldon). *See also* C & A Carbone, Inc. v. Town of Clarkson, 511 U.S. 383, 386-87 (1994) ("As solid waste output continues apace and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment.").

11. *See* 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 57 ("[T]he number of landfills is decreasing rapidly due to tougher environmental restrictions and public opposition to new landfills."); *see also* WASH. REV. CODE ANN. § 70.95.217(3) (finding that "[n]ew requirements for the siting and performance of disposal facilities have greatly decreased the number of such facilities in Washington"). The regulations restrict the use of land normally suitable for landfilling due to "surface water or aquifer protection, other geographical factors, or distance from the places where waste is being generated." James T. O'Reilly, *After the Applause Ends: Examining the Legal Issues in Municipal Solid Waste Disposal and Recycling*, 41 FED. B. NEWS & J. 106, 110 (Feb. 1994).

from local constituencies.[12] These factors have compelled many local governments to look to other means of handling municipal solid waste.[13]

Two emerging alternatives for handling municipal solid waste are shipping the waste to other communities and recycling.[14] Shipping the waste to other communities is an attractive option because it turns a local problem into an outsider's problem.[15] As environmental awareness increases and landfilling space decreases, recycling is also becoming an attractive alternative for those who are willing to bear

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12. Public political opposition tends to grow proportionately with the value of the homes in the area as citizens cry, "Not in my back yard." O'Reilly, *supra* note 11, at 112. Also, private citizens may provide a significant deterrent to certain forms of waste disposal by bringing citizens suits against municipalities. *See* O'Reilly, *supra* note 11, at 110. These aggrieved citizens may bring a civil suit against landfill owners under federal law:

> [A]ny person may commence a civil action on his own behalf—
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> . . . .
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> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . .

42 U.S.C. § 6972(a) (1994).

13. Although the total amount of municipal solid waste generated in the United States has increased by 15.5 million tons between 1989 and 1993, the amount of municipal solid waste deposited in landfills decreased by 3.4 million tons over the same period of time. *See* STATISTICAL ABSTRACT, *supra* note 1, at 236. In 1988, the EPA estimated that there were 5,500 municipal landfills, down from about 20,000 in 1979. *See* S. REP. NO. 102-301, at 5 (1992). The EPA further estimated that only two-thirds of the landfills operating in 1988 will still be open in 1994 and that only one-fifth of the landfills that were operating in 1988 will be open in the next 20 years. *See id.*

14. *See* 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 57-58 (noting incinerators as a growing option). *But see* O'Reilly, *supra* note 11, at 111-12 (noting that incinerators are becoming politically unacceptable and are on the decline).

15. *See generally* Orlando E. Delogu, *"NIMBY" Is a National Environmental Problem*, 35 S.D. L. REV. 198 (1990) (discussing the problems associated with the "not in my backyard" attitude toward municipal solid waste). Shipping the waste to a different community is politically popular among those sending the waste. This alternative is much less popular among those receiving the waste, which many believe to be disproportionately poor, minority communities. *See, e.g.*, Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

the expense.[16] Recycling protects human health and the environment, reduces the strain on natural resources,[17] and preserves more landfill space for wastes that are non-recyclable.[18]

Recycling laws, however, are not universally popular. Landfill owners and manufacturers are the most ardent opponents of recycling laws because the laws increase the cost of waste disposal and reduce the amount of waste the owners can import from other states.[19] This, in turn, reduces the landfill owners' profitability and increases the manufacturers' costs.[20] The waste management associations have been largely successful in challenging recycling laws aimed at reducing the importation and landfilling of municipal solid waste by arguing that the laws violate the dormant Commerce Clause.[21]

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16. "The disposal of [municipal solid] waste into landfills continues to be the most frequent disposal option, with recycling slowly growing in popularity as the most likely waste alternative." O'Reilly, *supra* note 11, at 107.

17. *See* S. REP. NO. 102-301, at 3 (1992) ("[T]he most efficient and effective way to protect human health and the environment from the hazards of solid waste is to where possible, eliminate the generation of waste, *recycle what is generated,* and safely dispose of the waste that cannot be reduced or recycled.") (emphasis added).

18. *See, e.g.,* N.J. STAT. ANN. § 13:1E-99.21(b) (West 1991) (barring leaves from being deposited in New Jersey landfills); WASH. REV. CODE ANN. § 70.95.217(4) (West Supp. 1996) (finding that "landfilling, incineration, and other disposal of solid waste may adversely impact public health and environmental quality"). *See also* OR. ADMIN. R. 340-91-010(1)(a) (1994) (stating the purpose of Oregon's Waste Management Programs is to "[c]onserve valuable landfill space by insuring that the persons who generate the garbage going to a disposal site have the opportunity to recycle, and that the amount of recyclable material being disposed is reduced as much as is practical.").

19. *See* Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-offs in Equity, Efficiency, Environmental Protection, and State Automony,* 73 N.C. L. REV. 1481, 1490 (1995) ("According to recent estimates, states presently export an estimated 15 million tons of municipal solid waste for disposal in other states.").

20. *See* 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 58 ("Business representatives say . . . mandates would be a costly intrusion into industry's market-based decisions . . . .").

21. For some examples of cases that have reached the United States Supreme Court, see *C & A Carbone, Inc.,* 511 U.S. at 394-95 (holding "flow control" statute illegal because it barred out-of-state waste processors from competing with local waste processors); *Oregon Waste Systems, Inc. v. Department of Environmental Quality,* 511 U.S. 93, 108 (1994) (striking down Oregon law that applied an across the board surcharge on out-of-state waste); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* 504 U.S. 353, 357 (1992) (striking down a law that restricted importation of waste originating outside of county in which a landfill was located because the practical effect of the law was to ban out-of-state waste); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334, 348 (1992) (holding an Alabama law

The message sent to local governments by these decisions is that states can ship garbage to other states without bearing the environmental or health costs of the waste.[22] Consequently, states with low land values that import a large amount of solid waste are left with a Hobson's choice.[23] The waste-importing state can choose the impractical option of prohibiting all dumping, including dumping by its own citizens, within its borders or the state must allow the dumping of waste from other states.[24] In sum, large-volume-municipal-waste-exporting states have little incentive to recycle and reduce the amount of municipal solid waste landfilled in other states because exporting states can dump their waste elsewhere without penalty.[25]

The judiciary's interpretation of the dormant Commerce Clause[26] and its general reluctance to allow states to limit the importation of waste[27] has perpetuated this environmental abuse of cheap-land

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that placed a surcharge on out-of-state hazardous waste illegal); *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (holding ban on importation of solid waste illegal).

22. *See* Stanley E. Cox, *What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky As Case Study in the Waste Wars*, 83 KY. L.J. 551, 558 n.20 (1995).

> It is no secret why capacity is not expanding sufficiently to meet demand—the substantial risk attendant to waste sites make them extraordinarily unattractive neighbors. The result, of course, is that while many are willing to generate waste—indeed, it is a practical impossibility to solve the waste problem by banning waste production—few are willing to dispose of it. Those locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste.

Id. (quoting *Fort Gratiot*, 504 U.S. at 369 (Rehnquist, C.J., dissenting)).

23. A "Hobson's choice" is defined as "an apparently free choice when there is no real alternative." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 574 (1989).

24. *See Fort Gratiot*, 504 U.S. at 372-73 (Rehnquist, C.J., dissenting) (arguing that cheap-land states should be able to limit the importation of solid waste after imposing landfilling restrictions on its own citizens).

25. *See id.* ("The Court today penalized 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 hope that another will pick up the slack.").

26. The "dormant Commerce Clause" is also commonly referred to as the "negative Commerce Clause." *See, e.g., Oregon Waste Systems*, 511 U.S. at 98.

27. Of central concern to the Framers of the Constitution was "commercial warfare" among the states that might result if states had the power to "retard, burden or constrict the flow of such commerce for their economic advantage . . . ." H. P. Hood & Sons, Inc. v. Du Mond,

states. The dormant Commerce Clause test set out by the Supreme Court does not prohibit states from regulating the waste coming into their state.[28] Nevertheless, most courts have ruled against states that have attempted to regulate the importation of municipal solid waste.[29] Moreover, some courts have extended the Supreme Court's scrutiny to further restrict states that have attempted to curtail the uncontrolled importation of municipal solid waste.[30]

Part I of this Note outlines the problems the dormant Commerce Clause creates for states that want to invoke vigorous recycling programs to preserve depleting landfill space. Part II discusses the development of the Supreme Court's dormant Commerce Clause test for state laws regulating the interstate shipment of waste. Part III examines a recent decision by the Seventh Circuit which represents a trend by the judiciary that makes it more difficult for states to implement incentive programs to encourage out-of-staters to reduce the amount of waste they produce, and thereby the amount of waste landfilled in the home state.[31] Part IV analyzes the effect this trend may have on other state recycling statutes. Finally, Part V examines the regulatory options left for states to control the importation of municipal solid waste and advocates a cost-benefit approach for adjudicating whether a state can protect its environment from other states' municipal solid waste.

I. THE PROBLEMS FACING ENVIRONMENTALLY CONSCIOUS STATES

The dormant Commerce Clause restricts the states' ability to regulate interstate activities, including the interstate shipment of waste,[32] because the Constitution specifically grants that power to

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336 U.S. 525, 533-36 (1949).

28. *See infra* Part V.

29. *See infra* Part I.

30. *See generally infra* Part III.D (discussing a Seventh Circuit decision invalidating a Wisconsin recycling law).

31. *See infra* notes 84-122 and accompanying text.

32. *See Philadelphia v. New Jersey*, 437 U.S. at 622-23 (holding that waste is commerce and subject to the dormant Commerce Clause); *but see* Stanley E. Cox, *Burying Misconceptions About Trash and Commerce: Why it is Time to Dump* Philadelphia v. New Jersey, 20 CAP. U. L.

Congress.[33] The inability to regulate the interstate shipment of waste is of special concern to "environmentally conscious states" such as Wisconsin and Washington.[34] These environmentally conscious states have established policies that affect an out-of-stater's ability to deposit solid waste in these home states' landfills in order to implement recycling programs that reduce landfilling.[35] The trend in the development of the dormant Commerce Clause analysis for solid waste, however, has been for courts to limit states' ability to restrict the importation of solid waste.[36]

In addition, federal congressional intervention is not a feasible source of relief for these environmentally conscious states.[37] Legislation permitting states to regulate the amount of solid waste entering their states pits large volume waste-exporting states, such as New York and New Jersey,[38] against large volume waste-importing

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REV. 813, 860-61 (1991) (criticizing the Court's classification of solid waste as commerce in *Philadelphia v. New Jersey*); *but see also Fort Gratiot*, 504 U.S. at 369 n.1 (Rehnquist, C.J., dissenting) (opining that a waste disposer is not buying the garbage but providing a service to process the garbage and rid the producer of the burden the garbage carries).

33. *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have [the] [p]ower [t]o regulate Commerce . . . among the several States . . . ."). "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." Maine v. Taylor, 477 U.S. 131, 137 (1986) (quoting Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980)). For an in depth examination of the dormant Commerce Clause, see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

34. *See* NORMAN J. VIG & MICHAEL E. KRAFT, ENVIRONMENTAL POLICY IN THE 1990S 73 (1990) ("The [progressive] group of states are those with a high commitment to environmental protection coupled with strong institutional capabilities. They include California, Florida, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Washington, Wisconsin, and Virginia.").

35. *See, e.g.*, WASH. REV. CODE § 70.95.217(7)-(8) (West Supp. 1996) (requiring waste producers outside of state to bear some of the cost of waste management and waste diversion within the State of Washington).

36. *See generally infra* Part III.D (discussing a Seventh Circuit decision invalidating a Wisconsin recycling program). *See also supra* note 21.

37. Although Congress has not regulated the interstate shipment of waste, they are clearly authorized to do so. *See Taylor*, 477 U.S. at 138 ("It is well established that Congress may authorize States to engage in regulation that the Commerce Clause would otherwise forbid.") (citing Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945)).

38. "Of the 15 million tons of interstate shipments [during 1989], about 53 percent was exported from New York and New Jersey . . . ." S. REP. NO. 102-301, at 73 (1992).

states.[39] Therefore, for a variety of political reasons, the waste management bills have always stalled before they were enacted.[40] Currently, a bill granting states the power to regulate the interstate shipment of waste appears unlikely.[41]

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39. The large volume importing states are typically found in the Midwest. *See* Kevin Braun, *Interstate Waste/Flow Control,* EESI WKLY. BULL., May 15, 1995, at 4. *See also* Dale D. Goble, *The Compact Clause and Transboundary Problems: "A Federal Remedy for the Disease Most Incident to a Federal Government,"* 17 ENVTL. L. 785, 787 (1987) ("Because of their geographically limited political responsibility, states are unlikely to restrict the conduct of their citizens to benefit the citizens of another state. Out-of-state individuals cannot make their preferences known through the local political market.").

40. For example, both the Senate and House of the 103d Congress passed interstate waste bills, S. 2345, 103d Cong. (1995); H.R. 4779, 103d Cong. (1995), but were unable to agree on whether to give the power to restrict the importation of waste to local or state governments. *See* 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 58. On May 16, 1995, the Senate passed a waste management bill which would have "restore[d] state and local authority to regulate out-of-state waste shipments (known as interstate waste) and allow[ed] some municipalities to require disposal of local waste at specific facilities (known as flow control)." Kevin Braun, *Senate Passes Solid Waste Bill,* EESI WKLY. BULL., May 22, 1995, at 23. The purpose behind the flow control section is to address the financial problems faced by local communities whose bond ratings are threatened by the costs of building waste disposal facilities. *See No Plans Set for Commerce Markup of Waste Bill,* EESI WKLY. BULL., July 10, 1995, at 27.

The opposing sides on the House Commerce Committee kept the bill off the Senate floor because no middle ground appeared satisfactory to either side. *See* Bill Ghent, *Bliley Presses for Waste Bill Markup Before Recess,* EESI WKLY. BULL., July 17, 1995, at 31.

During the summer of 1995, Commerce Committee Chairman Thomas Bliley (R-Va.) repeatedly set deadlines to finish negotiations and move the bill to a full committee markup. *See id.* But the bill remained in limbo, mainly because the states could not agree on interstate waste language. *See* Bill Ghent, *Negotiations on Interstate Waste Bill Snagged,* EESI WKLY. BULL., July 24, 1995, at 18.

Talks broke down time and time again during the final months of 1995. On September 29, 1995 members of the New York delegation introduced a new interstate waste bill. *See* Bill Ghent, *Interstate Waste Bill's Future Snagged Again,* EESI WKLY. BULL., Oct. 9, 1995, at 23. Committee staff during the last weeks of December tried a final push for an agreement, presenting a proposal that fell somewhere between Oxley's bill that would give state significantly more power to limit the importation of waste and Paxon's bill that would give states more opportunity to ship trash across state lines. But the effort failed, and the bill was not marked up. *See* Bill Ghent, *Negotiators Try One Last Time to Move House Waste Bill Before Year's End,* EESI WKLY. BULL., Dec. 18, 1995, at 18.

41. The House Commerce Committee decided to split the flow control measure from the more controversial interstate waste bill. The "flow control only bill" went to the floor, and the House defeated it 150-271. One committee aid stated that there was no intention to further invest resources in an issue that was "likely to go nowhere." Bill Ghent, *House Rejects Stand-Alone Flow Control Bill,* EESI WKLY. BULL., Feb. 5, 1996, at 10.

Despite the lack of an express statutory grant of power to regulate the importation of waste, states have a legitimate interest in protecting the health and safety of their citizens and preserving their local environments.[42] Nevertheless, states with lower disposal costs, such as those in the Midwest,[43] have become dumping grounds for more populous states with higher disposal costs.[44] Absent congressional intervention,[45] the central question becomes what, if anything, can a state[46] do to reduce the amount of solid waste

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42. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.2, at 284 (5th ed. 1995) ("The 'police power' is nowhere mentioned in the Constitution but the term is frequently used, particularly in the commerce area . . . [allowing] a state law [to] regulate health and safety and yet also regulate or affect commerce among the states."). *See also Maine v. Taylor*, 477 U.S. at 151 ("As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.") (citation omitted); *Philadelphia v. New Jersey*, 437 U.S. at 626 (recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people).

43. *See* JAMES E. MCCARTHY, CONGRESSIONAL RESEARCH SERVICE, CRS ISSUE BRIEF: SOLID WASTE: RCRA REAUTHORIZATION ISSUES IN THE 103D CONGRESS 8 (updated July 7, 1993) (stating that in parts of the Midwest and Southwest disposal costs range from $11 to $12 per ton, and that in the Northeast where disposal costs can be more than $100 a ton waste can be transported long distances starting around $50 per ton).

44. "[T]he laws of economics suggest that landfills will sprout in places where land is cheapest and population densities least. I see no reason in the Commerce Clause, however, that requires cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such sites present." *Fort Gratiot*, 504 U.S. at 372-73 (Rehnquist, C.J., dissenting) (citing Christopher Alm, *"Not in My Backyard:" Facing the Siting Question*, 10 EPA J. 9 (1984) (advocating that each county accept a share of the overall waste stream equivalent to what it creates so that "less populated counties are protected against becoming the dumping ground of the entire region")).

45. Congressional attempts to grant the states the right to regulate commerce have been largely unsuccessful. *See supra* notes 39-41 and accompanying text. *See also Environmental Protection Agency, Congress Sees Bumper Crop of Solid Waste Management Bills*, REUSABLE NEWS, Spring 1990, at 2 (noting that two waste management bills were introduced and rejected in 1989 that called for municipal solid waste reduction and recycling plans).

46. Environmental problems are uniquely dependent on government:

> The major reason for the preeminent role of government is that most environmental ills are *public problems;* that is, they cannot be solved through purely private action. This does not mean that individuals and nongovernmental organizations cannot do much to prevent environmental deterioration, especially in local communities; it means only that individual efforts alone are insufficient.

VIG & KRAFT, *supra* note 34, at 4-5. *But see* TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991) (advocating the use of market solutions to determine the

deposited in the state's limited landfill space?[47]

II. THE SUPREME COURT'S DORMANT COMMERCE CLAUSE ANALYSIS

A. Early Dormant Commerce Clause Decisions Regarding Solid Waste Disposal

The Supreme Court first addressed the interstate shipment of waste under the dormant Commerce Clause[48] in *Philadelphia v. New Jersey*.[49] The Court held that statutes facially discriminating between in-state and out-of-state wastes for the purpose of economic protection are per se illegal.[50] The Court found a New Jersey statute that prohibited the importation of most out-of-state solid municipal waste to be discriminatory and therefore per se illegal. The Court believed that New Jersey enacted the statute to protect New Jersey residents from high municipal solid waste disposal costs.[51]

B. The Modern Dormant Commerce Clause Test

The *Philadelphia v. New Jersey* decision set the stage for analyzing state statutes differently depending on whether the statute "regulates evenhandedly with only [an] 'incidental' effect[s] on interstate commerce, or [whether it] discriminates against interstate

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optimal level of landfilling). For a debate on the merits of free market environmentalism, see Symposium, *Free Market Environmentalism: The Role of the Market in Environmental Protection,* 15 HARV. J. L. & PUB. POL'Y 295 (1992).

47. If the federal government wants to allow states to regulate their landfill space, Congress can authorize the states to regulate commerce normally protected by the dormant Commerce Clause. *See Maine v. Taylor,* 477 U.S. at 139.

48. For a recent and thorough discussion of the dormant Commerce Clause test, see Justice Thomas's majority opinion in *Oregon Waste Systems,* 511 U.S. at 98-101.

49. *Philadelphia v. New Jersey,* 437 U.S. at 617.

50. *See id.* at 624.

51. *See id.* at 629. Ironically, New Jersey, which initiated the interstate shipment of waste debate by blocking waste imported into New Jersey by neighboring states, is now considered to be one of the most ardent opponents of relaxing the dormant Commerce Clause's limits on state's restrictions of waste importation. *See* Kevin Braun, *Interstate Waste/Flow Control,* EESI WKLY. BULL., May 8, 1995, at 8.

commerce either on its face or in its practical effect."[52] If the statute is facially discriminatory, or discriminatory in its practical effect, the state must show that: (1) the statute serves a legitimate local purpose which outweighs the burdens on interstate commerce, and (2) that no reasonable less discriminatory alternatives exist.[53] On the other hand, if the statute does not discriminate on its face or in its practical effect, the court will apply the balancing test articulated in *Pike v. Bruce Church, Inc.*[54] and uphold the statute unless the burdens on commerce "are clearly excessive in relation to the putative local benefits."[55] Thus, the dormant Commerce Clause test lessens the state's burden to justify its law if the court finds the statute is not discriminatory on its face or in its practical effect.[56]

C. Subsequent Supreme Court Decisions

Three years after *Philadelphia v. New Jersey*, the Supreme Court decided *Minnesota v. Clover Leaf Creamery Co.*,[57] which has particular importance to landfill conservation statutes. The challenged statute banned the sale of milk in plastic non-returnable, non-

52. Hughes v. Oklahoma, 441 U.S. 332, 336 (1979). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 425 (2d ed. 1988) ("*Philadelphia v. New Jersey* thus lays the foundation for a unified approach to state and local attempts to fence out national problems.").

53. *See Hughes*, 441 U.S. at 336. The Court analyzes these attempts to "fence out national problems" under the test that the Court formulated in *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes*, 441 U.S. at 336).

54. 397 U.S. 137, 142 (1970).

55. *Id.* at 142. In *Pike*, the court struck down an Arizona law that required an in-state cantaloupe grower to build in-state packing facility to enhance the state's reputation as a cantaloupe producer, reasoning that state interests were outweighed by burden on interstate commerce. *See generally Oregon Waste Systems*, 511 U.S. at 99 (articulating the current Supreme Court dormant Commerce Clause analysis).

56. Most current and former Supreme Court Justices agree that "state laws which *discriminate* against interstate commerce are ordinarily unconstitutional." GERALD GUNTHER, CONSTITUTIONAL LAW 211 (12th ed. 1991). While agreeing with this position, Justice Scalia advocates a narrower view that "the judicial role is limited to banning discrimination and that the Court's resort to 'balancing' usurps a task that more properly belongs to Congress." *Id.* (citing Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 895 (1988) (Scalia, J., concurring)).

57. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

refundable containers.[58] Minnesota's self-proclaimed purpose in passing the statute was to preserve energy and other natural resources as well as to reduce solid waste disposal problems.[59]

The Court found that the statute was not discriminatory because the statute banned *all* plastic milk containers regardless of their origin.[60] The Court rejected the argument that the law's effect was discriminatory because of the economically significant paper milk carton industry in Minnesota that would benefit from the proposed statute.[61] Moreover, the Court noted that adversely affected in-state economic interests could protect out-of-state milk producers from excessive regulations through the political process.[62]

Because the Court concluded that the law did not discriminate between interstate and intrastate commerce, the Court applied the *Pike* balancing test.[63] The Court used the *Pike* balancing test to determine if the incidental burdens of Minnesota's milk container law on interstate commerce were "clearly excessive in relation to the putative local benefits."[64] The majority concluded that Minnesota's interest in lessening solid waste disposal problems outweighed the relatively slight burden on out-of-state milk producers of changing to non-plastic containers.[65] Thus, in upholding Minnesota's law, the

58. *See id.* at 458. However, the statute allowed the sale of milk in paperboard milk cartons which are also nonreturnable and nonrefillable. *See id.*

59. *See id.* at 473.

60. *See id.* at 471-72.

61. *See id.* at 473. The Court reasoned that plastic would continue to be used in the manufacture of plastic pouches, returnable bottles, and paperboard, and that out-of-state pulpwood manufacturers would also benefit. *See id.*

62. *See id.* at 473 n.17 ("The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse.") (citing South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938)). *See also* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675 (1981) ("[A] State's own political processes will serve as a check against unduly burdensome regulations.") (quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978)).

63. *See Clover Leaf Creamery,* 449 U.S. at 472. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

64. *Clover Leaf Creamery,* 449 U.S. at 472 (quoting *Pike v. Bruce Church,* 397 U.S. at 142).

65. *See id.* at 473.

Court found it to be neutral in its practical effect.[66]

Not all environmental laws are found to be neutral in their practical effect. At the opposite extreme are laws which facially discriminate against out-of-staters. As the Supreme Court test indicates, however, a statute is not necessarily invalid because it discriminates on its face if the statute has some non-protectionist purpose.[67] For example, in 1985 the Supreme Court decided *Maine v. Taylor*.[68] The challenged Maine statute barred the importation of baitfish but allowed the sale of local baitfish[69] because of a parasite present in some out-of-state baitfish.[70] Because no reasonable less discriminatory alternative existed,[71] the Court upheld Maine's statute as serving a legitimate local interest.[72]

Since *Minnesota v. Clover Leaf Creamery*[73] and *Maine v. Taylor*,[74] other cases related to waste control have retreated from allowing states to restrict the importation of harmful substances.[75] Some states have attempted to implement a surcharge on waste coming from out-of-state.[76] However, because the states could not identify a reason

66. *See id.* at 472.

67. *See Oregon Waste Systems*, 511 U.S. at 100-01 (stating that discriminatory law is per se invalid unless the state can show "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives") (quoting New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)).

68. Maine v. Taylor, 477 U.S. 131 (1986).

69. *See id.* at 132 n.1.

70. *See id.* at 141.

71. The Court found that no reasonable alternative existed including testing the out-of-state fish for the feared parasite. *See id.* at 147 ("[T]he 'abstract possibility' of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an '[a]vailabl[e] ... nondiscriminatory alternativ[e]' for purposes of the Commerce Clause.") (citations omitted).

72. *See id.* at 151.

73. *See supra* notes 57-65 and accompanying text.

74 *See supra* notes 68-72 and accompanying text.

75. *See, e.g.*, Michael P. Healy, *The Preemption of State Hazardous and Solid Waste Regulations: The Dormant Commerce Clause Awakens Once More*, 43 WASH. U. J. URB. & CONTEMP. L. 177 (1993) (advocating that states wishing to limit the importation of solid waste either avoid Commerce Clause scrutiny as a market participant or impose mandatory recycling on all sources of waste).

76. See *Oregon Waste Systems*, 511 U.S. at 108 (striking down an Oregon law which included a per-ton fee of $2.25 charged on out-of-state solid waste, compared to the $2.85 per-ton for in-state solid waste); *see also Chemical Waste Management*, 504 U.S. at 348 (striking

why out-of-state waste was particularly evil compared to in-state waste, the Court refused to apply *Maine v. Taylor*[77] and held that the surcharge for out-of-state waste discriminated against out-of-staters.[78] Other states have tried to restrict the flow of waste by favoring local processors of waste, or by restricting the flow of waste through subdivisions of the state.[79] The Supreme Court, however, has invalidated these regulations because they discriminated against out-of-state waste in their practical effect.[80]

In sum, a state will find it much more difficult to justify a law restricting waste importation if the court finds the law to be discriminatory,[81] as opposed to a neutral law like the Minnesota statute in *Clover Leaf Creamery*.[82] Not surprisingly, the constitutional fate of any given state statute relating to the interstate shipment of waste largely depends upon the court's classification of the statute as either discriminatory or neutral.[83]

III. NATIONAL SOLID WASTES MANAGEMENT V. MEYER

A. Wisconsin's Solid Waste Reduction, Recovery and Recycling Statute

Because Wisconsin has low waste disposal costs, it has become a

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down an Alabama law that applied a surcharge of $72.00 per-ton for depositing out-of-state hazardous waste).

77. *See* Maine v. Taylor, 477 U.S. 131 (1986).

78. *See Chemical Waste Management,* 504 U.S. at 348 (noting the lack of a unique health threat posed by out-of-state hazardous waste).

79. *See C & A Carbone*, 511 U.S. at 390 ("The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside."). *See also Fort Gratiot*, 504 U.S. at 355 (prohibiting landfill owner from accepting solid waste that originated outside of the county).

80. *See Fort Gratiot,* 504 U.S. at 367-68.

81. *See Oregon Waste Systems*, 511 U.S. at 108.

82. *See Clover Leaf Creamery,* 449 U.S. at 472; *see also* Cox, *supra* note 22, at 555 ("Under current Court tests, only those state regulatory efforts which impose evenhanded burdens on the local citizenry rather than serve as a pretext for discrimination against out-of-state waste stand a reasonable chance of surviving constitutional attack.").

83. *See* GUNTHER, *supra* note 56, at 243 ("Increasing, moreover, the Court emphasizes the 'discriminatory effect' of a law, either to add strength to its inference of forbidden purposes or as an independent ground for invalidation.").

dumping ground for municipal solid waste from neighboring states.[84] Although Wisconsin is considered to be among the more "environmentally conscious" states,[85] the volume of municipal solid waste imported into Wisconsin had been steadily increasing, using up much of the state's available landfill space.[86] In response to this situation, Wisconsin has adopted an aggressive recycling program.[87]

The Wisconsin's Solid Waste Reduction, Recovery and Recycling statute[88] forbids the dumping of waste in Wisconsin that contain any of eleven listed recyclable materials.[89] The statute applies to all waste, intrastate and interstate.[90] Waste generators comply with the statute in either of two ways. First, the waste generator could process the waste at a materials recovery facility that separates the eleven listed

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84. For example, Illinois annually ships 325,458 tons of municipal solid waste into Wisconsin. *See Garbage Laws Targeted,* WIS. STATE J. (Madison, Wisconsin), Aug. 13, 1994, at 2B. Wisconsin also imports municipal solid waste from the neighboring states of Indiana, Iowa, Michigan, and Minnesota. *See id.*

85. *See supra* note 34.

86. *See* National Solid Waste Management Ass'n v. Meyer, 63 F.3d 652, 654 (7th Cir. 1995), *cert. denied,* 116 S. Ct. 1351 (1996) [hereinafter *National Waste Management II*].

87. WIS. STAT. ANN. § 287.07(3) (West Supp. 1997) mandates:

> Beginning on January 1, 1995, no person may dispose of in a solid waste disposal facility or burn without energy recovery in a solid waste treatment facility in this state any of the following:
>
> (a) An aluminum container.
> (b) Corrugated paper or other container board.
> (c) Foam polystyrene packaging.
> (d) A glass container.
> (e) A magazine or other material printed on similar paper.
> (f) A newspaper or other material printed on newsprint.
> (g) Office paper.
> (h) A plastic container.
> (i) A steel container.
> (j) A waste tire, as defined in s. 289.55(1)(c).
> (k) A container for carbonated or malt beverages that is primarily made of a combination of steel and aluminum.

Id

88. WIS. STAT. ANN. ch. 287 (West Supp. 1997).

89. *See* WIS. STAT. ANN. § 287.07(3)(a)-(k) (West Supp. 1997).

90. *See* National Solid Waste Management Ass'n v. Wisconsin Dep't of Natural Resources, 40 Envt. Rep. Cas. (BNA) 1269, 1272 (W.D. Wisc. 1994) [hereinafter *National Waste Management I*], *rev'd,* 63 F.3d 652, 662 (7th Cir. 1995), *cert. denied,* 116 S. Ct. 1351 (1996).

materials.[91] Second, the community from which the waste originated could adopt a comprehensive recycling program that conforms with the Wisconsin statute.[92]

Like most waste production plans, the parties most severely hurt by the Wisconsin plan were waste processors.[93] Consequently, a solid waste trade association challenged the Wisconsin law under the dormant Commerce Clause.[94]

B. The District Court Decision

The district court held the relevant portions of the Wisconsin statute constitutional.[95] The court reasoned that the law was not discriminatory because it required the same recycling standards for in-state and out-of-state waste producers who wanted to dump municipal solid waste in Wisconsin.[96] Moreover, the court stated that if the statute burdened anyone, it was in-staters.[97] However, because the record was incomplete, the district court declined to decide if the statute satisfied the *Pike* balancing test.[98] As a result, the court denied the landfill owners' motion for summary judgment in order to decide

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91. *See National Waste Management II*, 63 F.3d at 662 ("[T]he Wisconsin statute makes clear that, if the waste is processed by a materials recovery facility that separates the eleven listed materials, the waste will conform to the environmental needs of Wisconsin.").

92. WIS. STAT. ANN. § 287.07(7)(a) (West Supp. 1997) is an exemption from WIS. STAT. ANN. § 287.07(3)(a)-(k) (West Supp. 1997) and provides:

> The prohibitions in subs. (3) and (4) do not apply with respect to solid waste . . . that is generated in a region that has an effective recycling program, as determined under [Wisconsin law], and, if the region is not in this state, the region is located in a state that has as effective siting program . . . .

Id.

93. *See National Waste Management I*, 40 Envt. Rep. Cas. (BNA) at 1273.

94. *See National Waste Management II*, 63 F.3d at 653.

95. *See National Waste Management I*, 40 Envt. Rep. Cas. (BNA) at 1274.

96. *See id.* at 1272 ("An examination of the practical effects of the Wisconsin statute does not reveal discrimination against out-of-state interests but shows instead that Wisconsin consumers are more heavily burdened by the statute than are their out-of-state neighbors.").

97. *See id.* The court reasoned that the statute primarily burdened in-staters as established by the plaintiffs in this case who were in-staters. *See id.* The court also found that the waste diverted from Wisconsin would be of direct benefit to non-Wisconsin waste disposal companies who may be able to process the extra waste. *See id.* at 1273.

98. *See id.* at 1274.

these issues at trial.[99]

At trial, the district court ruled in Wisconsin's favor and held that the local benefits outweighed the burdens the statute placed on commerce.[100] The court identified both the "conservation of landfill space and the protection of the environment" as benefits to Wisconsin.[101] The court classified the burdens on interstate commerce and the cost to out-of-staters as "limited."[102] Subsequently, the trade association for solid waste management companies appealed.[103]

C. The Seventh Circuit Court of Appeals Decision

On appeal, the Seventh Circuit held the recycling law unconstitutional.[104] Rather than focusing on the traditional dormant Commerce Clause tests, the Seventh Circuit focused on the probability that Wisconsin's statute would regulate commerce occurring wholly outside of Wisconsin and would thus directly regulate interstate commerce.[105] The court relied heavily on a Tenth Circuit case for its dormant Commerce Clause analysis.[106]

The Tenth Circuit had confronted an Oklahoma statute that

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99. *See id* The district court did find two other provision of the statute violated the dormant Commerce Clause. The court found that requiring only out-of-state municipalities to go through the formal rulemaking process to get approval of their recycling programs was discriminatory and contrary to the dormant Commerce Clause. *See id.* at 1274-75 (holding a portion of the Wisconsin statute, WIS. STAT. ANN. § 159.11(1) (West Supp. 1995), invalid). The court also found that requiring the out-of-state municipality's state to have an effective siting program was facially discriminatory and contrary to the dormant Commerce Clause. *See id* at 1275 (holding WIS. STAT. ANN. § 159.12(3) (West Supp. 1995) unconstitutional because the statute violated the dormant Commerce Clause). However, these rulings had "little impact upon the application of the law," and did not "affect the validity of the effective recycling program itself." *Id.*

100. *See National Waste Management II,* 63 F.3d at 656.

101. *Id.*

102. *Id.* ("The court reasoned, however, that 'the cost to change [to a Wisconsin-approved recycling program]' and 'the administrative burden' of compliance 'would be limited.'").

103. *See Selected 1995 Wisconsin Environmental Decisions,* 3 WIS. ENVTL. L.J. 97, 110 (1996).

104. *See National Waste Management II,* 63 F.3d at 661.

105. *See id.* at 658 ("It essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce.").

106. *See id.* at 660.

limited access to Oklahoma disposal facilities to out-of-state waste producers who came from a state that had passed "'similar standards for controlled industrial waste disposal.'"[107] The statute was compulsory; if the waste producer's home state did not pass similar legislation, it would be barred from disposing of waste in Oklahoma.[108] The Tenth Circuit held the law invalid because it imposed an "economic embargo" on hazardous waste.[109]

Conversely, under the Wisconsin statute, a waste producer from a state that had not adopted an "effective recycling program" could still ship waste to Wisconsin.[110] The waste producer would, however, have to remove the eleven listed materials at a materials recovery facility.[111] The Wisconsin statute is distinguishable from the Oklahoma statute because there is no "absolute ban on the flow of interstate commerce."[112] Nevertheless, the Seventh Circuit found the Wisconsin statute to be contrary to the dormant Commerce Clause.[113]

After extending the Tenth Circuit decision to the Wisconsin statute which did not involve a complete embargo, the court found the need to supplement its decision by applying a normal dormant Commerce Clause analysis.[114] Under this analysis, the court found that the law discriminated in its practical effect because it forced out-of-state waste processors to follow Wisconsin law as well as their own states' laws if their communities adopted the program.[115] The

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107. *Id.* (quoting Hardage v. Arkins, 619 F.2d 871, 873 (10th Cir. 1980)).

108. *See id. Compare* WIS. STAT. ANN. § 287.07(7) (West Supp. 1997) (mandating that the out-of-state waste generator's state adhere to the importing state's law) *with* GA. CODE ANN. § 12-8-65.3(c) (1992) (mandating that the out-of-state waste generators adhere to the importing states law).

109. *National Waste Management II,* 63 F.3d at 660 (quoting *Hardage,* 619 F.2d at 873).

110. Adopting an "effective recycling program" offered out-of-state communities an alternative to removing the waste at a material recover facility. *See* WIS. STAT. ANN. § 287.07(7) (West Supp. 1997). For the text of section 287.07(7), see *supra* note 92.

111. *See* WIS. STAT. ANN. § 287.07(3) (West Supp. 1997).

112. *See National Waste Management II,* 63 F.3d at 660-61 ("Like the Oklahoma statute in *Hardage,* the Wisconsin statute seeks to force Wisconsin's judgment with respect to solid waste recycling on communities in its sister states 'at the pain of an absolute ban on the flow of interstate commerce.'").

113. *See id.* at 661.

114. *See id.*

115. *See id.*

court also found that less discriminatory alternatives were available, even though the statute allowed for the alternative that the court suggested.[116] Accordingly, the court held the statute unconstitutional under a normal dormant Commerce Clause analysis.[117] In doing so, the court gave little credence to Wisconsin's equal treatment of in-state and out-of-state waste.[118]

Normally, the inquiry would stop there.[119] The court, however, anticipated that its characterization of the Wisconsin statute as discriminatory might later be found erroneous and, thus, also applied the *Pike* balancing test.[120] The court found that its method of protecting Wisconsin's environment did not justify the substantial burdens on interstate commerce.[121] In other words, the court found that out-of-staters' right to dump municipal solid waste in Wisconsin "substantially outweighed" Wisconsin's right to protect the public health and safety of its communities.[122]

D. Analysis of the Seventh Circuit's Decision

The Seventh Circuit's opinion extends the dormant Commerce Clause analysis to invalidate laws designed to give out-of-staters more flexibility in complying with a waste importing state's disposal laws. The court did not consider the probability that other

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116. *See id.* at 662.

117 *See National Waste Management II*, 63 F.3d at 661.

118. *See id.*

119 *See supra* Part II.B.

120. The court reasoned that

> [g]iven the nondiscriminatory and less burdensome methods that could be implemented to ensure the segregation of recyclable materials before the waste is committed to a Wisconsin landfill, we also note that, if it were necessary to reach the issue (or if our earlier characterizations of the Wisconsin scheme as discriminatory and direct regulation of interstate commerce were found to be erroneous), the Wisconsin scheme still could not pass muster under the test of *Pike v. Bruce Church, Inc.*

National Waste Management II, 63 F.3d at 663 (citation omitted).

121. *See id.*

122. *Id.* The standard of review for findings of fact is "clear error." *See id.* at 656. The district court found at trial that "the statute's putative local benefits outweighed its 'small burden on interstate commerce.'" *Id.*

communities would only adopt the recycling program if they thought it would be economically beneficial to their community. If adopting the law was not economically feasible, the prudent state would not adopt the program and could remove the banned materials only from waste headed to Wisconsin.[123] Without such a scheme, out-of-state waste producers would have no incentive to reduce the "germ-infected rags, diseased meat, and other noxious items"[124] that are landfilled in Wisconsin.[125]

IV. RAMIFICATIONS OF THE SEVENTH CIRCUIT'S DECISION

After the 1991-92 "Environmental Term"[126] of the Supreme Court, commentators became particularly concerned about what, if anything, a state could do to regulate the importation of waste.[127] One legal expert suggested that two alternatives remain for states that want to regulate the importation of waste.[128]

First, states can own and operate the landfill facilities under the "Market Participant" exception to the dormant Commerce Clause.[129] However, this solution is not always feasible because of the costs of

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123. *See National Waste Management II*, 63 F.3d at 662 ("[T]he Wisconsin statute makes clear that, if the waste is processed by a materials recovery facility that separates the eleven listed materials, the waste will conform to the environmental needs of Wisconsin."); WIS. STAT. ANN. § 287.07(7) (West Supp. 1997). For the full text of section 287.07(7), see *supra* note 92.

124. Philadelphia v. New Jersey, 437 U.S. 617, 632 (1978) (Rehnquist, J., dissenting).

125. *See Fort Gratiot*, 504 U.S. at 369 (Rehnquist, C.J., dissenting). *See also supra* note 22. *See generally* Delogu, *supra* note 15.

126. *See* Symposium, *A Symposium on the United States Supreme Court's "Environmental Term" (1991-1992)*, 43 WASH. U. J. URB. & CONTEMP. L. 3 (1993).

127. *See* Healy, *supra* note 75, at 213 (discussing *Chemical Waste Management* and *Fort Gratiot*). *See also supra* notes 76-80 and accompanying text.

128. *See* Healy, *supra* note 75, at 213.

129. The "Market Participant" exception involves the states owning the landfills and exercising their own discretion about which sources of waste can be dumped in their landfills. *See id.* The "Market Participant" exception carries significant ownership and administrative expenses for the state. *See id.* at 214. For a general discussion of the "Market Participant" exception, see Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). For a discussion of the "Market Participant" exception as it relates to solid waste, see 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 (1989).

construction and operation of the needed facilities.[130] Federal standards for low-volume landfills make operating the landfills exceedingly expensive.[131] Therefore, to build a waste disposal facility that is cost effective, local governments must ensure that they will have adequate volumes of waste to process.[132] Moreover, in 1994, the Supreme Court invalidated local waste disposal laws that required local waste to be dumped at certain locations as a method of ensuring adequate revenues for the publicly-owned facility.[133] This decision will also discourage many small communities from this option.

Another problem with the "Market Participant" exception is that it is a relatively new doctrine that has not been tested in a solid waste case. Some legal experts question whether the "Market Participant" exception will actually give states the versatility they need to make being a "Market Participant" beneficial once the Supreme Court reexamines the doctrine.[134] Accordingly, the "Market Participant"

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130. *See* Healy, *supra* note 75, at 214-15.

131 *See id.* at 215 n.153 ("Once these inadequate public landfills, many of which are also small volume landfills . . . are required to install new mandatory controls, states and localities may decide to close the landfills because the new requirements are too costly.").

132. *See* Kevin Braun, *Interstate Waste/Flow Control*, EESI WKLY. BULL., May 15, 1995, at 26 ("Without local authority to require that waste haulers use the local facilities, many waste haulers have elected to dump trash at other, cheaper disposal sites. That, some local officials maintain, is causing financial problems for many disposal facilities . . . .").

133. *See* C & A Carbone, Inc. v. Town of Clarkson, 511 U.S. 383 (1994). The Town of Clarkson had a small landfill which needed to process a minimum amount of municipal solid waste to remain economically feasible. *See id.* at 387. A local ordinance required that all municipal solid waste from the city be deposited in the local processing plant. *See id.* at 388. However, the petitioner refused to ship its solid waste to the Clarkson landfill in violation of the city ordinance. *See id.* The Supreme Court held that this was an impermissible regulation of interstate commerce because it kept out-of-state firms from competing with the local processing plant. *See id.* at 391-94.

134. Commentators warn that the Supreme Court may restrict the scope of the market participant exception to prevent states from circumventing the dormant Commerce Clause:

> The Court's interest in defining some limits to the market participation exception is well placed. For a doctrine that purports to be merely a limited exception from the commerce clause-while roping in such diverse state endeavors as industrial production for the private market and contractual conditions on public works projects, and while twining together such varied commodities as cement, abandoned cars, and construction jobs-is a doctrine with the potential to knot up the remainder of the commerce clause, or to come unravelled [sic] altogether.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 434 (2d ed. 1988).

exception is available only to states that are willing to risk substantial tax dollars toward the effort of preserving landfill space.

Second, states can attempt to implement a vigorous recycling program like the one established in Wisconsin.[135] The theory behind this proposal is that if a state has removed recyclables from its waste, then waste coming from out-of-state is particularly harmful because it will fill the home state's landfills with potentially recyclable materials. Thus, a statute banning waste importation would be permissible under *Maine v. Taylor*.[136] In light of the Seventh Circuit's decision, however, it is worth reevaluating this landfill conservation strategy to determine if it still available to the individual states.

Washington's landfill conservation statute[137] provides a good test to examine what states can still do. The Washington legislature's purpose in passing the statute was to reduce the amount of waste going into Washington landfills through a program of waste reduction and recycling.[138] The statute specifically acknowledges that Washington cannot directly regulate outside its state borders.[139]

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135. Healy, *supra* note 75, at 215:

> If a state decides not to pursue public operation of landfills, the state may nevertheless limit the disposal of out-of-state waste, assuming it is able to identify some permissible reason for treating the out-of-state waste differently. The greatest opportunity for pursuing such a strategy is to require reductions in the sources of waste through a system of compulsory recycling.

Healy, *supra* note 75, at 215 (footnote omitted).

136. *Id.* See also *supra* notes 68-72 and accompanying text for discussion of *Maine v. Taylor*. *But see Chemical Waste Management*, 504 U.S. at 348 (1992) (distinguishing *Maine v. Taylor* because in *Chemical Waste Management* Alabama did not identify a legitimate reason why its hazardous waste surcharge targeted out-of-state sources of hazardous waste other than its point of origin).

137. WASH. REV. CODE ANN. § 70.95.217(8) (West Supp. 1996). For the text of section 70.95.217(8), see *infra* note 139.

138. *See, e.g.*, WASH. REV. CODE ANN. § 70.95.217(4) (West Supp. 1996).

139. WASH. REV. CODE ANN. § 70.95.217(8) (West Supp. 1996) acknowledges that:

> Because Washington state may not directly regulate waste handling, reduction, and recycling activities beyond its state boundaries, the only reasonable alternative to ensure this equitable treatment of waste being disposed within Washington is to implement a program of reviewing such activities as to waste originating outside of Washington, and to assign the additional costs, when necessary, to ensure that the waste meets standards substantially equivalent to those applicable to waste generated with the state, and, in some cases, to prohibit disposal of waste where its generation

Therefore, to reduce waste, Washington reserves the right to charge additional fees to those out-of-state sources of waste that do not have waste reduction standards substantially equivalent to Washington state's standards, and in some cases to prohibit disposal of that out-of-state waste altogether.[140]

In *National Waste Management II*,[141] the Seventh Circuit was particularly concerned about Wisconsin's Solid Waste Reduction, Recovery and Recycling statute[142] giving Wisconsin the ability to regulate waste outside Wisconsin that was never going to enter Wisconsin.[143] In contrast, Washington's statute only affects waste that actually enters Washington.[144] At that time, the state will process that waste if needed to conform with Washington's environmental standards.[145] Therefore, this procedure would seem to comply with the Seventh Circuit's extended test.[146]

However, the Seventh Circuit also found, in dicta, that the Wisconsin law violated the *Pike* test because the burdens on interstate commerce substantially outweighed the putative local benefits.[147] The court, however, may have reached this conclusion solely to bolster its

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and management is not subject to standards substantially equivalent to those applicable to waste generated within the state.

Id.

140. *See id.* The Washington statute's scheme is similar to a Washington statute that the Supreme Court upheld in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). The statute placed a leveling tax on out-of-state goods that were taxed less than Washington goods which were taxed at two percent. *See id.* at 579-80. Justice Cardozo summarized the Washington statute's substance as: "You may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here." *Id.* at 586. The Washington recycling waste management statute is similar in that it also attempts to force out-of-state benefactors of Washington's resources pay an equal share for the right to benefit from Washington. *See* WASH. REV. CODE ANN. § 70.95.217(8) (West Supp. 1996).

141. 63 F.3d 652 (7th Cir. 1995).

142. *See supra* note 87.

143. *See National Waste Management II*, 63 F.3d at 661.

144. *See supra* notes 139-40 and accompanying text (discussing the limitation on Washington's authority to regulate waste).

145. *See id.*

146. *See National Waste Management II*, 63 F.3d at 660-61.

147. *See id.* at 663.

"regulates outside the state's borders" approach.[148] This follows from the Seventh Circuits failure to address *Minnesota v. Clover Leaf Creamery* in which the Supreme Court allowed the states to impede commerce in the interest of preserving landfill space.[149] Moreover, the Seventh Circuit sidestepped the Court's indication that a state would be justified in excluding out-of-state commerce that does not conform to local standards if the substance is of a particularly evil nature.[150] Even if these Supreme Court pronouncements do not exempt the Washington statute from *Pike* scrutiny, as the Seventh Circuit suggests, the Washington statute should withstand the *Pike* test because, unlike the Wisconsin statute, it does not seek to regulate waste outside of Washington State.[151]

Furthermore, unlike the Oregon statute that the Supreme Court invalidated in *Oregon Waste Systems*,[152] Washington's statute does not provide for an across the board surcharge on out-of-state waste.[153] Instead, the Washington statute identifies particular out-of-state waste that is especially harmful: waste from states that do not adequately recycle, and thus fail to meet Washington's waste volume standards.[154] Unfortunately, even though Washington has identified a "particular evil" about some out-of-state waste which may make its statute maintainable under *Maine v. Taylor*,[155] the statute is facially

148. *Id.*

149. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981).

150. *See Maine v. Taylor*, 477 U.S. at 137 (finding that Maine could exclude out-of-state baitfish that may have contained parasites).

151. The Washington scheme will only apply the surcharge to municipal solid waste if it does not conform to Washington's standards upon reaching Washington's border. *See* WASH. REV. CODE ANN. § 70.95.218(2) (West Supp. 1996).

152. *Oregon Waste Systems*, 511 U.S. at 108 (striking down OR. REV. STAT. § 459.297 (1993), which required out-of-state depositors of waste in the State of Oregon to pay a surcharge fee based on that waste).

153. *See* WASH. REV. CODE ANN. § 70.95.217(8) (West Supp. 1996) (reserving the right to charge additional fees only when waste from out-of-state does not conform to standards that in-state waste must satisfy under Washington law).

154. *See* WASH. REV. CODE ANN. § 70.95.218(3) (West Supp. 1996) (permitting waste into Washington only if the waste substantially meets Washington's waste reduction and recycling standards).

155. In *Maine v. Taylor*, the Supreme Court upheld a Maine statute that banned the importation of minnows. *See* 477 U.S. at 151-52. According to the Court, which deferred to the

discriminatory because it only applies to out-of-staters.[156] This statute creates a difficult burden of persuasion for any subsequent court challenge, because the Supreme Court regards facially discriminatory statutes as "virtually per se invalid."[157]

V. PROPOSAL

"One generation's dissents have often become the rule of law years later."[158]

The current municipal solid waste disposal crisis[159] in the United States is largely due to timing. Municipal solid waste buried today cannot reasonably be disinterested tomorrow. The current restrictions placed on states by the judiciary do not allow states to shield themselves from out-of-state waste in any practical manner.[160] Therefore, states can only inhibit the importation of waste to the permissible degree.[161] After *National Waste Management II,* the importing states' ability to create incentives for exporting states to

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district court's finding, Maine's purpose was to maintain their own fisheries, which would be threatened by the out-of-state minnows carrying a threatening parasite. *See id.* at 148-50. The Court also deferred to the district court's findings that no reasonable alternatives existed, because Maine established that inspecting such a small fish was not feasible. *See id.* at 146-47.

In *Oregon Waste Systems,* the Court conceded that a discriminatory statute may be valid if the state can offer any safety or health reason for discriminating against out-of-state waste. *See Oregon Waste Systems,* 511 U.S. at 101.

156. *See* WASH. REV. CODE ANN. § 70.95.218 (West Supp. 1996).

157. *Oregon Waste Systems,* 511 U.S. at 99.

158. Irving R. Kaufman, *Keeping Politics Out of the Court,* N.Y. TIMES, Dec. 9, 1984 (magazine), at 72, 84.

159. *See* Healy, *supra* note 75, at 178 n.5 ("decrying the current 'municipal solid waste crisis' and '[t]oday's disposal capacity crisis'") (quoting 40 C.F.R. §§ 257-58) (alterations in original).

160. *See supra* notes 49-51 and accompanying text.

161. The limitation on the states is the reality of the current law; however, some experts have criticized the dormant Commerce Clause as a doctrine that interferes with Congress' power to defer to state regulation when Congress has not acted. *See* Breck C. Tostevin, Note, 38 HASTINGS L.J. 957, 997 n.159 (1987) (citing Julian N. Eule, *Laying the Dormant Commerce Clause to Rest,* 91 YALE L.J. 425, 435-36 (1982); Earl M. Matlz, *How much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence,* 50 GEO. WASH. L. REV. 47 (1981); Mark Tushnet, *Rethinking the Dormant Commerce Clause,* 1979 WIS. L. REV. 125)).

recycle in their home states appears impermissible.[162]

States, however, still have some options remaining. The "Market Participant" exception to the dormant Commerce Clause is a viable, although expensive, option.[163] States could also implement a statute, like Washington's, but without its facially discriminatory language,[164] that deters the importation of waste into the state while only affecting waste that will actually enter the state.[165] Although these options may slow the crisis, they are merely temporary fixes and not permanent solutions.

The most readily available solution may be found under current dormant Commerce Clause analysis but requires the judiciary to take a progressive view of the landfilling crisis.[166] Under Chief Justice Rehnquist's interpretation of the dormant Commerce Clause test, courts should give substantial weight to the local health and environmental benefits of aggressive landfill reduction programs.[167] Thus, Chief Justice Rehnquist's approach renders a formerly discriminatory statute neutral in its practical effect.[168] Therefore, the Court would not have to find the out-of-state waste to be "particularly evil" under *Maine v. Taylor* because the statute would be neutral in its *practical* effect.[169] A cost-benefit analysis lends strong support for this approach.

Under current law, states must allow landfill owners to charge in-state and out-of-state municipal solid waste disposers the same amount on a non-discriminatory basis.[170] Therefore, the out-of-pocket

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162. *See supra* Part III.C.

163. *See supra* notes 129-34 and accompanying text.

164. *See supra* notes 154-56 and accompanying text.

165. *See supra* notes 137-46 and accompanying text.

166. *See C & A Carbone*, 511 U.S. at 410-11 (Souter, J., dissenting); *Oregon Waste Systems*, 511 U.S. at 109 (Rehnquist, C.J., dissenting); *Fort Gratiot*, 504 U.S. at 368 (Rehnquist, C.J., dissenting); *Chemical Waste Management*, 504 U.S. at 349 (Rehnquist, C.J., dissenting); Hughes v. Oklahoma, 441 U.S. 322, 339 (1979) (Rehnquist, J., dissenting); *Philadelphia v. New Jersey*, 437 U.S. at 629 (Rehnquist, J., dissenting).

167. *See Fort Gratiot*, 504 U.S. at 368.

168. *See supra* Part II.

169. *See Oregon Waste Systems*, 511 U.S. at 114.

170. *See id.* at 100 (holding surcharge illegal because the surcharge favors in-staters over out-of-staters strictly on a geographical basis).

cost for all disposers is equal at the time the waste is disposed. However, the practical cost for all is *not* equal. Indeed, additional in-state costs and risks are numerous and significant.[171] The in-staters who may have a waste dump near their home face the prospects of damage to the health and environment of their community.[172] They also face the financial risk of cleanup efforts in the future if problems arise from the landfilling.[173]

When the relevant factors and consequences of landfilling are considered, not just the contemporaneous costs of disposal, the analysis must go beyond the mere difference in per-ton fees a state charges between in-state and out-of-state sources of municipal solid waste.[174] If a court views the lack of other incentives for exporting states to reduce waste, and the future risk of financial responsibility on the landfilling state as significant, then the landfilling state may be justified in charging out-of-staters more money per ton.

A court would then determine if the additional fees for out-of-staters accurately reflect the factors which make it more burdensome to landfill in one's own state. If the additional fees are reasonable, a court would proceed to apply the *Pike* balancing test which is a much lesser burden to overcome than if a court found the law to discriminate on its face or in its practical effect.[175] Under the *Pike* balancing test, a court would analyze whether the statute places burdens on interstate commerce which "are clearly excessive in relation to the putative local benefits."[176] Because the Supreme Court has already recognized in *Minnesota v. Clover Leaf Creamery Co.*

171. Not all of the ramifications of landfilling are presently known. For instance, many municipalities that have tried to build golf courses over landfills have run into numerous problems including sink holes and methane emissions from the ground. *See* Mitchell Pacelle, *Landfill Golf: Where One Man's Trash is Another's Fairway,* WALL ST. J., Dec. 4, 1995, at A1.

172. *See supra* notes 1-13 and accompanying text.

173. *See, e.g.,* 1995 BRIEFING BOOK ON ENVTL. AND ENERGY LEGIS., *supra* note 3, at 57.

174. *See, e.g., Oregon Waste Systems,* 511 U.S. at 96.

175. It is important that the requirements of a state statute, like Wisconsin's, are drafted in universal terms applying to both in-state and out-of-state waste disposers to avoid the court finding the statute facially discriminatory. *See, e.g., Oregon Waste Systems,* 511 U.S. at 101. Therefore, the inquiry will be limited to whether the state statute discriminates in its practical effect. *See, e.g., National Waste Management II,* 63 F.3d at 658.

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

that landfill space preservation is a legitimate local benefit which justifies some burden on interstate commerce, it is not unrealistic to believe that once a state has its statute analyzed under the *Pike* branch of the dormant Commerce Clause test, the waste regulating statute will have a good chance of surviving dormant Commerce Clause analysis.[177]

Under this approach, the courts would still be able to protect out-of-state waste from conduct that is strictly economic protectionism.[178] For instance, if the environmental statute is a pretext to protecting a state industry, the statute would not be neutral in its practical effect and, because no legitimate local purpose would outweigh the burdens on interstate commerce, the statute would violate the dormant Commerce Clause.[179] Likewise, if the state charged out-of-states an excessive premium fee per ton, the court may also find that the statute is not neutral in its practical effect.[180] Therefore, each state would have the power to protect the health of its citizens and the environment without invoking a complete ban on landfilling waste in the state.[181]

When this approach is applied to laws similar to the overturned Wisconsin statute, a much different outcome may result.[182] Wisconsin could distinguish its waste from out-of-state waste based on the potentially adverse local effects not experienced by the exporting states. The adverse local effects would also significantly bolster the

177. *See supra* Part II.C.

178. A balancing of protecting waste-exporting states against economic protectionism and the right of waste-importing states to safeguard their citizens' health and safety is essential to any test that would be acceptable to the Supreme Court. *See Philadelphia v. New Jersey*, 437 U.S. at 623-24 ("The opinions of the Court through the years have reflected an 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.").

179. *See Oregon Waste Systems*, 511 U.S. at 107.

180. *See id.* at 102-04.

181. *See Chemical Waste Management*, 504 U.S. at 349 (Rehnquist, C.J., dissenting) ("States may take actions legitimately directed at the preservation of the State's natural resources, even if those action incidentally work to disadvantage some out-of-state waste generators.").

182. For a discussion of the Wisconsin statute, see *supra* Part III.

local benefits when weighed against the burdens on interstate commerce. With potential future local costs imputed to the current dormant Commerce Clause analysis, Wisconsin, as well as other states, would have more flexibility in protecting its citizens' public health and environment.

The solution to the municipal solid waste problem will not be a swift one. Under our system of government, change has the potential of taking place at a glacial pace, especially when strong political alliances find themselves on opposite sides of the political fence.[183] However, hope is not lost.

Chief Justice Rehnquist, through his dissents, has previously persuaded the Court to change its view on constitutional issues.[184] By becoming a market participant[185] or implementing statutes similar to Washington's,[186] which makes importing non-recycled waste prohibitive, the amount of waste landfilled can be reduced until the courts or the legislature intervene to find a solution.

CONCLUSION

Although the legislature has been unable to resolve the municipal

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183. *See supra* notes 38-39 and accompanying text.

184. The most telling example of Chief Justice Rehnquist's persuasive force on the court occurred in a case concerning state immunity from federal regulation. In *Fry v. United States*, 421 U.S. 542, 548 (1975), the Court, in an 8-1 decision, held that states must comply with the Economic Stabilization Act. Justice Rehnquist dissented, calling for the Court to overrule *Maryland v. Wirtz*, 392 U.S. 183 (1968). *See Fry*, 421 U.S. at 549 (Rehnquist, J., dissenting). Only one year later in *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976), in a 5-4 decision, the Court held a federal law inapplicable to the states for the first time in 40 years. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 157 (12th ed. 1991). In doing so, the Court overruled *Maryland v. Wirtz* after affirming that decision only one year earlier in *Fry*.

In his *Fry* dissent, Chief Justice Rehnquist also noted the lower level of deference to *stare decisis* when important constitutional law questions are before the Court. *See Fry*, 421 U.S. at 559 (citing The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting); New York v. United States, 326 U.S. 572, 590-91 (1946) (Douglas, J., dissenting)); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting).

185. *See supra* notes 129-34 and accompanying text. *See also supra* text accompanying note 161.

186. *See supra* notes 137-45 and accompanying text. *See also supra* text accompanying note 166.

solid waste problem,[187] courts have fostered the problem through their rigid application of the dormant Commerce Clause. A better solution would be to allow waste importing states, such as Wisconsin, to pass laws that give out-of-state waste producers financial incentives to recycle, and therefore reduce landfilled waste. Indeed, the environmental incentives that local communities have to recycle has proven to be inadequate.[188]

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187. *See supra* notes 40-41 and accompanying text.
188. Philadelphia v. New Jersey, 437 U.S. 617, 632 (1978).

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