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COMMENT

MUNICIPAL SOLID WASTE REGULATION: AN INEFFECTIVE SOLUTION TO A NATIONAL PROBLEM

I. Introduction

The volume of solid waste, particularly in urban areas, is increasing as a result of several factors including population growth, industrial expansion, technological advances in the manufacture of consumer products, and continued American affluence. Both public health and the environment are in jeopardy because disposal methods have not kept pace with the accumulation of solid waste. "Solid waste" is defined as any garbage, refuse or other discarded material caused by agriculture, commercial and industrial operations, and by community activities. Stringent air and water pollution controls, which limit


2. 42 U.S.C. § 6901(b)(2). See also Note, Garbage, The Police Power And The Commerce Clause: City of Philadelphia v. New Jersey, 8 CAP. L. REV. 613 (1979). The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste into or on any land or water so that such solid waste may enter the environment or be emitted into the air or discharged into the waters, including ground waters. 42 U.S.C. § 6903(3). Congress has identified at least seven significant dangers as a result of improper solid waste disposal. These include: 1) fire hazards; 2) air pollution; 3) explosive gas migration; 4) surface and ground water contamination; 5) disease transfer; 6) personal injury; and 7) aesthetic blight. H.R. REP. No. 94-1491, 94th Cong., 2d Sess. 37, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6275.

3. The term "solid waste" is defined as any garbage, refuse, sludge or other discarded solid material, resulting from industrial, commercial, mining and agricul-
the use of incineration and ocean dumping for disposal, contribute to the problems facing governmental bodies responsible for solid waste management. Although land has become the only practical method of disposal because it is not extensively regulated, its effectiveness as a receptacle has been weakened by the increased amount, changing nature, and unplanned disposal of refuse.

This Comment focuses on the treatment and disposal of solid waste on land, particularly the use of sanitary landfills. Although waste...
materials have been disposed of by either sanitary landfills or open dumps,9 recent federal and state legislation now prohibit the disposal of refuse in open dumps.10 Sanitary landfill operations minimize environmental hazards by depositing refuse in a natural or man-made depression, compacting it, and covering it with compacted earth or other material.11 They are considered to be an interim solution until more efficient and environmentally safe methods become feasible.12

Municipal and state governments prohibit extraterritorial solid waste from disposal within their boundaries.13 Several states, in fact, have enacted legislation banning any refuse collected in other states from final disposition within their territorial limits.14 These barriers erected against interstate and intrastate solid waste disposal create severe problems15 because many municipalities and states are forced to export their refuse.16

9. 42 U.S.C. § 6901(b)(1). The term “open dump” means a land disposal site at which solid wastes are disposed of in a manner that does not protect the environment, are susceptible to open burning and are exposed to the elements, vectors and scavengers. 40 C.F.R. § 241:101(m) (1979).

10. 42 U.S.C. § 6902(3). See notes 91-98 infra and accompanying text. For purposes of this Comment, the terms “refuse” and “solid waste” are used interchangeably.


12. Congress recognized the substantial dangers to the environment and public health that are posed by current methods of waste disposal. 42 U.S.C. § 6901(b)(2). In 1976 Congress declared that alternatives to existing methods of land disposal must be developed since many United States cities will be running out of suitable waste disposal sites within five years unless immediate action is taken. Id. § 6901(b)(6). See also Note, Garbage, The Police Power And The Commerce Clause: City of Philadelphia v. New Jersey, 8 CAP. L. REV. 613 (1979).


Because municipalities are concerned with the dissipation of their irretrievable land resources and the creation of a health hazard from the operation of a landfill, a municipality’s primary objective in enacting these embargos on solid waste is to reduce the amount of waste by reserving the existing disposal capacity for local use. Note, State Embargo of Solid Wastes: Impermissible Isolation or Rational Solution to a Pressing Problem? 82 DICK. L. REV. 325, 333, 349 (1978) [hereinafter cited as Impermissible Isolation].

14. See notes 188-89 infra and accompanying text.

15. Closing the Gap, supra note 1, at 635-36.

This Comment examines the historical role that municipalities have played in providing adequate methods for solid waste disposal, emphasizes the traditional methods of zoning and critiques the effectiveness of municipal regulation. It reviews recent federal and state solid waste management acts and analyzes the issue of preemption. First, whether the Federal Resource Conservation and Recovery Act of 1976 preempts state solid waste disposal legislation, and second, whether state legislation preempts municipal ordinances regulating solid waste disposal. This Comment also discusses the constitutionality of state and municipal waste bans. State statutes prohibiting interstate waste disposal have been challenged as a violation of the commerce clause of the United States Constitution. Municipal bans on the intrastate disposal of solid waste may violate the commerce clause or be an illegitimate exercise of a municipality's police power. In conclusion, this Comment recommends more effective methods for states and municipalities to pursue in solving the problems of solid waste disposal.

II. Municipal Solid Waste Disposal

State and local governments, in executing their roles of administering law and furnishing public services, perform essential "governmental functions." The collection and disposal of solid waste is a necessary, essential and traditional governmental function generally performed by municipalities. Therefore, a municipality has exclusive control over the disposal of solid waste and may impose any reasonable regulation thereof.

18. U.S. Const. art. I, § 8 provides: "The Congress shall have Power . . . to regulate commerce . . . among the several states . . . ."
19. National League of Cities v. Usery, 426 U.S. 833 (1976). A few examples of essential or traditional governmental functions include fire prevention, police protection, sanitation, public health and parks and recreation. Id. at 851 (emphasis added).
21. Rochester v. Gutterlett, 211 N.Y. 309, 311, 318, 105 N.E. 548, 550 (1914). A municipality may provide that refuse shall only be removed by the city itself, or a private contractor hired by the city or by granting an individual an exclusive license to remove the city's refuse.
Courts have stated that the removal of solid waste is necessary for the continued well-being and health of a community and neighboring communities. As a result, municipalities have both the power and a duty to provide for the collection and disposal of waste.

A. The Historical Background of Zoning Ordinances

Zoning was one of the first methods employed by municipalities to regulate or prohibit refuse disposal within their boundaries. The Supreme Court, in Euclid v. Ambler Realty Co., held that the authority to zone property is included within the state's police power because zoning bears a rational relation to the health and safety of the community. Zoning, as an exercise of the state's police power, is generally delegated by the states to administrative agencies and local governments. Formerly the several bases for a state's delegation of the power to zone were home rule powers, implied powers of state constitutions, and enabling legislation. Currently, zoning enabling acts are used in all fifty states.


26. Id. at 391.


28. E.M. Bassett, Zoning: The Laws, Administration and Court Decisions During the First Twenty Years, reprinted in Metropolitan America 13, 14-15 (reprint ed. 1974). A home rule power is where a state constitution has empowered a municipality with broad regulatory powers. An example of a state which has home rule units is Illinois. See note 131 infra and accompanying text.

29. Hagman, Urban Planning 77 (1971). Some states had laws generally authorizing the exercise of the police power by local governments. A municipality's power to zone was implied from these laws.

30. Bassett, supra note 28, at 27. An enabling act for zoning is the grant of power to municipalities to regulate the height, area, location and use of buildings and the use of land. Id. Zoning enabling statutes set forth the purposes of zoning ordinances and contain guidelines and standards for enacting and administering them, including provisions for public protest. Bollinger v. Board of Supervisors, 217 Va. 185, 185 S.E.2d 682 (1976).

These acts grant municipalities the power to regulate the height, area, size, location, and use of buildings. In addition, they set forth categories for the use of land including commercial, industrial, residential, and agricultural uses.

Municipal zoning ordinances, in order to be a legitimate exercise of the police power, must relate to the health, safety and welfare of the community. A municipal zoning ordinance that does not comply with the applicable local ordinance will be held invalid. For example, the New York appellate division held that a town board had no authority to deny a permit for the excavation of a landfill site because the town board "did not have the power to deny the permit on grounds not expressly stated in the ordinance."

Until recently, most municipalities disposed of their refuse in open dumps creating public health hazards. Unfortunately, the terms "dump" and "sanitary landfill" often are confused and used interchangeably by the public. Consequently, there has been continuous public protest concerning proposed locations of sanitary landfills based on the misconception that the burial of solid waste is a nuisance per se because it endangers public health and decreases the value of adjoining property. However, courts have held that the establishment and operation of a sanitary landfill is not a nuisance per se, but is in fact a sensible solution to the problem of refuse disposal.

33. Id.
35. See, e.g., Case v. Knauf, 32 Misc. 2d 137, 224 N.Y.S.2d 228 (Sup. Ct. 1961) (holding that it is invalid for a town to grant a permit to operate a sanitary landfill because the town's zoning ordinance permitted disposal of refuse only for the purpose of establishing grades); Ench v. Mayor of Pequannock, 47 N.J. 535, 222 A.2d 1 (1966) (holding that a town resolution which granted the plaintiff a franchise to build and operate a garbage incinerator was inconsistent with the Town's zoning ordinance).
39. Id.
40. The term "nuisance per se" is defined as an act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of the location or surroundings. Black's Law Dictionary 962 (5th ed. 1979). (citations omitted).
41. See, e.g., Kirk v. McTyeire, 209 Ala. 125, 95 So. 361, 362 (1923); Rocchi v. Zoning Bd., 157 Conn. 106, 109, 248 A.2d 922, 924 (1968); Wood v. Town of
landfill which is properly located, designed and efficiently operated, eliminates or effectively controls the public health hazards associated with an open dump. The Connecticut Supreme Court, in *Rocchi v. Zoning Bd. of Appeals*, found that a sanitary landfill operation serves the public welfare and convenience and does not permanently or substantially injure neighboring property.

Zoning ordinances divide a municipality into districts based on functional utilization, such as residential, agricultural, commercial or industrial. Conditional, permissible and prohibited uses are provided for within each zoned district. In the absence of state preemption, municipalities are free to locate a waste disposal facility in any district. Generally, solid waste disposal is not expressly pro-

Wilton, 156 Conn. 304, 310, 240 A.2d 904, 907 (1968); Cullum v. Topps Stillman's Inc., 1 Mich. App. 92, 97, 134 N.W.2d 349, 351 (1965); Sommers v. City of Detroit, 284 Mich. 67, 72-75, 278 N.W. 767, 769-70 (1938); Roberts v. Lower Merion Twp., 333 Pa. 333, 335-36, 5 A.2d 10 (1939). Where a landfill becomes a nuisance in fact through illegal or improper operation, however, courts may enjoin the nuisance and award relief to neighboring residents. See, e.g., Brainard v. Town of West Hartford, 140 Conn. 631, 634, 103 A.2d 135, 137 (1954) (injunction granted to prohibit the establishment of prospective dump in a residential area); Steifer v. City of Kansas City, 175 Kan. 794, 798-800, 267 P.2d 474, 478-79 (1954) (city enjoined from continuing to operate a dump); Horn v. Community Refuse Disposal, Inc., 186 Neb. 43, 45-46, 180 N.W.2d 691, 693 (1970) (court did not grant an injunction to prohibit the establishment of a prospective dump where plaintiff did not meet the burden of proof that a nuisance would be created); Webb v. Rye, 108 N.H. 147, 150-55, 230 A.2d 223, 226-30 (1967) (court found the operation of a dump and incinerator was a nuisance but gave defendant town an opportunity to correct the problem because of the public necessity for these facilities); Bloss v. Village of Canastota, 35 Misc. 2d 829, 833-35, 232 N.Y.S.2d 166, 171-72 (1962) (court would enjoin the continued operation of a dump after the court had given defendant the opportunity to correct the nuisance); Harris v. Skirving, 41 Wash. 2d 944, 248 P.2d 408 (1952). The term "nuisance in fact" means any act, occupation or structure which is not a nuisance per se but may become nuisances by reason of the circumstances of the location and surroundings or manner in which it is performed or operated. BLACK'S LAW DICTIONARY 962 (5th ed. 1979) (citations omitted).


44. 113-14, 248 A.2d at 926.

45. HAGMAN, URBAN PLANNING at 80-81.

46. *Id.*

47. See notes 126-66 infra and accompanying text.

48. City of Birmingham v. Scogin, 269 Ala. 679, __, 115 So.2d 505, 514 (1959) (zoning did not apply to the operation of a governmental function by a municipality and the operation of a garbage disposal area was held to be a discharge of a governmental function); Pruett v. Dayton, 39 Del. Ch. 537, __, 168 A.2d 543, 544 (1961) (where a subdivision of a state government was not subject to its own zoning regulation when it exercised a governmental function); Nehbras v. Village of Lloyd Harbor, 2 N.Y.2d 190, 192, 140 N.E.2d 241, 242, 159 N.Y.S.2d 145, 147 (1957) (where a village was not subject to zoning restrictions in the performance of its governmental activities).
vided for in such zoning districts and is not considered a permissible use in any district. Instead, it is viewed as a conditional use, requiring either a variance, or a special or conditional use permit, to operate within a municipality. These permits are not usually granted within residential districts because the impact on the environment and community outweighs the public necessity for a landfill.


50. The term “conditional use” employed in a zoning ordinance means a provisional use for a purpose designated by the ordinance itself. See Schultz v. Board of Adjustment, 258 Iowa 804, 806, 139 N.W.2d 448, 450 (1966). Conditional use is a grant of right for any use specified by the ordinance subject to a finding by an administrative officer or board that the use is proper, essential, advantageous or desirable to the public good, convenience, health or welfare. Id.

51. The term “variance” is authority extended to the owner of a certain piece of property, to use the property in a manner forbidden by the zoning ordinance, where literal enforcement would cause him undue hardship. See Moody v. City of Univ. Park, 278 S.W.2d 912, 920 (Tex. Ct. Civ. App. 1955); Rosenfeld v. Zoning Bd. of Appeals, 19 Ill. App. 2d 447, 154 N.E.2d 323, 325 (1958); Vogelaar v. Polk County Zoning Bd. of Adjustment, 188 N.W.2d 860, 862 (Iowa Sup. Ct. 1971).

52. The term “special use permit” is the grant by the zoning administrative body pursuant to the existing provisions of the zoning law and subject to certain guidelines and standards of a special use which is permitted under the provisions of the existing zoning law. See Zengerle v. Board of County Comm’rs, 262 Md. 1, 276 A.2d 646 (1971) (where the court referred to a special use permit as a special exception).

53. Before granting an exception, a zoning board of adjustment was required to hold a public hearing at which it would balance the public necessity for a landfill versus the impact it would have on the environment and community. Some of the factors a court must consider in balancing the impact that a sanitary landfill will have on the environment and general health versus the need for a landfill includes the growth of the neighborhood; most appropriate use of the land; availability of fire fighting equipment; number of people residing and working within the immediate area; traffic conditions; conservation of property values; effect of odors, dust, gas, smoke, fumes, vibrations, noise upon uses of surrounding properties; ability of the county to supply facilities for garbage collection and disposal; suitability of terrain for the proposed use, necessity for the disposal of garbage. Id. at 8, 17-20, 276 A.2d at 650, 654-55.

54. But see Sinn v. Board of Selectmen, 357 Mass. 606, 259 N.E.2d 557 (1970) (It was noted that the existing town refuse disposal facility was located in an area only subsequently zoned for residential use. Therefore it was not unreasonable for the Board to extend that facility rather than construct a new one in another zone.); Rose v. Commissioners of Pub. Health, 361 Mass. 625, 631, 282 N.E.2d 81, 84 n.7 (1972) (where the court, based on the legislative intent, permitted a landfill in a zoned residential area because the area was sparsely settled with a need for a landfill). In some cases where it was imperative for a municipality to have a sanitary landfill,
Thus, sanitary landfills are located in agricultural,\textsuperscript{55} industrial\textsuperscript{56} and manufacturing\textsuperscript{57} districts.

Attempts to completely exclude waste disposal facilities have been upheld.\textsuperscript{58} Municipalities may accomplish this through zoning restrictions or by refusing to grant permits for the operation of these facilities.\textsuperscript{59} A legitimate exercise of a municipality's zoning power is to

zoning boards would rezone a parcel of land from residential to agricultural or industrial in order to grant a conditional use permit for the operation of a sanitary landfill. See, e.g., Garren v. Winston-Salem, 463 F.2d 54, \textit{cert. denied}, 409 U.S. 1039 (1972); Nicholas v. Clinton County Bd. of Comm'rs, 43 Mich. App. 527, 204 N.W.2d 351 (1972).

\textsuperscript{55} See, e.g., Zengerle v. Board of Comm'rs, 262 Md. 1, 276 A.2d 646 (1971). In \textit{Zengerle}, the County wanted to use a certain piece of farm land for a sanitary landfill. The Commission filed an application for a conditional use permit, special exception and variance, to use the farm as a landfill. The County Board of Appeals granted the permits and the Court of Appeals of Maryland affirmed. In Vogelaar v. Polk County Zoning Bd. of Adjustment, 188 N.W.2d 860 (1971), the Supreme Court of Iowa sustained the issuance of a special use permit for a sanitary landfill in an agricultural area as proper, essential, and advantageous to the public good. The court noted that a sanitary landfill was in accord with the state's policy of requiring every city, town and county to establish a sanitary solid waste disposal project, and that the court had previously held that sanitary landfills qualify as a bona fide waste disposal method. \textit{Id.} at 863. In Bollinger v. Board of Supervisors, 217 Va. 192, 227 S.E.2d 682 (1976), the defendants issued a conditional use permit to the city and county of Roanoke for the operation of a sanitary landfill on land zoned agricultural. The Supreme Court of Virginia upheld the Board's action because the permit issued by the Board contained extensive terms and conditions to protect the health, safety and general welfare of the residents of the county.

\textsuperscript{56} See Garren v. Winston-Salem, 463 F.2d 54, \textit{cert. denied}, 409 U.S. 1039 (1972). In \textit{Garren}, the city rezoned certain land from residential to industrial for the purpose of construction of a sanitary landfill, a use permitted only under the new classification.

\textsuperscript{57} See Schultz v. Board of Adjustment, 258 Iowa 804, 139 N.W. 448 (1966). In \textit{Schultz}, the Supreme Court of Iowa upheld the issuance of a conditional use permit by the county zoning board of adjustment within a general manufacturing district. The county zoning ordinance specifically permitted a conditional use of land in a general manufacturing district for the disposal of refuse.

\textsuperscript{58} See, e.g., Township of Vanport v. Brobeck, 22 Pa. Commw. 523, 349 A.2d 523 (1975). In \textit{Brobeck}, the defendant was convicted of violating a zoning ordinance prohibiting an open garbage dump within any district and where it could be construed as a menace to public health. The Commonwealth Court of Pennsylvania held that the zoning ordinance was constitutional because the town had the power to regulate the use of land in order to protect public health, safety and welfare. County of Cook v. Triem Steel & Processing Inc., 19 Ill. App. 2d 126, 153 N.E.2d 277 (1958). In \textit{Triem}, the County adopted a zoning ordinance prohibiting the disposal of refuse within one mile of a municipality. The Illinois Appellate Court upheld the zoning ordinance on the grounds that it was designed to protect the health and welfare of the public by controlling the dumping of garbage or other offensive substances.

\textsuperscript{59} See, e.g., In re Town of Shelburne Zoning Appeal, 128 Vt. 89, 258 A.2d 836 (1969), where a municipality's zoning ordinance prohibited the dumping of refuse at any place not approved by the town board. The state statute directed the cities and town to provide and maintain sanitary landfills for refuse disposal. The court held
limit the quantity of waste to be disposed within its boundaries because "no matter how carefully controlled, [it] present[s] some hazard to a community." Municipalities may not, however, limit the quantity of refuse to be disposed by discriminating on the basis of its source.

B. The Scope of the Problem

Two major factors contribute to the problem of efficient refuse disposal: the inadequate number of sites and the erroneous presumption that solid waste disposal problems are unique to municipalities.

that a municipality could not deny a permit for the establishment of a sanitary landfill unless the permit would give rise to a nuisance or the applicant had not complied with the established regulations. In Carlson v. Village of Worth, 62 Ill. 2d 406, 443 N.E.2d 493 (1975) and O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972), the Illinois Supreme Court held that non-home rule units may not zone out sanitary landfills. See also General Battery Corp. v. Zoning Hearing Bd., 29 Pa. Commw. Ct. 498, 371 A.2d 1030 (1977), where the court said that zoning ordinances are presumed valid.


61. Wiggins v. Town of Somers, 4 N.Y.2d 215, 149 N.E.2d 869, 873, 173 N.Y.S.2d 579, 584 (1958). In order to minimize this potential hazard, municipalities restrict the landfills within their boundaries to permit only those which are necessary to handle the town's refuse. Municipalities also deal with the problem of solid waste disposal by zoning ordinances permitting only municipally owned and operated sanitary landfills within a residential area. See Kavanagh v. London Grove Township, 33 Pa. Commw. 420, 382 A.2d 148 (1978) (holding constitutional a Pennsylvania zoning ordinance of this type).

62. See section IV infra.


Federal and state legislation which prohibit open dumping have caused a sharp decrease in the number of land disposal sites. As a result, municipalities must find other suitable means for solid waste disposal. Although sanitary landfills have become a popular waste disposal method, several problems prevent their increased use, including the lack of land suitable for a solid waste receptacle. In addition, the presence of restrictive and exclusionary ordinances limits the number of available sites. Finally, public opposition to the location of sanitary landfills hinders municipal acquisition of appropriate landfill facilities.

The persistent belief that solid waste disposal is a municipal problem prevents effective regulation. The problem of refuse disposal transcends territorial limits and affects areas substantially larger than a single municipality. Furthermore, most municipalities are too small to finance, construct or operate modern disposal facilities. The increasing involvement of federal and state governments in solid waste regulation indicates that the problems involving disposal have reached regional and national proportions. While the disposal of refuse continues to be a municipal function, state and regional planning is needed in order to find effective and economical solutions.

66. 42 U.S.C. §§ 6901(b)(1), 6944(b) (1976); Municipal Refuse Disposal, supra note 38, at 92. See also New Jersey's Options, supra note 63, at 33; Sanitary Landfill, supra note 6, at 634; Is There A Solution?, supra note 37, at 132-33.
68. Sanitary Landfill, supra note 6, at 638. A survey conducted by the American Public Works Association in 1956 indicated that approximately 60% of the cities in the United States were restricted in the acquisition of land for solid waste disposal sites by their own zoning ordinances. Municipal Refuse Disposal, supra note 38, at 95.
70. ENVIRONMENTAL CONTROL, supra note 64, at 154.
71. Id. at 66, 153.
72. See New Jersey's Options, supra note 63, at 59; Impermissible Isolation, supra note 13, at 349; Is There A Solution?, supra note 37, at 149-51.
73. Sanitary Landfill, supra note 68, at 633. See also note 75 infra and accompanying text.
III. Government Regulation of Solid Waste

Traditionally, solid waste disposal was considered to be a municipal function.\textsuperscript{74} Federal and state statutes have been enacted, however, because the problems associated with disposal are recognized as both regional and national in nature.\textsuperscript{75} With the enactment of these statutes, courts are forced to consider the doctrine of preemption.\textsuperscript{76} Although some state legislation has been held to be preemptive,\textsuperscript{77} it is not strong enough to overcome parochial interests.

A. Statutory Provisions

The Solid Waste Disposal Act of 1965,\textsuperscript{78} the first federal legislation of its kind, authorized the funding of state and local governments for research and development of new waste disposal technologies.\textsuperscript{79} Solid waste disposal is now regulated on the federal level by the Resource Conservation and Recovery Act of 1976 (RCRA).\textsuperscript{80}

The RCRA was enacted to promote the protection of health and environment and to conserve valuable materials and energy resources.\textsuperscript{81} The Act prohibits future open dumping\textsuperscript{82} and requires the

\textsuperscript{74} See notes 19-23 supra and accompanying text.
\textsuperscript{76} See notes 102-66 infra and accompanying text.
\textsuperscript{77} See notes 128-66 infra and accompanying text.
\textsuperscript{79} Id.
\textsuperscript{81} 42 U.S.C. § 6902.
\textsuperscript{82} Id. § 6902(3). It also regulates the treatment, storage, transportation and disposal of hazardous wastes. Id. § 6902(4). The Act provides for training grants in
conversion of existing dumps to facilities that do not present danger to health and environment. Although the RCRA recognizes that solid waste disposal is a national problem, statements found in the legislative history provide that "federal preemption is undesirable, inefficient and damaging to local initiative." The RCRA provides for federal assistance to state and local governments and interstate agencies for the development of solid waste management plans. In addition, the RCRA calls for the establishment of cooperative efforts among federal, state and local governments. In order for states to qualify for federal assistance they must submit a state solid waste management plan and name a state agency to be responsible for the plan’s implementation.

The legislatures of all fifty states have enacted laws governing the collection, disposal and management of solid waste. They establish guidelines for collection and disposal facilities and require state approval or permits for the operation of such facilities. These plans fall into three general categories. First, there are state plans which entrust solid waste control to a state agency concerned with public health. For example, Alabama provides that the state health de-

occupations involving solid waste disposal systems and a national research development program. Id. § 6902(2)(6). This program aims to improve solid waste management and resource conservation systems. Also, the Act provides for the demonstration, construction and application of solid waste management, resource recovery and conservation systems. These systems are to preserve and enhance the quality of air, water and land resources. Id. § 6902(7).

83. Id. § 6902(3).
84. Id. § 6901(a)(4) (Supp. III 1979).
86. 42 U.S.C. § 6902(1). These plans are for the improvement of solid waste management techniques and methods of collection, separation and recovery of solid waste. The Act also provides for the promulgation of guidelines for solid waste collection, transport, separation, recovery and disposal practices and systems. Id. § 6902(5).
87. Id. § 6902(8).
88. Id. §§ 6943-47.
89. F. GRAD, 1 TREATISE ON ENVIRONMENTAL LAW § 4.02, at 4-35 (1980).
90. Id.
partment shall have supervision over the equipment, methodology and personnel employed in the management of solid wastes.\textsuperscript{92} In addition, Alabama state and county boards of health may adopt rules and regulations to specify the methodology and procedures required by these acts.\textsuperscript{93}

Second, state statutes may authorize a state agency concerned with the environment to control solid waste disposal.\textsuperscript{94} This was the approach taken by Connecticut when it established a Department of Environmental Protection in 1973.\textsuperscript{95} The department commissioner examines all existing and proposed solid waste facilities and is authorized to plan, design, construct and operate them in order to prevent air and water pollution.\textsuperscript{96} The department protects, conserves and


\textsuperscript{93} Id.


\textsuperscript{96} Id. § 19-524b.
SOLID WASTE improves the natural resources and environment of the state and ensures that the health, safety and welfare of the people of Connecticut are safeguarded and enhanced.97

The third approach taken by state governments in establishing uniform disposal systems is the creation of a separate entity for the exclusive control of solid waste.98 For example, the Delaware Solid Waste Authority Act99 provides for a "[p]ublic instrumentality of the State established and created for the performance of an essential public and governmental function . . . known as the Delaware Solid Waste Authority."100 The functions of the Authority include the planning, designing, financing, construction, ownership, management, and operation of solid waste disposal and resource recovery facilities.101

B. Preemption

It is well established that a state may enact legislation, in the exercise of its police power, affecting interstate commerce as long as the federal government has not taken preemptive action.102 State action may be held an invalid interference with federal legislation either because it is in actual conflict with the operation of a federal program or because it affects an area that Congress has validly re-

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97. Id.
100. Id. § 6403.
101. Id. § 6404.
served to the federal government. The Supreme Court pronounced that a state is precluded or preempted from acting only where either the nature of the subject matter or an explicit declaration of congressional design indicates that state action is precluded. The enactment of state statutes regulating the disposal of solid waste affects interstate commerce; therefore, courts are forced to consider the doctrine of preemption.

1. Federal

The view expressed by Congress in the RCRA that solid waste disposal is a national problem has not been extended to include the preemption of state statutes. The issue of federal preemption was first discussed in a series of state and federal decisions regarding the power of the State of New Jersey to prohibit the disposal of all solid waste originating outside the state. An action in the New Jersey state courts challenged the constitutionality of this statute as a violation of the commerce clause. The New Jersey Supreme Court ultimately held that the statute was not preempted by the Solid Waste Disposal Act of 1965 and was not a violation of the commerce clause. The United States Supreme Court noted probable jurisdiction and the decision was appealed. However, the RCRA, which expanded the role of the federal government in solid waste disposal, had become law prior to the Court's consideration of the merits. The Supreme Court vacated the state's decision and re-
manded the case to the state courts on the issue of preemption in light of the recent enactment of the RCRA. On remand, the New Jersey Supreme Court held that the state statute banning the disposal of out-of-state waste was consistent with the federal program and was not preempted. In addition, the court reaffirmed its prior holding that the New Jersey statute was not a violation of the commerce clause.

The plaintiffs appealed to the United States Supreme Court for a stay of this judgment and the Court noted probable jurisdiction. In City of Philadelphia v. New Jersey, the Court agreed with the New Jersey court and held that the state law was not preempted by the RCRA. The Court determined that Congress did not have a clear and manifest purpose to preempt the states in the regulation of solid waste. In so ruling, however, the Court held that the statute was unconstitutional because it banned the disposal of out-of-state wastes.

2. State

The doctrine of preemption includes the notion that a state’s legislative or administrative authority may override municipal regulation. A few states have taken an active role in solid waste disposal.

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118. Id. at 574, 376 A.2d at 894.
119. Id.
121. Id.
123. Id. at 620.
124. Id. at 620-21 n.4. See H.R. REP. No. 94-1491, 94TH CONG., 2D Sess. 3,10 reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6271. It was the Committee’s intention that “federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem.”
Within these states, therefore, it has been necessary for the courts to determine whether state and municipal refuse disposal regulations operate concurrently or whether the municipal regulations are preempted.

The Illinois Environmental Protection Act of 1970 was enacted to provide for a statewide program of environmental regulation specifically designed to address the problems of solid waste treatment and disposal. Pursuant to the Illinois Constitution of 1970, many municipalities and counties were home rule units with broad regulatory powers. There was some question as to the regulatory powers of non-home rule units. As a result, the Illinois Supreme Court heard several cases involving the issue of whether the Environmental Protection Act preempted both home rule and non-home rule environmental regulation.

In O'Connor v. City of Rockford, the court held that a non-home rule county cannot require a city, in its operation of a landfill, to comply with a county ordinance because the Act was intended to override local regulation. When a non-home rule municipality sought to require an operator of a proposed landfill to comply with its environmental protection ordinance, the court followed the legislative policies of the Act and the rationale of O'Connor and held that the Act preempted local regulation.

The Supreme Court of Illinois also ruled on the authority of home rule units. When the Environmental Protection Agency filed a complaint against a home rule city for operating a landfill without an agency permit, the court upheld the city's issuance of a permit through its own environmental agency and declared that state and local governments can legislate concurrently on environmental issues. In a subsequent decision, a home rule municipality at-
tempted to apply its city health ordinance to a regional sewage treatment plant.\textsuperscript{134} The court ruled that the application of the city's ordinance to the plant was not within the constitutional grant of home rule powers,\textsuperscript{139} noting that local regulation interferes with the greater interest of the regional district.\textsuperscript{140}

In \textit{County of Cook v. John Sexton Contractors Co.},\textsuperscript{141} the Illinois Supreme Court resolved the apparent discrepancy between home rule decisions\textsuperscript{142} and affirmed its position as to the regulation of non-home rule units.\textsuperscript{143} A home rule county sought to enjoin the private owner of a sanitary landfill from further development and operation of the landfill until it complied with the county's zoning laws.\textsuperscript{144} The court determined that the county had the authority to impose zoning restrictions.\textsuperscript{145} It also found that the Pollution Control Board, which is empowered to review the Environmental Protection Agency's decision in the granting of permits, had the power to adopt regulations for the location of landfills, but not to designate the actual site.\textsuperscript{146} Thus, the court held that these "distinct but concurrent powers"\textsuperscript{147} must be exercised cooperatively to accomplish the public policy of the Environmental Protection Act.\textsuperscript{148} A home rule unit in Illinois, therefore, may legislate concurrently with the state on solid waste disposal as long as it conforms with the minimum standards established by the Act.\textsuperscript{149} As to non-home rule units, however, the court decided that the Environmental Protection Act preempts municipal regulation.\textsuperscript{150}

Rhode Island, in 1974, enacted legislation which preempted the regulation of solid waste collection and disposal by local municipalities.\textsuperscript{151} The Rhode Island Supreme Court had to determine whether a

\begin{itemize}
  \item \textsuperscript{138} Metropolitan Sanitary Dist. v. City of Des Plaines, 63 Ill. 2d 256, 347 N.E.2d 716 (1976).
  \item \textsuperscript{139} \textit{Id.} at 261, 347 N.E.2d at 719.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} 75 Ill. 2d 494, 389 N.E.2d 553 (1979).
  \item \textsuperscript{142} See notes 137-40 \textit{supra} and accompanying text.
  \item \textsuperscript{143} See notes 134-36 \textit{supra} and accompanying text.
  \item \textsuperscript{144} County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979).
  \item \textsuperscript{145} \textit{Id.} at 511, 389 N.E.2d at 558.
  \item \textsuperscript{146} \textit{Id.} at 516, 389 N.E.2d at 560.
  \item \textsuperscript{147} \textit{Id.} at 516-17, 389 N.E.2d at 561.
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} \textit{Id.} at 514, 389 N.E.2d at 559-60, \textit{citing} City of Chicago v. Pollution Control Bd., 59 Ill. 2d 484, 322 N.E.2d 11 (1974).
  \item \textsuperscript{150} \textit{Id.} at 515, 389 N.E.2d at 560, \textit{citing} O'Connor v. City of Rockford, 52 Ill. 2d 360, 388 N.E.2d 432 (1972) and Carlson v. Village of Worth, 62 Ill. 2d 406, 343 N.E.2d 493 (1975).
  \item \textsuperscript{151} The Rhode Island Solid Waste Management Corporation Act of 1974, R.I. GEN. LAWS §§ 19-1 to 19-29 (1979 & Supp. 1980).
\end{itemize}
town ordinance banning the importation of solid wastes not originating within the town was preempted by the Rhode Island Solid Waste Management Corporation Act. The court examined the legislative intent and found that it had enacted the statute because of the inefficient practices and management techniques of municipalities. The court declared that the legislature intended “disposal of solid waste to be handled on a statewide basis with control centralized in the Corporation.” Therefore, the court held that the Act preempted municipal regulation of solid waste collection and disposal.

In 1970, New Jersey adopted two statutes which make the state solid waste industry a public utility and require the development and formulation of statewide, regional, county, and inter-county plans for solid waste management. Owners and operators of a private sanitary landfill sought a determination that the legislature had preempted a township ordinance regulating the operation of landfills. The New Jersey Supreme Court held that with these acts the legislature intended to uniformly regulate the field of solid waste collection, disposal and management. The court stated:

[i]f each municipality in the state could place and restrict in a manner similar to . . . the ordinance passed by the Parsippany-Troy Hills, . . . the conflicting ordinances and requirements of the separate municipalities would bring to a complete halt the sanitary landfill operations in this state, the refuse disposal business, all to the detriment of the general health of the general public.'

153. Id. at __, 390 A.2d at 349.
154. Id.
155. Id.
157. Id. § 13:1E-27.
158. N.J. STAT. ANN. §§ 13:1E-2. Both statutes do not mention the legislative concern below inter-county level except that they are enforceable on a local level. Id. § 13:1E-9; N.J. STAT. ANN. §§ 48:13A-1-12. In 1971 the supplement to the Solid Waste Management Act provided that local governments may adopt health or environmental protection ordinances or regulations “more stringent” than the Act. N.J. STAT. ANN. § 13:1E-17 (1971).
160. Id. at 353, 283 A.2d at 100.
161. Id. at 352, 283 A.2d at 100.
Thus, the court concluded that the town cannot provide additional protection with an ordinance which imposes penalties or requires the same procedures as those of the state.\(^\text{162}\)

In 1971, the New Jersey legislature added a supplement to the Solid Waste Management Act which provided that local governments may adopt health or environmental protection ordinances or regulations "more stringent than this Act."\(^\text{163}\) The New Jersey Supreme Court declared that it was the legislative intent to give local governments authority to regulate the technical operation of waste disposal facilities.\(^\text{164}\) The town's ordinance, however, attempted to assume complete control over landfill operations.\(^\text{165}\) Hence, the court held that the town's ordinance was invalid because it was inconsistent with the concept of regionalization of waste disposal facilities.\(^\text{166}\)

IV. The Constitutionality of Waste Disposal Bans and Restrictions

Solid waste disposal is a necessary but unwanted governmental function. In order to protect parochial interests, various state and municipal governments have banned the disposal of waste originating outside their territorial boundaries.\(^\text{167}\) These bans, although based on a purported desire to protect public health and the environment, were constitutionally challenged by operators of private sanitary landfills.\(^\text{168}\)

A. State

In 1972, New Jersey enacted a Waste Control Act\(^\text{169}\) which prohibited the disposal of all wastes generated out of state in order to protect public health, safety and welfare.\(^\text{170}\) The Supreme Court held this Act violative of the commerce clause in City of Philadelphia v. New Jersey.\(^\text{171}\) The Court determined that waste is commerce and that

\(^{162}\) Id. at 354, 283 A.2d at 101.


\(^{165}\) Id. at 192, 314 A.2d at 66.

\(^{166}\) Id. at 195, 314 A.2d at 67.

\(^{167}\) See notes 169-238 infra and accompanying text.


\(^{170}\) N.J. STAT. ANN. § 13:11-9-10 (West 1979). The Act included a legislative finding that the state's environment was threatened by the treatment and disposal of waste which originated out of state. Id. § 13:11-9.

\(^{171}\) 437 U.S. 617 (1978).
"all objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."

The New Jersey statute was struck down because it discriminated against waste, an article of commerce, on the basis of origin. The Court found that the Waste Control Act imposed the burden of conserving New Jersey's landfills on other states and was an attempt by the state to isolate itself from "a problem common to many by erecting a barrier against the movement of interstate trade."

The Court also expressed a fear that New York and Pennsylvania would enact retaliatory statutes banning the disposal of extraterritorial solid waste if the New Jersey statute was upheld. In fact, Pennsylvania enacted a retaliatory statute in 1977 while the City of Philadelphia decision was pending. The Court's decision had been written prior to the enactment of the statute, however, and it was never challenged.

The purpose of the commerce clause is to establish a national economic unit. Retaliatory statutes have been held to frustrate this purpose.

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172. Id. at 622. In City of Philadelphia v. New Jersey, the Court examined the lower court's analysis of whether the interstate movement of solid waste is "commerce." See Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 127 N.J. Super. 160, 170, 316 A.2d 711, 719 (Super. Ct. Ch. Div. 1974), rev'd, 68 N.J. 451, 468, 348 A.2d 505, 514 (1975), vacated sub nom. City of Philadelphia v. New Jersey, 430 U.S. 141 (1977), modified, 73 N.J. 562, 376 A.2d 888 (1977), rev'd, 437 U.S. 617 (1978). The lower court held that garbage was a legitimate subject of interstate commerce because refuse has a market value for recycling and other purposes. The New Jersey Supreme Court found that the banned wastes were those which could not be put into effective use and, therefore, these wastes were not commerce at all. The Supreme Court rejected the New Jersey court's suggestion that the banning of valueless out-of-state wastes implicates no constitutional protection. See also United States v. Pennsylvania Refuse Removal Ass'n, 242 F. Supp. 794 (E.D. Pa. 1965), aff'd, 357 F.2d 806 (3d Cir. 1966), cert. denied, 384 U.S. 961 (1966), where the Third Circuit held that the business of collecting and disposing of refuse constituted interstate commerce. Although the court dealt with a violation of the Sherman Antitrust Act, a finding that disposal services are commerce also determines that the industry's activities are interstate commerce for the purpose of the commerce clause. 357 F.2d at 808.


174. Id. at 628. The Court stated that it did not matter that the ultimate aim of the New Jersey statute was to reduce waste disposal costs or to save remaining open lands from pollution since the Court assumed that New Jersey had the right to protect its taxpayers' money as well as their environment. Furthermore, it declared that New Jersey could have pursued those ends by slowing the flow of all the waste into New Jersey's remaining landfills. Id. at 626-28.

175. Id. at 629.

176. 35 PA. CONS. STAT. ANN. § 6007 (f.1) (Purdon 1977).

If one state has the power to exclude solid waste from final disposition within its borders all states have that power, and the effect would be to halt commerce at state lines. In addition, the threat of economic isolation may not be used as a weapon to force other states into reciprocal agreements.

The Tenth Circuit, in Hardage v. Atkins, invalidated the Oklahoma Controlled Industrial Waste Disposal Act because it contained a reciprocity clause. The Oklahoma statute forbade the receipt and disposal of controlled industrial wastes into the state unless the state of origin had enacted: (1) "substantially similar standards for controlled industrial waste disposal as Oklahoma; and (2) had entered into a reciprocity agreement with the State of Oklahoma." Plaintiff challenged the reciprocity clause of the Act because another state, a potential customer of plaintiff, did not have a reciprocal agreement with Oklahoma. The Tenth Circuit concluded that the Oklahoma statute violated the commerce clause because the shipment of out of state industrial waste into Oklahoma was prohibited unless the state of origin had a reciprocal agreement.

In a related decision the Tenth Circuit considered whether the entire Oklahoma statute or only the clause relating to reciprocity agreements was unconstitutional. The court held the entire statute to be unconstitutional because the substantially similar standards provision, in effect, imposed an economic embargo on industrial waste.

As a result of the determination that state exclusionary statutes barring solid waste disposal violate the commerce clause, all such statutes are unconstitutional. Despite this fact, not all state exclusionary statutes have been challenged or repealed. A few remain in

181. 582 F.2d 1264 (10th Cir. 1978), aff'd, 619 F.2d 871 (10th Cir. 1980).
183. Id. § 2764.
184. Hardage v. Atkins, 582 F.2d 1264, 1265 (10th Cir. 1978).
185. Id. at 1266-67.
186. Hardage v. Atkins, 619 F.2d 871 (10th Cir. 1980).
187. Id. at 873-74.
effect, but should these statutes be challenged, it is doubtful they will be upheld.\textsuperscript{189}

B. Municipal

Whereas states have enacted legislation to prevent state regulation of waste disposal, municipalities have erected barriers against both intrastate and interstate importation of solid waste.\textsuperscript{190} Municipal bans, like state exclusionary statutes, prevent the realization of an effective means of solid waste disposal. They have been challenged as a violation of the commerce clause\textsuperscript{191} and also as an illegitimate exercise of the police power.\textsuperscript{192}

\footnotesize{ANN. § 13:11 9-1110 (West Supp. 1976); Oklahoma: OKLA. STAT. ANN. tit. 63, §§ 2751-65 (West Supp. 1980); Pennsylvania: 35 PA. CONS. STAT. ANN. § 6007 (f.1) (Purdon 1977); Rhode Island: R.I. GEN. LAWS 19-7 (Supp. 1976); and Vermont: VT. STAT. ANN. tit. 24 § 2204 (1975) (repealed 1979 Vt. Acts No. 47, § 1(1)). These statutes fall into four categories which are not mutually exclusive. The first category is those statutes which have a valid state objective in preserving health. Examples of these are the Illinois statute which subjects waste entering the state to the same handling requirements that apply to internal waste, and Louisiana's statute which directs a ban against industrial waste if it is reasonably foreseeable that it will endanger public health. The second category includes those statutes which seek to exclude all waste except for any materials that may be used for the production of new commodities or recycling. States with such statutes include Maine, New Hampshire and Massachusetts. The third category of state exclusionary statutes are those in which the legislatures vest in an administrative body the ultimate decision to bar waste. For example, Delaware requires a permit from the Board of Health before any refuse may be brought into the state. Before it was found unconstitutional, New Jersey imposed an absolute prohibition until the commissioner determined such action can be permitted without endangering the public health. Before it was found unconstitutional, Oklahoma's statute prohibited the shipment of controlled industrial waste into Oklahoma unless the state of origin had standards for the disposal of industrial waste which were substantially similar to those of Oklahoma and the state of origin had entered into a reciprocity agreement with Oklahoma. The determination of whether the state of origin's statute had substantially similar standards was to be made by the Director of Controlled Industrial Waste Management and all reciprocity agreements had to be approved by the Governor of Oklahoma. The last category of state exclusionary statutes are those unrelated to effecting a valid state objective. Examples of these state exclusionary statutes are found in Pennsylvania, Rhode Island and Vermont. Pennsylvania's statute is a retaliatory embargo against states having exclusionary statutes. Rhode Island and Vermont have absolute embargos.}


\textsuperscript{190} See notes 193-238 infra and accompanying text.

\textsuperscript{191} See notes 193-211 infra and accompanying text.

\textsuperscript{192} See notes 212-238 infra and accompanying text.
1. Commerce Clause

The Rhode Island Solid Waste Management Corporation challenged a municipality’s anti-importation ordinance which banned the disposal of out of town waste within its boundaries in *Town of Glastonbury v. Rhode Island Solid Waste Management Corp.* The Rhode Island Supreme Court did not reach the constitutional issue because it determined that the state had preempted municipal regulation of solid waste disposal. Thus, the town’s ordinance was repugnant to the state’s policy of the statewide management of solid waste. In *Dutchess Sanitation Service, Inc. v. Town of Plattekill*, the ordinance of a New York municipality which prohibited any waste originating out of town from disposal within its territorial limits was challenged by the owner and operator of a sanitary landfill located within the town. The plaintiff sought to vacate that part of the injunction which prevented the disposal of refuse originating out of state. The New York Court of Appeals held, citing *City of Philadelphia*, that the town’s ordinance violated the commerce clause because the town was regulating refuse solely on the basis of its origin. A town ordinance disallowing the acceptance of refuse originating out of town for final disposal in the town was declared constitutional by the New York Court of Appeals, however, in *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*. The court found that

194. Id. at ___, 390 A.2d at 349.
195. Id.
197. Id. at 672, 417 N.E.2d at 76, 435 N.Y.S.2d at 962, 963. The Plattekill Town Ordinance Regulating Garbage, Rubbish and Other Articles read in part: “No licensee shall collect any garbage, rubbish and waste materials of any kind which originate outside the bounds of the Town of Plattekill in the Town of Plattekill dumping area or any other property, public or private in the Town of Plattekill.”
199. 51 N.Y.2d 670, 677, 417 N.E.2d 74, 78, 435 N.Y.S.2d 962, 966 (1980). In the final footnote of the court’s decision it was noted that three judges of the court would have held the ordinance invalid “not only in effect, but facially as well.” Id. at 678 n.3, 417 N.E.2d at 78 n.3, 435 N.Y.S.2d at 966 n.3.
201. Id. at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 68-69.
the ordinance did not discriminate against interstate refuse, but instead excluded all out of town refuse.\textsuperscript{202}

The dissenting opinion by Judge Fuchsberg noted that the town ordinance facially discriminated against interstate commerce.\textsuperscript{203} The dissent found the ordinance to be a direct prohibition against interstate commerce because it prevented a private landfill company from contracting with out-of-state carting companies or with intrastate companies and municipalities which engaged in interstate commerce.\textsuperscript{204} The operation of the town disposal facility was not subject to the ordinance.\textsuperscript{205} Therefore, the ordinance discriminated against private facilities.\textsuperscript{206}

Judge Fuchsberg also pointed out the majority's confusion with the meaning of "out of town."\textsuperscript{207} In Dutchess, the ordinance prohibiting "out of town" refuse, which included refuse that originated "out of state," was held unconstitutional because the town discriminated against refuse on the basis of origin.\textsuperscript{208} In Monroe-Livingston, the ordinance also discriminated against "out of town" waste, but this was held to be valid because the court interpreted the term to include refuse which originated only within the state.\textsuperscript{209} Both ordinances on their face, and in their effect, discriminated against solid waste on the basis of origin. Therefore, Judge Fuchsberg argued that both ordinances should have been held unconstitutional.\textsuperscript{210}

Experience teaches that parochial protectionist measures, fueled by an understandable but impermissible purpose to conserve the landfill site for the townspeople alone, are almost sure to spawn reciprocal exclusionary acts, which in totality would soon constitute a serious impediment to the free flow of interstate commerce.\textsuperscript{211}

\begin{footnotes}
\textsuperscript{202} Id. at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968.
\textsuperscript{203} Id. at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).
\textsuperscript{204} Id. at 686, 417 N.E.2d at 82, 435 N.Y.S.2d at 969-70 (Fuchsberg, J., dissenting).
\textsuperscript{205} Id. at 686, 417 N.E.2d at 81, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).
\textsuperscript{206} Id. at 688, 417 N.E.2d at 83, 435 N.Y.S.2d at 971 (Fuchsberg, J., dissenting).
\textsuperscript{207} Id. at 688, 417 N.E.2d at 83, 435 N.Y.S.2d at 970-71 (Fuchsberg, J., dissenting).
\textsuperscript{210} Id. at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).
\textsuperscript{211} Id. at 687, 417 N.E.2d at 82, 435 N.Y.S.2d at 971 (Fuchsberg, J., dissenting).
\textit{See also} Schiener v. Penfold, Index No. E91205/81 (Sup. Ct. Erie County 5/15/81), where Justice Joslin held invalid a Solid Waste Management Ordinance enacted by the Town of Sardinia because the Town Board failed to prepare an Environmental
\end{footnotes}
2. Illegitimate Exercise of the Police Power

Municipalities also attempt to control solid waste disposal through the use of their zoning power.\(^1\) The propriety of restrictive or exclusive municipal zoning ordinances has been seriously questioned. In fact, courts have held these zoning ordinances to be unconstitutional.\(^2\) Although a municipality may limit the quantity of refuse disposed as a legitimate exercise of its zoning power,\(^3\) a municipality may not limit quantity by discriminating on the basis of the source of refuse.\(^4\)

For example, the California Court of Appeals in *Ex Parte Lyons*,\(^5\) held that a county ordinance banning the importation of refuse produced outside the county is an arbitrary and improper exercise of the town's police power.\(^6\) The county argued that the disposal of solid waste originating outside of the county created a menace to public health, welfare and safety.\(^7\) The court noted that while it is possible that an increase in the quantity of refuse may endanger the public health, the ordinance did not limit the amount of waste, but discriminated against refuse on the basis of origin.\(^8\) The Supreme Court of Pennsylvania in *Lutz v. H. T. Armour*\(^9\) found a similar ordinance

Impact Statement prior to the ordinance's adoption. The town ordinance substantially duplicated the professional and scientific procedures which are within the regulatory responsibility of the Department of Environmental Conservation. The court found that

> [a]rticle 8 of the Environmental Conservation Law requires that an Environmental Impact Statement be undertaken before the adoption of legislation which will affect the operation of an existing landfill. The EIS should review the impact of the proposed ordinance not only upon the subject municipality but also upon the entire region served by the landfill operation. This will have the effect of deterring unrestrained provincialism and of furthering the reasonable use of governmental police power in promoting the overall public interest.

212. See notes 24-62 *supra* and accompanying text.


214. See notes 60-61 *supra* and accompanying text.

215. See note 62 *supra* and accompanying text.

216. 27 Cal. App. 2d 182, 80 P.2d 745 (1938).

217. *Id.* at —, 80 P.2d at 745.

218. *Id.* at —, 80 P.2d at 746.

219. *Id.* at —, 80 P.2d at 749.

unconstitutional. The court, citing *Ex Parte Lyons*, stated that the effect of the ordinance was to make any quantity of out of town refuse harmful to public health, while local waste, regardless of amount, did not violate the town’s health standards. This distinction was held to be arbitrary, discriminatory and without merit.

In *Yaworski v. Town of Canterbury*, the Superior Court of Connecticut declared a town ordinance void because it prohibited the disposal of out of town refuse within its borders. The court held that the legislature granted municipalities only the power to regulate the disposal of solid waste. This power, the court ruled, did not include the power to ban. The New Jersey Supreme Court in *Southern Ocean Landfill Inc. v. Mayor and Council of the Township of Ocean* struck down an ordinance because it conflicted with the legislature’s policy of regionalization of waste facilities. Both the New Jersey and Connecticut courts determined that their respective legislatures had preempted municipal action in the area of solid waste disposal.

Geographic origin also has been rejected as a basis for discriminating against solid waste generated outside a municipality. In *Boone Landfill Inc. v. Boone County*, the Illinois Supreme Court held that a county may not ban the disposal of refuse solely on the basis of its geographical source. The court rejected the county’s claim that the purpose of the zoning ordinance was to limit the quantity of refuse discarded. A town zoning ordinance completely excluding industrial waste disposal facilities within its boundaries was challenged in *General Battery Corp. v. Zoning Hearing Board of Alsace Township*. The Pennsylvania Commonwealth Court found that the Department of Environmental Resources controls the waste disposal fa-

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221. *Id.* at 581, 151 A.2d at 111.
222. *Id.* at 579-80, 151 A.2d at 110.
223. *Id.*
225. *Id.* at 352, 154 A.2d at 761.
226. *Id.* at 351, 154 A.2d at 760-61.
227. *Id.*
228. 64 N.J. 190, 314 A.2d 65 (1974).
231. *See* notes 173, 199, 208-210 *supra* and accompanying text.
232. 51 Ill. 2d 538, 283 N.E.2d 890 (1972).
233. *Id.* at 542, 283 N.E.2d at 892.
234. *Id.*
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cilities, and therefore, the facilities did not create health or safety hazards which would justify the total exclusion of disposal facilities.\textsuperscript{236} Although the town argued that the ordinance protected its residents from waste generated in another municipality,\textsuperscript{237} the court concluded that the origin of solid waste has little bearing on whether its disposal is harmful.\textsuperscript{238}

Sanitary landfills are a necessary solution to solid waste disposal.\textsuperscript{239} Suitable land is the basic requirement for this method of disposal. Municipalities, because of an inadequate number of available landfill sites, public opposition, and environmental and health hazards, have responded with zoning ordinances or solid waste plans which ban the importation of intrastate and interstate refuse.\textsuperscript{240} These ordinances cause the refuse to accumulate in municipalities which are unable to provide for disposal and, therefore, endanger the health and welfare of residents and non-residents.\textsuperscript{241}

Municipalities have the power to enact ordinances regulating and restricting the disposal of solid waste.\textsuperscript{242} It is evident that this power includes the power to ban the importation of intrastate refuse.\textsuperscript{243} Municipalities, however, may not interfere with interstate commerce by prohibiting the disposal of refuse originating out-of-state within their boundaries.\textsuperscript{244} The primary objective of states and municipalities in enacting anti-importation statutes is to prolong the lifespan of their landfills.\textsuperscript{245} The United States Supreme Court in \textit{City of Philadelphia v. New Jersey}\textsuperscript{246} held that this goal was unconstitutional because it permits states and municipalities to isolate themselves from a national problem.\textsuperscript{247}

\begin{itemize}
  \item \textsuperscript{236} Id. at 502, 371 A.2d at 1032.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Id. at 503, 371 A.2d at 1033.
  \item \textsuperscript{239} See notes 9-12, 66 \textit{supra} and accompanying text.
  \item \textsuperscript{240} See notes 58-73, Section IV B \textit{supra} and accompanying text.
  \item \textsuperscript{241} J. Goldstein, \textit{Garbage As You Like It} 47 (1969).
  \item \textsuperscript{242} See notes 59-62, 190-238 \textit{supra} and accompanying text.
  \item \textsuperscript{246} 437 U.S. 617.
  \item \textsuperscript{247} Id. at 628.
\end{itemize}
V. Conclusion

There are a limited number of appropriate landfill sites. These must be available to all states and municipalities. Therefore, all municipal bans on the importation of intrastate waste should be held invalid. Few municipalities are either isolated from or independent of neighboring communities; consequently, unilateral land use decisions by one municipality affect the needs and resources of an entire region.

The proliferation of solid waste requires a uniform statewide and regional approach, rather than fragmented municipal action, in order to achieve effective solid waste control. Municipalities lack the financial resources, land and expertise to plan, develop and implement efficient and effective solutions to their solid waste problems. As a result, uncoordinated municipal refuse disposal activities develop to meet the immediate needs of local governments. These ineffective practices create health hazards and pollution problems, and cause the dissipation of land and other valuable resources, all of which affect areas larger than a single municipality. Municipalities, therefore, must work together and each accept their "fair share" of refuse, regardless of its origin, if an effective solution is to be developed.

A statewide and regional approach is the most feasible method of eliminating environmentally unsound waste disposal practices. The

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250. See notes 67-72 supra and accompanying text.
251. New Jersey's Options, supra note 63, at 34.
252. Cases illustrating a municipality's power to exclude and prohibit refuse disposal completely from their boundaries can be analogized to exclusionary zoning cases which have the effect of excluding certain types of housing. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), a village restricted its land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple dwelling houses. The U.S. Supreme Court upheld the zoning ordinance under the police power of the state. In Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976), the town adopted a land use plan that restricted the housing growth rate in order to protect its small town character and surrounding open space. The Ninth Circuit permitted the zoning restriction since it bore a rational relationship to a legitimate state interest. Id. at 908-09. In Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), the town had a zoning ordinance excluding low and moderate income housing. The Supreme Court of New Jersey declared the ordinance invalid since every municipality must afford the opportunity for decent and adequate low and moderate income housing at least to the municipality's "fair share" of the regional need. Id. at 174, 336 A.2d at 724. In Golden v. Planning Bd. of
volume of solid waste produced within a state or region is large enough to necessitate processing refuse on a larger scale. State and regional agencies should have exclusive authority to conduct studies to locate environmentally safe areas within the state or region for the establishment of sanitary landfills. These agencies should strategically allocate districts for refuse disposal before they are needed. This would eliminate the processing and time involved in obtaining municipal variances and conditional use permits and satisfy local interests in conserving land. States and regions should establish public service corporations to plan, finance, construct, operate and regulate waste disposal facilities. A state or regional solid waste management corporation could effectively prevent municipalities from enacting ordinances excluding or restricting refuse disposal.

A statewide and regional approach would provide an economic base for better operational control of waste disposal facilities. Finally, a state and regional approach is the only viable system to control parochial opposition while simultaneously educating the public on the technological advances of solid waste disposal.

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Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), appeal dismissed, 409 U.S. 1003 (1972), the court of appeals held that a municipality may slow its natural development to “phase in” adequate municipal services, such as water supply and sewage treatment.

254. See notes 50-57 supra and accompanying text.
256. See notes 126-166 supra and accompanying text.