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## State Regulation of Out-of-State Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception

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REVIEW AND THE MARKET PARTICIPANT  
EXCEPTION**

**INTRODUCTION**

The image of "The Mobro," the notorious barge filled with New York garbage, traveling up and down the East Coast in a futile attempt to find a resting place for its cargo, exemplifies the landfill shortage that is threatening our nation.<sup>1</sup> This shortage has forced many cities to haul their garbage to distant landfills in other states.<sup>2</sup> Often, hauling garbage to other states is a short-term measure intended to handle garbage until incinerators can be built and operated.<sup>3</sup> But alternatives such as incineration and recycling will not eliminate the need for landfills. Landfills will be needed for the materials that cannot be recycled, for the ash that remains after burning, and for the garbage produced during the periods the incinerators are shut down.<sup>4</sup>

The increase in out-of-state dumping has led to the enactment of legis-

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1. Cook, *Garbage Law: It's Not a Trashy Practice*, NAT'L L.J., Nov. 2, 1987, at 1, col. 1; see *New York Public Int. Res. Group v. Town of Islip*, 71 N.Y.2d 292, 520 N.E.2d 517, 525 N.Y.S.2d 798 (1988) (upholding consent order permitting an increase in the height of the Islip town landfill and burial of ash in the landfill); see also Cook, *supra*, at 1, col. 4 (the nation's dump sites are reaching capacity and will run out of available landfill space by the 1990s); see generally Bronstein, *Garbage Landfills in Half of the States Approaching Capacity*, N.Y. TIMES, Feb. 12, 1987, at A 20, col.1; Bunch, *Trash Over the Long Haul*, *Newsday*, Dec. 14, 1987, at 6, col. 1; Rice, *Where Will We Put That Garbage*, FORTUNE MAGAZINE, Apr. 11, 1988, at 96, col. 1.

2. Bunch, *supra* note 1, at 30, col. 1. See Cook, *supra* note 1, at 1, col. 4; Bronstein, *supra* note 1, at A20, col. 1; Rice, *supra* note 1, at 96, col. 2. Since 1980 the amount of available landfill space has decreased nationwide. One study indicates that all but four states are running out of suitable locations. *Id.* at 96, col. 1; see generally H.R. REP. NO. 1491, 94th Cong., 2d Sess., at 3 (1976) [hereinafter H.R. REP. NO. 1491], reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6240 & 6247 (the lack of available landfill space has forced cities to transport their garbage to distant out-of-state sites).

For example, on Long Island, New York, long distance hauling of garbage to distant sites in the Midwest has increased significantly since 1984. Bunch, *supra* note 1, at 30, col. 1. This has resulted in enormous tax costs being levied on taxpayers in the exporting towns. It is expected that by 1989 roughly half of Long Islands garbage will be hauled out-of-state. *Id.* Despite attempts by Long Island townships to restrict long distance hauling, state officials have ruled that they have little choice because of a 1983 law restricting landfill expansions. *Id.* The rationale for the law is that land burial and disposal poses a significant threat to the quality of drinking water on Long Island. N.Y. ENVTL. CONSERV. LAW § 27-0704 (McKinney 1984 & Supp. 1988).

Long Island's landfill problems are not different from those in other states. For example, in New Jersey several giant landfills were closed or restricted this past year. Bunch, *supra* note 1, at 30, col. 1. It is expected that New Jersey will soon haul over half of the garbage it produces. *Id.*; see also Rice, *supra* note 1, at 96, col. 2. In addition, local opposition to alternative forms of waste management has forced cities such as Boston and Philadelphia to haul garbage out-of-state. *Id.* See also Bronstein, *supra* note 1, at A20, col. 1.

3. Bunch, *supra* note 1, at 30, col. 1.

4. *Id.* Although a small amount of material is recycled, composted, or incinerated, most solid waste is landfilled. Eisler, *Throwing it Away in New Jersey: A Comprehensive*

lation meant to curb it. As more states restrict the importation of out-of-state waste the incentive to haul garbage long distance will decrease. Discouraging the costly alternative of long-distance hauling<sup>5</sup> will reduce the economic,<sup>6</sup> environmental,<sup>7</sup> and legal<sup>8</sup> burdens that long-distance hauling forces on residents in the recipient and exporting states.<sup>9</sup> It will also make states more responsible for their own garbage, thereby encouraging them to develop safer environmental alternatives to solid waste dumping.<sup>10</sup> Furthermore, it will prevent states from being forced to accept

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*look at waste disposal* 17 (American Lung A. of N.J. with support from the N.J. Dep't of Env'tl. Protection, 1983).

5. Bunch, *supra* note 1, at 30, col. 2. *See generally*, H.R. REP. NO. 1491, *supra* note 2, at 9 (long distance hauling and disposal of garbage is a costly alternative); *id.* (only education and road construction surpass garbage disposal as the most expensive item in the local budget); Rice, *supra* note 1, at 96, col. 2 (the cost of dumping has risen steeply); Eisler, *supra* note 4, at 21 ("The cost of collecting and disposing of our . . . solid waste comes to about . . . \$240 million to \$400 million a year). Landfill dumping costs, commonly known as tipping fees, range from \$1.06 to \$4.65 a cubic yard).

6. Bunch, *supra* note 1, at 6, col. 1 (enormous tax bills, spread of pollution, and the risk of future lawsuits to clean up out-of-state sites under Superfund legislation, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9657); *see* Eisler, *supra* note 4, at 22 ("There are also hidden charges. The environmental costs of polluting our land, air, and water with materials which could be recycled or reused, or burned for energy, or which never should have entered the waste stream in the first place have never been calculated"). *See infra* notes 7-8 and accompanying text.

7. The high cost of hauling garbage long-distances has led trucking companies to resort to the practice of "back-hauling". Bunch, *supra* note 1, at 6, col. 1. "Backhaulers" are truckers who haul foodstuff and consumer goods one way, and then look to make money on their return trip by hauling garbage. *Id.* at 30, col. 1. Backhaulers use both regular tractor trailers and refrigerated trailers designed to haul food products, thereby creating potentially serious public health problems. *Id.* at 6, col. 1.

The garbage trucking industry is so new that federal, state, and local environmental agencies have no specific laws or regulations to deal with backhauling. *See id.* at 31, col. 1 ("The lack of regulation of long distance garbage trucking is in sharp contrast to federal rules on hazardous waste shipping," partially because of the large volumes involved and because garbage is not toxic). *See generally*, Solid Waste Action Team (S.W.A.T.) monitoring of Fairfield Landfill, Amanda Ohio, statistical data (Fordham Environmental Law Report File).

8. *See* Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(a)(3) (1982 & Supp. IV 1986), *as amended by* Act of October 17, 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) *reprinted in* 1986 U.S. CODE & CONG. & ADMIN. NEWS 2835, 2837 (States that export garbage will incur lawsuits if recipient landfills in other states later must be cleaned up under this legislation).

9. *See* Cook, *supra* note 1, at 32, col. 3 ("States have found themselves embroiled in litigation [over] where to dump . . . the trash"); Bronstein, *supra* note 1, at A20, col. 2 ("Public opposition has made it very difficult to create new landfills or . . . expand old ones"); Bunch, *supra* note 1, at 32, col. 4. (The mass exodus of garbage to landfills in other states is robbing the recipient states of space in which to dump its own garbage, and is discouraging aggressive recycling and reduction efforts by residents of these recipient states).

10. *See* 42 U.S.C. § 6901 (b)(8) (Supp. IV 1986) (alternative methods of land disposal must be developed since states are running out of suitable solid waste disposal sites); H.R. REP. NO. 1491, *supra* note 2, at 10 (advocating resource conservation by recycling materials); Solid Waste Management Act of 1988, 1988 N.Y. Laws 187 (McKinney) (state and local solid waste management policy, focusing on alternatives to landfilling such as waste

garbage from other states, thus reducing the likelihood that states will use waste disposal as a political or economic bargaining chip in their relations with other states.<sup>11</sup>

Although the Federal government, pursuant to its powers under the commerce clause<sup>12</sup>, has regulated garbage in the past,<sup>13</sup> it has taken the position that garbage is a matter more appropriately handled at the state and local levels.<sup>14</sup> This does not mean, however, that states have unbridled discretion in regulating solid waste disposal. On the contrary, there are limitations imposed on both state and local government by what has been termed the "dormant" commerce clause.<sup>15</sup>

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reduction, recycling, and incineration); *see generally*, Cook, *supra* note 1, at 33-34 (states are establishing waste reduction and clean-up programs, as well as encouraging recycling efforts and trash to energy incinerators); Bronstein, *supra* note 1, at A20, col. 3-5 (burn, recycle, waste reduction); Bunch, *supra* note 1, at 32, col. 3-4 (land entrepreneurs plan to convert abandoned coal mines to solid waste disposal facilities, and use railroad cars and barges to ship the garbage); Rice, *supra* note 1, at 98, col. 2, & 100, col. 1-2 (garbage to energy plants (mass-burn incineration) and recycling efforts).

11. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978). In *City of Philadelphia*, the Supreme Court struck down a New Jersey state statute banning out-of-state waste because it exceeded a state's power to regulate waste under the commerce clause. Dicta in the case supports an interpretation of the commerce clause that will allow states to send their waste into other states whenever the sending states find it "expedient or necessary to do so." *cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 443 (1980) (embargo may be retaliated by embargo and commerce would be halted at state lines); *Robertson v. California*, 328 U.S. 440, 458 (1946) (the commerce clause does not give states the right to use other states as a dumping ground by importing into other states "whatever one may please").

12. U.S. Const. art. 1, sec. 8. Garbage is considered a "good" in interstate commerce and merits protection under the Commerce Clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

13. Congress has acknowledged the threat to public health and welfare posed by the problem of solid waste by enacting the Resource Conservation and Recovery Act of 1976 [hereinafter R.C.R.A.] Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6991 (Supp. 1V 1986)). This statute typifies a flaw present in most of the federal regulations in that it serves to address the problem of hazardous waste as opposed to solid waste. The regulatory provisions of R.C.R.A. are restricted to the toxic subclass of solid wastes categorized as "hazardous wastes." *See id.* §§ 6921-6939. The problem of non-hazardous municipal and industrial solid waste is attacked using an incentives system, whereby the granting of federal funds is conditioned upon a state's implementation of solid waste disposal plans complying with minimum federal standards. 42 U.S.C. §§ 6941-6949 (Supp. 1V 1986). Moreover, the federal guidelines pursuant to subchapter four, Solid Waste, are not mandatory upon the states, whereas the subchapter three, Hazardous Waste, guidelines are mandatory. 42 U.S.C. §§ 6921-6949.

The federal government, until now active in regulating mostly hazardous waste, is contemplating a larger role in the disposal of ordinary solid waste. Cook, *supra* note 1, at 32, col. 1-2.

14. *See, e.g., R.C.R.A.*, 42 U.S.C. § 6901(a)(4) (1982) (Congress finds with respect to solid waste "that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies, the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate Federal action . . . to reduce the amount of waste . . . and to provide for proper and economical solid waste disposal practices."

15. The limitations or negative implications of the commerce clause have alternatively been referred to as the "dormant" commerce clause, *See, e.g. White v. Massachusetts*

There are two primary review standards by which the courts have analyzed environmental statutes regulating the importation of out-of-state waste under the dormant commerce clause: a "heightened scrutiny" review<sup>16</sup>, and a "balancing of interests" review.<sup>17</sup> In addition, certain environmental statutes stand outside the scope of constitutional inquiry because of the "market participant exception" to the dormant commerce clause.<sup>18</sup> Recent case law indicates that state and local governments can successfully restrict out-of-state garbage if they satisfy a balancing of interests standard of review under the dormant commerce clause<sup>19</sup> or become market participants<sup>20</sup> in the solid waste landfill market.

This Note examines these two methods of restricting out-of-state waste. Part I offers a brief overview of the commerce clause and discusses how it relates to the problem of garbage disposal. Part II analyzes the two review standards by which the courts have analyzed state regulation of out-of-state waste under dormant commerce clause analysis. This Note then examines the market participant exception to commerce clause review. Finally, this Note compares the balancing test with the market participant exception and argues that states who achieve market participant status can more successfully restrict out-of-state waste than states who try to satisfy the balancing test.

## I. AFFIRMATIVE AND DORMANT COMMERCE CLAUSE POWERS

The commerce clause of the United States Constitution grants Congress power "to regulate Commerce . . . among the several States."<sup>21</sup> The primary purpose of the commerce clause is to ensure cooperation among the states in the area of interstate trade.<sup>22</sup> The framers wanted to avoid the economic isolation and division that had plagued relations among the Colonies and later among the States under the Articles of Confederation.<sup>23</sup>

The power of Congress to promote interstate commerce also includes the power to regulate the local movement of goods traveling within interstate commerce in both the states of origin and destination, which might

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setts Council of Const. Employers, 460 U.S. 204, 213 (1983) (scrutinizing a Boston city hiring policy for commerce clause violation), or "negative" commerce clause. See Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax Exempt Bonds*, 31 VAND.L.REV. 473 (1978). These limitations were recognized in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

16. See *infra* notes 38-45 and accompanying text.

17. See *infra* notes 47-53 and accompanying text.

18. See *infra* notes 54-82 and accompanying text.

19. See *infra* notes 47-53 and accompanying text.

20. See *infra* notes 54-82 and accompanying text.

21. U.S. CONST. art. I sec. 8.

22. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

23. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979); See *H.P. Hood*, 336 U.S. at 533-34; *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 522 (1935).

have a substantial and harmful effect upon commerce.<sup>24</sup> Though the language of the commerce clause, as written, explicitly grants power to Congress, it has long been recognized that this grant of power implicitly limits the authority of the states in the area of interstate commerce.<sup>25</sup> This limitation placed on the states has come to be known as the "dormant commerce clause."<sup>26</sup> The limitation imposed by the dormant commerce clause on state regulatory power is not absolute, and states retain authority under their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected.<sup>27</sup> Yet even in regulating local concerns, the state may not put itself in a position of economic isolation.<sup>28</sup> More specifically, the dormant commerce clause operates to ensure that our nation's economic system and freedom in interstate trade will not be jeopardized by states acting as independent and self-interested economic actors.<sup>29</sup>

In *City of Philadelphia v. New Jersey*,<sup>30</sup> the United States Supreme Court held that garbage was an item of commerce<sup>31</sup> and struck down a New Jersey statute which prohibited the importation of garbage which originated outside the state.<sup>32</sup> Despite having a legitimate environmental

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24. *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264 (1981).

25. *See C.T.S. Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87, (1987); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *H.P. Hood*, 336 U.S. at 534-38; *Cooley v. Board of Wardens*, 53 U.S. 299 (1852).

26. *See White v. Massachusetts Council of Const. Employers*, 460 U.S. 204, 213 (1983); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) ("The bounds of these [dormant commerce clause] restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this [Supreme] Court giving effect to its basic purpose"). *See also H.P. Hood*, 336 U.S. at 539; *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945); *see generally Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960) (the dormant commerce clause limitations apply with equal force to all laws and regulations that effect interstate commerce, whether at the state, county, or municipal level).

27. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960) (state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity). *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977) (general police powers); *See also Pike v. Bruce Church, Inc.* 397 U.S. 137, 146 (1970); *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Hillsborough County, Florida v. Automated Medical Laboratories Inc.*, 471 U.S. 707 (1985).

28. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935).

29. *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 12 (1986).

30. 437 U.S. 617 (1978).

31. *City of Philadelphia v. New Jersey*, 437 U.S. at 622 ("All objects of interstate trade merit Commerce Clause protection").

32. 437 U.S. at 627 (1978). *See generally*, Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965), *codified as amended at* 42 U.S.C. §§ 6901-6991 (1982 & Supp. IV 1986). State statutes prohibiting the importation of most out-of-state waste are not preempted by the Solid Waste Disposal Act, other provisions of federal law, or because of general incompatibility with federal objectives. Rather, such statutes are violative of the commerce clause because they impose on sending states the full burden of conserving the recipient state's landfill space. *See City of Philadelphia v. New Jersey*, 437 U.S. 617

purpose in conserving its own landfill space and thereby easing its solid waste disposal problems, the Court held that New Jersey's discrimination against out-of-state garbage had exceeded the limitations imposed by the dormant commerce clause.<sup>33</sup> The Court's decision in *City of Philadelphia* reversed a trend spanning a few decades, in which the Supreme Court and lower federal courts had allowed for the conservation of resources by states even though interstate commerce was incidentally burdened.<sup>34</sup> Moreover, the Supreme Court in *City of Philadelphia*, by concluding its analysis without balancing New Jersey's state interest, abandoned its long-established sensitivity to the legitimate interests of the states.<sup>35</sup>

There is a recent trend of cases in which the courts have recognized constitutional ways for states to restrict out-of-state waste that differ from the total ban on out-of-state waste struck down in *City of Philadelphia*. States are able to regulate against interstate commerce without violating the dormant commerce clause by use of both "even-handed" regulations<sup>36</sup> and the market participant exception.<sup>37</sup>

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(1978); see also H.R. REP. NO. 1491, supra note 2, at 3 (State movement to ban the importation of waste have raised serious questions concerning restraint of trade and interference with interstate commerce).

New York's highest court has ruled that local laws making municipal landfills off-limits to waste generated outside the town's borders are valid so long as they do not prohibit waste from out-of-state. *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 684-85, 435 N.Y.S.2d 966, 968-69, 417 N.E.2d 78 (1980); See also *Dutchess Sanitation Service, Inc. v. Town of Plattekill*, 51 N.Y.2d 670; 435 N.Y.S.2d 962, 417 N.E.2d 74 (1980).

33. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

34. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (as a market participant, a cement plant owned by South Dakota may favor in-state customers during a cement shortage); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upheld Maryland regulatory scheme which favored in-state sale of auto hulks); *Const. Indus. A. of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976) (ban on further building); *Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975) (ban on phosphate detergents).

35. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (upheld state's police power in regulation of out-of-state activities damaging the state's environment); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (upholding state's public nuisance action to enjoin acts beyond their territorial limits impacting on their environment); see also *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (undertook a balancing test to strike down state statute prohibiting operation of trains with more than fourteen passenger cars or seventy freight cars); see generally *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970) (established general rule that where a state "statute regulates even-handedly 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").

36. See *infra* notes 47-53 and accompanying text.

37. See *infra* notes 54-82 and accompanying text.

## II. STANDARDS OF REVIEW OF ENVIRONMENTAL STATUTES RESTRICTING OUT-OF-STATE WASTE UNDER THE DORMANT COMMERCE CLAUSE

### A. "Heightened Scrutiny" Review

"Heightened scrutiny" or "strict scrutiny"<sup>38</sup> is the standard of review for state regulatory measures that discriminate against interstate commerce.<sup>39</sup> Even if the regulation deals primarily with matters of local concern, heightened scrutiny is applied if the measure is protectionist in nature.<sup>40</sup> Included in this test is a determination of whether the state statute advances a legitimate state purpose.<sup>41</sup> A statute may withstand heightened scrutiny review if the state or local government provides a sufficient reason for the discrimination, such as a legitimate state

38. The Court uses the term "strictest scrutiny" alternatively with "heightened scrutiny." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

39. A statute that "overtly blocks the flow of interstate commerce at a state's borders" falls most easily into the "heightened" scrutiny category. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). In such cases, a "virtual per se" rule of unconstitutionality is applied. *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, (1984); *City of Philadelphia v. New Jersey*, 437 U.S. at 624 (1978).

40. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (discriminatory on its face); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (neutral on its face but discriminatory in purpose); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (neutral on its face but discriminatory in effect). Environmental acts which merely burden (without discriminating against) interstate commerce are not per se invalid under *City of Philadelphia*, see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), and will be scrutinized under the Balancing of Interests Review. See *infra* notes 47-53 and accompanying text.

The Supreme Court has recognized that there is no bright line distinction between the "discriminatory effects" of state regulation held per se invalid under the commerce clause in *Hunt* and "incidental burdens" of state regulation to which the balancing approach is applied. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). A finding that state regulation constitutes "economic protectionism" can be made on the basis of either discriminatory purpose, *Bacchus Imports, Ltd.* 468 U.S. 263 (1984), or discriminatory effect, *Clover Leaf Creamery Co.*, 449 U.S. at 471 n.15; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

The rationale for applying a heightened scrutiny analysis to state regulations which disproportionately burden out-of-state interests relates to the adequacy of the political process. The State's political processes have less incentive to check state regulation when the burden falls mainly on out-of-state interests. *Norfolk Southern Corp. v. Oberly*, 632 F.Supp. 1225, 1233 n.14 (D. Del. 1986), *aff'd*, 822 F.2d 388 (3rd Cir. 1987). See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981).

41. *Washington State Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). See also, *Bowman v. Chicago & Northwestern Ry.* 125 U.S. 465, 489 (1888) (public health); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (same); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (promotion of the conservation of energy and environmental protection); *Asbell v. Kansas*, 209 U.S. 251, 256 (1908) (protection of health of people and animals).

In contrast, statutes with illegitimate or non-existent justifications inherently discriminate against out-of-state interests and will be struck down automatically without further inquiry. See, e.g., *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 538 (1949) (milk-purchasing licenses); *Hughes v. Oklahoma*, 441 U.S. 322, 339 (1979) (minnows); *Pennsylvania v. West Virginia*, 262 U.S. 553, 598-600 (1923) (natural gas).

purpose.<sup>42</sup>

In each instance where the Supreme Court has struck down a state law under a "heightened scrutiny" review, it was confronted with a law that imposed a total ban on imported or exported goods.<sup>43</sup> This ban had the effect of precluding interstate commerce of a particular good while leaving unaffected the intra-state trade of that good. Thus, the Court's decisions indicate that "heightened scrutiny" only applies when there is discrimination against interstate versus intra-state movement of goods and not when there is discrimination solely against a good itself<sup>44</sup>. For instance, the Court in *City of Philadelphia v. New Jersey* indicated that New Jersey could preserve its available landfill space by restricting the flow of all waste into its landfills, regardless of origin, even though incidental burdens on interstate commerce might result.<sup>45</sup> When states pursue such regulations "evenhandedly" to effectuate a legitimate public interest, the courts proceed from the "heightened scrutiny" review to the "balancing of interests" review.<sup>46</sup>

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42. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-627 (1978) (New Jersey statute which placed the burden of conserving the state's remaining landfill space on out-of-state commercial interests was held to be discriminatory despite a legitimate legislative purpose). The Court stated that the legislative purpose was irrelevant to its constitutionality because the "evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626. States must demonstrate a close fit between burden on interstate commerce and the asserted legitimate local purposes. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982).

43. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. at 617 (banning out of state waste from New Jersey landfills, but not similarly restricting disposal of New Jersey waste); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (barred exports of Oklahoma minnows but allowed for in-state sales).

44. See *City of Philadelphia v. New Jersey*, 437 U.S. at 626; see also *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 401 (3rd Cir. 1987).

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

46. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

Cases involving state highway safety regulation come under a third category of review: a deferential review standard. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 405 (3rd Cir. 1987). See also *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981). Special deference is accorded highway safety regulations on the assumption that the burden of facially even-handed highway safety regulations usually fall on in-state as well as out-of-state interests, thus providing a political check on unduly burdensome regulations. *Kassel*, 450 U.S. at 675 (citing *Raymond Motor Transport, Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978)).

Use of a deferential review standard for highway safety regulation results in a presumption of validity stronger than the "balancing of interests" review under *Pike*. *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1233 (D. Del. 1986), *aff'd*, 822 F.2d 388 (3rd Cir. 1987). The extent of this presumption, however, remains unsettled. *Id.* See *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 523-24 (1959) (grouping highway regulation with other categories of regulation, but employing the balancing test). Uncertainty about the use of a deferential review standard for highway safety regulation in *American Trucking Associations v. Larson*, 683 F.2d 787 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982), weakens the applicability of the deferential approach in other contexts. See *Norfolk Southern Corp.*, 632 F. Supp. 1225, 1233 (D. Del. 1986), *aff'd*, 822 F.2d 388 (3rd Cir. 1987).

The Supreme Court has not applied the deferential review standard to nondiscrimina-

## B. "Balancing of Interests" Review

States that regulate the importation of out-of-state garbage may be able to avoid a commerce clause violation by satisfying a balancing test under dormant commerce clause analysis. The first part of the balancing test requires that the ordinance: 1) regulate evenhandedly; 2) effectuate a legitimate local public interest; 3) have only an incidental effect on interstate commerce; and 4) not burden commerce excessively in relation to the local benefits.<sup>47</sup> Assuming that the state statute meets each of these requirements, the Court then considers the nature of the local interest involved and whether the local interest could be promoted with a less discriminatory impact on interstate commerce.<sup>48</sup>

States attempting to restrict out-of-state garbage welcomed the recent Ninth circuit ruling in *Evergreen Waste Systems v. Metropolitan Serv. Dist.*<sup>49</sup> The *Evergreen* court ruled that the Portland, Oregon metropolitan government (The District), in order to extend the life of its landfill,

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tory environmental statutes. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (applying balancing test). Lower courts have also resorted to use of the balancing test to review state statutes in the environmental area. See *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987); *Al Turi Landfill, Inc. v. Town of Goshen*, 556 F. Supp. 231 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 287 (2d Cir. 1982).

47. *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443; see also *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 820 F.2d 1482, 1484; *Washington State Bldg. and Const. Trades Council v. Spellman*, 684 F.2d 627, 630-631 (9th Cir. 1982), *cert denied*, 461 U.S. 913 (1983).

48. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977) (where a state law or regulation discriminates against interstate commerce in favor of local interests, the burden falls on the state to justify it in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interest at stake).

For the past two decades the Supreme Court has primarily used a balancing test to decide whether state regulations impose an "undue burden" on interstate commerce. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 966 (1987). The balancing test articulated in *Pike v. Bruce Church, Inc.* is most prominent in dormant commerce clause cases. *Id.*

The Supreme Court has applied the *Pike* balancing test to state regulation designed to protect the environment. *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1239 (D. Del. 1986), *aff'd*, 822 F.2d 388 (3rd Cir. 1987). See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); The balancing approach now prevails for evenhanded regulations. See *Arkansas Elec. Coop. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 389-394 (1983).

In a review of the dormant commerce clause cases Professor Regan has argued that a careful reading of the "movement of goods" cases demonstrates that, despite what it is saying, the Court is not balancing. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1094-95 (1986). Instead, Professor Regan argues that the dormant commerce clause is concerned primarily with purposeful economic protectionism. *Id.* Professor Aleinikoff has argued that in balancing the Court ignores analysis of text, precedent, and ethical tradition that is the usual stuff of constitutional interpretation. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. at 988.

49. *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987).

could restrict private haulers from nearby Washington state without violating the commerce clause.<sup>50</sup> The court noted that, unlike the ban on out-of-state waste struck down in *City of Philadelphia*, the District's ordinance applied to only one of Oregon's many landfills and barred waste from most Oregon counties as well as from out-of-state.<sup>51</sup> "[E]venhandedness," the court held, "requires simply that out-of-state waste be treated no differently from most Oregon waste."<sup>52</sup> Thus, the District's ordinance satisfied the dormant commerce clause balancing test.<sup>53</sup>

### III. MARKET PARTICIPANT EXCEPTION (STATE PLANNING)

#### A. Case Law

Whether or not a state statute satisfies the balancing test, the state may still regulate interstate commerce if it does so under the market participant exception to the dormant commerce clause.<sup>54</sup>

The Supreme Court has held that a state or local government is not subject to the restrictions of the commerce clause when it acts as a "market participant" as opposed to a "market regulator."<sup>55</sup> Nothing in the commerce clause prohibits a state, in the absence of congressional action, from participating in the market and thereby favoring its own citizens

50. *Id.* at 1485.

51. *Id.* at 1484; *See also* *Al Turi Landfill, Inc. v. Town of Goshen*, 556 F.Supp. 231 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 287 (2d Cir. 1982); *Borough of Glassboro v. Gloucester County Bd.*, 100 N.J. 134, 495 A.2d 49, *cert. denied*, 474 U.S.1008 (1985). In *Al Turi Landfill*, the court upheld a local ordinance restricting waste from outside the town's borders. The court quoted the *Pike* test and found that the ordinance was evenhanded and effected a substantial local interest. In *Glassboro*, a New Jersey statute enjoining use of a New Jersey landfill by all but three New Jersey counties was upheld by the Supreme Court of New Jersey. The court in *Glassboro* distinguished *City of Philadelphia*, noting that the injunction in the present case was unrelated to the garbage's place of origin. 495 A.2d at 55.

52. *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 820 F.2d 1482, 1484 (9th Cir. 1987) *citing* *Washington State Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *See also* *Loretto Winery Ltd. v. Gazzara*, 601 F.Supp. 850 *modified*, 761 F.2d 140 (2d Cir. 1985) (prohibiting sales of all wine products containing grapes grown outside of New York); *Waste Aid Systems v. Citrus County, Florida*, 613 F. Supp 102 (M.D. Fla. 1985) (county ordinance limiting available landfills was deemed even-handed even though it may foreclose the most cost efficient one); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93-94 (1987) (evenhanded statute reducing number of interstate transactions is not invalid).

53. *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 820 F.2d 1482,1485 (9th Cir. 1987).

54. *See infra* notes 55-82 and accompanying text.

55. *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204, 208 (1983); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). The Court in *Reeves, Inc.* referred to market-participant action as "state proprietary activity." 447 U.S. at 439 Recent legislative proposals by States have applied the "market-participant" exception under the guise of State Planning. If state or state subdivision acts as a market-participant rather than a market regulator the commerce clause does not "require independent justification" for any protectionist measure. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 809.

over others.<sup>56</sup> Judicial restraint in this area is counseled by policy considerations of state sovereignty,<sup>57</sup> the role of each state "as guardian and trustee" for its people,<sup>58</sup> fairness,<sup>59</sup> and the fact that a state, like a private business, should not be governed by the commerce clause when it enters the private market.<sup>60</sup>

The Court first enunciated the market participant exception to the Commerce Clause in *Hughes v. Alexandria Scrap Corp.*,<sup>61</sup> and significantly expanded it in *Reeves, Inc. v. Stake*.<sup>62</sup> In *Reeves*, the state of South Dakota limited the sale of cement from a state-owned plant to Dakota residents during a time of shortage.<sup>63</sup> The Court held that the resident-preference program did not violate the commerce clause because Dakota was acting as a market participant in the cement market.<sup>64</sup>

The decision in *Reeves, Inc.* rested on the Court's determination that cement is the end product of a "complex process," not a natural resource.<sup>65</sup> Dictum in *Reeves, Inc.* suggested that the market participant exception would not apply in cases involving the hoarding of natural resources and implied that landfill sites were a natural resource.<sup>66</sup> Thus, a state wishing to restrict the inflow of waste into its landfill sites under the market participant exception may be required to characterize the solid waste landfill facility as a complex process, rather than as a natural resource.<sup>67</sup> Because many waste disposal facilities are highly regulated,

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56. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

57. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980).

58. *Id.* at 438 (1980) (quoting *Atkins v. Kansas*, 191 U.S. 207, 222-23 (1903)).

59. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. at 446 (Reversal would discourage similar state projects because of the fear that other states would reap the benefits of its foresight, risk, and industry).

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

61. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upheld Maryland regulatory scheme which favored in-state sale of auto hulks).

62. *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980) (as market participant, cement plant owned by South Dakota may favor in-state customers during cement shortage). *See also White v. Massachusetts Council of Const. Employers*, 460 U.S. 204, 208 (1983) (The court upheld Boston's 50% local hiring quotas on construction projects funded by the city).

63. *Reeves, Inc. v. Stake*, 447 U.S. at 432-33 (1980).

64. *Id.* at 446.

65. *Id.* at 443-44 & n.16 (analogizing the cement plant to a railroad, mill, or irrigation system).

66. In *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978), the Court struck down a New Jersey statute that limited access to all publicly and privately owned land located in the state upon which landfills could be constructed. The Court reasoned that the statute "imposed on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." *Id.* It was in this context that the Court implied that landfill sites were natural resources. The Court in *Reeves, Inc.* recognized the possibility that "exemption for marketplace participation necessarily admits of [some] exceptions." 447 U.S. at 440 (1980). In upholding the market participant exception, the Court noted that "South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders." *Reeves, Inc.*, 447 U.S. at 444.

67. *See Cain, Routes and Roadblocks: State Controls on Hazardous Waste Imports*, 23

costly, and provide leachate control and other public services to state residents,<sup>68</sup> such a characterization would not be improper.<sup>69</sup>

Although the Supreme Court has not yet specifically recognized the market participant exception in the solid waste landfill market,<sup>70</sup> lower federal courts and state courts have recognized this exception in a number of recent decisions.<sup>71</sup> In *County Commissioners of Charles County v. Stevens*,<sup>72</sup> the Court of Appeals of Maryland addressed the question of landfill services in the context of a private refuse hauler's challenge to a county ordinance prohibiting the disposal of out-of-county waste at a county-owned landfill.<sup>73</sup> The court referred to the dicta in *Reeves, Inc.* and concluded that its landfill was not a natural resource and thus was not subject to any natural resource exception to the market participant rule.<sup>74</sup> The rationale behind this decision was that the county was not trying to hoard land but, rather, was preserving the benefits of a waste processing service for its residents. It accomplished this by providing by a costly, highly regulated waste disposal facility constructed and operated with tax revenues collected from its own citizens.<sup>75</sup> Therefore, the market involved was landfill services, and the market participant exception could be applied.<sup>76</sup>

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NAT. RESOURCES J. 767, 792 (characterizing waste disposal as a "production process . . . could be determinative before the courts").

68. *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 132 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987). Leachate involves the surface or subsurface runoff of discarded materials from inadequately designed landfill facilities. Such discarded materials consist of solid waste, semi-solid waste and sludge reduced to its liquid and gaseous forms. Leachate often results in contamination of underground water supplies. See H.R. REP. NO. 1491, *reprinted in*, 1976 U.S. CODE CONG. & ADMIN. NEWS 6240, 6248, 6256-57, 6276.

69. *See* *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 132 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987) (complex metropolitan landfill operation is not a natural resource to which commerce clause scrutiny should apply).

70. The Court in *City of Philadelphia* had an opportunity to foreclose this possibility but specifically left it open in a footnote. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6. It expressed no opinion "about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources . . . or New Jersey's power to spend state funds solely on behalf of state residents and business."

71. *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 131 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987). *See, e.g.*, *Shayne Bros. v. District of Columbia*, 592 F. Supp. 1128, 1134 (D.D.C. 1984) (upholding District of Columbia health regulation prohibiting disposal of "out-of-state" waste in District facilities); *County Commissioners of Charles County v. Stevens*, 299 Md. 203, 216, 473 A.2d 12, 19, (1984) (upholding ban on deposit of "extra county" waste in county owned landfill).

72. *County Commissioners of Charles County v. Stevens*, 299 Md. 203, 473 A.2d 12 (1984).

73. *Id.* at 19.

74. *Id.* at 20.

75. *Id.*

76. *County Commissioners of Charles County v. Stevens*, 473 A.2d 12, 19 (1984); *accord* *Evergreen Waste Systems v. Metropolitan Serv. District*, 643 F. Supp. 127, 132 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987); *Shayne Bros. v. District of Columbia*, 592 F. Supp. 1128, 1134 (D.D.C. 1984).

The district court in *Evergreen* referred to *Reeves, Inc.* and rejected *Evergreen's* argu-

In *Lefrancois v. State of R.I.*,<sup>77</sup> the federal district court held that a state statute banning out-of-state waste from a state-subsidized landfill served a legitimate public purpose in providing for the safe disposal of solid waste, and represented a reasonable and necessary measure to preserve limited landfill space, within the context of a comprehensive waste management plan.<sup>78</sup> The State of Rhode Island, by subsidizing and operating the only landfill in the state, did not become a participant in a natural resources market in landfill sites, for which the commerce clause would require an unfettered market, but rather a participant in the market for landfill services.<sup>79</sup> Although the court in *Lefrancois* did not follow the dicta in *Reeves* by characterizing its landfill as a complex process, it specifically followed *Stevens* in recognizing that the state was a participant in a landfill services market, not a natural resource market.<sup>80</sup>

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ment that the ordinance was protectionist. Thus the *Evergreen* court held that there could be no exception to the market participant doctrine in this case. *Evergreen Waste Systems v. Metropolitan Serv. District*, 643 F. Supp. at 128 & 131 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987) (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980)). The Court in *Reeves, Inc.* conceded that a state was protectionist only in the sense that it limited benefits generated by a state program to its citizens. *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980) cited in *Evergreen Waste Systems v. Metropolitan Serv. District*, 643 F. Supp. 127, 131 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987).

Analogizing the present situation in *Evergreen* to that in *Reeves, Inc.* the district court in *Evergreen* stated that a publicly-owned landfill provided a service to in-state haulers just as other governmental units provided services, such as "schools and police", to its citizens. *Evergreen Waste Systems*, 643 F.Supp. at 131 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987); see *Shayne Bros. v. District of Columbia*, 592 F.Supp. 1128, 1134 (D.D.C. 1984).

The Ninth Circuit in *Evergreen*, after concluding that the Ordinance satisfied the "balancing of interests" review, did not proceed to consider whether the ordinance also satisfied the market participant exception. *Evergreen Waste Systems*, 820 F.2d at 1485 (9th Cir. 1987).

77. *Lefrancois v. State of R.I.*, 669 F. Supp. 1204 (D.R.I. 1987).

78. *Id.* at 1215, 1217.

79. *Lefrancois*, 669 F. Supp. at 1211. The court noted that Rhode Island had not precluded any party, in-state or foreign, from purchasing property upon which to construct a sanitary landfill site (natural resource) open to all waste regardless of origin. *Id.*

80. *Id.* An argument can be made that state restrictions of out of state waste may violate the equal protection clause of the Constitution. *cf.* *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (Alabama violated the Equal Protection Clause by taxing out-of-state insurance companies at a higher rate than domestic insurance companies). Not all regulations, however, that disfavor out-of-staters will be found invalid under the equal protection clause. All that is required to avoid an equal protection violation is a rational relation between the regulation chosen by the state and the attainment of a legitimate state purpose. State statutes restricting out-of-state waste would have little difficulty meeting these tests because the minimization of out-of-state waste diminishes the economic, environmental and legal problems that out-of-state waste forces on residents in the recipient states. See *supra* notes 6-8.

One other argument that may be raised is that the Low-Level Radioactive Waste Policy Act (Low-Level Act) permits states to form interstate compacts to prohibit the importation of low-level radioactive waste generated outside their borders. Pub.L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. § 2021(d),(a)(2) (A)(B) (Supp. IV 1986)). The Act appears to grant the authority to exclude out-of-state low-level radioactive waste to compacts, not to individual states. See *Washington State Bldg. & Const. Trades Council v. Spellman*, 518 F. Supp. 928, 932 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627, 630 (9th Cir.

Although the New Jersey statute declared unconstitutional in *Philadelphia* applied to all in-state landfills, both public and private, while the Rhode Island statute upheld in *Lefrancois* applied only to the state-subsidized landfill, both statutes effectively closed their respective state's borders to out-of-state waste.<sup>81</sup> However, the fact that the Rhode Island statute applied solely to a state funded landfill was, for purposes of commerce clause scrutiny, a critical distinction.<sup>82</sup> The statute in *Philadelphia* applied to all public and private landfills in New Jersey. Thus, out-of-state haulers were not only excluded from using the waste processing services available at existing publicly-owned landfills, but were effectively prohibited from purchasing new landfill space to meet their needs. The Rhode Island statute, in contrast, merely restricted the use of a state service, without any restriction on the acquisition or use of private landfills.

### B. Legislative Enactments

In light of recent case law, legislatures in other states besides Rhode Island (*Lefrancois*), Maryland (*Stevens*), and Oregon (*Evergreen*) have attempted to prohibit or limit the receipt of out-of-state garbage under state and local laws which not only may avoid commerce clause scrutiny under the market participant exception but also may satisfy dormant commerce clause limitations by satisfying the balancing of interests standard.<sup>83</sup>

In Pennsylvania, for example, the legislature recently enacted a com-

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1982), *cert. denied*, 461 U.S. 913 (1983). By analogy, one may argue that interstate compacts, acting as market participants, could prohibit the importation of solid waste. Congress has previously encouraged states to form compacts to facilitate solid waste disposal. 42 U.S.C. § 6904 (a),(b) (1982).

The Supreme Court recently held that there is no market participant exception to the privileges and immunities clause. The Court reached this conclusion in ruling that the Clause applied to a town ordinance which required that at least 40% of the work force on any construction project funded by the city must reside in the city. *United Bldg. and Const. Trades Council v. City of Camden*, 465 U.S. 208 (1984).

The rationale for a market participant exception in the privileges and immunities context is not nearly as strong as in the Commerce Clause context. The Commerce Clause deals only with regulation, and a state acting as market participant is simply not regulating. But the Privileges and Immunities Clause bars any type of state conduct, regulatory or otherwise, which discriminates against out-of-staters on matters of fundamental concern. It is unlikely that Boston's local hiring rule, upheld against commerce clause attack (via the market participant exception) in *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204 (1983), would also have survived a privileges and immunities attack, had one been made. The privileges and immunities issue was not raised by opponents of the regulation in that case.

81. *Lefrancois*, 669 F. Supp. at 1208.

82. *Id.*

83. See Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101 of 1988"), 1988 Pa. Legis. Serv. 391 (Purdon)(to be codified at PA. STAT. ANN. §§ 303, 502); Ohio Am. Sub. H.B. 592, 1988 OHIO LEGIS. BULL. 498, 500 & 527 (Anderson) (to be codified at OHIO REV. CODE ANN. §§ 343.01, 3734.52 (A),(B)(1)(2), 3734.53 (A), (C)(1)(a)-(f), 3734.54 (A) 3734.57 (A)(2)(3), (B)(1)(2)(3).

prehensive solid waste management program to address the problems caused by a lack of regulatory control and planning for the landfilling of solid wastes.<sup>84</sup> This Pennsylvania legislation, entitled the Municipal Waste Planning, Recycling and Waste Reduction Act<sup>85</sup> (hereinafter the "Act") allows local governments to enact ordinances which limit or restrict the amount of waste deposited in its landfills. In this way, the local government is not regulating the landfill market, but rather is acting like a private party participating within the landfill market.<sup>86</sup> Thus, this legislation may avoid commerce clause scrutiny by fitting under the market participant exception.<sup>87</sup>

In order for a local government (county) to become a market participant by assuming public ownership of a solid waste landfill facility, it must expressly state its intention and provide an explanation for its decision based on a comparative cost-benefit analysis of private ownership or operation.<sup>88</sup> The Act also empowers a county to implement an approved county plan regarding the processing and disposal of the county's waste and enables the county to plan for the processing and disposal of out-of-county waste.<sup>89</sup> Furthermore, the Act allows the county to limit or restrict the processing or disposal of waste generated or produced outside the county borders where such out-of-county waste contributes to a capacity shortage.<sup>90</sup>

These measures taken by the state of Pennsylvania are mindful of the limitations imposed by the dormant commerce clause.<sup>91</sup> They too, attempt to promote needed restrictions of out-of-state garbage by fitting under the market participant exception.<sup>92</sup>

Just as in the State of Pennsylvania, the State of Ohio recently enacted a comprehensive solid waste management act.<sup>93</sup> The Ohio Act presented ways to prohibit the receipt of out-of-state waste.<sup>94</sup> This was accomplished through the use of local planning districts composed of counties

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84. 1988 Pa. Legis. Serv. 391 (Purdon) (to be codified at PA. STAT. ANN. §§ 101-1904).

85. *Id.* §§ 101(a)(10), 303.

86. *See supra* notes 54-82 and accompanying text.

87. *Id.*

88. 1988 Pa. Legis. Serv. 391(Purdon) (to be codified at PA. STAT. ANN. § 502 (m)).

89. *Id.* § 303 (a)(2)(3).

90. *Id.* §§ 303 (a), 304 (a).

91. *See supra* notes 54-82 and accompanying text. It is significant to note that the Act, as originally constructed, would have given counties much greater control over garbage disposal, including the power to ban out-of-state waste. Bunch, *supra* note 1, at 32, col. 2. However, this provision was stricken because the State Attorney General determined that it would violate the interstate commerce clause.

92. *See supra* notes 54-82 and accompanying text.

93. Ohio Am. Sub. H.B. 592, 1988 OHIO LEGIS. BULL. 498, 500 & 527 (Anderson) (to be codified at OHIO REV. CODE ANN. §§ 343.01, 3734.52 (A), (B)(1)(2), 3734.53 (A),(C)(1) (a)-(f), 3734.54 (A), 3734.57 (A)(2)(3), (B)(1)(2)(3)).

94. Ohio Am. Sub. H.B. 592, 1988 OHIO LEGIS. BULL. 498, 500 & 527 (Anderson) (to be codified at OHIO REV. CODE ANN. §§ 3734.132(A); *see id.* §§ 343.01 (F)(1), 3734.53 (C)(1)).

or groups of counties (joint counties) who developed suitable local plans to deal with the garbage problem.<sup>95</sup> Significantly, however, the Governor of Ohio vetoed certain sections of this Act which allegedly violated the federal Constitution.<sup>96</sup>

#### IV. COMPARISON OF THE BALANCING APPROACH USED BY THE NINTH CIRCUIT IN *Evergreen* and the Market Participant Exception

The market participant exception has allowed states to restrict out-of-state garbage while avoiding dormant commerce clause scrutiny.<sup>97</sup> The balancing test, on the other hand, requires a balancing of federal rights under the dormant commerce clause and state interests.<sup>98</sup>

Any type of balancing test is problematic, requiring the court to weigh competing interests and consider less discriminatory alternatives.<sup>99</sup> The inherent subjectivity of such an approach is exemplified by the court's task of determining whether the burdens imposed on commerce are "clearly excessive in relation to the putative local benefits."<sup>100</sup> As the current landfill crisis deepens, and subsequent litigation over solid waste disposal increases, the Supreme Court should have sufficient impetus to further delineate when a regulation is a "burden" on interstate commerce.<sup>101</sup>

In contrast to the balancing approach, the market participant exception is a less problematic method of restricting the inflow of out-of-state waste. By avoiding dormant commerce clause scrutiny, market participants can restrict out-of-state waste without fear that other states will use commerce clause freedom to export waste for disposal into its state whenever it felt it "expedient or necessary" to do so.<sup>102</sup>

State or local governments can become market participants by building waste disposal facilities providing a waste processing service for its

95. *Id.* §§ 343.01, 3734.52 (A), 3734.53 (A)(C)(1), 3734.54 (A).

96. The Governor of Ohio vetoed that section of the bill which allowed districts to prohibit and limit the receipt of out-of-state solid waste. *Id.* § 3734.132(A). In addition, the Governor vetoed that section of the bill which placed a \$75.00 per ton surcharge on out-of-state solid waste disposed in Ohio. § 3734.57 (A)(3). The Governor concluded that these sections would be held constitutionally invalid under the Interstate Commerce Clause of the United States Constitution. See Ohio Governor's Veto Message (June 24, 1988), Am. Sub. H.B. 592.

97. See *supra* notes 54-82 and accompanying text.

98. See *supra* notes 47-53 and accompanying text.

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

100. *Id.* Virtually all state regulation involves increased costs for those doing business within the state, including out-of-state interests doing business in the states as well as in-state interests. In the absolute sense, virtually all state regulation "burdens" interstate commerce. Where the "burden" on out-of-state interests is no different from that placed on competing in-state interests, however, it is a burden on commerce rather than a burden on interstate commerce. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406 (3rd Cir. 1987).

101. *Cook*, *supra* note 1, at 33, col. 1.

102. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978).

citizens.<sup>103</sup> Under this approach, state or local governments may need to show that its waste processing service is the product of a complex process and not merely a natural resource to which commerce clause scrutiny would apply.<sup>104</sup> Considering that most modern waste disposal facilities are costly, highly regulated, and complex operations, states should not have much difficulty meeting this test.<sup>105</sup>

#### CONCLUSION

The increasing shortage of landfill space has forced many states to search for available landfill space outside of their own borders. This effort has led to the recent practice of long distance hauling of garbage.

Restricting out-of-state waste would lessen the incentive to haul garbage long distance and thereby reduce many of its associated problems. Long distance hauling is robbing recipient states of space to dump their own garbage and is discouraging aggressive recycling and reduction efforts by residents in these recipient states.<sup>106</sup> Furthermore, long distance hauling of garbage is making it increasingly expensive for taxpayers in these exporting towns,<sup>107</sup> who also run the risk of indirectly paying at a later date for environmental cleanup under the Superfund legislation.<sup>108</sup> A beneficial aspect of a reduction in long distance hauling would be the development of alternative solutions to solid waste management, which would also make states more responsible for their own garbage problems.<sup>109</sup>

In *City of Philadelphia v. New Jersey* the United States Supreme Court set forth guidelines clearly stating that any state legislation which bans all out-of-state garbage necessarily violates the dormant commerce clause.<sup>110</sup> Yet subsequent lower courts have analyzed state and local statutes that employ various measures to restrict out-of-state waste and deemed them constitutional. These courts indicate that if state or local

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103. *County Commissioners of Charles County v. Stevens*, 299 Md. 203, 473 A.2d 12, 19-20 (1984); *See Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 131 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987); *see also*, *Lefrancois v. State of R.I.*, 669 F. Supp. 1204, 1211 (the state has entered the market for landfill services and is therefore not a participant in the natural resource market).

104. *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 132 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987); *See County Commissioners of Charles County v. Stevens*, 299 Md. 203, 473 A.2d 12, 20 (1984) (the service provided by the county landfill is the "end product of a complex process"); Cain, *Routes and Roadblocks: State Controls on Hazardous Waste Imports*, 23 NAT. RESOURCES J. 767, 792 (characterizing waste disposal as a "production process . . . could be determinative before the courts").

105. *County Commissioners of Charles County v. Stevens*, 473 A.2d 12, 20 (1984); *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 132 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987).

106. *See Bunch*, *supra* note 1, at 32, col. 4.

107. *See supra* note 5.

108. *See supra* note 8.

109. *See supra* note 10.

110. *See supra* notes 32-33 and accompanying text.

governments pursue "even-handed" regulations pursuant to the balancing of interests review standard<sup>111</sup> or become market participants<sup>112</sup> in the solid waste landfill markets, they can regulate the inflow of out-of-state waste without violating the dormant commerce clause.<sup>113</sup>

Although states should be able to restrict garbage by either one of these methods, the market participant exception provides a less problematic approach. It avoids the subjective balancing method that often yields uncertain results. It also prevents states from using the freedom to export garbage under the commerce clause as a "sword to obtain a preference."<sup>114</sup>

The market participant exception provides a more certain way for states to restrict out-of-state waste. State or local governments with pub-

111. See *supra* notes 49-53 and accompanying text.

112. See *supra* notes 72-82 and accompanying text.

113. The issue of "back-hauling," See *supra* note 7, has given rise to another possible exception to dormant commerce clause analysis, the "quarantine exception;" *Asbell v. Kansas*, 209 U.S. 251,256 (1908) (diseased livestock); *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 589 (1888) (infected rags and intoxicating liquors); see also *Maine v. Taylor*, 477 U.S. 131 (1986) (ban on importation of live baitfish).

The "quarantine exception" is more like a "market-participant" exception in that it is excluded from commerce clause scrutiny at the outset and it provides a more categorical exception. The Supreme Court states that, if an article from "its nature...or its condition is such" as to make it unfit for human consumption, then it is not a legitimate article of commerce, and the state power may exclude its introduction. *Bowman*, 125 U.S. at 490. The constitutional principles that underly the commerce clause do not require the state to sit idly by and wait until potentially irreversible environmental damage has occurred before it acts to avoid such consequences. *Maine v. Taylor*, 477 U.S. 131 (1986).

In light of the fact that transporting foodstuff and consumer products in refrigerated trailers and other rigs used for garbage is unsanitary and potentially dangerous for human consumption, a state may raise a plausible argument for a "quarantine exception" to the commerce clause. However, in *City of Philadelphia v. New Jersey*, where the state banned most garbage from outside the state, the Court found the "quarantine exception" inapplicable because New Jersey did not "even-handedly" impose upon its own garbage the same restrictions it imposed on out-of-state garbage. 437 U.S. 617, 628-29 (1978). The Court in *City of Philadelphia* appeared to be reversing *Bowman* by interpreting the rationale of the decision as being a balancing of an article's worth as against its inherent dangers, rather than the more traditional reading of allowing exclusion of "innately harmful articles." *City of Philadelphia*, 437 U.S. at 632 (Rehnquist, J., dissenting).

One possible approach to restricting "back-hauling" is under a newly proposed house bill, H.R. 3516, which regulates certain transportation of solid waste, and requires that long distance garbage haulers have a signed contract with a disposal site before shipping waste across state lines. H.R. 3516, 100th Cong., 1st Sess. 4011 (1987).

Section (b) of this bill, entitled, "standard of care," states that no person may transport any solid waste across state lines or handle any solid waste incidental to any such transportation or handling." *Id.* In terms of applicability to the problem of backhauling, this provision of H.R. 3516 comes close to addressing the problem. However, due to the potential gravity of the situation and the present lack of definitive case law or statutory authority under which one may restrict "back-hauling" practices, more specific regulation is needed.

114. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (commerce clause allows states to send their wastes to other states whenever they feel it "expedient or necessary" to do so). cf. *Borough of Glassboro v. Gloucester County Bd.*, 100 N.J. 134, 495 A.2d 49, 56 cert., denied, 474 U.S. 1008 (1985) (the commerce clause was intended as a shield against discrimination, not as a sword to obtain a preference).

licly owned landfills can construct a highly complex waste processing center and enter the market for landfill services, thereby becoming market participants in the solid waste landfill market.<sup>115</sup>

The federal government should take notice of the recent trend of lower court cases that restrict out-of-state waste. Although states have a legitimate interest in safeguarding the interests of its citizens by providing available landfill space, federal intervention is needed to ensure that the states do not abuse their power to restrict out-of-state waste under the market participant exception<sup>116</sup> and balancing of interests test.<sup>117</sup>

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115. See *supra* notes 65-82 and accompanying text.

116. See *supra* notes 54-82 and accompanying text. Excessive use of this exception ignores the fact that the garbage problem is no longer a state and local issue, but rather a national issue. States are more interdependent than ever before in this time of landfill crisis. The problem lies in the fact that there do not appear to be any limits on how many designated public lands a state can claim as being a "waste processing center" and thereby become a market participant in the solid waste landfill market. This raises the possibility that a state could own all the potential landfill sites within its borders, hoarding its natural resources. *Reeves, Inc. v. Stake*, 447 U.S. 429, 443-44 (1980). It also raises the question of whether a monopoly over a finished product such as a complex process (waste processing center) takes us outside the scope of *Reeves, Inc.* In *Reeves, Inc.*, the Court implied that a monopoly over state-owned resources within the state would not be eligible for the market participant exception. *Id.* at 440.

117. See *supra* notes 47-53 and accompanying text.

