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## Garbage and the Constitution: Solid Waste Disposal, the Dormant Commerce Clause, and the Market Participant Exception

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# GARBAGE AND THE CONSTITUTION: SOLID WASTE DISPOSAL, THE DORMANT COMMERCE CLAUSE AND THE MARKET PARTICIPANT EXCEPTION

EDWARD W. GREASON\*

## INTRODUCTION

IN the past several decades there has been increasing public concern for the quality and preservation of our environment. This concern has led to the enactment of legislation intended to protect and restore the environment, on both the national<sup>1</sup> and state<sup>2</sup> level. In recent years, much legislation has focused on the problem of waste storage and disposal, reflecting the public's increasing awareness of the garbage disposal problem.<sup>3</sup>

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1. See, e.g., Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7671 (1988), as amended by Act of Nov. 15, 1990, Pub. L. No. 101-549, 42 U.S.C.S. §§ 7401-7671 (Supp. 1991) (control of air pollution); Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1988); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75 (1988) (Superfund - cleanup of hazardous substances); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-92 (1988) (encouraging recycling).

2. See, e.g., FLA. STAT. ANN. §§ 403.702-403.73 (West 1986 & Supp. 1991) (Resource Recovery and Management Act); MINN. STAT. ANN. §§ 116F.01-.30 (West 1987 & Supp. 1992) (recycling solid waste); N.J. STAT. ANN. §§ 13:1K-6 to -13 (West 1979 & Supp. 1991) (Environmental Cleanup Responsibility Act); N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1992) (State Environmental Quality Review Act); VT. STAT. ANN. tit. 10, §§ 6601-13 (1984 & Supp. 1991) (reducing solid waste and packaging bans).

3. See, e.g., *Little Waste in the Dinkins Trash Plan*, N.Y. TIMES, Sept. 9, 1991, at A14 (editorial) (need for new incinerators); *Train Bearing Tainted Soil Rolls On*, N.Y. TIMES, Apr. 24, 1991, at A12 (trainload of contaminated soil seeking disposal site); William E. Schmidt, *Soil On Troubled Waters*, N.Y. TIMES, Apr. 29, 1987, at A34 (wandering garbage barge from Islip, New York, symbolizes the urgency of waste disposal problems); Jaffe, *Tons of City Ash Remaining in Limbo on the High Seas*, PHILADELPHIA INQUIRER, Feb. 12, 1988, at B1 (discussing two barges of ash from municipal incinerators, at sea with no destination).

The size of the problem can be daunting. Since the early 1970's, discarded materials of all kinds requiring disposal have risen to the level of five to six billion tons per year and are increasing at a rate of about eight percent per year. JOHN H. DAVIDSON & ORLANDO E. DELOGOU, *Solid Waste, Sanitary Landfills and Open Dumps*, 1 FED. ENV'T REG. § 4.02 at 4-1 (1990). The Freshkills landfill, in Staten Island, New York, alone receives 25,000 tons per day. *Illinois Lawmakers Send Groundwater Bill to Governor, Whose Signature is Expected*, 18 Env't Rep. (BNA) 836 (July 17, 1987).

The problem of garbage disposal has been with mankind for centuries. Kim I. Montroll, *Solid Waste Source Reduction and the Product Ban: A Commerce Clause Violation?*, 13 VT. L. REV. 691, 691 (1989). Monte Testaccio in ancient Rome was a 140 foot high, 1,200 foot wide mound of used clay wine jars. *Id.* at 691 n.1; MICHAEL GRANT, *HISTORY OF ROME* 321 (1978). By modern standards, however, Monte Testaccio is a dwarf. The landfill at Freshkills is expected to be 500 feet high when finished in the year 2000. A

There are five basic solutions to dealing with solid waste: incineration, ocean dumping, landfills, recycling, and source reduction.<sup>4</sup> None of these present a perfect long-term solution to waste disposal.<sup>5</sup>

Increasingly, states export their waste to other states who have space in their landfills, as their own domestic disposal sites are filled.<sup>6</sup> The states importing the waste are unhappy to receive other states' garbage. The receiving states foresee their landfills filling sooner than expected because of such influxes, thereby forcing *them* to seek new disposal sites. This creates incentive for prospective receiving states to prevent the extra

hazardous waste landfill in Alabama covers 2,400 acres. James Lyons, *The Garbage War Between the States*, FORBES, Oct. 15, 1990, at 92.

4. Montroll, *supra* note 3, at 692-95.

5. Incineration generates ash which must still be disposed of, Jaffe, *supra* note 3, and the construction of incinerators tends to lead to intense local community opposition (the Not In My Backyard Syndrome - NIMBY). Alfred B. DelBello, *The Politics of Garbage: The Influence of the Political Process on the Construction of a Refuse-to-Energy Plant*, 14 COLUM. J. ENVTL. L. 357 (1989); Allan R. Gold, *New Incinerators Termed Essential in New York City*, N.Y. TIMES, Sept. 5, 1991, at A1.

Ocean dumping is no longer viewed as an acceptable alternative because of the harm it causes to the marine environment. *Slope Water Receives Bulk of Sewage Dumping*, ON THE WATER, July/Aug. 1990, at 15 (Cornell Cooperative Extension - Suffolk County Marine Program 1990); *A Summary of Proceedings of the Bi-state Hearing on Environmental Problems in the Metropolitan New York/New Jersey Region* 11 (Apr. 8, 1986) (statement of Mr. Wendell, Interstate Sanitation Commission Counsel) (two billion gallons of sewage per day are discharged in the area of New York harbor).

Recycling, so far, has been limited to certain materials, mostly newspapers and metals, which amount to only a small part of a community's daily waste. See, e.g., John Holusha, *All About Making Recycling Pay*, N.Y. TIMES, Mar. 31, 1991, at 5. Moreover, recycling plant capacity to date is nowhere near dealing with the volume. Allan R. Gold, *Confronting the Rising Cost of Recycling*, N.Y. TIMES, Oct. 13, 1990, at A1. In a comprehensive study by the state of Washington, it was determined that only about 15% of its waste is recycled. See *Illinois Lawmakers*, *supra* note 3, at 839. The state ecology director noted the lack of markets for some recycled goods and also that the cost of recycling sometimes exceeded the cost of a new item. *Id.* See also Allan R. Gold, *As Trash is Recycled, Where Can It All Go?*, N.Y. TIMES, Oct. 3, 1990, at B4. There are also unexpected consequences of recycling. *Glass to be Recycled Showers Florida Dump*, N.Y. TIMES, Sept. 12, 1991, at C9 (half of the glass bottles collected are broken in transit and dumped); Marlise Simons, *U.S. Paper Recycling Hurts Europe's System*, N.Y. TIMES, Dec. 11, 1990, at A9 (American newspapers, collected and shipped to Europe, have flooded the recycling system and have caused a glut).

Landfills have always been the favorite disposal method because of the low cost and ease involved. Currently, at least 90% of waste is disposed of on land. DAVIDSON & DELOGOU, *supra* note 3, at 4-4. However, as the existing landfills fill up, it is becoming more difficult to locate new sites. *Id.* Regulations make it harder to keep the ones that are still open. Robert Pear, *U.S. Sets Rules to Cut Landfill Pollution*, N.Y. TIMES, Sept. 12, 1991, at A18; *Town Plans To Add Plastics To Mandatory Recycling List*, HAMPTON CHRONICLE-NEWS, Nov. 22, 1990, at 1.

Source reduction is aimed at eliminating some of the waste altogether. This is usually accomplished through product package bans (i.e., a ban on plastic containers). See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). This method is of limited use since at best it reduces the amount of waste and does nothing to dispose of the remainder.

6. Allan R. Gold, *Vote in Senate Alarms Exporters of Garbage*, N.Y. TIMES, Sept. 19, 1990, at B3. New Jersey ships 55% of its garbage to other states. New York ships 11%. *Id.*

waste from entering.<sup>7</sup>

But when a state attempts to take some action that may burden interstate movement, the state must consider whether its action is prohibited by the Commerce Clause of the United States Constitution.<sup>8</sup>

If the state act hinders the movement of interstate commerce, then the act will be found impermissible.<sup>9</sup> This simple maxim fails to explain the factors and considerations which courts weigh in determining the constitutionality of a state's action.<sup>10</sup> Nor does it mention exceptions to the Commerce Clause that have been created.<sup>11</sup>

This Article will explore the role that the Commerce Clause plays in interstate waste disposal.<sup>12</sup> It will focus in particular on the "Dormant" Commerce Clause and its most consuming exception - that for the "market participant." Part I examines the Commerce Clause in light of the Framers' intent and its history. Part II covers the market participant exception. Part III briefly looks at the clause's application to waste disposal. Part IV examines how courts and legislatures have applied the market participant exception to interstate waste cases. Finally, this Arti-

7. *Id.* Jeff Bailey, *Toxic Waste Sparks War Between States*, WALL ST. J., Aug. 16, 1991, at B1; Steven L. Myers, *New Jersey and Indiana Act on Trash*, N.Y. TIMES, Aug. 19, 1991, at B1.

8. U.S. CONST. art. 1, § 8, cl. 3. "Congress shall have the [p]ower . . . [t]o regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes . . . ."

9. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). *See generally* 1 RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 11.1 (4th ed. 1986). [Hereinafter ROTUNDA]; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988) [Hereinafter TRIBE]; GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* (1986).

10. *See infra* notes 67-87 and accompanying text.

11. One example is the exception invoking the exercise of a state's police power. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (upholding a city smoke ordinance that affected ships in interstate commerce on the grounds that the city was entitled to protect the health of its citizens).

Another example is the market participant exception. *See infra* notes 88-109 and accompanying text; *Reeves, Inc. v. Stake, Inc.*, 447 U.S. 429 (1980).

12. Solid waste is defined in RCRA in part as:

any garbage, refuse, sludge from a waste treatment plant, . . . and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, . . . operations, and from community activities . . . .

42 U.S.C. § 6903(27) (1988).

Waste, for the purposes of this Article, means nonhazardous garbage. Hazardous waste has been excluded since the disposal of toxic substances is heavily regulated by federal statutes. *See, e.g.*, CERCLA, 42 U.S.C. §§ 7401-7671 (1988); RCRA, 42 U.S.C. §§ 6901-92 (1988). Where hazardous waste cases have been cited it is for the general Commerce Clause principles involved.

Nuclear waste has been totally excluded from discussion because nuclear power and waste, both civilian and military, have been pre-empted by federal legislation. Also, despite nearly five decades of atomic power, the federal government has yet to determine how to dispose of nuclear waste. William J. Broad, *A Mountain of Trouble*, N.Y. TIMES, Nov. 18, 1990, § 6 (Magazine), at 37.

cle concludes that the exception is overwhelming the rule and that such a result is contrary to the intent of the Commerce Clause. Therefore, some modifications to the market participant exception are suggested.

### I. THE COMMERCE CLAUSE

Unlike much of the Constitution,<sup>13</sup> the Commerce Clause<sup>14</sup> is an affirmative grant of power to Congress. It is not, however, an exclusive grant of power to Congress, but rather one that is shared with the states.<sup>15</sup> Under the clause, Congress has the authority to take such action as it deems necessary to affect the nation's interstate commerce.<sup>16</sup> The Commerce Clause also acts as a limiting factor on state power since what Congress regulates, the states cannot regulate. This limit is enforced through the Supremacy Clause.<sup>17</sup>

More difficult than the affirmative aspect of the Commerce Clause is the problem of when Congress does not act to regulate interstate commerce. The courts then are faced with the task of interpreting the intent of Congress' silence.<sup>18</sup> It is the recognition of the fact that Congress has the power to regulate commerce but need not take any action to do so that led to the emergence of the Dormant Commerce Clause.<sup>19</sup>

The Dormant Commerce Clause is essentially an acknowledgment by the courts that some aspects of interstate commerce are properly within the jurisdiction of Congress, even though Congress has not yet acted or spoken.<sup>20</sup> It was first developed by the Supreme Court in 1829<sup>21</sup> as a means of checking the power of the states to burden interstate com-

13. See, e.g., U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

14. See, e.g., U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have [p]ower . . . [t]o regulate [c]ommerce . . .").

15. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall noted that some commerce "would be beyond the power of Congress to regulate." *Id.* at 194.

16. The Commerce Clause also gives Congress similar authority when dealing with trade with foreign nations and with Native Americans. This Article will examine only the interstate applications of the clause.

See also DAVID W. BROWN, *THE COMMERCIAL POWER OF CONGRESS* (1910); E. PARMALEE PRENTICE & JOHN G. EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* (reprint 1981) (1898).

17. U.S. CONST. art. VI, cl. 2. ("This Constitution, and the [l]aws of the United States . . . shall be the supreme [l]aw of the [l]and . . .").

18. *Gibbons*, 22 U.S. 1; ROTUNDA, *supra* note 9, §§ 11.1-2.

19. At least one commentator has suggested that the term "Dormant Commerce Clause" is inaccurate since "what remains dormant is Congress, and not the Commerce Clause." Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982).

20. See generally ROTUNDA, *supra* note 9, § 11.1, at 577-79.

Not all commentators, however, agree that the Dormant Commerce Clause is a constitutionally valid power. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571 (1987) (arguing that the Constitution provides no textual or non-textual support for the Dormant Commerce Clause).

21. *Willson v. Black-bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). The state's

merce<sup>22</sup> and has been implemented countless times since.<sup>23</sup>

### A. *The Early Years*

In the early Commerce Clause cases, the Court was concerned with preserving the newly constructed federal state.<sup>24</sup> The failure of the Articles of Confederation has been blamed on the divisive trade wars engaged in by the newly-established states.<sup>25</sup> So long as states could interfere with commerce, it was felt that the country would never be truly unified and there would always be the danger of it splintering apart.<sup>26</sup> The Balkanization of the nation's economy was and is something the Court has actively opposed.<sup>27</sup> As long as state governments pursued their separate interests at the expense of the nation through discriminatory and protective measures, the country could not prosper.<sup>28</sup>

This view reflects what the Court perceives to be the original intent of the Constitution's Framers.<sup>29</sup> Though it has been suggested that the

act was not "repugnant to the power to regulate commerce in its dormant state." *Id.* at 252.

22. Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis - Protecting Protectionism?*, 1985 DUKE L.J. 697, 699-700 nn.15-18 (1985).

23. See *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). The Court has, however, recently referred to it as the "negative" aspect of the Commerce Clause." See also *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

24. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (attempt by New York to create a monopoly on interstate ferry service in New York Harbor); *Willson v. Black-bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (erection of a dam that blocked a navigable waterway); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852) (erection of a bridge over a river blocking boat traffic); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852) (local ordinance requiring all vessels entering port to use a local pilot).

25. THE FEDERALIST NO. 42, at 275 (James Madison) (Paul L. Ford ed., 1898) ("[t]he defect of power in the existing Confederacy to regulate the commerce between its several members"). See also *TRIBE*, *supra* note 9, § 6-3, at 404; *PRENTICE & EGAN*, *supra* note 16, at 1.

26. THE FEDERALIST NO. 7, at 36 (Alexander Hamilton) (Paul L. Ford ed., 1898). "The competitions of commerce would be another fruitful source of contention . . . Each state . . . would pursue a system of commercial policy, peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent." *Id.*

27. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The original purpose of the Commerce Clause was "to avoid the tendencies toward economic Balkanization that had plagued relations among the [c]olonies and later among the [s]tates under the Articles of Confederation." *Id.* at 325-26. See also *ROTUNDA*, *supra* note 9, § 11.1.

28. THE FEDERALIST NO. 11, at 69 (Alexander Hamilton) (Paul L. Ford ed., 1898) ("[a]n unrestrained intercourse between the [s]tates themselves will advance the trade of each").

29. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Justice Cardozo stated "a chief occasion for the Commerce Clause was the 'mutual jealousies and aggressions of the [s]tates, taking form in customs barriers and other economic retaliations.'" *Id.* at 522 (quoting 2 FARRAND, RECORD OF THE FEDERAL CONVENTION 308 n.29). Cardozo was echoing the opinion of a long series of Court decisions.

Framers, as men of property, were more interested in preserving their wealth than in any ideals,<sup>30</sup> it cannot be doubted that they also had the intellect to foresee the benefits of a central government with strong powers. As Alexander Hamilton wrote, "[t]he importance of the Union, in a commercial light, is one of those points about which there is the least room to entertain a difference of opinion . . . ."<sup>31</sup>

In the pre-Civil War cases, the Court usually deferred to Congress' decisions regarding commerce.<sup>32</sup> On the few occasions when the Court did consider the Commerce Clause, the issue invariably involved an overt attempt by a state to directly affect interstate commerce.<sup>33</sup> In *Gibbons v. Ogden*,<sup>34</sup> Chief Justice Marshall broadly defined commerce as "intercourse"<sup>35</sup> and noted that such trade in any form affected every state.<sup>36</sup> He interpreted the Commerce Clause as invalidating any action by a state which hindered this commerce. However, Marshall did recognize that there are some areas that are better left to the states themselves. He believed that the exclusively internal commerce of a "[s]tate would be beyond the power of Congress to regulate."<sup>37</sup>

The Court acknowledged a further exception to this principle, called the state's "police power," in cases where the state legislated to protect the health, welfare and morals of its citizens.<sup>38</sup> "[T]he role of each state as 'guardian and trustee for its people' "<sup>39</sup> has been an accepted justification for state burdens on interstate commerce.<sup>40</sup>

30. DAVID W. BROWN, *THE COMMERCIAL POWER OF CONGRESS*, at vii-viii (1910); CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1961). *But see* ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION, A CRITICAL ANALYSIS OF "An Economic Interpretation of the Constitution"* (1956).

31. *THE FEDERALIST* No. 11, at 69 (Alexander Hamilton) (Paul L. Ford ed., 1898).

32. *TRIBE*, *supra* note 9, § 5-4, at 306. This is in part because Congress passed little commercial legislation during the period. No federal commercial legislation was found invalid prior to the Civil War. In fact, only two pieces of federal legislation were found unconstitutional during this period: the Judiciary Act, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and the Missouri Compromise, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). *See also* ROTUNDA, *supra* note 9, § 4.4, at 266.

33. *See* Seamon, *supra* note 22.

34. 22 U.S. (9 Wheat.) 1 (1824).

35. *Id.* at 189. Marshall was not the first to so define commerce. *See* *THE FEDERALIST* No. 11, at 69 (Alexander Hamilton) (Paul L. Ford ed., 1898), which defines commerce as "[a]n unrestrained intercourse between the [s]tates themselves . . . by an interchange of their respective productions."

36. *Gibbons*, 22 U.S. at 194.

37. *Id.* at 194-95.

38. Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1210 (1986).

39. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (quoting *Atkins v. Kansas*, 191 U.S. 207, 222-23 (1903)).

40. *See, e.g., Willson v. Black-bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). A state-approved dam, erected to contain the health dangers of a marsh, was allowed although it blocked navigation by ships.

In more recent times, the Court has upheld the application of city air pollution ordinances to ships engaged in interstate shipping. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

Marshall described “[i]nspection laws, quarantine laws, [and] health laws” as being in that “mass of legislation” that the states had not surrendered to the federal government.<sup>41</sup> State inspection laws for out-of-state goods are within the state police power when reasonable,<sup>42</sup> unless in-state goods are excluded from inspection.<sup>43</sup> Should in-state goods be exempt, however, the state is deemed to be engaging in discriminatory practices. Under Marshall’s view, the state laws were valid under its police powers and not from any inherent state commerce power.<sup>44</sup>

The Court went one step further in 1852 in strengthening the power of the states. In *Cooley v. Board of Port Wardens*,<sup>45</sup> a Pennsylvania law requiring all ships in state waters to engage a state-approved pilot was upheld. While the state law undoubtedly burdened interstate commerce, the Court concluded that the burden was indirect. The regulation involved concerned only a matter of “peculiarly local” concern and did not call for Congress to pass a uniform “national” law.<sup>46</sup>

The result of this holding was that, in some cases involving peculiarly local concerns, the states could concurrently exercise power over commerce provided Congress had not yet done so. Subjects requiring uniform national regulation could be regulated only by Congress while subjects of local concern might be regulated to some extent by the states. This is despite the fact that the local concern may be clearly within Congress’ power, like the Pennsylvania pilot law in *Cooley*. Whether a given subject was considered appropriate for state regulation often depended on how the state proposed to regulate it. The critical question concerns the nature of the state’s action, not the subject of its action. The impact of a state regulation was analyzed by classifying its burden on commerce as “direct” or “indirect.”<sup>47</sup>

The Court’s willingness to recognize the possibility of state regulatory powers concurrent with Congress’ may be viewed in light of the politics of the time. The states, especially those in the South, were concerned with checking federal power, a concern that was realized a decade later in the Civil War. Within the Supreme Court itself, John Marshall had died and had been replaced by Roger Taney, an ardent supporter of states’ rights. Taney viewed the Commerce Clause more leniently than Marshall.<sup>48</sup> He believed that it “had no implicit power to invalidate state

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41. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

42. *Savage v. Jones*, 225 U.S. 501 (1912).

43. *Voight v. Wright*, 141 U.S. 62 (1891).

44. See ROTUNDA, *supra* note 9, § 11.2, at 581-82. “Historically Congress has acquiesced in state enforcement of Quarantine Laws . . . . In quarantine cases, the controlling principle is whether the state police power has been exercised to exclude any object ‘beyond what is necessary for any proper quarantine.’ ” *Id.* at 582 n.8 (citations omitted).

45. 53 U.S. (12 How.) 299 (1851).

46. *Id.* at 319. Because every harbor is unique, each has different local safety concerns and thus requires different qualifications for pilots. A uniform national standard is therefore inappropriate. See *id.*

47. TRIBE, *supra* note 9, § 6-4, at 408.

48. In fact Taney never used the Commerce Clause to invalidate state legislation.



law" but could only preempt such laws as conflicted with valid acts of Congress.<sup>49</sup>

### B. *The Modern Era*

The *Cooley* doctrine lasted for the next eighty years. Regardless of the changes and turmoil the country underwent, the distinction between national and local concerns persisted in interstate commerce.

But the doctrine was not without its critics. They argued that the local/national division with its test of direct and indirect burdens was no longer appropriate in light of the structure of the national economy. In a land linked and crisscrossed by a vast system of transcontinental railroads and highways, it was hard to argue that a state act would not have some impact in other states.

In *DiSanto v. Pennsylvania*,<sup>50</sup> Justice Stone wrote a dissent in which he urged the Court to adopt a more modern and appropriate standard in order "to prevent discrimination" in "the free flow of commerce."<sup>51</sup> He sought a more realistic method, instead of the direct or indirect test, which he described as "too mechanical, too uncertain in its application, and too remote from actualities, to be of value."<sup>52</sup> Though the Court did not adopt Stone's proposal, it did begin to inch away from rigid adherence to the direct/indirect test.<sup>53</sup>

The beginning of the end for the test occurred when the Supreme Court decided the case *Baldwin v. G.A.F. Seelig, Inc.*<sup>54</sup> New York had adopted a pricing system that served to restrict the sale of milk by requiring milk originating out-of-state to be sold at artificially high prices. In a unanimous decision by Justice Cardozo, the Court invalidated the state law. Legitimate state power to regulate commerce for health and safety reasons could not be invoked to justify discriminatory state protectionist acts. The Court rejected New York's attempts to allude to a distinction between direct and indirect burdens:

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk . . . . Such a power . . . will set a barrier to traffic between one state and another as effective as if customs duties . . . had been laid . . . . Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its . . . tendency, is to suppress . . . the consequences of competition between

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ROTUNDA, *supra* note 9, § 4.4, at 270 n.21. See also ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 88 (1960).

49. Seamon, *supra* note 22, at 697, 699-700 n.15.

50. 273 U.S. 34 (1927) (holding invalid a state law requiring sellers of steamship tickets to be licensed) (Stone, J., dissenting).

51. *Id.* at 43-44.

52. *Id.* at 44.

53. One commentator has described the cases of this period as paying only "lip service" to the test. Regan, *supra* note 29, at 1094.

54. 294 U.S. 511 (1935).

the states.<sup>55</sup>

*Baldwin* is now regarded as the beginning of the "modern era" where the burden test is discarded,<sup>56</sup> though it was not recognized as such then. In fact it would be another decade before the Supreme Court would formally abandon the test.<sup>57</sup>

The movement away from the burdens test and towards Justice Stone's balancing test continued with an article written by Professor Noel Dowling.<sup>58</sup> In his article, Professor Dowling began with Justice Stone's dissent in *DiSanto* and expanded upon it. He concluded that for each case the Court needed to deliberately balance the national and local interests involved and decide which of the two interests should prevail.<sup>59</sup>

Under this new theory, the Court had to consider all the facts and circumstances of a challenged regulation and its potential effects and then weigh the competing national and local interests. If the regulation interfered with interstate commerce, then it would be invalidated by the Court. If the regulation fell short of interference, then it would survive. The key to Dowling's theory was that Congress' regulation would be conclusive. Congress could always approve of a Court's decision by doing nothing, or it could subsequently enact legislation authorizing and resurrecting the state law.<sup>60</sup>

In 1945, the Court had the opportunity to finally renounce the burdens test and adopt Professor Dowling's theory. *Southern Pacific Co. v. Arizona*<sup>61</sup> involved an Arizona law limiting the length of trains operating in the state to a maximum of fourteen passenger or seventy freight cars. The Arizona law impacted most rail traffic between El Paso and Los Angeles.<sup>62</sup> Applying the new balancing test, the Supreme Court concluded that the state's interest in train safety was more than outweighed by the nation's interest in an efficient interstate rail system.<sup>63</sup> The Court also noted the lack of evidence justifying the state's conclusion that the

55. *Id.* at 521-22. See also *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (Court condemned attempt by Connecticut to project its beer prices across state lines).

56. See *ROTUNDA*, *supra* note 9, § 11.8, at 601; cf. *Regan*, *supra* note 29, at 1093-94 n.5.

57. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). However, certain tax applications lasted longer. *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976).

58. Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

59. *Id.* at 21.

60. *Id.* at 20. See, e.g., *In re Rahrer*, 140 U.S. 545 (1891) (upholding the Wilson Act in which Congress reversed the prior Supreme Court decision *Leisy v. Hardin*, 135 U.S. 100 (1890)); *Pennsylvania v. Wheeling & Belmont Bridge Co. (II)*, 59 U.S. (18 How.) 421 (1856) (decision in *Pennsylvania v. Wheeling & Belmont Bridge Co. (I)*, 54 U.S. (13 How.) 518 (1852), finding bridge blocked river navigation, reversed by congressional decision that bridge is an aid to postal service).

61. 325 U.S. 761 (1945).

62. *Id.* at 774-75.

63. Though the Court did not allude to the Second World War then occurring, it can be stipulated that it was concerned about the law's impact on the movement of military material.

limits would significantly improve safety.<sup>64</sup> By rejecting Arizona's assertion that the law was reasonable under its police power,<sup>65</sup> "the Court thus indicated by its language and actions that the test of 'reasonableness' under the interstate Commerce Clause cases is much stricter than . . . [in] due process and equal protection cases."<sup>66</sup>

The balancing test in *Southern Pacific* is still used today. It has been described variously as a subtle<sup>67</sup> and ad-hoc<sup>68</sup> balancing of the facts in a particular case. Though the test has been stated in a variety of ways, the classic formulation was stated in *Pike v. Bruce Church, Inc.*<sup>69</sup> In voiding a law requiring cantaloupes grown in-state to be packaged in-state, the Court, in an oft-quoted passage, said:

the general rule . . . can be phrased as . . . [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And . . . whether it could be promoted as well with a lesser impact on interstate activities.<sup>70</sup>

Essentially, the Court considers a three step process.<sup>71</sup> First, the Court examines whether the statute has a legitimate purpose.<sup>72</sup> Second, the Court looks to whether a rational relationship exists between the statute's purpose and the means selected to effect it.<sup>73</sup> Finally, the Court determines whether there are no available alternatives to the regulation that are less discriminatory.<sup>74</sup>

Legitimate interests can be separated into two types: non-economic and economic. Non-economic interests include highway safety,<sup>75</sup> pure milk,<sup>76</sup> clean air,<sup>77</sup> clean water,<sup>78</sup> and protection of natural resources.<sup>79</sup>

64. *Southern Pac.*, 325 U.S. at 775-76.

65. *Id.* at 780-82. Previous state regulations, ostensibly for public safety in interstate transportation, were usually upheld. ROTUNDA, *supra* note 9, § 11.7 n.2.

66. ROTUNDA, *supra* note 9, § 11.7, at 595.

67. Robert Meltz, *State Discrimination Against Imported Solid Waste: Constitutional Roadblocks*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,383 (1990).

68. Earl M. Maltz, *How Much Regulation Is Too Much - An Examination of Commerce Clause Jurisprudence*, 50 *GEO. WASH. L. REV.* 47, 48 (1981).

69. 397 U.S. 137 (1970).

70. *Id.* at 142 (citations omitted).

71. Smith, *supra* note 38, at 1231. See also Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 *HARV. L. REV.* 1762 (1974). "Generally, the rule is that the regulation will be upheld only if it is rationally related to a legitimate state purpose and the resultant burden on interstate commerce is outweighed by the state interest involved." *Id.* at 1764.

72. Smith, *supra* note 38, at 1231.

73. *Id.*

74. *Id.*

75. *South Carolina State Highway Dep't v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

76. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

77. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

Such interests are usually found valid unless they are facially discriminatory.

Economic interests are less certain of being upheld because of the risk that the regulation will be seen as protectionist. A state may protect against fraud,<sup>80</sup> financial security of its citizens,<sup>81</sup> and preserve the local economy.<sup>82</sup> Only those types of interests, which afford those within a state an economic advantage over those outside the state, are consistently treated as illegitimate.<sup>83</sup>

Whether the regulation rationally serves the state interest is usually relatively easy to demonstrate<sup>84</sup> unless the state legislature carelessly drafted the statute.

The final question is whether less discriminatory alternatives are available. If so, then the regulation will be struck down.<sup>85</sup> A statute is discriminatory if it provides a "gain for those within the state . . . at the expense of those without."<sup>86</sup> A state with a discriminatory statute is excused only if Congress has consented to the discrimination by passing an act authorizing it,<sup>87</sup> an extremely rare event.

## II. THE MARKET PARTICIPANT EXCEPTION

The market participant exception was first articulated by the Supreme Court in *Hughes v. Alexandria Scrap Corp.*<sup>88</sup> Maryland had implemented a system in which a bounty was paid for abandoned cars brought

78. *Procter and Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir.), cert. denied, 421 U.S. 978 (1975).

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

80. *DiSanto v. Pennsylvania*, 273 U.S. 34 (1927).

81. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (avoiding the expense of new landfills).

82. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980).

83. *Smith*, supra note 38, at 1234. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522, 527 (1935); *Edwards v. California*, 314 U.S. 160, 162 (1941).

84. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). If a regulation seems to move towards its stated goal, courts hesitate to second guess the legislature, even if it seems unlikely the regulation will accomplish that goal by itself. *Procter and Gamble Co. v. Chicago*, 509 F.2d 69, 76 (7th Cir.), cert. denied, 421 U.S. 978 (1975). An equal protection case, *Railway Express Agency v. New York*, 336 U.S. 106 (1949), takes a similar stand. "It is no requirement . . . that all evils of the same genus be eradicated . . ." *Id.* at 110.

85. *Hughes*, 441 U.S. at 336. See also *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Baldwin*, 294 U.S. at 524.

86. *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184 n.2 (1938). For other definitions, see *Smith*, supra note 38, at 1213, and *Regan*, supra note 29, at 1094-95.

87. See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 434-36 (1946); Allan R. Gold, *Vote in Senate Alarms Exporters of Garbage*, N.Y. TIMES, Sept. 19, 1990, at B3 (proposed legislation permitting states to ban imports of garbage); *Curbs on Interstate Garbage Die in Talks on Capitol Hill*, N.Y. TIMES, Oct. 13, 1990, at A28 (the Senate bill permitting states to ban imports of garbage died in House-Senate conference). But see Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 54-55 (1979) (noting a congressional statute authorizing exactly the type of state law that the Court struck down).

88. 426 U.S. 794 (1976). *Contra American Yearbook Co. v. Askew*, 339 F. Supp. 719

into the state for reprocessing. The state legislature realized that it was paying to clean up other states' highways and therefore changed the bounty system to subject out-of-state reprocessors to more stringent documentation requirements. The change was challenged by the out-of-state reprocessors as a state act that discriminated against interstate commerce.

The Supreme Court upheld the regulations finding that the state was not burdening or discriminating as a state actor. It rejected the argument that the state had "interfered with the natural functioning of the interstate market."<sup>89</sup> Rather, Maryland had "entered into the market itself to bid up their price."<sup>90</sup>

*Reeves, Inc. v. Stake*<sup>91</sup> followed shortly after. There the Court held that South Dakota could refuse to sell cement from a state-owned plant to out-of-state buyers during a shortage. The state preference for its residents was held immune from Commerce Clause scrutiny. Because the state funded, owned and operated the plant, the Court concluded that South Dakota was a participant in the interstate cement market.<sup>92</sup> As such it was not acting as a state regulator, but rather as a private party, who was free to sell to whomever it wanted.

The Court distinguished cement from natural resources<sup>93</sup> such as coal, minerals, wild game, and timber. It noted that cement was "the end product of a complex process whereby a costly physical plant and human labor act on raw materials."<sup>94</sup> The distinction was necessary since the Court had struck down previous state attempts to hoard privately owned natural resources<sup>95</sup> and to prefer state citizens in their consumption.<sup>96</sup>

If a state is allowed to regulate a product it owns, how far down the "stream of commerce" can the state regulation reach? In *South-Central Timber Development, Inc. v. Wunnicke*,<sup>97</sup> the Court invalidated an Alaskan law requiring that any purchases of state-owned timber be processed in-state before being shipped out-of-state. There was no majority opinion

(M.D. Fla.), *summarily aff'd*, 409 U.S. 904 (1972) (a prior affirmation distinguishing a state's purchases for its own use).

89. *Hughes*, 426 U.S. at 806.

90. *Id.* Justice Stevens, in his concurrence, was more pragmatic when he noted that Maryland had created the market through its subsidies and that the resulting commerce would not exist otherwise. *Id.* at 815.

91. 447 U.S. 429 (1980).

92. *Id.* at 440.

93. *Id.* at 443.

94. *Id.* at 444.

95. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (landfills); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (natural gas).

96. *Pennsylvania v. West Virginia*, 262 U.S. 553, 598-600 (1923) (distributors to favor citizens during gas shortages); *Hicklin v. Orbeck*, 437 U.S. 518 (1978). "In a related context . . . state ownership of a natural resource does not immunize its regulation of that resource from scrutiny under the [P]rivileges and [I]mmunities [C]lause." Carol A. Fortine, Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 GEO. WASH. L. REV. 601, 603 n.9 (1982).

97. 467 U.S. 82 (1984).

on the question of whether Alaska was a market participant. In a plurality opinion, Justice White reasoned that the state was a participant in the timber market, but the conditions imposed went beyond what *Reeves* had endorsed in allowing a state to choose with whom to deal. The state was "attempting to govern the private, separate economic relationships of its trading partners."<sup>98</sup> The state was not allowed to qualify for the market participant exception to immunize its downstream regulation.<sup>99</sup>

The threshold determination is whether a challenged state action is of the regulatory kind that the Commerce Clause is concerned with or whether it was " 'market participation' by the state and thus beyond the reach of the clause."<sup>100</sup> The "test centers on the form rather than on the intent or effect of the state action."<sup>101</sup>

The distinction<sup>102</sup> between a market participant<sup>103</sup> and a market regulator<sup>104</sup> had been criticized as having no support in the Commerce Clause or its underlying purposes.<sup>105</sup> The exception laid out in *Reeves*, and developed in later cases,<sup>106</sup> makes it easy for a state to avoid Commerce Clause scrutiny and favor its own citizens through the use of government enterprises. As will be seen in Part IV, the exception is becoming the rule.

Considering the uneven distribution of natural resources among the various states, such distinctions are inadvisable.<sup>107</sup> The Court is inviting confusion since there is no clear definition of a natural resource<sup>108</sup> or when it becomes an end-product.<sup>109</sup>

98. *Id.* at 99.

99. *Id.* See also *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984). But see *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983).

100. Seamon, *supra* note 22, at 705.

101. *Id.*

102. See *supra* notes 91-92, 97-99 and accompanying text.

103. A state is a market participant when action by the state resembles that of a private trader.

104. A state is a market regulator where the state attempts to control a market to gain an advantage for itself.

105. Note, *supra* note 96, at 618. See also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 818-820 (1976) (Brennan, J., dissenting); *Reeves, Inc. v. Stake*, 447 U.S. 429, 449-50 (1980) (Powell, J., dissenting).

106. *E.g.*, *South-Central Timber Development v. Wunnicke*, 467 U.S. 82 (1984); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *Hughes*, 426 U.S. 794. In all of the preceding cases except *Wunnicke*, the Supreme Court upheld state activity that otherwise would have been struck down as discriminatory under the Commerce Clause.

107. The stronger a state's share, the more the "terms" of its contracts resemble regulations. Conversely, the weaker its share, the less regulatory a state's contract terms appear. See STONE, *supra* note 9, at 327-28.

108. Compare *County Comm'rs of Charles County v. Stevens*, 473 A.2d 12 (Md. 1984) (landfill not a natural resource) with *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 251-54 (3d Cir. 1989) (difficulty in defining a natural resource evident from the courts discussion whether a landfill is a natural resource), *cert. denied*, 493 U.S. 1127 (1990).

109. How much human labor is necessary to become an end-product? Coal and natu-

III. WASTE AND THE COMMERCE CLAUSE: *CITY OF PHILADELPHIA V. NEW JERSEY*

*City of Philadelphia v. New Jersey*<sup>110</sup> has proven to be the touchstone Supreme Court decision on the Commerce Clause and out-of-state waste. The New Jersey legislature, in an effort to preserve its dwindling landfill space for its own citizens, passed a statute prohibiting the importation of most solid or liquid waste,<sup>111</sup> which originated or was collected outside the state. When challenged by private landfill operators and the cities with whom they had disposal agreements, the New Jersey Supreme Court held the law valid under the Commerce Clause.<sup>112</sup>

In a seven to two decision, the United States Supreme Court reversed. It held that the statute fell "squarely within the area that the Commerce Clause puts off limits to state regulation."<sup>113</sup> The state had slowed "the flow of commerce for protectionist reasons . . ." and attempted to "isolate itself from a problem common to many by erecting a barrier" to interstate commerce.<sup>114</sup>

New Jersey had argued that waste had no value and so could not be used in trade.<sup>115</sup> As support for this, New Jersey pointed to the state's police power to prohibit items which by their very nature were dangerous to humans.<sup>116</sup> The Supreme Court rejected this argument noting that "all objects of interstate trade merit Commerce Clause protection."<sup>117</sup>

The Court distinguished the quarantine cases, on which New Jersey relied, as involving articles whose "very movement risked contagion."<sup>118</sup> The waste involved here represented no danger while it was being moved and any harm that did arise would occur after disposal in a landfill. At that point, the waste was indistinguishable from New Jersey generated waste.<sup>119</sup> While New Jersey could conserve landfill space by reducing the waste flow through bans, it could not discriminate based on the waste's origin.<sup>120</sup> The Court did recognize that it was possible that a state might

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ral gas have to be mined and pumped before they can be used, timber becomes lumber, and water may be purified before drinking; yet, all have essentially the same characteristics afterwards as when they started. Justice Powell noted this problem in his dissent in *Reeves* when he wrote that the Court's definition of a "complex [physical] process" would cover most economic activity. 447 U.S. at 448-49 n.2 (Powell, J., dissenting).

110. 437 U.S. 617 (1978).

111. The exceptions were largely limited to materials being recycled. *Id.* at 619 n.2.

112. *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 348 A.2d 505 (N.J. 1974), *rev'd sub nom.*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

113. *Philadelphia*, 437 U.S. at 628.

114. *Id.*

115. *Id.* at 621-22.

116. *Id.* at 622. See also *supra* notes 38-44 and accompanying text.

117. *Philadelphia*, 437 U.S. at 622.

118. *Id.* at 628-29.

119. *Id.*

120. *Id.* at 626-27. Because the state regulation affected all landfills, publicly and privately owned, the market participant exception was not an issue. *Id.* at 627 n.6.

be able to ban waste from only state funded landfills. However, because the state regulation involved here affected all landfills, publicly and privately owned, the market participant exception was not an issue.<sup>121</sup> Prophetically, Justice Stewart reminded New Jersey that the same Commerce Clause that permits other states to send their waste for disposal would "protect New Jersey in the future" if it should decide to export waste.<sup>122</sup>

#### IV. WASTE AND THE MARKET PARTICIPANT EXCEPTION

The cases after *Philadelphia* applied its holding in a straightforward manner and struck down bans on the import of out-of-jurisdiction waste.<sup>123</sup> These cases all found *Philadelphia* controlling in rejecting arguments that the bans were necessary to protect public health and existing landfill space because there were less discriminatory means available.<sup>124</sup> They stand for the general rule that a state can freely limit or curtail the amount of waste entering its landfills, but in the process, it cannot discriminate against out-of-state waste purely on the basis of origin.<sup>125</sup>

In the mid-1980's, a new generation of cases began to emerge. Unlike the earlier cases, which had involved broad state or local regulations that banned out-of-state waste from all disposal sites within the jurisdiction,<sup>126</sup> the new cases involved bans that were limited in application. Typically, the ban would apply only to disposal sites owned by the regulating government entity rather than to all sites within the jurisdiction.<sup>127</sup>

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121. *Philadelphia*, 437 U.S. at 627 n.6. "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources. . . ." *Id.* (citations omitted). This language has been seized upon by some states as permitting discriminatory waste bans when limited to state-owned landfills.

122. *Id.* at 629. See Gold, *supra* note 6; Alan D. Levine, Note, *Solving New Jersey's Solid Waste Problem Constitutionally - or - Filling the Great Silences With Garbage*, 32 RUTGERS L. REV. 741 (1979) (predicting retaliation by other states to New Jersey's efforts to ban garbage).

123. *Browning-Ferris, Inc. v. Anne Arundel County*, 438 A.2d 269 (Md. 1981); *Shayne Bros., Inc. v. Prince George's County*, 556 F. Supp. 182 (D. Md. 1983); *Dutchess Sanitation Servs., Inc. v. Town of Plattekill*, 417 N.E.2d 74 (1980). *But see* *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980). The court upheld a similar ordinance to that of *Plattekill* because the plaintiff failed to show that it accepted out-of-state waste.

124. See *supra* notes 85-87, 120 and accompanying text.

125. *Philadelphia*, 437 U.S. at 626-27. The application of this rule has not been limited to nonhazardous waste but has been applied to low level nuclear waste as well. *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

126. See, e.g., *Philadelphia*, 437 U.S. at 621 (holding unconstitutional New Jersey statute banning out-of-state waste).

127. A representative statute is Michigan Compiled Laws Annotated § 299.413a, which banned all out-of-county waste. "A person shall not accept for disposal solid waste or municipal solid waste incinerator ash that is not generated in the county in



By limiting the restrictions only to government-owned disposal sites, the municipalities argued that the market participant exception should apply. The governments contended that, as participants in the landfill market, they could decide whose waste to accept.

In *County Commissioners of Charles County v. Stevens*,<sup>128</sup> a ban limiting the use of a county-owned landfill to county residents was upheld. The court found that the county was entitled to market participant immunity because the ban merely limited the benefits of the landfill to the county taxpayers who had paid for it.<sup>129</sup> The decision noted that the ban did not restrict the disposal of waste collected outside the county.<sup>130</sup> The court did not deem the complete lack of private landfills important since anyone who wished to enter the landfill market in competition was free to do so.<sup>131</sup>

Citing *Stevens*, a federal court reached a similar decision the same year in *Shayne Brothers, Inc. v. District of Columbia*.<sup>132</sup> Here the District operated several landfills, some of which were actually outside of the District's boundaries, and banned waste collected elsewhere.<sup>133</sup> The court had no trouble finding market participation,<sup>134</sup> even in the case of the landfills outside the District's boundaries. There, the District enjoyed no special powers and was only another private landfill operator.<sup>135</sup>

In another case, *Harvey & Harvey, Inc. v. Delaware Solid Waste Authority*,<sup>136</sup> a court upheld an out-of-state waste ban by distinguishing *Philadelphia*.<sup>137</sup> The court said *Philadelphia* stood for the rule that a state could not gain benefits at the expense of those out-of-state.<sup>138</sup> Here it concluded that the aim was not to gain benefits but purportedly to protect health and the environment,<sup>139</sup> the very two arguments that New Jersey had made and lost.<sup>140</sup> Questionably, the court concluded that the state act had only "incidental impact on commerce between the states."<sup>141</sup>

In *Evergreen Waste Systems, Inc. v. Metropolitan Service District*,<sup>142</sup> a three county solid waste planning district banned waste generated

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which the disposal area is located unless [the county so authorizes]." MICH. COMP. LAWS ANN. § 299.413a (West 1984 & Supp. 1991).

128. 473 A.2d 12 (Md. 1984).

129. *Id.* at 19-21.

130. *Id.* at 19, 20.

131. *Id.* at 19.

132. 592 F. Supp. 1128 (D.D.C. 1984).

133. *Id.* at 1130.

134. *Id.* at 1133-34.

135. *Id.*

136. 600 F. Supp. 1369 (D. Del. 1985).

137. 437 U.S. 617 (1978).

138. *Harvey*, 600 F. Supp. at 1380.

139. *Id.*

140. *See supra* notes 115-120 and accompanying text.

141. *Harvey*, 600 F. Supp. at 1380.

142. 820 F.2d 1482 (9th Cir. 1987).

outside the district from the district landfill.<sup>143</sup> In upholding the prohibition, the court found that the ban "applie[d] to only one of Oregon's many landfills"<sup>144</sup> and that it affected waste from most other counties within the state as well as waste from out-of-state.<sup>145</sup> Using a balancing test, it concluded that the ordinance regulated evenhandedly and treated out-of-state waste the same as most in-state waste.<sup>146</sup> Also, the prohibition placed only an incidental burden on interstate commerce since other landfills were available in Washington and Oregon.<sup>147</sup>

The Service District's act of banning non-local waste is distinguishable from the market participant exception. As a market participant, a government entity like the District of Columbia in *Shayne Brothers*<sup>148</sup> and South Dakota in *Reeves*,<sup>149</sup> is free to choose with whom it will trade or contract. The *Evergreen* ban typifies the local waste ban. The locality bans non-local waste from only a small percentage of the state's landfills overall, leaving the rest available for waste regardless of source.<sup>150</sup>

The *Evergreen* rationale, however, has been criticized.<sup>151</sup> By using a rational basis balancing test instead of the strict scrutiny standard, the court permitted a facially discriminatory statute to stand.<sup>152</sup> The potential threat to interstate commerce that the ruling presented has been noted.<sup>153</sup> If every locality in a state passed a similar law, the effect would be the same as a state ban on out-of-state garbage.

Although the Supreme Court has rendered *Evergreen's* validity questionable by striking down instances of intrastate discrimination affecting interstate trade,<sup>154</sup> other courts continue to follow the *Evergreen* rationale.<sup>155</sup> If this line of cases continues, then the local waste ban could join the market participant exception as a way to avoid Commerce Clause scrutiny.

The most dramatic interpretation of the Commerce Clause exceptions occurred in *LeFrancois v. Rhode Island*.<sup>156</sup> The state legislature enacted

143. *Id.* at 1483.

144. *Id.* at 1484.

145. *Id.*

146. *Evergreen*, 820 F.2d at 1484-85.

147. *Id.* at 1485.

148. *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128, 1133-34 (D.D.C. 1984).

149. *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980).

150. *Evergreen Waste Systems*, 820 F.2d at 1484.

151. Meltz, *supra* note 67.

152. *Id.*

153. *Exclusion of All Non-Oregon Waste Envisioned*, 18 Env't Rep. (BNA) 835 (July 17, 1987) (citing plaintiff's attorney).

154. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984), reached the same conclusion under the Privileges and Immunities Clause of U.S. CONST. art. IV, § 2, cl. 1.

155. *Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources*, 732 F. Supp. 761 (E.D. Mich. 1990) (holding an out-of-county waste ban does not overtly discriminate against out-of-state waste), *aff'd*, 931 F.2d 413 (6th Cir. 1991).

156. 669 F. Supp. 1204 (D.R.I. 1987).

a law limiting the use of one specified state-owned landfill<sup>157</sup> to state-generated waste only. Significantly, the landfill was the largest landfill still operating in New England and the only one in Rhode Island that accepted non-hazardous solid waste.<sup>158</sup> The result was that Rhode Island had effectively shut out garbage from other states.<sup>159</sup>

Nevertheless, since the statute was limited to only one landfill, the act would probably have met the *Evergreen* test for a local use only ban. However, the court never reached that issue, finding that, as a state-owned facility, the market participant exception applied.<sup>160</sup> The court noted that "in its practical effect" the act was "identical to the New Jersey statute"<sup>161</sup> in *Philadelphia*<sup>162</sup> and, as such, should have been invalidated. However, applying the law solely to a state-funded landfill proved a "critical distinction."<sup>163</sup> Finally, the court refused to create an exception to the market participant exception for a "monopoly in landfill services."<sup>164</sup> The court noted that, while the state may own the only landfill, no mechanism existed to stop anyone else from opening a new landfill.<sup>165</sup> Moreover, at least four such landfill applications were then pending in Rhode Island.<sup>166</sup>

Several principles have emerged from these recent Dormant Commerce Clause/solid waste cases. First, the Dormant Commerce Clause applies equally to efforts by states<sup>167</sup> to ban out-of-state waste, as well as to each state's political subdivisions.<sup>168</sup> Second, a state can freely ban or limit waste entering landfills provided no distinction is made based on the waste's origin.<sup>169</sup> Third, the market participant exception permits discriminatory bans, if limited to government-owned or operated landfills,<sup>170</sup> provided private landfills are not barred.<sup>171</sup>

### CONCLUSION

In an effort to ban out-of-state garbage from their landfills, states and their political subdivisions have been seizing the market participant exception as a loophole to avoid Commerce Clause scrutiny. While the exception has its merits, the states, through their domination of the landfill business, have so abused the exception as to make it meaningless.

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157. *Id.* at 1206.

158. *Id.*

159. *Id.*

160. *LeFrancois*, 669 F. Supp. at 1212.

161. *Id.* at 1208.

162. 437 U.S. 617 (1978).

163. *LeFrancois*, 669 F. Supp. at 1208.

164. *Id.* at 1212.

165. *Id.* at 1211.

166. *Id.*

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

168. *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984).

169. *See Philadelphia*, 437 U.S. at 626-27.

170. *See supra* notes 128-41 and accompanying text.

171. *See supra* note 165 and accompanying text.

Since over ninety percent of America's waste goes into landfills,<sup>172</sup> and over eighty percent of those landfills are government-owned or operated,<sup>173</sup> the exception is quickly becoming the rule.

The market participant theory worked well when applied to a single cement plant, but when eighty percent of the participants claim that they are the exception, something is obviously wrong. In light of these statistics and the lower courts' applications of the rule, it is time for the Supreme Court to revisit the market participant exception.

Some commentators have suggested that the market participant exception should be eliminated altogether as violative of both the Commerce Clause and the Privileges and Immunities Clause.<sup>174</sup> Others have said that the exception should be limited to situations where the state is allowed to discriminate and pursues a minimally burdensome means,<sup>175</sup> quite similar to the rule's current applications.

This author suggests that a middle approach is more desirable. Market participation in the waste disposal field should be limited to where the state is entering the market for its own benefit. The state participant would have to actually use the waste disposal site itself for its own, state-generated waste.

Merely owning the site and reserving its use to resident taxpaying citizens should not be enough. A state allowing only taxpayers to use a state site is not really participating in the market itself. Rather, the state's invocation of the market participant exception is merely a facade to conceal the state's discriminatory purpose. It is attempting to gain an economic advantage for its citizens. This benefit would come at the expense of other states; exactly what the Framers designed the Commerce Clause to prevent.

The proposed application would maintain consistency with prior Supreme Court decisions. In *Hughes*,<sup>176</sup> the state cleared its own highways. The cement plant in *Reeves*<sup>177</sup> had originally been built to supply public enterprises, and presumably, continued to do so. At the same time, it would curtail the trend towards an abusive expansion of the market participant exception. This would limit the state to claiming the exception solely for state-generated waste.

In light of this conclusion that the market participant exception should

172. DAVIDSON & DELOGOU, *supra* note 3, at 4-3 to 4-4.

173. David Pomper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Post-Industrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1311 (1989).

174. William A. Campbell, *State Ownership of Hazardous Waste Disposal Sites: A Technique for Excluding Out-of-State Wastes?*, 14 ENVTL. L. 177 (1983). *But see*, Bruce H. Aber, Note, *State Regulation of Out-of-state Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception*, 1 FORDHAM ENVTL. L. REP. 99 (1989).

175. Pomper, *supra* note 173, at 1313.

176. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 801 (1976).

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

be limited in order to maintain national economic harmony, recent Congressional attempts<sup>178</sup> to remove waste regulation from judicial review are ill-advised. Such action would result in a situation adverse to the Framers' intent and over two hundred years of constitutional history. To allow state regulation of interstate waste commerce is to crack open the door to the dangers of interstate trade reprisals.

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178. *See, e.g., supra* note 87.